No. 06-8093

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

WINSLOW FRIDAY
Defendant-Appellee

ORAL ARGUMENT IS REQUESTED
ATTACHMENTS INCLUDED (Digital Form)

On Appeal from the United States District Court
for the District of Wyoming (Hon. William F. Downes)

BRIEF OF APPELLANT

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STATEMENT OF RELATED CASES

Counsel for the United States is unaware of any prior or related appeals filed in the Tenth Circuit.

STATEMENT OF JURISDICTION

Winslow Friday was charged by Information with one count of killing a bald eagle in violation of the Bald and Golden Eagle Protection Act (Eagle Act), 16 U.S.C. § 668(a). Aplt. App. 8. The district court had jurisdiction under 18 U.S.C. § 3231 and dismissed the Information on October 13, 2006. Id. 185. The United States filed a notice of appeal on November 8, 2006, id. 197, that was timely filed under Fed. R. App. P. 4(b)(1)(B). This Court has jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Friday had standing to challenge the application of the Eagle Act's permitting process to him, when he never applied for a permit.

2. Whether the Eagle Act's permitting process violates the Religious Freedom Restoration Act.

STATEMENT OF THE CASE

The Eagle Act, *inter alia*, prohibits the killing of bald eagles without a permit, 16 U.S.C. § 668(a), but authorizes the Secretary of the Interior to permit the killing of eagles for the religious purposes of Indian tribes, id. § 668a. On March 2, 2005, Winslow Friday, a member of the federally recognized Northern Arapaho Tribe, shot and killed one of only two nesting bald eagles on the Wind

River Reservation without having first obtained or even applied for a permit. He was charged with a misdemeanor violation of the Eagle Act. Friday moved to dismiss the charge, contending that the Eagle Act, as applied to him, violated the Religious Freedom Restoration Act of 1993 (RFRA) and the Free Exercise Clause of the First Amendment. On October 13, 2006, the district court granted Friday's motion, holding that 1) Friday had standing to challenge the Eagle Act's permitting process, despite his failure to apply for a permit, and 2) the Eagle Act's regulatory process is not the least restrictive means of furthering the government's compelling interest in preserving eagles.

STATEMENT OF FACTS

A. Statutory Background

1. Recognizing that "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom" and that "the bald eagle is now threatened with extinction," Congress enacted the Protection of the Bald Eagle Act of 1940, 54 Stat. 250 (preamble). That statute prohibits the taking, possession, sale, barter, purchase, transport, export, and import of bald eagles or any parts of bald eagles, except as permitted by the Secretary of the Interior. See 16 U.S.C. §§ 668(a), 668a, Add. i. Because young golden eagles are very difficult to distinguish from young bald eagles, Congress extended the

statute's prohibition to golden eagles in the Bald and Golden Eagle Protection Act of 1962, 76 Stat. 1246. Id.[1]; see generally United States v. Dion, 476 U.S. 734, 736, 740-743 (1986). The Eagle Act defines the term "take" to include "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." 16 U.S.C. § 668c.

The Eagle Act abrogated the treaty rights of numerous Indian tribes to hunt eagles on their land. See Dion, 476 U.S. at 743-745. In lieu thereof, the Eagle Act authorizes the Secretary of the Interior to permit the taking, possession, and transportation of eagles and eagle parts for certain specified purposes, including for "the religious purposes of Indian tribes." 16 U.S.C. § 668a.[2] The Secretary

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1. Section 668(a) provides in part:

> Whoever * * * without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, * * * transport, export or import, * * * any bald eagle * * * or any golden eagle, alive or dead, * * * or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both * * *.

2. Section 668a provides in part:

> 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 of public museums, scientific societies, and zoological

may issue such permits only if he determines that it is "compatible with the preservation of the bald eagle or the golden eagle." Id.

Regulations require an applicant for a permit under the Eagle Act's "Indian-tribes" exception to be an enrolled member of a federally recognized Indian tribe with which the United States maintains a government-to-government relationship (referred to herein as "tribal member"). 50 C.F.R. § 22.22(a) (citing 25 U.S.C. § 479a-1), Add. iii-iv. The applicant must identify the species and number of eagles or feathers proposed to be taken and the state and local area where the taking is proposed. Id. In processing applications for permits under the Eagle Act's Indian-tribes exception, the Department of the Interior's Fish and Wildlife Service (FWS) considers whether the applicant is a tribal member and "the direct or indirect effect which issuing such a permit would be likely to have upon the wild populations of bald or golden eagles." Id. § 22.22(c). When processing permits to take eagles, the FWS also considers the tribe's longstanding cultural or religious needs and whether the National Eagle Repository, which collects eagle carcasses, parts, and feathers and distributes them free-of-charge to

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> parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe * * * .

members of federally recognized tribes, Aplt. App. 64, 67, could satisfy the applicant's need, id. 90. Permits are valid for up to one year. Id. § 22.22(d).

For example, the FWS has issued a "take permit" to the Hopi tribe annually since 1986. Aplt. App. 174. For the past ten years, that permit has authorized the take of up to 40 golden eagles for religious purposes. Id. 165, 174. The FWS has also issued permits to members of the Navajo tribe and the Taos Pueblo, among others. Id. 90-91, 174.[3]

2. Under the RFRA, 42 U.S.C. § 2000bb et seq., the government may "substantially burden a person's exercise of religion" if "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) and (b), Add. ii. Congress enacted RFRA following Employment Division, Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), in which the Supreme Court held that the Free Exercise Clause did not require Oregon to exempt from its criminal

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3. On October 2, 2006, following the hearing in this case, Interior issued another permit authorizing the Jemez Pueblo to take two golden eagles. Aplt. App. 199. Although that permit is not in the district court record, the Court may take judicial notice of it since it is in the public record. See San Juan County, Utah v. United States, 420 F.3d 1197, 1202 n.2 (10th Cir. 2005) (taking judicial notice of 1995 Backcountry Management Plan for Canyonlands National Park and 2002 environmental assessment of the Middle Salt Creek Canyon Access Plan).

drug laws the sacramental ingestion of peyote by members of the Native American Church. Id. at 877-882. Under Smith, generally applicable laws may be applied to religious exercises even when they are not supported by a compelling governmental interest. Id. at 884-889. RFRA codifies, as a requirement of federal statutory law, the Free Exercise Clause standard that the Supreme Court applied before Smith in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972). See 42 U.S.C. § 2000bb(b)(1); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216-17 (2006).

RFRA's legislative history reveals that Congress intended for courts to look to cases decided before Smith for guidance in applying the Act. Adams v. Comm'r of Internal Revenue, 170 F.3d 173, 177 (3d Cir. 1999) (citing S. Rep. No. 103-111 (1993)). Thus, "prior case law is central to the understanding of the compelling interest test," id., and courts often use pre-Smith free exercise case law to analyze RFRA claims. Id. at 180 n.7 (listing cases); Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 630 (7th Cir. 2000).

Under RFRA, the person contesting the government action must first prove that it substantially burdens a sincerely held religious belief. Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996). When the plaintiff has met that threshold, the

government bears the burden on the compelling interest and narrow tailoring elements of RFRA.. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3); O Centro, 126 S. Ct. at 1219. The government, however, is not required to "refute every conceivable option" to prove that a law is narrowly tailored. Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996). Once the government provides evidence that an exemption would impede the government's compelling interests, the plaintiff "must demonstrate what, if any, less restrictive means remain unexplored." Id.

Congress intended for RFRA's statutory standard to provide "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). The Supreme Court, applying the identical statutory standard under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq., held that the test must "be applied in an appropriately balanced way." Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

To meet its burden under RFRA, the government may not simply assert categorically that recognizing *any* religious exemption to a generally applicable law would fatally undermine the purpose of the statute. For example, in O Centro, the Supreme Court rejected the government's argument that the Controlled Substances Act "simply admits of no exceptions." 126 S. Ct. at 1220. Rather,

"RFRA operates by mandating consideration * * * of exceptions to 'rule[s] of general applicability.'" Id. at 1223 (quoting 42 U.S.C. § 2000bb-1(a)). Thus, under RFRA, courts must look "beyond broadly formulated interests justifying" federal statutes and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." Id. at 1220; see also id. at 1225 (RFRA "requires the Government to address the particular practice at issue").

B. Factual Background. On March 2, 2005, Friday shot and killed one of only two bald eagles that were nesting at the time on the Wind River Indian Reservation, which the Northern Arapaho share with the Shoshone Tribe. Aplt. App. 106, 111, 118. He had made no attempt to obtain an Eagle Act permit, even though, as a member of a federally recognized tribe, he was eligible to apply for and receive such a permit. 50 C.F.R. § 22.22(a). Indeed, Friday admitted that he never even inquired about the possibility to obtain a permit to take an eagle. Aplt. App. 60. As the district court recognized in its opinion, Interior's rate of granting take permit applications is quite high. Id. 190 (three out of four). Both the Hopi and Navajo Tribes have received annual take permits. Id. 91. The current Hopi permit authorizes the take of up to forty golden eagle eaglets. Id. 165. Brian Milsap, then-chief of the FWS' Division of Migratory Bird Management, testified

that it took Interior only two months to process the most recent Hopi take permit. Id. 92.

