



June 15, 2012

GENERAL MEMORANDUM 12-076

DOJ Initiates Tribal Consultation on Eagle Feather Policy; Joint Tribal-Federal Law Enforcement Training Session to be Held

On June 8, 2012, the Department of Justice (DOJ), in the attached Dear Tribal Leader Letter, formally initiated the tribal consultation process requesting further comments on the DOJ's proposal to clarify and formalize implementation of the "Morton Policy" – a statement developed by the Department of Interior in the 1970s providing guidance on how to handle cases involving American Indians in possession of migratory bird parts and feathers. This initiation of consultation follows the DOJ's October 21, 2011, Request for Tribal Input.¹

The attached framing paper which accompanies the Dear Tribal Leader Letter provides the DOJ's answers to questions raised during the initial solicitation of comments and highlights areas where further input is requested from tribes. Of note, the framing paper clarifies that:

- Members of federally recognized tribes are free to possess, exchange, and travel *domestically* with migratory bird parts and feathers (the DOJ proposes to add a description of the requirements for *international* travel with such items to the policy)
- The "taking" of live migratory birds is legal for members of federally recognized tribes, provided that they obtain and comply with appropriate Fish and Wildlife Service permits²

For clarity, the DOJ proposes defining a number of terms including "buying and selling;" "compensation;" "exchange;" "federally protected birds;" and "American Indian." Both the Departments of Justice and Interior propose to clarify that the term "American Indian" is only interpreted to mean a "member of a federally recognized tribe."

Consultation Sessions

- *June 18, 2012, 1:30-4 PM, at the National Congress of American Indians Mid-Year Conference in Lincoln, Nebraska*

¹ See our General Memorandum 11-124 (October 28, 2012).

² See our General Memorandum 12-053 (April 18, 2012).

- *June 22, 2012*, 2-4 PM EDT, via telephone
- *July, 11, 2012*, 2-4 PM EDT, via telephone
- *July, 19, 2012*, at a meeting of the Midwest Alliance of Sovereign Tribes in Tama, Iowa

Those wishing to attend consultations in person or to participate in the telephone consultations should register using the information in the attached letter. In addition, the DOJ is accepting written comments received on or before close of business on *August 1, 2012*.

Joint Tribal-Federal Law Enforcement Training

On October 15, 2012, a joint tribal-federal training session on the enforcement of wildlife and other environmental laws will be held at the DOJ's National Advocacy Center in Columbia, South Carolina.

Please let us know if we may provide additional information on the Department of Justice's proposed policy or assistance preparing comments.

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Inquiries may be directed to:

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U.S. Department of Justice

Office of Tribal Justice

Room 2318, Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

(202) 514-8812
FAX (202) 514-9078

June 8, 2012

Dear Tribal Leader:

I am honored to invite you to government-to-government consultations with the United States Department of Justice on whether the Department should adopt a formal policy that would memorialize its practice of enforcing federal wildlife laws in a manner that facilitates the ability of members of federally recognized tribes to use the feathers and other parts of eagles and other migratory birds for tribal cultural and religious purposes.

The Department of Justice first announced that it was considering such a policy in a document requesting tribal input on the proposed policy, which the White House sent to all tribal leaders on October 21, 2011. The Department received very helpful and significant tribal comments on the proposed policy, as well as several requests for further consultation. The upcoming consultations will be an opportunity to build on the tribal input that the Department received on the proposed policy and to further address specific issues raised in the comments the Department received.

This letter is being sent along with a framing paper that provides background on the proposed policy as well as a summary of comments that the Department has received so far and the Department's responses to those comments. The Department welcomes tribal comments on any aspect of the proposed policy.

The Department of Justice will be conducting both in-person and telephonic consultations. The in-person session will be held on July 19, 2012, in Tama, Iowa, at a meeting of the Midwest Alliance of Sovereign Tribes. The telephonic consultations will be held on June 22, 2012, from 2:00- 4:00 p.m. E.D.T., and on July 11, 2012, from 2:00-4:00 p.m. E.D.T. The Department will also accept written comments through August 1, 2012.

In addition, Department representatives will be attending the Mid-Year Conference of the National Congress of American Indians in Lincoln, Nebraska, to participate in a panel on the proposed policy, which will be held on June 18, 2012, from 1:30-4:00 p.m.

Logistics

If you would like to participate in the in-person consultation session or one of the telephonic consultation sessions, please contact the Department's Office of Tribal Justice at (202) 514-8812 or at eagles@usdoj.gov to register.

