

Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion

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I. Introduction

Protection and conservation of the natural environment and the species that live in this environment are important and necessary goals. Ideally, these environmental protection measures should be carefully structured to avoid placing unnecessary burdens on constitutionally protected individual freedoms. The American eagle receives special protection under environmental laws because it is an endangered species and the national symbol of freedom. However, the legal scheme to protect eagles infringes on Native American free exercise of religion because it unduly restricts Native American access to eagles and eagle parts for religious purposes.

Such unduly burdensome, government-imposed infringements on Native American religious practices¹ threaten the future existence of Native Americans. Native Americans support federal protection of eagles, yet request that the government also accommodate their religious needs. The accommodations proposed by Native Americans pose no threat to eagles, which Native Americans hold sacred,² but preserve traditional religious freedoms for all Native Americans.

This Article addresses the conflict between the federal scheme to protect eagles and Native American religious rights. Section II describes the importance of the eagle as the United States national symbol of freedom and as a sacred religious entity to Native Americans. Section II also explains why the eagle is currently threatened with ex-

1. *Infra* part II.B.

2. *Infra* part II.B.

inction. Section III outlines the necessary legal protections available to preserve and sustain eagle populations. Section IV details the federal eagle permit system designed to effectuate these legal protections and the unnecessary burden this permit system places on Native American free exercise of religion. Section V addresses the available legal arguments Native Americans may use to relieve the regulatory burdens of the federal eagle permit scheme. Section VI summarizes a proposed bill before Congress which would require the government to protect Native American religious freedoms, and more specifically, which would require the government to develop a plan to protect Native American religious use of eagles. Lastly, Section VII urges Congress to immediately legislate necessary and effective changes to the current federal eagle permit system which would accommodate Native American religious rights into the federal scheme to protect eagles.

II. The Eagle

A. As a National Symbol

The bald eagle³ is a revered bird in the United States and has enjoyed the special status of a national symbol since the Continental Congress adopted it as such in 1782.⁴ In order to provide proper protection for this national symbol, Congress enacted the Eagle Protection Act in 1940, providing that the bald eagle is “the symbolic representation of a new nation under a new government in a new world [It] is no longer a mere bird of biological interest but a symbol of the American ideals of freedom”⁵

3. The bald eagle is commonly referred to as the American eagle. *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 47 (1st ed.) (1966). Most laws protecting bald eagles also apply to golden eagles and eagle parts. Eagle Protection Act, 16 U.S.C. §§ 668-668d (1988).

4. Eagle Protection Act, 16 U.S.C. § 668 (Enacting Clause of Eagle Protection Act, June 8, 1940). Benjamin Franklin was opposed to adopting the bald eagle as our national symbol. *United States v. Hetzel*, 385 F. Supp. 1311, 1315 n.1 (W.D. Mo. 1974). In a letter to Sarah Bache dated January 26, 1784, he expressed his opinion on the 1782 Continental Congress's action:

I wish the Bald Eagle had not been chosen as the Representative of our Country; he is a Bird of bad moral Character; like those among Men who live by Sharping and Robbing, he is generally poor, and often very lousy. The Turkey [sic] is a much more respectable Bird, and withal, a true original Native of America.

Id.

5. 16 U.S.C. § 668 (enacting clause of Eagle Protection Act, June 8, 1940).

B. As Sacred to Native Americans

In addition to being the national symbol of the United States and a magnificent bird, the eagle is also considered a sacred messenger to the spirit world by Native Americans.⁶ Native Americans hold eagle feathers sacred and equate them to the cross or the Bible in western religions.⁷ They describe the powers of eagle feathers as “awesome.”⁸ Moreover, Native Americans have physically used entire eagles or eagle parts in their religious ceremonies since time immemorial, and eagles are necessary, irreplaceable, and indispensable to the practice of their religions.⁹ In fact, the Native American Church utilizes eagles or eagle parts in every religious ceremony.¹⁰

According to Native American belief, humans and eagles were created on the same day.¹¹ Eagles were specifically made so that people could use their feathers and other parts in religious ceremonies.¹² A Medicine Man explains, “[e]very line on the feather tells a story or

6. *American Indian Religious Freedom Act-Part II: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 159 (1993) [hereinafter *Washington Hearing II*] (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); see generally *Proposed Amendments to the American Indian Religious Freedom Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 103d Cong., 1st Sess. (1993) (Part I [herein after *Scottsdale Hearing*]), (Part II [herein after *Albuquerque Hearing*]), and (Part III [hereinafter *Minneapolis Hearing*]); *Washington Hearing II*; *American Indian Religious Freedom Act-Part I: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 1993 [hereinafter *Washington Hearing I*]; *Proposed Amendments to the American Indian Religious Freedom Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. (1992) [hereinafter *Los Angeles Hearing*]; *Religious Freedom Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 102d Cong., 2d Sess. (1992) [herein after *Portland Hearing*].

7. *Albuquerque Hearing*, *supra* note 6, at 331-32 (letter from Harrison Stover Paul, Medicine Man); *United States v. Thirty Eight Golden Eagles*, 649 F. Supp. 269, 276 (D. Nev. 1986).

8. *Minneapolis Hearing*, *supra* note 6, at 351 (statement of Joe Circle Bear, Traditional Practitioner, Sisseton Wahpeton Dakota Traditional People).

9. *Scottsdale Hearing*, *supra* note 6, at 8 (statement of Vernon Masayesva, Chairman of the Hopi Nation); *id.* at 317 (testimony of Kenneth G. White, Sr., President, White Cone Chapter, Native American Church of Navajoland, Inc.). Unlike western religious ceremonies which utilize symbolic representations of sacred objects, Native American religious ceremonies require the physical presence of sacred objects, for example, eagle feathers. *Portland Hearing*, *supra* note 6, at 7 (statement of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado, Boulder, Colo.).

10. *Scottsdale Hearing*, *supra* note 6, at 317 (testimony of Kenneth G. White, Sr., President, White Cone Chapter, Native American Church of Navajoland, Inc.).

11. *Albuquerque Hearing*, *supra* note 6, at 321-22 (letter from Dudley Yazzie). “The human and the eagle came together, at the same time. They have the same birthdate. They can not be separated.” *Id.* at 322.

12. *Id.* at 321.

a vision that Creator gave to us to understand and what we need to know to survive on Mother Earth.”¹³ Native Americans believe that because eagles fly nearer to the sun and the heavens than mere humans, eagles deliver their prayers to the Creator. Eagles are, in essence, Native American prayer messengers.¹⁴ Thus, eagle feathers or parts must be present at all Native American religious ceremonies; this is according to Native American religious custom and tradition and so that Native Americans may communicate with their Creator.¹⁵

To most Native Americans, killing an eagle is expressly forbidden.¹⁶ When a Native American finds or otherwise receives a live eagle or eaglet, he or she performs a special ceremony to honor and respect the eagle.¹⁷ The eagle is washed, named, given a home, and provided with fresh meat and water.¹⁸ Native Americans must obtain eagle feathers for their ceremonies without harming the bird or its ability to fly.¹⁹ Because this task is difficult, it is sacred and described as an “honor” or a “ritual ordeal.”²⁰ After obtaining the necessary

13. *Albuquerque Hearing*, *supra* note 6, at 331 (letter from Harrison Stover Paul, Medicine Man).

14. *Scottsdale Hearing*, *supra* note 6, at 36 (statement of ValJean Joshevama, Sr., Hopi); *Washington Hearing II*, *supra* note 6, at 159 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); *Portland Hearing*, *supra* note 6, at 362 (statement by Daniel Deschinny, Sr., Secretary of the Dineh Spiritual & Cultural Society, Navajo Tribe). The Zuni tribes use eagle and other migratory bird feathers each month at their sacred sites as one time offerings in the form of “prayer sticks.” *Albuquerque Hearing*, *supra* note 6, at 329 (letter from Mudhead Society, Pueblo of Zuni). Once offered, the feathers are neither retrieved nor replaced, but are left to be naturally “planted into the Mother Earth for time immemorial.” *Id.*

15. *Washington Hearing II*, *supra* note 6, at 159-60 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes of the Flathead Nation).

16. *Minneapolis Hearing*, *supra* note 6, at 347 (statement of Joe Williams, Spokesman, Sisseton Wahpeton Cultural Affairs Committee); *id.* at 335 (statement of Devils Lake Sioux Tribe).

Throughout her research, the author found no references to any Native American tribes or religions that sanction the killing of eagles. Most references stated to the contrary that killing eagles was expressly prohibited. *See, e.g., Minneapolis Hearing*, *supra* note 6, at 335, 347. However, the defendant in *United States v. Jim*, No. CR 93-87-RE, 1995 U.S. Dist. LEXIS 8025 (D. Or. Mar. 13, 1995) did claim that his personal religious beliefs required him to kill eagles. *Jim*, LEXIS 8025, at *2-3. This statement was highly contested by other Native American witnesses who affirmed that killing eagles is prohibited by their religion. *Id.* at *2-3. That Native American religious practices in general pose no threat to the continued existence of eagles is a very important but not widely-known fact. *See part II.B-C. A Native American eagle killing is a rare aberration. Id.*

17. *Scottsdale Hearing*, *supra* note 6, at 36 (statement of ValJean Joshevama, Sr., Hopi.).

18. *Id.*

19. *Id.*

20. *Washington Hearing I*, *supra* note 6, at 46 (testimony of Neil Abercrombie). Honorable James S. Hena, Chairman, All Indian Pueblo Council, related a story about a tradi-

feathers from live eagles, Native Americans usually set their eagles free.²¹ Additionally, Native Americans perform traditional Grief and Mourning Ceremonies for deceased eagles to be used in religious ceremonies.²² These ceremonies last for four days and allow the spirit of the eagle to return to earth so that the eagle parts may be utilized in religious ceremonies.²³

Eagles and eagle parts are used in a variety of Native American religious ceremonies,²⁴ including baptismal name-giving ceremonies, womanhood ceremonies, ceremonies for young men to become warriors, marriage ceremonies, burial ceremonies, healing ceremonies, and seasonal ceremonies.²⁵ These ceremonies are religious because they are intrinsically tied to Native American spiritual beliefs. Native Americans believe that the ceremonial use of eagles blesses the participants and their families and results in good health and a construc-

tional leader in his Pueblo who captured an eagle and kept it caged for over ten years. *Id.* The man faithfully cared for the eagle as a pet and only pulled a feather when he needed one for a religious ceremony. *Id.* He never harmed the eagle and eventually released it back into the wild. *Id.* at 46-47.

When plucking sacred feathers from live eagles, Native Americans may never take more than will permit the eagle to continue to fly. *Portland Hearing, supra* note 6, at 362-63 (statement by Daniel Deschinny, Sr., Secretary of the Dineh Spiritual & Cultural Society, Navajo Tribe).

21. *Minneapolis Hearing, supra* note 6, at 335 (statement of Devils Lake Sioux Tribe). As the author understands it, usually the live eagle is set free, but sometimes it is cared for in captivity and not released. If the eagle remains in captivity, it might eventually die of natural causes. However, eagles are never killed. See *Washington Hearing I, supra* note 6, at 46-47 (testimony of Neil Abercrombie).

22. *Minneapolis Hearing, supra* note 6, at 354 (statement of David Louis, Traditional Practitioner, Sisseton Wahpeton Dakota Traditional People).

23. *Id.*

24. For more detailed explanations of ceremonial uses of eagles, see *Minneapolis Hearing, supra* note 6, at 346-58 (materials prepared by the Sisseton Wahpeton Sioux Tribe).

All parts of an eagle are used for a variety of ceremonial purposes. For example, eagle wings are used for fans, eagle feathers to decorate warriors for bravery and courage, and eagle bones on some ceremonial costumes. *Minneapolis Hearing, supra* note 6, at 335 (statement of Devils Lake Sioux Tribe). Also, eagle plumes are tied to children's head and hair to foster their emotional growth. *Id.* at 346 (statement of Gary M. Holy Bull, Traditional Medicine Man, Sisseton Wahpeton Dakota Traditional People Red Iron Community). Lastly, tribal chiefs wear eagle feather headdresses as a sign of humility and reliance upon the power of the eagle for strength, guidance, courage, and bravery. *Id.* at 355 (statement of Edward M. Red Owl, Traditional Practitioner, Sisseton Wahpeton Dakota Traditional People).