Friday also testified that he knew about the National Eagle Repository, id. 58, which collects eagle carcasses, parts, and feathers and distributes them free-of-charge to members of federally recognized tribes, id. 64, 67. Even though Friday knew of his need for an eagle for use in the Sun Dance several years in advance, id. 56, in sufficient time to obtain a bald eagle from the Repository, id. 79-80, and other members of the Northern Arapaho Tribe have obtained eagle feathers and parts from the Repository for use in the Sun Dance, id. 55, 158-63, Friday made no attempt to obtain an eagle by that legal means, id. 80.

Friday testified that he knew that killing a bald eagle was illegal. Id. 58. Nonetheless, he said he saw the bald eagle "that one day and decided to shoot it" for use in the Sun Dance, id. 57, then proceeded to a friend's house where the tribal game warden found him playing video games, id. 59. Friday did not consult anyone to determine whether shooting an eagle was a traditionally appropriate means of obtaining an eagle for religious purposes in the Northern Arapaho Tribe. Id. 63. Indeed, a former Northern Arapaho tribal chairman, Burton Hutchinson, testified that, traditionally, eagles used in the Sun Dance were caught live following prayer and abstinence from food. Id. 21; see also id. 41, 54. He said

"we'd never go out and shoot them, no. That's not our way. No, we don't do that 'cause that's a sacred bird, that one." Id. 24-25. Two other tribal elders also testified that shooting is not an acceptable way to take an eagle for the Sun Dance. Id. 42, 46. In fact, the Hunting and Trapping Regulations for the Wind River Reservation prohibit the taking of bald and golden eagles. Id. 149

C. Procedural Background. Friday was charged by Information with a misdemeanor violation of the Eagle Act. Aplt. App. 8. Friday moved to dismiss the Information, alleging that the Eagle Act, as applied to him, violates RFRA and the Free Exercise Clause. Clerk's Record of Docket Entries (CR) 28 at 4. In May, 2006, the district court held a two-day hearing and later heard closing arguments on Friday's motion to dismiss.

On October 13, 2006, the district court dismissed the Information. Aplt. App. 185. The court first held that Friday had standing to challenge the permitting process, even though he never sought a permit, because it would have been futile for him to do so. The court recognized that the Eagle Act "expressly contemplates a permitting process for the taking of eagles for Indian religious purposes" and acknowledged that, prior to 2003, three out of four such permit applications were granted. Id. 190. Nonetheless, the court faulted Interior for not "promot[ing] the taking of eagles" and not advertising the opportunity to obtain permits to kill

eagles. Id. Stating its view that the agency prefers that tribal members use the Repository, despite its "obvious inadequacies in filling their religious needs," the district court concluded that, "[b]ased upon the agency's conduct in every other respect, it is clear that Defendant would not have been accommodated" had he applied for a take permit. Id. 191.

Turning to the merits, the court held that the prohibition on killing eagles without a permit substantially burdened Friday's religious practices, because any effort to obtain a permit would be futile and obtaining parts from the Repository would be unduly delayed. Id. 191-92. The court also held that the government has compelling interests in "preserving our eagle populations and in protecting Native American culture." Id. 192.

The court concluded, however, that the permitting process is not the least restrictive means of advancing those interests. While the court agreed with the government that "some regulation of the taking of eagles is necessary," it concluded that the government's alleged "policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none" was not the least restrictive means of serving the government's interests. Id. 195. The court further explained that it was not the permitting process itself that was objectionable, but the "biased and protracted

nature of the process." Id. The court concluded that "[i]t is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time." Id.

SUMMARY OF THE ARGUMENT

Friday's failure to apply for a permit to take an eagle precludes him from now challenging the application of the permitting process to him. The Ninth Circuit has held that one must apply for an Eagle Act permit to have standing to challenge the permitting process as applied under RFRA. Where a permit process was not invoked, it cannot have been illegal in its application.

The district court erred in holding that Friday was not required to seek a permit because applying would have been futile. Both the Eagle Act and the regulations expressly provide for the availability of permits to take eagles for Indian religious purposes, and the record shows that take permits are in fact available and have been issued in short order. RFRA does not require the FWS to advertise the availability of take permits and does not excuse Friday from his burden to determine whether he could satisfy his religious desires through lawful means. Friday could have, for example, applied for a permit or filed a civil suit challenging the Eagle Act instead of taking the law into his own hands.

Friday's failure to apply for a permit does not, however, preclude him from challenging the Eagle Act's prohibition against killing eagles and arguing that, even if a permit is available, requiring him to engage any permitting process as a precondition to his exercise of religion violates RFRA. Both the law and the record in this case defeat the merits of that claim.

The district court erred in holding that the Eagle Act imposes a substantial burden on Friday and similarly situated individuals due to the alleged futility of the permit process. The permit process is not futile, but is a viable, lawful alternative. While the process imposes some burden on tribal members, that burden is not "substantial" under RFRA. This Court has held that where government actions make it more difficult to practice religion, but do not coerce individuals into acting contrary to their religious beliefs, those actions do not constitute "substantial burdens" within the meaning of RFRA. Requiring tribal members like Friday to fill out a form before taking eagles does not impose a substantial burden and hence does not violate RFRA.

The district court also erred in holding that the Eagle Act's permit process is not the least restrictive means of furthering the government's compelling interests. Both the Eighth and Ninth Circuits have held to the contrary. The FWS does not discourage tribal members from filing applications for take permits; rather, as the

district court recognized, the Service regularly grants such applications in a timely manner. The permit process is the least burdensome means of tracking the number of eagles taken and the area from which they are taken to assess the impact of proposed takings on particular eagle populations. That information enables the FWS to fashion permits that accommodate Indian religious needs to the maximum extent possible while still protecting eagle populations by specifying, for example, the number, species, or age of eagles, or the season or geographic area in which they may be taken. Indeed, the district court acknowledged that some regulation of eagle takes is necessary.

The government's unique task under the Eagle Act is to balance its compelling interest in protecting eagle populations with its compelling interest in preserving Native American culture and religion. The Indian Tribes exception and the permitting process set those interests in equipoise. Friday's request to be excused from the permitting process, on the other hand, interferes with both of those interests. By killing half of the only nesting pair of bald eagles on the Wind River Reservation without a permit, Friday imperiled not only the viability of the local bald eagle population, but also the opportunity to serve future religious needs through eagle reproduction.

Moreover, RFRA does not require the government to abandon its compelling interests, but only to minimize the burden on religion. No means of pursuing the government's compelling interests is available, however, that would be less restrictive of Indian religious practices. Abandoning all regulation of eagle takes for Indian religious purposes would vitiate the government's efforts to protect eagles, which in turn would undermine its ability to make eagles available to tribal members for religious practices. Accordingly, the two courts of appeals that have addressed claims similar to Friday's have held that the Eagle Act satisfies the least restrictive means element of RFRA.

The record in this case shows that allowing tribal members to take eagles for religious purposes without a permit would seriously compromise the FWS' ability to administer the Eagle Act and threaten the viability of the species. Although bald eagle populations nationwide have rebounded, they are not evenly distributed. The nest Friday divided was one of only 95 active nests in Wyoming, and the only active nest on the Wind River Reservation. The record further shows that the potential demand for taking eagles without a permit is high. The National Eagle Repository receives almost 2,000 requests for whole eagles annually and has approximately 4,000 pending requests. That potential demand is significant when

compared to the estimated population of bald eagles of only 7,700 nesting pairs in the lower 48 states.

In sum, the permitting process imposes no substantial burden and is the bare minimum required to enable the FWS to continue to protect eagles while simultaneously allowing tribal members to take eagles for religious purposes. The Court should follow the Eighth and Ninth Circuits and reverse the district court.

ARGUMENT

I. The Court reviews the district court's judgment *de novo*.

The grant of a motion to dismiss in a criminal case is reviewed *de novo*. United States v. Atandi, 376 F.3d 1186, 1188 (10th Cir. 2004); see also United States v. Sandia, 188 F.3d 1215, 1217 (10th Cir. 1999) (reviewing *de novo* district court's denial of motion to dismiss under RFRA indictment for selling golden eagle).

Whether Friday has standing to challenge the application of the Eagle Act's permitting process to him is a question of law that is reviewed *de novo*. See United States v. Thomas, 372 F.3d 1173, 1176 (10th Cir. 2004) (reviewing *de novo* district court's holding that defendant had standing to raise Fourth Amendment defense to firearm charge). The United States raised standing in

response to Friday's motion to dismiss, CR 37 at 5-12, and in its closing argument, Aplt. App. 134. The district court ruled on that issue in its opinion. Id. 189-91.

