UTE INDIAN TRIBE
P. O. Box 190
Fort Duchesne, Utah 84026
Phone (435) 722-5141 • Fax (435) 722-5072

Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on the Fish and Wildlife Service's Request for Public Comment on Petition to Revise Regulations Regarding the Indian Tribe Exception of the Bald and Golden Eagle Protection Act (FWS-HQ-LE-2018-0078)

June 18, 2019

I. Introduction

The Ute Indian Tribe (Tribe) submits these comments in response to the Fish and Wildlife Service's (FWS) request for public comments on a petition which asks FWS to revise the existing rules regarding the religious us of federally protected bird feathers by federally recognized Indian tribes and their members. The petition was submitted by Pastor Robert Soto (Petition) as a part of a settlement agreement in *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-060 (S.D. Tex. June 3, 2016).

The Petition generally makes three proposals related to the current regulatory scheme governing the "religious purposes of Indian tribes" exception in the Bald and Golden Eagle Protection Act (Eagle Act).[1] First, the Petition proposes that FWS "engage in government-to-government consultations with federally recognized tribes" to develop efforts to combat illegal commercial operations involving eagle feathers.[2] Second, the Petition urges FWS to expand the supply of eagles and their parts available through the National Eagle Repository by fixing the existing permitting process that produces "inexcusably long wait times."[3]

The Petition's third and main proposal is to amend the current the federal regulations related to the use and possession of eagle feathers under the "religious purposes of Indian tribes" exception of the Eagle Act. Specifically, the Petition asks FWS to amend the regulations to expand the exception beyond members of federally recognized tribes, to allow all "sincere religious believers," including non-Indians, the ability to possess and use eagle feathers.[4] In doing so, the

[1] 16 U.S.C. § 668a
[2] Petition, at 42.
[3] *Id*.
[4] *Id*. at 41-42.

Petition asks FWS to protect "only *sincere* religious exercise – not those who fake Native American religious practices for personal or commercial gain" by providing a "presumption of sincerity" to four distinct groups:

1. Members of federally recognized Indian tribes
2. Members of state recognized tribes
3. Members of a Native American Church
4. Members of other Native American religious organizations.[5]

All other individuals who wish to possess and use eagles and their parts would have the opportunity to "demonstrate their sincerity in other ways."[6]

While the Petition's first two proposals make common sense and support FWS's treaty and trust responsibilities to federally recognized Indian tribes, its third and main proposal is outside of FWS's authority under the Eagle Act, and would fundamentally violate the government's treaty and trust obligations to Indian tribes. The third and main proposal also violates and would jeopardize the entirety of federal law and policy governing tribal-federal relations, and would irreparably harm all Indian tribes by incentivizing the appropriation and commercialization of not only eagle feathers, but Native American culture and religious beliefs. For these reasons, the Tribe urges FWS to reject the Petition's proposal to expand the "religious purposes of Indian tribes" exception in the Eagle Act to apply to all "sincere religious believers."

II. The Petition's Main Proposal is Outside FWS's Authority

The Eagle Act authorizes the permitted "taking, possession, and transportation of" bald or golden eagles for eight discrete purposes, including the narrow exception "for the religious purposes of Indian tribes."[7] This "Indian tribe" exception was added to the Eagle Act through an amendment in 1962. The amendment came in large part due to a letter and testimony from the Department of the Interior establishing that the bill should support "the use of eagles for religious purposes by Indian tribes."[8]

The Petition's main proposal would revise the regulations governing this narrow treaty and political based exception to vastly expand the exception and to allow any and all "sincere religious believers," including non-Indians, to possess, wear, and carry eagle feathers.

As an initial matter, the Petition's main proposal is in direct conflict with the express language of the Eagle Act and outside the scope of FWS's authority. In *U.S. v. Dion* the Supreme Court specifically rejected the "patronizing and strained view" that the "Indian tribe" exception in the Eagle Act allows the Secretary to issue permits to non-Indians for Indian religious purposes.[9] In *Dion*, the Supreme Court held that Congress intended the Eagle Act to abrogate Indian treaty

[5] *Id*. at 41.
[6] *Id*.
[7] 16 U.S.C. § 668a.
[8] H.R. Rep. No. 1450, 87th Cong., 2d Sess., 2 (1962); Protection for the Golden Eagle: Hearings before a Subcommittee of the Senate Committee on Commerce, 87th Cong., 2d Sess., 23 (1962).
[9] 476 U.S. 734, 744 (1986).

rights to hunt eagles, and, after considering "the special cultural and religious interests of Indians," included the "specific, narrow exception" as a recognition that the loss of treaty rights would cause hardship to Indian tribes.[10] Providing this exception was unquestionably within the power of Congress as "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."[11]

Congress could have easily have worded the exception differently to include exception like the proposal in the Petition, but did not. For example, Congress could have allowed the use of eagle feathers "for the purposes of Native American religion." This would have been a clear indication that Congress intended to protect and promote Native American religion per se, rather than the specific religions of federally-recognized Indian tribes. But, instead, Congress specifically chose to narrow the exception to "Indian tribes," rather than individual practitioners. As the Tenth Circuit has noted, this is direct evidence "that Congress saw the statutory exception not as protecting Native American religion qua religion, but rather as working to preserve the culture and religion of federally-recognized tribes."[12]

Thus, the view that the Petition's main proposal is outside the scope of FWS's authority is supported by both the plain language of the statue and the Supreme Court's precedent in *Dion*. It is telling that the Petition makes no effort to square its main proposal with these specific legal limitations and instead simply ignores controlling authorities. For this reason alone, FWS should deny the Petition's main proposal.