Because space may be limited, tribal leaders will be registered in the order that their responses are received. The Office of Tribal Justice will provide information on how to participate in the session after you register.

If the Department cannot accommodate all tribal leaders who would like to participate, we will schedule an additional telephonic consultation.

The Department of Justice will accept written comments any time before the close of business on August 1, 2012. Please send comments to:

Email: eagles@usdoj.gov


Mail: United States Department of Justice
Office of Tribal Justice
950 Pennsylvania Ave. N.W., #2318
Washington, D.C. 20530

Fax: (202) 514-9078

If you have questions about the consultations or wish to discuss the proposed policy further, please contact the Department's Office of Tribal Justice at (202) 514-8812.

The Department hopes you will be able to participate in these important government-to-government consultation sessions and looks forward to continuing to work together on these issues.

Sincerely,


for Tracy Toulou
Director
Office of Tribal Justice

DOJ CONSIDERATION OF EAGLE FEATHERS POLICY: TRIBAL CONSULTATION AND RESPONSE TO TRIBAL COMMENTS

The Department of Justice is inviting tribal leaders to consult, government-to-government, on whether the Department should adopt a formal policy memorializing its practice of enforcing federal wildlife laws in a manner that facilitates the ability of members of federally recognized tribes to use the feathers and other parts of eagles and other migratory birds for tribal cultural and religious purposes. The Department announced that it is considering such a policy in its October 2011 Request for Tribal Input, which is attached here. This paper provides additional background on the proposed policy, information about the upcoming tribal consultations, a summary of the comments received by the Department, and the Department's initial responses to those comments.

As explained previously, the Department is considering adopting such a policy in recognition of the important role that eagles and other federally protected birds have in the religious and cultural life of many Indian tribes. In light of the important government-to-government relationship that the United States shares with federally recognized tribes, the United States has a strong interest in accommodating the interests of these tribes in ensuring that their members can meaningfully practice their religions and preserve their cultures.

The Department solicited tribal views on this policy proposal by sending a formal Request for Tribal Input to leaders of all federally recognized tribes in October 2011 and by placing it on the Department's website as a public notice. That Request provided background on the proposed policy and explained that it would be consistent with the Department of the Interior's long-standing Morton Policy.¹ The Department also sought input on the proposed policy through informal discussions with tribes and tribal members, with the Department's Tribal Nations Leadership Council, and with non-governmental organizations that work closely with tribes. The Department welcomed input on all aspects of the policy and solicited comments on whether the Department should adopt such a policy and, if so, whether the policy should clarify or define any terms used in the Morton Policy.

The Department received significant and helpful comments on the policy proposal and has carefully reviewed all the comments provided. Several comments urged further government-to-government consultation between the United States and federally recognized tribes. In light of the nature and significance of the issues involved, the Department agrees that additional coordination and consultation are appropriate and is therefore inviting tribal leaders to consult further on the proposed policy.

To ensure that tribes have sufficient information to provide meaningful input on the Department's policy proposal, this paper describes the tribal comments the Department has received and provides the

¹ 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 to the Department's October 2011 Request for Tribal Input.

Department's initial responses to or proposals for addressing those comments. Tribal views and recommendations on all aspects of the policy proposal are welcome.

The Department recognizes and acknowledges that this policy proposal is just one step in addressing the range of concerns that tribes have expressed regarding the enforcement of federal laws protecting birds. The Department will continue to work with tribes and the Department of the Interior to address tribal concerns on eagle feathers, consistent with the shared responsibilities of the United States and tribal governments to protect eagles and other precious wildlife resources.

This paper is not intended to be, nor should it be construed as, a statement of Department policy. This paper does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person.

Request for Further Comments

The Department looks forward to continuing its dialogue with tribes on these important topics. The Department welcomes tribal comments on the issues addressed in this paper, as well as on any other aspect of the proposed policy.

The Department will hold teleconference consultations to discuss the proposed policy on June 22, 2012, at 2:00 p.m. E.D.T. and on July 11, 2012, at 2:00 p.m. E.D.T. and will hold an in-person consultation on July 19, 2012, in Tama, Iowa, at a meeting of the Midwest Alliance of Sovereign Tribes.

The Department also welcomes written comments. Please submit written comments to the Office of Tribal Justice by August 1, 2012. Comments should be sent to:

Email: eagles@usdoj.gov

Mail: United States Department of Justice
Office of Tribal Justice
950 Pennsylvania Avenue N.W., #2318
Washington, DC 20530

Fax: (202) 514-9078

In addition, Department representatives will be attending the Mid-Year Conference of the National Congress of American Indians in Lincoln, Nebraska, to participate in a panel on the proposed policy, which will be held on June 18, 2012, from 1:30-4:00 p.m.