The "ultimate determination" of whether RFRA has been violated is a question of law that is reviewed *de novo*. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1177 (2003), aff'd 389 F.3d 973 (10th Cir. 2004) (en banc), aff'd 126 S. Ct. 1211 (2006); see also United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996). Thus, the constituent elements of the RFRA test should also be reviewed *de novo*. See Thiry, 78 F.3d at 1495 (reviewing "what constitutes a substantial burden" under RFRA *de novo*); In re Young, 82 F.3d 1407, 1419 (8th Cir. 1996), vacated 521 U.S. 1114 (1997), reinstated 141 F.3d 854, 856 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (reviewing least restrictive means element of RFRA *de novo*); Hamilton, 74 F.3d at 1552 (same); Hoevenaar v. Lazaroff, 422 F.3d 366, 368 (6th Cir. 2005) (reviewing least restrictive means element of identical RLUIPA test *de novo*); see also O Centro, 126 S. Ct. at 1224 (RLUIPA sets forth "same standard" as RFRA); but see Hardman, 297 F.3d at 1130 (declining to resolve standard of review for least restrictive means element of RFRA).

Moreover, RFRA's "least restrictive means" element is analogous to the narrow tailoring element of the strict scrutiny test that governs in other contexts,

see O Centro, 126 S. Ct. at 1220 ("Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test."), such as in Free Exercise Clause cases involving statutes that are not neutral or generally applicable with respect to religion, see Smith, 494 U.S. at 886 n.3. District court determinations of narrow tailoring in those analogous contexts are reviewed *de novo*. See, e.g., American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1249 (10th Cir. 2000) (First Amendment free speech); United States v. Lippman, 369 F.3d 1039, 1043 (8th Cir. 2004) (Second Amendment); Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000) (Equal Protection).

Facts necessarily underlie any constitutional analysis. See O Centro, 126 S. Ct. at 1220-21. Nevertheless, courts of appeals review *de novo* the narrow tailoring element of the strict scrutiny test.

392 F.3d 367, 371 (9th Cir. 2004) (reviewing district court's "conclusions regarding the sufficiency of the facts in meeting strict scrutiny" *de novo*); United States v. Secretary of Housing and Urban Development 239 F.3d 211, 219 (2d Cir. 2001) ("A district court's determination that a race-conscious remedy is narrowly tailored to advance a compelling government interest involves an application of law to facts, which we review de novo."); Engineering Contractors

Ass'n of South Florida Inc. v. Metropolitan Dade County, 122 F.3d 895, 905 (11th Cir. 1997) (Equal Protection); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) (same). Indeed, even if the Court were to treat the narrow tailoring element of the RFRA test as a mixed question of law and fact, the district court's application of the law to the facts would still be reviewed *de novo*. See In re Hedged Investments Assoc., Inc., 380 F.3d 1292, 1297-98 (10th Cir. 2004). Regardless of the standard of review the Court applies here, however, the district court's judgment was wrong and should be reversed.

Friday raised a RFRA challenge in his motion to dismiss, as well as in his opening and closing arguments. Aplt. App. 11, 20, 131-33. The district court addressed the validity of the Eagle Act under RFRA in its opinion. Id. 191-95.

II. Friday lacks standing to challenge the application of the Eagle Act's permitting process to him, because he failed to apply for a permit.

The "irreducible constitutional minimum of standing" requires parties to show, *inter alia*, that they have suffered an "injury in fact" that is "actual or imminent, not conjectural or hypothetical," and is causally connected to the challenged conduct. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); see also Wyoming Sawmills Inc. v. U.S. Forest Service, 383 F.3d 1241, 1246 (10th Cir. 2004). Accordingly, it is well established that a party "lacks standing to

challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit." Madsen v. Boise State University, 976 F.2d 1219, 1220 (9th Cir. 1992) (citing some of "a long line of cases"); see also Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997) (citing cases); cf. United States v. Maestas, 523 F.2d 316, 322 (10th Cir. 1975) ("One may not be heard to challenge the constitutionality of a statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court.").

As the Supreme Court explained in Poulos v. State of New Hampshire, 345 U.S. 395 (1953):

> It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, * * * defendants are given the choice of complying with the regulation, or not engaging in the regulated activity, or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation.

Id. at 409 n.13 (quotation omitted). In other words, "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. * * * He should apply and see what happens." Highland Farms Dairy v. Agnew, 300 U.S. 608, 616-17 (1937); see also Lehon v. City of Atlanta, 242 U.S. 53, 56 (1916) ("To complain of a ruling, one must be made the victim of

it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval.").

In Hardman, this Court recognized that several other courts, including the Ninth Circuit, have held that one must apply for an Eagle Act permit to have standing to challenge the permitting process as applied. 297 F.3d at 1121 (citing United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997); United States v. Lundquist, 932 F. Supp. 1237, 1242 n.4 (D. Or. 1996)). In Hugs, the Ninth Circuit held that the defendants had standing to "challenge only the facial validity of the Eagle Act and its regulations," since they had not applied for a permit to take or possess eagles. 109 F.3d at 1378, 1378-79. Similarly, in United States v. Thirty Eight Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986), aff'd 829 F.2d 41 (9th Cir. 1987) (table), the court held that the defendant need not have attempted to comply with the Eagle Act to challenge its facial validity, but his failure to apply for a permit precluded him from challenging the Act as applied. 649 F. Supp. at 273-74 (discussing Poulos, 345 U.S. 395); accord United States v. Tawahongva, 456 F. Supp. 2d 1120, 1127-29 (D. Ariz. 2006).[4]

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4. To prevail on a facial challenge, a plaintiff must prove that the statute is unlawful in all circumstances, see United States v. Salerno, 481 U.S. 739, 745 (1987); United States v. Grimmett, 439 F.3d 1263, 1271, 1273 (10th Cir. 2006), or at least in the "vast majority" of its applications, see Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1157 & n.5 (10th Cir. 2006) (challenging ordinance as void

That rule does not apply where the defendant could not have obtained relief through the permitting process. Unlike the defendants in Hugs, Thirty Eight Golden Eagles and Tawahongva, the Hardman claimants had standing even though they had never applied for permits, because they were not members of federally recognized tribes and hence were not eligible for permits. 297 F.3d at 1121; accord United States v. Winddancer, 435 F. Supp. 2d 687, 693-94 (M.D. Tenn. 2006), motion for reconsideration pending. Friday, however, is a member of a federally recognized Indian tribe and, hence, is eligible for an Eagle Act permit. See 50 C.F.R. § 22.22(a). Friday failed to apply for a permit and thus, like the defendants in Hugs, does not have standing to challenge the application of the permitting process to him. See Hugs, 109 F.3d at 1378.

Friday's failure to apply for a permit bars him from now challenging the permitting process as applied to him. There simply is no application of the permitting process to Friday that can be challenged and no information in the record on which to base such an analysis. Where a permit process was not

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for vagueness). "Because facial challenges push the judiciary towards the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims." Ward v. Utah, 398 F.3d 1239, 1247 (10th Cir. 2005). That heavy burden makes a facial attack "the most difficult challenge to mount successfully." West v. Derby Unified School Dist. No. 260 , 206 F.3d 1358, 1367 (10th Cir. 2000).

invoked, it cannot conceivably have been illegal in its application. Friday's failure to apply for a permit thus leaves him with the substantially more onerous burden of showing that he was not required to seek a permit because applying would necessarily have been futile. As demonstrated below, he did not meet that burden, and the district court erred in concluding otherwise.

III. The district court erred in holding that it would have been futile for Friday to apply for a permit.

The district court held that Friday had standing to challenge the Eagle Act's permitting process, because it would have been futile for him to apply for a permit. The court acknowledged that the statute itself "expressly contemplates a permitting process for the taking of eagles for Indian religious purposes" and that Interior has issued take permits. Aplt. App. 190. Nonetheless, the court concluded, "[b]ased upon the agency's conduct in every other respect," that Interior would not have granted Friday a take permit. Id. 191. The court did not specify the "conduct" to which it referred, but said that Interior "does not in any way promote the taking of eagles and prefers Native Americans to use the Repository." Id. 190. The district court's holding that it would have been futile for Friday to apply for a permit is wrong, and its judgment should be reversed.

First, as the district court acknowledged, id. 190, both the Eagle Act and its implementing regulations expressly provide for the availability of permits to take eagles for Indian religious purposes. 16 U.S.C. § 668a; 50 C.F.R. § 22.22.

Second, the record establishes that take permits are in fact available, as the district court likewise acknowledged, Aplt. App. 190. As noted above, the FWS has issued a take permit to the Hopi tribe annually since 1986, id. 174, which, for the past ten years, has authorized the take of up to 40 eagles for religious purposes, id. 165, 174. The FWS has also issued permits to members of the Navajo tribe, the Taos Pueblo, and the Jemez Pueblo, among others. Id. 90-91, 174, 199.

Third, applicants for take permits do not face lengthy bureaucratic delays. The FWS took only two months to process the most recent Hopi take permit. Id. 92; see also id. 165, 168 (application received December 29, 2005; permit issued February 1, 2006).

Fourth, the district court faulted the FWS for not having "outreach programs" advertising the availability of take permits for eagles. Id. 190. The government, however, has no obligation to advertise permitting exceptions to general criminal prohibitions. RFRA requires the government to show only that the "application of the burden to the person" is the least restrictive means of serving its compelling interests. 42 U.S.C. § 2000bb-1(b). That test turns on the

government's prohibitions or mandates; it does not require the government to facilitate religious exercise or engage in propaganda efforts that make religious exercise easier for individuals. "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Lyng v. Northwestern Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J.; concurring)); see also Bowen v. Roy, 476 U.S. 693, 700 (1986) (same).[5] The availability of take permits is explicitly revealed in the Eagle Act and the regulations, both of which are publicly available. RFRA requires nothing more.