III. The Eagle Protection Act's "Indian tribe" Exception is a Political Distinction Supported by *Morton v. Mancari.*

The Petition's main proposal attempts to turn the "Indian tribe" exception in the Eagle Act into an impermissible racial classification and effectively overturn the Supreme Court's ruling in *Dion*. This is not correct. The "Indian tribe" exception in the Eagle Act is a recognition of the political and treaty relationship between federally recognized tribes and the federal government. This relationship includes the right to hunt bald and golden eagles, secured through treaty making with the United States.[13] This political relationship was broadly upheld by the Supreme Court in *Morton v. Mancari* and is a fundamental principle in the framework of federal Indian law and policy.[14]

In *Mancari*, the Supreme Court upheld an employment preference for Indians within the Bureau of Indian Affairs (BIA) in the face of an equal protection challenge and on the basis that the preference was political in nature and could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians…"[15] After noting Congress' "plenary power" to legislate

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[10] *Id*. at 743.
[11] *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).
[12] *U.S. v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).
[13] *Id*. at 743, 45("It seems plain to use, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles."…"We therefore read the statute as having abrogated that treaty right.")
[14] 417 U.S. 535, 553-54 (1974).
[15] *Id*. at 555.

concerning Indian tribes, the Court found that the United States' "obligation" to Indian tribes empowers Congress to "single out for special treatment a constituency of tribal Indians."[16] The Court went on to hold that the preference at issue in *Mancari* was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."[17]

At a very commonsense level, the legal categories of "Indian tribe," "federally recognized tribe," and "member of a federally recognized tribe" are inherently political as evidenced by their treatment in the Constitution, hundreds of treaties, laws, executive orders, and court decisions since the founding of the United States. *Mancari* simply affirms and recognizes the government-to government relationship between Indian tribes and the United States and protects the relationship against misguided challenges that do not account for this legal and political history, tribal sovereignty, and tribal governmental status.

The Petition is one of these misguided challenge as it expressly seeks to change the political distinction in *Mancari* by arguing that "[t]he politically unique relationship between federally recognized tribes and the U.S. government does not justify granting [federally recognized tribes] a religious accommodation while denying it to others who engage in similar religious practices."[18] This argument fails to consider the sovereign political status of Indian tribes, as well as the Supreme Court's holding in *Dion* and the Eagle Act's legislative history, both of which show the Indian tribe exception was not a religious accommodation, but a political accommodation due to the Eagle Act's abrogation of hunting rights secured through treaties with the United States.

The Eagle Act's exception for "the religious purposes of Indian tribes" is not an exception based on an individual racial or ethnic classification. The statute and corresponding regulations recognize a unique political relationship between the United States and federally recognized Indian tribes. Thus, as with the preference in *Mancari*, the "Indian tribe" exception is lawful political exception under Congress' plenary power "based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[19]

In arguing that the unique trust relationship between the federal government and federally recognized Indian tribes is not a compelling interest, the Petition expressly jeopardizes the federal law and policy governing over a century of tribal-federal relations. As the Supreme Court noted:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians.... If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed [invalid], an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[20]

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[16] *Id*. at 552.
[17] *Id*. at 554.
[18] Petition, at 39.
[19] 417 U.S. at 551.
[20] *Id*. at 552.

IV. The Petition's Main Request Would Violate FWS's Trust Obligation

In addition to being outside of FWS's authority and undermining a foundational principle of federal Indian law and policy, any change that would allow "all sincere believers" to possess eagle feathers would impermissibly diminish the rights of members of federally recognized tribes to the benefit non-Indians in violation of FWS's treaty and trust obligation to tribes. As FWS's own policy states, "the trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similar recognized rights.[21]

For example, under the Petition, members of federally recognized tribes would be lumped together with members of "Native American religious associations" as having a presumption of sincerity in their religious beliefs. First, purporting to judge the sincerity of a tribal member's religious beliefs is as insulting as it is outrageous. Second, the Petition fails to define "Native American Church" or "other Native American religious organizations" or otherwise provide examples or justification of why these amorphous entities should be given a presumption of sincerity without any tangible connection to federally recognized Indian tribes. The open-ended classifications proposed in the Petition invites non-members from all walks of life to fabricate Indian heritage, culture, and religion for personal and commercial claim. In doing so it would incentivize the appropriation and commercialization of Native American culture and religious beliefs.

