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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.)

PLAINTIFFS' OPPOSITION TO MOTION TO STRIKE

COME NOW Plaintiffs and file the following response in opposition to Defendants'
Motion to Strike:

1. In a footnote in its Memorandum in Opposition to Plaintiffs' Motion for

Summary Judgment on Remaining Claims, Doc.#87 at 14, fn. 5, Defendants (FWS) move to strike Plaintiffs' exhibit 3, Doc.#79-2 ("NAT ROD") from the court record.

2. Rule 12(f) of the Federal Rules of Civil Procedure (Motion to Strike) permits a party to move to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendants do not assert that the NAT ROD is redundant, impertinent or scandalous, but argue it is immaterial to an agency record review under the Administrative Procedures Act (APA).

3. Two claims are before the Court at this time – Plaintiffs' First Amendment claim and their APA claim. Plaintiffs have sought summary judgment pursuant to Rule 56, Fed.R.Civ.Proc., which contemplates – and expressly permits – submission by the parties of documents, affidavits, declarations or other materials. Rule 56(c)(1)(A). There is no basis for FWS' motion to strike these materials in a summary judgment proceeding seeking to declare and protect the First Amendment rights of the Plaintiffs, and, accordingly, FWS cites to none.

4. FWS asks the Court to ignore the NAT ROD when considering the Plaintiffs' APA claim. Doc.#87 at 14. Under the circumstances in the case at bar, FWS' motion should be denied, for the following reasons.

NAT did not receive a copy of the FWS ROD until after its Complaint was filed in this matter, and then only after FWS finally issued a decision on the permit application and submitted its record to this Court. At that point, the only "evidence" of a religious-based objection was FWS' own characterization of a phone call with EST "elders." It was not at all improper for NAT to submit evidence to FWS and this Court refuting arguments made by FWS long after the FWS ROD was compiled and provided to NAT. In fact, NAT had no notice and so no opportunity to confront or refute the allegations upon which FWS relied.

The NAT ROD was submitted to FWS in July, 2013 (*see* Appendix, Doc.#79-1). FWS has supplemented its administrative record several times, as late as September, 2013. Doc.#75. Because the permit application must be submitted each year, additional information becomes available to the Agency at least annually. NAT is required to submit another application in 2014. The NAT ROD should already be part of the FWS ROD; if not, FWS cannot avoid including it indefinitely. The argument that the Court ought to strike it now is a waste of effort aimed at ignoring evidence FWS already has, does not want to consider, but must.

FWS itself appears to rely on what it would call extra-record evidence. FWS “assumes that a tribe’s representatives [including the EST Business Council] are authorized to speak on behalf of its members.” Doc.#87 at 23 and Riley decl. The EST resolution (Doc.#48-3) is the only official governmental action by the EST on the subject, was submitted by *Amicus* on December 14, 2012, and is not in what FWS says is the current FWS ROD.

The NAT ROD provides key information about NAT religious beliefs and practices, and is highly relevant to FWS’ administrative decision, including its notion that the location of an eagle take ceremony has no religious significance for the Arapaho people. For example:

- The Sun Dance involves not just the time that dancers are within the Sun Dance Lodge, but efforts by them and their extended families and friends that last throughout the year. “[E]xtensive year-long preparation [is] required of the men (and their families) who had pledged the [Sun Dance] lodge, served as ceremonial grandfathers, and functioned as Sun Dance leaders.” NAT ROD at 012 (Dr. Anderson letter).

- The Sun Dance and ceremonial take of an eagle has been occurring on the WRR for generations – eagles have been taken this way on the WRR for over 130 years. NAT ROD at 028 (Trosper affidavit); 035 (C’Hair declaration); 037 (letter from Elders of the Northern Arapaho Tribe, the Four Old Men); 066 (Addison letter); 071 (findings). The first known example of criminal prosecution for this religious activity was that involving tribal member Winslow Friday. NAT ROD at 066 (“Only recently, since the *U.S. v. Friday* case, has anyone been prosecuted for this ceremonial act.”).

- The sacred eagle itself chooses the location. “Where an eagle chooses to present itself, and where the ceremonial take occurs, is indeed a sacred and significant location. ... The fact that the location for one take may differ from the location of other takes does not make the place any less ‘instrumental’ to the religious ceremonial practice. The precise location is not the same year after year. But as a choice made by the eagle itself, the location is indeed ‘instrumental’ to the ceremony.” NAT ROD at 071 (findings); 037 (“An eagle presents itself to a person who is in need or who will use it for the benefit of all, such as for the Sun Dance” and “[t]his event [eagle take], including where it happens, is sacred to the Arapaho people”) (letter from Elders of the Northern Arapaho Tribe, the Four Old Men); and 035 (“...the eagle chooses the person and place to present itself to”) (C’Hair declaration).

- The proper ceremonial take of an eagle is a religious tradition passed on from generation to generation. Arapaho “ceremonies have been practiced since time immemorial and are essential to the survival of the Arapaho people’s traditions and religious identity.” NAT ROD at 036 (C’Hair declaration). “It is important to show our children the proper way to do ceremonies and our right to raise them in a traditional way so they can in turn keep our traditions and ceremonies alive for future generations to come.” NAT ROD at 037 (Elders letter, the Four Old Men). “The Northern Arapaho Tribe is trying to get an eagle take permit on the reservation.

Nicholas Vassallo	<input type="checkbox"/>	By Facsimile
U.S. Attorney's Office	<input type="checkbox"/>	By U.S. mail, postage prepaid
P.O. Box 668	<input type="checkbox"/>	By Hand Delivery
Cheyenne, WY 82003-0668	<input type="checkbox"/>	By Overnight Courier
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Coby Howell	<input type="checkbox"/>	By Facsimile
Environmental & Natural Resources Div.	<input type="checkbox"/>	By U.S. mail, postage prepaid
Wildlife and Marine Resources Section	<input type="checkbox"/>	By Hand Delivery
c/o U.S. Attorney's Office	<input type="checkbox"/>	By Overnight Courier
1000 S.W. Third Avenue	<input checked="" type="checkbox"/>	Electronic Filing
Portland, OR 97204-2901		

Kimberly Varilek	<input type="checkbox"/>	By Facsimile
Office of Attorney General	<input type="checkbox"/>	By U.S. mail, postage prepaid
Eastern Shoshone Tribe	<input type="checkbox"/>	By Hand Delivery
P.O. Box 1644	<input type="checkbox"/>	By Overnight Courier
Fort Washakie, WY 82520	<input checked="" type="checkbox"/>	Electronic Filing

_____/s/
Andrew W. Baldwin