

## **Native American Traditional Practices and Protected Birds**

### **THE ISSUE**

Federal law broadly prohibits the possession and use of eagle feathers and parts, as well as those of certain other birds. Among the few exceptions to this prohibition is a limited exception for Native Americans engaged in religious practices. In 2009, the U.S. Fish & Wildlife Service (USFWS) conducted a sting operation targeting the illegal poaching and sale of eagle parts and feathers. Despite its goal of targeting illegal activities, the sting operation has had a negative impact on the lawful possession of eagle parts and feathers by Native Americans for religious use. These incidents have created widespread fear in tribal communities. Legitimate sacred materials were taken from innocent individuals and those targeted feel that the sanctity of their homes was unjustly trampled upon. This sting operation exploited the ambiguities in existing federal laws and policies designed to preserve eagles and protect traditional use of eagle feathers by Native Americans.

Now, a broad consortium of tribal leaders, traditional practitioners, and advocates for Native American rights are coming together with federal officials from relevant agencies charged with administering the eagle feather system with the goal of reevaluating the current regime and proposing cooperative solutions to the problems that have recently come to the fore.

### **BACKGROUND**

The federal Bald and Golden Eagle Protection Act<sup>1</sup>, along with related laws and regulations,<sup>2</sup> prohibits the taking, possession, sale, purchase, barter, transport, export, or import of bald and golden eagles or their parts.<sup>3</sup> However, this law contains some exceptions, including a narrow one that allows Native Americans to obtain permits for the use of eagle parts or feathers in religious practices. The U.S. Fish & Wildlife Service administers the permitting system, which is subdivided to include: (a) Native American Aviary permits, issued to the leadership of applicant tribes for the purpose of housing eagles that are non-releasable as a result of the nature or severity of their injuries; (b) Religious Take permits, issued to members of tribal communities who can appropriately document the need for the carcass of a live bird; and (c) Individual Use permits, issued to Native individuals who seek eagle feathers and parts from the National

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<sup>1</sup> 16 U.S.C. § 668 (1972)

<sup>2</sup> The federal regulations related to the Bald and Golden Eagle Protection Act can be found at 50 C.F.R. § 22. A related statute is the Lacey Act, 16 U.S.C. § 3372 (2008), which expands penalties for individuals found in violation of the Bald and Golden Eagle Act or other tribal, federal, or state statutes prohibiting the capture or sale of wildlife.

<sup>3</sup> Federal restrictions are not limited to bald and golden eagles. The Migratory Bird Treaty Act, 16 U.S.C. § 703 (2004), prohibits the capture or sale of migratory birds, and does not provide an exemption for religious or cultural use.

Repository. The permits are not transferable, although once lawfully obtained, eagle parts or feathers may be handed down generation to generation or transferred from one Indian to another in accordance with tribal or religious customs. The sale, purchase, barter, trade, import, or export of eagle parts and feathers is prohibited even to permit holders.

Over the last several decades, the President and relevant federal agencies have expressed their support for the protection of Native Americans using eagle parts and feathers in religious ceremonies. For instance, a Presidential Memorandum by President Clinton on April 29, 1994 required agencies to improve the collection and distribution of eagle parts and feathers to Native Americans for religious purposes to the “fullest extent under the law.”<sup>4</sup> For 35 years, USFWS has had an informal policy of deference to individuals who possess noncommercial quantities of eagle parts and feathers for personal or religious use, so long as the individual has a valid permit or is a member of a federally recognized tribe.<sup>5</sup> Despite these commitments, the realities of enforcement have sometimes obstructed religious practice.

In 2009, USFWS conducted a large-scale undercover operation that targeted individuals who bought, sold, or received bald and golden eagle feathers outside of the established federal permit system. While some of the persons caught in possession of alleged contraband were, in fact, involved in criminal activity, there are numerous reports of individuals – all members of federally recognized tribes – who claim that their feathers were wrongly confiscated, and that USFWS agents acted in violation of the policy to protect Native American religious practice. These actions by USFWS threaten to further chill the already highly restricted ability of Native Americans to engage in legitimate religious practice.

### RECOMMENDATIONS

Over the past year, a working group made up of tribal leaders, traditional practitioners, representatives from national tribal organizations, and legal and technical advisors have worked together to address access to eagle feathers. Now, that working group will be meeting with the federal authorities responsible for devising and implementing eagle feather policies. The meeting will address the following topics:

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<sup>4</sup> “Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes,” 59 Fed. Reg. 22953. See also Executive Order 13175, signed by President Clinton, November 6, 2000, relating to tribal consultation and directing all federal departments and agencies to defer to tribal decision-making when implementing policies with tribal implications.

<sup>5</sup> <http://www.fws.gov/pacific/lawenforcement/eaglelaws/pdf/Possession%20of%20Eagle%20Feathers%20Fact%20Sheet.pdf>. See also Press Release, U.S. Dep’t of the Interior Office of the Sec’y, Morton Issues Policy Statement on Indian Use of Bird Feathers (Feb. 1975) (stating the policy of the Department of the Interior to protect Native Americans who “possess, carry, use, wear, give, loan, or exchange” the parts or feathers of protected birds without compensation.)

- Review of the enforcement of eagle feather laws and policies, including:
  - Discussion of ongoing sting operations and the need for cooperation with tribal government and religious practitioners;
  - Enhanced cooperation and coordination between federal and tribal law enforcement officials, including respect for and development of tribal laws addressing the conservation of and access to eagles, eagle feathers and other protected birds;
  - Development of new training and education curricula that ensures that federal law enforcement officials will no longer unjustly target Native Americans and confiscate the belongings of individuals engaged in the exercise of legitimate cultural practices;
  - Review of the sting investigation to date, including all confiscations made under the program and any resulting prosecutions;
  - Review of the application of federal eagle feather policy to Native Americans crossing international borders, whether deployed in the military or otherwise.
- Evaluation of current federal laws, regulations or policies and determination of changes necessary in order to protect the traditional use and possession of eagle feathers and other protected birds by Native Americans.
- Improvement of eagle feather and parts distribution through:
  - Reform of the permitting process;
  - Further development of tribal aviaries; and
  - Clarification of the religious take permitting system.
- Creation of an advisory board of tribal leaders, traditional practitioners, and legal and technical advisors to assist the federal government in reforming its eagle feather policies.