Tribes that have questions or wish to discuss the proposed policy further can contact the Department's Office of Tribal Justice at (202) 514-8812.

**Initial Responses of the Department of Justice to Specific Tribal Comments on
The Department's Consideration of a Policy Regarding Tribal Use of Eagle Feathers**

1. Comment: The Department should provide additional information about the proposed policy regarding possession and use of the feathers and other parts of eagles and other migratory birds (collectively, migratory bird parts) and an opportunity for further tribal consultation.

Response: The Department agrees that further tribal consultation and coordination on the proposed policy is appropriate. Providing additional information will help to ensure that any such policy will appropriately reflect tribal views and concerns on this important issue. The Department is therefore providing this summary of the comments it has received thus far and its initial responses to those comments, as well as seeking further tribal input. The Department plans to hold teleconference consultations to discuss the proposed policy on June 22, 2012, and on July 11, 2012, and will hold an in-person consultation in Tama, Iowa, on July 19, 2012, at a meeting of the Midwest Alliance of Sovereign Tribes. The Department also welcomes written comments. Tribes that wish to discuss the proposed policy further can contact the Department's Office of Tribal Justice directly.

2. Comment: There is significant confusion in Indian country as to whether tribal members must have a permit from the Department of the Interior's Fish and Wildlife Service (FWS) to be in legal possession of migratory bird parts. The Department should clarify whether or not such a permit is necessary.

Response: The Department agrees that this clarification is important in light of the confusion regarding the relationship between the Morton Policy and the FWS permit system. The Department wishes to make clear that members of federally recognized tribes do not need FWS permits in order to be covered by the Morton Policy or the Department's proposed policy. Tribal members can show that they are covered by the policy – and thus that they are free to possess or use migratory bird parts – simply by showing that they are members of a federally recognized tribe (by producing, for example, a tribal identification card). To eliminate any confusion, the Department proposes to clarify in the policy that members of federally recognized tribes do not need permits to possess or use migratory bird parts.

3. Comment: The Department should clarify the terms “buying or selling” and “compensation” and explain what “exchanges” of migratory bird parts would be permissible.

Response: The Department agrees that clarification of these terms would be helpful. The Morton Policy uses but does not define the terms “buying or selling” and “compensation.” The Department proposes to define “buying or selling” or “compensation” to include the exchange of migratory bird parts for anything other than migratory bird parts, including any exchange involving cash, services, or goods. The proposed policy would thus make clear that while members of federally recognized tribes may exchange migratory bird parts for other migratory

bird parts, tribal members may not barter migratory bird parts for other types of goods or for services of any type.

4. Comment: The policy should address whether and when tribal members can travel domestically and/or internationally with migratory bird parts.

Response: The Department recognizes that the issue of travel with migratory bird parts is of great importance to tribal members and agrees that it would be helpful for the proposed policy to specifically address this issue. The Department proposes to do this by clarifying that members of federally recognized tribes can travel domestically with migratory bird parts and by describing the requirements for international travel with such items.

5. Comment: The policy should permit tribal members to acquire feathers they find in the wild (*i.e.*, “found feathers”) and to gift such feathers to other tribal members.

Response: Several comments stated that found feathers are of special religious significance for particular tribes and asked that the policy permit tribal members to acquire such feathers and to gift them to other tribal members. The Department acknowledges the importance of this issue and proposes to clarify that members of federally recognized tribes may acquire from the wild, without compensation, naturally molted or fallen feathers of migratory birds.

6. Comment: The Department should define “federally protected birds” and clarify that the proposed policy applies not just to eagles but also to other migratory birds.

Response: The Morton Policy uses but does not define the term “federally protected birds.” The Department proposes addressing this comment by identifying federal laws that protect birds and by defining a “federally protected bird” as a bird that is protected under any federal law.

7. Comment: The Department should clarify that a craftsperson who works on migratory bird parts must be a member of a federally recognized tribe and should use the term “craftspersons” rather than “craftsmen.”

Response: The Department proposes accepting these suggestions.

8. Comment: The policy should address the permissibility of killing migratory birds for tribal religious and cultural purposes.

Response: The Morton Policy does not address this issue, but it is addressed in FWS regulations. 50 C.F.R. 22.22. The Department proposes addressing this request by acknowledging that members of federally recognized tribes may legally take (including kill) live eagles or other migratory birds only if they obtain and comply with appropriate FWS permits.