25. *Washington Hearing II, supra* note 6, at 235 (statement of Mark A. Powless, Tribal Advocate, Oneida Tribe); *Los Angeles Hearing, supra* note 6, at 27 (statement of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.); *Portland Hearing, supra* note 6, at 362 (statement by Daniel Deschinny, Sr., Secretary of the Dineh Spiritual & Cultural Society, Navajo Tribe).

tive life.²⁶ Eagles are "pure" and, therefore, help young people maintain the purity they were born with as they grow into adulthood.²⁷ Ideally, each member of a family is represented by its own eagle feather.²⁸ Then, when the children grow up and move away from home, the parents keep the eagle feathers to keep the family spiritually intact.²⁹

Eagle parts are used in most healing ceremonies to cure physical and emotional disorders.³⁰ Native Americans believe that sickness is contrary to the natural order of the world, and the use of eagle feathers is required to restore order and harmony within the afflicted person.³¹ Furthermore, eagle feathers are used in the sacred "Sun Dance" ceremonies (so sacred they cannot be described in detail), which function to assist people in gaining atonement and reconciliation with their family and community.³²

Eagle feathers are also given to military veterans as a symbol of extraordinary bravery and courage.³³ In fact, the traditional flag of the Cheyenne tribe depicts a row of sacred eagle feathers which signify the "overall dedication of our people to religious and spiritual principles based on truth, honor, and generosity which the soldier vows to uphold even to the point of giving up his life in battle so that his people may live."³⁴

The religious use of eagles is essential to the practice of Native American religion. Native Americans cannot pray or perform their religious ceremonies without utilizing eagle feathers and parts.³⁵ Since religion is the foundation of Native American culture,³⁶ the future existence of traditional Native American lifestyle depends on Na-

26. *Washington Hearing II*, *supra* note 6, at 159 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

27. *Los Angeles Hearing*, *supra* note 6, at 27 (statement of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.).

28. *Albuquerque Hearing*, *supra* note 6, at 332 (letter from Harrison Stover Paul, Medicine Man).

29. *Id.*

30. *Los Angeles Hearing*, *supra* note 6, at 201 (statement of Gary M. Holy Bull, Traditional Medicine Man of the Cheyenne River Sioux Tribe).

31. *Id.*

32. *Id.*

33. *Los Angeles Hearing*, *supra* note 6, at 201 (statement of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.).

34. *Id.*

35. *Portland Hearing*, *supra* note 6, at 7 (statement of Vine Deloria, Jr. from the Center for Studies of Ethnicity and Race, University of Colorado, Boulder, Colo.).

36. *See Albuquerque Hearing*, *supra* note 6, at 138 (statement of Everett Burch, Spiritual Leader, Southern Ute Indian Tribe); *Minneapolis Hearing*, *supra* note 6, at 32 (testimony of Stephen Brady, Northern Cheyenne Tribe, Lame Deer, Mont.); *Washington*

tive American freedom to exercise their religion as they have since time immemorial.³⁷ However, federal laws designed to protect eagles unnecessarily interfere with Native American religious use of eagle feathers and parts.³⁸

C. As Needing Federal Protection

Eagles, especially bald eagles, are threatened with extinction in the twentieth century in the United States.³⁹ However, the cause of this threat is modern human life, not Native American religious practices. Contrary to public perception, Native American religious practices do not threaten or endanger the United States eagle population.⁴⁰ Most Native American traditional practitioners only use eagle parts and feathers salvaged from dead eagles — they do not kill eagles for religious purposes.⁴¹ Rather, Native Americans revere and care for eagles. To them “life is sacred, all life, not just human life but animal life.”⁴²

Conversely, the modern age is the primary reason bald eagles are threatened with extinction. Land development and increasing human population have gradually destroyed natural eagle habitats⁴³ and

Hearing II, *supra* note 6, at 232 (testimony of Vernon Masayesva, Chairman of the Hopi Tribe); *see generally* VINE DELORIA, JR., *GOD IS RED* (2d ed. 1992).

37. *See Portland Hearing*, *supra* note 6, at 4 (statement of Walter Echo-Hawk, Attorney, Native American Rights Fund, Boulder, Colo.). “[R]eligion is the glue that holds the tribal communities and the tribal cultures together.” *Id.*

38. *See Albuquerque Hearing*, *supra* note 6, at 282 (testimony of J. Gilbert Sanchez, First Lt. Governor, Pueblo of San Ildefonso); *Minneapolis Hearing*, *supra* note 6, at 30 (testimony of Ed Benton, Director, Heart of the Earth Survival School).

39. 50 C.F.R. § 17.11 (1992). An “endangered species” is a species which is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened species” is a species which is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

40. *Washington Hearing II*, *supra* note 6, at 162 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); *Washington Hearing I*, *supra* note 6, at 42 (testimony of Jerry Flute, field director, Association on American Indian Affairs).

41. *Washington Hearing II*, *supra* note 6, at 162 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); *Portland Hearing*, *supra* note 6, at 43 (statement of John Pretty on Top, Facilities Manager, Crow Tribe); *Portland Hearing*, *supra* note 6, at 362 (statement by Daniel Deschinny, Sr., Secretary of the Dineh Spiritual & Cultural Society, Navajo Tribe); *see also supra* notes 16-20 and accompanying text.

42. *Washington Hearing I*, *supra* note 6, at 42 (testimony of Jerry Flute, field director, Association on American Indian Affairs).

43. *Washington Hearing II*, *supra* note 6, at 161 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

greatly increased "accidental" eagle mortalities.⁴⁴ For example, many eagles have been electrocuted by power lines that are erected too closely together.⁴⁵ In addition, toxic pollution in rivers, mercury deposits in fish, and pesticides on plants affect both eagle mortality and reproduction.⁴⁶ Pollutants and pesticides cause eagle eggshells to become too thin to sustain a young eagle's life, and older, stronger eagles are too old to multiply enough to sustain a viable future eagle population.⁴⁷

Further, recent popularity of Native American art and artifacts has fueled a lucrative black market in eagle and other migratory bird feathers and parts used to decorate Native American art objects.⁴⁸ The United States Fish and Wildlife Service reported in 1991 that this black market has resulted in "the slaughter of thousands of birds to fill this demand for feathers, and other parts such as beaks, bones, and talons."⁴⁹ Some Native Americans also suspect that art dealers, collectors, and hobbyists may kill eagles simply to procure the feathers or eagle parts necessary for their artwork.⁵⁰ Finally, ranchers and

44. *Albuquerque Hearing*, *supra* note 6, at 332 (testimony of Harrison Stover Paul, Medicine Man).

45. *Portland Hearing*, *supra* note 6, at 95 (statement of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado, Boulder, Colo.); *Washington Hearing I*, *supra* note 6, at 42 (testimony of Jerry Flute, field director, Association on American Indian Affairs). In Montana, 40 electrocuted eagles were found along a 10 mile stretch of power lines. *Id.* As a result, environmental groups in Oregon and Idaho specifically requested that power companies space their power lines farther apart, and fewer eagles have been electrocuted. *Id.*

46. *Albuquerque Hearing*, *supra* note 6, at 332 (testimony of Harrison Stover Paul, Medicine Man); *Washington Hearing II*, *supra* note 6, at 161 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes). DDT, and other man-made synthetic chemicals and pollutants, are major threats to eagles. *Id.* It increased eagle death rates and diminished eagle reproduction. *Id.* Since the ban of DDT in the United States, fewer eagles have died as a result of this dangerous chemical. *Id.* However, DDT "residues still choke eagle reproduction at several contaminated areas, including the lower Columbia River and the Great Lakes." Brian T. Meehan, *The Eagle in Winter*, OREGONIAN, Feb. 5, 1995, at A1, A16.

47. *Albuquerque Hearing*, *supra* note 6, at 332 (testimony of Harrison Stover Paul, Medicine Man); *see also* Great Lakes Indian Fish and Wildlife Commission, *Poisoning Deaths of 17 Bald Eagles Being Looked into as Deliberate, \$5000 Reward Offered*, MASINAIGAN, Summer 1994, at 26 (describing the recent death of 17 eagles in Wisconsin due to ingestion of a chemical insecticide illegally introduced into the environment).

48. *Washington Hearing II*, *supra* note 6, at 169 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, REGION 6 INFORMATION SHEET: FEATHERS AND FEDERAL LAW, Oct. 9, 1991).

49. *Id.*

50. *Los Angeles Hearing*, *supra* note 6, at 41 (testimony of Priscilla Hunter, Coyote Valley Tribal Council, Pomo Indians).

sportsmen who indiscriminately slaughter eagles are an additional constant threat to the eagle population.⁵¹

Because of the threatened extinction of eagles and their reverence for all life, Native Americans generally support federal protection of eagles, provided that the law also accommodates their religious needs to use eagle feathers and parts. As one Native American explained, "protecting the sacred animals is a form of protecting American Indian religions; it has to be done, and we can live with that just so long as that protection does not become a cultural strangulation."⁵²

III. Federal Restrictions on the Taking of Eagles

The federal scheme to protect eagles is an elaborate permit system established pursuant to the Eagle Protection Act,⁵³ the Migratory Bird Treaty Act,⁵⁴ the Endangered Species Act,⁵⁵ and accompanying regulations. In general, all takings of eagles and eagle parts are prohibited unless a narrowly tailored permit is granted by the Secretary of the Interior for a specifically authorized individual taking.⁵⁶

A. The Eagle Protection Act

The Eagle Protection Act⁵⁷ was enacted in 1940 to protect the eagle, which is threatened with extinction in the twentieth century in the United States.⁵⁸ Originally, the Act protected only bald eagles.⁵⁹ In 1962 the Act was extended to protect golden eagles, which also need protection and are difficult to distinguish from bald eagles as

51. *Portland Hearing*, *supra* note 6, at 95 (statement of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado, Boulder, Colo.).

52. *Minneapolis Hearing*, *supra* note 6, at 122 (statement of Dr. Charles J. Kingswan, traditional religious leader and Chief Clan, Winnebago Nation).

53. 16 U.S.C. §§ 668-668d (1988).

54. 16 U.S.C. §§ 703-712 (1988).

55. 16 U.S.C. §§ 1531-1543 (1988).

56. *See Washington Hearing II*, *supra* note 6, at 159-65 (testimony of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

57. 16 U.S.C. §§ 668-668d (1994).

58. 16 U.S.C. § 668 (Enacting Clause of Eagle Protection Act, June 8, 1940). The legislative history to an amendment to the Act indicates that the legislation was prompted by the slaughter of 500 bald and golden eagles by gunmen from helicopters over Wyoming and Colorado in 1971. *United States v. Hetzel*, 385 F. Supp. 1311, 1314 (W.D. Mo. 1974) (citing S. REP. NO. 92-1159, 92nd Cong., 2d Sess. 4285 (1972)). At that time, the Department of the Interior estimated the total population of bald and golden eagles at between 30,000 and 50,000, with only 1,000 pairs of eagles nesting in the contiguous United States. *Id.*; *see also* Brian T. Meehan, *The Eagle in Winter*, OREGONIAN, Feb. 5, 1995, at A1, A16.

59. 16 U.S.C. § 668-668d (1940).

eaglets.⁶⁰ Prior to the Act, modern human life was (and still is) the major threat to the continued existence of eagles in the United States.⁶¹ Bald and golden eagle populations were rapidly declining due to increasing human population and modern human activity, including bounty hunting, defense of livestock and agriculture, use of industrial chemicals and pollutants, and erection of power lines.⁶² The Act prohibits anyone, in any place subject to the jurisdiction of the United States, at any time, and in any manner, from knowingly taking,⁶³ possessing, selling, purchasing, bartering, offering for sale, purchase, or barter, transporting, exporting, or importing any bald or golden eagle, alive or dead, or any eagle part, nest, or egg, without a specific permit from the Secretary of the Interior.⁶⁴

The Secretary may issue a permit to take, possess, and transport an eagle or eagle part whenever the Secretary determines that the authorized actions are "compatible with the preservation" of the bald or golden eagle.⁶⁵ The Secretary may issue permits for eagles or eagle parts in accordance with proper regulations for specific designated purposes, including: scientific or exhibition purposes; religious purposes of Indian tribes; the protection of wildlife or agricultural interests in a particular locality; the seasonal protection of domesticated flocks and herds in a state; falconry; or to prevent interference with resource development or recovery operations.⁶⁶

The first violation of the Act or of an authorized permit may result in a maximum fine of \$5,000, one year imprisonment, or both.⁶⁷ Each subsequent violation may result in a maximum fine of \$10,000, two years imprisonment, or both.⁶⁸ Additionally, the Secretary may assess civil penalties for as much as \$5,000 for each violation.⁶⁹ Any eagles, eagle parts, or vessels involved in actions prohibited by the Act or outside the scope of an authorized permit are subject to forfeiture to the United States.⁷⁰

60. Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (codified as amended at 16 U.S.C. § 668 (1988)).

61. See *infra* notes 43-47 and accompanying text.

62. See *infra* notes 43-47 and accompanying text.

63. "Take" includes to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb." 16 U.S.C. § 668c (1994); 50 C.F.R. § 22.3 (1992).

64. 16 U.S.C. § 668(a) (1994); 50 C.F.R. §§ 13, 22 (1992).

65. 16 U.S.C. § 668a (1994).

66. 16 U.S.C. § 668a (1994); 50 C.F.R. §§ 13, 22 (1992).

67. 16 U.S.C. § 668(a) (1994).

68. *Id.*

69. 16 U.S.C. § 668(b) (1994).

70. 16 U.S.C. § 668b (1994); 50 C.F.R. § 12 (1992).

