

CASE 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 )

**FILED**  
United States Court of Appeals  
Tenth Circuit

JUN 28 2007

ELISABETH A. SHUMAKER  
Clerk

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On Appeal from the United States District Court  
for the District of Wyoming  
The Honorable William Downes  
District Judge  
D.C. No. 05-CR-260-D

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**APPELLEE'S OPENING BRIEF**

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Respectfully submitted,

RAYMOND P. MOORE  
Federal Public Defender

Robert R. Rogers  
Assistant Federal Public Defender  
214 W. Lincolnway Ste. 31A  
Cheyenne, WY 82001  
(307) 772-2781

**THIS BRIEF IS AVAILABLE  
ELECTRONICALLY ON PACER**

Oral Argument is requested.

SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED  
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June 27, 2007

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## STATEMENT OF THE ISSUES

**I. MR. FRIDAY'S RFRA DEFENSE TO A CRIMINAL CHARGE SHOULD NOT BE DENIED FOR FAILING TO APPLY FOR A PERMIT, WHERE AN APPLICATION WOULD BE FUTILE OR THE PERMIT PROGRAM WAS ILLUSORY.**

**II. MR. FRIDAY'S SINCERE EXERCISE OF A RELIGIOUS BELIEF WAS SUBSTANTIALLY BURDENED BY THE GOVERNMENT, AND THE GOVERNMENT'S IMPLEMENTATION OF THE BALD AND GOLDEN EAGLE PROTECTION ACT(BGEPA) IS NOT SUFFICIENTLY NARROWLY TAILORED.**

## STATEMENT OF THE FACTS

In the Spring of 2005, Winslow Friday shot and killed a bald eagle on the Wind River Indian Reservation. Friday is a member of the Northern Arapaho Indian tribe, and the Wind River Reservation is home to him and his tribe. Though in the literal sense, Mr. Friday shot and killed a bald eagle, Arapahoes do not use either verb to describe what happened. Due to cultural and language differences, they use the English word, "take" to describe the killing (Tr. at 64, 148 ) This distinction is important in interpreting the record. One simply does not "kill" an eagle in the Arapaho usage of the word, but one does use fatal means to take one.

Friday took the eagle because he and his family needed it for the Sundance, the most sacred of Arapaho religious ceremonies. Without the tail of an eagle (described as the "tailfan"), a badger, a buffalo, and several other natural objects of religious

significance, the annual Sundance cannot occur. The entire eagle tailfan is used as the offering on the central pole of the Sundance Lodge. (Tr. at 61.) Winslow Friday's brother<sup>1</sup>, Nathan Friday, was charged with being a "sponsor" of that year's Sundance. (Tr. at 172.) Sponsors are those who have made a spiritual vow for that year, and are jointly responsible for securing all that is necessary for the Sundance to occur. (Tr. at 51,62, 137-138, 172, 177.) As is common in Indian culture, the obligation of Nathan became the obligation of his family (Tr. at 175, 195.). As of the spring of 2005, and eagle had not yet been secured, yet Nathan knew the Creator would supply one eventually (Tr. at 177.) It did so when his brother, Winslow, happened upon one sitting in a tree.

Winslow had also made a vow with regard to that year's Sundance. His grandmother, Agnes Ortiz, had been stricken with cancer the previous year. (Tr. at 191 ) He made a vow to the Creator that he would dance in the 2005 Sundance for her (Tr. at 192.) A few days after he told her of this vow, Mrs. Ortiz passed away (Tr. at 193.) Winslow, however, knew that she was at peace

I'm relieved that I did it, you know; that I finally completed by vow and my grandma is okay.

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<sup>1</sup> Biologically, Nathan Friday is Winslow Friday's cousin. The two generally refer to each other as "brothers," however, because they are "brothers in the Indian way." (Tr. at 195.) For purposes of this brief, the Fridays' usage will be used.

(Tr. at 198.)

Winslow Friday took the eagle, and notified his friend, who helped him gather the downed bird and “part it out.” (Tr. at 196-197.) By parting out the eagle, Friday meant that he had removed the sacred parts needed for religious purposes—such as the tailfan and wing bones known as “whistles.” (Tr. at 196-197.) Winslow “parted out” the bird within minutes of obtaining it, with the Sundance in mind all along. (Tr. at 207.) (Insignificantly, later in the day when contacted by a game warden he was playing video games.) The unused remains were respectfully returned to nature. (Tr. at 205.) He provided the eagle tail to Nathan, and the Northern Arapaho Sundance occurred, as it always must, in the summer of that year. (Tr. at 176.) Winslow was able to fulfill his promise to his dying grandmother that he would dance for her in the Sundance, which made his heart peaceful. (Tr. at 191-192.) Likewise, other members of the tribe were able to fulfill their vows in the Sundance. The only eagle used in the annual Northern Arapaho Sundance of that year was the one taken by Winslow Friday.

The record is somewhat confused on whether there was general tribal approval of the modern method Mr. Friday used to take the eagle, though it is clear that Mr. Friday himself was exercising a sincerely held religious belief. (Tr. at 191-197.) Regarding shooting an eagle, one Arapaho witness said that “in today’s world, . . . life



has changed I think it is acceptable.” (Tr. at 149 ) Burton Hutchinson, an elderly Arapaho who had been participating in Arapaho Sundances since the 1940's, testified that “we never done that,” (regarding shooting), but that somebody always donated birds for the Sundance (Tr. at 26-27 ) The birds were dead. (Tr at 27-28.) When asked about Mr. Friday’s shooting of the eagle, Mr. Hutchinson noted that “I could see nothing wrong with it, you know, however this was done, you know, ‘cause there’s a lot of ways where we use [eagles] ” (Tr at 32.) Nelson White Eagle, “Keeper of the Sacred Pipe,” and a member of the Northern Arapaho Business Council, described Friday’s taking of the eagle as a “blessing” (Tr at 63), and testified there was nothing culturally inappropriate about the way Friday took the eagle. (Tr. at 67.) Harvey Spoonhunter, a member of the Northern Arapaho Business Council (a quasi-governing body), stated “I think in today’s world, . . . life has changed. I think [shooting an eagle] is acceptable ” (Tr at 149.)

Arapahoes were in agreement that only a cleanly taken eagle could be used in a Sundance. (Tr. at 35-37, 137,161.) An eagle that died from sickness is not acceptable, nor is roadkill, nor is an electrocuted eagle, and certainly not a decayed eagle carcass. (Tr. at 35-37, 65-66.) A tailfan could not simply be reused from year to year. (Tr. at 42.) It needed to be “fresh ” (Id.)

Mr. Friday found himself in federal court as a result, criminally charged by the United States with taking a bald eagle in violation of the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a) . In defense, Mr. Friday filed a motion to dismiss the charge, citing the provisions of the Religious Freedom Restoration Act [RFRA] as a defense

### **The National Eagle Repository**

At a hearing on the Motion to Dismiss, members of the Northern Arapaho Tribe testified about their knowledge and experience in dealing with the U.S government. Discussed at length by witnesses on both sides was bureaucratic creation known as the “National Eagle Repository ”

The National Eagle Repository in Commerce City, Colorado, is a facility administered by the U.S. Fish and Wildlife Service, within the Department of Interior, for collecting and distributing to Native Americans dead eagles found under power lines and along roadsides or elsewhere (Tr. at 219 ) Government personnel around the country, upon finding a dead eagle (and regardless of its condition), send the carcass to the Repository. The Repository then sends eagle feathers and parts to enrolled Indians around the country who have submitted applications. (Id.) The waiting period, however, can be substantial, as the demand exceeds supply. According to Repository personnel, while a request for mere feathers may be filled

as quickly as 90 days (Tr. at 236), a request for an intact tailfan or entire bald eagle (treated as the same priority by the Repository) takes two to two and a half years (as of the time of the hearing) (Tr. at 256, 234, 236) Requests for immature golden eagles take four to four and a half years (Id)

Northern Arapahoes who had attempted to go through the Repository process described various experiences. Tribal member Daniel Caldwell had first applied for an eagle from the Repository in 1998 (Tr. at 155) He eventually received an eagle in 2002. (Id at 156.) According to Caldwell, “the entire carcass was spoiled. . . I wasn’t able to use any of the . . . feathers or anything on him.” (Id) Caldwell did not immediately give up. He contacted the Repository again, explaining that the bird was “spoiled,” and submitted a “Request for Additional Materials.” (Id. at 156.) The results were equally unsatisfactory “[M]ost of the [feathers] were broke . . . they were spoiled, too. The smell on them was just—it was terrible.” (Id. at 156-157.) He wasn’t able to use the parts or feathers from either shipment for ceremonial purposes due to their condition. (Id. at 156.) He felt a third request for acceptable feathers or parts would be futile. (Id. at 161.) Ultimately, Caldwell did not make a vow to participate in the Sundance, because he did not have any acceptable eagle parts. (Id. at 163.)

Another Northern Arapaho, Harvey Spoonhunter, testified regarding his experience with the Repository (Tr. at 135-137) Mr Spoonhunter applied for an immature golden eagle in 1997. (Id at 135) In 2001, he was finally contacted by the Repository, and was told they could not obtain an immature golden eagle, but offered a bald eagle, to which he agreed (Id.) The head of the bird he received was “decaying or deteriorating, and there was on blood on the head of the bald eagle” Id. at 136) He contacted the Repository, who sent him a separate head of a bald eagle. (Id at 136) This one “was also stained. It had kind of a . . . yellow color to it The bald eagle has a white–white head” (Id at 136.) This part was no more acceptable for ceremonial purposes. (Id. at 137.) As a result, he was not able to complete his Sundance vow. (Id.)

. . . we make these vows for the people that are sick, our loved ones or the ones that have passed on; and if it ain’t there and if you don’t get the right parts you’ve asked for, your–your vow is not complete There is a link missing there, and I didn’t feel right that my vow is not complete yet.

(Tr. at 137.)

Mr Spoonhunter made another request for a replacement eagle, but was told he’d already received one eagle and he wouldn’t be able to get another. (Tr. at 146-147.) He then asked the Repository to keep him on the list for an immature golden eagle. (Id. at 147.) He hasn’t heard from them since. (Id. at 147.)

William C’Hair, a member of the Northern Arapaho Language and Culture Commission testified He had applied for the wings and tail of an eagle from the Repository in the past (Id at 106 ) He described the fulfillment of his order as receiving parts from a duck or a goose (Tr at 106):

. . . they told me to go down to Shoshone at a bus stop and pick up a package and I did When I opened it, that’s what I had, some kind of a geese [*sic*]or something, I guess.

(Id. at 106.)

It was definitely not an eagle (Id. at 107.)

Nathan Friday, a 2005 Sundance Sponsor, testified that he had applied for an eagle from the Repository in 2001 (Tr. at 178.) As of 2006, he had yet to hear any word. (Id. at 178.) Although he never followed up with the Repository, he testified that “A lot of people it takes years and years, and in some cases we—I have known people that have called back and checked on it, and they said they never got any applications. So I never had no good faith with that Repository to begin with.” (Id. at 185-186.) “I never had faith that I was going to get anything at all.” (Id. at 185.)

Nelson White Eagle is a member of the Northern Arapaho Business Council and the “Keeper of the Sacred Pipe” for the tribe—a position of religious importance (Id. at 54.) He had an experience receiving an eagle from the Repository on behalf of a person who was incarcerated at the time. (Id at 54-55.) He reported, “. . . when

I opened that box, you know, boy it really . . . was spoiled ” (Id. at 55.) “[I]t’s like you, the non-Indian. You know, . . . you don’t have a repository for the Bible, . . . and our Bible is from . . . the mother earth alone ” (Id. at 55.)

No Northern Arapahoes testified who had satisfactory experiences with the National Eagle Repository. The Government did, however, introduce copies of five Permit Applications and Shipping Requests purporting to be from Northern Arapahoes (Appx. at 158-162.) None of these applicants testified, and nothing in the record indicates whether these applicants experienced any satisfaction. One of the applicants used an address in “Littlefield, Texas,” and it was obvious from the information given that he was in jail or prison at the time (Id. at 250.)

Bernadette Atencio, an official from the Eagle Repository, agreed that their eagles were often in bad shape (Tr. at 229 ) Numbers of eagles received that died of power line electrocution were tracked by the Repository. (Tr. at 252 ) This was easy to do because the carcasses were in a burnt condition. (Tr. at 252-253.)

Ms. Atencio also testified that on a few occasions, eagles had been sent out of the Repository for purposes other than Indian religious uses. (Tr. at 254-255.) These exceptions were authorized by the Regional Director, and the birds were generally used for display purposes at federal facilities. (Id.)

Winslow Friday, the Defendant, never applied for an eagle from the Repository or otherwise. He had, however, heard stories similar to the ones described above (Id. at 208.)

### **Eagle Take Permits for Indian Religious Purposes**

Interior Department officials testified regarding the existence of regulations permitting the take of eagles for Indian religious purposes (Tr. at 274.) There had never been a permit for Indians granted, or even applied for in the Rocky Mountain and Plains Region, headquartered in Denver. (Tr. at 257, ) At least one take permit authorizing “harassment” had been granted to prevent livestock depredation. (Tr. at 257-258.) Nationwide there had been four golden eagle (as opposed to bald eagle) take permit applications originating in the Southwest Region, based in Albuquerque (Tr. at 274.) Three had been granted (Id. at 276), though the permittees had been tribes, as opposed to individuals. (Tr. at 311.) One recurring permit had been granted to the Hopi Tribe, and two permits had been issued to the Navajo Tribe. (Id. at 277.) The permits, by regulation, require the permittee to submit to entry and inspection by FWS agents. (Tr. at 310.)

All of the Northern Arapahoes who testified said they had never heard of the existence of the possibility for such a permit. (See, e.g., Tr. at 54.)

The FWS Internet web page (fws.gov), under “Frequently Asked Questions,” contained the hyperlinked question, “How can I obtain eagle feathers or parts?” (Tr at 248-249.) This hyperlink led to a discussion of Native American’s needs for eagle feathers and how to obtain them from the Repository (Tr. at 249) There was no reference or hyperlink on the page informing the reader of the possibility of a take permit. (Tr at 249.)

Indeed, the Government openly conceded that it preferred Native American religious users of eagles to use the Repository, rather than obtain take permits. (See, e.g., Tr. at 265-267; Appellant’s Brief at 26.) The reason given was that bald eagles were listed as “threatened” on the Endangered Species List. (Tr. at 263.) The Director of the Migratory Birds Office (in charge of such permits) stated they had not engaged in any outreach “outside of our own internal efforts to make the regional offices aware of the process . . . .” (Tr. at 294 ) His agency did, however, “recognize that the – you know, that there is a shortage of eagle feathers at the Repository ” (Tr. at 295-296.) Speaking hypothetically about the possibility of FWS field personnel not knowing about the possibility of an Indian religious take permit, Mr. Milsap offered that there “potentially would be folks out there that were unfamiliar with this.” (Id. at 307.) Department officials were not, however, prepared to concede that the existence of a take permit for Indian religious purposes was actively



concealed FWS Special Agent Roy Brown, based in Lander, Wyoming (adjacent to the Wind River Reservation), testified that he had been contacted by counsel for the Tribe, which has been Amicus in this case (Tr. at 351-352.) When asked if it was true that he had previously undergone a disagreement during a phone conversation with Amicus Counsel about the existence of the authority for a take permit, Agent Brown responded that,

I thought he was talking about not Part 22 but under the—like the falconry-type permit section which is under a totally different section Then he mentioned Part 22, and I grabbed the book I said, “Oh yeah. Now I remember which one you’re talking about basically ”

(Tr. at 352.)

Another FWS special agent with over twenty years of experience in the FWS was called by the Government as an expert in law enforcement, “particularly in relation to the enforcement against eagle violations ” (Tr. at 356 ) He was based in Bozeman, Montana (part of the Denver-based Mountain and Plains Region). Upon cross-examination, the previously sequestered witness testified as follows.

Q: . . . and it’s your understanding that under current law there cannot be exceptions for Native Americans to shoot an eagle?

A: Correct.

Q: Do you—do you take inquiries sometimes from citizenry asking about wildlife legalities or permitting issues?

A: Yes

Q: If—if someone called you to ask if a person could get a license to shoot an eagle for Native American religious purposes, would you tell them there's no provision for that currently?

A: Currently there's no provisions for Native Americans to obtain a permit to kill eagles

(Tr. at 367-368.)

### **Eagle Population**

The Government's repeated claim that Mr. Friday killed one of only two bald eagles on the Wind River Reservation (Applt. Brief at 1,8,14,15) is a gross misapprehension of the facts. Before Mr. Friday took the eagle in question, there was one pair of eagles with a nest within Reservation boundaries. (Tr at 349.) In 2005, after Mr. Friday took the eagle out of the population, there was still one nest on the Reservation. (Tr at 349 ) The number of active nests on the Reservation has not changed since at least 2000 (Tr at 350.) To be precise, population of nesting eagles was absolutely unaffected by Mr. Friday's take. This fact is the only hard evidence produced regarding the local eagle population on the Reservation

Two Government biologists testified, Brian Milsap (an expert on eagle population management and biology, including reproductive patterns (Tr at 271)), and Jody Millar.

