

## I. Introduction

Fearing incarceration, a Yakima Indian commits suicide while waiting prosecution for illegal possession of eagle feathers, items necessary to practice his religion.<sup>1</sup> Empathetic to the tribe's loss, the prosecuting United States Attorney takes several eagle feathers from the National Eagle Repository and drives to the reservation in order that the tribe may use the feathers in the deceased's burial ceremony. Unfortunately, he arrives too late for the ceremony to be performed.

The right to practice one's religion free from persecution is a fundamental right in the United States of America. Regrettably, it appears that Native Americans lack this basic privilege since their religious practices do not conform to Western religious concepts.<sup>2</sup> As a result, "there is something inherently evil in the system of a country, that was founded by people escaping religious persecution, that fills it's [sic] citizens with such fear that they kill themselves over what they consider to be a basic right of religious freedom."<sup>3</sup>

Regulatory federal statutes preclude Native Americans from exercising religious ceremonies that are central to their beliefs. Most notably, this paper focuses on the Bald and Golden Eagle Protection Act as an illustration of the inability of Native Americans to freely practice their religion.<sup>4</sup> The Act's burdensome permit process and court failure to provide

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<sup>1</sup> The story that follows the introduction is an excerpt from Brookie Craig, *Death of an Eagle*, available at <http://www.ilhawaii.net/~stony/lore39.htm> (2003) [hereinafter Craig].

<sup>2</sup> See generally Louis Fisher, Article, *Indian Religious Freedom: To Litigate or Legislate*, 20 Am. Indian L. Rev. 1 (2002) [hereinafter Fisher] (noting that the colonists that fled England so that they might practice their religion freely did not allow the Indians to continue tribal religious practices); see also Anastasia Winslow, Article, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 Ariz. L. Rev. 1291 (1996) (discussing that Native American practices were considered nonreligious and primitive according to Western concepts of religion).

<sup>3</sup> Craig, *supra* note 1.

<sup>4</sup> 16 U.S.C.S. § 668 (2003).

adequate relief threatens the demise of Indian culture. Consequently, it is necessary to reevaluate judicial arguments and look to Congress to protect the religious needs of Native Americans.

Part II of this paper explores the importance of the eagle in Native American culture and religion. In Part III, this paper discusses the regulatory measures used to protect the eagle from extinction and, consequently, from Native American use in religious ceremonies. Part IV demonstrates that courts strike down Native American challenges to the regulatory measures. However, Part IV also suggests that vital arguments still exist to challenge the prohibitions in a court of law. Finally, Part V proposes that Native Americans may be able to persuade Congress to pass legislation to accommodate their religious use of eagles and eagle feathers.

## II. The Importance of the Eagle in Native American Culture and as an American Symbol

The eagle is vital to the practice of Native American culture and religion. On the other hand, the eagle represents the American ideal of freedom. To fully comprehend the various arguments concerning the Bald and Golden Eagle Protection Act, it is necessary to evaluate the competing roles that eagles play in Native American culture and American society.

### A. The Eagle is Vital to Native American Religion and Culture

The eagle plays a vital role in Native American culture and is “necessary, irreplaceable, and indispensable to the practice of [their] religion;”<sup>5</sup> therefore, it is essential that the use of eagles and eagle feathers in Native American ceremonies be preserved.<sup>6</sup> Religiously, the eagle

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<sup>5</sup> Antonia M. DeMeo, *Access to Eagles and Eagle parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 Hastings Const. L.Q. 771 at 774 (1995) [hereinafter DeMeo] (discussing the history and religious use of eagles and eagle parts by Native Americans).

<sup>6</sup> *Id.*

occupies a position similar to the Bible or cross in Christian religions.<sup>7</sup> More specifically, Native American cultures view the eagle as a sacred messenger that allows them to communicate their prayers to the Creator:

According to Native American belief, humans and eagles were created on the same day. Eagles were specifically made so that people could use their feathers and other parts in religious ceremonies. A Medicine Man explains, “[e]very line on the feather tells a story or a vision that Creator gave to us to understand and what we need to know to survive on Mother Earth.” 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. Thus, eagle feathers or parts must be present at all Native American religious ceremonies; this is according to Native American religious custom and traditions and so that Native Americans may communicate with their Creator.<sup>8</sup>

Because the eagle is necessary to practice Indian religious beliefs, Native Americans exercise extreme caution when obtaining eagles and eagle feathers for sacred ceremonies.<sup>9</sup> Therefore, the undertaking of obtaining eagle feathers without harming the bird is difficult and most tribes describe the task as a sacred honor.<sup>10</sup>

According to Native American religious practices, many rituals begin by hunting eagles for use in holy ceremonies. If the eagle is alive when captured, the eagle receives shelter, food and water while Native Americans perform a special ceremony to honor the eagle.<sup>11</sup> If the eagle is deceased, a Grief and Mourning ceremony is performed to “allow the spirit of the eagle to

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<sup>7</sup> *Id.*; see also *Proposed Amendments to the American Indian Religious Freedom Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 103d Cong. (1993) [hereinafter Proposed AIRFA Amendments Hearing].

<sup>8</sup> DeMeo, *supra* note 5 at 774-775.

<sup>9</sup> *Id.* at 775 (noting that most tribes forbid members from harming or killing eagles when hunting eagles for eagle feathers).

<sup>10</sup> *Id.*; see also *The American Indian Religious Freedom Act: Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Nat'l Resources*, 103d Cong. (1993) [hereinafter AIRFA Hearing].

<sup>11</sup> DeMeo, *supra* note 5; see also Proposed AIRFA Amendments Hearing, *supra* note 7.

return to earth so that the eagle parts may be utilized in religious ceremonies.”<sup>12</sup> Once the preliminary customs are performed, the eagle or eagle feathers are available for use in Native American religious practices.

Native Americans use eagles and eagle feathers in “baptismal name-giving ceremonies, womanhood ceremonies, ceremonies for young men to become warriors, marriage ceremonies, burial ceremonies, healing ceremonies, and seasonal ceremonies.”<sup>13</sup> The Native American community believes that the role the eagle and eagle feathers play in each practice provides participants with good health and productive lives.<sup>14</sup> Further, the use of eagles and eagle feathers in healing ceremonies assist members in gaining atonement and reconciliation with their family and community; therefore, the use of eagle feathers is essential “to restore order and harmony within the afflicted person.”<sup>15</sup>

Culturally, eagles and eagle feathers play a vital role in Native American family units. Many Native American families view the eagle as a member of their clan that maintains the family unit when children obtain maturity and move out of the home.<sup>16</sup> Further, when family

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<sup>12</sup> DeMeo, *supra* note 5 at 776 (noting the 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”); *see also* Proposed AIRFA Amendments Hearing, *supra* note 7.

<sup>13</sup> DeMeo, *supra* note 5; *see also* AIRFA Hearing, *supra* note 10.

<sup>14</sup> DeMeo, *supra* note 5 at 776-777; *see also* AIRFA Hearing, *supra* note 10.

<sup>15</sup> DeMeo, *supra* note 5 at 777.

<sup>16</sup> *Id.*; *see also* Proposed AIRFA Amendments Hearing, *supra* note 7; the term “clan” is utilized by many Native Americans to denote their family units. Many times, the clan encompasses not only the immediate family, but the extended members, as well.

members pass away, the eagle is used “to send gifts, prayers, and messages to the deceased members in the spiritual world” to honor the departed.<sup>17</sup>

As a result, eagles and eagle feathers are vital to Native American religion and culture. Without eagles and eagle feathers, many Native American ceremonies and customs cannot be practiced. Therefore, “the future existence of traditional Native American lifestyle depends on Native American freedom to exercise their religion” through the use of eagles and eagle feathers “as they have since time immemorial.”<sup>18</sup>

#### B. The Eagle is a National Symbol

The bald eagle represents the American ideal of freedom. Noted for its longevity, great strength, and majestic looks, the eagle is embedded on coinage, paper money, stamps, and the United States’ Seal.<sup>19</sup> Author Maude M. Grant writes that the “eagle, full of the boundless spirit of freedom, living above the valleys, strong and powerful in his might, has become the national emblem of a country that offers freedom in word and thought and an opportunity for a full and free expansion into the boundless space of the future.”<sup>20</sup>

After declaring independence from Great Britain, the thirteen colonies adopted the bald eagle as the national symbol of the United States at the Continental Congress in 1782.<sup>21</sup> In order to preserve the unique status the eagle occupies in the United States, Congress passed the

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<sup>17</sup> Brent Gunson, Article, *Cultural Tug of Wars: An Analysis of the Legal Issues Involving the NPS Proposed Rule to Allow Taking of Golden Eagles at Wupatki National Monument for Religious Purposes*, 22 K. Land Resources & Envtl. L. 399 (2002) [hereinafter Gunson] (discussing the religious practices of the Hopi concerning the eagle).

<sup>18</sup> DeMeo, *supra* note 5 at 778.

<sup>19</sup> The Bald Eagle – An American Emblem, *available at* <http://www.baldeagleinfo.com/egale/eagle9.html> [hereinafter Bald Eagle Website] (discussing the history of the eagle in the United States).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; *see also* the Bald and Golden Eagle Protection Act, 16 U.S.C.S. 668 (2003) (enacting remarks of the Eagle Protection Act, June 8, 1940).