B. The Migratory Bird Treaty Act

The Migratory Bird Treaty Act⁷¹ ("MBTA") was enacted on July 3, 1918, to protect all migratory birds.⁷² The MBTA provides general protection for migratory birds, including eagles,⁷³ and currently is a useful, supplemental mechanism to the Eagle Protection Act to prevent unauthorized takings of eagles. Specifically, the MBTA protects migratory birds, birds threatened with extinction, and bird environments by comprehensively prohibiting takings at any time and in any manner unless permitted by regulation.⁷⁴ All migratory birds, bird parts, nests, eggs, and certain bird products are protected.⁷⁵

The Secretary of the Interior may, pursuant to established regulations, permit some takings of migratory birds.⁷⁶ Alaska natives, however, may take migratory birds for subsistence purposes.⁷⁷ Notably the MBTA fails to specifically provide an exemption for the religious use of birds or bird parts.

It is easier to prosecute violations of the MBTA than of the Eagle Protection Act because the MBTA does not require proof of "guilty knowledge" (*scienter*) as an essential element of an offense,⁷⁸ while

71. 16 U.S.C. §§ 703-712 (1994).

72. 16 U.S.C. § 703 (1994). The MBTA applies to all wild birds commonly within the contiguous United States, except house sparrows, starlings, pigeons, and game birds, including pheasants, geese, quail, and wild turkeys. 50 C.F.R. § 10 (1992).

73. In 1972, the treaty with Mexico (which is incorporated into the MBTA) was amended to include eagles as migratory birds. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mexico, 50 Stat. 1311, T.S. No. 912. Currently the MBTA protects four species of eagle: bald, golden, sea, and white-tailed eagles. 50 C.F.R. § 10.13 (1992).

74. 16 U.S.C. §§ 703-712 (1994). The laundry list of prohibited actions includes to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, sale, barter, purchase, offer to sell, barter, or purchase, deliver, export, import, cause to be shipped, exported, or imported, transport, carry, or receive. 16 U.S.C. § 703 (1994).

The United States Fish and Wildlife Service explains that the comprehensive prohibitions against all commercial traffic in eagles and migratory birds are intended to eliminate any market for the birds themselves, or for their feathers and parts. . . . The Department of the Interior firmly believes . . . it must totally deny a marketplace for migratory birds including eagles. If such markets were allowed to exist, individuals would be prompted to supply the demand for protected birds by killing them illegally.

Washington Hearing II, supra note 6, at 169 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, REGION 6 INFORMATION SHEET: FEATHERS AND FEDERAL LAW, Oct. 9, 1991).

75. 16 U.S.C. § 703 (1994).

76. 16 U.S.C. § 704 (1994); 50 C.F.R. § 21 (1992).

77. 16 U.S.C. § 712 (1994); 50 C.F.R. § 100 (1992).

78. 16 U.S.C. §§ 703, 707(a)-(b) (1994).

violations of the Eagle Protection Act must be knowing.⁷⁹ However, violations of the MBTA result in less stringent penalties than violations of the Eagle Protection Act. Regulatory violations of the MBTA are classified as misdemeanors and may result in maximum fines of \$500, six months imprisonment, or both.⁸⁰ In contrast, actual statutory violations of the MBTA are felonies and may result in maximum \$2,000 fines, two years imprisonment, or both.⁸¹ Additionally, all guns, traps, nets, and other equipment utilized in violating the MBTA are subject to forfeiture to the United States.⁸²

C. The Endangered Species Act

The Endangered Species Act⁸³ ("ESA") was enacted in 1973 to conserve endangered and threatened species and their ecosystems.⁸⁴ With the ESA, Congress declared its conservation policy for endangered and threatened species and recognized the aesthetic, ecological, educational, historical, recreational, and scientific value of fish, wildlife, and plants to our nation.⁸⁵

In all but five states in the United States, the bald eagle is listed as an endangered species, and as such is protected by the ESA.⁸⁶ In the remaining five states, Michigan, Minnesota, Oregon, Washington, and Wisconsin, the bald eagle is listed as a threatened species,⁸⁷ subject to slightly different protections under the ESA. Golden eagles

79. *United States v. Hetzel*, 385 F. Supp. 1311, 1314 (W.D. Mo. 1974). The defendant, a boy scout who innocently picked up a dead eagle to use its talons for an exhibit, did not violate the Eagle Protection Act. *Id.* at 1318. The court implied, however, that a contrary result might have been possible if the defendant had been charged under the Migratory Bird Treaty Act. *Id.* at 1314 (citing *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966)).

Criminal violations of the Endangered Species Act must also be knowing, but violations lacking requisite knowledge may result in a small civil penalty. 16 U.S.C. § 1540(a)-(b) (1994).

80. 16 U.S.C. § 707(a) (1994).

81. 16 U.S.C. § 707(b)(2) (1994).

82. 16 U.S.C. § 707(c) (1994); 50 C.F.R. § 12 (1992).

83. 16 U.S.C. §§ 1531-1544 (1994).

84. 16 U.S.C. §§ 1531, 1531(b) (1994).

85. 16 U.S.C. § 1531(a),(c) (1994). Notably, religious value is missing from this list.

86. 16 U.S.C. §§ 1531-44 (1994).

87. 50 C.F.R. § 17.11 (1992). An "endangered species" is a species which is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is a species which is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

There is a proposal before Congress to down-list the bald eagle from endangered to threatened in all areas of the United States except the Southwest. Brian T. Meehan, *The Eagle in Winter*, SUNDAY OREGONIAN, Feb. 5, 1995, at A1, A16. However, there is no proposal to completely down-list the bald eagle; that is, it will remain protected by the

are neither threatened nor endangered,⁸⁸ and therefore receive no protection under the ESA.

The relevant section of the ESA, section 9, prohibits anyone from knowingly taking threatened or endangered species.⁸⁹ The ESA also prohibits other related activities, including importing, exporting, possessing, selling, delivering, transporting, and shipping protected species.⁹⁰ Section 10 of the ESA provides some exemptions from the general prohibition of takings. The Secretary may permit takings for scientific purposes or to enhance the survival of a specific species.⁹¹ In addition, the Secretary may permit incidental takings, provided the "taking will not [among other things] appreciably reduce the likelihood of the survival and recovery of the species in the wild."⁹² Lastly, Alaska natives residing in Alaska may take protected species for subsistence purposes in accordance with specifically established regulations, provided the Secretary determines that such taking will not "materially and negatively affect" the protected species.⁹³ However, like the MBTA, the ESA does not provide an exemption for takings of protected species for religious purposes.

Violations of the ESA may result in serious penalties. In fact, the ESA is the most severe of the laws protecting eagles. People who knowingly violate the ESA by taking a protected species may receive a civil penalty up to \$25,000 for each violation,⁹⁴ in addition to criminal fines up to \$50,000, one year imprisonment, or both.⁹⁵ Violators who lack the requisite knowledge are only subject to civil penalties of \$500 for each violation.⁹⁶ In order to successfully prosecute violators under the ESA, the government need not prove the defendant had knowledge that the species taken was listed as threatened or endangered. Rather, the government must only show that the defendant had knowledge of his actions constituting the taking.⁹⁷ All protected

ESA. *United States v. Jim*, No. CR 93-87-RE, 1995 U.S. Dist. LEXIS 8025, at *13-14 (D. Or. Mar. 13, 1995) (Redden, J.).

88. 50 C.F.R. § 17.11 (1992).

89. Technically, the Act prohibits takings of endangered species and accompanying regulations extend this prohibition to threatened species. 50 C.F.R. § 17.31(a). This regulation has been upheld by the Court of Appeals for the D.C. Circuit. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993).

90. 16 U.S.C. § 1538(a)(1) (1994).

91. 16 U.S.C. § 1539(a)(1)(A) (1994); 50 C.F.R. § 17.22 (1992).

92. 16 U.S.C. § 1539(a)(2)(B)(iv) (1994); 50 C.F.R. § 17.22 (1992).

93. 16 U.S.C. § 1539(e)(4) (1994); 50 C.F.R. §§ 17.3, 17.5 (1992).

94. 16 U.S.C. § 1540(a)(1) (1994).

95. 16 U.S.C. § 1540(b)(1) (1994).

96. 16 U.S.C. § 1540(a)(1) (1994).

97. *United States v. Nguyen*, 916 F.2d 1016, 1018 (5th Cir. 1990).

species, equipment, and means of transportation involved in activities prohibited by the ESA are subject to forfeiture to the United States.⁹⁸

The Eagle Protection Act, the MBTA, and the ESA combine to comprehensively prohibit takings and possession of protected eagles or eagle parts without specific, advance permission from the Secretary of the Interior. However, only the Eagle Protection Act recognizes the importance of the religious use of eagles and eagle parts by providing for an exemption via its intricate permit procedure. Unfortunately, this permit process is practically ineffective and fails to sufficiently protect the religious rights of Native Americans towards which it is directed. Thus, while these statutes provide necessary protection for a magnificent bird, they also infringe on Native Americans' rights to religious freedom.

IV. The Federal Eagle Permit System

All legally permissible takings of protected eagles require a permit from the Director of the United States Fish and Wildlife Service ("FWS") issued pursuant to regulations promulgated under the Eagle Protection Act.⁹⁹ Whenever possible, Native Americans comply with the complicated and frustrating federal eagle permit system.¹⁰⁰ However, in some circumstances, when these procedures become too burdensome, Native Americans must break the law and suffer serious penalties in order to remain faithful to their religion, culture, and tradition.¹⁰¹

A. The Permit Procedure for Religious Use of Eagles

As established in the regulations pursuant to the Eagle Protection Act, any person who takes eagles (alive or dead), eagle parts, nests, or eggs must have an authorized permit from the Director of the FWS.¹⁰² Permits are only granted 1) for scientific or exhibition purposes, 2) for Indian religious purposes, 3) to take depredating eagles, 4) for fal-

98. 16 U.S.C. § 1540(e) (1994).

99. 50 C.F.R. § 22.22 *Washington Hearing II*, *supra* note 6, at 172 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, REGION 6 INFORMATION SHEET: FEATHERS AND FEDERAL LAW, Oct. 9, 1991).

100. *Minneapolis Hearing*, *supra* note 6, at 347 (statement of Joe Williams, Spokesman, Sisseton Wahpeton Cultural Affairs Committee).

101. *Albuquerque Hearing*, *supra* note 6, at 33 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife). *United States v. Jim*, No. CR-93-87-RE, 1995 U.S. Dist. LEXIS 8025 (D. Or. Mar. 13, 1995).

102. 50 C.F.R. §§ 13.1, 22.11 (1992). Even eagles or feathers acquired by gift or inheritance must be permitted. 50 C.F.R. § 22.22(a)(1) (1992).

conry purposes, or 5) to take golden eagle nests for resource development or recovery.¹⁰³ As outlined in the regulations, there is a specific process that must be adhered to in order for a Native American to be granted a permit for religious use of an eagle.¹⁰⁴

To begin the process, an individual Native American (not a tribe) must submit a written application¹⁰⁵ to take, possess, and transport an eagle or eagle parts and a \$25.00 application fee¹⁰⁶ to the FWS. Applicants may only request one eagle or the equivalent parts of one eagle per application, and may only have one application pending at a time.¹⁰⁷ The regulations make no time guarantees, but do provide that the FWS will "process all applications as quickly as possible."¹⁰⁸ Further, applications are processed in the order in which they are received with no emergency exceptions.¹⁰⁹

In the application, a Native American must include 1) general information,¹¹⁰ 2) the species and number of eagles or feathers requested (up to the equivalent of one whole eagle), 3) the state and local area for the proposed activity, 4) the name of the applicant's associated tribe, 5) the name of the tribal religious ceremony requiring the applicant to use the eagle or eagle parts requested, 6) certification from the Bureau of Indian Affairs that the applicant is Indian, and 7) certification from an authorized official from the applicant's religious group authorizing the applicant to participate in the listed ceremony.¹¹¹

103. 50 C.F.R. §§ 22.21 to 22.25 (1992).

104. 50 C.F.R. § 22.22 (1992).

105. 50 C.F.R. §§ 13, 22 (1992).

106. 50 C.F.R. § 13.11(d)(2) (1992).

107. *Washington Hearing II, supra* note 6, at 195 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIVISION OF LAW ENFORCEMENT, REGION 2 INFORMATION). The FWS warns prospective applicants that there are usually 500-700 applicants on the waiting list for a whole eagle. Furthermore, it estimates that it may take two years to process applications. *Id.*

108. 50 C.F.R. § 13.11(c) (1992). *But cf. infra* part IV.B.1 (discussing the unreasonable time delays).

109. *See Washington Hearing II, supra* note 6, at 196 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIVISION OF LAW ENFORCEMENT, REGION 2 INFORMATION). At least one regional office does, however, have an informal, unofficial policy to give priority to certain applications for permits for religious use of eagles. *United States v. Jim*, No. CR-93-87-RE, 1995 U.S. Dist. LEXIS 8025, *10 (D. Or. Mar. 13, 1995).

