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**Yankton Sioux Tribe**

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

**June 24, 2018**

## I. Introduction

Like many in the Great Plains, the *Ihanktonwan* or "Yankton" band of the *Oceti Sakowin* (Seven Council Fires) or "Sioux" is a resilient treaty tribe having entered into numerous treaties with the United States as well as other tribes. The first known treaty between the "Sioux Nation" and the United States was in 1805, and the Sioux Nation granted nine square miles to the United States at the mouth of the St. Croix River near St. Anthony Falls for the establishment of a military post. One of the purposes of Fort Saint Anthony, later (and currently) known as Fort Snelling, was to keep Indian lands free from white settlement. The United States affirmed its trust responsibility in 1815, when the Yankton entered into a treaty of "peace and friendship" with the United States, who was represented by William Clark, by the Tribe's acknowledgment that it would be under the protection of the United States. In 1825, Yankton and the United States again agreed by treaty that all trade and intercourse with Yankton shall be regulated by the United States. Perhaps unknown to the Tribe, the United States had declared for many years preceding these treaties that no sale or grant of Indian lands would be valid unless it was made in a public treaty that was held under the authority of the United States. Indian Nonintercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834. This history is important to an understanding of the statutory and trust responsibility undertaken by the United States and, in particular, the treaty right to take eagles that was found to have been abrogated by Congress.

The Yankton Sioux Tribe (Tribe) submits these comments on the Fish and Wildlife Service's (FWS) Petition for Rulemaking and Request for Public Comment for the petition submitted by Pastor Robert Soto (Soto Petition) under the terms of a settlement agreement *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-060 (S.D. Tex. June 3, 2016).

The Soto Petition generally makes three requests related to current regulatory scheme governing the "religious purposes of Indian tribes" exception in the Bald and Golden Eagle

Protection Act (Eagle Act).[1] First, the Soto 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 Soto 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 Soto Petition's third and main request is that FWS amendment 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, it 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 Soto 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 Tribe generally supports Soto Petition's first two requests as they align with tribal interests and the FWS's trust responsibility to federally recognized tribes, its main request is not only outside of FWS's authority under the Eagle Act, but would fundamentally violate the government's trust obligation to Indian tribes, jeopardizes 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 to FWS to summarily reject the request 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 Request 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

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

purposes of Indian tribes."[7] This "Indian tribe" exception was added to the Eagle Act through its amendment in 1962 in large part due to a letter and testimony from the Department of Interior establishing that the bill should support "the use of eagles for religious purposes by Indian tribes."[8]

However, the Soto Petition's main request is to have the current regulations governing this narrow exception expanded to allow any and all "sincere religious believers," including non-Indians, who use eagle feathers in exercising their faith to possess, wear, and carry them. Thus, as an initial matter, it is clear that the petition for rulemaking's main request is in direct conflict with the express language of the Eagle Act and thus outside the scope of the FWS' authority.

In *U.S. v. Dion*[9] 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.[10] In *Dion*, the Supreme Court held that Congress intended the Eagle Act to abrogate Indian treaty 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.[11] This was unquestionably within their power as "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."[12]

Congress could have easily have worded the exception differently; i.e. "for the purposes of Native American religion." This would have been clear indication to courts that Congress saw itself as protecting and promoting Native American religion per se, rather than the religion of federally-recognized tribal members. 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."[13]

Therefore, the view that the Soto Petition's main request 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 Soto Petition makes no effort to square its main request with these express limitations and instead simply ignores these plainly controlling authorities. For this reason alone FWS should deny the Soto Petition's main request.

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

[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] The *Dion* case arose on the Yankton Reservation and involved one of our enrolled members.
[10] 476 U.S. 734, 744 (1986).
[11] *Id*. at 743.
[12] *Rice v. Cayetano*, 528 U.S. 495, 519 (2000).
[13] *U.S. v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).