9. Comment: The policy should confirm that the Department will prosecute those who kill eagles and those who sell bird parts for profit.

Response: The Department is committed to protecting eagles and other migratory birds. The proposed policy would make clear that the Department will continue to prosecute those who violate federal law by killing eagles or other migratory birds without a permit or by buying, selling, or otherwise commercializing migratory bird parts.

10. Comment: The policy should emphasize the government-to-government relationship and should foster tribal self-determination and self-governance.

Response: The Department agrees that the proposed policy reflects the important government-to-government relationship that the United States shares with federally recognized tribes. The Department believes that the proposed policy is integral to its commitment to fostering tribal self-determination and self-governance.

11. Comment: The policy should leave it to individual tribes – rather than the federal government – to determine whether a practice is a bona fide tribal religious or cultural practice.

Response: The Department agrees that the proposed policy should not require federal agents or prosecutors to assess the legitimacy of tribal religious or cultural practices. The Department proposes to address this issue by having the applicability of the policy hinge on the type of conduct at issue – *e.g.*, possessing or gifting migratory bird parts as opposed to selling them – rather than on a subjective determination of whether a particular tribal member was engaged in “legitimate” tribal cultural or religious practices.

12. Comment: The policy should more clearly define the “legitimate needs of Indians” and make clear that selling sacred items in the pow-wow arena is not part of such needs.

Response: The Department believes that it is up to individual Indian tribes to define their legitimate cultural and religious needs. The proposed policy, like the Morton Policy, would make it clear, however, that members of federally recognized tribes may be prosecuted whenever they buy or sell migratory bird parts or barter them for other types of goods or services. The Department is not contemplating any exception to this prohibition.

13. Comment: The policy should state that its protection of the “legitimate interests” of American Indians is an issue of religious freedom and expression.

Response: The Department is deeply committed to ensuring religious freedom for all Americans, including members of federally recognized tribes and other Native Americans. However, the proposed policy would be based on the government-to-government relationship between the United States and federally recognized tribes.

14. Comment: The Department should coordinate with tribal governments when violations occur on tribal lands and/or involve tribal members and should consider whether tribes can address violations so as to eliminate the need for federal prosecution.

Response: The Department agrees that this is an important issue. The Department proposes using the policy to further encourage federal prosecutors to consider whether particular cases could be appropriately handled by tribal prosecutorial authorities. Given the wide range of circumstances and issues that can arise in any individual case, this is an issue best addressed on a case-by-case basis. The Department understands and appreciates that many tribes would urge greater involvement in enforcing laws protecting eagles and other wildlife and looks forward to continuing to work with tribes on a number of fronts to increase tribal capacity and responsibilities for this enforcement work. The Department, for example, is in the process of developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing wildlife and environmental laws that affect tribal lands. This training is intended to promote federal-tribal partnerships, foster communication between federal and tribal enforcement officials and prosecutors, and develop tribal capacity to assume a greater role in enforcement.

15. Comment: We would like additional information on the joint federal/tribal training program on enforcement of wildlife and other environmental laws, which was described in the Department's October 2011 Request for Tribal Input. When will the Department be holding this training?

Response: The first such training program will be held the week of October 15, 2012, at the Department's National Advocacy Center in Columbia, South Carolina. The training will provide federal and tribal law enforcement officers and prosecutors with additional tools for sensitive and effective enforcement of the laws protecting tribal lands and resources,

16. Comment: What if the Department of the Interior's Morton Policy and the DOJ policy differ? Will the federal government have a consistent policy?

Response: This is a very important point. The Department has worked very closely with the Department of the Interior on the proposed policy, and will continue to do so. The Department will not issue such a policy without coordinating closely with the Department of the Interior to ensure that the federal government has a single, consistent policy.

17. Comment: Will this policy be applied consistently throughout the Department and by all U.S. Attorneys' Offices?

Response: Yes. The policy would cover the whole Department. It would provide guidance for all prosecutors in the Department, regardless of which Division or U.S. Attorney's Office they

are in. In addition, such a policy would provide a mechanism for internal coordination to ensure that it would be interpreted consistently throughout the Department.

18. Comment: The policy should state in plain language what it means for tribal members.

Response: The Department agrees that a clear statement of what tribal members can and cannot do is very important. The Department plans to work closely with the Department of the Interior to develop additional materials (such as a “Fact Sheet” or “Frequently Asked Questions” document) that explain the scope of the policy in plain language. These materials would be available if and when the policy is issued.

19. Comment: The Department should make sure that the final policy is distributed as broadly as possible so that tribal members are aware of it and can use it to guide their behavior.