Beyond that, ignorance cannot render futile a permitting process that is, in fact, available and operating. Those like Friday who are aware that the conduct in which they wish to engage is illegal have the burden of determining whether their conduct may be conformed to the law. RFRA provided Friday "a claim or defense in a criminal proceeding," 42 U.S.C. § 2000bb-1(c), not a license to intentionally disregard the law. For example, nothing prevented Friday from filing a civil suit

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5. As explained above, RFRA's legislative history reveals that Congress intended for courts to look to cases decided before Smith, 494 U.S. 872, for guidance in applying the Act. Adams, 170 F.3d at 177 (citing S. Rep. No. 103-111 (1993)).

challenging the Eagle Act and seeking a preliminary injunction allowing him to take an eagle. See, e.g., O Centro, 126 S. Ct. 1211 (affirming preliminary injunction enjoining enforcement of Controlled Substances Act); Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (per curiam) (judicial review of denial of Eagle Act permit). As the Supreme Court explained in Poulos, a criminal defendant has the choice of either complying with the law, not engaging in the regulated activity, "or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation." 345 U.S. at 409 n.13. Indeed, the district court asked at the hearing why the Tribe had not brought such a suit. Aplt. App. 136. The district court erred when it rewarded Friday for taking the law into his own hands and blamed the government for not illuminating the alternative, lawful path more brightly.

Finally, the district court was correct that the FWS prefers that tribal members use the Repository instead of taking live birds from the wild. Id. 85, 88. That preference, however, has not prevented the Service from granting take permits in the past and need not have prevented the Service from granting Friday a take permit if he had applied. Therefore, the district court erred in holding that it would have been futile for Friday to apply for a take permit under the Eagle Act.

Friday's failure to apply for a permit does not entirely prevent him from alleging that the Eagle Act violates RFRA. He may not challenge the application of the permitting process to him, since it has not been applied to him, and contrary to the district court's holding, it would not have been futile for him to apply.

The Eagle Act's prohibition against killing eagles, however, has been applied to him by the filing of an Information. Accordingly, Friday may argue that the Act's prohibition violates RFRA. To prevail on that argument, though, he must show that, even if the permitting process is not frivolous, requiring religious adherents to engage *any* permitting process as a precondition to the exercise of their religion violates RFRA. As demonstrated below, both the law and the record show otherwise.

IV. The district court erred in holding that the Eagle Act violates RFRA.

A. The permitting process imposes no substantial burden on tribal members.

The district court held that the Eagle Act imposes a substantial burden on tribal members, like Friday, who need eagles for their religious practices, due to the futility of the permitting process and the delay in obtaining eagles from the Repository. Aplt. App. 192. As demonstrated above, however, the FWS issues permits authorizing the take of eagles for tribal religious purposes with minimal

bureaucratic delay. While requiring tribal members to apply for a permit imposes some burden, that burden is not "substantial" under RFRA.

In Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996), the court held that "the incidental effects of otherwise lawful government programs 'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion," within the meaning of RFRA. Id. at 1495 (quoting Lyng, 485 U.S. at 450-51). Accordingly, the Court held in Thiry that the proposed relocation of a child's gravesite did not substantially burden the parents' religion where it did not prevent them from exercising their faith. Alleging that the government's conduct "distressed and inconvenienced" the religious adherents was not enough to establish a substantial burden on their religion under RFRA. Id.; see also Henderson v. Kennedy, 253 F.3d 12, 16-17 (D.C. Cir. 2001) (regulation banning sales of message-bearing t-shirts on the national Mall did not violate RFRA, because it did not force plaintiffs "to engage in conduct that their religion forbids" or "prevent[] them from engaging in conduct their religion requires").

Similarly, in this case, merely requiring tribal members to apply for a permit before taking eagles does not impose a substantial burden on their religious

exercise. The government has not prohibited tribal members from killing eagles for religious purposes. Nor has it mandated that they engage in conduct prohibited by their faith. Friday did not argue that his religion precluded him from interacting with permitting officials. The record shows to the contrary that members of the Northern Arapaho Tribe regularly engage the regulatory process to obtain permits to possess eagle parts. Aplt. App. 158-63. Friday also does not argue that his religion precluded him from tolerating the relatively short delay in obtaining a take permit. Id. 92, 165, 168. As in Thiry, filling out a form simply does not rise to the level of a "substantial burden" under RFRA.[6] Since Friday cannot establish his *prima facie* case under RFRA, the district court's judgment should be reversed.

B. The permitting process is the least restrictive means of furthering the government's compelling interests.

In implementing the Eagle Act, the FWS must protect eagle populations, while simultaneously trying to accommodate the religious needs of all tribal

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6. In support of its holding that the Eagle Act substantially burdened Friday, the district court quoted from Hardman, "Any scheme that limits [Native Americans'] access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief.". Aplt. App. 192 (quoting Hardman, 297 F.3d at 1126-27). That statement, however, is *dicta*, as the government did not contest substantial burden in that case. 297 F.3d at 1126. Unlike Friday, the claimants in Hardman were entirely prohibited from possessing eagle parts; no permit process was available to them.

members. To that end, the Eagle Act itself provides an exemption to the statutory ban on taking eagles for the religious purposes of Indian tribes. 16 U.S.C. § 668a. Under the authority granted in that provision, the FWS has issued permits allowing tribal members to take eagles for religious purposes. E.g., Aplt. App. 165. The Service also collects and distributes eagles and eagle parts through the National Eagle Repository free of charge to members of federally recognized Indian tribes. Id. 64, 67. Recently, the FWS has also begun to permit tribes to keep live eagles in aviaries to fulfill their religious needs. Id. 84, 86-87, 93-94.

The district court held, essentially, that those accommodations were not sufficient and that *any* regulation of eagles violates RFRA. To the contrary, the Eagle Act's permit process is the only means by which the FWS can track and protect eagle populations, both for their own sake and for the sake of all of the tribal members who depend on viable eagle populations for their religious practices. The only way the government could reduce the Eagle Act's burden on Friday's religious exercise would be to abandon all regulation of takes for Indian religious purposes. Doing away with all regulation would vitiate the government's compelling interest in balancing the need to protect eagles with the need to allocate scarce resources to maximize the opportunities of *all* tribal members who need eagles for their religious exercise. RFRA does not, however,

require the government to abandon its compelling interest, but only to show that it is pursuing that interest using the means that are least restrictive of religious exercise. The government met that burden here, both as a matter of law and on the record.

1. The district court's reasoning was flawed.

As described above, the district court agreed that "some regulation of the taking of eagles is necessary," but the court did not suggest any alternative means of regulation that would be less restrictive of Friday's religious exercise. Aplt. App. 195. Instead, the court faulted the FWS for the "biased and protracted nature of the process," as well as for "its policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none * * * particularly * * * when considering the recent recovery of the species and that a more significant cause of eagle mortality is electrocution." Id. The district court's holding was wrong, and its judgment should be reversed.

First, the FWS does not have a policy to discourage requests for take permits, and nothing in the record supports that statement. The Service simply prefers that tribal members use the Repository instead of taking live birds from the wild. Id. 85, 88. That preference benefits both eagles and all of the tribal members who need eagles for their religious practices. As explained below, the

wild bald eagle population simply could not sustain the needs of all of the tribal members who currently use eagles and eagle parts from the Repository. In any event, as noted above, the FWS' preference that tribal members use the Repository would not have prevented it from granting Friday a take permit if had he applied.

Second, Interior does not limit the issuance of take permits to "almost none." To the contrary, as the district court recognized in its opinion and as discussed above, Interior's rate of granting take permit applications is quite high. See Aplt. App. 190 (three out of four). Interior also authorizes tribes to possess live eagles in aviaries. Id. 84, 86-87, 93-94.

Third, the district court's suggestion that Interior should issue more take permits, particularly since eagle populations have rebounded, does not justify removing all regulatory oversight of eagle takes by tribal members. A bare permit requirement is the least burdensome means of tracking the number of eagles taken and the area from which they are taken. See 50 C.F.R. § 22.22(a). Absent that information, the FWS could not assess the impact of proposed takings on eagle populations in a particular area. Aplt. App. 96; see also id. 194. With that information, the FWS can draft permits that accommodate Indian religious needs to the maximum extent possible while still protecting eagle populations by, e.g., specifying the number, species, or age of eagles, or the season or geographic area

in which they may be taken. See id. 112. The Hopi permit, for example, authorizes the take of 40 golden eagle eaglets in Northeastern Arizona. Id. 165. Through the permit process, the FWS was able to determine that structuring the Hopi permit in that manner would reduce the local golden eagle population of approximately 1,558 nesting pairs by only 0.3%. Id. 170. Eliminating the permitting process would eliminate the FWS' ability to track eagle takes and to design permits that accommodate Indian religious needs as much as possible while still protecting eagle populations, both for their own sake and for the sake of those tribal members who will need eagles in the future. Indeed, the district court agreed that "some regulation of the taking of eagles is necessary." Id. 195.

