



Office of the Attorney General
Washington, D.C. 20530

OCT 12 2012

MEMORANDUM

TO: ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL
RESOURCES DIVISION

ALL UNITED STATES ATTORNEYS

DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

FROM:  THE ATTORNEY GENERAL

SUBJECT: Possession or Use of the Feathers or Other Parts of Federally Protected Birds for
Tribal Cultural and Religious Purposes

This memorandum formalizes and memorializes the longstanding policy and practice of the Department of Justice regarding the possession or use of federally protected birds, bird feathers, or other bird parts for the cultural and religious purposes of federally recognized Indian tribes.¹ This memorandum also provides background and guidance regarding this policy.

The Department of Justice recognizes that many Indian tribes and tribal members use, and traditionally have used, federally protected birds, bird feathers, or other bird parts for their tribal cultural and religious expression. Indeed, the eagle plays a unique and important role in the religious and cultural life of many Indian tribes. And in light of the important government-to-government relationship that the United States has with federally recognized tribes, the United States has a strong interest in accommodating the interests of these tribes by protecting the ability of their members to meaningfully practice their religions and preserve their cultures.² In addition, accommodating these tribal interests is integral to the federal commitment to foster tribal self-determination and self-governance.

At the same time, tribes and their members and the United States share an interest in – and a responsibility for – protecting this Nation's scarce and precious wildlife resources. Federal wildlife laws are essential to preserving natural resources – including the eagle and other migratory birds – that are vitally important to this Nation.³ It is a federal enforcement priority to prosecute those who violate federal laws by engaging in commercial activities involving federally protected birds, bird feathers, or other bird parts, or by killing such birds without

authority under federal law. The objective of these enforcement efforts is to reduce and eliminate the unlawful taking of federally protected birds by prosecuting not only individuals who take protected birds but also individuals who seek to profit from the commercialization of federally protected birds or their feathers or other parts.

In short, the Department of Justice is committed to robust enforcement of federal laws protecting birds while respecting tribal interests in the use of eagle feathers and other federally protected birds, bird feathers, and other bird parts for cultural and religious purposes.

Background

The Department of Justice policy memorialized in this memorandum is consistent with the longstanding policy of the Department of the Interior. In 1975, then-Secretary of the Interior Rogers C. B. Morton issued a policy statement concerning Indian cultural and religious use of migratory bird feathers and parts, which has become known as the "Morton Policy."⁴ The Morton Policy was issued to "clarify the Department of the Interior's responsibilities and intentions" as to enforcement of federal laws protecting eagles and to "ease the minds of American Indians" who had raised concerns about the application of federal wildlife protection laws to their cultural and religious activities.⁵

Pursuant to the Morton Policy, the Department of the Interior has long permitted members of federally recognized tribes to engage in specified activities, including the possession and use of federally protected birds, as well as their parts or feathers, "without fear of Federal prosecution, harassment, or other interference." The Morton Policy also affirmed that the government would not permit anyone, including members of federally recognized tribes, to kill federally protected birds without a permit or to engage in commercial trade in federally protected birds, bird feathers, or other bird parts. The government would continue to enforce against all persons federal laws prohibiting the killing of protected birds and prohibiting commercial activities involving protected birds and their feathers and parts.

The Morton Policy has guided the federal government's approach to enforcement of federal laws protecting birds ever since it was issued. Nonetheless, I understand that there continues to be some uncertainty and concern regarding enforcement of federal bird protection laws as related to the cultural and religious activities of members of federally recognized tribes. I am therefore issuing this memorandum in order to clarify and confirm that the Department of Justice continues to exercise its prosecutorial discretion in a manner consistent with the Morton Policy.