As Milsap explained, in any eagle population, there are more adults than the ones which are actively nesting (Tr at 303 ) Bald eagle populations are characterized by non-breeding adults, known as “floaters.” (Tr at 303 ) When a nesting territory becomes available, then floaters may start using the territory (Id.) Even when just one member of a pair of nesting eagles is killed, the mate may be replaced by a previously non-breeding adult. (Id. at 304.) In some cases, a large population of non-breeding floaters can actually inhibit the productivity of a bald eagle population. (Id at 319.) No witness could say how many floaters occur on the Wind River Reservation. (See, e.g., Tr. at 320.) All that is known for sure is that the number of nesting pairs remained unchanged after Mr. Friday’s take Lifelong Reservation resident William C’Hair contested the Government counsel’s implication that only two eagles occurred on the Reservation. (Tr. at 115 )

From a regional and national standpoint, the bald eagle population is quite robust. (See, *Endangered and Threatened Wildlife and Plants, Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife*, 71 Fed. Reg. 8238 (proposed rules Feb. 16, 2006). Declaring that “the best available scientific and commercial data available indicates that the bald eagle has recovered,” the Government in 2006 reopened the public comment period for removing the bald eagle from the List of Endangered and Threatened Wildlife The FWS Eagle

Recovery Coordinator, and author of the Notice in the Federal Register, Jody Millar, testified at Mr. Friday's hearing. (Tr at 321 ) According to her, the bald eagle population has been healthy enough to remove from the List of Threatened Species since at least 1999 (Tr. at 325.) The Government first proposed to delist the bald eagle in 1999, *Endangered and Threatened Wildlife and Plants, Proposed Rule to Remove the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife*, 64 Fed Reg. 36454 (proposed July 6, 1999), but having taken no action to do so, sought additional commentary. The only reason given for not following through with delisting the bald eagle after 1999 was that "the Secretary [of Interior] did not approve it" (Tr at 324.) According to the Government, the bald eagle population in the lower 48 states has increased from approximately 487 active nests in 1963 to an estimated 7,066 breeding pairs today 71 Fed. Reg at \*8239 Compared to 1974 numbers, nesting pairs have increased by 462 percent. *Id* at \*8240. The Government regarded the eagle as eligible for delisting as far back as 1999, and recovery has continued to progress at an "impressive rate." *Id* at \*8241. While a minimum productivity of 0.7 nestlings per nesting pair per year is necessary to maintain a stable population, average productivity has been at least one fledgling per pair. *Id.* .

The Pacific Recovery Region, which includes Wyoming, has been particularly successful. The goal for delisting was set at 800 nesting pairs *Id* at \*8242 This goal was exceeded as long ago as 1995 (Tr. at 326-327), and has continued to increase. (*Id*, Tr. at 322.) As of 2001, 1,627 nesting pairs were estimated in the region. *Id*

This recovery has occurred despite very significant mortality from power line electrocutions. Thousands of birds of prey--including especially larger birds such as eagles--are electrocuted every year on power lines. (Tr. at 301-302.) The FWS response has generally been to arrange memoranda of understanding with the companies, so that such mortalities are reported. (Tr. at 303.) FWS Special Agent Brown, based in Wyoming, estimated he had become personally aware of around fifty or so bald eagles killed by power lines in the state since he had been stationed there. (Tr. at 354.) Power line electrocution is an ongoing problem in Wyoming and elsewhere. (Tr. at 353.) Though such an eagle mortality is a "take" under the Eagle Protection Act (Tr. at 302), Special Agent Brown was aware of no prosecutions for such takes (Tr. at 354.) Mr. Milsap, the Migratory Bird Director in Washington, D.C., could name only one prosecution in the country that he was aware of for power line electrocution. (Tr. at 313.)

The district judge ultimately granted Friday's motion to dismiss. The judge found that that it would have been futile for Friday to attempt to obtain a suitable eagle from the Eagle Repository, or through the process for take permits. (Order dismissing at 6-7) "Based on the agency's conduct in every respect, it is clear that Defendant would not have been accommodated by applying for a take permit." (Order Dismissing at 7.) Given the futility of obtaining a suitable eagle through government programs, the court also found that Friday's religious practice was substantially burdened. (Order Dismissing at 8.) While the district court agreed that the government had a compelling interest in protecting eagles, it found the government had not met its burden of showing it used the least restrictive means (Order Dismissing at 9-11.) While agreeing that some regulation is necessary, the court found that:

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.

(Order Dismissing at 11.) Concluding that "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," the criminal charge was dismissed. (Order Dismissing at 11-12.)

## STANDARD OF REVIEW

While the ultimate question of whether the RFRA test has been met is a question of law, *O Centro Espirita v Ashcroft*, 342 F.3d 1170, 1177 (2003), *aff'd* 126 S Ct 1211 (2006), the district court's factual findings should be reviewed for clear error. *United States v Callarman*, 273 F.3d 1284 (10<sup>th</sup> Cir. 2001); *see United States v Hardman*, 297 F.3d 1116, 1120 (10<sup>th</sup> Cir 2002). In *Hardman*, this Court declined to hold whether the “least restrictive” means test of RFRA is a legal issue, a factual issue, or a mixed question of law and fact. *Id.* at 1130. It did note, however, that several district courts have found it to be a factual question. *Sledge v Cummings*, 1996 WL 665450 (D. Kan. 1996), *Rust v. Clarke*, 851 F Supp. 377,380 (D.Neb 1994). Clearly, however, the trial judge's constituent factual findings are to be viewed deferentially. These would include findings as to whether the government has discouraged applications for take permits for Indian religious purposes.

Likewise, the ultimate question of standing is reviewed *de novo*, *see United States v Thomas* 372 F.3d 1173 (10<sup>th</sup> Cir. 2004), but the constituent factual findings should be reviewed for clear error.

## SUMMARY OF THE ARGUMENT

Winslow Friday's RFRA claim should not be denied because he failed to exhaust administrative remedies, if any. The National Eagle Repository is not a

remedy for his need. This office, created by the Executive Branch, could not supply an eagle meeting Friday's needs, and his application to it would have been futile.

Moreover, Friday is a criminal defendant, who has been involuntarily summoned into court by the government. There is a case or controversy, meeting the constitutional "standing" requirement. He is not required to exhaust administrative remedies, because the government has not fully implemented an Indian religious take permit system, and in effect conceals it. As a practical matter, no administrative process existed for Friday to go through.

Friday easily met his burden under the RFRA test, showing that his sincerely held religious belief was substantially burdened. It is beyond any reasonable dispute that government control of access to eagles substantially burdens Native American religions, and in particular that of the Northern Arapaho. By enforcing a rule of general applicability against taking eagles, while discouraging access to permits for Indian religious takes, the government is not using the least restrictive means of protecting eagle populations. This is even more so since the bald eagle has been eligible to delist from the threatened species list since at least 1999 due to its complete recovery. The Fish and Wildlife Service, however, has arbitrarily allowed it to remain on the list on the one hand, while on the other hand, citing the eagle's presence on the list as a reason to discourage Indian religious take permits.



## ARGUMENT

I. FRIDAY'S RFRA DEFENSE TO A CRIMINAL CHARGE SHOULD NOT BE DENIED FOR FAILING TO APPLY FOR A PERMIT, WHERE AN APPLICATION WOULD BE FUTILE OR THE PERMIT PROGRAM WAS ILLUSORY.

Friday asserts a defense under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1(b). Congress passed this enactment to be asserted “as a claim or defense in a judicial proceeding . . .” 42 U.S.C. §2000bb-1(c). As Mr. Friday was charged with a criminal offense, he certainly finds himself in a “judicial proceeding.”

**As a criminal defendant under this set of facts, Mr. Friday is not required to exhaust administrative remedies.**

As far as Appellee is aware, this Court has never actually denied a RFRA defense to a criminal defendant for failing to exhaust administrative remedies, despite government arguments that the defendant must. While standing is necessary, the analysis of standing for a criminal defendant asserting a defense is different from a plaintiff in civil litigation. The Supreme Court has said so. In *McKart v United States*, 395 U.S. 185 (1969), the Court considered the claim by a defendant charged with failing to report for Selective Service induction. Mr. McKart could have received an exemption to the draft requirement, had he appealed to the Selective Service. He did not do so, however, and simply did not report for induction. His defense to criminal prosecution, that he was exempt from being drafted because he

was a “sole surviving son,” was allowed by the Supreme Court. The Court spoke much of the standing requirement, but noted the following exception in criminal cases:

First of all, it is well to remember that the use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. The deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review. The statute as it stood when petitioner was reclassified said nothing which would require registrants to raise all their claims before the appeals boards. We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner. . . .

395 U.S. at 197.

Mr Friday, like the *McKart* defendant, is not affirmatively asking for assistance from the courts, but trying to avoid a criminal sanction. He cannot now, as a defense in this case, go through an administrative process. The only judicial review available to him is in the criminal case. And as in *McKart*, the Governmental interest is not compelling enough to outweigh the severe burden placed on him.

In other Tenth Circuit cases involving RFRA claims by Indians, this Court has made exceptions based upon the unique facts of the case. *See, e.g., United States v Hardman*, 297 F.3d 1116 (10<sup>th</sup> Cir. 2002) (Court considers statutory RFRA claim in

criminal case, despite administrative remedies not being exhausted); *see also*, *United States v Abeyta*, 632 F.Supp. 1301 (D.N.M. 1986); *United States v Gonzales*, 957 F Supp. 1225 (D.N.M. 1997) (in pre-RFRA case applying the same test as RFRA, exhaustion not required because of futility).

Very recently, this Court addressed the principle of exhaustion of administrative remedies, and did not require it in an immigration case—even where Congress had imposed such an exhaustion requirement *Batrez Gradiz v Gonzales*, Slip Op No. 06-9534 (10<sup>th</sup> Cir. June 20, 2007). The petitioner appealed a deportation order for having sustained an aggravated felony, though he had not exhausted administrative remedies. *Id* at 6. The Court held that a “miscarriage of justice” would be enough to excuse his failure to exhaust administrative remedies *Id* at 9. In doing so, this Court noted how several other Circuits had found exceptions to the rule. *See, e g*, *Marrero Pichardo v Ashcroft*, 374 F.3d 46 (2<sup>nd</sup> Cir 2004) (“courts have historically interpreted procedural rules to prevent a fundamental miscarriage of justice”); *Goonsuwan v Ashcroft*, 252 F.3d 383, 389 (5<sup>th</sup> Cir. 2001) (exhaustion procedure not required when administrative procedures are inadequate), *Sousa v INS*, 226 F 3d 38 (1<sup>st</sup> Cir. 2000) (the Supreme Court has carved out exceptions to exhaustion requirement, even when statutorily required), *Singh v Reno*, 182 F.3d 504 (7<sup>th</sup> Cir 1999) (exception exists to address certain due process claims).

Further, noted this Court, the Supreme Court has recognized an exhaustion bar in habeas corpus proceedings under 28 U.S.C. § 2254 where there would be a miscarriage of justice. *Coleman v Thompson*, 501 U.S. 722 (1991)

Unlike the above cited exceptions, there is no express statutory requirement that a claimant exhaust administrative remedies before asserting the Religious Freedom Restoration Act. *See*, 42 U.S.C §§2000bb *et seq* Though the Ninth Circuit seems to have judicially grafted on such a requirement, its legitimacy is suspect. Exhaustion of administrative remedies is a rule of administrative law, not criminal law “Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided, for of paramount importance to any exhaustion inquiry is congressional intent.” *Darby v Cisneros*, 590 U.S 137,145 (1993), *citing McCarthy v Madigan*, 503 U.S. 140 (1992) (internal quotations omitted). Where Congress specifically mandates, exhaustion is required. 503 U.S at 144 On the other hand, where there is not a specific Congressional mandate, judicial discretion governs. *Id* Notwithstanding exhaustion requirements, federal courts are vested with a “virtually unflagging obligation” to exercise the jurisdiction given them. *Id* at 146, *quoting Colorado River Water Conservation Dist v United States*, 424 U.S. 800,817-818 (1976) “We have no more right to decline the exercise of jurisdiction which is given, than to usurp

that which is not given.” *Cohens v Virginia*, 6 Wheat 264,404, 5 L Ed 257 (1821),  
*quoted in McCarthy*, 503 U.S. at 146 “Exhaustion principles apply with less force  
when an individual’s failure to exhaust may preclude a defense to criminal liability.”  
503 U.S. at 147, *quoting Moore v East Cleveland*, 431 U.S. 494,497 (1977)

If there is a “rule of exhaustion,” facts unique to this particular case warrant  
excusing Mr Friday from failing to apply for a permit. Applying for eagle parts from  
the National Eagle Repository would have been futile. Further, the administrative  
process for receiving a take permit was effectively unavailable.

**Attempting to use the repository would have been futile.**

Several tribal members testified about their use of the National Eagle  
Repository. Not one of them received eagle parts which were usable for religious  
ceremonies. They agreed that there was an unreasonably long delay in receiving  
eagles, and those that received them found them to be literally rotten and smelly,  
broken, and/or stained. Such birds are entirely unacceptable for the Arapaho’s sacred  
religious purposes. It is hard to find an analogy that provides an equally offensive  
notion, but this Appellee will try

Roman Catholics, as is generally known, practice the Sacrament of  
Communion (also known as the Eucharist, or “Lord’s Supper”), wherein they receive  
bread and wine which has been consecrated by a priest. After consecration, the bread

and wine are believed to have literally “transubstantiated” into the body and blood of Christ. The consecrated bread (or “host,” as it is known) and wine is treated with the utmost respect. No wine consecrated during a mass may be left unconsumed; and the unconsumed host is preserved in a sacred box (the “tabernacle”). Something so seemingly minor (to a non-Catholic) as dropping a host on the floor is governed by the degree of ritual and care one would expect to be paid to the “body” of Christ. It is nearly unimaginable to consider a government-controlled distribution of holy bread or wine to Catholics. It is even more unfathomable to consider a government that, upon written application, only provides dirty or decayed bread, culled from the garbage. Yet the decayed, foul-smelling eagle parts and feathers provided to the Arapaho are no less offensive. This cannot be overstated.

The eagle, in addition to symbolizing and providing an ideal for their culture, is a messenger to the Creator at the Sundance. Its tailfan is elevated on the central pole of the Lodge. One does not use a leftover eagle tailfan from a previous year. Nor does one use one that by any standard would be considered unclean and in disrepair. An application for an eagle tail from the Repository would have been as futile for Mr. Friday as for the other Northern Arapaho applicants who testified.

The delay inherent in obtaining a tailfan was also unacceptably long. Taking the Government witness’s optimistic view, the wait for an entire tailfan (treated the

same as a request for an entire eagle) was at least two and a half years at the time of the hearing in this case. In the past, the wait had been twice as long—or indefinite. Two witnesses testified they had never heard back from the Repository after making requests.

Had Mr. Friday applied for an intact eagle or eagle tailfan from the Repository, he could still be waiting—and even if he wasn't—he would have received parts from a dilapidated carcass and would still be hoping an eagle would turn up so the Sundance could go on, so he could keep his vow to his grandmother.

Futility is a well recognized exception to the “exhaustion rule” (a rule whose application in the first place is in question). *See, e.g., Gonzales*, 957 F.Supp. 1225. Because attempting to use the Eagle Repository would have been ridiculously futile, Mr. Friday is excused from not attempting to go through that process.

**The Eagle Repository is not an administrative remedy within the BGEPA.**

Further, the National Eagle Repository is not a creature created by the Eagle Protection Act, nor by any other statute or regulation. *See*, 16 U.S.C.; 50 C.F.R. (no authorization or implementing regulations for the Repository). It appears to be a matter of grace by the Executive Branch. Had Mr. Friday unsuccessfully applied for a suitable eagle from the Repository, and then initiated a lawsuit in federal court, it is likely his case would be dismissed for failure to state a claim. *See*, F.R.C.P.

12(b)(6) He could not compel the government to comply with BGEPA requirements, because there is no requirement in the Act which authorizes or requires the Repository. It is not part of the administrative apparatus of the BGEPA. He can hardly be required to exhaust a “remedy” which is not, after all, part of the Eagle Protection Act.

**In effect, there was no permitting program for Indian religious taking of bald eagles.**

The Repository is, however, the only program the government had truly implemented in order to accommodate Indian religious practitioners. The procedure for applying for a take permit for religious purposes, though existing in the Code of Federal Regulations, *see* 50 C.F.R. § 22.22, was not truly available outside of the Southwest Region of the U.S. Fish and Wildlife Service.

To say that the FWS “concealed” the existence of the permit program from Plains Indians is a difficult claim to prove. Concealment implies a state of mind, which is difficult to attribute to an institution. It might as well have been intentional though. The fact is, the permit process was *de facto* unavailable in the Rocky Mountain and Plains Region of the FWS. The director of the migratory bird permit office did admit, however, that the FWS had a preference that Native Americans use the hopelessly inadequate Repository rather than apply to take an eagle from the wild.



The official from the Repository agreed. The Internet web page on “How can I obtain eagle feathers or parts?” directed the reader only to the Repository, and away from the take permit process. Most importantly, a Native American making a phone call to an FWS field office about a permit would have been met with discouragement and misdirection. Despite trust obligations, no dissemination of information regarding the permit program was made outside of regional offices. The testimony of the FWS agent based in Wyoming shows, at a bare minimum, that there was a confused conversation about the existence of take permits for eagles. Most convincingly, the Government’s own expert on law enforcement, “particularly in relation to the enforcement against eagle violations,” (Tr. at 356), denied that such a permit could be issued. (Id.) This is the natural product of an agency, that as an institution, discouraged Indian religious applicants by concealing the existence of provision—even within its own field offices.