The district court faulted Interior not for regulating takes, but for the "biased and protracted nature of the process." Id. As explained above, however, while applicants to receive eagle parts from the Repository face lengthy delays due to the huge demand for a very limited supply, id. 78-82, applicants for take permits do not. Brian Milsap testified that it took the FWS two months to process the most recent Hopi take permit. Id. 92. Friday knew of his need for an eagle several years in advance, id. 56, giving him plenty of time to engage the permit system or the Repository. Of course, there is no evidence that the permitting process would have been "biased or protracted" for Friday, since he never applied for a permit.

Fourth, the district court may have been correct that electrocution kills more eagles than do tribal members, though Jody Millar, the expert on eagle populations, testified that the data is insufficient to make that determination. Id. 107-8. Brian Milsap admitted that "there remains much work to be done in reducing eagle mortality from * ** electric utility lines." Id. 100. He further testified, however, that "there's also been much progress made." Id. In United States v. Moon Lake Electric Association, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999), the court denied the defendant's motion to dismiss the indictment, holding that the Eagle Act and Migratory Bird Treaty Act (MBTA) prohibit not only hunting and poaching, but also conduct that is not intended to be harmful, such as the operation of electric power lines. Following that decision, some power companies have entered into agreements with Interior to avoid prosecution, either voluntarily or following issuance of a notice of violation, under which they have agreed, *inter alia*, to take measures to reduce eagle mortality and report takes to the regional FWS offices. Aplt. App. 98-99. In any event, the fact that Interior is still in the process of combating eagle mortality from electrocution does not justify removing its only means of tracking takes for Indian religious purposes. For these reasons, the district court's analysis was flawed and should be reversed.

2. The Eagle Act permitting process is, as a matter of law, the least restrictive means of advancing the government's compelling interests.

a. In Hardman, the Court held that protecting eagles is a compelling interest. 297 F.3d at 1128. A flat prohibition on killing eagles obviously furthers that interest. Congress prohibited the taking of bald eagles in 1940 in order to preserve the species. See Andrus v. Allard, 444 U.S. 51, 52-53 (1979); S. Rep. No. 76-1589, at 1 (1940); see also S. Rep. No. 87-1986, at 1 (1962); H.R. Rep. No. 87-1450, at 1 (1962); S. Rep. No. 92-1159, at 1 (1972). A flat prohibition also makes it easier to enforce the law. Aplt. App. 124.

A flat prohibition, however, would undermine the government's compelling interests in "preserving Native American culture and religion in-and-of-themselves and in fulfilling trust obligations to Native Americans." Hardman, 297 F.3d at 1129. Thus, the government's unique task under the Eagle Act, in light of RFRA, is to balance those compelling interests and protect the religious exercise of all tribal members while simultaneously ensuring the conservation of a sustainable eagle population. Id. at 1135. Achieving and preserving that critical balance is the compelling interest at stake here.

The Indian Tribes exception to the Eagle Act, which authorizes the Secretary to permit the taking of eagles for the religious purposes of Indian tribes,

16 U.S.C. § 668a, "sets those interests in equipoise." Rupert v. U.S. Fish and Wildlife Service, 957 F.2d 32, 35 (1st Cir. 1992); see also Dion, 476 U.S. at 743 ("Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception * * * ."). As the First Circuit explained in Rupert, "[a]ny diminution of the exemption would adversely affect [the interest in protecting Native American religion and culture], but any extension of it would adversely affect [the interest in protecting a dwindling and precious eagle population]." 957 F.2d at 35.[7]

b. Friday has not presented a viable RFRA claim. In this unusual case, the religious claim of the individual bumps up against not only secular governmental interests, but also the ability of many other individuals to exercise their religion. "Religion weighs on both sides of the scale." United States v. Antoine, 318 F.3d 919, 923 (9th Cir. 2003). By killing half of the only nesting pair of bald eagles on the Wind River Reservation, Friday imperiled not only the viability of the local bald eagle population, but also the ability of every other tribal

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7. The Indian Tribes exception also distinguishes this case from O Centro, 126 S. Ct. 1211. There, the government argued that the Controlled Substances Act "simply admits of no exceptions." Id. at 1220. Here, the statute expressly provides an exception, and Friday argues that it should be broadened.

member in the vicinity to exercise his or her Native American faith by taking an eagle, as well as the opportunity to serve future religious needs through eagle reproduction. Thus, Friday is asking not that the government reduce its burden on Native American religion, but rather that the burden be shifted to other individuals. Id. "This is not a viable RFRA claim; an alternative can't fairly be called 'less restrictive' if it places additional burdens on other believers." Id. The government's compelling interest in balancing the need to protect the species with the need to allocate scarce resources to maximize the opportunities of *all* tribal members who need eagles for their religious exercise can be served only by requiring individuals to adhere to the permitting process and not take the law into their own hands.

In addition, RFRA does not require the government to abandon its compelling interests, but only to minimize the burden on religion. Here, no means of furthering the government's compelling interests is available that is less restrictive of Indian religious practices. The Eagle Act merely requires tribal members to obtain a permit before taking eagles for religious purposes and requires the Secretary to consider whether granting a permit would be compatible with eagle preservation. 16 U.S.C. § 668a. The only less restrictive regulatory process would be one that required no permit at all and simply allowed

unregulated take of eagles by members of federally recognized Indian tribes. Such a process, however, would not *advance* the government's compelling interest in protecting eagles. It might initially further the government's interest in preserving Native American religion by eliminating any impediment to Indian religious use of eagles, but in the long run, it would undermine that interest as well by threatening the viability of eagle populations. Thus, doing away with the permitting process might benefit a few individuals, like Friday, but it would vitiate the government's compelling interest in protecting eagles and reduce the ability of tribal members in general to practice their religion.

The government need not sacrifice its eagle protection goal to accommodate Friday's religious desires. RFRA does not require the government to abandon one compelling interest to further another. Rather, RFRA requires the government to show that a burden on a person's exercise of religion is the least restrictive means of *furthering* a compelling governmental interest. 42 U.S.C. § 2000bb-1(b). As the Supreme Court observed in Lyng, 485 U.S. at 452, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." The statutory requirement that tribal members obtain a permit before killing eagles is the least restrictive means of pursuing the compelling interest in

protecting eagle populations while simultaneously accommodating Indian religious needs.

c. The other courts of appeals that have addressed claims similar to Friday's have held that the Eagle Act satisfies RFRA. The Eighth Circuit in United States v. Oliver, 255 F.3d 588 (8th Cir. 2001), affirmed the conviction of a tribal member for taking an eagle without a permit. With regard to the least restrictive means element of RFRA, the court held that "[i]t is clear that unrestricted access to bald eagles would destroy [the] legitimate and conscientious eagle population conservation goal of the BGEPA. * * * There are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting." Id. at 589. Similarly, in Hugs, the Ninth Circuit affirmed the convictions of tribal members for taking eagles without a permit and held that "the statute and permit system provide the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes." 109 F.3d at 1378; see also United States v. Jim, 888 F. Supp. 1058 (D. Or. 1995).

Indeed, virtually every court to address the validity of the Eagle Act under RFRA has upheld the Eagle Act. See Antoine, 318 F.3d 919 (affirming conviction of non-tribal member Native American for possession and sale of eagle parts);

Oliver, 255 F.3d 588; Gibson, 223 F.3d 1256 (upholding denial of application to possess eagle feathers filed by non-tribal member Native American); Hugs, 109 F.3d 1375; Winddancer, 435 F. Supp. 2d 687 (denying motion to dismiss under RFRA filed by non-tribal member Native American charged with possession and bartering of eagle feathers); Lundquist, 932 F. Supp. 1237 (denying motion filed by non-tribal member Native American to dismiss charges of possessing eagle feathers); Jim, 888 F. Supp. 1058 (holding conviction of tribal member charged with killing eagles did not violate RFRA); cf. United States v. Eagleboy, 200 F.3d 1137 (8th Cir. 1999) (reversing dismissal of charge against non-member Native American for possessing hawk parts in violation of Migratory Bird Treaty Act); Rupert, 957 F.2d 32 (holding denial of application to possess eagle feathers filed by non-tribal member Native American did not violate Free Exercise Clause); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) (affirming conviction of tribal member who claimed treaty right to kill bald eagles); United States v. Top Sky, 547 F.2d 486 (9th Cir. 1976) (per curiam) (affirming conviction of tribal member who claimed Free Exercise Clause and treaty right to sell eagle parts); Tawahongva, 456 F. Supp. 2d 1120 (denying motion to dismiss under RFRA filed by tribal member charged with possession in violation of MBTA); Thirty-Eight Golden Eagles, 649 F. Supp. 269 (denying Free Exercise Clause claim in action

against tribal member for forfeiture of eagle parts); but see Hardman, 297 F.3d 1121; United States v. Gonzales, 957 F. Supp. 1225 (D. N.M. 1997) (dismissing under RFRA Information against tribal member for killing bald eagle);[8] United States v. Abeyta, 632 F. Supp. 1301 (D. N.M. 1986) (dismissing as against treaty rights charge against tribal member for possessing eagle feathers without a permit).[9]

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8. The district court in Gonzales held that the requirement that an applicant for a permit to take an eagle identify the ceremony in which the eagle will be used and include a certification from a tribal elder that the applicant is authorized to participate in that ceremony violated RFRA. The FWS no longer requires permit applicants to submit that information. See Aplt. App. 71; 64 Fed. Reg. 50,467, 50,468 (Sept. 17, 1999). Significantly, the Gonzales court did not excuse the defendant from applying for a permit, but only from complying with those specific former requirements. 957 F. Supp. at 1229 ("Native Americans will still need to apply for an eagle permit but they will not be required to provide the information demanded by [former] 50 C.F.R. §§ 22.22(a)(4) & (6).").