Policy

The Department of Justice is committed to balancing enforcement of the Nation's wildlife laws with acknowledgment of the cultural and religious needs of federally recognized Indian tribes with which the United States shares a government-to-government relationship. This policy is intended to ensure coordination and continued consistency with the Morton Policy and to clarify certain issues not expressly or fully addressed in the Morton Policy itself. The

Department of Justice has worked very closely with the Department of the Interior in developing this policy. This policy is intended to ensure a consistent and uniform approach across the nation to enforcement of federal laws protecting birds.⁶

Accordingly, consistent with the Morton Policy and the Department of Justice's traditional exercise of its discretion, a member of a federally recognized tribe engaged only in the following types of conduct will not be subject to prosecution:

- Possessing, using, wearing, or carrying federally protected birds, bird feathers, or other bird parts;
- Traveling domestically with federally protected birds, bird feathers, or other bird parts or, if tribal members obtain and comply with necessary permits, traveling internationally with such items;⁷
- Acquiring from the wild, without compensation of any kind, naturally molted or fallen feathers of federally protected birds, without molesting or disturbing such birds or their nests;
- Giving or loaning federally protected birds or the feathers or other parts of such birds to other members of federally recognized tribes, or exchanging federally protected birds or the feathers or other parts of such birds with other members of federally recognized tribes, without compensation of any kind;
- Providing the feathers or other parts of federally protected birds to craftspersons who are members of federally recognized tribes to be fashioned into objects for eventual use in tribal religious or cultural activities. Although no compensation may be provided and no charge made for such feathers or other bird parts, tribal craftspersons may be compensated for their labor in crafting such objects.

Members of federally recognized tribes are covered by this policy regardless of whether they have a U.S. Fish and Wildlife Service permit.⁸

The Department of Justice balances its commitment to accommodating the needs of federally recognized tribes with its commitment to enforcement of the Nation's wildlife laws. Thus, the Department of Justice will continue to prosecute tribal members and non-members alike for violating federal laws that prohibit the killing of eagles and other migratory birds or the buying or selling of such birds or the feathers or other parts of such birds.⁹ The terms "buying," "selling," and "compensation" include the exchange of federally protected birds, bird feathers, or other bird parts for cash, services, goods, or anything other than protected birds, bird feathers, or other bird parts.

The Department of Justice's Environment and Natural Resources Division (ENRD) and United States Attorneys' Offices work closely with the Department of the Interior's U.S. Fish and Wildlife Service on enforcement of federal laws protecting birds. It is a goal of both the

Department of Justice and the Department of the Interior that these enforcement efforts are carried out in a way that is consistent with the policies of both agencies, as described in this memorandum. Prosecutors should be aware that the Department of the Interior has a longstanding internal procedure regarding review of cases involving members of federally recognized tribes, which governs decisions by the Department of the Interior on the referral of cases to Department of Justice prosecutors.

United States Attorneys' Offices shall consult with the Assistant Attorney General of ENRD or her designee, the Chief of ENRD's Environmental Crimes Section, if they have questions regarding whether particular conduct is consistent with this policy or whether exceptional circumstances exist. In addition, in light of the significant and important issues these cases raise, it is strongly recommended that Assistant U.S. Attorneys handling any case involving Native Americans and federally protected birds, bird feathers or other bird parts, consult at an early stage of their investigation or prosecution with ENRD's Environmental Crimes Section. Among other things, prosecutors are strongly encouraged to consult with ENRD in any such case (involving Native Americans and federally protected birds, bird feathers, or other bird parts) in which an issue is raised regarding a treaty with an Indian tribe, the First Amendment of the United States Constitution, the American Indian Religious Freedom Act, or the Religious Freedom Restoration Act.

Consistent with the sovereign status of Indian tribes, and with this Department's commitment to fostering tribal self-determination, prosecutors are also encouraged to consider whether prosecution of particular cases would be more appropriately handled by tribal prosecutorial authorities in lieu of federal prosecution. *See* U.S. Attorneys' Manual Ch. 9-27.220(A)(2).

This policy is based on the special relationship that the federal government has with federally recognized tribes. This policy is not intended to address or change how the Department of Justice handles cases involving those who are not members of federally recognized tribes, including non-Indians or members of state-recognized tribes or other groups or organizations. The traditional elements of federal prosecutorial discretion continue to apply in all such cases. *See Principles of Federal Prosecution*, U.S. Attorneys' Manual Ch. 9-27.000. Prosecutors retain the discretion to consider all appropriate factors, such as the nature and seriousness of the offense and the culpability of the offender, in determining whether to pursue a particular prosecution that would not be inconsistent with this policy. *See, e.g.,* U.S. Attorneys' Manual Ch. 9-27.230-250 (describing factors that may be relevant in determining whether to prosecute) and 9-27.260 (detailing impermissible considerations). In exercising their discretion in such cases, prosecutors should be aware that it has been and continues to be the priority of the Department of Justice and the Department of the Interior to focus wildlife enforcement resources on those cases involving illegal activities that have the greatest negative impact on protected species, such as the unlawful take of protected wildlife and unlawful commercial activities involving protected wildlife.¹⁰

