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August 26, 2014

The Honorable Alan B. Johnson
U.S. District Court
2120 Capitol Ave.
Cheyenne, WY 82001

Re: *Northern Arapaho Tribe v. Ashe*, 11-CV-347-J

Dear Judge Johnson:

On August 20, shortly after our letter to you regarding the *Hobby Lobby* decision, the Fifth Circuit Court of Appeals decided *McAllen Grace Brethren Church, et al. v. Salazar* (No 13-40326). That ruling also sheds fresh light on what a court must now consider when deciding whether a federal agency is advancing a "compelling interest" by the "least restrictive means." In the spirit of F.R.A.P. Rule 28(j), we respectfully submit the following observations.

In *McAllen*, plaintiffs challenge federal regulations limiting access to eagle parts and feathers to members of federally recognized tribes. Plaintiffs argue that those regulations violate the Free Exercise Clause and RFRA. Plaintiffs are not enrolled in any federally recognized tribe, but are sincere practitioners of a traditional Native American religion that requires the ceremonial use of eagles. *McAllen* discusses the recent *Hobby Lobby* ruling and a number of Tenth Circuit cases, pointing out that they "were decided before... *Hobby Lobby* clarified how heavy the burden is" on an agency to meet the "least restrictive means" test. *McAllen* at 21.

The Fifth Circuit remanded the matter for trial "on whether the protection of federally recognized tribes is a compelling interest protected by" the Bald and Golden Eagle Protection Act (BGEPA). Only a federal interest "of the highest order" can be "compelling." General statements of the government's interest are not sufficient – "the interests need to be closely tailored to the law" and focused on the particular circumstances. *McAllen* at 9, 13-14. The federal interest is declared and defined by BGEPA itself, which works to preserve eagles as a species and to provide access to eagles for Indian religious use. *McAllen* might expand access to eagles beyond the class of practitioners who are members of federally recognized tribes; the Free Exercise Clause and RFRA might require this limitation to be struck down. But however the Fifth Circuit ultimately rules on that question, the legitimate federal interest must be compelling and focused.

If the United States can show that protection of federally recognized tribes is a compelling interest under the statute, then the federal agency must also show "specific evidence" that the religious practice by *McAllen* plaintiffs would jeopardize that interest. *Id.* at 19. "The burden on the Department is a high one: they must demonstrate that 'no alternative forms of regulation' would maintain this [trust] relationship" with the federally recognized tribes. *Id.* at 22. Citing *Hobby Lobby*, the Fifth Circuit said "[r]ecent Supreme Court cases, unavailable to the district court at the time it granted summary judgment, have reaffirmed that the burden on the government in demonstrating the least restrictive means test is a heavy burden." *McAllen.* at 14. Only those interests of the highest order *not otherwise served* can overcome the Free Exercise Clause. *McAllen* (citing *Yoder*) at 14.

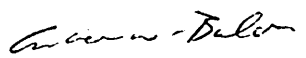
Under the Fifth Circuit's approach, USFWS must demonstrate that granting an on-reservation eagle take permit to the NAT would fully frustrate a compelling and focused federal interest, and not simply make that interest "more difficult" to achieve. *See McAllen* at 21, fn. 15. USFWS cannot show that the occasional take of an eagle for religious purposes by the NAT imperils the federal responsibility to another tribe, especially when the specific federal interest under BGEPA is in making eagles *more* accessible for practitioners, not less.

McAllen also illustrates that the First Amendment protects religious activity – the possession and use of eagle feathers. Here, no Shoshone activity (religious or otherwise) would be prevented, and none would be compelled, by the occasional take of an eagle by the NAT. Nor would that occasional take from the wild diminish the supply of eagles available from the Federal Repository.

When the compelling interest is properly focused through the BGEPA, it is difficult to see how a Free Exercise or RFRA claim could be overcome when the proposed eagle take neither threatens the eagle population nor limits access to eagles by members of another tribe. Whatever generalized interest USFWS might see in protecting the "religious" view of certain Shoshone members from an "offensive" NAT religious practice occurring outside the presence of those members, that interest cannot overcome the Free Exercise Clause or RFRA under the approach taken in *McAllen.*

The recent ruling in *McAllen* does not change NAT's position on the merits, but may provide some guidance about the effect of *Hobby Lobby* and how these issues might be resolved in the context of Indian religious practice and the BGEPA.

Sincerely,



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cc: Coby Howell
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