110. 50 C.F.R. § 13.12 (1992). General information includes the applicant's name, mailing address, telephone number, date of birth, height, weight, hair color, eye color, sex, relevant business or institutional affiliations, location of requested activity, certification, date, signature, and any other relevant information required by the Director. *Id.*

111. 50 C.F.R. § 22.22(a) (1992). Native Americans must attach two certifications to their permit applications: first, certification from the Bureau of Indian Affairs that the applicant is an enrolled member of a recognized Indian tribe, and second, certification

Upon receipt of an application, a regional Director of the FWS conducts an investigation to determine whether the requested taking, possession, and transportation of the eagle or eagle parts is "compatible with the preservation of the bald or golden eagle."¹¹² In this determination, the Director considers both the direct and indirect effects of the proposed activity on the wild population of protected eagles and whether the Native American applicant is "authorized to participate in *bona fide* tribal religious ceremonies."¹¹³

Several restrictions are applicable to Native American permit applicants. For example, the Director cannot issue a permit if the Native American applicant was assessed a civil penalty or convicted of a crime under any related law, failed to disclose material information or made false statements during the application process, failed to demonstrate a valid justification for the permit and a showing of responsibility, or is otherwise not qualified.¹¹⁴ In addition, the Director should deny the permit if issuance may potentially threaten the eagle population.¹¹⁵

Other disqualifying factors may preclude a Native American from ever receiving a permit for the religious use of eagles. These factors include any felony convictions, guilty pleas, or nolo contendere pleas under the Lacey Act,¹¹⁶ the MBTA, or the Eagle Protection Act, or any willful violations of federal, state, or Indian law governing the permitted activity.¹¹⁷ In determining potential disqualification, the Director may consider all relevant information.¹¹⁸ An administrative appeal process is available to review the Director's denial of any permit application.¹¹⁹

When the Director approves an application for religious use of eagles, an authorized permit is issued to the Native American applicant. By accepting an authorized permit, the Native American con-

from a tribal traditional religious leader that the eagle feather or part will be used in a religious ceremony. *Washington Hearing II, supra* note 6, at 157 (statement of Karen Atkinson, Esq., Tribal Attorney for the Confederated Salish and Kootenai Tribes).

112. 50 C.F.R. § 22.22(c) (1992).

113. *Id.* (emphasis added).

114. 50 C.F.R. § 13.21(b) (1992).

115. *Id.*

116. Act of May 25, 1900, ch. 553, 31 Stat. 187, *partially repealed* by Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378.

117. 50 C.F.R. § 13.21(c) to (d) (1992).

118. 50 C.F.R. § 13.21(d) (1992). Thus, unless the Director waives the disqualification, once a Native American has been convicted for illegally taking or possessing an eagle, even if solely for religious purposes, the Native American may never again obtain an eagle permit and, therefore, may never again legally possess an eagle. *See id.*

119. 50 C.F.R. § 13.29 (1992).

sents to reasonable entry by government agents onto the premises where the permitted activity is conducted for monitoring.¹²⁰ Usually, permits facially provide specific limitations, such as times, dates, places, methods of takings, numbers and kinds of wildlife, location of activity, or circumscribed transactions.¹²¹ Furthermore, an authorized permit is strictly construed and does not permit any similar or related activities outside the express facial provisions.¹²²

Once a permit is authorized, the FWS sends the designated eagle or eagle parts from the National Repository in Asland, Oregon, to the applicant.¹²³ The National Repository is the only legal source from which to obtain eagles or eagle parts.¹²⁴ All remains of eagles which die naturally or are killed or confiscated from the wild, zoos, or any other source, are sent to the National Repository.¹²⁵ No one may salvage an eagle, dead or alive, or eagle parts for any purpose—including eagles or eagle feathers found by Native Americans on Indian lands.¹²⁶ Rather, salvaged eagles are to be sent to the National Repository for distribution to permit applicants; thus, Native Americans may only obtain eagles through the federal eagle permit system.¹²⁷

B. Problems with the Permit Procedure for Native American Religious Use of Eagles

Native Americans attempt to comply with the federal permit process to obtain eagles and eagle parts for religious use,¹²⁸ even though

120. 50 C.F.R. § 13.21(e)(2) (1992).

121. 50 C.F.R. § 13.42 (1992).

122. *Id.*

123. See *Washington Hearing II*, *supra* note 6, at 196 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIVISION OF LAW ENFORCEMENT, REGION 2 INFORMATION).

124. There is only one National Repository in the United States. *Washington Hearing II*, *supra* note 6, at 196 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIVISION OF LAW ENFORCEMENT, REGION 2 INFORMATION).

125. *Id.* It is important for an applicant to keep the applicant's mailing address on his application current because if the FWS approves an application but cannot locate the applicant, the applicant loses his or her place in the application process and must begin the process anew. See *Washington Hearing II*, *supra* note 6, at 165 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

126. *Portland Hearing*, *supra* note 6, at 42-43 (statement of John Pretty, Top Facilities Manager, Crow Tribe, Crow Agency, Mont.); see also *Albuquerque Hearing*, *supra* note 6, at 117 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife).

127. *Washington Hearing II*, *supra* note 6, at 172 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, REGION 6 INFORMATION SHEET: FEATHERS AND FEDERAL LAW, Oct. 6, 1991).

128. See *Minneapolis Hearing*, *supra* note 6, at 347 (statement of Joe Williams, Spokesman, Sisseton Wahpeton Cultural Affairs Committee).

this process is burdensome on their religious practices.¹²⁹ Native Americans criticize the system because of the 1) long processing delays; 2) poor condition of eagles received; 3) lack of processing priorities; 4) governmental failure to acknowledge Indian sovereignty; and 5) general governmental insensitivity toward Native American religion.¹³⁰

1. Time Delays and Supply Problems

Unreasonable time delays are perhaps the greatest problem of the federal eagle permit system. Native Americans report that the permit procedure from application to actual receipt of an eagle takes between one and five years.¹³¹ The FWS may have as many as 1,700 applications pending at any given time without enough eagles to fill the applications.¹³² Even the FWS acknowledges that the process may take two years.¹³³

Extreme understaffing of personnel to monitor eagles and process eagle permit applications causes most of the procedural delays.¹³⁴ One FWS regional office reported that it had only two law enforcement agents per state to perform all official duties.¹³⁵ In addition,

129. *Washington Hearing II*, *supra* note 6, at 156 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes). According to the New Mexico District Court, the "federal administrative apparatus erected to accommodate Indian religious need is utterly offensive and ultimately ineffectual." *United States v. Abeyta*, 632 F. Supp. 1301, 1307 (D.N.M. 1986) (barring the prosecution of a Native American for the religious taking of a golden eagle).

130. Many Native American religious practitioners find the federal permit process "humiliating" because they are forced to ask the government for permission to practice their traditional religion. *Washington Hearing II*, *supra* note 6, at 157 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

131. *Albuquerque Hearing*, *supra* note 6, at 32, 116 (statement of Larry Spencer, Wildlife Conservation Officer of the Navajo Nation Department of Fish and Wildlife); *Washington Hearing II*, *supra* note 6, at 157 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); *Washington Hearing I*, *supra* note 6, at 98, 104 (statement of Honorable Marshall Plummer, Vice President, Navajo Nation); *Los Angeles Hearing*, *supra* note 6, at 28 (statement of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.); *Portland Hearing*, *supra* note 6, at 42 (statement of John Pretty on Top, Facilities Manager, Crow Tribe, Crow Agency, Mont.).

132. *Washington Hearing II*, *supra* note 6, at 163-64 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); *Los Angeles Hearing*, *supra* note 6, at 28 (statement of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.).

133. *Washington Hearing II*, *supra* note 6, at 195-96 (UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, DIVISION OF LAW ENFORCEMENT, REGION 2 INFORMATION).

134. *Washington Hearing II*, *supra* note 6, at 164-65 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

135. *Id.* at 164.

there is only a single FWS staff member to run the National Repository.¹³⁶ Due to this lack of FWS personnel, salvaged eagles are not sent to the National Repository in a timely manner and application processing is not given top priority.¹³⁷ Even when a regional office receives notification of the specific location of a dead eagle, it may take over a year for the reported eagle to actually be sent to the National Repository.¹³⁸

These long delays, coupled with the immediacy of certain religious ceremonies, force some Native Americans to violate this permit procedure in order to follow their religious beliefs.¹³⁹ For example, a burial ceremony must be performed within one week of the deceased's death,¹⁴⁰ but it is impossible for a Native American to obtain an eagle permit in this time period. In such circumstances, complying with the federal permit system infringes on Native American religion because the eagle or eagle parts cannot be obtained in time for the religious ceremony.¹⁴¹ Thus, rather than curbing illegal takings of eagles, the federal eagle permit process actually encourages Native Americans, who have no criminal intent, to break the law in order to fulfill their religious obligations.¹⁴²

2. *Condition and History of Eagles*

When Native Americans do finally receive eagles or eagle parts from the National Repository, the birds and feathers are frequently in

136. *Id.* at 164-65.

137. *Id.* at 157.

138. *Id.* at 164.

139. *Albuquerque Hearing, supra* note 6, at 32-33 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife). Law enforcement officials confirm that time delays are problematic because they do not want to arrest Native Americans acting only for religious purposes, yet they fear the eagles suffer the consequences of continued illegal activity. *Id.*; see *United States v. Jim*, CR 93-87-RE, 1995 U.S. Dist. LEXIS 8025 (D. Or. Mar. 13, 1995).

140. Ulrich, *infra* note 207, at B4 (quoting Rory Fausett, Oglala Sioux, attorney for Yakima Indian Nation and former law professor specializing in Native American religious and cultural issues).

The permit system regularly frustrates Navajo Indians because each summer they must perform a religious ceremony, the Squaw Dance, which requires the use of two eagle tail feathers. *Albuquerque Hearing, supra* note 6, at 117 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife). However, due to the long delays and the rule that only one eagle application can be pending at any given time, it is impossible for the tribe to legally obtain the necessary two feathers. *Id.*

141. Ulrich, *infra* note 207, at B5 (quoting Rory Fausett).

142. *Washington Hearing I, supra* note 6, at 104 (statement by the Honorable Marshall Plummer, Vice President, Navajo Nation); *Portland Hearing, supra* note 6, at 42 (statement of John Pretty on Top, Facilities Manager, Crow Tribe).

“deplorable shape;” tail and wing feathers may be broken, birds may be burnt, or parts may be missing.¹⁴³ Occasionally, the wrong type of bird is delivered.¹⁴⁴ This mistake may be disastrous because some ceremonies require the use of very specific bird parts from only certain types of birds.¹⁴⁵ Furthermore, religious practitioners prefer to know the history, means of death, and discovery location for eagles used in religious ceremonies,¹⁴⁶ but this information is rarely available.

3. *Processing Priorities*

The federal eagle permit system lacks any priority system for processing applications for eagles. All applications for eagles for religious purposes are processed chronologically regardless of the nature of the religious use of the eagle requested.¹⁴⁷ This system ignores the reality that certain ceremonies, for example, burial ceremonies, require eagle feathers immediately upon request, while other ceremonies may allow for some processing delays.¹⁴⁸

Native Americans favor prioritization among their applications for religious use of eagles and among applications for eagles under the other non-religious exemptions.¹⁴⁹ Native Americans believe that applications for religious purposes should be processed before applications for other permissible exemptions.¹⁵⁰ Then, within applications for the religious use of eagles, priority should be determined by Na-

143. *Washington Hearing I*, *supra* note 6, at 104 (statement by the Honorable Marshall Plummer, Vice President, Navajo Nation).

144. *Albuquerque Hearing*, *supra* note 6, at 33 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife).

145. *Id.*

146. *Id.* at 33.

147. *Washington Hearing II*, *supra* note 6, at 163 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

148. *See supra* part II.B.

149. The regulations provide for eagle permits for a variety of uses. *See* 50 C.F.R. §§ 22.21 to 22.25 (1992) (for example, permits for scientific or exhibition purposes, to take depredating eagles, and for falconry purposes).

150. Educational and scientific applications require only a written statement of justification, and often eagles are immediately released. *Washington Hearing II*, *supra* note 6, at 164 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes); 50 C.F.R. § 22.21 (1992). In addition, ranchers are granted permits to take depredating eagles with little delay. *United States v. Abeyta*, 632 F. Supp. 1301, 1304, 1307 (D.N.M. 1986); *cf.* 50 C.F.R. § 22.23 (1992). These discrepancies are extremely frustrating to Native Americans who wait two or more years for an eagle permit for religious purposes. *See supra* part IV.B.1.

tive American tribes who understand the varying importance and timeliness of different religious or ceremonial uses of eagles.¹⁵¹

4. *Native American Sovereignty*

Many Native Americans view the current federal eagle permit system as “an unreasonable imposition of ‘white tape.’”¹⁵² Since time immemorial Native Americans have used and managed eagles and eagle parts for religious purposes without causing any harm to the eagle species.¹⁵³ Native American tribes maintain this ability to regulate Native American religious takings of eagles.¹⁵⁴ Tribal governments believe that as sovereign nations¹⁵⁵ they should have more control over a regulatory process that significantly impacts Native American religion. “It is not right that American Indians jump through bureaucratically designed and wielded hoops to practice their ancestral religions.”¹⁵⁶

The federal eagle permit system could be restructured so that tribes are authorized to act as eagle repositories and disbursing agents.¹⁵⁷ Under such a system, tribes could issue permits to take eagles pursuant to tribal law, procedure, and custom.¹⁵⁸ At the very least, tribes should control eagles located, confiscated, or found on

151. *Los Angeles Hearing*, *supra* note 6, at 29 (testimony of Gary M. Holy Bull, Traditional Medicine Man, Red Iron Community, Sisseton, S.D.).