Eagle Protection Act in 1940: “the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom.”<sup>22</sup> Today, the eagle enjoys protective status under the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and the Endangered Species Act. Further, the eagle symbolizes honor and dignity in American society.<sup>23</sup>

### III. Protecting the Eagle

In the eighteenth century, the number of eagles inhabiting the United States varied between 300,000 to 500,000.<sup>24</sup> However, during the early part of the twentieth century, eagle populations began decreasing at an alarming rate.<sup>25</sup> By 1950, the number of eagles still alive in the United States fell to less than 10,000, and in 1960, estimates reported only 500 living eagles inhabited America.<sup>26</sup>

There are several factors that contribute to the rapid decline of eagle populations. First, land development and increasing human populations destroy eagle habitats and food sources “leaving them with fewer places to nest and hunt.”<sup>27</sup> Generally, eagles nest near large rivers and lakes in order to hunt fish.<sup>28</sup> Unfortunately, industries powered by water have led to “toxic

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<sup>22</sup> 16 U.S.C.S. § 668 (2003) (enacting clause of the Eagle Protection Act, June 8, 1940).

<sup>23</sup> Matthew Perkins, Chapter: *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?* 30 *Envtl. L.* 701 at 705 (2000) [hereinafter Perkins] (discussing the symbolism of the eagle in American society).

<sup>24</sup> “Bald Eagle, The U.S.A.’s National Symbol” *available at* <http://www.eagles.org/moreabout.html> (discussing the history of the Bald Eagle in the United States).

<sup>25</sup> Rebecca F. Wisch, *Detailed Discussion of the Bald and Golden Eagle Protection Act*, Animal Law Legal and Historical Web Center, SU-DCL (2002) *available at* [http://animallaw.info/articles/art\\_details/print.htm](http://animallaw.info/articles/art_details/print.htm) [hereinafter Wisch] (noting the development of the Eagle Protection Act to preserve eagle populations).

<sup>26</sup> *Supra* note 24.

<sup>27</sup> DeMeo, *supra* note 5 at 778.

<sup>28</sup> “The History of the Bald Eagle,” *available at* <http://www.baldeagleinfo.com/eagle/eagle11.html>.

pollution in rivers [and] mercury deposits in fish,” which affect eagle habitats and nutrition.<sup>29</sup> Also, the ingestion of crop pesticides such as dichloro-diphenyl-trichloroethane (DDT) cause many eagle deaths.<sup>30</sup> In addition, illegal shootings, pesticides, and electrocution from high voltage lines affect eagle mortality and reproduction.<sup>31</sup> Finally, the demand for eagle feathers in Native American art promotes a black market that results in increasing eagle homicides.<sup>32</sup>

Consequently, in order to protect and conserve the susceptible species, Congress saw it necessary to take action to shelter eagles from further harm. Therefore, the enactments of the Bald and Golden Eagle Protection Act (BGEPA), the Migratory Bird Treaty Act (MBTA), and the Endangered Species Act (ESA) represent a comprehensive congressional scheme to protect the eagle from illegal takings.

#### A. The Bald and Golden Eagle Protection Act

The Eagle Protection Act (EPA), enacted in 1940, represents Congress’s response to the threatened extinction of the bald eagle populations in the United States.<sup>33</sup> Today, the Act is entitled the Bald and Golden Eagle Protection Act (BGEPA) and seeks to protect and conserve bald and golden eagles throughout America.<sup>34</sup> As written, the BGEPA prohibits any person to knowingly “take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time in any manner, any bald eagle commonly known as the American eagle, or

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<sup>29</sup> *Id.*; see also Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 Nat. Resources J. 709 (1990) [hereinafter Boradiansky] (discussing eagle mortality generally).

<sup>30</sup> *Supra* note 24 (ingestion of DDT also causes premature egg hatching during incubation that brings about early demise); see also Wisch, *supra* note 25.

<sup>31</sup> DeMeo, *supra* note 5 at 779.

<sup>32</sup> DeMeo, *supra* note 5 at 779.

<sup>33</sup> 16 U.S.C.S. § 668 (2003).

<sup>34</sup> *Id.*

any golden eagle, alive or dead, or any part.”<sup>35</sup> In an effort to thoroughly protect the eagle from any taking, Congress defines “take” to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.”<sup>36</sup> Any person that violates the BGEPA is subject to a maximum criminal penalty of incarceration for one year and a fine of \$5,000.<sup>37</sup> Further, violators may be subject to a civil penalty of \$5,000, as well.<sup>38</sup>

Fortunately, the BGEPA does provide exceptions for scientific, exhibition or religious purposes:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes . . . or for the religious purposes of Indian tribes . . . he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to proscribe.<sup>39</sup>

Thus, at first glance, it appears Congress understands the importance eagles have in Native American religious practices. However, the permit process curtails the ability of Native Americans to perform their religious ceremonies.

#### 1. The Permit Process

The Secretary of the Interior (Secretary) promulgates the requirements to secure a permit under the BGEPA in Section 22.22 of the Code of Federal Regulations (CFR).<sup>40</sup> In order to

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at § 668c.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at § 668a.

<sup>40</sup> 50 C.F.R. § 22.22 (2003).

obtain a valid permit from the Secretary to take eagles or eagle feathers for religious purposes, an individual member of a federally recognized tribe must forward a written application to the Fish and Wildlife Service (FWS) for review.<sup>41</sup> Specifically, the application must state the applicant's full name, mailing address, telephone number, date of birth, height, weight, hair color, eye color, sex, and the location where the ceremony is to be performed.<sup>42</sup> Also, the application must contain the species and number of eagles or eagle feathers to be utilized in the ceremony, the name of the tribe with which the applicant is associated, and the name of the religious ceremony for which the parts are required.<sup>43</sup> Further, the applicant must attach a certification acknowledging the applicant's enrollment in a federally recognized tribe and, the tribal official, who is authorized to make the determination, must sign the certification.<sup>44</sup>

Once the application is submitted, the Regional Director of the FWS (Director) conducts a preliminary review to make sure the application is complete.<sup>45</sup> The Director then forwards the application to the Bureau of Indian Affairs (BIA) for certification of the applicant's status.<sup>46</sup> The BIA returns the application to the Director who conducts an investigation to determine whether the taking is compatible with the preservation of the bald and golden eagle.<sup>47</sup> In making its determination, the Director considers the direct and indirect effects the permit may have on the existing populations of bald and golden eagles and whether the individual member is an Indian

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<sup>41</sup> 50 C.F.R. § 13.11 (2003).

<sup>42</sup> § 13.12(a)(1), (2).

<sup>43</sup> § 22.22(a)(1-4).

<sup>44</sup> § 22.22(a)(5).

<sup>45</sup> See Perkins, *supra* note 23 at 706 (discussing the permit process generally).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

authorized to participate in the religious ceremony.<sup>48</sup> Further, the Director is obligated to disqualify the applicant if the applicant has a prior conviction, or any entry of a plea of guilty or nolo contendere for a felony violation of the MBTA or the BGEPA.<sup>49</sup> The Director may also disqualify the applicant if the applicant's prior permit was revoked by the FWS within the past five years, failed to pay the required fees for the application, or failed to submit a timely, accurate, and valid report for the permit.<sup>50</sup>

If the Director approves the application, a permit is issued to the applicant. The permit contains the time, date, place and method of taking, number and kind of wildlife, location of activity, and authorized transactions for the use of the eagle or eagle feathers.<sup>51</sup> Once the permit is issued, the applicant requests the eagle or eagle feathers from the National Repository in Denver, Colorado. 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. 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.”<sup>52</sup>

## 2. Problems with the Permit Process

Many problems associated with the BGEPA permit system makes it difficult for many Native Americans to obtain the requisite eagles or eagle feathers necessary to practice their religion and customs. First, time delays and supply problems are the major contributing factors

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<sup>48</sup> *Supra* note 40 at § 22.22(c)(1), (2).

<sup>49</sup> § 13.21(c)(1).

<sup>50</sup> § 13.21(c)(2) – (4).

<sup>51</sup> § 13.42.

<sup>52</sup> DeMeo, *supra* note 5 at 788 (discussing the problems with the permit process generally).

that make it difficult for many to comply with the federal permit scheme.<sup>53</sup> For instance, reports indicate that the permit process takes approximately one to five years to complete.<sup>54</sup> Further, understaffing of personnel to process applications contributes to more delays.<sup>55</sup> Finally, the number of applicants requesting the items is far greater than eagles and eagle parts available.<sup>56</sup>

Second, the eagles and eagle feathers received by Native American applicants are “frequently in ‘deplorable shape;’ tail and wing feathers may be broken, birds may be burnt or parts may be missing.”<sup>57</sup> Further, incorrect types of eagles or eagle feathers are sometimes sent.<sup>58</sup> Thus, the items received cause more delays in practicing certain ceremonies that require the use of a specific eagle type or part.<sup>59</sup>

Third, because the permit system lacks a priority system for processing applications, many Native Americans in need of eagles or eagle feathers to perform ceremonies within a certain period of time are without a means to obtain immediate access:

A burial ceremony must be performed within one week of the deceased’s death, 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 obtain in time for the religious ceremony. 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.<sup>60</sup>

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<sup>53</sup> *Id.* at 789; *see also* Proposed AIRFA Amendments Hearing, *supra* note 7; *see also* AIRFA Hearing, *supra* note 10.

<sup>54</sup> DeMeo, *supra* note 5.

<sup>55</sup> *Id.* (discussing the small staff is unable to timely fulfill the requests of applicants).

<sup>56</sup> *Id.*; *see also* AIRFA Hearing, *supra* note 10.

<sup>57</sup> DeMeo, *supra* note 5 at 790-791; *see also* AIRFA Hearing, *supra* note 10.

<sup>58</sup> DeMeo, *supra* note 5; *see also* Proposed AIRFA Amendments Hearing, *supra* note 7.

