



NATIONAL CONGRESS OF AMERICAN INDIANS

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Ethan Shenkman, Deputy Assistant Attorney General
Environmental & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Tracy Toulou, Director
Office of Tribal Justice
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Deputy Assistant Attorney General Shenkman and Director Toulou:

On behalf of the National Congress of American Indians, I write to comment on the policy proposals released by the U.S. Department of Justice (DOJ) in late October. While we are encouraged by the DOJ's willingness to engage with tribes on issues related to federal enforcement of wildlife laws protecting eagles and other birds, we have several outstanding concerns, as set forth in the body of this letter. Nonetheless, we are optimistic that we can work together in the coming weeks to resolve these concerns and proceed with initiating policy and program changes that will have meaningful and lasting impacts for Native peoples.

Below are NCAI's responses to each of the specific questions posed by the DOJ in its Request for Tribal Input.

(1) DOJ Consideration of Policy Regarding Eagle Feathers

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

NCAI believes that the DOJ should adopt a policy, consistent with the Morton Policy, which addresses tribal use of eagle feathers and other bird feathers and parts **only if** that policy is created and implemented in a manner that permits all Indigenous peoples in the United States to exercise their religious freedom and maintain their cultural practices. Barring that, NCAI fears that this policy could be more harmful than what currently stands.

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Tlingit

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

There is much to be gained by DOJ deciding to institute a formal, department-wide policy to enforce federal wildlife laws in a manner that facilitates the ability of American Indian and Alaska Native peoples to use eagle feathers and other bird feathers and parts for cultural and religious purposes. In particular, this would go a long way toward ensuring consistency in prosecution nationally, and it would help ensure coordination between the Department of Interior (DOI) and DOJ on this important issue.

However, NCAI is concerned that in its Request for Tribal Input, DOJ asserts – without previous consultation or coordination with tribes – that any such policy would only apply to “members of federally recognized tribes”. Although DOJ claims that this new policy would be “consistent with” the Morton Policy, the Morton Policy uses the phrases “Indians” and “American Indians,” which are broad enough to encompass members of: 1) federally recognized tribes; 2) state recognized tribes; 3) terminated tribes; 4) unrecognized tribes; 5) Alaska Native Villages; and, arguably, 6) Indigenous groups from Canada and other countries in the Americas. Additionally, the Morton Policy contemplates non-enrolled members of federally recognized tribes who still practice their traditional religion and cultural ceremonies even though, for whatever reason, they are not formally enrolled with their respective tribe.

What DOJ is proposing is a significant narrowing of the scope of applicability, which alone makes the proposed policy much more restrictive than the Morton Policy and conflicts with legal and legislative precedent that supports a definition of “Indian” that is more expansive than federally recognized tribes, especially where issues of cultural protection and religious freedom are involved. See, e.g., *Alaskan Chapter, Associated Gen. Contr. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982) (concluding that a regulation which defined “Indian” to include “any person recognized as being an Indian or Alaska Native by a tribe, the Government or any State” was constitutional because it was a political classification, not a racial one). See also *The American Indian Religious Freedom Act*, 42 U.S.C. §1996 (1978) (stating that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites[.]” and that federal implementation would be developed “in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices”, which does not limit national policy to members of federally recognized tribes); and *The Indian Arts and Crafts Act of 1990*, 25 U.S.C. §305e(d)(3)(B) (2000) (defining “Indian tribe” broadly).

Given that early and current legislation acknowledge definitions of “Indian” and of “Indian tribe” that include but extend beyond members of federally recognized tribes – and that DOJ has not consulted with tribes on this issue prior to submitting its Request for Tribal Input – NCAI cannot support any resultant policy without further consultation. Further, NCAI notes that if DOJ moves forward without resolving this aspect of its proposed formal policy, there would be conflicting policies in place within the same administration. The DOI would be operating under the Morton Policy that acknowledges the broader definitions, while DOJ officials would have a different mandate that would not be “consistent with” the Morton Policy in a key area that has

specific implications for policy enforcement. If the DOJ truly intends to make its new policy “consistent with” the Morton Policy, then it should continue to use the term “Indians” – or something equally broad – in any potential policy dealing with the religious freedom of Indigenous peoples in the United States.