Of course, the Department of Interior has made no efforts to educate Indian tribes about take permits either. The Government argues that it has no such duty, but given its acknowledged trust responsibility to Indian tribes, Mr. Friday disagrees (see below). This is an potentially an issue of paramount importance to many Indian tribes. The government’s duty is heightened beyond its duties to ordinary members of the public.

## II MR. FRIDAY'S SINCERE EXERCISE OF A RELIGIOUS BELIEF WAS SUBSTANTIALLY BURDENED BY THE GOVERNMENT, AND THE GOVERNMENT'S IMPLEMENTATION OF THE BGEPA IS NOT SUFFICIENTLY NARROWLY TAILORED

### **Mr. Friday was sincerely exercising a religious belief.**

To assert a RFRA defense, the defendant need only demonstrate that his sincerely held religious belief is substantially burdened 42 U S C. § 2000bb(b)(2); *See, Gonzales v O Centro Espirita Beneficente Uniao*, 126 S. Ct. 1211 (2006). That Mr Friday was doing just that goes unchallenged by the Government on appeal. As the district judge found, “. . . 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.” (Order Dismissing at 8 n.2.) This finding is amply supported by the evidence. Mr. Friday made a vow to the Creator and to his dying grandmother that he would dance for her in the 2005 Sundance. As his brother, Nathan, was a sponsor of that year's Sundance, it became the family's responsibility to assure an eagle was available (among other preparations) for the ceremony. Mr. Friday believed he was doing something necessary and vital to exercise his religious belief. Members of the tribe expressed gratitude for Mr. Friday's action. Having met his burden, it becomes the Government's burden of demonstrating that it was furthering a compelling interest, and that it is using the least restrictive means to do

so 42 U S C §§ 2000bb(b)(2)(b), 2000bb-2(3). *O Centro*, 126 S Ct at 1219 The Government has failed to do so.

**The Government's compelling interest.**

Mr. Friday does not contest that the Government has a compelling interest in protecting eagle populations. This Court has said as much. *Hardman*, 297 F 3d at 1128 The district court agreed. (Order Dismissing at 8-9 )

**The Government has substantially burdened Winslow Friday.**

The substantial burden placed upon Mr. Friday as well as other Arapaho religious practitioners, though contested by the Government, is not reasonably in dispute. This Court has previously held that any government regulation of access to eagles by Native Americans substantially burdens their exercise of religious freedom *Hardman*, 297 F.3d at 1126-1127. “[A]ny scheme which limits access of the faithful to their talisman must be seen as having a profound effect on the exercise of religious belief.” *United States v Thirty-eight Golden Eagles*, 649 F.Supp. 269,276 (D Nev. 1986).

There is no room to disagree. Keep in mind that Arapahoes used the eagle long before the federal government existed, let alone regulated the use of eagles

Having to ask the government for permission to obtain the most sacred object needed for one's traditional religious practices is offensive and burdensome, to say the least. Not having an effective process for getting the sacred object is even worse.

**The Government's ineffective implementation of the BGEPA and its prosecution of Friday is not the least restrictive means of furthering its compelling interests.**

The Government fails in satisfying RFRA's strict scrutiny test. At least in the Region pertaining to this case, FWS has never granted, and has in fact discouraged, any permits to take eagles for religious purposes. This is in spite of the same agency's acknowledgment that the bald eagle population has been fully recovered for years. The only government effort truly made is the National Eagle Repository, which was hopelessly inadequate for Mr. Friday's needs. Take permits have been granted (and Repository eagles sent) for non-religious purposes, and had Mr. Friday been treated as deferentially as a power line company, the government would not have used criminal prosecution as its tool for protecting eagles. This is in spite of the fact that power line electrocution is perhaps the most significant cause of eagle mortality.

It is undisputed that at the time of the hearing on the motion to dismiss, on a nationwide basis only three eagle take permits had ever been granted to Indians for religious purposes. All this permitting took place in the Albuquerque-based

Southwest Region, and involved the Navajo and Hopi Tribes. A fourth application for a permit had been denied. Elsewhere in the country, there had never been a permit granted, nor known application received. This is powerful evidence of the government's discouragement of Indians who would wish to obtain eagles outside of the Repository program.

By legislating prohibitions, it is the Government that has imposed a burden on the religious freedom of the Northern Arapaho. Likewise, it is the Government's responsibility to ensure that its prohibition is not more burdensome than necessary. This duty upon the Government applies not only to the passage of regulations on paper, but in its actual implementation of them. The Government cannot claim they are using the "least restrictive" means to regulate Indian eagle takes when they have effectively made permitting unavailable. In fact, the Government should have bent over backwards to ensure Indians knew they were eligible for a permit.

There is no dispute that the Government owes a fiduciary trust obligation to Indian tribes. *United States v. Mitchell*, 463 U.S. 206 (1983). As the trustee, the government has fiduciary duty to fully and accurately inform its Indian beneficiaries about its management of the trust. *Cobell v. Norton*, 377 F.Supp.2d 4,13 (D.D.C. 2005). The evidence in this case demonstrates, however, that local FWS offices do not know about the Indian take permit regulations, and that such information is not

provided to Indians through any other mechanism. As a practical matter, there is no take permit process. At a minimum, there needs to be an accessible permit process before the Government can claim it is using the “least restrictive” means

Were the government to fairly implement its existing regulations, there would still be unacceptably broad requirements imposed on Indians. All migratory bird permits, including those for Indian religious use found at 50 C.F.R. § 22.22, are subject to general permit administration requirements found at 50 C.F.R. § 13.21. These include the disqualification of any permittee who has a previous felony conviction for a wildlife-related federal offense. § 13.21(c)(1). Additionally, the permittee “consents to and shall allow entry by agents or employees of the Service upon premises where the permitted activity is conducted at any reasonable hour” § 13.21(e)(2). By exercising one’s religious belief under the government’s restrictive regime, an individual has opened up his sacred site to search and inspection at any reasonable hour. For sacred religious matters, this would be unacceptable to Mr. Friday or any other Arapaho. It is also a more onerous waiver of privacy than is strictly necessary for the government to further its interest.

The district court was correct when it made the finding 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.

(Order Dismissing at 11.)

It is not the permitting process itself that the court found objectionable, but “biased and protracted nature” of the process. “To show deference to the agency’s implementation of the permitting process is to honor the hypocrisy of the process.”

(Id )

The district court correctly found that requests for eagle take permits for Indian religious purposes were discouraged. Given the widely acknowledged recovery of the bald eagle population, applications need not be discouraged at the front end, before there is any assessment of the proposed take on eagle populations. This, in itself, is enough to show that the Government is not using the least restrictive means to further its compelling interests. As perhaps the oldest Arapaho to testify at Friday’s hearing, Burton Hutchinson put it

I’ve never really experienced anything where you really go out and say, “Well, I – I want a permit to do these things.” . . . I see this for the protection of the eagle, you know; that they don’t say nothing about the Indian. All it says is, . . . they want this eagle protected. Then it don’t say nothing about us, you know, because we – it’s been a part of our lives

(Tr at 49.)

## **CONCLUSION**

Like other many other Northern Arapahoes, Winslow Friday's religious practice has been severely hampered by government regulation of access to eagles, the most sacred in the Arapaho culture and religion. As the bald eagle population has recovered, government regulation has not become less restrictive, and Indian religious needs have not been reasonably accommodated. At a minimum, accommodating Arapahoes situated like Friday would require some dissemination of information to tribes (or at least admitting to them) that it is possible to apply for a permit to take eagles. At the time of Friday's taking of an eagle, such accommodations had not been made. Rather, Indians were directed to receive rotted, dilapidated carcasses salvaged from roadsides, and parceled out by the government in its discretion. The disrespect shown to Native American culture and religion is profound, and the government can hardly claim it is using the least restrictive method of preserving eagle populations. As for Winslow Friday, the judge's order dismissing the charge against him must be upheld.

## **ORAL ARGUMENT**

Oral argument is requested.

DATED this 27th day of June, 2007.

Respectfully submitted,



RAYMOND P MOORE  
Federal Public Defender



Robert R. Rogers  
Asst. Federal Public Defender

By: /s/ Robert R. Rogers  
Asst Federal Public Defender (Digital)  
214 W Lincolnway Ste. 31A  
Cheyenne, WY 82001  
(307) 772-2781

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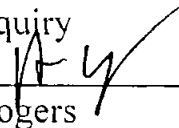
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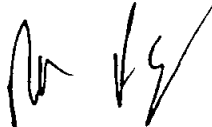
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Robert R. Rogers  
Assistant Federal Public Defender

By. /s/ Robert R. Rogers  
Assistant Federal Public Defender (Digital)

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I hereby certify that a copy of the foregoing APPELLEE'S BRIEF was furnished by Electronic Mail and U.S Mail to the following on this the 27th day of June, 2007:

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David Kubichek  
Asst. U S. Attorney

**by: U.S. Mail**

Winslow Friday  
P O Box 397  
Fort Washakie WY 82514

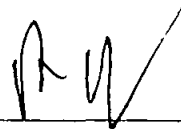
**by: E-Mail**

Kathryn Kovacs  
Asst. U.S. Attorney

**by: E-Mail**

Christopher J Schneider  
Baldwin & Crocker P C.  
P O Box 1229  
Lander WY 82520

Additionally, on the same date, a copy of the digital submission in electronic form was emailed to the above attorneys.



\_\_\_\_\_  
Robert R. Rogers

/s/ Robert R. Rogers

Robert R. Rogers (Digital)

## ATTACHMENTS

Order on Motion to Dismiss Information

50 C.F.R §22.22 (2005)

50 C F.R §13 21 (2005)

71 Fed Reg. 8238-01 (Feb 16, 2006)

64 Fed. Reg 36454 (July 6, 1999)

United States District Court

For The District of Wyoming

UNITED STATES OF AMERICA,

Plaintiff(s),

vs

WINSLOW FRIDAY,

Defendant(s)

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Case No 05-CR-260-D

**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 possess 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 its 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 (10<sup>th</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> "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

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<sup>2</sup> 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.

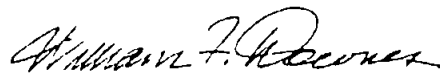
The Court does not disagree with the Government that some regulation of the taking of eagles is necessary to further its compelling interests. However, the present application of the permitting process is not the least restrictive means of doing so. It is not the permitting process itself that the Court 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 13<sup>th</sup> day of October, 2006



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UNITED STATES DISTRICT JUDGE

50 C F R § 22.22

**C****Effective: [See Text Amendments]**

Code of Federal Regulations Currentness

Title 50 Wildlife and Fisheries

Chapter I United States Fish and Wildlife Service, Department of the Interior

Subchapter B Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants

Part 22 Eagle Permits (Refs &amp; Annos)

Subpart C Eagle Permits

**→ § 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

50 C F R § 22 22

(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

[63 FR 52638, Oct 1, 1998, 64 FR 50473, Sept 17, 1999]

50 C F R § 22 22, 50 CFR § 22 22

Current through June 21, 2007, 72 FR 34179

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50 CFR § 13.21

Effective: [See Text Amendments] to May 10, 2005

## Code of Federal Regulations

## Title 50 Wildlife and Fisheries

## Chapter I United States Fish and Wildlife Service, Department of the Interior

## Subchapter B Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants

## Part 13 General Permit Procedures

## Subpart C Permit Administration

## → § 13.21 Issuance of permits.

(a) No permit may be issued prior to the receipt of a written application therefor, unless a written variation from the requirements, as authorized by § 13.4, is inserted into the official file of the Bureau. An oral or written representation of an employee or agent of the United States Government, or an action of such employee or agent, shall not be construed as a permit unless it meets the requirements of a permit as defined in 50 CFR 10.12.

(b) Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit unless

(1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility

(2) The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with his application,

(3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility,

(4) The authorization requested potentially threatens a wildlife or plant population, or

(5) The Director finds through further inquiry or investigation, or otherwise, that the applicant is not qualified

(c) Disqualifying factors. Any one of the following will disqualify a person from receiving permits issued under this Part.

(1) A conviction, or entry of a plea of guilty or nolo contendere, for a felony violation of the Lacey Act, the Migratory Bird Treaty Act, or the Bald and Golden Eagle Protection Act disqualifies any such person from receiving or exercising the privileges of a permit, unless such disqualification has been expressly waived by the Director in response to a written petition

(2) The revocation of a permit for reasons found in § 13.28 (a)(1) or (a)(2) disqualifies any such person from receiving or exercising the privileges of a similar permit for a period of five years from the date of the final agency decision on such revocation

(3) The failure to pay any required fees or assessed costs and penalties, whether or not reduced to judgment

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## 50 C F R § 13.21

disqualifies such person from receiving or exercising the privileges of a permit as long as such moneys are owed to the United States. This requirement shall not apply to any civil penalty presently subject to administrative or judicial appeal, provided that the pendency of a collection action brought by the United States or its assignees shall not constitute an appeal within the meaning of this subsection.

(4) The failure to submit timely, accurate, or valid reports as required may disqualify such person from receiving or exercising the privileges of a permit as long as the deficiency exists.

(d) Use of supplemental information. The issuing officer, in making a determination under this subsection, may use any information available that is relevant to the issue. This may include any prior conviction, or entry of a plea of guilty or nolo contendere, or assessment of civil or criminal penalty for a violation of any Federal or State law or regulation governing the permitted activity. It may also include any prior permit revocations or suspensions, or any reports of State or local officials. The issuing officer shall consider all relevant facts or information available, and may make independent inquiry or investigation to verify information or substantiate qualifications asserted by the applicant.

<Text of subsection (e) effective until May 11, 2005 >

(e) Conditions of issuance and acceptance

(1) Any permit automatically incorporates within its terms the conditions and requirements of Subpart D of this part and of any part(s) or section(s) specifically authorizing or governing the activity for which the permit is issued.

(2) Any person accepting and holding a permit under this Subchapter B acknowledges the necessity for close regulation and monitoring of the permitted activity by the Government. By accepting such permit, the permittee consents to and shall allow entry by agents or employees of the Service upon premises where the permitted activity is conducted at any reasonable hour. Service agents or employees may enter such premises to inspect the location, any books, records, or permits required to be kept by this Subchapter B, and any wildlife or plants kept under authority of the permit.

<Text of subsection (e) effective May 11, 2005 >

(e)(1) Conditions of issuance and acceptance. Any permit automatically incorporates within its terms the conditions and requirements of subpart D of this part and of any part(s) or section(s) specifically authorizing or governing the activity for which the permit is issued, as well as any other conditions deemed appropriate and included on the face of the permit at the discretion of the Director.

(2) Any person accepting and holding a permit under this Subchapter B acknowledges the necessity for close regulation and monitoring of the permitted activity by the Government. By accepting such permit, the permittee consents to and shall allow entry by agents or employees of the Service upon premises where the permitted activity is conducted at any reasonable hour. Service agents or employees may enter such premises to inspect the location, any books, records, or permits required to be kept by this Subchapter B, and any wildlife or plants kept under authority of the permit.

(f) Term of permit. Unless otherwise modified, a permit is valid during the period specified on the face of the permit. Such period shall include the effective date and the date of expiration.

(g) Denial. The issuing officer may deny a permit to any applicant who fails to meet the issuance criteria set forth in this section or in the part(s) or section(s) specifically governing the activity for which the permit is requested.

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50 C F R § 13 21

[39 FR 1161, Jan 4, 1974, as amended at 42 FR 32377, June 24, 1977, 47 FR 30785, July 15, 1982, 54 FR 38148, Sept 14, 1989, 70 FR 18319, April 11, 2005]

50 C F R § 13 21, 50 CFR § 13 21

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(Cite as: 71 FR 8238)

## PROPOSED RULES

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AF21

Endangered and Threatened Wildlife and Plants, Removing the Bald Eagle in the  
Lower 48 States From the List of Endangered and Threatened Wildlife

Thursday, February 16, 2006

AGENCY. Fish and Wildlife Service, Interior

**\*8238 ACTION** Proposed rule, reopening of public comment period with new information.

**SUMMARY** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for the proposal to remove the bald eagle (*Haliaeetus leucocephalus*) from the List of Endangered and Threatened Wildlife in the lower 48 States of the United States, under the Endangered Species Act of 1973 (ESA), as amended. The proposed delisting rule for the bald eagle was published on July 6, 1999 (64 FR 36454). Comments previously submitted on the July 6, 1999, proposed rule need not be resubmitted as they have been incorporated into the public record as part of this reopening of the comment period, and they will be fully considered in the preparation of the final rule. In reopening the comment period, we provide new information, respond to the comments we received in the proposed rule, and further clarify our reasons for proposing to delist the species.

The best available scientific and commercial data available indicates that the bald eagle has recovered. The bald eagle population in the lower 48 States has increased from approximately 487 active nests in 1963, to an estimated minimum 7,066 breeding pairs today. The recovery of the bald eagle is due in part to habitat protection and management actions, and the reduction in levels of persistent organochlorine pesticides (such as DDT) occurring in the environment. This rule will not affect protection provided to the species under the Bald and Golden Eagle Protection Act (BGEPA) or the Migratory Bird Treaty Act (MBTA).