<sup>59</sup> DeMeo, *supra* note 5.

<sup>60</sup> *Id.* at 790; *see also* AIRFA Hearing, *supra* note 10.

Fourth, since tribes are sovereign nations, Native Americans believe that the permit process infringes on their sovereignty.<sup>61</sup> In this manner, the United States is regulating the practice of Native American religion “while the rest of the Americans enjoy and take for granted their rights to worship freely.”<sup>62</sup> Finally, Native Americans argue that the United States discriminates against them by enforcing and prosecuting more Native American violators under the BGEPA than non-Native Americans.<sup>63</sup>

As a result of the problems associated with the permit process, including the “degrading act of requesting permission to practice one’s religion and subsequently having FWS investigate the request to determine if the reported religious ceremony is legitimate,” many Native Americans are hindered from practicing their religion, culture, and tradition.<sup>64</sup>

#### B. The Migratory Bird Treaty Act

Enacted on July 3, 1918, the Migratory Bird Treaty Act (MBTA) codifies treaties between the United States, Great Britain, Canada, Mexico, and Japan by making it unlawful “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill” migratory birds.<sup>65</sup> The MBTA prohibitions include the regulation of the bald and golden eagles.<sup>66</sup> Although regulatory violations of the MBTA result in misdemeanor offenses, persons that violate the statute are

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<sup>61</sup> DeMeo, *supra* note 5; *see also* Proposed AIRFA Amendments Hearing, *supra* note 7.

<sup>62</sup> DeMeo, *supra* note 5 at 793-794; *see also* Proposed AIRFA Amendments Hearing, *supra* note 7.

<sup>63</sup> DeMeo, *supra* note 5 at 793.

<sup>64</sup> Perkins, *supra* note 23 at 707.

<sup>65</sup> 16 U.S.C.S. § 703 (2003).

<sup>66</sup> 50 C.F.R. § 10.13 (2003).

subject to felony criminal prosecutions for a maximum penalty of two years incarceration and a \$2,000 fine.<sup>67</sup>

However, the MBTA permits the Secretary to establish regulations that allow the taking of migratory birds.<sup>68</sup> Most notably, Section 712 directs the Secretary to issue regulations to “assure the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska . . . for their own nutritional and other essential needs.”<sup>69</sup> Unfortunately, the permit regulations, the same as those under the BGEPA, are extensive, complicated and burdensome causing many Native Americans to disobey the law and suffer penalties “to remain faithful to their religion, culture, and tradition.”<sup>70</sup> Further, it is important to note that the MBTA does not provide an express exception for the use of eagles or eagle feathers in Native American religious ceremonies making it more difficult to obtain the requisite items to practice their religion.<sup>71</sup>

### C. The Endangered Species Act

Passed on December 28, 1973, the Endangered Species Act (ESA) declares the policy of Congress to conserve threatened and endangered species.<sup>72</sup> Specifically, Section 1538 states that it is unlawful to import, export, take, possess, sell, “deliver, carry, transport or ship” an

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<sup>67</sup> 16 U.S.C.S. § 707(a), (b)(2).

<sup>68</sup> 16 U.S.C.S. § 704 (2003).

<sup>69</sup> 16 U.S.C.S. § 712.

<sup>70</sup> Gunson, *supra* note 17 at 409.

<sup>71</sup> DeMeo, *supra* note 5 at 782.

<sup>72</sup> 16 U.S.C.S. § 1531 (2003).

endangered species.<sup>73</sup> The Act defines an “endangered species” as any “species which is in danger of extinction throughout all or a significant portion of its range.”<sup>74</sup> Currently, most states list the bald eagle as an endangered species.<sup>75</sup> In those states that do not list the bald eagle as an endangered species, the eagle is classified as threatened.<sup>76</sup>

Any person that violates the ESA is subject to a maximum criminal penalty of incarceration for one year and a fine of \$50,000.<sup>77</sup> Further, violators may be subject to a civil penalty of \$25,000 for each taking, as well.<sup>78</sup>

Similar to the BGEPA and the MBTA, the ESA allows the Secretary to permit takings of endangered species for scientific purposes; however, the ESA does not provide an exception for the use of birds or feathers in religious ceremonies.<sup>79</sup> Thus, Native Americans have no remedy for obtaining eagles or eagle feathers under the ESA for religious purposes.

#### IV. Challenging the Bald and Golden Eagle Protection Act

Native Americans lack the freedom to practice their religion and customs due to the prohibitions under the BGEPA, the MBTA, and the ESA. This paper focuses on judicial arguments that may be used to invalidate the BGEPA as unconstitutional since the Act is the only regulatory federal statute that permits Native Americans to take eagles for religious

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<sup>73</sup> *Id.* at § 1538.

<sup>74</sup> *Id.* at § 1532(6).

<sup>75</sup> DeMeo, *supra* note 5 at 783.

<sup>76</sup> *Id.*

<sup>77</sup> 16 U.S.C.S. § 1540(b).

<sup>78</sup> § 1540(a).

<sup>79</sup> DeMeo, *supra* note 5 at 784.

purposes. The federal permit process under the BGEPA curtails the ability of Native Americans to perform their religious ceremonies in a beneficial manner causing many to violate the law in order to practice their religion. Consequently, Native Americans must find useful arguments to invalidate the Act as unconstitutional.

#### A. The Treaty Rights Challenge

Although the Supreme Court foreclosed any opportunity for a Native American to utilize a treaty argument in *Dion*, originally, the treaty rights challenge represented a viable argument to assert that the BGEPA did not apply to a Native American, hunting eagles, on his reservation.<sup>80</sup> Basically, the argument states that Native Americans have a treaty right to hunt eagles on their land for use in religious ceremonies.<sup>81</sup> Nevertheless, when Congress expressly states, it may abrogate a tribe's hunting and fishing rights by exercising its plenary power.<sup>82</sup> However, when the BGEPA was enacted, Congress failed to expressly state whether the treaty rights of Native Americans to hunt eagles on their reservation were abrogated; therefore, courts grappled "with the issue of whether the Eagle Act implicitly [modifies] those hunting rights afforded to Indians by virtue of treaty."<sup>83</sup>

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<sup>80</sup> See *US v. Dion*, 476 U.S. 734 (1986) (holding that the BGEPA abrogates the rights of tribes to hunt eagles under their treaties).

<sup>81</sup> The right to hunt on reservations is reserved to tribes in most treaties with the United States; see generally Treaty with the Wyandot, Delaware, Chippawa and Ottawa Nations, 7 Stat. 16 (Jan. 21, 1785) available at [http://www.utulsa.edu/law/classes/rice/Treaties/07\\_State\\_016\\_WYANDOT,%20ETC.htm](http://www.utulsa.edu/law/classes/rice/Treaties/07_State_016_WYANDOT,%20ETC.htm) (Article Four of the treaty declares the right of the Indians to hunt on their land).

<sup>82</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress has "plenary authority over the tribal relations of Indians . . . [when], therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress"); see also *US v. Kagama*, 118 U.S. 375 (1886) (Congress has plenary authority to abrogate treaties).

<sup>83</sup> Wisch, *supra* note 25.

In *White*, the Eighth Circuit held that the BGEPA does not explicitly abrogate or modify the treaty hunting rights of Native Americans.<sup>84</sup> Although the government pointed to the religious use exception in the BGEPA as evidence of congressional intent to abrogate the hunting rights of tribes, the court was not convinced.<sup>85</sup> Focusing on the congressional silence in creating the exception and the determination made by the Department of the Interior (DOI) that a Native American is not subject to the provisions of the BGEPA while on his reservation, the court found that Congress did not intend to abrogate the right of tribes to hunt eagles on their reservations.<sup>86</sup>

In *Fryberg*, the Ninth Circuit reached the opposite result. In holding that the BGEPA explicitly abrogated treaty hunting rights to take eagles on reservations, the court interpreted the legislative history and surrounding circumstances of the BGEPA different from the Eighth Circuit.<sup>87</sup> The Ninth Circuit opined that Native Americans hunt eagles for religious uses rather than subsistence or commercial purposes.<sup>88</sup> Therefore, the creation of the BGEPA religious use exception demonstrated congressional intent to modify Native American treaty rights: “[The] continued congressional tightening of the Act to avoid extinction of the bald eagle is a further indication that Congress intended to prohibit all threats to the bald eagle without regard to the existence of treaty hunting rights.”<sup>89</sup>

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<sup>84</sup> *US v. White*, 508 F. 2d 453 (8<sup>th</sup> Cir. 1974).

<sup>85</sup> *Id.* at 458.

<sup>86</sup> *Id.*

<sup>87</sup> *US v. Fryberg*, 622 F.2d 1010 (9<sup>th</sup> Cir. 1980).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1016.

In contrast, the New Mexico District Court held that the BGEPA did not abrogate the Pueblo Indian treaty right to hunt eagles on their reservation.<sup>90</sup> Relying on the Treaty of Guadalupe Hildago, the court found that the United States guaranteed the Pueblos that their religious rights would be respected.<sup>91</sup> As a result, the court agreed with the Eighth Circuit in *White* and found no explicit congressional intent to abrogate the Pueblo treaty right to hunt eagles.<sup>92</sup> Therefore, the court concluded that Congress did not intend to repudiate its earlier treaty to honor the religious freedom of the Pueblos because Congress failed to clearly indicate its intention in enacting the BGEPA.<sup>93</sup>

In 1986, the United States Supreme Court resolved the conflicts among the lower courts by holding that the BGEPA abrogated the Native American treaty right to hunt eagles.<sup>94</sup> According to the Court, treaty abrogation is apparent where congressional intent is “clear and plain.”<sup>95</sup> Looking to an express declaration from Congress, the legislative history, and the surrounding circumstances of the enactment of the BGEPA, the Court found congressional intent to abrogate the treaty hunting right for eagles.<sup>96</sup> As evidence of its determination, the Court opined that the religious use exception found on the face of the BGEPA strongly suggested an intent to abrogate Indian treaty rights to hunt eagles: “the provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a

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<sup>90</sup> *US v. Abeyta*, 632 F. Supp. 1307 (D. N.M. 1986).