Second, the DOJ's current proposal to limit any new policy to members of federally recognized tribes seems to be based on the assumption that the U.S. Government's process of federal acknowledgement is working as it should, when it is, in fact, a broken system that needs fixing. NCAI has several standing resolutions on the issue of federal recognition and has provided congressional testimony on the federal acknowledgement process and related issues numerous times. If there is one thing that these resolutions and testimony demonstrate, it is that the federal recognition process has severely deteriorated since its inception. The current system is fraught with unreasonable, decades-long delays in considering applications and irrational documentation requirements that defy historical and cultural realities. These problems raise legitimate questions about the fairness and integrity of the federal recognition process. If the DOJ moves forward with its policy as currently proposed, it would be making prosecutorial judgments about questions of religious freedom based on a wholly unreliable system of federal recognition for tribes. As such, NCAI cannot support such a policy.

Finally, the position that DOJ has taken on the applicability of its new policy to solely federally recognized tribal members is directly at odds with the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which President Obama endorsed on December 16, 2011. Article 12 of the Declaration states that: “Indigenous peoples have the right to manifest, practi[c]e, develop and teach their spiritual and religious traditions, customs and ceremonies...[as well as] the right to the use and control of their ceremonial objects...” The Declaration applies to all Indigenous peoples within the United States; it is not limited by the bounds of the U.S. federal recognition process. NCAI believes that the formalization of this DOJ policy presents a unique opportunity for the Obama Administration to reaffirm its commitment to implement the Declaration by ensuring that the policy protects all Indigenous peoples' rights to possess eagle—and other bird—feathers and parts for cultural and religious use, not just the rights of members of federally recognized tribes.

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

NCAI does not believe that issuance of a new DOJ policy would help to allay the concerns of tribal members who fear their use of eagle feathers in religious or cultural practices may subject them to federal prosecution. At present, DOJ is contemplating implementation of a policy that is “consistent with” the Morton Policy; however, we must not forget that the Morton Policy is what, at present, formally governs the activities of DOI officials and informally governs the activities of DOJ officials (and has for more than 35 years). Under this policy, there have been numerous reports of individual tribal members who claim that their feathers were wrongfully confiscated. These seizures have resulted in uncertainty among Native Americans as to the status of the feathers they possess, have highlighted the woeful inadequacy of the existing permit system, and have had a chilling effect on the religious practices of Native peoples. For these

reasons, NCAI does not believe that adoption of a similar policy by the DOJ would significantly alter the current concerns tribal members have regarding their eagle feather possession and use.

Moreover, the DOJ policy would govern federal prosecutions for violation of federal wildlife laws; it would not govern the initial investigations of these matters – including the seizure of sacred objects and potential detention of those in possession of them – which have proven to be the primary sources of fear for tribal practitioners. Tribal members who may not know the origin of their feathers are concerned that they will be the innocent casualty of undercover operations perpetrated by the U.S. Fish & Wildlife Service (USFWS) if it is discovered, unbeknownst to them, that their feathers were at one time part of the black market or remotely linked to illegal activities. Although, the DOJ may play a role in planning such undercover operations, they are not often involved with the on-the-ground investigations that have caused the chilling effect within tribal communities. As such, implementing a DOJ policy consistent with the DOI's Morton Policy will likely not do anything to significantly curb tribal fears; it would simply memorialize what is already occurring.

If the DOJ wants to achieve its intended goals of allaying fears within tribal communities, it has to be willing to change the way it carries out its law enforcement duties. In other words, it needs to create a more meaningful policy that has tangible impacts that can be felt by Native people participating in their cultural and religious practices. For example, creating a policy for the return of seized items in a timely manner to innocent owners of contraband feathers and parts is the type of policy that would have a real, lasting impact on how tribes view the DOJ when it comes to enforcement of federal wildlife laws.

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

While NCAI believes that issuance of a carefully crafted, formal Department policy could provide a useful clarification for Native peoples who use eagle feathers in their religious or cultural practices, any policy that potentially narrows the scope of applicability of the Morton Policy to federally recognized tribes will only complicate investigation and enforcement efforts and result in further uncertainty and ongoing hesitance to engage freely in cultural and religious practices. As previously mentioned, if DOJ makes its policy only applicable to members of federally recognized tribes, it would create a complicated scheme under which USFWS investigations are governed by one standard, with DOJ prosecutions governed by another. This does not help to clarify anything. Instead, it may leave tribes even more confused about their rights to access their sacred items.

If DOJ wants to provide truly useful clarification, it should work with DOI officials to do away with the eagle feathers permitting system in its entirety and replace it with a system under which tribal identification (ID) cards are sufficient legal authorization to possess and use eagle feathers and parts. This would acknowledge the sovereignty of tribes to determine their own members, while correcting the fact that American Indians are the only minority group in the country who are required to have a permit to access their sacred items for religious purposes.

