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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE,)	
on its own behalf and on behalf of its)	
members, and)	
)	
DARRELL O'NEAL, Sr., individually,)	
Chairman, Northern Arapaho Business)	
Council, in his official capacity, and individual)	
Capacities,)	
Plaintiffs)	Civil Action No. 11-CV-347-J
v.)	
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.)	

SECOND SUPPLEMENT TO EASTERN SHOSHONE TRIBE
AMICUS CURIAE BRIEF

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ARGUMENT SUPPLEMENT

I. Wind River Indian Reservation Law

...

d. SA LOC Criminalizes Eagle Killing on Wind River Indian Reservation.

When the Tribes enacted its joint-tribal legislation in 1987 to govern both Tribes, the Tribes also criminalized activity violating the SA LOC Game Code. SA LOC § 16-8-10 “Violations of Game Code”, provides:

- (1) Any person who violates any provision of this game code shall be subject to prosecution in tribal or federal court under applicable laws . . . Any person who has committed a violation of this code shall be subject to a fine of not more than \$5,000.00, or to imprisonment of not more than one (1) year, or to a combination of both fine and imprisonment per offense.

...

- (3) The privilege to hunt may also be suspended, revoked or forfeited.

Id.

Both Tribes, the NAT and EST, criminalized eagle taking for all Shoshone and Arapaho tribal members within the WRIR when they jointly-enacted the SA LOC and adopted their Title XVI *Fish and Game Code*. USFWS did not implement tribal law.

V. Shoshone Authority to Speak on behalf of Tribe

a. Shoshone Business Council

As identified in Section I of its brief, EST, a non-IRA tribe, is a resolution tribe with a

general council comprised of all tribal members over the age of 18 who is the supreme governing body of the Tribe. Pursuant to the Eastern Shoshone General Council, by and through its Resolution 6499¹ (Attachment H), the EST General Council conveyed authority to the Shoshone Business Council (SBC) “the necessary authority to carry out the business of the Shoshone Tribe . . .” *Id.* Pursuant to that authority, the SBC, comprised of six (6) at-large elected officials, is the body responsible for participating in government-to-government discussions with the United States, among many other duties.

In this case, the SBC is the authorized body to carry out business of the Shoshone Tribe, and SBC met with and conferred the EST position to the USFWS regarding the Tribe’s cultural, traditional and religious practices, ways and beliefs. Conferring with other governmental entities, such as the USFWS, is part of Shoshone tribal business.

b. Eastern Shoshone Entertainment Committee

EST also has a body of six (6) elected officials in addition to the SBC, titled the Eastern Shoshone Entertainment Committee (ESEC). While the name may be deceptive as to its duty and significance, the Entertainment Committee is the elected cultural committee comprised of the most-knowledgeable Shoshone tribal members who know the EST practices, traditions, beliefs and ways. The ESEC is authorized to speak about Shoshone cultural practices and affirms the SBC’s role in communicating with other governmental entities. ESEC confirms SBC’s accurate communications to the USFWS regarding EST cultural, religious and traditional practices during the relevant consultation process.²

¹ EST General Council Resolution No 6499.

² ESEC November 12, 2013 Statement, “*Eastern Shoshone Tribe Entertainment Committee Statement of Affirmation Regarding Tribal Position*”. (Attachment I)

c. NAT is not an Authorized Entity to Speak on Behalf of the EST.