<sup>91</sup> *Id.* at 1307.

<sup>92</sup> *Id.* at 1306.

<sup>93</sup> *Id.* at 1307.

<sup>94</sup> *US v. Dion*, 476 U.S. 734 (1986).

<sup>95</sup> *Id.* at 738.

<sup>96</sup> *Id.*

reflection of an understanding that the statute otherwise bans the taking of eagles by Indians.”<sup>97</sup>

Further, the Court found that the legislative history indicated that the exception was created because of congressional awareness of the necessity of Native American use of eagles and eagle feathers in religious ceremonies.<sup>98</sup> Therefore, the Court held that Congress abrogated the rights of Indians to take eagles in passing the BGEPA.<sup>99</sup> Consequently, the Court eliminated any future challenges to the BGEPA based on the treaty rights argument.

## B. First Amendment Challenge: Religious Freedom

Because the *Dion* Court forecloses any future treaty rights arguments under the BGEPA, Native Americans must search for alternative arguments to invalidate the Act. One such argument may be a religious freedom challenge. Although the religious freedom tests applicable to the federal government are currently unclear, the claim may prove to be a vital argument for Native Americans to use to invalidate the Act. In order to comprehend the ambiguity surrounding the current religious freedom tests, it is necessary to review precedent religious freedom cases.

### 1. Background

Originally, when a person invoked a religious freedom challenge, the government had to demonstrate that it had a compelling interest in burdening religious practices. First articulated in *Sherbert*, the compelling interest test stated that the government may burden a person’s religious

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<sup>97</sup> *Id.* at 740.

<sup>98</sup> *Id.* at 741.

<sup>99</sup> See Perkins, *supra* note 23 (noting that the decision in *Dion* represents a significant blow to future Native American challenges under the Act).

practices if the government has a compelling interest and the means employed to accomplish that interest are the least restrictive possible.<sup>100</sup> Therefore, if the government cannot justify a compelling interest to satisfy the substantial infringement on a person's right to freely exercise his religion, courts will strike the burdened law down.<sup>101</sup>

The Court clarified the compelling interest test in *Wisconsin v. Yoder*.<sup>102</sup> In *Yoder*, the Court had to determine whether Wisconsin's imposition of criminal penalties on the parents of Amish children for failing to send their children to school past eighth grade are compelling to burden the religious practices of the Amish.<sup>103</sup> Although the Court opined that the regulation is neutral on its face and motivated by secular concerns, the Court held that such application "offend[s] the constitutional requirements for governmental neutrality [in that] it unduly burdens the free exercise of religion."<sup>104</sup> Unable to find a compelling interest, the Court found the statute to be unconstitutional.<sup>105</sup>

Consequently, the compelling interest test brought success to Native American religious freedom challenges to the BGEPA. For instance, in *Abeyta*, the New Mexico District Court found that the government failed to demonstrate a compelling interest in protecting golden eagles under the BGEPA.<sup>106</sup> The court noted that the golden eagle is not an endangered species and that

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<sup>100</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963) (also noting that where "the purpose or effect of a law" impedes a religion or discriminates between religions, such a law "is constitutionally invalid").

<sup>101</sup> *Id.* at 406.

<sup>102</sup> 406 U.S. 205 (1972).

<sup>103</sup> *Id.* at 207.

<sup>104</sup> *Id.* at 220.

<sup>105</sup> *Id.*

<sup>106</sup> *U.S. v. Abeyta*, 632 F. Supp. 1301 (N.M.D. 1986).

some eagles may be taken without harming the remaining population.<sup>107</sup> Further, the court opined that even if a compelling interest exists, the BGEPA permit process did not represent the least restrictive means of pursuing that interest: the permit process is “cumbersome, intrusive, and demonstrates a palpable insensitivity to Indian religious beliefs.”<sup>108</sup> As a result, Native Americans were successful in challenging the BGEPA by utilizing the compelling interest test. Unfortunately, the Supreme Court departed from the test two years later.

In *Lyng*, the Court had to determine whether the free exercise of religion prohibits the government from constructing a road through Native American sacred sites.<sup>109</sup> The Court found that the road does not prohibit the religious practices of Native Americans; therefore, the Court stated that the *Sherbert* test does not require the government to put forth a compelling interest for neutral laws of general applicability.<sup>110</sup>

The holding of *Lyng* was clarified in *Smith*. The Court in *Smith* decided that the Free Exercise Clause permits the State of Oregon to deny unemployment benefits to Native Americans who were terminated from employment for using peyote during religious ceremonies.<sup>111</sup> In rejecting the compelling interest test, the Court stated that “if ‘compelling interest’ really means what its says . . . many laws would not meet the test. Any society adopting such a system would be courting anarchy . . . [The rule] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every kind.”<sup>112</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1307.

<sup>109</sup> *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

<sup>110</sup> *Id.* at 453.

<sup>111</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>112</sup> *Id.*

Because an individual’s religious beliefs may excuse him from compliance with an otherwise valid law, the Court held that neutral laws of general applicability may burden religion incidentally.<sup>113</sup>

In recognizing that the Court eliminated the governmental requirement to justify neutral laws that burden religious exercise, Congress acted to restore the compelling governmental interest test in 1993 by enacting the Religious Freedom and Restoration Act (RFRA).<sup>114</sup> Finding that neutral laws “may burden religious exercise” and that “governments should not substantially burden religious exercise without compelling justification,” Congress enacted the RFRA to guarantee the compelling interest test application to religious free exercise claims.<sup>115</sup> Therefore, the RFRA provided a “claim or defense to persons whose religious exercise is substantially burdened by government.”<sup>116</sup>

In *City of Boerne*, the Court invalidated the RFRA holding that Congress exceeded its authority to enforce the due process and equal protection clauses under the Fourteenth Amendment.<sup>117</sup> The Court found that imposing a compelling interest test on a *state* when an individual’s religious freedom is substantially burdened by a neutral rule of general applicability, is disproportionate to the injury suffered and improperly legislates a change in substantive rights.<sup>118</sup> As a result, the Court ruled that the RFRA is unconstitutional.

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<sup>113</sup> *Id.* at 886.

<sup>114</sup> 42 U.S.C. § 2000bb(a)(4).

<sup>115</sup> § 2000bb(b).

<sup>116</sup> § 2000bb(b)(2).

<sup>117</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) [hereinafter *City of Boerne*]; see also Kathryn S. Kanda, Article, *Validity and Application of the Religious Freedom Restoration Act in the Tenth Circuit after City of Boerne v. Flores*, 79 Denv. U.L. Rev. 295 at 307 (2002) [hereinafter Kanda] (discussing the extent to which the Court invalidated the RFRA).

<sup>118</sup> *City of Boerne*, *supra* note 117 at 520 (emphasis added).

However, the extent to which the Court invalidated the RFRA “remains cloudy in that the *City of Boerne* opinion repeatedly refers to [the] RFRA’s impact on state laws.”<sup>119</sup> For instance, the Court stated that the RFRA requirement that “a *State* demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.”<sup>120</sup> Also, the Court declared that the RFRA “is a considerable congressional intrusion into the *States’* traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>121</sup> Further, the Court found that the RFRA imposes “a heavy litigation burden on the *States* and . . . [curtails] their traditional general regulatory power.”<sup>122</sup> Consequently, the repeated assertions to the RFRA’s impact on state laws suggest that the RFRA compelling interest test continues to apply to federal governmental actions. In this manner, commentators argue that the RFRA is invalid as applied to states because Congress lacks the power to enact such a requirement under section 5 of the Fourteenth Amendment; however, “Congress does not enact legislation regulating the *federal* government pursuant to section 5 of the Fourteenth Amendment.”<sup>123</sup> As a result, some courts are using the RFRA compelling interest test in analyzing religious claims against the federal government if the claimant alleges a RFRA claim.<sup>124</sup>

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<sup>119</sup> Kanda, *supra* note 117 at 307 (2002).

<sup>120</sup> *City of Boerne*, *supra* note 117 at 534 (emphasis added).

<sup>121</sup> *Id.* (emphasis added)

<sup>122</sup> *Id.* (emphasis added)

<sup>123</sup> See *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9<sup>th</sup> Cir. 1999) (discussed *infra* p. 45-46); see also Erwin Chemerinsky, Symposium, *Reflections on City of Boerne v. Flores: The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 Wm and Mary L. Rev. 601 (1998) (discussing the constitutionality of RFRA after the Court’s invalidation of the statute in *City of Boerne*); see also Thomas Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. Ark. Little Rock L.J. 715, 728 (1998) (RFRA still applies to federal law).