Under the Supreme Court's ruling in *Dion*, the "Indian tribe" exception in the Eagle Act is not an impermissible racial classification as Soto contends and as FWS appear to promote in its proposed rulemaking. Rather, it is a recognition of the political relationship between federally recognized tribes and the federal government and the special rights, including the right to hunt bald and golden eagles, secured through treaty making with the United States.[14] This political distinction was upheld by the Supreme Court in *Morton v. Mancari* and is a fundamental principle in the framework of federal Indian law and policy.[15]

In *Mancari*, the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA) in the face of an equal protection challenge, 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…"[16] The Court found that the United States' "obligation" to Indian tribes empowers Congress to "single out for special treatment a constituency of tribal Indians."[17] 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."[18]

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 this country. *Mancari* simply affirms this inherent fact of tribal sovereignty and assigns it into legal doctrine that embraces the government-to government relationship between tribes and the United States and protects the relationship against misguided challenges that do not account for tribal histories or governmental status.

The Soto Petition represents one of those misguided challenges as it expressly seeks to challenge 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."[19] However, this argument fails to consider both 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.

Simply put, the Eagle Act contains an exception based on "the religious purposes of Indian tribes," rather than an exception based on an individual racial or ethnic classification. The statute and corresponding regulations do not discriminate based on religion, but based upon political

[14] *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.")
[15] 417 U.S. 535 (1974).
[16] *Id*. at 555.
[17] *Id*. at 552.
[18] *Id*. at 554.
[19] Soto Petition, at 39.

affiliation as a member of a federally recognized tribe. 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."[20]

In arguing that unique trust relationship between the federal government and federally recognized Indian tribes is not a compelling interest, the Soto Petition is explicitly undermining the political distinction that ensures that federal Indian law is not subject to the increasingly strict scrutiny applied by the courts to government classifications deemed racial in nature, or in this case, to federal laws that "burden" an individual's religious exercise. [21] By doing so, it expressly jeopardizes the federal law and policy governing over a century of tribal federal relations. As the Supreme Court has 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.[22]

## 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 the FWS's trust obligation to tribes. As the 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.[23]

For example, under the Soto Petition, tribal members would be lumped together with members of "Native American religious associations" as having a presumption of sincerity in their religious beliefs. Judging the sincerity of a tribal member's religious beliefs is as insulting as it is outrageous. Moreover, the Soto Petition fails to define the "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 a recognized Indian tribe. The open ended classification set forth in the Soto 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.

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[20] 417 U.S. at 551.
[21] Soto Petition 29-31.
[22] *Id*. at 552.
[23] U.S. Fish and Wildlife Service, Native American Policy, 510 FW 1, January 20, 2016.

Tribal members would also be would be made to compete against non-Indians in an already broken system that currently requires tribal members 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."[24]

Moreover, as discussed above the indeterminate limitations set on who qualifies as a "sincere believer" make it impossible to estimate the number of persons eligible to obtain eagle feathers under the Soto Petition's 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 an Indian. This is the undisputable result of a scheme that adds increased demand to a commodity with a fixed supply.[25] Thus, granting the Soto Petition's request would alleviate the burden on his religious practice by redistributing the burdens on members of federally-recognized tribes in the exercise of their religious practices. There can hardly be imaged a more clear-cut violation of the FWS trust duties then to amend regulations to benefit non-Indians at the expense of Indians.

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

In 1975 the Department of 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.[26] It established 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. [27] 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.[28] 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

[24] 233 F.3d, 1256, 1258 (11th Cir. 2000).
[25] *See*, *U.S. v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003).
[26] 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).
[27] *Id*.
[28] 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).

- 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.
- 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.[29]

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. . ."[30] Thus, despite their intent to "ease the minds of American Indians" and remove the "uncertainty and concern" regarding enforcement of eagle feather regulations, both the 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 under the Administrative Procedure Act rulemaking. This would serve not only accommodate the interests of tribes but 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 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.

## VII. Conclusion

In sum, the Soto Petition's main request is in direct contradiction with the statutory language of the Eagle Act and Supreme Court precedent in *U.S. v. Dion*. It would also fundamentally violate the government's trust obligation to Indian tribes, jeopardize the federal law and policy governing over a century of tribal federal relations, 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 Yankton Sioux Tribe urges the FWS to reject the Soto Petition 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

[29] *Id*.
[30] *Id*. at 4.

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.