Nothing in the Eastern Shoshone Tribal government, resolutions or other, authorize NAT, or individual tribal members, to speak on behalf of the EST, EST cultural, traditional, religious, governmental, social or other, practices, beliefs, actions or ways in an official capacity. Throughout the NAT Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Remaining Claims (Document 79), its "Recent Record Developments", and all of the accompanying exhibits, NAT attempts to convey questions and draw speculative and incorrect conclusions about Eastern Shoshone tribal, traditional, cultural, governmental, political, social or other practices, and offers those speculations and opinions with an air of authority. NAT and all persons identified within their brief are not persons authorized to speak on behalf of EST.³

VI. United States-Tribal Government-to-Government Consultation

a. Treaty Obligation to Consult with EST

The United States has a trust responsibility to the EST in its role as trustee for the Shoshone Treaty-protected lands and trust resources within the WRIR⁴, pursuant to treaty obligations and federal common law. USFWS has a role as trustee regarding wildlife management on the WRIR. Because NAT applied for a permit to kill eagles on Shoshone

³ While EST appears *amicus* and not as a party to this matter, if EST were a party, it would file a FED.R.CIV.P. Rule 12(f) Motion to Strike all references NAT makes to Eastern Shoshone's cultural practices, religious beliefs, governmental practices, NAT opinions regarding EST practices, and proffered Declarations and other exhibits attempting to support NAT opinions about EST subject matter. EST would file its motion on the basis that all references are immaterial to NAT's USFWS application and permit, that the irrelevant and speculative references are spurious at best, and the effort to discredit or diminish the EST Tribal representations, practices, and EST beliefs are scandalous in sum.

⁴⁴ July 3, 1868, Treaty of Fort Bridger, 15 Stat. 673, art. 2 (1868).

treaty-protected lands and for Shoshone treaty-protected (trust) resources, the USFWS has a trust responsibility to consult with the EST regarding potential USFWS actions that will directly impact EST's sovereign interests, including activity within the WRIR, as well as directly impact trust resources where EST maintains a perpetual sovereign interest. Failure to consult with the EST would constitute a violation of trust responsibility to the EST.

b. United States Executive Orders and Policy Mandate and Guide Consultation

Executive Order 13175 mandates and defines appropriate consultation between US agencies and tribal representatives, and governs agency actions that have a substantial direct effect on a Tribe. Exec. Order No. 13175, 65 FR 67249 (Nov. 6, 2000). Executive Order 13175 governs federal policies that have tribal implications and states, “(b) Our Nation ... recognized the right of Indian tribes to self-government. . . . Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government tribal trust resources, and Indian tribal treaty and other rights.” *Id.* In addition to Executive Order 13175, the Department of Interior issued Secretarial Order 3317, *Department of the Interior Policy on Consultation with Indian Tribes*. Sec. Order 3317 (Dec. 1, 2011). Secretarial Order 3317 identifies:

Sec. 1 Purpose. The purpose of this Order is to update, expand, and clarify the Department's policy on consultation with American Indian . . . tribes; and to acknowledge that the provisions for conducting consultation in compliance with Executive Order (E.O) 13175 . . . and applicable statutes or administrative actions are expressed in the

Department of Interior Policy on Consultation with Indian Tribes.

Id.

By and through Executive Order 13175 and Secretarial Order 3317, the Department of Interior and USFWS adopted its government-to-government consultation policy for proposed actions affecting tribes in general, which includes NAT's permit application and how such application impacts EST and EST's interests. In regard to the eagle permitting process, these policies govern consultation with a potential affected Tribe, and require USFWS to consult with the affected Tribe. In this case USFWS is required to consult with EST because EST has a direct interest in the land ownership, a direct interest in the wildlife in regard to its sovereign, cultural and traditional practices, and a direct interest in management for the eagles in question.

USFWS appropriately recognized EST's sovereign interest in its own resources, use, management, and cultural practices pertaining to its resources, on its land⁵. Consultation compliance in this case does not conflict with any statute or other regulation. In order to comply with Exec. Order 13175, (and Sec. Order 3317), “. . . the order requires certain federal agencies to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *Carattini v. Salazar*, 2010 WL 4568876, 7 (W.D. Okla. 2010) (*citing* Exec. Order 13175 § 5(a) (Nov. 6, 2000)).

⁵ EST refers to the factual distinction between tribal land from federal land as identified in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), where the land in question in *Navajo* was not the Tribe's reservation lands or the Tribe's resources, as are the issues in this case where the land in question is the EST treaty land, and the resources in question are EST resources.