The Eighth Circuit recently applied the RFRA compelling interest test to a federal district court order that allowed a bankruptcy trustee to recover tithes from a church that the trustee characterized as a fraudulent transfer of funds.<sup>125</sup> Noting that the *City of Boerne* Court did not “reach any decision as to the constitutionality of [the] RFRA as applied to federal law,” the Eighth Circuit determined that the RFRA is valid law as applied to the federal government based on the enumerated powers of Congress under Article I of the Constitution.<sup>126</sup> Consequently, the Eighth Circuit held that the district court order violates the RFRA and allowed the church to keep the funds.<sup>127</sup>

In *Sutton*, the Ninth Circuit followed the Eighth Circuit’s reasoning and held that the RFRA compelling interest test applies to federal laws.<sup>128</sup> Sutton’s employer refused to hire him after Sutton failed to provide his social security number for employment forms because of religious reasons.<sup>129</sup> Subsequently, Sutton sued his employer under the RFRA.<sup>130</sup> Looking to the Supreme Court’s opinion in *City of Boerne*, the Ninth Circuit determined that the Court invalidated the RFRA as applied to state and local laws.<sup>131</sup> Therefore, although the court dismissed the RFRA claim since Sutton could not “state a valid claim under [the] RFRA against

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<sup>124</sup> See *US v. Wilgus*, 2001 U.S. App. LEXIS 17700 (10<sup>th</sup> Cir. 2001) (stating that the RFRA analysis only applies when the claimant alleges a RFRA claim); see also *US v. Hardman*, 2001 U.S. App. LEXIS 17702 (10<sup>th</sup> Cir. 2001) (stating that a RFRA claim must be raised by the party before its analysis is employed).

<sup>125</sup> *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8<sup>th</sup> Cir. 1998).

<sup>126</sup> *Id.* at 858 – 859.

<sup>127</sup> *Id.*

<sup>128</sup> *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9<sup>th</sup> Cir. 1999).

<sup>129</sup> *Id.* at 829 – 830.

<sup>130</sup> *Id.* at 830.

<sup>131</sup> *Id.* at 831 – 833.

a private employer,” the court held that the RFRA compelling interest test continues to apply to federal actions.<sup>132</sup>

Likewise, the Tenth Circuit applied the RFRA analysis in *Kikumura*.<sup>133</sup> *Kikumura*, an inmate in the United States Penitentiary, brought a RFRA action after the federal prison warden denied his request for pastoral visits.<sup>134</sup> Determining that the *City of Boerne* Court only focused its analysis on “Congress’ remedial powers to enforce the Fourteenth Amendment against states and local authorities,” the Tenth Circuit held that the RFRA is not “unconstitutional as applied to the federal government.”<sup>135</sup> Therefore, the court remanded the case to the district court to determine whether the government’s interest is compelling under the RFRA.<sup>136</sup>

## 2. The BGEPA and the RFRA Compelling Interest Test

Because it appears that the RFRA compelling interest test continues to apply to federal laws, it is important to analyze its impact on the BGEPA. The following cases illustrate the courts’ willingness to use a RFRA analysis to protect and preserve Native American religious practices under the BGEPA.

In *Saenz*, the Tenth Circuit held that the RFRA analysis invalidates the federally recognized tribal membership requirement under the BGEPA permit process.<sup>137</sup> *Saenz*, a

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<sup>132</sup> *Id.*

<sup>133</sup> *Kikumura v. Hurley*, 242 F.3d 950 (10<sup>th</sup> Cir. 2001).

<sup>134</sup> *Id.* at 953 – 954.

<sup>135</sup> *Id.* at 958 – 959.

<sup>136</sup> *Id.* at 962.

<sup>137</sup> *Saenz v. Dep’t of the Interior*, 2001 U.S. App. LEXIS 17698 at (10<sup>th</sup> Cir. 2001).

member of a non-federally recognized tribe, possessed eagle feathers for religious practices.<sup>138</sup> Unfortunately, New Mexico state officials seized the feathers from Saenz because he did not have a permit for them.<sup>139</sup> Because the BGEPA only grants permits to members of federally recognized tribes, Saenz brought an action in federal court arguing that the federal government burdened his free exercise of religion.<sup>140</sup> The Tenth Circuit determined that membership in a federally recognized tribe “bears no relationship whatsoever to whether or not an individual practitioner is of Indian heritage by birth, sincerely holds and practices traditional Indian religious beliefs, is dependent on eagle feathers for the expression of those beliefs, and is substantially burdened when prohibited from possessing eagle parts.”<sup>141</sup> Therefore, in utilizing the RFRA compelling interest test, the Court found that the federally recognized tribal membership requirement in the BGEPA regulations fails to serve a compelling interest.<sup>142</sup>

In reaching a contrary result, the Eleventh Circuit utilized the RFRA test in *Gibson* to hold that the federally recognized tribal membership requirement serves a compelling governmental interest in preserving treaty commitments to tribes.<sup>143</sup> After being denied a federal permit to possess eagles because he was not a member of a federally recognized tribe, Gibson brought an action under the RFRA claiming that the government’s refusal violates his rights.<sup>144</sup> The Eleventh Circuit determined that the limitation of eagles and eagle parts to federally

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<sup>138</sup> *Id.* at 2.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 21.

<sup>142</sup> *Id.* at 27.

<sup>143</sup> *Gibson v. Babbitt*, 223 F.3d 1256 (11<sup>th</sup> Cir. 2000).

<sup>144</sup> *Id.* at 1257.

recognized tribes is “the least restrictive means of furthering the United States’ treaty obligations” due to the evidentiary support that “the demand for eagle parts exceed the supply.”<sup>145</sup> Thus, the federally recognized tribal membership requirement serves a compelling governmental interest under the RFRA.<sup>146</sup>

Both *Saenz* and *Gibson* demonstrate that the federal courts are willing to apply the RFRA analysis to preserve Native American religious practices although the cases reach opposite results. Therefore, because the RFRA continues to apply to federal laws, Native Americans may be able to successfully challenge the BGEPA permit process. Currently, no court has been faced with the issue of whether the permit process as a whole is the least restrictive means in accomplishing the federal government’s interest in preserving the eagle. Consequently, as in *Abeyta*, Native Americans may argue that the BGEPA permit process is not the least restrictive process since it is “cumbersome, intrusive, and demonstrates a palpable insensitivity to Indian religious beliefs.”<sup>147</sup> By arguing that the government may accomplish its goal of preserving the eagle in a least restrictive manner by allowing tribes to act as enforcement, repository, and disbursement agents, Native Americans may be able to invalidate the BGEPA permit process under a religious freedom claim.<sup>148</sup>

### C. The Trust Doctrine Challenge

Because the Court failed to establish the extent of the RFRA’s invalidity in *City of Boerne*, the trust doctrine may prove to be an alternative argument that could be used by Native

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See supra* note 106 at 1307.

<sup>148</sup> *See infra* p. 46 for a more thorough explanation of tribes acting as enforcement, repository and disbursement agents.

Americans to invalidate the BGEPA. The trust doctrine states that the federal government owes a fiduciary obligation to Native Americans in protecting tribal resources and culture.<sup>149</sup>

Regrettably, application of the doctrine varies based on the current federal governmental policy toward Indian tribes.<sup>150</sup> However, because recent federal policy promotes tribal self-determination, Native Americans may be able to succeed in challenging the BGEPA using the trust doctrine.

## 1. Background

The trust doctrine originated in the early treaties between the United States and the tribes.<sup>151</sup> Although the treaties recognized the sovereignty of the tribes, the treaties “also contained express assurances that the federal government would ‘protect’ the tribes . . . by restraining local governments and white settlers from intruding upon native territories and sovereignty.”<sup>152</sup> For instance, an 1868 treaty with the Cheyenne states that “if bad men among the whites . . . subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States . . . will cause the offender to be . . . punished according to the laws of the United States.”<sup>153</sup> This provision demonstrates the

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<sup>149</sup> See generally Mary Wood, Article, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994) [hereinafter Wood] (the author argues that the term “trust doctrine” is a court developed common law doctrine to enforce the trustee role of the United States towards the tribes; I use the term “trust doctrine” to represent not only the court doctrine to enforce the trustee role of the United States but also in discussing the history leading up to the court created doctrine); see also Nell Newton, Article, *Federal Power over Indians: Its Source, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984) [hereinafter Newton] (discussing the trust doctrine generally).

<sup>150</sup> See Perkins, *supra* note 23.

<sup>151</sup> Wood, *supra* note 149 at 1496.

<sup>152</sup> *Id.* at 1497 – 1498 (characterizing this early relationship between the United States and the tribes as the sovereign trusteeship model).

<sup>153</sup> Treaty with the Northern Cheyenne and Northern Arapahoe, May 10, 1868, art. I, 15 Stat. 655.

willingness of the federal government to protect tribal resources and culture from intruding white populations.

The duty of the federal government to protect tribes from encroaching non-Indian settlers was codified by the Trade and Intercourse Acts and the Northwest Ordinance.<sup>154</sup> The Trade and Intercourse Acts “prohibited non-Indians from entering Indian territories, provided for the removal of intruders, regulated white man’s trade with the tribes, and denied non-Indians and local governments the right to purchase Indian lands.”<sup>155</sup> The Northwest Ordinance stated that the United States must practice “utmost good faith” towards the tribes by enacting laws that prevent “wrongs from being done to them.”<sup>156</sup> Both acts demonstrate a federal duty to protect tribal resources and culture.

Court enforcement of the trust doctrine first appeared in the landmark case *Cherokee Nation v. Georgia*.<sup>157</sup> By characterizing Indian tribes as domestic dependent nations, the Court held that the federal government has a trust duty to protect tribal interests: “they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>158</sup> Therefore, the federal government owes Native Americans a fiduciary obligation in protecting tribal resources and culture.

In *Worcester*, the Court reiterated the duty of the federal government to protect tribal land and resources.<sup>159</sup> Classifying tribes as “distinct political communities,” the Court held that

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<sup>154</sup> Newton, *supra* note 149 at 201.