Response: The Department agrees that this is important and would work to ensure that the final policy and any explanatory materials for the public are widely available. The Department welcomes input on how best to achieve this goal.

20. Comment: The Department should ensure that all federal, state, and tribal law enforcement agents receive clear guidance regarding what is permissible under the policy and what is not.

Response: The Department agrees that providing information to federal, state, and tribal law enforcement agents is essential. The Department plans to work closely with the Department of the Interior to develop appropriate informational materials and ensure that they are broadly distributed to federal, state, and tribal law enforcement officials. In addition, the new training program described above will include guidance for federal and tribal law enforcement agents on the policy. The Department welcomes input on how best to achieve this goal.

21. Comment: The Department should provide training for tribal rangers and tribal law enforcement officers on the policy.

Response: As mentioned above, the Department is developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing wildlife and environmental laws that affect tribal lands. This training, which will be held the week of October 15, 2012, will include training for both tribal and federal law enforcement officers on enforcement of laws protecting eagles and other migratory birds and on the proposed policy, as well as on other important issues regarding the enforcement of laws protecting tribal lands and resources.

22. Comment: The Department should not only educate tribal members about FWS and enforcement issues but also learn from tribes and tribal members about tribal religious and cultural practices that involve the use of migratory bird parts.

Response: The Department agrees that a two-way educational process between tribes and federal officials is essential. That is one reason that the training program the Department is developing on enforcing wildlife laws that affect tribal lands is for both tribal and federal law enforcement officials and prosecutors. This training program will provide an opportunity for federal agents and prosecutors to learn directly from tribal members about the significant role that migratory birds and bird parts can play in tribal religious and cultural practices and to learn how to effectively enforce wildlife laws in a culturally sensitive manner. The Department also notes that the federal government works with tribal cultural and religious leaders to provide training for federal law enforcement officers in other contexts as well. The Department welcomes input on additional ways to foster this goal.

23. Comment: The policy should define “American Indian” or otherwise state more clearly who is covered by the policy.

Response: The Departments of Justice and the Interior consistently have interpreted the Morton Policy to apply only to members of federally recognized tribes. The Department agrees that it would be helpful to make this clear in the proposed policy.

24. Related comments (addressing appropriate scope of proposed policy):

- a. The policy should continue to apply only to members of federally recognized tribes.
- b. The policy should apply only to those who have CDIB (Certificate of Degree of Indian or Alaska Native Blood) cards issued by the Department of the Interior’s Bureau of Indian Affairs.
- c. Application of the policy should be tied to possession of a federally-recognized tribal-enrollment identification card.
- d. The policy should be extended to all indigenous peoples in the United States.
- e. The policy should apply only to those whose DNA establishes that they are of Native American ancestry.
- f. The policy should be extended to members of historic tribes who have maintained their cultural lifeways and practices.
- g. The policy should defer to tribal officials (from federally recognized, state-recognized, or historic tribes) as to who is an American Indian.

Response: The Department received a wide range of comments regarding who should be covered by the proposed policy, with some arguing that it should continue to cover only members of federally recognized tribes, while others urged the Department to extend the proposed policy to members of non-federally recognized tribes or others of Native American heritage.

After carefully reviewing and considering all comments received, the Department proposes that, consistent with the long-standing policy and practice of both the Departments of Justice and the Interior, the policy would apply only to members of federally recognized tribes. As stated above, the Departments of Justice and the Interior both interpret the Morton Policy to apply only to

members of federally recognized tribes and have consistently done so. It is precisely because the Morton Policy is based on the political, government-to-government relationship between the United States and federally recognized tribes that courts have upheld that Policy.²

Basing the proposed policy on race or ethnicity, or on a claim or assessment of “legitimate” religious need, would be inappropriate and would present serious legal concerns. Moreover, as courts have held, extending the policy beyond members of federally recognized tribes “would in fact harm” members of such tribes. *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011).³ “If the government extended eligibility, every permit issued to a nonmember would be one fewer issued to a member. This is the inescapable result of a demand that exceeds a fixed supply.” *United States v. Antoine*, 318 F.3d 919, 923 (9th Cir. 2003). Expanding the policy therefore “would not forward the government’s compelling interest in protecting the religion and culture of federally-recognized tribes” but “would do that interest a disservice.” *Wilgus*, 638 F.3d at 1293-94.