In addition, the Bald and Golden Eagle Protection Act will continue to provide protection to the bald eagle, if delisting under the ESA is found to be warranted.

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**(Cite as 71 FR 8238)**

To help clarify the BGEPA protections provided to the bald eagle, the Service is also soliciting public comments on two related draft bald eagle documents under the BGEPA that are being published simultaneously with this proposed delisting rule. First, \*8239 we are publishing a notice of availability and request for public comments on draft National Bald Eagle Management Guidelines (Guidelines). The Guidelines provide guidance on how to comply with the requirements of the BGEPA by avoiding disturbance to bald eagles under different land use scenarios. Second, we are publishing a proposed rule to add the definition of "disturb" to our regulations at 50 CFR 22.3, which implement the BGEPA. These two documents are published separately in this part of today's Federal Register and include additional information about submitting comments on them.

**DATES** We must receive comments by May 17, 2006 in order to ensure their consideration in our final decision. Any comments that we receive after the closing date may not be considered in the final decision on this proposal.

**ADDRESSES** You may submit comments and other information, identified by RIN 1018-AF21, by any of the following methods:

- Mail: Michelle Morgan, Chief, Branch of Recovery and Delisting, Endangered Species Program, U.S. Fish and Wildlife Service, Headquarters Office, 4401 N. Fairfax Drive, Room 420, Arlington, Virginia 22203. Attn: RIN 1018-AF21
- Hand Delivery/Courier: Same address as above
- E-mail: [baldeagledelisting@fws.gov](mailto:baldeagledelisting@fws.gov). Include "RIN 1018-AF21" in the subject line of the message.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**Instructions** All submissions received must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments, file format and other information about electronic filing, and additional information on the rulemaking process, see the "Public Comments Solicited" heading of the SUPPLEMENTARY INFORMATION section of this document. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

Comments and materials received for this rule will be available for public inspection, by appointment, during normal business hours at the above address after the close of the comment period. Call (703) 358-2061 to make arrangements.

**FOR FURTHER INFORMATION CONTACT** Mary Klee, Biologist, at the Headquarters Office (see ADDRESSES section), or via e-mail at [Mary--Klee@fws.gov](mailto:Mary--Klee@fws.gov); telephone (703) 358-2061.

Additional information is also available on our World Wide Web site at <http://>

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www.fws.gov/migratorybirds/BaldEagle.htm Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1-800-877-8339 for TTY assistance, 24 hours a day, 7 days a week

## SUPPLEMENTARY INFORMATION

## Background

Note: Unless otherwise noted with specific citations, the following life history information is derived from our five recovery plans for the bald eagle and from Gerrard and Bortolotti (1988) (see References)

Current data indicate that the bald eagle in the lower 48 States has recovered. The bald eagle population in the lower 48 States has increased from approximately 487 active nests in 1963 to an estimated minimum 7,066 breeding pairs today. The recovery of the bald eagle is due in part to habitat protection and management actions, and the reduction in levels of persistent organochlorine pesticides (such as DDT) occurring in the environment.

The bald eagle is well known as our Nation's symbol. Its appearance is distinguished in adult birds by its white head and tail contrasting against its dark brown body. Its Latin name, *Haliaeetus leucocephalus*, literally means sea eagle with a white head. The bald eagle is the only species of sea eagle native to North America, and was first described in 1766 as *Falco leucocephalus* by Linnaeus. This South Carolina specimen was later renamed as the southern bald eagle, subspecies *Haliaeetus leucocephalus leucocephalus* (Linnaeus) when Townsend identified the northern bald eagle as *Haliaeetus leucocephalus alascanus* in 1897 (Peters 1979). By the time the bald eagle was listed throughout the lower 48 States under the ESA, subspecies of the bald eagle were no longer recognized by ornithologists (American Ornithologists Union 1983).

The bald eagle is a bird of aquatic ecosystems, frequenting large lakes, rivers, estuaries, reservoirs and some coastal habitats. It feeds primarily on fish, but waterfowl, gulls, cormorants, and a variety of carrion may also be consumed. Adult birds are brown with a white head and tail, while the sub-adult's plumage varies. Female bald eagles usually weigh 10 to 14 pounds and are larger than the males, which usually weigh 8 to 10 pounds.

Bald eagles usually nest in trees near water, but may use cliffs in the southwest United States, and ground nests have been reported from Alaska. Nests are usually built in large trees along shorelines, but may be up to one-half mile or more from the shoreline. The nest is often 4 to 6 feet wide, and after years of use, may weigh 1,000 pounds. Adults use the same breeding territory, and often the same nest, year after year. They may also use one or more alternate nests within their breeding territory.

Bald eagles are relatively long lived. The longest living bald eagle known in the wild was reported near Haines, Alaska, as 23 years old (Schempf 1997). It is

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thought that bald eagles may live even longer in captivity. It is presumed that bald eagles mate for life, though if a member of a pair is lost, the survivor will find another partner. Courtship begins about a month prior to egg-laying, with eagles in southern latitudes beginning as early as September, and the northern latitudes, as late as May. The nesting season is approximately 6 months. Eggs are incubated for approximately 35 days, and fledging takes place at 11 to 12 weeks old. Parental care may extend 4 to 11 weeks after fledging (Wood, Collopy, and Sekerak 1998). Between fledging and adulthood, the bald eagle's plumage changes from solid dark brown as fledglings to include the distinctive white head and tail as mature adults at age 4 to 5. The timing and distance of dispersal from the breeding territory varies. Some bald eagles stay in the general vicinity while some migrate up to hundreds of miles to their wintering grounds and remain there for several months. Young eagles may wander randomly for years before returning to nest in their natal areas. In Arizona, most bald eagles return to within 124 miles of their natal areas to breed (Terry Johnson, pers comm.)

Eagles seek wintering (non-nesting) areas offering an abundant and readily available food supply with suitable night roosts. Night roosts typically offer isolation and thermal protection from winds. Northern bald eagles winter in areas such as the Upper Mississippi River and Great Lakes area. For mid-continent bald eagles, wintering grounds include the southern States. Southern bald eagles nest during the winter months, and may utilize foraging areas of Chesapeake Bay and Yellowstone National Park during the summer.

The first major decline in the bald eagle population probably began in the mid to late 1800s. Widespread shooting for feathers and trophies led to extirpation of eagles in some areas. Shooting also reduced part of the bald eagle's prey base. Waterfowl, shorebirds, and small mammals were also reduced in numbers. Carrion treated with strychnine, thallium sulfate, and other poisons was used as bait to kill livestock predators and ultimately killed many eagles as well. These were the major factors, in addition to loss of nesting habitat from forest clearing and development, which contributed to a reduction in bald eagle numbers through the 1940s.

In the late 1940s, shortly after World War II, the use of dichloro-diphenyl-trichloroethane (DDT) and other organochlorine pesticide compounds became widespread. Initially, DDT was sprayed extensively along coastal and other wetland areas to control mosquitoes (Carson 1962). Later, it was widely used as a general crop insecticide. Dichlorophenyl-dichloroethylene (DDE), the principal metabolic breakdown product of DDT, devastated eagle productivity from the 1950s through the mid-1970s. DDE accumulated in the fatty tissue of adult female bald eagles, and impaired calcium metabolism necessary for normal eggshell formation, causing eggshell thinning. Many eggs broke during incubation, while others suffered embryonic mortality resulting in massive reproductive failure.

Breeding and productivity surveys have been conducted annually on a State-by-State basis since the early 1970s. Data collection methods vary, but generally include surveys by aircraft or ground observations each year during the

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breeding season to determine the number of occupied breeding areas, a second survey is conducted just before fledging to count the number of young produced at the site. Surveys continue to be conducted by the Service and cooperators, primarily the States and the U.S. Forest Service. However, recently some States have discontinued annual surveys. The last rangewide survey was conducted in 2000. Since that time, more than half of the States have updated their bald eagle population figures. Of the 48 States in which the bald eagle is listed, 30 States completed surveys in 2003, 5 States completed the last survey in 2002, and 9 States completed the last survey in 2001.

#### Previous Federal Actions

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712) was passed in 1918. It implements various treaties and conventions between the U.S. and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Under the MBTA, taking, killing, or possessing migratory birds is unlawful. Unless permitted by regulations, the MBTA provides that it is unlawful to pursue, hunt, take, capture, or kill, attempt to take, capture or kill, possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not.

The Bald Eagle Protection Act (16 U.S.C. 668-668d) was passed in 1940, specifically protecting bald eagles in the United States. A 1962 amendment to this Act included the golden eagle in this protection, and the amended statute became known as the Bald and Golden Eagle Protection Act (BGEPA). The golden eagle was given protected status because of population declines, value to agriculture in the control of rodents, and to afford greater protections to bald eagles because of the similarity of appearance to juvenile bald eagles. This law prohibits the take, possession, sale, purchase, barter, or offering to sell, purchase or barter, transport, export or import, of any bald eagle, alive or dead, including any part, nest, or egg, unless allowed by permit (16 U.S.C. 668(a)). "Take" includes pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb (16 U.S.C. 668c, 50 CFR 22.3).

On March 11, 1967 (32 FR 4001), the Secretary of the Interior listed bald eagles south of 40 degrees north latitude as endangered under the Endangered Species Preservation Act of 1966 (Pub. L. 89-699, 80 Stat. 926) due to a population decline caused by DDT and other factors. Bald eagles north of this line were not included in that action because the northern populations had not experienced the same threats and population declines and, therefore, were not considered endangered in 1967.

On December 31, 1972, the U.S. Environmental Protection Agency canceled and suspended registration of DDT in the United States. The following year the Endangered Species Act of 1973 (16 U.S.C. 1531-1544) was passed. Among the purposes of the ESA are " \* \* \* to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and to

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provide a program for the conservation of such endangered and threatened species" 16 U S C Id At 1531(b). The ESA contains provisions for listing, protection, and recovery of imperiled species. An endangered species is defined under the ESA as a species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The ESA and its implementing regulations prohibit the unauthorized take of any listed species. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these acts. The ESA also prohibits shipment in interstate commerce in the course of commercial activity or sale or offer for sale in interstate or foreign commerce.

In 1978, the Service listed the bald eagle as endangered under the ESA in 43 of the contiguous States, and threatened in the States of Michigan, Minnesota, Wisconsin, Oregon, and Washington (43 FR 6233, February 14, 1978). Sub-specific designations for northern and southern eagles were removed.

The protection available under the ESA and the banning of DDT and other harmful chemicals resulted in significant increases in the breeding population of bald eagles throughout the lower 48 States. In response to the increasing population, we published an advanced notice of a proposed rule on February 7, 1990, (55 FR 4209) to reclassify the bald eagle from endangered to threatened in the remaining 43 States where it had been listed as endangered and retained threatened status for the other 5 States. On July 12, 1994, we published a proposed rule to accomplish this reclassification (59 FR 35584), and the final rule was published on July 12, 1995, (60 FR 36000). Populations of bald eagles have continued to increase, and on July 6, 1999, we published a proposed rule to delist the bald eagle throughout the lower 48 States due to recovery (64 FR 36454).

#### Bald Eagle Recovery

Section 4(f) of the ESA directs us to develop and implement recovery plans for listed species. In some cases, we appoint experts to recovery teams to assist in the preparation of recovery plans. To facilitate the recovery of the bald eagle, we divided the lower 48 States into five recovery regions (Table 1). Separate recovery teams composed of experts in each geographic area prepared recovery plans for their region. The teams established recovery objectives and criteria and identified tasks to achieve those objectives. Coordination meetings were held regularly among the five teams to exchange data and discuss progress towards recovery.

Table 1.--The Five Bald Eagle Recovery Regions and Dates of Approved Recovery Plans

Recovery region	Date of recovery plan	States
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Chesapeake Bay .	1982, rev	
	1990	Delaware, Maryland, the southern two-thirds of New Jersey, the eastern half of Pennsylvania, Virginia east of the Blue Ridge Mountains, and the "panhandle" of West Virginia
Pacific ..	...	1986 California, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming
Southeastern . .	1984, rev	
	1989 .	Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Eastern Texas
Southwestern ....	...	1982 Arizona, the area of California bordering the Lower Colorado River, New Mexico, and Oklahoma and Texas west of the 100th meridian
Northern States ...	...	1983 All remaining 24 States or parts thereof

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**\*8241 Recovery Accomplishments**

The Service and other Federal, State, tribal, and local cooperators from across the Nation have funded and carried out many of the tasks described within the recovery plans. Annual expenditures for the recovery and protection of the bald eagle by public and private agencies have exceeded \$1 million each year for the past decade (Service records). State fish and wildlife agencies have played a vital role in restoring bald eagles to areas from which they were extirpated or in which their numbers were greatly reduced. These activities include conducting annual surveys of breeding and productivity, purchasing lands for the protection of bald eagle habitat, reintroduction and habitat management programs, and public outreach.

A partial survey conducted by the National Audubon Society in 1963 reported on 417 active nests in the lower 48 States, with an average of 0.59 young produced per nest. Surveys we coordinated in 1974 resulted in a population estimate of 791 occupied breeding areas for the lower 48 States.

Since the early 1980s, breeding and productivity surveys were conducted annually on a State-by-State basis. Data collection methods vary somewhat from State to State but generally include surveys by aircraft or visits to the site each year during the breeding season to determine the number of occupied breeding areas, and a second survey just before fledging to count the number of young produced at the site. Some States conduct the survey themselves with agency personnel, others collate data from partners (including cooperating agencies), while some data is collected by personal interviews with reliable sources. Though the data collection methods may vary, most States agree that the data provided to us represent a minimum number of known, occupied breeding areas. The last National bald eagle

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census was recorded in 2000. Since then, a number of States have collected bald eagle data every other year or every few years.

Since the development and implementation of the five recovery plans, the bald eagle's population growth has exceeded most of the goals established in the various recovery plans. In 1994, our cooperators reported about 4,450 nesting pairs with an estimated average young of 1.16 young per nest. Compared to the survey conducted in 1974, the number of nesting pairs in 1994 in the lower 48 had increased by 462 percent.

Based on the improvements through 1994, including a significant increase in numbers of nesting pairs, increased productivity, and expanded distribution, we reclassified the bald eagle in 1995 from endangered to threatened (60 FR 36000, July 12, 1995). In 1999, we proposed the bald eagle for delisting due to recovery (64 FR 36454, July 6, 1999).

Recovery continues to progress at an impressive rate. Between 1989 and 1999, the bald eagle's nesting population increased at a rate of 8 percent per year. In 2000, the last year a National census was conducted, there were an estimated 6,471 nesting pairs of bald eagles.

Approximately 60 percent of the lower 48 States have reported nesting pair numbers for 2003, totaling 4,044 nesting pairs. We estimate a current bald eagle nesting population in the lower 48 States to be a minimum of 7,066 nesting pairs, using the numbers last reported from the States. Of the 48 States in which the bald eagle is listed, 30 States completed surveys in 2003, 5 States completed the last survey in 2002, and 9 States completed the last survey in 2001. This population estimate may be conservative given that several States that support large bald eagle populations have not continued annual monitoring. Therefore, based on the 2000 census data, the current national bald eagle population is likely larger than the numbers available to the Service.

The bald eagle has successfully recovered throughout its range. In 1984, 13 of the lower 48 States had no nesting pairs of bald eagles, and 73 percent of the nesting pairs were located within only six States: Florida, Wisconsin, Michigan, Minnesota, Washington, and Oregon. By 1996, all but two States supported nesting pairs. By 2000, these six States had a reduced share of 59 percent of all nesting pairs, due to increased nesting in other States. In 2000, there were an estimated 6,471 occupied breeding areas.

In order to maintain a stable population of bald eagles, a minimum productivity of 0.7 young per nesting pair per year is necessary (Sprunt, et al. 1973). With a national average productivity of at least one fledgling per nesting pair per year between 1990 and 2000, the bald eagle population has increased and continues to maintain a healthy reproductive rate.

Recovery within the individual recovery regions has also been successful. Recovery plans and objectives were designed to guide and measure recovery efforts.

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They are intended to provide targets rather than absolute numeric criteria. We discuss bald eagle recovery goals for the five regions and how these goals have been attained below.

#### Regional Recovery Status

The following is a comparison of the status of the bald eagle in each of the five recovery regions against specific objectives in each of the five recovery plans.

#### *Chesapeake Recovery Region*

**Delisting Goals** Sustain a nesting population of 300-400 pairs with average productivity of 1.1 young per nest over 5 years, and permanently protect enough habitat to support this nesting population and enough roosting and foraging habitat to support population levels commensurate with increases throughout the Atlantic Coastal area. Habitat protection will be accomplished through landowner cooperation, land easements and acquisition, incentive programs, and a continuing effort to pursue broad-based \*8242 shoreline protection through State legislation and policy initiatives.

**Achievements** The numeric recovery goals were met in 1992, when the number of nesting pairs exceeded 300 nesting pairs, and the population has continued to increase, with over 800 nesting pairs reported in 2003. The average productivity of 1.1 young per nest over 5 years has been met, with the average between 1998 and 2003 being 1.19 young per nest. The objective of permanently protecting enough habitat to sustain these population numbers is close to being achieved. Habitat has been protected for approximately 200 nesting pairs. These protected lands include, but are not limited to, National Wildlife Refuges, State management areas, National Park Service lands, and conservation easements. Since 1990, occupied breeding areas for the bald eagle have more than doubled in this region, indicating that habitat has not been a limiting factor and that potential nesting habitat is still available for an increasing population of bald eagles, despite land development pressures.