152. *Albuquerque Hearing*, *supra* note 6, at 281 (testimony of J. Gilbert Sanchez, First Lt. Governor, Pueblo of San Ildefonso).

153. *See generally supra* part II.B-C.

154. *See Albuquerque Hearing*, *supra* note 6, at 281 (testimony of J. Gilbert Sanchez, First Lt. Governor, Pueblo of San Ildefonso).

155. For a general discussion of tribal sovereignty, see *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS* (1988).

President Clinton recently publicly emphasized the need of federal agencies to respect sovereign tribal governments' rights. *See Jehl, infra* note 170. The President's commitment to respect sovereign tribes' rights of self-government through the official policy of government-to-government relations between the federal government and sovereign tribes strengthens Native Americans' pleas to directly participate in implementing the federal eagle permit system. Memorandum, *Government-to-Government Relations With Native American Tribal Governments*, 59 Fed. Reg. 22,951 (Apr. 29, 1994).

156. *Albuquerque Hearing*, *supra* note 6, at 9 (statement of Jicarilla Apache Tribe); *Minneapolis Hearing*, *supra* note 6, at 122 (statement of Charles J. Kingswan, Traditional Religious Leader and Chief Clan of the Winnebago Tribe); *Portland Hearing*, *supra* note 6, at 8-9 (commentary from the Chairman of the Select Committee on Indian Affairs) (acknowledging on behalf of the Bureau of Indian Affairs that religion gives Native American tribes their identity. “Without religion, sovereignty is meaningless. Sovereignty without religion is meaningless.”).

157. *See Albuquerque Hearing*, *supra* note 6, at 91 (testimony of Navajo Nation).

158. *Washington Hearing II*, *supra* note 6, at 132 (statement of Peterson Zah, President, Navajo Nation). *See also* part IV.C.

tribal lands.¹⁵⁹ Delegation of authority to tribal governments would enhance tribal sovereignty and likely result in a more efficient and effective eagle disbursement process.¹⁶⁰ Local tribal responsibility would streamline and hasten the eagle permit application process, allow for immediate distribution of eagles when needed, discourage illegal takings of eagles, encourage mutual cooperation between tribes and the federal government, and permit Native Americans to more freely exercise their religion.¹⁶¹

5. *Government Insensitivity Toward Native American Religion*

Lastly, the current federal eagle permit system is criticized by Native Americans because it manifests government insensitivity toward their religion by forcing them to bear an unequal burden of the conservation scheme to protect eagles.¹⁶² Native American religion is significantly different from other western religions because it is based on nature.¹⁶³ By denying Native Americans the use of eagle feathers, not required by other mainstream western religious followers, the government "den[ies them their] most basic human rights, while the rest of

159. *Albuquerque Hearing*, *supra* note 6, at 118 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife).

160. *See Albuquerque Hearing*, *supra* note 6, at 92 (testimony of the Navajo Nation).

161. *Albuquerque Hearing*, *supra* note 6, at 118 (statement of Larry Spencer, Wildlife Conservation Officer, Navajo Nation Department of Fish and Wildlife); *Washington Hearing II*, *supra* note 6, at 158 (statement of Karen J. Atkinson, Tribal Attorney, Confederated Salish and Kootenai Tribes).

162. Perhaps this unequal burden could form the basis of an equal protection argument based on analogy to recent environmental injustice cases regarding the discriminatory effects of pollution laws. *See* Senator Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U. WEST L.A. L. REV. 3 (1992); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Richard Herz, Note, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691 (1993); Marianne Lavalle & Marcia Coyle, *Unequal Protection, The Racial Divide in Environmental Law*, NAT'L L.J., Sep. 21, 1992, at S1; Michael Satchell, *Trashing the Reservations?*, U.S. NEWS & WORLD REPORT, Jan. 11, 1993, at 24.

163. VINE DELORIA, JR., *GOD IS RED* (1992). "Respect should be given to a religion that does not involve going to church one day a week, but which is based on the animals, the world and the universe, and whose church is the mountains, rivers, clouds, and sky." Susan Landon, *Indians Want Equality In Religious Freedom, Navajo President Says*, ALBUQUERQUE JOURNAL, Nov. 23, 1991 (quoting Peterson Zah, President of the Navajo Nation).

For the history of repression of Native American religion, which began when Columbus discovered the New World, see Walter Echo-Hawk, *Loopholes in Religious Liberty: The Need for Federal Law to Protect Freedom of Worship for Native People*, 16 NATIVE AM. RTS. LEGAL REV. 7 (Summer 1991); Inouye, *supra* note 162, at 12-14; Patricia Nelson Limerick, Ph.D., *The Repression of Indian Religious Freedom*, 18 NATIVE AM. RTS. FUND LEGAL REV. 9 (Summer 1993).

the Americans enjoy and take for granted their rights to worship freely without persecution."¹⁶⁴

Additionally, Native Americans often complain that when the government enforces and administers the laws protecting eagles, it discriminates against Native Americans. For example, Native Americans claim that non-Native Americans who collect traditional Native American religious costumes or crafts decorated with eagle feathers are rarely prosecuted for illegal possession of eagle feathers without a permit.¹⁶⁵ Native Americans also report that federal agents sometimes entice tribal medicine men to give them eagle feather objects which the agents add to personal art collections or use to decorate their offices.¹⁶⁶ If the federal agents do not have permits for these eagle parts, then they are violating the very laws they are charged to enforce.¹⁶⁷ "[T]he glaring inconsistency in the application and enforcement of federal laws contains such a disparity that it violates any minimum standard of decency that should prevail in a civilized society."¹⁶⁸ Since the government can easily accommodate Native American religious needs into the federal eagle permit scheme without risking harm to endangered eagles, it is unjust that instead the government targets Native Americans for criminal prosecution for practicing their religion.¹⁶⁹

C. Recent Presidential Policy Toward a Solution

On April 29, 1994, President Clinton made history by becoming the first President to hold a meeting to which all the leaders of the 547

164. *Albuquerque Hearing*, *supra* note 6, at 49 (statement of Mike Kiyanni, Spiritual Leader, Native American Church of Navajoland, Inc.); *Los Angeles Hearing*, *supra* note 6, at 228 (testimony of Captain Nic Villa, Sr., Chief, Locolumne/Moquelumne Tribe); Landon, *supra* note 163 (quoting Peterson Zah, President, Navajo Nation).

165. *Los Angeles Hearing*, *supra* note 6, at 229 (testimony of Captain Nic Villa, Sr., Chief, Locolumne/Moquelumne Tribe).

166. *Portland Hearing*, *supra* note 6, at 7 (statement of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado).

167. No eagle feathers or parts may be possessed by any person without a federal eagle permit, unless this feather or part was acquired prior to the date federal protection was extended over eagles, that is, 1940 for bald eagles, and 1962 for golden eagles. *Washington Hearing II*, *supra* note 6, at 171 (U.S. DEPARTMENT OF THE INTERIOR, *Region 6 Information Sheet*, Oct. 9, 1991).

168. *Id.* at 97.

169. Findings in the Proposed Native American Free Exercise of Religion Act state, "(3) throughout American history, the manifestation of Native American traditional cultures, including the free exercise of Native American religions, has been infringed upon, interfered with, and even prohibited by the Federal Government and the devastating impact of these governmental actions continues to the present day." S. 1021, 103d Cong., 1st Sess. § 101(1) (1993); *see infra* part VI.

federally-recognized Indian tribes were invited.¹⁷⁰ At this historic meeting, the President announced two important policy directives for his Administration. First, the President directed his administration to promote government-to-government relations between the United States and sovereign Indian tribes.¹⁷¹ Second, the President called for federal agencies to broadly reexamine the practices and procedures for eagle feather distribution to “accommodate Native American religious practices to the fullest extent under the law.”¹⁷²

President Clinton’s Eagle Feather Directive specifically instructs agencies to improve collection and transfer of eagles and eagle parts to the National Repository.¹⁷³ Accordingly, the Secretary of the Interior “shall issue guidelines . . . [and] agencies shall immediately adopt policies, practices, and procedures necessary” to implement these guidelines.¹⁷⁴ In addition, the President directed the Secretary to focus on certain problems, namely, prioritizing the distribution of eagles, simplifying and minimizing delay in the permit application process, and expanding Native American involvement in the distribution process.¹⁷⁵

While the President’s historic policy announcements demonstrate an understanding of the problems the current federal eagle permit system imposes on Native Americans, it is important to emphasize that these directives are policy statements, not enforceable law. Further, agencies have not yet implemented the President’s directives. Never the less, this new presidential policy is a step toward much needed change in the law to afford Native Americans full religious protection.

V. Native American Rights Relating to the Religious Use of Eagles

This Article next discusses legal arguments Native Americans may make to relieve the governmental burdens placed on their free exercise of religion. In the past, Native Americans have argued that

170. Douglas Jehl, *Clinton Meets Indians Citing a New Respect*, N.Y. TIMES, Apr. 30, 1994, §1, at 10; see also Paul Bedard, *Clinton Vows Closer Ties With Indians*, WASH. TIMES, Apr. 30, 1994, at A1; Tracey A. Reeves, *Clinton Hears Indian Tribes’ Concerns*, OREGONIAN, Apr. 30, 1994, at A1, A13; Marcus Stern, *President Promises Policy Role to Indians*, SAN DIEGO UNION-TRIB., Apr. 30, 1994, at A1; Staci Turner, *Clinton Meets With Indian Nation, Vows A New Relationship*, HOUS. CHRON., Apr. 30, 1994, at A14.

171. Memorandum, *supra* note 155.

172. Memorandum, *Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes*, 59 Fed. Reg. 22,953 (Apr. 29, 1994).

173. *Id.*

174. *Id.*

175. *Id.*; see *supra* part IV.B.

the federal eagle permit system as applied violates their constitutionally protected right to free exercise of religion. This argument, however, has had only limited success in the courts.¹⁷⁶ Native Americans have also argued that the permit system violates the American Indian Religious Freedom Act. This argument has been wholly unsuccessful because the Supreme Court has interpreted the Act to create no legally cognizable rights.¹⁷⁷

A better argument for Native Americans may be based on the federal government's historic trust responsibilities owed to Native Americans.¹⁷⁸ Under the Federal Indian Trust Doctrine, Congress owes a special responsibility to Native Americans to protect their culture and identity, an integral part of which is freedom to practice their religion.¹⁷⁹ This trust responsibility grants Congress both the duty and authority to offer Native Americans affirmative protections.¹⁸⁰ Thus, Congress may, and should, legislate to cure inadequate legal protections by revising the current federal eagle permit system or passing new legislation to offer Native Americans necessary religious protections.

A. Constitutional Free Exercise of Religion

The First Amendment to the Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁸¹ The second clause, the Free Exercise Clause, absolutely protects everyone's right to hold religious beliefs.¹⁸² However, the government may burden one's exercise or practice of religion if the governmental interest causing the burden is sufficiently compelling and the means employed are the least restrictive.¹⁸³ Current interpretation of the Free Exercise Clause fails to ad-

176. See *infra* part V.A.

177. See *infra* part V.B.

178. See *infra* part V.C.

179. See *infra* notes 265-68 and accompanying text.

180. See *infra* note 269.

181. U.S. CONST. amend. I, cl. 1. The first clause is referred to as the Establishment Clause; it requires separation of church and state. Although a full discussion of the Establishment Clause is beyond the scope of this Article, see generally Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990).

182. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

183. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993), (overruling *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-78 (1990), which had overruled the compelling governmental interest test for neutral laws with burdensome effects on free exercise of religion).

equately protect Native American rights to freely exercise their religious practices. Walter Echo-Hawk, senior staff attorney for the Native American Rights Fund, commented, "You would think that the First Amendment would protect us, but that has never been the reality for Native American tribes There are no legal protections in this country for our traditional religions."¹⁸⁴ This comment is especially true for Native American religious use of eagles because protection of endangered species, which includes eagles, has generally been interpreted by the courts as a sufficiently compelling governmental interest to uphold regulation.¹⁸⁵ Thus, Native Americans must comply with the laws protecting eagles, despite the burdensome effects on their religious practices, until Congress changes the law.