In sum, the proposed policy represents a careful balancing of the federal government’s responsibility to protect migratory birds and its commitment to support the cultural and religious practices of federally recognized tribes. As the Court of Appeals for the Tenth Circuit explained:

By allowing only members of federally-recognized tribes an essential though otherwise prohibited commodity (eagle feathers and parts), the United States ensures that those tribes are able to continue to practice their traditional culture to the greatest extent possible. And by limiting the permitting process to only members of those recognized tribes, the United States does its best to guarantee that those tribes, which share a unique and constitutionally-protected relationship

² See *United States v. Eagleboy*, 200 F.3d 1137, 1138 (8th Cir. 1999) (upholding the Morton Policy because it “rests on the non-racial basis of ... membership in a federally-recognized tribe”). Courts have held that the United States’ political relationship with federally recognized tribes gives the federal government the requisite interest in “protecting and fostering” the culture and religion of those tribes. See, e.g., *United States v. Wilgus*, 638 F.3d 1274, 1285-88 (10th Cir. 2011). It is this unique interest that allows the federal government to provide members of federally recognized tribes with exclusive access to a resource – migratory bird parts – that is not available to other Americans. *Id.*; see also *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006) (holding that the Department of the Interior “struck a careful balance between eagle preservation, and the preservation of Native American cultures” by using a “political categorization [*i.e.*, membership in a federally recognized tribe], and not a religious one” as the basis of its eagle feathers policy).

³ The *Wilgus* court also suggested that, if the courts were to extend the right to obtain eagle feathers to those who practice Native American religions but are not members of federally recognized tribes, then anyone who claims that his or her religion (including non-Native religions) requires the use of migratory bird parts could claim a similar right to possess eagle feathers under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1). *Wilgus*, 638 F.3d at 1293 n.9.

with the federal government, will receive as much of a very scarce resource (eagle feathers and parts) as possible.

Wilgus, 638 F.3d at 1295.

25. Comment: It would be better for the policy, like the Morton Policy, to continue to use a broad, undefined term like “Indians” than to limit itself to members of federally recognized tribes.

Response: The Department respectfully disagrees. The central goals of the proposed policy include clarity and transparency for those involved in law enforcement, for tribal members, and for others. It is important to communicate openly and clearly so that the proposed policy can guide the behavior of all concerned.

26. Comment: If the policy applies only to members of federally recognized tribes, other Native Americans will fear that they will become targets of prosecutors, who will pursue them regardless of the nature or magnitude of the alleged offense.

Response: The Department intends to make clear that the proposed policy is not intended to address or change how the Department handles cases involving those who are not members of federally recognized tribes. Nor would the proposed policy prevent federal prosecutors from considering all appropriate factors, such as the nature and seriousness of the offense and the culpability of the offender, in deciding whether to pursue a given case.

27. Comment: Members of federally recognized tribes should be able to gift migratory bird parts to those who are not members of any federally recognized tribe where that is consistent with the tribe’s own religious and cultural practices.

Response: As noted above, prosecutors retain in all cases the discretion to consider all appropriate factors in determining whether to proceed with a particular prosecution. However, DOJ does not believe it would be appropriate to include in the proposed policy a general rule that would allow members of federally recognized tribes to gift migratory bird parts to non-members. As the courts have explained, “such a scheme would create well-nigh insuperable obstacles to enforcement of any restrictions on possession” and would divert migratory bird parts “away from members of federally-recognized tribes, the very people that the governmental interest protects.” *United States v. Wilgus*, 638 F.3d at 1294-95 (quotation omitted). If there are tribes that feel that their specific cultural and religious practices are not adequately addressed by the proposed policy, the Departments of Justice and the Interior are open to discussing whether there may be a way to accommodate such limited practices without hampering the government’s ability to enforce the law.

28. Comment: The policy should be expanded to be consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP).

Response: The proposed policy is consistent with the UN DRIP. As described in the Announcement of United States Support for the UN DRIP, the “United States’ existing recognition of, and relationship with, federally recognized tribes” is the “basis for the special legal and political relationship . . . pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including . . . culture [and] religion.” The Department, of course, values the religious freedom of all Americans, but it is the government-to-government relationship that the United States shares with federally recognized tribes that forms the underpinning for the proposed policy.

Comments Beyond the Scope of the Proposed Policy

The Department also received a significant number of comments that raise issues and concerns about the enforcement of laws protecting birds, or that make proposals for additional tribal involvement in the enforcement of such laws, which fall outside the scope of this particular proposed policy, which focuses on the possession and use of migratory bird parts for tribal cultural and religious purposes.