Approximately 75 percent of the nest sites in the Chesapeake Bay area are on private lands. Habitat protection continues to proceed. For instance, the State of Maryland, where 40 percent of the nesting pairs occur, has established the Chesapeake Bay Critical Area Program. This program regulates development and timber harvest operations within 1,000 feet of the Chesapeake Bay and its tidal tributaries in Maryland. Approximately 70 to 80 percent of all eagle nests in Maryland are within the Critical Area. Much of the forested areas within the Critical Area will be conserved (Therres, 4/19/04 in litt), which will likely contribute to the ability to meet the habitat preservation goal established in the recovery plan.

#### *Northern States Recovery Region*

**Delisting Goals** By the year 2000, establish 1,200 occupied breeding areas

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distributed over a minimum of 16 States with an average annual productivity of 1 0 young per occupied nest

**Achievements:** The delisting goal was achieved in 1991, with 1,349 occupied breeding areas distributed over 20 States. Since 1991, average productivity was estimated to be greater than 1 0. In 2000, the Northern States Recovery Region had an estimated 2,559 occupied breeding areas. When the recovery plan was approved in 1983, nesting bald eagles were considered extirpated in Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, Nebraska, and Utah, and there was no evidence that the species ever had nested in Vermont or Rhode Island. As of 2003, only Vermont remains without a nesting pair of bald eagles, with some of the aforementioned States having more than 25 active eagle nests.

#### *Pacific Recovery Region*

**Delisting Goals:** A minimum of 800 nesting pairs with an average annual productivity of 1.0 fledged young per occupied breeding area, and an average success rate for occupied breeding areas of not less than 65 percent over a 5-year period. Additionally, breeding population goals should be met in at least 80 percent of 30 management zones, and wintering populations should be stable or increasing.

**Achievements.** The recovery goals have been met, with the numeric delisting objectives having been met since 1995. According to the Pacific Bald Eagle Recovery Plan, the estimated number of nesting pairs for the entire recovery unit in 1985 was 527. However, between 1985 and 2001 the number of nesting pairs of bald eagles for this recovery unit more than tripled, totaling 1,627 nesting pairs. The number of nesting pairs exceeded the recovery goal of 800 in 1990, and has continued to increase. Productivity has averaged approximately 1 0 young per nesting pair since 1990. In 1998, six of the seven Pacific Region States reported an average success rate of 75 percent. Distribution of nesting pairs among management zones was achieved in 1999, with the Olympic Peninsula and Central California Coast meeting their recovery goals. The Pacific Recovery Plan identifies 47 management zones with recovery goals identified for 37 of the zones. As of 1999, 30 of the 37 targeted management zones had met their goals, or 81 percent of the zones. Of the 30 zones where target levels have been met, at least 11 have more than doubled the established objective. At least three zones where no targets were set have one or more nesting pairs of bald eagles.

Data indicate that the objective of stable to increasing trends in wintering populations of bald eagles has been attained on the average for the recovery region. Wintering populations have been tracked in the Pacific and many other States using the mid-winter bald eagle surveys. Wintering populations are difficult to assess because bald eagle concentrations depend upon weather and food supply and consequently will vary from year to year. With these constraints, the information suggests that Washington, Oregon, Idaho, and California have experienced an increasing trend in wintering populations of 1.5 to 4.5 percent, while Nevada and Montana report a decline of about 2 5 percent for 1986-2000. As

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of 2002, the Pacific Coast Region's counts increased at 1.6 percent per year, and the Great Basin counts increased 1.3 percent per year (K. Steenhof, pers. comm.)

#### *Southeastern Recovery Region*

**Delisting Goals.** The original recovery plan stated that delisting would be considered if the recovery trend continues for 5 years after reclassification goals are met, and the criteria for delisting would be developed when the species is reclassified from endangered to threatened. After reclassifying the species to threatened in 1995, the Southeastern States Bald Eagle Recovery Team reconvened to consider criteria for delisting. The current recommendations of the recovery team are to achieve 1,500 occupied breeding areas over the most recent 3-year period, with average productivity of 0.9 young per occupied breeding area over the same 3-year period, and have 8 of 11 States meet their nesting and productivity goals.

**Achievements.** The delisting goal of 1,500 occupied breeding areas over the most recent 3-year period has been met, with over 1,700 pairs counted in 2000. Production between 1997 and 2000 averaged 1.24 young per occupied territory, thus exceeding the 0.9 goal for the last surveyed consecutive 3-year period. Individual population goals for all 11 States were first attained in 2000, and the population levels have continued to increase.

#### *Southwestern Recovery Region*

**Delisting Goals:** Although the 1982 recovery plan does not have delisting goals for the Southwestern Recovery Region, it does outline goals for reclassifying the bald eagle from endangered to threatened. The recovery plan states that when the reproductive effort has been effectively doubled to 10-12 young per year over a 5-year period, and the population range has expanded to include one or more river drainages in addition to the Salt and Verde River Systems, the southwestern bald eagle should be reclassified to threatened. The 1982 recovery plan indicated that Arizona was the only State in the recovery region containing nesting bald eagles, with 42 unverified historic nesting territories in the State, 12 occupied territories in the Salt and Verde River Systems, and 1 occupied territory along the Colorado River.

**Achievements.** The goal established in the recovery plan has been exceeded. In 2003, 46 occupied breeding areas were reported in New Mexico and Arizona alone. In 2004, the State of Arizona had **\*8243** 41 occupied breeding areas, and productivity was estimated at 0.75 young per occupied breeding area (Terry Johnson, pers. comm.). The number of occupied breeding areas has more than doubled in the past 15 years.

The information from the five recovery regions demonstrates that bald eagle numbers have greatly increased and productivity has substantially improved during the past two decades. The increases have continued throughout the species' range since publication of the original July 6, 1999, proposed delisting rule and several States, notably Wisconsin and Minnesota have changed the status to a

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species of special concern. Currently the Service estimates that more than 7,066 occupied breeding areas occur in the lower 48 States.

#### Summary of Comments on the July 6, 1999, Proposed Delisting Rule

In the July 6, 1999, proposed delisting rule (64 FR 36454), we requested that all interested parties provide information and comments on the proposal to delist the bald eagle. Announcements of the proposed rule were sent to Federal, State, and local officials, Federal and State agencies, tribes, interested private citizens, and local newspapers and radio stations. We held public hearings in Nashville, Tennessee, on September 13, 1999, in Yorktown, Virginia, on September 21, 1999, and in Phoenix, Arizona, on September 23, 1999.

We considered all comments provided in writing, received through our Web site, and presented orally at the public hearings. The public hearings were attended by a total of 137 people, who provided 47 oral comments. Among those submitting comments were 12 Federal agencies, 22 State resource agencies, 41 conservation organizations, 10 academic institutions, and 213 private citizens. By recovery region, 132 comments were received from the Southwest Region, 79 from the Chesapeake Bay Region, 35 from the Southeastern Region, 28 from the Pacific Region, and 22 from the Northern States Region.

In addition, five bald eagle experts from the Raptor Research Foundation, Inc. volunteered to provide scientific review of the proposal to delist the bald eagle and they submitted comments during the public review period. The Raptor Research Foundation, Inc. is an organization representing approximately 1,200 professional raptor biologists and scientists throughout the world.

We address both the comments of the Raptor Research Foundation's five bald eagle experts along with other comments received during the public comment period under the respective issues below:

**Issue 1. Habitat protection for the bald eagle will be reduced once it is removed from the List of Endangered and Threatened Wildlife.** The Service should develop a strategy to ensure a core amount of nesting, wintering, and foraging habitat is identified and protected and should give adequate consideration to the species future management needs.

**Our Response.** As further discussed under Factor A below, we recognize that the level of habitat protection for the bald eagle will be reduced once it is delisted. However, as discussed under Factor D, the Federal and State laws will continue to provide adequate protection to bald eagles and their core nesting, wintering, and foraging habitat. Environmental laws that regulate polluted discharges and fill into waterways, wetlands, and associated habitats, will contribute to the protection of bald eagle habitat.

**Issue 2.** The Service did not adequately enlist the help and advice of the bald eagle recovery teams, nor did it update or revise the five recovery plans.

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Our Response: Though formal recovery team meetings did not reconvene, we worked with, and sought the advice of, many of the individual recovery team members throughout the rulemaking process. During the rulemaking process, we solicited information from numerous other sources including the States, bald eagle working groups, Federal, tribal, and university affiliated biologists, and the public.

Issue 3: Habitat protection objectives in the Chesapeake Bay, Northern States and Pacific region recovery plans were not addressed. The draft revised population objectives for the Southeastern Recovery Region have not been met.

Our Response. All recovery plans state "that approved recovery plans are subject to modification as dictated by new findings, changes in species status, and the completion of recovery tasks." The objectives identified during the recovery planning process provide a guide for measuring the success of recovery, but are not intended to be absolute prerequisites, and should not preclude a reclassification or delisting action if such action is otherwise warranted.

The Northern States and Pacific Recovery Plans did not include specific habitat protection goals. The Northern States Recovery Plan instead focused on site-specific and general habitat management. This management approach has contributed to a population level that is more than double the number of breeding pairs identified in the delisting goals. The Pacific Recovery Plan states that if the breeding population goal is reached, we can assume that adequate breeding habitat has been secured. The breeding population goal in the Pacific Recovery Plan has been achieved. The habitat protection goal of the Chesapeake Bay Recovery Plan has not yet been met. However, as discussed earlier, between one-half and one-third of the original habitat protection goal has been met. The bald eagle population is more than double the population goal and continues to increase and has not yet reached carrying capacity--indicating that habitat is not a threat to the maintenance of the population goal for the foreseeable future. The population objectives for the Southeastern Recovery Region were met in 2000, and numbers in that recovery region continue to increase.

Issue 4: Once the bald eagle is removed from the List of Endangered and Threatened Species, legal protections for the bald eagle and its habitat will be reduced or nonexistent. The BGEPA should be strengthened. Federal and State law enforcement officials should be informed about the BGEPA.

Our Response. The ESA has been used to provide the primary regulatory protection for the bald eagle since the listing of the species. However, after delisting occurs, the protections of the BGEPA will remain in effect. The BGEPA restrictions and other existing regulatory mechanisms are discussed under Factor D. We believe these mechanisms are adequate to protect the species if it is delisted, for the reasons discussed under Factor D. BGEPA provides indirect habitat protection, by protecting the bald eagle itself from disturbance. Through the public comment period on this proposed delisting rule, the proposed National Bald Eagle Management Guidelines, and the proposed definition of "disturb," the States will have the opportunity to review and submit any concerns their law enforcement

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officials may have regarding the protections afforded the bald eagle if it is delisted

Issue 5 The Service should conduct rigorous long-term monitoring after the species is delisted. The condition and security of habitat should be assessed every 5 years. The contaminant monitoring outlined in the discussion of the monitoring plan in the original proposed rule is also inadequate.

Our Response. We are in the process of updating the post-delisting **\*8244** monitoring plan that was included in the 1999 proposed delisting rule by addressing comments we received, and we will publish a revised draft monitoring plan for public comments in the near future. We will also seek peer review of the revised monitoring plan by independent scientists. The primary objective of the monitoring plan is to monitor effectively, in cooperation with the States, for not less than 5 years the status of all species delisted due to recovery. (See "Monitoring" section)

Issue 6. The Service should consider establishing minimum criteria that might signal the need for relisting.

Our Response. The Service has not at this time established any criteria that might specifically trigger the need to consider relisting. As required by section 4(g)(1) of the ESA, the Service will monitor the status of the bald eagle for at least five years after delisting. If at any time following delisting, information indicates that the bald eagle may become threatened or endangered, we will evaluate the need to relist the species in accordance with section 4 of the ESA.

Issue 7. The Service should support the U.S. Geological Survey's efforts to develop a streamlined protocol for monitoring wintering bald eagles in the future as part of the post-delisting monitoring plan under the ESA.

Our Response. We support the U.S. Geological Survey's efforts to develop a standardized wintering bald eagle monitoring protocol. However, our goal for bald eagle monitoring after delisting is to detect significant declines in numbers of breeding pairs in the lower 48 States, and we will be working in cooperation with the U.S. Geological Survey in developing the post-delisting monitoring plan. Winter survey results are highly variable; the influx of bald eagles from Canada and Alaska can make assessment of the breeding population in the lower 48 States extremely difficult. We believe that our most reliable and cost-effective approach for detecting population trends in the lower 48 States is to focus on nest site occupancy. These nest surveys have been conducted since the bald eagle was listed under the ESA and form the basis for our determination of recovery. Thus, we believe that post-delisting monitoring should focus on nest site occupancy. Until the U.S. Geological Survey's wintering bald eagle monitoring protocols are completed, the Service will continue working with the States to monitor breeding pairs and productivity.

Issue 8: The annual census of breeding areas and productivity fails to provide

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the demographic information that is necessary to detect population trends

Our Response We disagree Annual bald eagle breeding area and productivity surveys to date have been conducted in the majority of the lower 48 States for more than 15 years and have provided an extensive database on geographic and National population trends. These surveys not only monitor performance of known territories, but also document recruitment of new territories. The results provide a comprehensive database that clearly demonstrates an increasing population trend

Issue 9 The Service should initiate shoreline surveys (Chesapeake Bay)

Our Response We will monitor bald eagles of the Chesapeake Bay using the protocols set up in the National post-delisting monitoring plan under the ESA. The draft monitoring plan will be announced for public comment in the Federal Register at a later date. States may choose to conduct more comprehensive monitoring for management purposes on a State level.

Issue 10 Several commenters recommended retaining threatened or endangered status for bald eagles in the Southwest and Chesapeake Bay Recovery Regions, possibly by designation as distinct population segments.

Our Response. Listing under the ESA in taxonomic terms is limited to species, but the term "species" is defined by the ESA to include any subspecies and any distinct vertebrate population segment. To facilitate meeting the intent of the law, we and the National Marine Fisheries Service jointly developed a "Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act" (DPS Policy) (61 FR 4722; February 7, 1996). Three elements are considered regarding the potential recognition of a DPS as endangered or threatened. These elements include discreteness, defined as being markedly separated from other populations or separated by international boundaries, significance, defined in terms of the population segment's importance to its species, and status, defined as the population's classification as endangered or threatened.

We are not aware of threats specific to any part of the eagle's range, including the Southwest and Chesapeake Bay Recovery Regions, that suggest that the bald eagle is likely to become endangered in any particular geographic area. As discussed above, the bald eagle's recovery is widespread. Even in the Southwest region, where there has historically and is currently limited available habitat, the bald eagle has significantly exceeded the reclassification goals outlined in the recovery plan. Therefore, we need not at this time analyze whether any particular geographic area would constitute a DPS pursuant to our DPS policy.

Issue 11: Another commenter stated that the Service did not cite the papers by Dr. Jim Fraser and his colleagues (Fraser et al., 1996) documenting the impact of human population growth on bald eagles and indicating a likelihood of extirpation in the Chesapeake Bay area given present trends in habitat loss. Therefore, the Service should evaluate the rate of habitat loss in Chesapeake Bay before

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delisting

Our Response The analysis under Factor A has considered the subject papers We are aware of development pressure in the Chesapeake Bay area However, we disagree with Dr. Fraser about the long-term prospects for eagle survival in this area The bald eagle population numbers continue to increase at a healthy rate in each of the States covered under this recovery region During the past decade, we have added several new National Wildlife Refuges encompassing thousands of acres of eagle habitat to the refuge system Newer refuges at James River and Rappahannock in Virginia, and recent expansions at Blackwater Refuge in Maryland, are notable examples. In addition, the State of Maryland will continue to implement the Chesapeake Bay Critical Area Program (discussed under the "Regional Recovery Status" section above) While any species would benefit by having its entire habitat permanently protected, such a level of protection is not required to ensure the long-term persistence of the bald eagle in the Chesapeake Bay watershed. Bald eagles have not yet reached carrying capacity in the Chesapeake Bay recovery unit Because habitat is not currently limiting the species' population growth, it is likely that the species will continue to expand into available habitat after delisting

We recognize that the bald eagle's continued population expansion will likely cause its population to reach the carrying capacity of the Chesapeake Bay area At that point, additional habitat loss may in fact cause the population to decline from its future peak level to some degree Moreover, it is conceivable that at some point in the future, continued habitat loss could, under certain scenarios, result in the eagle being in danger of extirpation in the Chesapeake Bay area. However, having reviewed all of the available information regarding habitat threats as well as the existing regulatory mechanisms that \*8245 directly or indirectly protect eagle habitat, it is our judgment that this outcome is not likely in the foreseeable future.

Issue 12. Demographic data show that the Arizona bald eagle population faces a high likelihood of decline Mortality of breeding adults is excessive. Subadults constitute a higher percentage of breeding eagles than is the case for other populations. Fledgling mortality is excessive and reproductive rates are below those characteristic of other eagle populations Direct human intervention through the Arizona Bald Eagle Nestwatch Program has saved 16 percent of all southwestern bald eagle fledglings since 1983, but continuance of this program is not assured Some human intervention will be required to maintain this population

Our Response: We fully recognize the role that active management of the bald eagle has played in the Southwest in achieving recovery. With that said, this population has increased since listing in 1978, and may have reached its carrying capacity given the extent and nature of available nesting habitat, and the difficult conditions under which it nests We will continue to work with other involved agencies to assure continuation of existing management and protection regimens, which we believe will adequately protect the current nesting population

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Issue 13: Threats to the continued existence of the bald eagle in the southwest are increasing. These threats include habitat loss, river dewatering, human encroachment through recreation and development, toxic substances, low-flying aircraft, fishing line entanglement, grazing, and global warming. The Service has issued a number of biological opinions that document the perilous status of southwestern bald eagles.