These orders govern the U.S. policies and how the U.S. and its agencies perform its various obligations, including those under the Bald and Golden Eagle Protection Act (“BGEPA”), 16 U.S.C. § 668 *et seq.*, though the executive and secretarial orders may not in themselves create rights enforceable by law⁶. However, the Exec. Order 13175 (as adopted and promoted pursuant to Sec. Order 3317) principles require USFWS to recognize the existing rights Tribes do have, including, “Sec. 2. Principles . . . (c) [t]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.” Exec. Order 13175, Sec. 2 (Nov. 6, 2000). As part of supporting tribal sovereignty and self-determination, USFWS appropriately relies on the EST tribal government to express EST’s cultural and religious practices.

USFWS consulted with EST’s tribal officials who are the appropriate body to communicate on a government-to-government basis regarding EST cultural practices, and identify the significant and practical implications a permit for an eagle take of EST resources within its lands would have on EST cultural practices and sovereign interests.

c. NAT Proposes a Double Standard for Self-governance and Self-determination.

NAT advocates that the USFWS use two separate processes within the BGEPA permitting process:

i) On one hand, NAT advocates for the USFWS to comply with the governing consultation requirements and principles and rely on NAT’s governmental representations regarding its religious practices and need for an eagle permit. NAT, by and through its tribal officials, submitted an application to USFWS identifying a need to take an eagle for

⁶ Exec. Order 13175, Sec. 10 (Nov. 6, 2000).

its cultural and religious Sundance purposes. At no point does NAT advocate USFWS make NAT “prove” it has a bona fide religious interest in a “clean” eagle for its Sundance.

ii) On the other hand, NAT advocates the USFWS abandon those same guiding federal principles and policies regarding tribal consultation and presumption of tribal self-governance when it comes to required consultation with EST. NAT argues that USFWS only spoke with “some” Shoshone tribal members and therefore fails to determine whether EST has a “bona fide” religious belief in the representations made to USFWS. NAT implies that a government-to-government consultation process was not enough, but rather the USFWS was required to poll all Shoshone Tribal members and that all enrolled Shoshone tribal members must share the same belief. NAT could not match such a standard. NAT also advocates that multiple meetings and discussions with EST elected officials is not adequate for consultation, that USFWS must conduct an evidentiary hearing, investigate and decide on behalf of the US whether EST holds a “bona fide” religious interest in eagles within the reservation. NAT’s proposed contradictory standard and its proposed USFWS requirements undermine and upend the long-standing policies for the U.S. to support tribal self-determination and self-governance.

USFWS conducted a government-to-government process with EST. EST, as a sovereign, conducted a consultation meeting with USFWS where it is EST’s right, as a sovereign nation, to determine who spoke to USFWS on EST’s behalf. EST’s SBC has authority to communicate EST’s cultural interests and significance of eagles to EST. All of which comply with the long-standing principles of tribal self-determination and implementation of the BGEPA permitting process.

There is no standard, either in statute or law, requiring a federal agency to conduct an investigation into a Tribe's representations about its cultural, religious, traditional, sovereign interests or practices. Such a standard would create the substantial burden NAT argues against. EST communicated with USFWS on a government-to-government basis, was authorized to speak to USFWS, appropriately conveyed EST's interests, and communicated the impact and cultural significance a permit killing eagles would have on EST if issued regarding Shoshone trust lands and Shoshone trust assets. EST need not further "prove" its cultural and religious practices. Self-governance, however, is upheld in federal policy, statute and long-standing federal law. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63, 98 S.Ct. 1670, 1679-80, 56 L.Ed.2d 106 (1978)(citing, *Morton v. Mancari*, 417 U.S. 535, 55, 94 S.Ct 2474, 2483, 41 L.Ed.2d 290 (1974).

RESPECTFULLY SUBMITTED this 15th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

/s/ Kimberly D. Varilek