Such issues include: creating additional tribal repositories; improving the National Eagle Repository; authorizing tribes to regulate the retrieval of migratory bird parts from found carcasses or from the Repository and document tribal distribution of those parts; providing funding to tribal officers or for tribal conservation programs; addressing the return of seized items that include migratory bird parts taken from birds that were killed or such parts that have been commercialized; more quickly processing requests for permits for migratory bird parts or for the take of live birds; and moving away from a permit system altogether.

Although these are matters that fall outside of the scope of the proposed policy, the Department is open to discussing, in conjunction with the Department of the Interior and other relevant federal agencies, whether there are ways to address these issues and proposals in other contexts. The Department remains committed to working closely with tribes and with the Department of the Interior to increase the tribal role in enforcing laws protecting migratory birds and to address further tribal concerns about enforcement issues related to these laws.

ATTACHMENT

Request for Tribal Input on:
(1) DOJ Consideration of Policy Regarding Eagle Feathers;
and (2) Federal/Tribal Training Program on Enforcement of
Wildlife and Other Environmental Laws

In meetings that the Departments of Justice and the Interior have had with federally recognized Indian tribes and tribal organizations, tribal representatives have raised questions and concerns about federal enforcement of wildlife laws protecting eagles and other birds. Among other things, tribes have expressed concern that federal enforcement efforts are having a chilling effect on tribal members who wish to engage in religious and cultural practices that involve eagle feathers. Both Departments look forward to continuing a productive dialogue with tribes and tribal organizations on these issues.

In furtherance of this dialogue, the Department of Justice welcomes tribal input on two specific proposals. First, the Department of Justice is considering adopting a formal policy that would memorialize and clarify its practice of enforcing federal wildlife laws in a manner that facilitates the ability of members of federally recognized tribes to use eagle feathers and other bird feathers and parts for cultural and religious purposes. Second, in response to the expressed desire of tribal representatives that tribes become more involved in the enforcement of laws related to eagle feathers, the Department of Justice has begun to develop a joint federal and tribal training program on enforcement of such laws, as well as other environmental laws.

Tribal views and recommendations on all aspects of these two proposals are welcome. This paper is designed merely to provide background information and to frame issues to invite tribal input. This paper is not itself intended to be, nor should it be construed as, a statement of Department policy.¹

¹ The Department is taking this opportunity to seek tribal input on these proposals, even though these proposals do not fall under Executive Order 13175.

I. Should the Department of Justice Formalize Its Policy Regarding Possession of Eagle Feathers by Tribal Members?

The Department of Justice recognizes that members of federally recognized tribes have a significant interest in practicing and preserving their cultures and religions. Eagle feathers, and other bird feathers or parts, play a unique and important role in the religious and cultural life of many Indian tribes and their members.

In light of the important government-to-government relationship that the United States shares with federally recognized tribes, the United States has a strong interest in accommodating the interests of tribes in protecting the ability of their members to meaningfully practice their religion and preserve their culture.

The Department of Justice is considering whether to adopt a formal policy that would memorialize and clarify its practice of enforcing federal wildlife laws in a manner that respects and protects the ability of members of federally recognized tribes to use eagle feathers and other bird feathers and parts for cultural and religious purposes. In particular, the Department is considering formally issuing a prosecution policy consistent with the Department of the Interior's long-standing "Morton Policy." (The Morton Policy, which was issued in 1975 as a policy statement by then-Secretary of the Interior Rogers C. B. Morton, is attached to this document.) The Department is interested in soliciting tribal input on this proposal.

Background

Tribal officials, tribal members, and tribal organizations have raised a number of concerns about enforcement issues that affect tribal members' possession and use of eagle feathers for cultural and religious purposes. One of the concerns that the Department has heard is that tribal members are unsure of how federal enforcement policy affects use and possession of eagle feathers, and that

the resulting fear of prosecution chills the ability of tribal members who have eagle feathers to engage fully in important religious and cultural practices.

The Department of Justice works closely with the Department of the Interior to enforce federal laws protecting eagles and other birds, including the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. The Department of the Interior has a long-standing policy, the Morton Policy, which recognizes tribal interests in the use of eagle feathers for cultural and religious purposes. In general, the Morton Policy permits members of federally recognized tribes to possess and use eagle feathers and other bird feathers and parts, and to engage in other specified activities, for religious and cultural purposes. The Morton Policy has guided the Department of Justice's prosecution efforts in this area for more than three decades, but the Department of Justice has not formally adopted guidance or a policy to memorialize its practice of following the Morton Policy.