This policy has been promulgated solely for the purpose of internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party in any matter, civil or

criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

cc: Director, Federal Bureau of Investigation
Director, Office of Tribal Justice

Attachment

Notes

¹ The term “federally recognized tribes” (also referred to in this memorandum as “Indian tribes” or “tribes”) means all Indian tribes (including Alaska Native entities) identified in the most recent list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs published in accordance with section 104 of Public Law 103-454 (108 Stat. 4792; 25 U.S.C. § 479a-1) and any other Indian tribes acknowledged by the United States Bureau of Indian Affairs and identified for inclusion in such a list.

² This interest is reflected in statutes, Executive Orders, and case law. *See, e.g.*, 16 U.S.C. § 668a (authorizing exceptions to the Bald and Golden Eagle Protection Act “for the religious purposes of Indian tribes”); 42 U.S.C. § 1996 (the American Indian Religious Freedom Act); Executive Order 13007 (May 24, 1996) (Indian Sacred Sites); Presidential Memorandum on Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 F.R. 22953 (Apr. 29, 1994); *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (finding that regulatory scheme concerning tribal member possession of eagle feathers for religious purposes serves compelling governmental interests in protecting eagles and in “protecting and fostering [the] culture and religion . . . of federally-recognized Indian tribes”); *United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999) (upholding Morton Policy, defined *infra* at 2 and n.4). The unique legal and political relationship that the United States shares with federally recognized tribes has been addressed by the Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974), and is further addressed in Executive Order 13175 (Nov. 6, 2000) (Consultation and Coordination with Indian Tribal Governments) and Presidential Memorandum on Tribal Consultation, 74 F.R. 57881 (Nov. 5, 2009).

³ Federal wildlife laws that protect birds (and the feathers and parts thereof) include the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712, the Lacey Act, 16 U.S.C. §§ 3371-3378, and the Endangered Species Act, 16 U.S.C. §§ 1531-1544. The term “federally protected bird,” as used in this memorandum, refers to any bird that is protected under any federal wildlife law.

⁴ Rogers C. B. Morton, Secretary of the Interior, Policy Statement on Indian Use of Bird Feathers (Feb. 5, 1975). A copy of the Morton Policy is attached.

⁵ *Id.*

⁶ Neither the Morton Policy nor this policy is intended to address issues regarding live birds.

⁷ Enrolled members of federally recognized tribes may legally transport federally protected birds, bird feathers, or other bird parts internationally if they obtain a permit to do so. *See* 50 C.F.R. § 22.22; *see also* www.fws.gov/le/public-bulletin-native-american-travel-overseas.html. In addition, U.S. Fish and Wildlife Service policy allows enrolled members of federally recognized tribes to travel without a permit to Mexico or Canada with eagles, eagle parts, or eagle feathers under certain conditions, including that the tribal member enters and leaves the United States with the same items. *See* U.S. Fish and Wildlife Service, Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America (Feb. 1, 2003) (www.fws.gov/le/public-bulletin-transport-eagle-items.html). U.S. Fish and Wildlife Service policy similarly allows Canadians who present a “Certificate of Indian Status” card issued by the federal Government of Canada to travel into and out of the United States with eagles, eagle

parts, or eagle feathers under conditions similar to those required of members of tribes recognized by the United States. *Id.* Note that these policies address transport requirements under federal wildlife laws and do not address the applicability of customs and related laws.

⁸ The U.S. Fish and Wildlife Service issues permits for receipt and possession of eagle carcasses, eagle feathers, and eagle parts to tribal members who apply for and receive such items through the National Eagle Repository. Members of federally recognized tribes are not, however, required to have permits to engage in the conduct that this policy allows (other than any permits that may be necessary for international travel, as described in note 7).