9. The court's primary holding in Abeyta was that the Eagle Act did not abrogate the defendant's rights under the Treaty of Guadalupe Hidalgo. 632 F. Supp. at 1307. That conclusion is inconsistent with the Supreme Court's later decision in Dion, 476 U.S. 734. See Havasupai Tribe v. United States, 752 F. Supp. 1471, 1487 (D. Ariz. 1990), aff'd, 943 F.2d 32 (9th Cir. 1991). The rest of the court's opinion discussing the First Amendment was *dicta* and has since been consistently rejected by other courts. See Hugs, 109 F.3d at 1378; Tawahongva, 456 F. Supp. 2d at 1135; Jim, 888 F. Supp. at 1063-64; Thirty-Eight Golden Eagles, 649 F. Supp. at 277-78. Notably, this Court expressly disagreed with Abeyta in Hardman when it held that "the government's interest in preserving eagle populations is compelling." 297 F.3d at 1128.

d. Omitting the permit requirement from the Eagle Act's Indian tribes exception would "destroy [the] legitimate and conscientious eagle population conservation goal of the BGEPA," Oliver, 255 F.3d at 589, and hence is not required under RFRA. RFRA permits the government to pursue its compelling interests, even if doing so substantially burdens religious exercise, so long as the means used are the least restrictive of religious exercise. 42 U.S.C. § 2000bb-1(b). The Court's analysis here need extend no further.

Hardman concerned the right of non-tribal member Native Americans to possess eagle parts. 297 F.3d at 1135 ("The question at the heart of this case is why an individual who is not a member of a federally recognized tribe is foreclosed from applying for a permit that may be used as a defense to criminal prosecution for possession of eagle feathers, while an identically situated individual may apply for a permit if she is a member of a federally recognized tribe."). This Court held that the government had not presented sufficient evidence to prove that allowing more people to obtain eagle feathers from the National Eagle Repository would "place increased pressure on eagle populations," that increasing the waiting time to receive eagle feathers from the Repository would increase poaching, or that allowing non-tribal members to obtain eagle

feathers would increase the waiting time at the Repository enough to harm tribal members. Id. at 1132-33.

No such proof is necessary here, because the only way the government could reduce the burden the permit process imposes on Friday's religion would be by abandoning pursuit of its compelling interests and shifting Friday's burden to other tribal members who need eagles for their religious exercise, which RFRA does not require. Unlike Hardman, the flaw in Friday's argument is readily apparent and requires no evidentiary support. Cf. Antoine, 318 F.3d at 923 ("the consequences of extending eligibility are predictable" and "inescapable"). Thus, this Court should follow the Eighth and Ninth Circuits and hold that Friday's argument fails as a matter of law.

3. In any event, the record shows that the Eagle Act's permitting process is the least restrictive means of advancing the government's compelling interests.

a. The record shows that "granting the requested religious accommodations" -- here, allowing members of federally recognized tribes who need eagle feathers for religious purposes to take eagles without a permit -- would "seriously compromise [the FWS'] ability to administer" the Eagle Act. See O Centro, 126 S. Ct. at 1223. As explained above, the permit process enables the FWS to track the number of eagles taken and the area from which they are taken.

See 50 C.F.R. § 22.22(a). Absent that information, the FWS could not assess the impact of proposed takings on eagle populations and design permits that protect eagles while accommodating Indian religious needs. Jody Millar explained that regulating the location, season, and age of birds taken can reduce the impact of takes on eagle populations, which effectively allows the FWS to permit more takes. Aplt. App. 112. Eliminating the permitting process, then, would vitiate the FWS' ability to protect eagles, which would ultimately harm not just the species, but also those who need eagles for religious purposes. See id. As then-chief of the FWS' Division of Migratory Bird Management, Brian Milsap, testified, absent a permit requirement, the agency "would have no way of assessing, in a predictive way, what the impact of that harvest was on eagle populations which would potentially increase the probability or the possibility of reaching that point of catastrophic declines without us ever knowing we were getting close." Id. 96; see also id. 194. In addition, a special agent with the Fish and Wildlife Service who testified as an expert on law enforcement, particularly with regard to eagle violations, testified that omitting the permit requirement would "seriously hamper our enforcement abilities." Id. 126.

b. The record also shows that allowing members of federally recognized tribes who need eagle feathers for religious purposes to take bald

eagles without a permit could threaten the viability of the species. Bald eagle populations have rebounded to the point that the Department of the Interior has proposed removing the species from the list of threatened species under the Endangered Species Act. 71 Fed. Reg. 8,238 (Feb. 16, 2006). The delisting proposal, however, is predicated in part on the continued protection of the species under the Eagle Act, see 16 U.S.C. § 1533(a)(1), (c)(2) (requiring Secretary to consider "inadequacy of existing regulatory mechanisms" when determining whether to list or delist a species as threatened or endangered); 71 Fed. Reg. 8238, 8243, 8245, 8246, 8247-48, 8249, which predated the Endangered Species Act by 33 years.

Moreover, while overall bald eagle populations now appear to be healthy, populations are not evenly distributed. For example, in Wyoming, there are only 95 occupied bald eagle territories with approximately 89 fledged young in 2004. Aplt. Appx. 14 ¶13; see also id. 101 (receiving affidavit as direct testimony). Taking of bald eagles is prohibited under Wyoming law. Wyo. Stat. Ann. § 23-3-101 (2006); see also id. § 23-1-102 (defining "take"). The bald eagle remains on the State of Wyoming's list of Species of Greatest Conservation Need. See A Comprehensive Wildlife Conservation Strategy for Wyoming at 11 (Wyoming Game and Fish Department, July 12, 2005), available at

http://gf.state.wy.us/wildlife/CompConvStrategy/index.asp (visited 3/20/07). The State classifies the bald eagle as a Species of Special Concern "because breeding populations are restricted in numbers and distribution, there is ongoing significant loss of nesting habitat, and it is sensitive to human disturbance." Id. at 259; see also Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1263 n.2 (10th Cir. 2004).

On the Wind River Reservation, which the Northern Arapaho share with the Shoshone Tribe, there was only one active bald eagle nest and one unoccupied territory at the time Friday shot an eagle. Aplt. App. 14 ¶13; id. 111, 118. The presence of an unoccupied territory indicates that the area could support additional eagles. Id. 102-5, 135. The government's expert on eagle populations and reproductive biology dynamics, Jody Millar, explained that the bald eagle population "increases at a very slow rate" and its "main key to success is survivability of the adults." Id. 14 ¶16. The loss of one breeding pair of eagles equates to "the loss of 10-15 fledgling eagles." Id. ¶18; id. 103. Though a non-breeding adult or "floater" may take the place of a deceased member of a breeding pair, that floater could also "mate with another and create its own territory." Id. 105. Jody Millar also explained that Wyoming is not an area in which many floaters are likely to be found. Id. 110-11. Thus, even if there was a floater

available to take the place of the eagle Friday shot, his action -- killing an eagle in an area with only one occupied nest and an unoccupied territory -- significantly impacted the bald eagle population on the Reservation. In a larger context, Millar testified that while the bald eagle population as a whole "can withstand some individual mortality without depressing population numbers, * * * on a long-term or widespread basis, unregulated take of mature bald eagles can depress, and potentially endanger the population." Id. 14 ¶18.

c. The potential demand for taking live eagles without a permit is high. Congress' decision to prohibit the taking of bald eagles in 1940 was based on the "fact that there are persons in almost every community where an eagle may appear who are eager to shoot it" as well as "numerous collectors of birds' eggs who persistently rob the nests of these eagles." S. Rep. No. 76-1589, at 2 (1940); see also H.R. Rep. No. 76-2104, at 1 (1940). In 1962, Congress extended the Act's protection to golden eagles, thereby indirectly increasing protection of bald eagles, since immature bald and golden eagles are "virtually indistinguishable." H.R. Rep. No. 87-1450, at 2 (1962). At that time, Congress observed that "a large number" of golden eagles are killed to obtain feathers for Indian religious purposes and for "souvenirs for tourists in the Indian country." Id. at 2; see also id. at 6.