<sup>155</sup> Wood, *supra* note 149 at 1498-1499.

<sup>156</sup> *Id.* at 1499; *see also* Northwest Ordinance of 1787, art. III.

<sup>157</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>158</sup> *Id.* at 27.

<sup>159</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

although Indian tribes retain inherent authority within their territorial boundaries that is “not only acknowledged, but guaranteed [SIC] by the United States,” Indian tribes submit to the protection of the federal government.<sup>160</sup> Consequently, the federal government must preserve and protect tribal interests.

In 1886, the Court withdrew from the original interpretation of the trust doctrine as laid out in the Cherokee cases. Concurrently, congressional policy toward Indian tribes began favoring assimilation into American culture.<sup>161</sup> Because of the federal policy of assimilation, “Indian conditions worsened dramatically . . . creating an entrenched dependency relationship with the federal government.<sup>162</sup> As a result, in *Kagama*, the Court held that the Major Crimes Act,<sup>163</sup> which mandates federal criminal jurisdiction for major crimes committed on Indian reservations, is a valid exercise of congressional power in acting in the best interest of the tribe as trustee.<sup>164</sup> In other words, the Court was stating that the power of the federal government “over these remnants of a race once powerful” is “necessary to their protection, as well as to the safety of those among whom they dwell.”<sup>165</sup> Therefore, the Court established congressional plenary power “under which the government subjects tribes to complete federal authority” in order to protect and preserve tribal interests in keeping with the trust responsibility owed to the tribes.<sup>166</sup>

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<sup>160</sup> *Id.* at 557.

<sup>161</sup> William C. Canby, Jr., *American Indian Law in a Nutshell* at 123 (1998) (discussing the various federal Indian policies) [hereinafter Canby].

<sup>162</sup> Wood, *supra* note 149 at 1501-1502.

<sup>163</sup> 18 U.S.C. § 1153.

<sup>164</sup> *US v. Kagama*, 118 U.S. 375 (1886).

<sup>165</sup> *Id.* at 384.

The trust doctrine soon became the most powerful source for Congress to act “in respect to the care and protection of the Indians.”<sup>167</sup> For instance, during the allotment period in the early twentieth century, the federal government violated treaty provisions by allotting reservation land to individual Indian members and selling the surplus to white homesteaders.<sup>168</sup> In *Lone Wolf*, the Court upheld the power of Congress to abrogate treaties in order to accomplish its federal policy so long as the abrogation was “consistent with perfect good faith towards the Indians.”<sup>169</sup> Consequently, the Court “reduced the trust obligation to a selfpolicing code of good behavior on the part of Congress toward the Indians.”<sup>170</sup>

However, in 1980, the Court used the trust doctrine to constrain the power of Congress towards Indian tribes.<sup>171</sup> Concurrently, the federal government promoted a policy of tribal self-determination by permitting “the tribes to manage their affairs with a maximum degree of autonomy.”<sup>172</sup> Court support for this policy was established in *United States v. Sioux Nation of Indians*.<sup>173</sup> In that case, the Court used the trust doctrine to hold that the United States violated its fiduciary obligations to the tribe by taking treaty-guaranteed land without fair compensation.<sup>174</sup> As a result, the Court did away with the good faith presumption established in

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<sup>166</sup> See Perkins, *supra* note 23 at 717; see also Newton, *supra* note 135 (discussing in detail the Congress’s plenary authority in dealings with Indian tribes).

<sup>167</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553 at 564 (1903).

<sup>168</sup> Canby, *supra* note 161 at 20 (analyzing the various federal policies towards Indians).

<sup>169</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 at 568 (1903).

<sup>170</sup> Wood, *supra* note 149 at 1509.

<sup>171</sup> *Id.*

<sup>172</sup> Canby, *supra* note 161 at 30.

<sup>173</sup> 448 U.S. 371 (1980).

<sup>174</sup> *Id.*; see also Wood, *supra* note 149 at 1509-1510 (discussing the case in detail).

*Lone Wolf* and suggested that congressional actions towards Indians are no longer absolute.<sup>175</sup> Therefore, the Court interpreted the trust doctrine in support of the current federal policy of promoting tribal sovereignty by removing the barriers put in place by the allotment and assimilation period.

Generally, the trust doctrine is invoked to compel the government to protect tribal lands and resources. For instance, the First Circuit, in *Passamaquoddy Tribe*, held that the trust doctrine requires the United States to file suit on behalf of a tribe to recover unlawful ceded tribal lands.<sup>176</sup> Also, in *White Mountain Apache*, the Court found that the trust doctrine is breached when the federal government fails to properly manage tribal trust land: “a fiduciary actually administering trust property may not allow it to fall into ruin under his watch.”<sup>177</sup> Likewise, the *Seminole Nation* Court determined that the trust doctrine applies to federal management of trust funds on behalf of tribes.<sup>178</sup> Finally, in *Mitchell*, the Court declared that the federal government breached its trust obligation by mismanaging timber on tribal lands.<sup>179</sup>

However, the current trend also shows the willingness of the judiciary to apply the trust doctrine to other Indian claims, as well.<sup>180</sup> As such, because courts are willing to interpret the trust doctrine in favor of current federal Indian policy, a trust doctrine challenge to the BGEPA may be successful in that current federal Indian policy is to promote tribal sovereignty.<sup>181</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 371 (1<sup>st</sup> Cir. 1975).

<sup>177</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465 at 475 (2003).

<sup>178</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

<sup>179</sup> *United States v. Mitchell*, 463 U.S. 206 (1983)

<sup>180</sup> *Infra* notes 182 and 186.

<sup>181</sup> *Id.* at 720.

## 2. Applying the Trust Doctrine to Religious Claims Today

Today, the current federal policy is to promote tribal government and the courts are interpreting the trust doctrine in accordance with federal policy. Recently, the First and Fifth Circuits applied the trust doctrine to defend Native American religious practices. For instance, the Fifth Circuit used the trust doctrine to hold peyote exemption statutes constitutional for Indian religious practices.<sup>182</sup> In *Peyote Way*, the court had to determine whether statute exemptions for Native Americans to possess peyote during religious practices are a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>183</sup> After the Texas legislature and the federal government passed statutes exempting Native American Church members from violations of criminal peyote laws, members of the Peyote Way Church brought an action to declare the Texas and federal statutes as a violation of Equal Protection.<sup>184</sup> Relying on the “governmental objective of preserving Native American culture,” the Court found that the “governmental objective in preserving Native American culture” legitimized the exemption to criminal peyote possession.<sup>185</sup>

Likewise, the First Circuit applied the trust doctrine to defend Native American religious practices. In *Rupert v. Director, Fish and Wildlife Service*, a church pastor formed a tribe to practice certain Indian customs.<sup>186</sup> As part of its religious practices, the church required eagle feathers to be used in the ceremonies.<sup>187</sup> Consequently, the pastor applied to the FWS for an

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<sup>182</sup> *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5<sup>th</sup> Cir. 1991).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (the Peyote Way Church of God is not a recognized Native American religion and most of its members were non-Indian).

<sup>185</sup> *Id.*

<sup>186</sup> *Rupert v. Director, US Fishing and Wildlife Service*, 957 F.2d 32 (1<sup>st</sup> Cir. 1992).

eagle permit.<sup>188</sup> However, the FWS refused to issue a permit since the BIA could not certify that the pastor was a member of a federally recognized tribe.<sup>189</sup> The pastor brought an action against the FWS claiming that the BGEPA permit system requirement that applicants must be a member of a federally recognized tribe is unconstitutional.<sup>190</sup> By acknowledging the important role eagle feathers play in Native American religious practices, the court used the trust doctrine to find that the federally recognized membership requirement is valid.<sup>191</sup> Noting that the trust doctrine requires the federal government to protect Native American access to eagles and eagle feathers over non-Native Americans, the court found that the federally recognized tribal membership requirement under the permit process is a valid exercise of the federal government's trust responsibility to protect tribal access to eagles and eagle feathers.<sup>192</sup>

Recent judicial reliance on the trust obligation by the First and Fifth Circuits demonstrates that the doctrine “legitimizes the preservation of Native American religion.”<sup>193</sup> Therefore, in light of the failure of traditional Native American arguments to the BGEPA, the trust doctrine may represent a successful argument to challenging the Act. Consequently, because recent executive and congressional emphasis on the trust obligation reflects intent to restore the enhanced protections to which Native Americans are entitled, courts may be willing

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Perkins, *supra* note 23 at 724.

to invoke the trust doctrine to grant Native Americans relief from the BGEPA's burdensome permit process.<sup>194</sup>

## V. Legislating a Change

Except for a possible trust doctrine or RFRA challenge, courts appear to be unwilling to grant relief for Native American religious practices hindered by the BGEPA. As a result, an alternative solution for Native Americans to gain access to eagles and eagle feathers is to lobby Congress for the right to practice their religion free from governmental intrusion. By considering recent congressional and presidential policy toward Indian tribes, Native Americans may succeed in accomplishing some form of accommodation for religious practices.

### A. Recent Congressional and Presidential Policy Favors Indian Religious Practice

Beginning with the Nixon administration, it is apparent that congressional and presidential policy favors enhancing tribal sovereignty.<sup>195</sup> Most notably, as explained below, recent agency policies, congressional enactments, and executive directives acknowledge the unique relationship of the tribes in natural resource and wildlife law.

In the 1970s, Congress recognized the need to preserve Native American religious practices. As a result, Congress enacted the American Indian Religious Freedom Act (AIRFA) "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to

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<sup>194</sup> *Id.* at 727.