Members of federally recognized Indian tribes would also be made to compete against non-Indians in an already broken system that currently requires members of federally recognized Indian tribes to wait months, if not years, before obtaining eagle feathers or parts from the National Eagle Repository, many times in a state of unusable decay. As the Eleventh Circuit concluded in *Gibson v. Babbitt*, if the "Indian tribe" exception was expanded to include non-Indians "the limited supply bald and golden eagles parts will be distributed to a wider population and the delays will increase in providing eagle parts to members of federally recognized Indian tribes, thereby vitiating the government's efforts to fulfill its…obligations to federally recognized Indian tribes."[22]

The Petition's proposal to vastly expand those who could use and possess of eagle feathers make it impossible to estimate the number of persons eligible to obtain eagle feathers under the proposed regulatory framework. No matter the overall number, however large that may be, it is a concrete fact that any permit issued to a non-Indian would be one fewer permit issued to a member of a federally recognized tribe. This is the undisputable result of a scheme that adds increased demand to a commodity with a fixed supply.[23] Taking such action would benefit non-Indians at the expense of Indians and violate FWS's trust responsibilities to Indian tribes.

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[21] U.S. Fish and Wildlife Service, Native American Policy, 510 FW 1, January 20, 2016.
[22] 233 F.3d, 1256, 1258 (11th Cir. 2000).
[23] *See*, *United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003).

V. FWS Should Promulgate the Morton Policy as Formal Regulation Without Modification

In 1975 the Department of the Interior (DOI) released the "Morton Policy," which recognized Indians have a "legitimate interest in expressing their cultural and religious way of life" … "without fear of Federal prosecution, harassment, or other interference."[24] It established that DOI would not prosecute "American Indians" who possess or use federally protected bird feathers or parts in religious or cultural activities without a permit, so long as they did not take birds or exchange their parts for compensation.[25]

In 2012, the Department of Justice (DOJ) similarly issued a memorandum clarifying the agency's policy regarding the possession and use of eagles and their parts for tribal cultural and religious ceremonies.[26] The memorandum incorporated DOI's "Morton Policy" and established that "based on the special relationship that the federal government has with federally recognized tribes" members of federally recognized tribes can engage in the following activities without being subject to prosecution:

- Possess, use, wear, and carry federally protected birds and their parts;
- Travel domestically with federally protected birds;
- Pick up naturally molten feathers in the wild;
- Give, loan, or exchange federally protected birds to or with other members of federally recognized tribes without compensation; and
- Provide feathers or other parts of federally protected birds to "craftspersons" who are members of federally recognized tribes to be made into objects for use in traditional religious or cultural activities.[27]

However, as with the Morton Policy, DOJ's 2012 memorandum only constitutes agency policy, and as such "[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable by law. . ."[28] Thus, despite their intent to "ease the minds of American Indians" and remove the "uncertainty and concern" regarding enforcement of eagle feather regulations, both DOI and DOJ policies may be arbitrarily rescinded or disregarded with no legal consequence.

In order to fully protect the rights of members of federally recognized tribes to meaningfully practice their religious and preserve their culture, DOI should promulgate the 1975 and 2012 policies as binding regulations. This would accommodate the interests of Indian tribes and would foster the federal commitment to tribal self-determination and self-governance. In doing so, DOI should also work to provide a factual basis to support the regulations should they be challenged in federal court by clarifying the political nature of the "Indian tribe" exception

[24] U.S. Dep't of Interior, Office of the Secretary News Release, Morton Issues Policy Statement on Indian Use of Bird Feathers (Feb. 5, 1975).
[25] *Id*.
[26] U.S. Dep't of Justice, Attorney Ge. Mem. Re: Possession and Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural and Religious Purposes (Oct. 12, 2012).
[27] *Id*.
[28] *Id*. at 4.

pursuant to the Eagle Act's abrogation of tribal treaty rights as well as the compelling governmental interest in protecting tribal treaty rights, religion, and culture under its trust responsibilities to and government-to-government relationship with federally recognized tribes.

VI. Conclusion

In sum, the Petition's main proposal directly contradicts the statutory language of the Eagle Act, Supreme Court precedent in *U.S. v. Dion* and *Morton v. Mancari*, and more than a century of precedent in federal-tribal relations. The Federal government has a long-standing and legally sound basis for allowing only federally recognized Indian tribes and their members to use and possess eagle feather and parts. There is nothing in the Petition that requires FWS upset this long-standing legal foundation and revise its regulations regarding the use and possession of eagle feathers and parts by federally recognized Indian tribes.

Accepting the Petition's main proposal would also fundamentally violate FWS's trust obligation to Indian tribes and irreparably harm all Indian tribes by incentivizing the appropriation and commercialization of not only eagle feathers, but Native American culture and religious beliefs. For these reasons the Ute Indian Tribe urges FWS to reject the Petition's main request to expand the "Indian tribe" exception to non-Indians.

Instead, the Tribe requests FWS engage in government-to-government consultations with federally recognized tribes to develop efforts to combat illegal commercial operations involving eagle feathers, expand the supply of eagles and their parts available through the National Eagle Repository by fixing the existing permitting process, and promulgate DOI's 1975 Morton Policy and DOJ's 2012 memorandum as formal agency regulation without modification.