**Our Response:** We agree that a number of biological opinions have been issued relevant to the Southwest population of bald eagles. Section 7 of the ESA requires Federal agencies to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of listed species. Biological opinions analyze and document project-level effects to the bald eagle in the context of the effects on the recovery region and ultimately to the National population. In other words, the potential effects to the southwestern or any of the other four populations are considered in terms of whether they appreciably reduce the likelihood of both survival and recovery of the bald eagle throughout the lower 48 States, not solely for the geographic area in which the impacts may occur. In making these population level determinations, the biological opinions assess the status of the recovery unit populations. The current status of the Southwest Recovery Region indicates that population numbers are nearly equal to the estimated historical occupancy and are expanding into new watersheds.

Issue 14: No laws other than the ESA provide the necessary protection for the continued survival of Southwestern bald eagles. Many of the existing laws the Service plans to rely on were in place when the bald eagle was listed, thus demonstrating their inadequacy.

**Our Response:** The primary reason the bald eagle was listed was due to the catastrophic reproductive failure resulting from the widespread use of DDT. That major threat has been eliminated since DDT was banned in 1972. Though it did take some time after the ban for DDT and DDE (its metabolic breakdown product) to dissipate from the food chain, the banning of DDT effectively stopped the declining trend. Although the protective mechanisms of the ESA will no longer apply if the species is delisted, a number of other laws provide protection to the bald eagle throughout its range and these protections will continue after delisting. Many of the current laws and regulations protecting our environment (such as the Clean Water Act of 1972) were enacted about the same time as the ESA. We believe that existing laws and regulations, including the BGEPA and the Migratory Bird Treaty Act, will provide adequate protection from potential threats to maintain a recovered population of the bald eagle. (See discussion under Factor D of the "Summary of Factors Affecting the Species" section of this proposed rule.)

Issue 15: Statements made in the proposed rule that eagles are thriving on private land, thus implying that they may be adapting to human presence, remain unsubstantiated.

**Our Response:** Based on the best available data, we have determined that bald eagle response to human presence is highly variable. For example, Florida hosts

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the largest number of nesting pairs of bald eagles of any of the lower 48 States, exceeding 1,100 nesting pairs. Available data indicate that approximately 66 percent of these nest sites occur on private lands. The remaining 34 percent of these nest sites occur on publicly owned lands or some form of conservation lands. In addition, these Florida eagles have shown remarkable adaptation to human presence and activities and continue to thrive in environments that, until recently, would have been considered unsuitable habitat.

Issue 16. The Service should initiate a coordinated research effort and seek funding to investigate the ecology of Avian Brain Lesion Syndrome in the Southeastern Recovery Region.

Our Response. This disease, now known as Avian Vacuolar Myelinopathy, is being studied and tracked by the National Wildlife Health Center in Madison, Wisconsin. This is further discussed under "Factor C" of the Summary of Factors Affecting the Species.

Issue 17. The 90-day comment period was not adequate to conduct a thorough scientific review. The Service should have published a notice of intent to delist. The Service held too few public hearings, engaged in too little advertisement about them, and did not allow for extension of time.

Our Response: We believe the 90-day comment period for the proposed delisting rule, which exceeded the required 60-day comment period, was adequate. Prior to the publication of the proposed rule, we solicited input from numerous entities, including the States, tribes, and many recovery team members. The number of public hearings was based on the number of requests we received. We had seven requests for public hearings, and offered three hearings at locations close to the requesters' home towns. The advertisements regarding the hearings followed our standard procedures and included direct coordination with the requesters. The Service received a few requests for extensions of the comment period, however, the requests did not provide adequate justification for an extension. In any case, due to new information we have now reopened the public comment period on the proposed delisting.

#### Summary of Factors Affecting the Species

Section 4 of the ESA and the regulations (50 CFR part 424) promulgated to implement its listing provisions set forth the procedures for listing, reclassifying, and delisting species. We may list a species if one or more of the five factors listed in Section 4(a)(1) of the ESA threatens the continued existence of the species. A species may be delisted, according to 50 CFR 424.11(d), if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened for one of the following reasons: (1) Extinction, (2) recovery; or (3) original data for classification of the species were in error.

\*8246 The bald eagle was proposed for delisting on July 6, 1999. This notice

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further indicates our intent to delist and supply more information to the public than was provided previously. Discussion of the five listing factors and their application to the recovery of the bald eagle are discussed below.

A. The Present or Threatened Destruction, Modification or Curtailment of its Habitat or Range. Nesting, wintering, and foraging habitat are essential to the continued survival of the bald eagle. The current increasing population trend clearly indicates that habitat is not presently limiting the growth of the bald eagle population in the lower 48 States, that the population has not yet reached carrying capacity in many parts of its range, and that the population will continue increasing following delisting. We recognize that the bald eagle occupies habitats that are often subject to development or other encroachment in some parts of the range. In addition, we acknowledge that habitat availability may limit future growth of certain local populations. The population will likely increase at a much slower rate than what has been documented during the recovery period. In addition, population numbers will naturally fluctuate in areas where the habitat has reached its carrying capacity.

Despite these potential limitations, however, numerous factors ensure the bald eagle is not likely to become endangered in the foreseeable future by loss of suitable habitat or range in any of the five recovery regions. First, the bald eagle thrives near a variety of different aquatic environments including reservoirs, lakes, rivers, estuaries, and the marine environment. These environments exist in each of the lower 48 States, and currently, bald eagles occupy these types of habitats in 47 out of the 48 States. This tremendous distribution of bald eagles throughout the entire United States, combined with the eagles' ability to exploit such a wide range of geographic habitat settings provides an important buffer against any potential threats to the population in each recovery region and as a whole.

In addition, information suggests that some individual eagles in many parts of their range are demonstrating a growing tolerance of human activities in proximity to nesting and foraging habitats. Eagles in these situations continue to successfully reproduce in settings previously considered unsuitable. For example, where our Southeastern nesting management guidelines have been followed in Florida, some bald eagle pairs have shown a remarkable adaptation to human presences by nesting in residential subdivisions, commercial and industrial parks, on cell phone towers, and alongside expressways. A common thread throughout these urban landscapes is the availability of ample food sources such as natural lakes, rivers and ponds, artificial stormwater retention ponds, and public landfills. As the eagles begin to reach the carrying capacity in local areas and face development or other encroachments, it is anticipated that some eagles will adapt to these circumstances, while other eagles may not be successful. However, because this species utilizes numerous aquatic environments and many areas have not yet reached carrying capacity, we expect many of these displaced eagles will be able to relocate to more suitable habitats.

Additionally, there will continue to be numerous bald eagles nesting on protected

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lands, including, but not limited to, National Wildlife Refuges, National Parks, National Forests, as well as State management areas, and lands owned by private conservation organizations. Therefore, a substantial number of bald eagle nesting territories will remain protected and provide strongholds throughout the range of the species

Absent any range-wide, catastrophic impacts such as epidemic disease or widespread environmental contamination, habitat loss is not likely to become a limiting factor for the recovery regions or the national bald eagle population in the foreseeable future, and is not likely to rise to the level where the bald eagle meets the definition of either threatened or endangered. Given the existence of suitable habitat sufficient to support a bald eagle population at a recovered level into the foreseeable future, the demonstrated increasing levels of tolerance of some local bald eagle populations to increasing levels of human disturbance, and continued protections afforded under various laws described below under Factor D, the bald eagle is not threatened by present or future destruction, modification, or curtailment of its habitat or range

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes. The shooting of bald eagles, and the taking of their nests and eggs, was prohibited in 1940 with the Bald Eagle Protection Act. Shooting of bald eagles was prohibited again in 1972, when eagles were added to the list of birds protected by the MBTA. Large-scale mortality from unregulated shooting, like that which occurred early in the last century, has been eliminated. Hunter education courses include bald eagle identification material to educate hunters about bald eagles and the protection that the species is afforded. There is currently a low level of illegal shooting and commerce in eagle feathers and parts, and it is likely that this level will continue in the future. We will continue to enforce the restrictions of BGEPA and MBTA.

There is no legal commercial or recreational use of bald eagles, and such uses of bald eagles will remain illegal under various statutes, as described under Factor D below. We consider current laws and enforcement measures apart from the ESA sufficient to protect the bald eagle from illegal activities, including trade. We exercise very strict control over the use of bald eagles or their parts for scientific, education, and Native American religious activities. To respond to the religious needs of Native Americans, we established the National Eagle Repository in Commerce City, Colorado, which serves as a collection point for dead eagles. As a matter of policy, all Service units transfer salvaged bald eagle parts and carcasses to this repository. Members of federally recognized tribes can obtain a permit from us authorizing them to receive and possess whole eagles, parts, or feathers from the repository for religious purposes. After removal from protection under the ESA, we will still have the ability to issue permits for limited exhibition and education purposes, selected research work, and other special purposes, including Native American religious use, consistent with Federal regulations implementing the BGEPA (50 CFR part 22). We will not issue these permits if they are incompatible with the preservation of the bald eagle.

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In summary, there is no current or anticipated future overutilization of the bald eagle for commercial, recreational, scientific, or educational purposes. Such uses will remain regulated under the BGEPA, the Migratory Bird Treaty Act, and Lacey Act.

C Disease or Predation. Predation has been documented but it does not constitute a significant problem for bald eagle populations.

Diseases such as avian cholera, avian pox, aspergillosis, tuberculosis, and botulism may affect individual bald eagles, as do parasites such as the Mexican chicken bug, but are not considered to be a significant threat to overall bald eagle numbers. According to the National Wildlife Health Center (NWHC) in Madison, Wisconsin, only a small percentage of bald eagles submitted to the NWHC between 1985 and 2003 died of infectious disease. The species' widespread distribution \*8247 generally helps to protect the bald eagle from catastrophic losses due to disease.

Since 1994, it is estimated that 104 bald eagles died of avian vacuolar myelinopathy (AVM). Confirmed cases of bald eagle deaths due to AVM are recorded in Arkansas, North Carolina, South Carolina, and Georgia. At present, this disease continues to be investigated. While a toxic agent is suspected as the cause of this condition, cooperative efforts are under way to determine the prevalence of this disease and its origin. These mortalities can have a localized impact on bald eagle populations; however, there is currently no evidence that the overall recovery of the species is affected.

In more recent years, the West Nile Virus (WNV) has affected some individual bald eagles. According to NWHC, between January 2002 and January 2004, 81 bald eagles were tested for WNV at the Center, and 4 tested positive. Individual States have also conducted tests on dead bald eagles with an overall small percentage testing positive. For example, the State of New York annually counts the number of bald eagles residing in the State. The count has averaged over 300 individual bald eagles each year since 2000, with only two confirmed cases of WNV. The recovery of the bald eagle should not be affected by the small percentage of localized cases of WNV.

The NWHC is investigating winter mortality to bald eagles along the lower Wisconsin River. Unusual mortality to birds wintering in two counties along the lower Wisconsin River, Wisconsin, began in 1994-1995 with the deaths of at least 14 bald eagles. However, no sick bald eagles were found at roosts from 10-65 km upriver and 10-150 km downriver from the affected region, and elsewhere in the State. Beginning in 2000-2001, after a hiatus of 4 years, similar bald eagle mortality has reoccurred each winter, with 30 to 40 confirmed cases. The current hypothesis is that the syndrome is caused by a severe thiamine deficiency as a result of feeding largely on gizzard shad, but that hypothesis remains to be adequately tested (G. S. McLaughlin et al. 2004, abstract). This syndrome is very localized, and is not having an impact on the Statewide bald eagle population. Wisconsin's eagle population has been rising each year since the mid-1980s, with

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over 830 nesting pairs counted in 2003 (Beneler, WIDNR 2003)

In summary, like all wildlife populations, the bald eagle is affected by numerous natural and environmentally related diseases, as well as predation. While these diseases and predation may have significant impacts on small, local populations, there are no known natural or environmentally related disease threats that currently have, or are anticipated to have, widespread impacts on any of the five recovery regions or the national bald eagle population in the lower 48 States. Therefore, neither predation nor disease constitutes a significant threat to the bald eagle.

D. The Inadequacy of Existing Regulatory Mechanisms After removal from the list of species protected by the ESA, the bald eagle and its nests and eggs will remain protected in the United States by other Federal wildlife laws. These statutes will continue to protect and sustain a recovered bald eagle population within the lower 48 States. The following discusses the protections that will continue to be afforded the bald eagle.

The Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d) enacted by Congress in 1940, was the first law intended to prevent extinction of the bald eagle. It prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions. The law provides significant protections for bald eagles by prohibiting, without specific authorization, take, possession, selling, purchase, or bartering, offering to sell, purchase, or barter, transport, export or import any bald or golden eagle, alive or dead, or any part, nest, or egg thereof.

Take under the BGEPA is defined as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" (16 U.S.C. 668c). Under BGEPA, permits may be issued to take of bald eagles only for scientific or exhibition purposes, for religious purposes of Native American tribes, or for the protection of wildlife, agriculture, or other interests (50 CFR part 22). All other take is prohibited. Thus, unless permitted for any of the aforementioned activities, any and all other activities that take bald eagles constitute a violation of the BGEPA.

Unlike the ESA, which provides exceptions and exemptions to the prohibitions against take (i.e., via section 7 incidental take statements, and section 10 incidental take permits) for take resulting from an "otherwise lawful activity," there is no similar mechanism expressly available under BGEPA to permit the incidental take of bald eagles, including take by "disturbance."

To help land managers, landowners, and others who conduct activities in bald eagle habitat avoid a prohibited disturbance of bald eagles after ESA delisting, the Service has developed draft National Bald Eagle Management Guidelines. A Notice of Availability to solicit public input on the draft Guidelines is being published in the Federal Register concurrent with this proposed delisting rule.

The purposes of the National Bald Eagle Management Guidelines are to (1)

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Publicize the provisions of the BGEPA and the MBTA that continue to protect bald eagles to reduce the possibility that the law will be violated, (2) advise landowners, land managers, and the general public of the potential for various activities to disturb bald eagles, and (3) encourage land management practices that benefit bald eagles and their habitat.

Concurrent with this proposed delisting rule and draft National Bald Eagle Management Guidelines, we are also publishing a proposed rule in the Federal Register to promulgate a regulatory definition of "disturb" to 50 CFR 22.3, part of our regulations that implement the BGEPA. A regulatory definition of the term "disturb" will provide a clarification of the scope of the BGEPA's prohibitions of take, and will provide the basis for the recommendations contained in the draft National Bald Eagle Management Guidelines.

The Migratory Bird Treaty Act (MBTA) (16 U S C 703-712) implements various treaties and conventions between the U S and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Unless permitted by regulations, the MBTA provides that it is unlawful to pursue, hunt, take, capture, or kill, attempt to take, capture or kill, possess, offer to sell, barter, purchase, deliver or cause to be shipped, exported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not.

In 2001, the President signed Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds" requiring Federal agencies to incorporate migratory bird conservation measures into their agency activities. Under the Executive Order, each Federal agency whose activities may adversely affect migratory birds was required to enter into a Memorandum of Understanding (MOU) with the Service, outlining how the agency will promote conservation of migratory birds. Although the MOUs are still under development, per the Executive Order, Federal agencies are encouraged to immediately begin implementing conservation measures.

Specific Federal agency responsibilities addressed in the Executive Order that could have direct or indirect benefits to bald eagles \*8248 include: Integrating bird conservation principles, measures, and practices into agency activities, avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources; preventing detrimental alteration of migratory bird habitat; designing migratory bird habitat and population conservation into agency plans and planning processes, and recognizing and promoting economic and recreational values of birds.

The Lacey Act Amendments of 1981 (16 U S.C. 3372-3378) make it unlawful to import, export, transport, buy or sell wildlife taken or possessed in violation of Federal, State, or tribal law. Interstate or foreign commerce in wildlife taken or possessed in violation of foreign law also is illegal. The Lacey Act helps foreign countries and our individual States enforce their wildlife conservation laws.

The Convention on International Trade in Endangered Species of Wild Fauna and

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Flora (CITES) establishes a system of import/export regulations to prevent the over-exploitation of plants and animals listed in its three appendices. For species listed under Appendix I, there is no commercial trade allowed, only import/export for scientific/propagation purposes, which requires a permit from both the countries of origin and import. Although Appendix II species may be commercially traded, a permit is required from the country of export or re-export, and a permit is only issued if certain conservation conditions are met.

The bald eagle is currently listed as an Appendix II species. However, commercial trade is prohibited due to the BGEPA, which prohibits import and export. Bald eagles are limited to North America--Canada, the United States, Mexico, and the French Island territories of St. Pierre and Miquelon. A bald eagle is considered a vagrant when found in Belize, Bermuda, Ireland, Puerto Rico, and the U.S. Virgin Islands.