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

For reasons previously stated, NCAI asserts that if the DOJ wishes to remain “consistent with” the Morton Policy it should use the term “Indians” to refer to Native peoples within the United States, or a phrase equally broad, e.g., “Indigenous peoples,” “Native peoples,” etc. The new policy should not be limited in applicability to just members of federally recognized tribes.

NCAI also notes that the text in paragraph three of the first page of the Morton Policy could be modified to more accurately describe the “legitimate interests” of American Indians that any new policy would aim to protect. The text in the middle of that paragraph reads “[The Department of Interior] also recognizes that American Indians have a legitimate interest in expressing their cultural and religious way of life.” The DOJ should strengthen this phrase in any new policy in a way that conveys the sanctity of eagle, and other bird, feathers and parts to Native American religion and culture, as would demonstrate that this is squarely an issue of religious freedom and expression. For example, the new language could read, “The Department of Justice recognizes that American Indians have a compelling interest in protecting their religious freedom and cultural/traditional practices, both of which may involve the use of feathers or parts of federally protected birds.”

Lastly, any new DOJ policy should clarify whether “bartering” eagle feathers is permissible. The Morton Policy plainly states that “American Indians may...exchange among other Indians, without compensation, all federally protected birds, as well as their parts or feathers.” However, at a recent meeting at NCAI’s 68th Annual Convention in Portland, Oregon, DOJ officials stated that “bartering” is a prosecutable offense. Tribes need clarity on these two terms – bartering and exchanging – and just what they encompass.

(2) Development of New Federal/Tribal Training Program on Enforcement of Wildlife and Other Environmental Laws

NCAI generally supports the establishment of a training program on enforcement of wildlife and pollution-control laws in Indian country, so long as it involves a training component for federal officials in addition to that for tribal enforcement officials and other staff. From our earliest meetings with this Administration, we have been requesting cultural sensitivity and awareness training on tribal culture and religion for federal officials who enforce federal wildlife laws. However, the current DOJ proposal is focused almost entirely on training of tribal personnel. While we think that training tribal officials is critical to attaining the long-term goal of tribal control and enforcement of wildlife and pollution laws on tribal lands, the reality is that relatively few tribes are in a position to take advantage of this training at present. A much better approach would be to train tribal officials and federal officials side-by-side at the proposed training, so as to develop mutual understandings, foster relationship-building, and encourage cooperation on these matters – which are essential aspects of meeting the goal of “promot[ing] federal-tribal partnership in this area”.

Of all of the potential topics listed in the DOJ’s Request for Tribal Input, we feel that tribal officials would benefit most from learning about: 1) development of tribal wildlife codes; 2)

introduction to wildlife laws and the prosecution of wildlife crimes; and 3) application of Lacey Act and other federal wildlife and hunting/fishing laws on tribal lands. Federal officials would benefit most from learning about: 1) enforcement concerns related to use of eagle feathers; 2) effective approaches to provide law enforcement officers and prosecutors with the tools for effective and culturally sensitive wildlife enforcement; 3) appropriate protocols for collecting evidence and preserving the sanctity of seized items; and 4) civil and criminal jurisdiction issues. Both tribal and federal officials would benefit from training on building and developing federal-tribal enforcement partnerships, including development of Memoranda of Understanding between tribal and federal officials.

Tribal personnel who should participate in any proposed training should include: tribal law enforcement officials, tribal natural resource department personnel, tribal fish and wildlife department personnel, tribal prosecutors, and tribal attorneys. Also, to increase tribal participation and tailor the trainings to the tribal needs of each region, we encourage DOJ to consider administering these types of trainings on a regional basis.

In closing, NCAI thanks you for the opportunity to submit these comments as you engage in policy development and the decision-making process. These are issues that our membership deeply cares about, and we look forward to a continued partnership to move forward effective policies and practices. Please feel free to contact us with questions or concerns via NCAI Staff Attorney, Katy Jackman, at kjackman@ncai.org.

Sincerely,



Jacqueline Johnson Pata
Executive Director

Cc: Kim Teehee
Senior Policy Advisor for Native American Affairs
The White House

Charles Galbraith
White House Office of Public Engagement & Deputy
The White House

William Woody
Chief of Law Enforcement
U.S. Fish & Wildlife Service