⁹ Enrolled members of federally recognized tribes may legally kill federally protected birds only if they obtain a permit to do so and comply with its conditions. *See* 50 C.F.R. § 22.22; U.S. Fish and Wildlife Service, Federal Fish and Wildlife Permit Application Form (Type of Activity: Native American Eagle Take). Similarly, a U.S. Fish and Wildlife Service permit is required to salvage a carcass or part of a federally protected bird or anything from such a carcass or part, except naturally molted or fallen feathers as provided under this policy. *See* 16 U.S.C. § 668(a), 668a, 668c; 16 U.S.C. § 703(a), 704(a); 50 C.F.R. 10.12.

¹⁰ *See generally* U.S. Fish and Wildlife Service, Enforcement Priorities, 444 FW 1, ¶¶ 1.2A, 1.3A (Aug. 25, 2005), available at www.fws.gov/policy/444fw1.html.

DEPARTMENT of the INTERIOR

news release

OFFICE OF THE SECRETARY

For Release February 5, 1975

McGarvey 202/343-5634

MORTON ISSUES POLICY STATEMENT ON INDIAN USE OF BIRD FEATHERS

Secretary of the Interior Rogers C. B. Morton today issued a policy statement concerning Indian cultural and religious use of migratory bird feathers and parts. Following is the text of the statement.

"I am aware that American Indians are presently experiencing uncertainty and confusion over the application of Federal bird protection laws to Indian cultural and religious activities. Apparently, this confusion and concern may have resulted, in part, from this Department's enforcement activities under such laws. This statement is intended to clarify the Department of the Interior's responsibilities and intentions, and to ease the minds of American Indians.

"The Department of the Interior recognizes the unique heritage of American Indian culture. It also recognizes that American Indians have a legitimate interest in expressing their cultural and religious way of life. At the same time, both the Department of the Interior and American Indians share an additional responsibility to conserve wildlife resources, including federally protected birds.

"As a result of meetings between agencies of the Department of the Interior, the Association for American Indian Cultural and Traditional Activities, and others, I can assure American Indians that our policy is to permit them to engage in the following activities without fear of Federal prosecution, harassment, or other interference.

(over)

"1. American Indians may possess, carry, use, wear, give, loan, or exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers.

"2. American Indians who wish to possess bird feathers or parts to be worked on by tribal craftsmen for eventual use in Indian religious or cultural activities may transfer such feathers or parts to tribal craftsmen without charge, but such craftsmen may be compensated for their work.

"However, the Department of the Interior will continue to enforce against all persons those Federal laws prohibiting the killing, buying or selling of eagles, migratory birds, or endangered species, as well as those laws prohibiting the buying or selling of the parts or feathers of such birds and animals.

"I encourage American Indians to express their identity and to freely pursue their cultural and religious practices. At the same time, I encourage them to support the purposes of the Federal bird protection laws. There is much work to be accomplished to further clarify the rights and obligations of American Indians with respect to Federal bird protection laws, and special efforts will be made to conduct a two-way education process between Government employees and Indian communities. In addition, we have agreed to work in a spirit of cooperation with the Association for American Indian Cultural and Traditional Activities, and other interested Indian representatives, in order to harmonize the policies, practices, and procedures for enforcement of the Federal bird protection laws with the legitimate needs of Indians. This includes review of Federal regulations, with probable changes where the legitimate needs of American Indians can be legally recognized without harming federally protected birds.

"In this regard, one area of discussion should be the possibility of American Indians sharing with Federal officials the responsibilities of wildlife management and enforcement through the adoption of tribal ordinances designed to conserve federally protected birds.

"In the past, one problem has been that legitimate sources of feathers, which might have been available to the Department for distribution to American Indians, have not been fully utilized. We are presently developing better procedures to collect and distribute eagle feathers from the Fish and Wildlife Service repository at Pocatello, Idaho, where feathers of eagles found dead are stored. In addition, we will make an effort to distribute the feathers and parts of other migratory birds to Indians.

"I hope that this statement will help to take away the uncertainty and confusion presently experienced by American Indians. I hope also that our efforts will encourage tradition, culture, and religious activities among American Indians, while at the same time promoting a mutual effort to protect and conserve federally regulated birds.

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