<sup>195</sup> U.S. Dep't of the Interior, Secretarial Order, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993); *see also* Steven K. Albert, Article, *American Indian Perspectives on the Endangered Species Act*, 9 Buff. Env't'l. L.J. 175 (2002) [hereinafter Albert] (discussing the various Secretarial Orders concerning agency policies toward Indian tribes).

access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>196</sup> In addition, Congress accommodated Native American religious practices by providing exemptions for the use of peyote in religious ceremonies: “the listing of peyote as a controlled substance . . . does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.”<sup>197</sup>

Likewise, the Department of Interior (DOI) recently promulgated orders to preserve Native American religious freedom. For instance, Secretarial Order 3175 requires agencies to “identify potential effects from their activities on Indian trust resources and to have meaningful consultation with tribes where Department activities affect tribal resources, either directly or indirectly.”<sup>198</sup> The Order also directs agencies to consult and work with tribal governments when trust resources are affected and identify the potential effects DOI plans, projects, programs, and activities have on Indian trust resources.<sup>199</sup> In a similar manner, Secretarial Order 3206 states that the agencies “may issue guidelines to accommodate Indian access to, and traditional use of, listed species.”<sup>200</sup> Although the Order fails to mention its effect on access to eagles for Native American religious purposes, the DOI recognizes the tribal concerns for better and quicker access to eagle feathers by making a commitment to convene a federal and tribal faction to address the issue in detail and make recommendations to the DOI.<sup>201</sup>

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<sup>196</sup> 42 U.S.C.S. § 1996.

<sup>197</sup> 21 C.F.R. § 1307.31.

<sup>198</sup> See Albert, *supra* note 195 at 179.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

Similarly, President Clinton favored accommodation of Native American religious practices during his presidential term. For instance, in May 1994, after President Clinton met with the leaders of the federally recognized tribes in the United States, he issued policy directives to the heads of executive departments and agencies mandating that federal agencies make all reasonable accommodations to ensure that Native American religious practices were not burdened.<sup>202</sup> Specifically, in addressing distribution of eagle feathers for Native American religious purposes, President Clinton directed executive departments and agencies to “work cooperatively with tribal governments and to reexamine broadly their practices and procedures to seek opportunities to accommodate Native American religious practices to the fullest extent under the law.”<sup>203</sup> Further, President Clinton called for agencies to “improve their collection and transfer of eagle carcasses and eagle body parts” for Native American religious purposes by directing the agencies to adopt policies and procedures necessary to simplify the eagle permit application process, minimize the delay in distributing eagles, and increase efforts to involve Native Americans in the distribution process.<sup>204</sup>

In the same manner, the FWS issued its Native American policy in June 1994 in an effort to accommodate Native American religious practices.<sup>205</sup> Noting the long history of working with Native American governments in managing resources, the policy directed that the FWS to “work directly with Native American governments and observe legislative mandates, trust responsibilities, and respect Native American cultural values when planning and implementing

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<sup>202</sup> President Clinton, Memorandum of April 29, 1994, 59 Fed. Reg. 85 (May 4, 1994); *see also* DeMeo, *supra* note 5 (noting that President Clinton was the first President to meet with the leaders of every federally recognized tribe); *see also* Wisch, *supra* note 25 (discussing recent Presidential policies to preserve Native American religion).

<sup>203</sup> Memorandum, Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22,953 (Apr. 29, 1994).

<sup>204</sup> *Id.*

<sup>205</sup> U.S. Fish and Wildlife Service, Native American Policy (June 28, 1994).

programs.”<sup>206</sup> Specifically, the policy recognized the problems inherent in the BGEPA permit system and acknowledged the need to resolve the process. Thus, the FWS policy declared that it will expedite processing and distribution of eagle feathers for religious ceremonies and cultural purposes in recognition of the “solemn nature of Native American uses” of eagles and eagle parts.<sup>207</sup>

In 1995, the National Park Service (NPS) also demonstrated a willingness to accommodate the religious practices of Native Americans by issuing a climbing management plan for Devils Tower in order to allow Native Americans to practice their culture and religion free from non-Indian intrusions.<sup>208</sup> Devils Tower is a National Monument in Wyoming and considered to be a sacred site by many Native Americans.<sup>209</sup> Therefore, the NPS requested that rock climbers “voluntarily refrain from climbing [the tower] during the culturally significant month of June.”<sup>210</sup> During this period, many Native Americans travel to the tower to perform sacred religious ceremonies.<sup>211</sup> The presence of the climbers on the tower adversely impacts the religious ceremonies and impairs the spirituality of the area.<sup>212</sup> As a result, the NPS issued a

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<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.* at 5.

<sup>208</sup> *See Bear Lodge Multiple Use Assoc. v. Babbitt*, 2 F. Supp. 2d 1448 (Wyo. Distr. 1998), *aff'd on other grounds by Bear Lodge Multiple Use Assoc. v. Babbitt*, 175 F.3d 814 (10<sup>th</sup> Cir. 1999) (discussing the NPS final climbing management plan and holding that it does not violate the constitution); *see also* Lloyd Burton & David Ruppert, Article, *Bear's Lodge or Devils Tower: Inter-Cultural Relations, Legal Pluralism and the Management of Sacred Sites on Public Lands*, 8 Cornell J. L. & Pub. Pol'y 201 (1999).

<sup>209</sup> 2 F. Supp. 2d 1448.

<sup>210</sup> *Id.* at 1449 (quoting the final climbing management plan).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

Final Climbing Management Plan “to protect the natural and cultural resources of Devils Tower.”<sup>213</sup>

Unquestionably, recent congressional, presidential, and agency awareness demonstrates an understanding of the problems the current federal eagle permit system imposes on Native Americans; however, it is important to note that the directives are not enforceable law.<sup>214</sup> Nevertheless, congressional, executive and agency awareness of the inherent problems with access to eagles and eagle feathers demonstrates a willingness to preserve Native American religious culture. Further, congressional enactments in the late twentieth century acknowledge the necessity to preserve and protect Native American religious freedom.

#### B. The Proposed Native American Free Exercise of Religion Act

On May 25, 1993, the Native American Free Exercise of Religion Act (NAFERA) was introduced into the 103<sup>rd</sup> Congress to assure religious freedom for Native Americans.<sup>215</sup> The NAFERA protects access to sacred sites, traditional use of peyote, prisoners’ religious rights, and the religious use of eagles in Native American ceremonies.<sup>216</sup> Further, the NAFERA establishes a right to bring an enforceable action against violations in federal district court for equitable and other relief.<sup>217</sup>

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<sup>213</sup> *Id.* (quoting the purpose of the final climbing management plan).

<sup>214</sup> DeMeo, *supra* note 5.

<sup>215</sup> S. 2269, 103d Cong., 2<sup>nd</sup> Sess. (1994) (NAFERA was replaced with Senate Bill 2269, the Native American Cultural Protection and Free Exercise of Religion Act (CPFERA) due to year-long negotiations among the administration, the Senate Committee on Indian Affairs, and the American Indian Religious Freedom Coalition; unfortunately, the final Senate vote rejected the CPFERA).

<sup>216</sup> *Supra* note 215.

<sup>217</sup> *Id.* at § 501(a); *see also* Testimony Hearing Statement of Robert N. Clinton, Capitol Hill Hearing Testimony (Sept. 10, 1993) (noting that the NAFERA cures the AIRFA’s failure to provide an independent judicially enforced mechanism).

Title IV of the proposed Act specifically addresses the religious use of eagles.<sup>218</sup> Particularly, the NAFERA mandates the Director of the FWS to develop a plan to amend the inherent problems with the permit system.<sup>219</sup> Most notably, the Director is to ensure the prompt disbursement of eagles and eagle parts to Native American practitioners upon receipt of an application for access to such parts, provide that sufficient numbers of eagles and eagle parts are allocated to Native American practitioners, and to simplify and shorten the permit process.<sup>220</sup>

In developing the plan, the Director is to consult with Indian tribes and Native American traditional leaders.<sup>221</sup> Together, the council is to develop a plan to ensure that all eagles and their parts are promptly transmitted to the FWS and made available for distribution.<sup>222</sup> Further, the council is to propose arrangements to expedite the review and approval of permit applications.<sup>223</sup>

In addition, the proposed Act permits the Director to consult with Indian tribes regarding decentralization of the permit system.<sup>224</sup> Therefore, if eagles or eagle parts are discovered in Indian country and the tribe has established a procedure for issuing tribal permits to Native American practitioners, the tribe may act as a repository and disbursement agent by distributing eagles and eagle feathers in accordance with tribal religious custom.<sup>225</sup> Although the scope of tribes acting as repositories and disbursement agents is limited to deceased eagles and eagle

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<sup>218</sup> § 401(a)-(d).

<sup>219</sup> § 401(a).

<sup>220</sup> § 401(a)(1-3).

<sup>221</sup> § 401(b).

<sup>222</sup> § 401(c).

<sup>223</sup> § 401(c)(A)(i), (ii).

<sup>224</sup> § 401(c)(B).

<sup>225</sup> § 401(d)(1-2).

parts, the NAFERA illustrates Congress's desire to resolve the inherent problems with the permit process.