Section 101(a) of the Clean Water Act (33 U.S.C. 1251-13287) states that the objective of this law is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and provide the means to assure the "protection and propagation of fish, shell fish, and wildlife" (section 101(a)(2)). If the bald eagle is delisted, this statute will continue to contribute in a significant way to the protection of the species and its food supply through provisions for water quality standards, protection from the discharge of harmful pollutants, contaminants (section 303(c), section 304(a), and section 402) and discharge of dredge or fill material into all waters, including wetlands (section 404).

The Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) requires that agencies sponsoring, funding, or permitting activities related to water resource development projects request review by the Service and the State natural resources management agency. This Act allows the resource agencies to examine impacts to fish and wildlife resources from all aspects of the proposed project and to make recommendations to offset those impacts. These comments must be given equal consideration with other project purposes.

Another important regulatory mechanism affecting the bald eagle is the requirement that pesticides be registered with the Environmental Protection Agency (EPA). Under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136), the EPA requires environmental testing of new pesticides. It specifically requires testing the effects of pesticides on representative wildlife species before a pesticide is registered. It is meant as a safeguard to avoid the type of environmental catastrophe that occurred from organochlorine pesticides, such as DDT, that led to the listing of this species as endangered.

Many States protect the bald eagle under their State wildlife and endangered species laws. After Federal delisting, many States may follow suit by removing their special protections for the bald eagle. Most State laws that protect bald eagles are not as comprehensive as the ESA, they provide little habitat protection and, therefore, have generally played a smaller role in protection of eagles while

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the eagle has been listed under the ESA. After delisting, those States that also remove the bald eagle from their State protection laws will continue to manage the recovered population as they do their other wildlife resources.

In summary, several existing Federal laws and regulations will continue to provide a limited amount of protection to the recovered bald eagle population in the lower 48 States. Take of bald eagles will remain restricted through the BGEPA, the MBTA, and the Lacey Act. The BGEPA protection of individual bald eagles from disturbance, as defined in the proposed regulation, will continue to protect the species and maintain recovered population levels. The National Bald Eagle Management Guidelines will provide the public with a guide for complying with the requirements of the BGEPA by avoiding activities that disturb the bald eagle.

E. Other Natural or Manmade Factors Affecting Its Continued Existence. Bald eagles have been subjected to direct and indirect mortality from a variety of human-related activities, for example, poisoning (including indirect lead poisoning), electrocution, strikes by wind turbines, collisions with trains and other vehicles, and death and reproductive failure resulting from exposure to pesticides.

The threat of death and reproductive failure was dramatically reduced in 1972 when DDT was banned from use in the United States. An additional step to halt the decline was taken in 1976, when registrations of dieldrin, heptachlor, chlordane, and other toxic persistent pesticides were cancelled for all but the most restricted uses in the United States. Although persistent levels of DDT in the environment of the Channel Islands (located off the coast of California) are continuing to affect the reproduction of bald eagles on the islands, the effects are highly localized and have a negligible impact on the bald eagle population in the lower 48 States.

By 1977, most uses of polychlorinated biphenyls (PCBs) were restricted in the United States. Some industrial and commercial applications where PCBs were used include: electrical, heat transfer, and hydraulic equipment; as plasticizers in paints, plastics, and rubber products; and in pigments, dyes, and carbonless copy paper. More than 1.5 billion pounds of PCBs were manufactured in the United States prior to 1977 (U.S. EPA 2004). PCBs do not readily break down and may persist in the environment for decades. There continues to be a risk of reproductive failure to individual bald eagles that consume prey that have accumulated levels of PCBs in their system. However, cases where PCBs have impaired bald eagle reproductive success are relatively low and localized. For example, Bowerman (1993) documented lower reproduction among the bald eagles nesting along the coasts of the Great Lakes in Michigan compared to those nesting further inland. Nevertheless, Michigan's bald eagle population has continued to increase.

Mercury is a toxic metal that is emitted into the atmosphere by industrial activities like coal-fired power generation. It can travel long distances and can be deposited on the surface of the earth in remote areas far from the industry emitting the atmospheric mercury. Mercury that accumulates in soil can be

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transported to waterways in runoff and subsurface water flow. Once in the water, mercury begins to accumulate in the aquatic organisms, with concentrations highest \*8249 at the top of the food chain. Consumption of prey with elevated levels of mercury can cause a variety of neurological problems in bald eagles. Flight and other motor skills can be significantly altered (Eisler 1987). Elevated levels of mercury have been reported in bald eagles in the Northeast, Great Lakes region, Northwest, and Florida. However, populations of bald eagles continue to increase in each of these areas, albeit at a slower rate in some, thus mercury exposure seems to have a negligible impact on the bald eagle population in the lower 48 States.

Lead poisoning has caused death and suffering in birds and other wildlife for many years. Bald eagles died from lead poisoning as a result of feeding on hunter-killed or crippled waterfowl containing lead shot and from lead shot that was inadvertently ingested by prey waterfowl. In 1991, the Service completed its 5-year program to phase out the use of lead shot for waterfowl hunting (USFWS, Bald Eagle Biologue (no date)). However, the use of lead sinkers remains legal in every State except New Hampshire, and could potentially pose a threat to the bald eagle. According to the National Wildlife Health Center in Madison, Wisconsin, numerous bald eagles that have succumbed to lead poisoning are sent to the center each year.

Other causes of injury and mortality to individual bald eagles continue to exist. Raptor electrocution has been a concern since the early 1970s. Although power companies are starting to become more proactive in preventing bird electrocution (USGS, Field Manual of Wildlife Diseases, 1999), a significant amount of progress is needed before bird electrocutions are completely prevented.

While structures and vehicles continue to kill or injure individual birds, and environmental contaminants can cause death or reduced productivity in local areas, given the geographic range of the bald eagle and its widespread recovery, these negative impacts appear to have a negligible effect on regional or national populations. Therefore, we have determined that these other natural or manmade factors affecting the bald eagle are not sufficient to cause the bald eagle to become threatened in the future.

#### Conclusion of Recovery Analysis and Status Review

In summary, the bald eagle has made a dramatic resurgence from the brink of extinction. With the protections of the ESA, the banning of DDT, and cooperative conservation efforts of the Service, States, other Federal agencies, non-government organizations, and individuals, our National symbol has recovered and the purposes and policy of the ESA have been achieved.

Bald eagle recovery goals have generally been met or exceeded for the species on a nationwide basis. There is no recovery region in the lower 48 States where we have not seen substantial increases in eagle numbers. Conversely, there are no sizeable areas where bald eagle numbers continue to decline. We believe the

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surpassing of recovery targets over broad areas and on a regional basis, and the continued increase in eagle numbers since the 1995 reclassification from endangered to threatened, effectively compensates for any local shortfall in meeting targets in a few recovery sub-areas or regions

We have reviewed the national status of the bald eagle and evaluated past, present, and future threats to the regional and national bald eagle populations in the preceding five-factor analysis. Adequate habitat is available to support existing bald eagles and to ensure future population growth, disease or predation is not a significant threat, there is no current or anticipated future overutilization for commercial, recreational, scientific, or educational purposes, adequate regulatory mechanisms will remain in place after delisting to ensure the continued recovery of the bald eagle; and the level of other natural and manmade factors is not high enough to threaten the survival of the species. We have determined that none of these existing or potential threats, either alone or in combination with others, are likely to cause the bald eagle to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range. The bald eagle no longer requires the protection of the ESA, and therefore, we propose its removal from the list of threatened and endangered species.

In accordance with our joint peer review policy that was published in the Federal Register on July 1, 1999 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our delisting decision is based on scientifically sound data, assumptions relating to the taxonomy, population models, and supportive biological and ecological information on this proposed rule. We will send copies of this proposed rule to these peer reviewers immediately following publication in the Federal Register. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed delisting. We will also solicit peer review on the post-delisting monitoring plan when the proposed plan is completed.

#### Effects of This Rule

This rule as proposed will remove the protection afforded the bald eagle under the Endangered Species Act, including the special rule at 50 CFR 17.41(a). The provisions of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (including prohibitions on the taking of bald eagles) will remain in place. These and other laws affecting bald eagles are discussed in Factor D above. This rule will not affect the bald eagle's status as a threatened or endangered species under State laws or suspend any other legal protections provided by State law. Critical habitat was not designated for the bald eagle, so the delisting will not affect critical habitat provisions of the Act. This rule will not affect the bald eagle's Appendix II status under CITES.

#### Post-Delisting Monitoring

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Section 4(g)(1) of the ESA requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been recovered and delisted. The purpose of this requirement is to develop a program that detects the failure of any delisted species to sustain itself without the protective measures provided by the ESA. If, at any time during the monitoring period, data indicate that protective status under the ESA should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

A monitoring plan was provided in the proposed delisting rule on July 6, 1999 (64 FR 36454). Slightly more than 10 percent of all comments we received on the proposed rule were concerned with post-delisting monitoring and our monitoring proposal. We have been working with biostatisticians to redevelop our monitoring plan to be responsive to the comments we received, including extension of the monitoring period beyond the required 5 years.

The post-delisting monitoring plan will use occupied breeding areas (territories) as representative of the population. It will contain a sample design to estimate numbers of occupied territories, acknowledging that some States will no longer conduct their census-type survey of bald eagle nesting every year. The occupied territory estimates will be compared to those at the time of delisting to determine trends. The sample design, protocol, and estimates for each recovery region \*8250 will be developed in cooperation with our State partners.

We, in cooperation with the U.S. Geological Survey, Biological Resources Division and selected States, have recently completed a series of pilot studies for the monitoring plan. The pilot studies incorporate the methods traditionally used by the States to monitor their occupied territories while adding techniques to check accuracy and reduce variability.

The first pilot study was conducted in cooperation with the State of Maine in the spring of 2004. We conducted additional pilot studies in cooperation with the States of Florida, Minnesota, and Washington in the winter/spring of 2005. All of the general habitat types were represented in these pilot studies. Based on the results from 2 years of pilot studies and comments from States, researchers (including peer review), and the public, a final post-delisting monitoring plan will be prepared. We anticipate that our revised draft bald eagle post-delisting monitoring plan will be available for public review in 2006.

#### Public Comments Solicited

We request comments on three aspects of this proposed rulemaking.

#### *A Proposed Delisting of the Bald Eagle*

We intend any final action resulting from this proposal will be based on the best available scientific information. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We do not

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anticipate extending or reopening the comment period on this proposed rule after this comment period ends (see DATES) We are particularly seeking comments concerning

- (1) Biological, commercial, trade, or other relevant data concerning any threat (or lack thereof) to the bald eagle,
- (2) Additional information on the range, distribution, and population size of the bald eagle and its habitat;
- (3) The location of any additional populations of the bald eagle,
- (4) Data on population trends

All previous comments and information submitted during the initial comment period on the July 6, 1999, proposed rule need not be resubmitted We will take into consideration the comments and any additional information received, and such communications may lead to a final determination that differs from the proposal

If you wish to provide comments and/or information, you may submit your comments and materials concerning this proposed rule by any one of several methods (see ADDRESSES section) Please submit Internet comments to [baldeagledelisting@fws.gov](mailto:baldeagledelisting@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: RIN 1018- AF21" in your e-mail subject header, and your full name and return address in the body of your message Please note that the Internet address [baldeagledelisting@fws.gov](mailto:baldeagledelisting@fws.gov) will be closed at the termination of the public comment period

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours Comments and materials related to this rulemaking will be available for public inspection, by appointment, during normal business hours at the above address (see ADDRESSES section). Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

We anticipate a large public response to this proposed rule After the comment period closes, we will organize the comments and materials received and make them available for public inspection, by appointment, during normal business hours at the above address (see ADDRESSES section)

B. Executive Order 12866

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(Cite as 71 FR 8238)

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand including answers to questions such as the following (1) Is the discussion in the SUPPLEMENTARY INFORMATION section of the preamble helpful in understanding the proposal? (2) Does the proposal contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposal (grouping and order of sections, use of headings, paragraphing, etc ) aid or reduce its clarity? What else could we do to make the proposal easier to understand?

#### *C Paperwork Reduction Act*

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub L 104-13, 44 U S C 3501 et seq ), require that interested members of the public and affected agencies have an opportunity to comment on agency information collection and recordkeeping activities (see 5 CFR 11320 8(d)) The OMB regulations at 5 CFR 1320 3(c) define a collection of information as the obtaining of information by or for an agency by means of identical reporting, recordkeeping, or disclosure requirements imposed on ten or more persons Furthermore, 5 CFR 1320 3(c)(4) specifies that "ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period We will submit the final post-delisting monitoring plan to OMB for approval under the Paperwork Reduction Act

#### National Environmental Policy Act

We have determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended We published a notice outlining our reasons for this determination in the Federal Register on October 25, 1983 (48 FR 49244)

#### Executive Order 13211

On May 8, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions As this proposed rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required

#### References Cited

A complete list of all references cited herein is available upon request from the Headquarters Office (see ADDRESSES section)

#### Author

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The co-authors of this proposed rule are Jody Gustitus Millar, U S Fish & \*8251 Wildlife Service, Rock Island Field Office and Diane Lynch, U S Fish & Wildlife Service, Northeast Regional Office

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation

Proposed Regulation Promulgation

Accordingly, as first proposed July 6, 1999, at 64 FR 36454, we propose to amend part 17, subchapter B of chapter I, Title 50 of the Code of Federal Regulations, as set forth below

PART 17--[AMENDED]

1. The authority citation for part 17 continues to read as follows

Authority. 16 U.S.C. 1361-1407, 16 U.S.C. 1531-1544, 16 U.S.C. 4201-4245, Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted

50 CFR § 17.11

§ 17.11 [Amended]

50 CFR § 17.11

2. Section 17.11(h) is amended by removing the entry for "Eagle, bald" under "BIRDS" from the List of Endangered and Threatened Wildlife

50 CFR § 17.41

§ 17.41 [Amended]

50 CFR § 17.41

3. Section 17.41 is amended by removing and reserving paragraph (a)

Dated: October 31, 2005.

H Dale Hall,

Director, Fish and Wildlife Service

[FR Doc 06-1442 Filed 2-15-06, 8:45 am]

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PROPOSED RULES

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AF21

Endangered and Threatened Wildlife and Plants, Proposed Rule To Remove the **Bald Eagle** in the Lower 48 States From the List of Endangered and Threatened Wildlife

Tuesday, July 6, 1999

~~\*36454~~ AGENCY Fish and Wildlife Service, Interior

ACTION Proposed rule

**SUMMARY** We, the Fish and Wildlife Service (the Service), propose to remove the bald eagle (*Haliaeetus leucocephalus*), from the List of Endangered and Threatened Wildlife in the lower 48 States of the United States. We propose this action because the available data indicate that this species has recovered. The recovery is due in part to habitat protection and management actions initiated under the Endangered Species Act. It is also due to reduction in levels of persistent organochlorine pesticides such as DDT occurring in the environment. Section 4(g) of the Act requires the Service to monitor recovered species for at least 5 years following delisting. This rule describes our proposed post-delisting monitoring plan for bald eagles. Removal of the bald eagle as a threatened species under the Act will not affect the protection provided under the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and many other state laws.

**DATES** Comments from all interested parties concerning the proposal to delist the **bald eagle** in the lower 48 States must be received by October 5, 1999. Public hearing requests must be received by August 20, 1999.

Comments from all interested parties on the collection of information from the public during the 5-year monitoring period will be considered if received on or before September 7, 1999. The Office of Management and Budget (OMB) has up to 60 days to approve or disapprove information collection but may respond after 30 days. Therefore, to ensure maximum consideration, your comments should be received by OMB by August 5, 1999.

**ADDRESSES** Send your comments and other information concerning the proposal to delist the **bald eagle** in the lower 48 States to Jody Gustitus Millar, **Bald Eagle** Recovery Coordinator, U S Fish and Wildlife Service, 4469-48th Avenue Court, Rock Island, IL 61201 or comments may be sent through our web site at [www.fws.gov/r3pao/eagle](http://www.fws.gov/r3pao/eagle)

Also send your comments and suggestions on specific information collection requirements to Rebecca Mullin, Service Information Collection Clearance Officer, U S Fish and Wildlife Service, MS 224 ARLSQ, 1849 C Street, NW, Washington, DC 20240

**FOR FURTHER INFORMATION CONTACT** Jody Gustitus Millar, **Bald Eagle** Recovery Coordinator at the above address, telephone 309/793-5800 ext 524, or refer to our website at [www.fws.gov/r3pao/eagle](http://www.fws.gov/r3pao/eagle)

SUPPLEMENTARY INFORMATION

Background

The bald eagle, *Haliaeetus leucocephalus*, is well known as our Nation's symbol. Its large and powerful appearance is distinguished by its white head and tail contrasting against its dark brown body. Though once endangered, the bald eagle population in the lower 48 States has increased considerably in recent years. Regional bald eagle populations in the northwest, Great Lakes, Chesapeake Bay, and Florida have increased 5-fold in the past 20 years. Bald eagles are now repopulating areas throughout much of the species' historic range that were unoccupied only a few years ago.

Note: Unless otherwise noted with specific citations, the following life history information is derived from our 5 recovery plans for the bald eagle and from Gerrard and Bortolotti (1988), see References.