The Department is now considering whether to formalize a policy that memorializes its approach in applying federal bird-protection laws to tribal religious and cultural activities. In particular, the Department is considering whether to issue a policy that would inform tribal members that, consistent with the Morton Policy and the Department's traditional exercise of its discretion, they will not be subject to prosecution merely for possessing or using eagle feathers or other bird feathers or parts. The Department anticipates that the policy would also provide that tribal members are free to engage without fear of prosecution in all of the activities permitted under the Morton Policy, such as giving or loaning such bird feathers or parts to other tribal members or exchanging them with other tribal members for other bird feathers or parts, without compensation of any kind.

At the same time, and like the Morton Policy, a Department policy in this area should reflect the Department's commitment to protecting this Nation's scarce and precious wildlife resources, including the eagle and other migratory birds. The policy would therefore need to make clear that the Department will continue to prosecute tribal members and non-members alike for violations of federal law that involve killing eagles or other birds, or that involve the buying or selling of, or other commercial activities involving, eagle feathers or other bird feathers or parts.

Request for Tribal Views

In formulating a policy in this area, the Department would seek to reflect its commitment to balance enforcement of the Nation's wildlife laws with acknowledgment of the religious and cultural needs of members of federally recognized tribes. The goals of the policy would be to clarify how federal enforcement policy affects use and possession of feathers and other bird parts, and to assure tribal members that they may practice their religion without fear of prosecution.

To that end, the Department invites tribal input on the following:

Should the Department of Justice formally adopt a policy, consistent with the Morton Policy, addressing tribal use of eagle feathers and other bird feathers and parts? In particular:

- A. Would issuance of a Department policy help to allay the concerns of tribal members who fear their use of eagle feathers as part of their religious or cultural practices may subject them to federal prosecution?**

- B. Would issuance of a Department policy provide useful clarification for tribal members who use eagle feathers in their religious or cultural practices?**

- C. Are there any terms used in the Morton Policy that should be clarified or defined if also used in a policy issued by the Department of Justice?**

The Department of Justice also welcomes comments and input on other aspects of the policy.

II. Development of New Federal and Tribal Training Program on Enforcement of Wildlife and Other Environmental Laws

The Department of Justice is developing, through its National Indian Country Training Initiative, a training program on enforcement of wildlife and pollution-control laws in Indian country.

Our goal is to develop a training program that will, among other things, promote federal-tribal partnerships in this area, foster communication between federal and tribal enforcement officials, and help build tribal capacity to assume additional responsibility for enforcement of such laws.

The National Indian Country Training Initiative is working with the Department's Environment and Natural Resources Division, Office of Tribal Justice, and several U.S. Attorneys' Offices, as well as with the Environmental Protection Agency and the Department of the Interior, to develop this training program.

We are seeking input from tribal leaders and organizations to ensure that the training meets the needs of tribal prosecutors, tribal law enforcement, and other tribal personnel. In addition, we wish to gauge the level of interest in this training program.

Request for Tribal Views

The training could address a broad range of issues related to the enforcement of laws protecting wildlife and prohibiting pollution on tribal lands.

To that end, the Department welcomes tribal input regarding which of the following topics would be of most interest to tribal personnel:

- Introduction to wildlife laws and the prosecution of wildlife crimes;
- Providing law enforcement officers and prosecutors with the tools for effective and culturally sensitive wildlife enforcement;
- Enforcement concerns related to use of eagle feathers;

- Development of tribal wildlife codes;
- Building and developing federal-tribal enforcement partnerships;
- Collecting evidence and preserving the sanctity of seized items;
- Application of Lacey Act and other federal wildlife and hunting/fishing laws on tribal lands;
- Forfeiture and related issues;
- Advanced investigative techniques in plant and animal cases;
- Introduction to pollution control law and enforcement;
- Case studies of environmental enforcement in Indian country;
- Technical support for environmental investigations; and
- Civil and criminal jurisdiction issues.

We also welcome input as to what additional topics should be included in the training program, what audiences would be most appropriate to include (e.g., prosecutors, law enforcement officers, wildlife and natural-resource administrators, etc.), and any other matters related to the development of the program.

Of course, in addition to this new training program, both the Department of Justice and the Department of the Interior recognize that continued training of *federal* officers on tribal issues — including respect for tribal concerns and sensitivity to tribal cultural and religious issues — is a critical part of ensuring appropriate enforcement of federal wildlife protection laws and of developing federal-tribal partnerships in this area. We also welcome tribal input as to what training on tribal issues is helpful for federal officers.

The Department of Justice looks forward to continuing our discussions on these important topics.

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For further inquiry or to submit comments, please contact the Department of Justice Office of Tribal Justice at (202) 514-8812.

October 2011

ATTACHMENT

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 employèes 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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