1. *Recent Restrictions on Free Exercise of Religion*

Between 1988 and 1993 the Supreme Court withdrew from the traditional compelling governmental interest test¹⁸⁶ for evaluating laws or government actions with burdensome consequences on religious practices. This departure began with *Lyng v. Northwest Indian Cemetery Protective Ass'n*¹⁸⁷ in which Native American tribes unsuccessfully challenged government permits authorizing timber harvesting and road construction on federal forest land which contained sacred sites.¹⁸⁸ Even though Native American religious beliefs were "sincere" and the government action would have "severe adverse affects" on religious practices, the Court held that the government action did not impermissibly burden Native American religious rights.¹⁸⁹

The compelling governmental interest test was the traditional test applied to burdens on free exercise of religion. *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983) (Native Americans unsuccessfully challenged development of federal lands which were sacred sites where they prayed, performed ceremonies, and gathered sacred objects, including fir boughs and eaglets). Under the test, Native Americans must first establish that the law or government action burdens a practice "rooted in religion." *Id.* Then, the court considers whether the governmental interest is compelling or whether the interest could be achieved in a less burdensome manner. *Id.*; see also *Sherbert v. Verner*, 374 U.S. 398 (1963) (establishing the balancing test).

184. Hugh Dellios, *Native Americans Fight for Sacred Sites*, S.F. EXAMINER, July 11, 1993, at B1 (quoting Walter Echo-Hawk, Attorney, Native American Rights Fund); see also Echo-Hawk, *supra* note 163.

185. *United States v. Billie*, 667 F. Supp 1485 (S.D. Fla. 1987); *Thirty Eight Golden Eagles*, 649 F. Supp 269 (D. Nev. 1986); *United States v. Jim*, No. CR 93-87-RE, 1995 U.S. Dist. LEXIS 8025 (D. Or. Mar. 13, 1995).

186. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

187. 485 U.S. 439 (1988).

188. *Id.* at 442.

189. *Id.* at 447.

In its analysis, the *Lyng* Court did not apply the compelling governmental interest test.¹⁹⁰ The Court did not find that the government actions were compelling or that they outweighed the burdensome consequences on the tribes' religious practices.¹⁹¹ Rather, the Court emphasized that the government actions would neither coerce Native Americans into violating their religious beliefs nor penalize their religious activities.¹⁹² As a result, the government actions caused only "incidental effects" on religious practice and did not require the government to justify its otherwise lawful actions as advancing a compelling interest.¹⁹³

Furthermore, the Court hypothesized that even if it assumed the government action would "virtually destroy the . . . Indians' ability to practice their religion," it still could not rule in favor of the tribes under the Free Exercise Clause because the constitutional analysis does not depend on the measure of burdensome effects on religious practice.¹⁹⁴ "The government simply could not operate if it were required to satisfy every citizen's religious needs and desires."¹⁹⁵ It is for legislatures, rather than courts, to reconcile the competing demands on the government based on sincere religious beliefs.¹⁹⁶

In 1990, the Supreme Court solidified its restrictive interpretation of the Free Exercise Clause in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁹⁷ In *Smith*, the Court affirmed that a state may deny unemployment benefits to a Native American fired for using peyote in religious ceremonies in violation of a general criminal prohibition against possession of a controlled substance.¹⁹⁸

190. *Id.* at 465 (Brennan, J., dissenting).

191. *Id.*

192. *Id.* at 449. The dissent criticizes the distinction between government actions that affirmatively coerce conduct versus actions that prevent conduct based on religious belief. *Id.* at 468-69 (Brennan, J., dissenting). "[G]overnmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief." *Id.* at 469.

193. *Id.* at 450-51. The Court found the effects of the government action technically "incidental" (that is, no coercive or penalizing effects) even though it admitted that there would be "devastating effects on traditional Indian religious practices." *Id.* at 451.

194. *Lyng*, 485 U.S. at 451-52 (quoting Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)). According to the dissent, this language "stripped . . . Native Americans of any constitutional protection" for their religious practices. *Id.* at 476 (Brennan, J., dissenting).

195. *Id.* at 452.

196. *Id.*

197. 494 U.S. 872 (1990).

198. *Id.* at 890. On remand, the Oregon Supreme Court held that the Native American was entitled to unemployment benefits because even though religious use of peyote was illegal under state law, this prohibition violated the Free Exercise Clause. *Id.* at 876.

Most importantly, the Court proclaimed that the compelling governmental interest test did not apply to general criminal laws which incidentally burden an individual's free exercise of religion.¹⁹⁹ The Court stated that protection of religious practices in the context of general prohibitions should be governed by the political process.²⁰⁰ In other words, the individual states should legislate exceptions to general criminal laws if they want to protect specific Native American religious practices.²⁰¹

2. *Congress Restores the Compelling Governmental Interest Test*

In 1993, in response to *Smith* and *Lyng*, Congress enacted the Religious Freedom Restoration Act ("RFRA") to reinstate into law the compelling governmental interest test.²⁰² The RFRA specifically states that its purpose is to "restore the compelling governmental interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."²⁰³ Under the RFRA, the general rule is that "[g]overnment shall not substantially burden a person's exercise of religion;"²⁰⁴ with one exception, "[g]overnment

199. *Id.* at 884-85. Only general laws implicating both religious rights and other constitutional rights have been found to violate the Free Exercise Clause. *Id.* at 881.

Both the concurrence and dissent strongly disagree with the majority's rejection of the compelling governmental interest test. The dissent described this test as "an inviolate principle of this Court's First Amendment jurisprudence." *Id.* at 908 (Blackmun, J., dissenting). Justice O'Connor, in her concurrence, explains that the First Amendment does not distinguish between religious belief and conduct motivated by religious belief; therefore, both must be presumptively protected by the Free Exercise Clause. *Id.* at 893. "A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" *Id.* at 898 (citations omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901.

200. *Id.* at 890.

201. *Id.* The concurrence disagrees that protection of religious practice should be controlled by the legislature.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts. One's right to . . . freedom of worship . . . depend[s] on the outcome of no elections.

Id. at 902-03 (O'Connor, J., concurring) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

202. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

203. 42 U.S.C. § 2000bb(b) (1994).

204. 42 U.S.C. § 2000bb-1(a) (1994).

may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden" furthers a "compelling governmental interest," and is the "least restrictive means" of doing so.²⁰⁵

Enactment of the RFRA reversed the Supreme Court's restrictive interpretation of the Free Exercise Clause. However, the RFRA does not relieve Native Americans of all governmental burdens on their free exercise of religion because it still permits burdens that pass the compelling governmental interest test. The first case discussing the RFRA, as well as the discussion of cases below, indicate that the federal eagle permit system satisfies this test. Thus, in order to fully protect Native American religious freedoms, Congress must address the eagle issue specifically.

In one of the first cases under the RFRA, *United States v. Jim*, the District Court of Oregon held that prosecution of a Native American under the Eagle Protection Act and the ESA for religious takings of eagles did not violate the RFRA.²⁰⁶ Jim is an Yakima Indian spiritual helper who had already served jail time for previous illegal possessions of eagles. In this case, he promised tribal elders that he would supply them with essential eagle feathers for burial ceremonies, and when he could not obtain these feathers legally, he killed two bald and two golden eagles.²⁰⁷ Following the denial of a motion to dismiss argued under the *Smith* test, Jim plead guilty to violating the Eagle Protection Act and the ESA.²⁰⁸ In his defense, he explained that he acted in accordance with a "vow beyond law. . . . This is a religious duty, a tribal duty."²⁰⁹ After Jim's guilty plea, Congress enacted the RFRA, restoring the compelling governmental interest test; consequently, Jim

205. 42 U.S.C. at § 2000bb-1(b) (1994).

206. *United States v. Jim*, No. CR 93-87-RE, 1995 U.S. Dist. LEXIS 8025, *18 (D. Or. Mar. 13, 1995). See also *Belgard v. Hawaii*, No. CV 93-00961-HG, 1995 U.S. Dist. LEXIS 4903 (D. Haw. Feb. 3, 1995) (Native American prisoner filed suit under 42 U.S.C. § 1983 alleging the state violated his right to free exercise of religion; the court upheld the constitutionality of the RFRA).

207. *Id.* at *2; Roberta Ulrich, *Indian Agrees To Not Kill Eagles*, OREGONIAN, Oct. 28, 1993, at B1, B4. Remember that since this defendant had already been convicted of illegal possession of eagles, he could never obtain a permit under the federal eagle permit system. 50 C.F.R. § 13.21(d).

208. *Jim*, 1995 U.S. Dist. LEXIS 8025, at *2; Roberta Ulrich, *Indian Agrees To Not Kill Eagles*, OREGONIAN, Oct. 28, 1993, at B1, B4.

209. Roberta Ulrich, *Indian Agrees To Not Kill Eagles*, OREGONIAN, Oct. 28, 1993, at B1, B4; see also *Jim*, 1995 U.S. Dist. LEXIS 8025; Marc Peyser & Sonya Zalubowski, *Between a Wing and a Prayer*, NEWSWEEK, Sep. 19, 1994, at 58.

moved for reconsideration as to whether his prosecution under the Eagle Protection Act and ESA violated the RFRA.²¹⁰

At the evidentiary hearing held in connection with the motion for reconsideration, uncontroverted testimony established that the use of eagle feathers and parts is necessary for Native American religious practices.²¹¹ Jim claimed that his Creator allows him to kill enough eagles to satisfy his elder's requests for burials.²¹² Another Native American witness testified that religious practices do not require the killing of eagles, and he "criticized [the defendant]'s killing of four eagles as 'wanton destruction which is against the principle of the Creator to have reverence of all living things.'"²¹³ This Native American "believes that the killing of four eagles is inconsistent with a religious duty to be a steward of the Earth."²¹⁴

In its analysis, the *Jim* court considered "whether the laws [the Eagle Protection Act and the ESA] substantially interfere with Jim's free exercise of religious beliefs; whether the laws promote a compelling state interest; and the extent to which recognition of an exemption from the statute would impede the objectives that the state seeks to advance."²¹⁵ The court explained that the defendant bears the burden of establishing the first element, while the government bears the burden on the remaining two elements.²¹⁶ To satisfy the first element, the defendant need only establish his own religious beliefs, not that these beliefs are shared by others. Thus, although Jim's testimony that his religion required him to kill eagles was contested, the court still credited him with his claimed religious belief.²¹⁷ Then, considering the long delays of the federal eagle permit system, the *Jim* court concluded that the law does substantially burden Jim's exercise of his religion.²¹⁸

Considering the level of the governmental interest in the Eagle Protection Act and the ESA, the *Jim* court found that the evidence regarding the declining numbers of golden eagles and the threatened status of bald eagles established a "compelling" governmental interest.²¹⁹ The final question for the court, regarding the means em-

210. *Jim*, 1995 U.S. Dist. LEXIS 8025, at *2.

211. *Id.* at *3.

212. *Id.*

213. *Id.* at *4.

214. *Id.* at *4.

215. *Id.* at *6.

216. *Id.*

217. *Id.* at *7.

218. *Id.* at *8-11.

219. *Id.* at *11-14.

ployed, was the most difficult. The court acknowledged the long delays in the current permit system. It also noted that the FWS claims it is taking steps to alleviate the burdens of the system. Finally, the court explained that for this defendant, the only manner by which he could obtain eagles to adequately meet his needs would be to kill eagles, but this would harm the eagle population.²²⁰ Therefore, based on these facts, the *Jim* court concluded that the means employed were the least restrictive.²²¹ Thus, “[t]he government has a compelling interest in not exempting [the defendant] and those who share his religious belief of killing eagles.” Consequently, the defendant’s prosecution does not violate the RFRA.²²²

Although the *Jim* case was rightly decided, it leaves open potential relief for future Native Americans who need to take eagles to exercise their religion. This case is rare because Nathan Jim is the only Native American the author found who ever claimed that his religion sanctioned the killing of eagles, and even in this case his claim was controverted. Other Native Americans disagreed with Jim and testified that they believe their religion expressly forbids the killing of eagles. So, given that the court restricted its holding to a case where a Native American believed in the killing of eagles, it is possible that future courts in more normal eagle takings or possession cases may not find the federal eagle permit system in compliance with the RFRA because it may not be the least restrictive means possible for the government to promote its compelling governmental interest.

3. Case Law on Native American Religious Takings of Eagles

Only a handful of cases specifically address Native American religious takings of eagles in the context of the Free Exercise Clause.²²³ These cases were decided under traditional free exercise analysis²²⁴

220. *Id.* at *16-17.

221. *Id.* at *17.

222. *Id.* at *18.

223. *United States v. Dion*, 476 U.S. 734 (1986); *Rupert v. United States Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992); *United States v. Lloyd C. Top Sky*, 547 F.2d 483 (9th Cir. 1976); *United States v. Charlie Top Sky*, 547 F.2d 486 (9th Cir. 1976); *United States v. Thirty Eight Golden Eagles*, 649 F. Supp. 269 (D. Nev. 1986); *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986); *cf. United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987) (ESA did not infringe on free exercise of religion where Native American hunted an endangered panther).

224. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

and pre-date *Lyng, Smith*, and the RFRA.²²⁵ However, even under the stringent RFRA test, these cases indicate only marginal religious protection for Native Americans. These cases suggest that the protection of endangered species is a compelling governmental interest sufficient to override Native American free exercise of religion rights under the traditional compelling governmental interest test.²²⁶

The courts have upheld the constitutionality of both the criminal and civil provisions of the Eagle Protection Act against facial challenges based on the Free Exercise Clause.²²⁷ The constitutionality of the federal eagle permit system, however, has not been specifically affirmed because the Native Americans who have attempted to challenge the system on free exercise grounds have lacked standing to sue because they never applied for a permit for the religious use of an eagle.²²⁸ Never the less, case law suggests that the federal eagle permit system is constitutional. In *Rupert v. United States Fish & Wildlife Service*,²²⁹ the Court of Appeals for the First Circuit upheld the exclusive application of the religious permit exemption to Native Americans because the permit process carefully balances protection of the endangered eagle against protection of Native American religion and culture in a rational manner.²³⁰

225. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb) (1994); Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

226. This conclusion is based on traditional free exercise analysis in the case law. See *supra* note 163. If the Court interprets RFRA's compelling governmental interest test differently than traditional analysis, then this conclusion may be incorrect. It is doubtful that the Court would alter the analysis because the RFRA expressly references the two primary traditional cases, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), such a contrary interpretation seems unlikely. 42 U.S.C. §2000bb) (1994).

227. *Charlie Top Sky*, 547 F.2d at 488 (upholding constitutionality of criminal provisions against facial attack based on Free Exercise Clause); *Thirty Eight Golden Eagles*, 649 F. Supp. at 277 (upholding constitutionality of civil forfeiture provisions against facial attack based on Free Exercise Clause).

228. *Thirty Eight Golden Eagles*, 649 F. Supp. at 277. A Native American challenging the facial validity of the Act need not have actually applied for a permit, but a Native American challenging the administration of the Act through the eagle permit system must first have applied for a permit. *Id.* at 274.

229. 957 F.2d 32 (1st Cir. 1992) (denial of an eagle permit to a non-Native American pastor of an all-race Church following Native American religious customs upheld because the pastor was not a member of a recognized Indian tribe).

230. *Rupert*, 957 F.2d at 35. The plaintiff attacked the eagle permit system as violative of the Establishment Clause of the Constitution. *Id.* at 33. Legal analysis under the Establishment Clause is similar to analysis under the Equal Protection Clause. Establishment Clause challenges are usually analyzed in accordance with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). *Kreisner v. City of San Diego*, 1 F.3d 775, 780 (9th Cir. 1993). According to the *Rupert* court, the eagle permit system is rationally related to legitimate governmental interests. *Rupert*, 957 F.2d at 35. Furthermore, the permit system would

The eagle cases also clarify that the Eagle Protection Act only permits an exemption for Native American use of eagles that is in fact solely for religious purposes.²³¹ Prosecutions of Native Americans under the Act for violations occurring in pursuit of commercial enterprises do not even implicate free exercise concerns. In *United States v. Lloyd C. Top Sky* and *United States v. Charlie Top Sky*, the Court of Appeals for the Ninth Circuit expressly acknowledged that “the sale of eagle parts is incompatible with Indian religious beliefs. . . [and] deplored by the Indians as a matter of tribal custom and religion.”²³² Therefore, prosecutions of Native Americans for purely commercial violations of the Act cannot burden free exercise of religion.²³³

In a related case, *United States v. Billie*,²³⁴ involving the taking of an endangered panther for Native American religious purposes, the court upheld the constitutionality of the ESA against attacks based on the Free Exercise Clause.²³⁵ Facially the ESA is constitutional because it permissibly regulates conduct, as opposed to beliefs, and it is neutral in its application.²³⁶ Furthermore, the court applied the stringent compelling governmental interest test to determine the constitutionality of the ESA in application.²³⁷ The court found that the governmental interest in protecting endangered panthers was compelling, but the Native American religious use of panthers was dispensable.²³⁸ Thus, under the facts presented, the ESA was constitutional in application.

also probably survive strict scrutiny analysis, even though this more difficult standard was not required. *Id.* at 34-36.

231. *Charlie Top Sky*, 547 F.2d 486 (9th Cir. 1976); *Lloyd C. Top Sky*, 547 F.2d 483 (9th Cir. 1976) (father and son prosecuted for selling golden eagle feather fans for purely commercial purposes). *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985) (prosecution for hunting bald and golden eagles within Indian reservation), *rev'd in part*, 476 U.S. 734 (1986) (holding that Eagle Protection Act and ESA abrogate Indian treaty rights to hunt eagles, but no holding regarding invasion of free exercise of religion).

232. *Charlie Top Sky*, 547 F.2d at 487-88; *Lloyd Top Sky*, 547 F.2d 483. This is an accurate statement regarding most Native American religious beliefs. *Supra* SECTION II, Part B.

233. *Charlie Top Sky*, 547 F.2d at 488.

234. 667 F. Supp. 1485 (S.D. Fla. 1987).

235. *Billie*, 667 F. Supp. 1485 (Native American hunted an endangered Florida panther, a species with only twenty to fifty animals remaining in the wild, and was prosecuted for violating the ESA).

236. *Id.* at 1495.

237. *Id.* at 1496-97.

238. *Billie*, 667 F. Supp. at 1496-97. Evidence regarding the religious use of panthers established that possession of panther parts is “important” and “preferable,” but not “indispensable.” *Id.* at 1497. Furthermore, other non-endangered species of panther may have been available to the Native American for his religious purposes. *Id.* Native Ameri-

Only one case has been supportive of Native American religious freedom, but the validity of this case is questionable. *United States v. Abeyta*²³⁹ held that the Eagle Protection Act did not apply to a Native American who killed a golden eagle without a permit on Indian lands.²⁴⁰ The District Court reasoned that because the golden eagle is not an endangered species, unlike the bald eagle, and because the permit procedure is "unwieldy, unresponsive, and ineffectual" for Native American religious needs, sanctions under the Eagle Protection Act would "unnecessarily, unduly, and impermissibly" burden Native American free exercise of religion.²⁴¹ In reaching this conclusion, the *Abeyta* court applied the compelling governmental interest test.²⁴² While protection of golden eagles was acknowledged as both "commendable and important," the fact that golden eagles are not endangered failed to raise the governmental interest in conservation to the required level of "compelling."²⁴³ Further, the court believed that, even if the interest was compelling, the eagle permit system could be administered in a manner far less burdensome on Native American religious practices.²⁴⁴ Thus, based on the particular facts of this case, criminal sanctions under the permit system were held to violate the Free Exercise Clause.²⁴⁵

Other cases, however, are contrary to *Abeyta*. In *United States v. Thirty Eight Golden Eagles*,²⁴⁶ a District Court applied the compelling governmental interest test to reach an opposite conclusion from *Abeyta*. In this case, a Native American also illegally possessed golden eagle parts without a permit.²⁴⁷ Although the court agreed

can religious use eagles, however, is indispensable and all eagles are protected by federal law. *See supra* part II.B & III.

239. 632 F. Supp. 1301 (D.N.M. 1986).

240. *Id.* at 1302.

241. *Id.* at 1304. The court described the federal eagle permit system as "a labyrinthine application procedure," *id.* at 1303; an "intricate application procedure . . . unnecessarily intrusive and hostile to religious privacy when viewed in light of the conservation goals it seeks to achieve," *id.* at 1304; "utterly offensive and ultimately ineffectual," "cumbersome, intrusive and demonstrates a palpable insensitivity to Indian religious beliefs." *Id.* at 1307.

242. *Id.* at 1307.

243. *Id.* at 1307. The court suggested that if the golden eagle were an endangered species, then the governmental interest would have been "compelling." *Id.* It is unclear whether, to the *Abeyta* court, protection for a merely threatened species would also suffice as a "compelling" governmental interest. *See United States v. Thirty Eight Golden Eagles*, 649 F. Supp. 269, 276-77 (D. Nev. 1986) (concluding that protection of threatened species is a compelling interest).

244. *Abeyta*, 632 F. Supp. at 1307.

245. *Id.*

246. 649 F. Supp. 269 (D. Nev. 1986).

247. *Id.* at 271-72.

that the Native American religious interest was “significant,” it found the governmental interest in protecting threatened eagles was “compelling.”²⁴⁸ Furthermore, the court inaccurately²⁴⁹ feared that “the cost of exempting all Indians from the regulatory procedures would be disastrous to the eagles, in that their numbers could be severely reduced.”²⁵⁰ Therefore, it upheld the constitutionality of the Eagle Protection Act.²⁵¹

Current case law addressing Native American religious takings of eagles indicates that the federal eagle permit system is constitutional. *Abeyta*, the one case sympathetic to Native American religious freedom, may no longer be valid or persuasive law because the Native American charged under the Eagle Protection Act may not have had standing to challenge the constitutionality of the federal eagle permit system due to his failure to apply for a permit.²⁵² Thus, in future challenges, given the courts’ historical affirmation of the Eagle Protection Act, the ESA, and the endangered status of bald eagles, the federal eagle permit system may be found constitutional despite the burdens the system unnecessarily imposes on Native American religious practices.²⁵³

Moreover, it is important for courts to uphold the environmental concerns in laws like the ESA and MBTA as compelling or else there is great potential for these laws to become ineffective in response to religious challenges. That is, if courts were to find that protection of an endangered species was not compelling, then that species could be threatened by the religious practices of various religions.²⁵⁴ To avoid gutting general environmental laws, a better solution to the Native

248. *Thirty Eight Golden Eagles*, 649 F. Supp. at 276-77; see *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987).

249. PART II, Sections B-C.

250. *Thirty Eight Golden Eagles*, 649 F. Supp. at 277; see *supra* part II.C; cf. *Billie*, 667 F. Supp. 1485 (Native American violated ESA by taking an endangered Florida panther on Indian land for non-commercial hunting purposes). Indian hunting rights on reservation land are abrogated by the ESA to the extent the hunted animal is an endangered species. *Billie*, 667 F. Supp. at 1492. “Indian treaty rights [to hunt] do not extend to the point of extinction. . . . Rights can be controlled by the need to conserve a species.” *Id.* at 1489 (citations omitted). “When Congress passed ‘the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,’ [the ESA], . . . it could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers.” *Id.* at 1492 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)).

251. *Thirty Eight Golden Eagles*, 649 F. Supp. at 277-78.

252. *Id.* at 278.

253. *Abeyta*, 632 F. Supp. at 1304, 1307.

254. See *infra* part IV.

American eagle problem is for Congress to legislate changes to the federal eagle permit system by enacting the Native American Free Exercise of Religion Act, discussed below, or similar legislation.

B. The American Indian Religious Freedom Act

In 1978, with the enactment of the American Indian Religious Freedom Act (AIRFA), the United States adopted the policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."²⁵⁵ Initially, this Act appears to offer protection for Native American traditional religious practices, including religious use of eagles. However, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Supreme Court interpreted the AIRFA as failing to "create a cause of action or any judicially enforceable individual rights" for Native Americans.²⁵⁶ The Court's interpretation of the AIRFA is supported by the legislative history of the Act, which indicates that the AIRFA merely ensures the government will not infringe on Native American freedom of religion without a clear legislative decision that Native American freedom of religion must yield to a more important concern.²⁵⁷

In a prior case, *United States v. Thirty Eight Golden Eagles*,²⁵⁸ a Native American prosecuted under the Eagle Protection Act for illegally selling eagles²⁵⁹ unsuccessfully argued that the Eagle Protection

255. 42 U.S.C. § 1996 (1994).

256. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988). Even Justice Brennan in the dissent agrees with this proposition. *Id.* at 471 (Brennan, J., dissenting). However, Justice Brennan also commented that the Court's ruling on religious freedom

amounts to nothing more than the right to believe that [Native American] religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the 'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions,' it fails utterly to accord with the dictates of the First Amendment.

Id. at 477 (quoting AIRFA).

For Native American reaction to the holding, see Vine Deloria, *Sacred Lands and Religious Freedom*, 16 NATIVE AMERICAN RTS. FUND L. REV. 1 (1991).

257. *Lyng*, 485 U.S. at 455; 124 CONG. REC. 21,444 (1978).

258. 649 F. Supp. 269 (D. Nev. 1986).

259. The fact that the defendant was involved in commercial activities makes any free exercise of religion defense highly suspect because "the sale of eagle parts is deplored by the Indians as a matter of tribal custom and religion." *United States v. Top Sky*, 547 F.2d 486, 488 (9th Cir. 1976).