The district court "acknowledged that the demand for eagles and eagle parts for religious purposes is very high." Aplt. App. 194. Both the population of tribal members and the demand for eagles for religious purposes are growing. The government's expert on demographics and statistics testified that at least 2.2 percent of the almost 2 million current members of federally recognized Indian tribes, or approximately 42,300 persons, practice a Native American religion and could "potentially want to take an eagle." Id. 114, 115, 117 ("the estimate of 2.2 percent, is, in fact, a lower-bound estimate"); id. 184. The National Eagle Repository received almost 2,000 applications for whole eagles in 2005, id. 76, 83, and currently has approximately 4,000 pending permit requests, id. 83. That annual demand is significant when compared to the estimated population of bald eagles of only 7,700 nesting pairs in the lower 48 states, each producing an average of less than one fledged offspring each year with survivals rates as low as 50%. Id. 14 ¶¶12, 14. Jody Millar testified that allowing the take of 3,500 eagles would have a significant impact on eagle populations. Id. 112-13.

d. In sum, allowing unregulated takes of eagles is not a less restrictive means of advancing the government's compelling interest in protecting eagle populations; it is an abandonment of that interest, and consequently also an abandonment of the government's compelling interest in maximizing the ability of

all tribal members to use eagles for their religious practices. Of course any permitting requirement burdens Native American religious practices, but this permitting process does not impose a substantial burden and is the bare minimum required to enable Interior to protect eagles from unregulated take for Indian religious purposes. Here, exempting members of federally recognized Indian tribes from Eagle Act's permit requirement would vitiate not just the government's compelling interest in protecting eagles, but also its interest in preserving Native American religion.

CONCLUSION

For the forgoing reasons, the district court's judgment should be reversed and this case remanded.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States believes that oral argument would assist the Court in resolving the important questions presented in this appeal.

Respectfully submitted,

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198-87-00791

STATUTORY AND REGULATORY ADDENDUM

16 U.S.C.A. § 668
(a) Prohibited acts; criminal penalties

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: Provided, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10;000 or imprisoned not more than two years, or both: Provided further, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: Provided further, That one-half of any such fine, but not to exceed $2,500, shall be paid to the person or persons giving information which leads to conviction: Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

16 U.S.C.A. § 668a

> 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 of public museums, scientific societies, and zoological parks, or for the religious purposes of

Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: Provided, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: Provided further, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry: Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking of golden eagle nests which interfere with resource development or recovery operations.

42 U.S.C.A. § 2000bb-1

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

50 C.F.R. § 22.22 What are the requirements concerning permits for Indian religious purposes?

We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1 engaged in religious activities who satisfy all the issuance criteria of this section. We may, under the provisions of this section, issue a permit authorizing the taking, possession, and transportation within the United States, or transportation into or out of the United States of lawfully acquired bald eagles or golden eagles, or their parts, nests, or eggs for Indian religious use. We will not issue a permit under this section that authorizes the transportation into or out of the United States of any live bald or golden eagles, or any live eggs of these birds.

(a) How do I apply if I want a permit for Indian religious purposes? You must submit applications for permits to take, possess, transport within the United States, or transport into or out of the United States lawfully acquired bald or golden eagles, or their parts, nests, or eggs for Indian religious use to the appropriate Regional Director--Attention: Migratory Bird Permit Office. You can find addresses for the appropriate Regional Directors in 50 CFR 2.2. If you are applying for a permit to transport into or out of the United States, your application must contain all the information necessary for the issuance of a CITES permit. You must comply with all the requirements in part 23 of this subchapter before international travel. Your application for any permit under this section must also contain the information required under this section, § 13.12(a) of this subchapter, and the following information:

(1) Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.

(2) State and local area where the taking is proposed to be done, or from whom acquired.

(3) Name of tribe with which applicant is associated.

(4) Name of tribal religious ceremony(ies) for which required.

(5) You must attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a-1, 108 Stat. 4791 (1994). The certificate must be signed by the tribal official who is authorized to certify that an individual is a duly enrolled member of that tribe, and must include the official title of that certifying official.

(b) What are the permit conditions? In addition to the general conditions in part 13 of this subchapter B, permits to take, possess, transport within the United States, or transport into or out of the United States bald or golden eagles, or their parts, nests or eggs for Indian religious use are subject to the following conditions:

(1) Bald or golden eagles or their parts possessed under permits issued pursuant to this section are not transferable, except such birds or their parts may be handed down from generation to generation or from one Indian to another in accordance with tribal or religious customs; and

(2) You must submit reports or inventories, including photographs, of eagle feathers or parts on hand as requested by the issuing office.

(c) How do we evaluate your application for a permit? We will conduct an investigation and will only issue a permit to take, possess, transport within the United States, or transport into or out of the United States bald or golden eagles, or their parts, nests or eggs, for Indian religious use when we determine that the taking, possession, or transportation is compatible with the preservation of the bald and golden eagle. In making a determination, we will consider, among other criteria, the following:

(1) The direct or indirect effect which issuing such permit would be likely to have upon the wild populations of bald or golden eagles; and

(2) Whether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies.

(d) How long are the permits valid? We are authorized to amend, suspend, or revoke any permit that is issued under this section (see §§ 13.23, 13.27, and 13.28 of this subchapter).

(1) A permit issued to you that authorizes you to take bald or golden eagles will be valid during the period specified on the face of the permit, but will not be longer than 1 year from the date it is issued.

(2) A permit issued to you that authorizes you to transport and possess bald or golden eagles or their parts, nests, or eggs within the United States will be valid for your lifetime.

(3) A permit authorizing you to transport dead bald eagles or golden eagles, or their parts, nests, or dead eggs into or out of the United States can be used for multiple trips to or from the United States, but no trip can be longer than 180 days. The permit will be valid during the period specified on the face of the permit, not to exceed 3 years from the date it is issued.

United States District Court
For The District of Wyoming

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. 05-CR-260-D
	)	
WINSLOW FRIDAY,	)	
	)	
Defendant(s).	)	

ORDER ON MOTION TO DISMISS INFORMATION

This matter comes before the Court on the Defendant's Motion to Dismiss Information. The Court, having carefully considered the briefs and materials submitted in support of the motion and the government's opposition thereto, having received testimony of witnesses and heard oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

Background

On November 15, 2005, Winslow W. Friday, Defendant, was charged by Information with the unlawful taking of one bald eagle without having previously procured permission to do so from the Secretary of the Interior, a misdemeanor in violation of the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668. In support of his motion to dismiss, Defendant contends that the charge violates the free

exercise of religion protected under the First Amendment, as well as the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq.

Defendant maintains that the eagle was taken for religious practices. Defendant is an enrolled member of the Northern Arapaho Tribe ("the Tribe"), as well as a member of the Native American Church. Defendant asserts that, as a practitioner of Native American religion, he took the eagle for use in the Sun Dance for the Northern Arapaho Tribe. He further asserts that he and other members of the Northern Arapaho Tribe in fact participated in the Sun Dance ceremony for which the eagle was taken.

Both the Defendant and the Tribe (participating as Amicus party) explained the significance of the Sun Dance to the religious beliefs of the Arapahoes, which is not disputed by the Government. The eagle parts are an offering to God and are central to the Sun Dance ceremony. Defendant and the Tribe assert that "clean" eagles are required for their ceremonies; eagles that have died as a result of electrocution, vehicle collision, unlawful shooting or trapping, poisoning or from natural causes are unacceptable for ceremonial sacrifice. The Tribe contends that the actual hunting and taking of an eagle is an act of religious belief and is itself entitled to protection under the free exercise clause.

The Government investigation into the eagle taking revealed the following facts. On March 2, 2005, Eddie Friday reported to the Bureau of Indian Affairs Police Department that he had just witnessed someone shoot a bald eagle near his home

located on the Wind River Indian Reservation. Tribal Warden Rawley Friday and Special Agent Roy Brown of the United States Fish and Wildlife Service ("USFWS") began an investigation into the shooting. After observing a truck parked at Keenan Groesbeck's home matching a description provided by Eddie Friday, Warden Friday made contact with Groesbeck, who was with Defendant. Both Groesbeck and Defendant denied any knowledge of the shooting. While at Groesbeck's home, Warden Friday noted the tread pattern on Groesbeck's white, Chevrolet pick-up truck.

Warden Friday went to the site of the shooting where he observed fresh tire tracks that appeared to match the tire tread on Groesbeck's truck. He also saw one set of footprints leaving the tracks from the passenger side of the truck. He tracked the footprints through the fence to the tree where the bald eagle was shot.

A few days later SA Brown spoke with Groesbeck about the shooting. Groesbeck initially denied knowing anything about the bald eagle being shot. Eventually, however, Groesbeck told SA Brown that Defendant had shot a bald eagle and that he had driven Defendant to the kill site. Groesbeck told SA Brown that Defendant gave the tail fan of the eagle to one of the sponsors of the Arapaho Sun Dance. SA Brown subsequently made contact with Defendant who indicated that he shot the eagle for the Sun Dance. Defendant further stated that he had given away all of the parts of the eagle, except the feet, which he kept. There is no record of either Defendant or Groesbeck applying for or receiving any permit to take or posses eagles

or eagle parts. There is also no record of Defendant having applied to receive eagles or eagle parts from the National Eagle Repository.