If enacted into law, constitutional challenges to the NAFERA will be struck down. The courts have long recognized that Congress has extraordinarily broad protective powers in the field of Indian law.<sup>226</sup> For instance, in *Cherokee Nation*, the Court notes that a trustee relationship exists between the federal government and the Indian tribes in which the tribes looked to the federal government for protection.<sup>227</sup> Further, under the Indian Commerce Clause,<sup>228</sup> the Court declares "the plenary power of Congress to deal with the special problems of Indians."<sup>229</sup> Therefore, "since every provision of [the] NAFERA is intended by Congress to further the protective relationship which the federal government has with Indian tribes, it would appear that the broad powers that Congress has over Indian affairs, would supply more than ample constitutional authority for the enactment of [the] NAFERA."<sup>230</sup>

Numerous Indian tribes, the Native American Rights Fund, civil liberties organization and other Native American organizations support the NAFERA.<sup>231</sup> For instance, the President of the National Congress of American Indians testified before the Senate Committee on Indian Affairs in support of the NAFERA:

We also support Title IV as it proposes to establish a plan . . . to guarantee tribes and Native American traditional leaders an adequate supply of eagles feathers . . . the current system does not provide an adequate number of, nor timely disbursement of, such

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<sup>226</sup> Testimony Hearing Statement of Robert N. Clinton, Capitol Hill Hearing Testimony (Sept. 10, 1993).

<sup>227</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>228</sup> US Const. art. 1., sec. 8, cl. 3.

<sup>229</sup> See *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

<sup>230</sup> DeMeo, *supra* note 5.

<sup>231</sup> *Id.* at 811.

animals parts which are fundamental and necessary to fully engage in traditional culture and religious ceremonies.<sup>232</sup>

Unfortunately, the NAFERA faced strong congressional opposition because of the provision protecting sacred sites and was eventually rejected by the Senate.<sup>233</sup> However, the NAFERA will set in place adequate legal protections for Native American religious practitioners.

### C. The National Park Service Proposed Rule

The National Park Service (NPS) likewise demonstrates a willingness to accommodate Native American religious practices. For instance, the NPS recently proposed a rule that gives the Hopi Indians the right to take golden eaglets from Wupatki National Monument (Wupatki) for religious ceremonial purposes.<sup>234</sup> The proposed regulation allows the NPS to regulate the taking of eagles from the monument for religious purposes “including gathering times, take limits, and permit tenure.”<sup>235</sup> Currently, the proposed rule is open for public comment.<sup>236</sup>

The proposed rule recognizes Hopi religious ceremonies to be the heart of the tribe’s culture.<sup>237</sup> As an example, an important aspect of the Hopi religious ritual is eaglet gathering

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<sup>232</sup> Prepared Statement of Gaiashkibos President of the National Congress of American Indians Before the Senate Committee on Indian Affairs regarding “The Native American Cultural Protection and Free Exercise of Religion Act of 1994,” Fed. News Service (Thursday, Jul. 14, 1994).

<sup>233</sup> DeMeo, *supra* note 5 at 811; *see infra* note 215.

<sup>234</sup> Religious Ceremonial Collection of Golden Eaglets from Wupatki National Monument, 66 Fed. Reg. 6516 (proposed Jan. 22, 2001) (to be codified at 36 C.F.R. pt. 7) [hereinafter Hopi Proposed Rule]; *see also* Gunson, *supra* note 17 (discussing in detail the proposed rule and the legal considerations involved).

<sup>235</sup> Hopi Proposed Rule, *supra* note 235.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

from a particular area.<sup>238</sup> Looking to anthropological data, the NPS notes that the Wupatki nest is an important area for traditional eagle gathering.<sup>239</sup> Therefore, the NPS acknowledges that there is an ancestral and historical connection between the Hopi tribe and Wupatki.<sup>240</sup>

The NPS derives its authority to regulate the use of federal areas from the National Park Organic Act: “the service . . . shall promote and regulate the use of the Federal areas known as national parks, monuments and reservations.”<sup>241</sup> Further, in recognizing the AIRFA as directing the accommodation of Native Americans for religious practices consistent with statutory management obligations, the NPS states that it “intends to provide reasonable access to, and use of, park lands and park resources by Native Americans for religious and traditional activities.”<sup>242</sup>

Turning to the RFRA, the NPS notes that the RFRA encourages accommodation.<sup>243</sup> Since the current NPS regulations prohibiting gathering of golden eaglets at Wupatki substantially burden the Hopi’s exercise of religion, the NPS argues it has a compelling governmental interest in amending the current “absolute bar on the tak[ing] of wildlife for purposes except [for] scientific research.”<sup>244</sup>

Further, in looking to executive orders and policy statements, the NPS recognizes the need to accommodate Native American religious practices.<sup>245</sup> For instance, the NPS

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> 16 U.S.C. § 1 (2003).

<sup>242</sup> Proposed Hopi Rule, *supra* note 235; *see also* The American Indian Religious Freedom Act, 42 U.S.C.S. § 1996 (2003).

<sup>243</sup> Proposed Hopi Rule, *supra* note 235.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

acknowledges that President Clinton’s directive concerning eagle feathers notes the importance of the use of eagles in Native American ceremonies by directing executive departments and agencies to accommodate Native American religious practices to the fullest extent under the law.<sup>246</sup> Also, the NPS acknowledges that Executive Order No. 13,084 states “each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribal government for a waiver of statutory or regulatory requirements.”<sup>247</sup> Consequently, the NPS believes it has the authority to promulgate the rule.

If the rule is promulgated, it will withstand constitutional scrutiny under an establishment of religion or Equal Protection claim. For instance, one district court recently affirmed that the NPS accommodation of the religious practices of Native Americans does not violate the constitution so long as its purpose is secular and its involvement is not excessively entangled.<sup>248</sup> Also, any discrimination action brought against the NPS may be disregarded since the religious accommodation provided by the rule is merely a Native American preference, which is constitutional under *Mancari*.<sup>249</sup> In any event, the Supreme Court’s reasoning that “the Government’s right to the use of its own land . . . need not and should not discourage it from accommodating [Indian] religious practices” suggests that the NPS has the authority to

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* (quoting Executive Order No. 13,084, 63 FR 27655 (May 14, 1998)).

<sup>248</sup> *Bear Lodge Multiple Use Assoc. v. Babbitt*, 2 F. Supp. 2d 1448 (Distr. Wyo. 1998) (holding that the NPS climbing plan to accommodate the religious practices of Native Americans is constitutional), *aff’d on other grounds by Bear Lodge Multiple Use Assoc. v. Babbitt*, 175 F.3d 814 (10<sup>th</sup> Cir. 1999); *see also* Lloyd Burton & David Ruppert, Article, *Bear’s Lodge or Devils Tower: Inter-Cultural Relations, Legal Pluralism and the Management of Sacred Sites on Public Lands*, 8 Cornell J. L. & Pub. Pol’y 201 (1999); *see also* *Lemon v. Kurtzman*, 403 U.S. 602 (stating the test for determining whether a governmental regulation violates the establishment of religion clause: (1) the purpose of the regulation must be secular and (2) the government must not be excessively entangled with the religion).

<sup>249</sup> *Morton v. Mancari*, 417 U.S. 535 (1974) (declaring the Bureau of Indian Affairs’s policy to favor Native Americans in promotions and hiring constitutional).

promulgate the rule.<sup>250</sup> As a result, the NPS willingness to accommodate the religious needs of the Hopi Indians demonstrates the federal government's readiness to protect and preserve Native American religious practices.

#### D. Other Solutions

Cooperative law enforcement agreements between tribes and agencies may represent a viable solution for access to eagles and eagle parts in Native American religious ceremonies. Today, federal agencies are recognizing that tribes have substantial natural resource management expertise.<sup>251</sup> As a result, tribes have established cooperative law enforcement agreements to prosecute federal violations of the Endangered Species Act on reservations.<sup>252</sup> These agreements allow the FWS and tribes to "work through problems toward a common goal of protecting resources."<sup>253</sup> A similar agreement concerning enforcement of violations of the BGEPA may be feasible if the FWS allows tribes to act as repositories and disbursement agents. In this manner, the FWS and tribes are protecting resources from violators while allowing easier access to eagles and eagle feathers for Native American religious ceremonies.

Another potential solution is to lobby Congress for well thought out exceptions to federal laws and regulations since the judiciary fails to provide adequate relief for Indian religious liberties.<sup>254</sup> One commentator notes that Native Americans are successful when they lobby

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<sup>250</sup> Proposed Hopi Rule, *supra* note 235 (quoting the Court dicta in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 at 454 (1988)).

<sup>251</sup> Albert, *supra* note 195.

<sup>252</sup> *Id.* at 186.

<sup>253</sup> *Id.* at 187.

<sup>254</sup> Gunson, *supra* note 17 at 432.

Congress for exceptions to federal statutes: “what they were unable to achieve through litigation they were often able to achieve through legislation, such as the religious use of peyote and various claims for sacred sites.”<sup>255</sup> Because recent executive and congressional policy demonstrates a willingness to protect and preserve Native American religious cultures, Congress may be more willing to carve out exceptions to federal statutes. As a result, the need to protect and preserve the ability of Native Americans to use eagles and eagle feathers in religious ceremonies may best be accomplished through legislation.

## VI. Conclusion

The search for Native American religious freedom under the BGEPA is limited to complying with the burdensome permit process. However, a religious freedom and trust doctrine challenge to the BGEPA may invalidate the constitutionality of the Act and grant Native Americans the right to take eagles for religious uses without governmental control. If courts remain unwilling to grant Native Americans adequate relief under the BGEPA, recent congressional and executive policy suggests that Native Americans will be able to accomplish through legislation new religious protections to preserve their inherent right to utilize eagles and eagle feathers in religious ceremonies.

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<sup>255</sup> See Fisher, *supra* note 2 (the author discusses the current federal policies toward Indian tribes and theorizes that legislation is more inept to protect Native American religious practices than judicial challenges under the free exercise of religion clause).

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