Act violated the AIRFA because it deprived him of his use and possession of sacred objects, namely eagles.²⁶⁰ The court's discussion suggested accord with the later reasoning in *Lyng*, in that it noted difficulties with the concept of a private cause of action under AIRFA.²⁶¹ The court explained that if there were a cause of action under the AIRFA, the defendant would have to prove that the Eagle Protection Act was "created in complete disregard for Indian religious values."²⁶² Such proof, however, would be impossible because the Eagle Protection Act contains an express exemption to the federal eagle permit system for Native American religious use of eagles.²⁶³ Thus, the AIRFA fails to provide Native Americans with independent relief from governmental burdens placed on their free exercise of religion by the federal eagle permit system.²⁶⁴

C. Historic Trust Responsibilities

While the Free Exercise Clause and the AIRFA fail to offer Native Americans effective religious protection, the Federal Indian Trust Doctrine may provide Native Americans some relief from governmental burdens on their religion because it provides authority for specific legislation to protect Native American religion. Under the Federal Indian Trust Doctrine, the federal government owes Indian tribes a fiduciary duty, that is, the duty of loyalty.²⁶⁵ This responsibility is similar to guardianship.²⁶⁶ Although Indian tribes are sovereign nations, they do not have full sovereign powers; rather, Indian tribes are domestic dependent nations with self-governing powers which the federal government must protect in a trust relationship.²⁶⁷ In order to fulfill this duty to protect Native American sovereignty and self-determination, the federal government must also protect Native American culture and religion. Thus, if the federal government fails to protect

260. *Thirty Eight Eagles*, 649 F. Supp. at 278.

261. *Id.* at 278-79.

262. *Id.* at 280.

263. 16 U.S.C. § 668a (1988); 50 C.F.R. § 22 (1992).

264. 16 U.S.C. § 668a; 50 C.F.R. §§ 13, 22.

265. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221, 227-28 (1982).

266. *Id.*

267. *Seminole Nation v. United States*, 316 U.S. 286, 295 (1942); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (acknowledging the trust relationship); COHEN, *supra* note 263, at 220-28; *see generally* DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 349-94 (3d ed. 1993). A full discussion of the trust doctrine is beyond the scope of this Article.

Native American religious freedom, then it violates its legal obligation to all Indian tribes.²⁶⁸

Under the Trust Doctrine, the federal government has the authority to affirmatively protect Native American religion through legislation.²⁶⁹ The Native American Free Exercise of Religion Act ("NAFERA"), which is currently before Congress, proposes to create a judicially enforceable policy to preserve Native American rights to exercise their traditional religion, and that would allow, among other things, Native American religious use of eagles and eagle parts.²⁷⁰ The findings of NAFERA expressly acknowledge the federal government's trust responsibilities toward Native Americans.²⁷¹ NAFERA's critics, however, argue that any affirmative legislation to specifically protect Native American religion violates the Establishment Clause of the Constitution.²⁷² This argument fails precisely because the Trust Doctrine separately requires the federal government to protect tribal culture and religion;²⁷³ therefore, based on the unique relationship between Native American tribes and the federal government, the gov-

268. *Portland Hearing*, *supra* note 6, at 6, 79 (statement of Walter Echo-Hawk, Senior Staff Attorney, Native American Rights Fund and testimony of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado); Bunty Anquoe, *Religious Freedom Bill Passes Major Hurdles*, ETHNIC NEWSWATCH, INDIAN COUNTRY TODAY, Sep. 15, 1993, at A1 (quoting Robert Clinton, law professor, University of Iowa, and Milner Ball, law professor, University of Georgia).

269. *Portland Hearing*, *supra* note 6, at 79 (testimony of Vine Deloria, Jr., Center for Studies of Ethnicity and Race, University of Colorado); Anquoe, *supra* note 268 (quoting Robert Clinton, law professor, University of Iowa).

270. S. 2269, 103d Cong., 2nd Sess. (1994). The NAFERA is discussed in detail in part VI of this Article.

271. *Id.* "[A]s part of its historic trust responsibility, the Federal Government has the obligation to enact enforceable Federal policies which will protect Native American community and tribal vitality and cultural integrity, and which will not inhibit or interfere with the free exercise of Native American religions." *Id.* § 101(3).

272. Anquoe, *supra* note 268; Dellios, *supra* note 184.

273. *Id.* A full discussion of the Establishment Clause is beyond the scope of this Article, see Lupu, *supra* note 181; Nuechterlein, *supra* note 181.

Establishment Clause analysis usually follows the three part test established by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). The *Lemon* Test provides that in order to not violate the Establishment Clause, 1) the statute or governmental action at issue must "have a secular legislative purpose," 2) "its principal or primary effect must be one that neither advances nor inhibits religion," and 3) it "must not foster an excessive government entanglement with religion." *Id.* at 612-13. In a cursory application of this test to the NAFERA: 1) the NAFERA has the purpose of fulfilling the government's trust obligations to Native Americans, 2) it removes governmental burdens that inhibit Native American free exercise of religion without itself advancing those religions, and 3) it does not entangle the government in Native American religion, but rather allows Native Americans to voluntarily practice their religion without governmental burdens.

ernment may benefit tribal religions (by allowing them free exercise of their religion) without establishing religion.²⁷⁴ By enacting the NAFERA, Congress would fulfill its trust duties to Native Americans and would begin to relieve the burdens placed on Native American free exercise of religion by the federal eagle permit system.²⁷⁵ Given the inadequacies of other legal arguments, the Trust Doctrine is the best argument for Native Americans to reclaim their free exercise of religion, and the NAFERA is one such good example of the Trust Doctrine in action.

VI. The Proposed Native American Free Exercise of Religion Act

In reaction to inadequate legal protections for Native American religion, Senator Daniel K. Inouye,²⁷⁶ a Democrat from Hawaii, introduced a bill to Congress, the Native American Free Exercise of Religion Act of 1993 (NAFERA), to amend the AIRFA and strengthen First Amendment religious rights for Native Americans.²⁷⁷ NAFERA would establish a judicially enforceable policy "to protect and preserve the inherent right of any Native American to believe, express, and exercise his or her traditional religion."²⁷⁸ In its substantive provisions, the NAFERA would protect 1) access to sacred sites, 2) traditional use of peyote, 3) prisoners religious rights, and 4) religious use

274. Testimony of Gerald Torres, Counsel to the Attorney General on NAFERA, Capital Hill Hearing Testimony (Mar. 23, 1994).

275. S. 2269, 103d Cong., 2nd Sess. § 401 (1994).

276. Senator Inouye also co-sponsored the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, which requires states to prove a compelling governmental interest for any law that infringes on religious rights, overruling *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990). S. 578, 103d Cong., 1st Sess. (1993). For background information on the Act, see *Congress to Vote on Religious Freedom: American Indians are Among Groups Whose Rituals are Unprotected*, ORLANDO SENTINEL, Oct. 9, 1993, at D7; Roberta Ulrich, *Senate Overrides Court Ruling on Peyote*, OREGONIAN, Oct. 28, 1993, at B4.

277. S. 2269, 103d Cong., 2nd Sess. (1994). For more information on this bill, contact the Native American Rights Fund at (303) 447-8760.

At present, this bill passed House approval and awaits a vote by the Senate. Telephone Conversation with Native American Rights Fund in Boulder, Colo. (Sep. 27, 1994).

278. S. 2269, 103d Cong., 2nd Sess. § 2 (1994); 42 U.S.C. § 1996 (1994). Some officials at the Justice Department argue that the NAFERA would violate the Establishment Clause of the Constitution, U.S. CONST. amend. I, cl. 1, a claim strongly disputed by some constitutional legal experts and scholars who explain that the Act would "remed[y] centuries of undoubted wrongs and present burdens on Native religions" and fulfill the government's trust obligation to protect Indian culture and sovereignty. Dellios, *supra* note 184; Anquoe, *supra* note 184; see also *supra* part V.C-D.

of eagles, other animals, and plants.²⁷⁹ These rights would be enforceable in federal district court by an aggrieved party against the United States for equitable or other relief.²⁸⁰

The NAFERA is supported by the Native American Rights Fund, other Native American organizations, numerous Indian tribes, civil liberties organizations, Jewish and Protestant organizations, and environmental groups.²⁸¹ However, the Bill faces strong congressional opposition particularly due to its controversial provisions protecting sacred sites.²⁸² A similar law proposed in 1989 that related to sacred sites²⁸³ was defeated by a coalition of resource users, including miners and loggers.²⁸⁴

The section of the NAFERA pertinent to this Article is title IV, section 401, which expressly protects Native American religious use of eagles.²⁸⁵ This provision has not received significant opposition in Congress.²⁸⁶ However, rather than defining substantive changes to the current federal eagle permit system, section 401 would require the FWS to develop a plan, within one year, in consultation with Indian tribes, to simplify the current system and make it more effective and efficient.²⁸⁷ Specifically, Section 401 directs the FWS to develop a plan to ensure prompt disbursement of available eagles to applicants, allocate sufficient numbers of eagles, when available, for demonstrated Native American religious needs, and simplify and shorten the permit process for religious use of eagles.²⁸⁸ The Director of the FWS has a duty to promptly make all recovered eagles available for distribution, to expedite review of permit applications for the religious use of eagles, and to monitor the eagle distribution system.²⁸⁹ This section

279. S. 2269, 103d Cong., 2nd Sess., titles 1-4 (1994).

280. *Id.* § 501. If the aggrieved party prevails, the party may recover attorney's fees. *Id.* § 501(c).

281. Dellios, *supra* note 184.

282. *Id.*

283. S. 1124, 101st Cong., 1st Sess. (1989). For discussion on the 1989 proposed bill, see Kristen L. Boyles, Note, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117 (1991).

284. Hugh Dellios, *Rock Park: Sacred Place or Road to Suburbia*, CHI. TRIB., Jan. 1, 1994, at News 1.

285. S. 2269, 103d Cong., 2nd Sess. § 401 (1994). A telephone conversation with the Native American Rights Fund in Washington, D.C. (Jan. 17, 1994) and in Boulder, Colo. (Sep. 27, 1994) indicates that section 401 has not yet received significant congressional opposition.

286. Telephone conversation with Native American Rights Fund in Washington, D.C. (Jan. 17, 1994) ((202) 543-0923) and in Boulder, Colo. (Sep. 27, 1994) ((303) 447-8760).

287. S. 2269, § 401(a).

288. *Id.*

289. S. 2269, § 401(c)(3).

also directs the FWS to consider decentralizing the eagle disbursement process.²⁹⁰

Lastly, section 401 permits eagles discovered on tribal lands to be distributed by tribes, in accordance with tribal religious customs, provided that the tribes establish procedures by law or custom to issue tribal permits and distribute eagles for religious use.²⁹¹ Tribes that establish such procedures would prepare and submit an annual report to the FWS summarizing their actions.²⁹² Tribal control over the distribution of eagles for religious use, however, is expressly limited to eagles which die accidental or natural deaths.²⁹³ The FWS would retain all authority over takings of live eagles on any lands within the United States.²⁹⁴

Thus, with future legislation to protect Native American religious use of eagles unsettled, Native Americans and other interested persons are left to actively lobby Congress to pass the NAFERA and then develop a new federal eagle permit system that sufficiently accommodates their religious practices. If NAFERA becomes law, then the FWS should develop a new eagle permit system from the Native American perspective, taking into consideration traditional religious practices and Native American tribal sovereignty and self-determination.²⁹⁵ In the meantime, the only religious protections available for Native Americans when the current permit system becomes too burdensome, are the uncertain and perhaps inadequate protections offered by the compelling governmental interest test under the Free Exercise Clause.²⁹⁶ As discussed previously, these protections may not be sufficient to offer Native Americans the same free exercise of religion enjoyed by most other Americans.²⁹⁷ Therefore, it is time for Congress to fulfill its trust responsibilities to Native Americans by enacting the NAFERA, or similar legislation.

VII. Conclusion

Native Americans deserve the same legal protections under the law for their religious rights that most other Americans take for

290. S. 2269, § 401(b).

291. S. 2269, § 401(d).

292. S. 2269, § 401(e).

293. *Id.*

294. *Id.*

295. S. 2269, § 401(d); Memorandum, *supra* note 155; *see supra* part II.B & IV.B.4.

296. *See* 42 U.S.C. § 2000bb (1994); Memorandum, *supra* note 172.

297. *See Portland Hearing, supra* note 6, at 4 (statement of Walter Echo-Hawk, Attorney, Native American Rights Fund).

granted. Unfortunately, the federal scheme to protect endangered and revered eagles unnecessarily infringes on Native American free exercise of religion by restricting Native American access to eagles and eagle parts for religious purposes.

Because the courts have failed to relieve this burden, and the government owes Native Americans fiduciary trust obligations, Congress should act immediately to protect Native American religious freedoms. Enacting NAFERA would be one way for Congress to extend religious protections to Native Americans. If, however, NAFERA does not become law, Congress should still cure the administrative problems in the current federal eagle permit system to accommodate Native American religious practices.

A happy ending is possible to the conflict over access to endangered eagles. The federal government can protect both eagles and Native American religious freedoms; it need only decide to do so. Native Americans favor the federal protection of eagles and will work within federal guidelines to protect eagles, provided the government also allows them to practice their religion. The government should affirm its commitment to protecting both the environment and religious rights for all Americans by relieving the unnecessary restrictions on Native American free exercise of religion caused by the federal scheme to protect eagles.