The BGEPA provides a permitting process for the possession or taking of bald eagles:

> 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 of public museums, scientific societies, and zoological parks, or *for the religious purposes of Indian tribes*, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: . . . *Provided* . . . That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior . . . .

16 U.S.C. § 668a (first emphasis added).

The U.S. Fish and Wildlife Service operates the National Eagle Repository in Commerce City, Colorado. The Repository serves as the main collection point for all salvaged bald and golden eagle carcasses, parts and feathers. It is responsible for the receipt, evaluation, storage and distribution of dead bald and golden eagles, and parts thereof, to enrolled Native Americans of federally recognized tribes throughout the United States for use in their religious ceremonies. Eagles and eagle parts distributed by the Repository come from various sources throughout the United States. The majority of carcasses received are birds found dead and salvaged; some are obtained through law enforcement seizures. Mortalities include electrocution, collisions,

emaciation, gun shot, etc.

The demand for eagle parts far exceeds the supply of salvaged eagles. Requests for whole birds are filled in approximately 3 to 3½ years. Orders for the tail or tail feathers also take more time to fill because the tail is usually the part with the most damage due to it's use in flight. Applicants with needs which do not require a whole bird or tail feathers may apply for a pair of wings which can be filled in one year. A request for higher quality loose feathers (which typically includes 2 tail and 8 wing feathers or 10 wing feathers) can be filled in 6 months. Those applicants willing to settle for 20 miscellaneous feathers of varied species, size and type, and of lower quality, can have their order filled in 90 days.

Discussion

A. Standing

The Government contends, as a threshold matter, that Defendant lacks standing because he made no application for a permit to take a bald eagle and there is no indication that such an application would be categorically futile. The Tenth Circuit has recognized that where an individual never actually applied for a permit, he cannot thereafter complain that the permitting process harmed his constitutional rights. *United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002). When, however, it would have been futile for the individual to apply for a permit, he will not be denied standing to

challenge the statutory and regulatory scheme. *Id.*

In *Hardman*, the court recognized the futility of the defendants' application for permits because they could not fulfill the requirement of membership in a federally recognized tribe. Although Mr. Friday does not have the same impediment to applying for a permit, the Court likewise finds futility in the application process. The Defendant and the tribal members testifying on his behalf were not aware of the possibility of obtaining a permit to take an eagle. The statute expressly contemplates a permitting process for the taking of eagles for Indian religious purposes, relying on the Secretary of the Interior to implement regulations to make this accommodation to our Native Americans. Yet, testimony at the hearing revealed that as recently as 2003, the Secretary had not delegated the authority to process fatal take permits for Indian religious purposes. The evidence is that prior to 2003, only four such applications were submitted – three were issued and one denied. The Government's brief represents that a total of eleven such applications have been submitted of which approximately five were granted. Although the Fish and Wildlife Service utilizes outreach programs in an attempt to increase the understanding of its Repository program, there are no outreach programs advising Native Americans of the fatal take permitting process. The agency admittedly does not in any way promote the taking of eagles and prefers Native Americans to use the Repository program, despite the program's obvious inadequacies in filling their religious needs. As a result, very few applications for fatal take permits for

Indian religious purposes have been submitted and even fewer granted.[1] Based upon the agency's conduct in every other respect, it is clear that Defendant would not have been accommodated by applying for a take permit. Therefore, the Court finds that Defendant has standing to challenge the statutory and regulatory scheme.

B. Religious Freedom Restoration Act (RFRA)

"Congress enacted the Religious Freedom Restoration Act against the background of Free Exercise Clause law." *Hardman*, 297 F.3d at 1125. Substantively, RFRA states:

> (a) Government shall not *substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a)&(b) (emphasis added). RFRA further provides that this test may be asserted "as a claim or defense in a judicial proceeding . . . ." 42 U.S.C. § 2000bb-1(c).

1. Substantial Burden on Religion

Defendant argues that the BGEPA is a substantial burden on his religious

[1] One of the Government's witnesses stated that he would not be surprised that new agency employees were unaware that such take permits are available or can be applied for.

practices due to the highly restrictive method for obtaining bald eagles from the Government. The Court has already discussed the futility of the process for obtaining a fatal take permit. Moreover, there is a significant waiting period for obtaining bald eagles or eagle parts from the National Eagle Repository and, in any event, Defendant contends that eagles from the Repository are not acceptable for Sun Dance purposes. There can be no real dispute that the BGEPA substantially burdens Defendant's exercise of religion.[2] "The eagle feather is sacred in many Native American religions . . . Any scheme that limits [Native Americans'] access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief." *Hardman*, 297 F.3d at 1126-27. Thus, this Court must consider whether the regulations governing the BGEPA: (1) advance a compelling government interest; and (2) are the least restrictive means of furthering that interest.

2. *Compelling Interests*

There can also be no real dispute, however, regarding the Government's interest in preserving our eagle populations and in protecting Native American culture. *Id.* at 1128.

> The bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government's interest in preserving the

[2] The Government challenges whether the Defendant's actions in taking the eagle were at all related to a sincere belief in the religious practices of the Northern Arapaho Tribe. However, the unrebutted evidence before the Court is that the Defendant's Native American religious beliefs are sincerely held and his taking of the eagle was for religious purposes.

> species remains compelling in either situation. *What might change depending on the number of birds existing is the scope of the program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.* Thus, we agree that the government's interest in preserving eagle populations is compelling.

Id. (emphasis added).

3. Least Restrictive Means

The Defendant argues that the present permitting process is not the least restrictive means of preserving the eagle populations given the recovery of the bald eagle in recent years. Despite this recovery, Defendant argues, the Government has failed and refused to issue any regulations authorizing the more liberal granting of take permits for the religious purposes of Native Americans. Defendant contends that doing so will not adversely impact the eagles. The Tribe argues that the present regulations do nothing to alleviate the burden on Indian religion created by the BGEPA. The Tribe further urges the Court to consider this burden in conjunction with the trust obligation owed by the federal government to Indians.

The Government responds that the prohibitions against taking bald eagles without a permit under the BGEPA plainly advance the compelling interest of protecting such birds. The Government further acknowledges, however, that a flat statutory ban on taking and possession of eagles would simultaneously harm the Government's interest in protecting tribal Native American religion and culture, as well as in fulfilling its general trust obligations to Indian tribes. So, to advance both interests, the BGEPA has

issued regulations which make exceptions to the flat ban for "the religious purposes of Indian tribes."

The Government maintains that any taking must be regulated, however, because unregulated take would proceed without any opportunity for agency experts to determine if then current populations, in the relevant take area, could sustain the take contemplated. It would also remove any requirement for the person taking the specimen to attest that they were doing so for religious purposes, and any opportunity for the government to accurately track the numbers of legal taking, and thus the impact on population numbers. The resulting takings, outside of the permit system review and record-keeping, also would exacerbate the black market for these birds and their parts, further motivating illegal hunting.

Further, the Court acknowledges that the demand for eagles and eagle parts for religious purposes is very high. This demand is supplied predominantly, albeit inadequately, through the National Eagle Repository. The Government argues that, although Defendant and the Tribe claim that only "clean" eagles can be used for sacrifice in the Sun Dance, between September 2004 and October 2005, six Northern Arapaho submitted applications for Repository eagle parts, most of which specifically stated that they were for use in the Sun Dance. The fact that these Native Americans were forced to settle for Repository parts does not diminish their sincerely held religious belief that a "clean" eagle is the most appropriate Sun Dance offering to God.

"The two dispositive questions under RFRA are whether application of the permitting process to [Defendant] furthers the government's compelling interests, and whether it is the 'least restrictive means' of furthering those interests." *Hardman*, 297 F.3d at 1129. The Court finds that the Government has failed to demonstrate that its policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none, is the least restrictive means of advancing its stated interests in preserving eagle populations and protecting Native American culture. This is particularly so when considering the recent recovery of the species and that a more significant cause of eagle mortality is electrocution.

The Court does not disagree with the Government that some regulation of the taking of eagles is necessary to further its compelling interests. However, the present application of the permitting process is not the least restrictive means of doing so. It is not the permitting process itself that the Court finds objectionable. Rather, it is the biased and protracted nature of the process that cannot be condoned as an acceptable implementation of the BGEPA. To show deference to the agency's implementation of the permitting process is to honor the hypocrisy of the process. Although the Government professes respect and accommodation of the religious practices of Native Americans, its actions show callous indifference to such practices. It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time.

THEREFORE, it is hereby

ORDERED that the Defendant's Motion to Dismiss Information is **GRANTED** and the Information filed against Defendant is **DISMISSED**.

DATED this 13th day of October, 2006.

William F. Downes

UNITED STATES DISTRICT JUDGE

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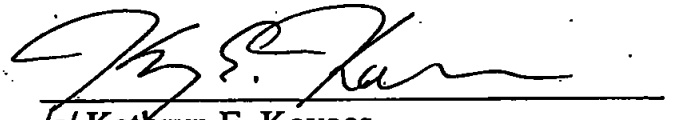

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I hereby certify that on March 22, 2007, two paper copies of the foregoing brief were served by first class mail and an electronic copy of the foregoing brief was served in PDF format by email on:

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