The bald eagle ranges throughout much of North America, nesting on both coasts from Florida to Baja California, Mexico in the south, and from Labrador to the western Aleutian Islands, Alaska in the north. The earliest known record of a bald eagle comes from a cave in Colorado. Deposits from that cave are dated at 670,000 to 780,000 years old (Dr. Steve Emslie, University of North Carolina, pers. comm. 1998). An estimated quarter to a half million bald eagles lived on the North American continent before the first Europeans arrived.

*Haliaeetus leucocephalus* (literally, sea eagle with a white head) is the only species of sea eagle native to North America. It was first described in 1766 as *Falco leucocephalus* by Linnaeus. This South Carolina specimen was later renamed as the southern bald eagle, subspecies *Haliaeetus leucocephalus leucocephalus* (Linnaeus) when Townsend identified the northern bald eagle as *Haliaeetus leucocephalus alascanus* in 1897 (Peters 1979). By the time the bald eagle was listed throughout the lower 48 States under the Endangered Species Act in 1978, the subspecies were no longer recognized by ornithologists (American Ornithologists Union 1983).

The bald eagle is a bird of aquatic ecosystems. It frequents estuaries, large lakes, reservoirs, major rivers, and some seacoast habitats. Fish is the major component of its diet, but waterfowl, seagulls, and carrion are also eaten. The species may also use prairies if adequate food is available. Bald eagle habitats encompass both public and private lands.

Bald eagles usually nest in trees near water, but are known to nest on cliffs and (rarely) on the ground. Nest sites are usually in large trees along shorelines in relatively remote areas that are free of disturbance. The trees must be sturdy and open to support a nest that is often 5 feet wide and 3 feet deep. Adults tend to use the same breeding areas year after year, and often the same nest, though a breeding area may include one or more alternate nests. A 35-year old nest at Vermilion, Ohio, measured 8 1/2 feet across at the top and 12 feet deep before it blew down in 1925 (Herrick 1932). In winter, bald eagles often congregate at specific wintering sites that are generally close to open water and offer good perch trees and night roosts.

Bald eagles are long-lived. The longest living bald eagle known in the wild was reported near Haines, Alaska as 28 years old (Schempf 1997). Bald eagles from Arizona are known to have exceeded 12 years of age (Hunt et al. 1992). In captivity, bald eagles may live 40 or more years.

It is presumed that once they mate, the bond is long-term, though documentation is limited. Variations in pair bonding are known to occur. If one mate dies or disappears, the other will accept a new partner. The female bald eagle usually weighs 10 to 14 pounds in the northern sections of the continent and is larger than the male, which weighs 8 to 10 pounds. The wings span 6 to 7 feet. The northern birds are larger and heavier than southern birds, with the largest birds in Alaska and Canada, and the smallest in Arizona or Florida.

Bald eagle pairs begin courtship about a month before egg-laying. In the south, courtship occurs as early as September, and in the north, as late as May. The nesting season lasts about 6 months. Incubation lasts approximately 35 days and fledging takes place at 11 to 12 weeks of age. Parental care may extend 4 to 11 weeks after fledging (Wood, Collopy, and Sekerak 1998). The fledgling bald eagle is generally dark brown except the underwing linings which are primarily white. Between fledging and adulthood, the bald eagle's \*36455 appearance changes with feather replacement each summer. Young dark bald eagles may be confused with the golden eagle, *Aquila chrysaetos*. The bald eagle's distinctive white head and tail are not apparent until the bird fully matures, at 4 to 5 years of age.



(Cite as: 64 FR 36454, \*36455)

As they leave their breeding areas, some bald eagles stay in the general vicinity while most migrate for several months and hundreds of miles to their wintering grounds. Young eagles may wander randomly for years before returning to nest in natal areas.

Northern bald eagles winter in areas such as the Upper Mississippi River, Great Lakes shorelines and river mouths in the Great Lakes area. For mid-continent bald eagles, wintering grounds may be the southern States, and for southern bald eagles, whose nesting occurs during the winter months, the non-breeding season foraging areas may be Chesapeake Bay or Yellowstone National Park during the summer. Eagles seek wintering (non-nesting) areas offering an abundant and readily available food supply with suitable night roosts. Night roosts typically offer isolation and thermal protection from winds. Carrion and easily scavenged prey provide important sources of winter food in terrestrial habitats far from open water.

The first major decline in the bald eagle population probably began in the mid to late 1800s. Widespread shooting for feathers and trophies led to extirpation of eagles in some areas. Shooting also reduced part of the bald eagle's prey base. Big game animals like bison, which were seasonally important to eagles as carrion, were decimated. Waterfowl, shorebirds and small mammals were also reduced in numbers. Carrion treated with strychnine, thallium sulfate and other poisons were used as bait to kill livestock predators and ultimately killed many eagles as well. These were the major factors, in addition to loss of nesting habitat from forest clearing and development, that contributed to a reduction in bald eagle numbers through the 1940s.

In 1940, the Bald Eagle Protection Act (16 U.S.C. 668-668d) was passed. This law prohibits the take, possession, sale, purchase, barter, or offer to sell, purchase or barter, transport, export or import, of any bald eagle, alive or dead, including any part, nest, or egg, unless allowed by permit (16 U.S.C. 668(a)). "Take" includes pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb (16 U.S.C. 668c, 50 CFR 22.3). The Bald Eagle Protection Act and increased public awareness of the bald eagle's status resulted in partial recovery or at least a slower rate of decline of the species in most areas of the country.

In the late 1940s, shortly after World War II, the use of dichloro-diphenyl-trichloroethane (DDT) and other organochlorine compounds became widespread. Initially, DDT was sprayed extensively along coastal and other wetland areas to control mosquitos (Carson 1962). Later it was used as a general crop insecticide. As DDT accumulated in individual bald eagles from ingesting prey containing DDT and its metabolites, reproductive success plummeted. In the late 1960s and early 1970s, it was determined that dichlorophenyl-dichloroethylene (DDE), the principal breakdown product of DDT, accumulated in the fatty tissues of the adult female bald eagles. DDE impaired calcium release necessary for normal egg shell formation, resulting in thin shells and reproductive failure.

In response to this decline, the Secretary of the Interior, on March 11, 1967 (32 FR 4001), listed bald eagles south of the 40th parallel as endangered under the Endangered Species Preservation Act of 1966 (16 U.S.C. 668aa-668cc). Bald eagles north of this line were not included in that action primarily because the Alaskan and Canadian populations were not considered endangered in 1967. On December 31, 1972, DDT was banned from use in the United States by the Environmental Protection Agency. The following year, the Endangered Species Act of 1973 (the Act) (16 U.S.C. 1531-1544) was passed.

Nationwide bald eagle surveys, conducted in 1973 and 1974 by us, other cooperating agencies, and conservation organizations, revealed that the eagle population throughout the lower 48 States was declining. We responded in 1978 by listing the bald eagle, *Haliaeetus leucocephalus*, throughout the lower 48 States as endangered except in Michigan, Minnesota, Wisconsin, Washington, and Oregon, where it was designated as threatened (43 FR 6233, February 14, 1978). Sub-specific designations for northern and southern eagles were dropped.

The Act contains provisions for listing, protection, and recovery of imperiled species. An endangered species is defined under the Act as a species that is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. The Act and its implementing regulations prohibit the take of any listed species. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these acts. It also prohibits shipment in interstate commerce in the course of commercial activity, or

sale or offer for sale in interstate or foreign commerce. The Act requires review of all activities funded, permitted or conducted by Federal agencies to consider impacts to endangered and or threatened species. The purpose of the Act is to restore endangered and threatened animals and plants to the point where they are again viable, self-sustaining components of their ecosystems.

To facilitate the recovery of the bald eagle and the ecosystems upon which it depends, we divided the lower 48 States into 5 recovery regions. Separate recovery teams composed of experts in each geographic area prepared recovery plans for their region. The teams established goals for recovery and identified tasks to achieve those goals. Coordination meetings were held regularly among the 5 teams to exchange data and other information.

What Are the Five Recovery Regions Established for the Bald Eagle and the Dates of Their Approved Recovery Plans?

Recovery region	Date of recovery plan	States
Chesapeake Bay	1982, rev. 1990	Virginia east of the Blue Ridge Mountains, Delaware, Maryland, the eastern half of Pennsylvania, the 'panhandle' of West Virginia, and the southern two-thirds of New Jersey
Pacific	1986	Idaho, Nevada, California, Oregon, Washington, Montana, and Wyoming.
Southeastern	1984, rev. 1989	Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and eastern Texas.
Southwestern	1982	Oklahoma and Texas west of the 100th meridian, New Mexico, Arizona, and that area of California bordering the Lower Colorado River
Northern States	1983	All remaining 25 States and parts thereof

**\*36456 Recovery Accomplishments**

The Service and other Federal, State, tribal, and local cooperators from across the Nation have funded and carried out many of the tasks described within the recovery plans. Annual expenditures for the recovery and protection of the bald eagle by public and private agencies have exceeded \$1 million each year for the past decade (Service records). State fish and wildlife agencies have played a vital role in restoring eagles to areas from which they were extirpated or in which their numbers were greatly reduced. These activities include conducting annual surveys of breeding and productivity, purchasing lands for the protection of bald eagle habitat, reintroduction and habitat management programs, and public outreach.

A partial survey conducted by the National Audubon Society in 1963 reported on 417 active nests in the lower 48 States, with an average of 0.59 young produced per nest. Surveys we coordinated in 1974 resulted in a population estimate of 791 occupied breeding areas for the lower 48 States.

Breeding and productivity surveys have been conducted annually on a State-by-State basis since the early 1980s. Data collection methods vary somewhat from State to State but generally include surveys by aircraft or visits to the site each year during the breeding season to determine the number of occupied breeding areas, and a second survey just before fledging to count the number of young produced at the site. Some States conduct the surveys themselves.

with agency personnel, others collate data from partners (including cooperating agencies), while some data is collected by personal interviews with reliable sources. Though the data collection methods may vary, most States agree that the data provided to us is a minimum number.

Since the development and implementation of the recovery plans, the bald eagle's population growth has exceeded most of the goals established in the various plans. In 1994, our cooperators reported about 4,450 occupied breeding areas with an estimated average young per occupied territory of 1.16. Compared to surveys conducted in 1974, the number of occupied breeding areas in 1994 in the lower 48 States had increased by 462 percent (Figure 1). Between 1990 and 1994, there was a 47 percent increase.

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Image 1 (4 X 6") Available for Offline Print

BILLING CODE 4310-55-C

The bald eagle was reclassified in 1995 from endangered to threatened as a result of the significant increase in numbers of nesting pairs, increased productivity and expanded distribution (60 FR 36000, July 12, 1995).

Recovery continues to progress at an impressive rate. In the past 10 years, the bald eagle's nesting population has increased at an average rate of about 8.36457 percent per year (Figure 1). The current nesting population in the lower 48 States constitutes more than a tenfold increase from the known population level in 1963. We estimate that the breeding population exceeded 5,748 occupied breeding areas in 1998. The bald eagle population has essentially doubled every 7 to 8 years during the past 30 years.

Recovery has been broadly distributed throughout the bald eagle's range. In 1984, 13 states had no nesting pairs of bald eagles. By 1998, all but 2 of the lower 48 States supported nesting pairs. In 1984, the 6 States of Florida, Wisconsin, Michigan, Minnesota, Washington and Oregon contained 73 percent of all nesting pairs in the lower 48 States. By 1998, these six States had a reduced share of 56 percent of all nesting pairs, due to increased nesting in other states. Much of the greater distribution of nesting sites is due to reoccupancy of vacant nesting habitat where competition for nest sites is minimal and an adequate prey base exists.

An expanding population requires the successful production of young. Reproduction has generally met or exceeded target values established by recovery teams nationally for the past 10 years. Certain geographically restricted areas still have contamination threats, such as southern California, the Columbia River, along the Great Lakes and parts of Maine (see E under the Summary of Factors Affecting the Species section). Because the adults are long-lived, a minimum of 0.7 young per occupied breeding area is necessary to maintain a stable population (Sprunt, et al. 1973). With a national average of more than one fledgling per occupied breeding area since 1990, the eagle population continues to increase in overall size and maintain a healthy reproductive rate.

Recovery within recovery regions has also been successful. Recovery plans and objectives were designed to guide and measure recovery efforts. They are intended to be general goals rather than absolute numeric targets. We discuss recovery goals for the 5 regions and the bald eagle's attainment of those goals discussed below.

What Are the Goals for Bald Eagle Recovery in Each Recovery Region and What Has Been Achieved?

#### *Chesapeake Recovery Region*

**Delisting Goals:** Sustain 300-400 pairs with an average productivity of 1.1 young per active nest over 5 years with permanent protection of sufficient habitat to support this nesting population and enough roosting and foraging habitat to support population levels commensurate with increases throughout the Atlantic coastal area.

**Achievements:** Numeric delisting goals were met in 1996 with more than 300 occupied breeding areas estimated since 1992 and average productivity of 1.1 young per occupied breeding area. In 1998, 538 occupied breeding areas

were estimated with an average productivity of 1.21. Habitat protection work continues.

Protecting bald eagle habitat remains a concern in the Chesapeake Recovery Region. The area contains large, expanding human population centers contributing to rapid development pressures and high land values that can conflict with bald eagle habitat needs. However, since 1990, occupied breeding areas for the bald eagle have doubled in the Chesapeake Recovery Region. This increase is greater than that found in any other recovery region. This indicates that adequate habitat is still available for an increasing population of bald eagles despite land development pressures. The Endangered Species Act has been a key factor in protecting eagle habitat in the Chesapeake area, particularly through the application of buffer zones around nest trees.

#### *Northern States Recovery Region*

**Delisting Goals** 1,200 occupied breeding areas distributed over a minimum of 16 states with an average annual productivity of at least 1.0 young per occupied nest.

Since reclassification, the Northern States Recovery Team has reconvened to review the plan. The team supported the numerical goals established in 1983 but emphasized continued habitat protection concerns.

**Achievements** Delisting goals were met in 1991 with 1,349 occupied breeding areas distributed over 20 States and an estimated average productivity since 1991 of greater than 1.0. In 1998 the estimated number of occupied breeding areas for the Northern States Recovery Region exceeded 2,204. Some of the most rapidly expanding areas of bald eagle nesting are in states with the majority of their lands held in private ownership. For example, between 1990 and 1998, the bald eagle population in Iowa increased from 8 to 83 occupied breeding areas. In this same period, Missouri has gone from 11 to 45 occupied breeding areas, Illinois increased from 8 to 43 occupied breeding areas, and Oklahoma has gone from 0 to 26 occupied breeding areas. The Northern States Recovery Region includes large tracts of federally owned land that is prime bald eagle habitat. The three States with the largest bald eagle populations in the Northern States Recovery Region (Minnesota, Wisconsin, and Michigan) contain large proportions of public land, and eagle numbers did not quite double during the same 8-year span. Thus, habitat on private property has proven to be very important for the continued expansion of the bald eagle population in this region.

#### *Pacific Recovery Region*

**Delisting Goals** A minimum of 800 nesting pairs with an average reproductive rate of 1.0 fledged young per occupied breeding area, and an average success rate for occupied breeding areas of not less than 65% over a 5 year period are necessary for recovery. Attainment of breeding population goals should be met in at least 80% of management zones. Wintering populations should be stable or increasing.

**Achievements** Numeric delisting goals have been met since 1995. Productivity has averaged about 1.0 young per occupied breeding area since 1990. The average success rate for occupied breeding areas has exceeded 65 percent for the past five years. For 1998, six of the seven Pacific region States reported an average success rate of 75 percent. However, the plan goal for distribution among management zones is not yet fully achieved for all areas. The number of occupied breeding areas exceeded 800 in 1990 and has continued to increase. In 1998, 1,480 occupied breeding areas were estimated. Twenty-eight of 37 (76%) management zone targets have been met. The zone targets were based on a best estimate for each area at the time, and several management zones that still lack nesting bald eagles may not contain preferred habitat. Of the 28 zones where target levels have been met, at least 11 have more than doubled the established goal. Wintering populations have been tracked in the Pacific and many other States using the mid-winter bald eagle surveys. However, wintering populations are difficult to assess because concentrations are dependent on weather and food supply and thus can be quite variable from year to year.

#### *Southeastern Recovery Region*

**Delisting goals** Consider delisting if the recovery trend continues for 5 years after reclassification goals are met. Develop the criteria for delisting when the species is reclassified from endangered to threatened.

(Cite as: 64 FR 36454, \*36457)

After the reclassification to threatened in 1995, the Southeastern States Bald Eagle Recovery Team reconvened to \*36458 consider criteria for delisting. The most recent recommendations of the recovery team are to achieve an average of 1,500 occupied breeding areas over the most recent 3-year period, with an average production of greater than 0.9 young per occupied breeding area over the same 3 year period, and 8 of 11 states meeting their nesting and productivity goals.

**Achievements** Reclassification goals have been met and exceeded from 1991 through the most current data year of 1998. At the current rate of increase, the team expects the southeastern region to exceed 1,500 pairs in 1999 and meet the newly recommended delisting criteria by the year 2000. Production since 1991 averaged 1.17 young per occupied territory, exceeding the goal of greater than 0.9. In 1998, 1,485 occupied breeding areas were estimated with a productivity of 1.15 per occupied breeding area. Newly revised individual state goals are expected to be met by 6 of 11 States by the year 2000.

#### *Southwestern Recovery Region*

**Delisting Goals** None given. **Reclassification Goals** 10-12 young per year over a 5-year period, population range has to expand to include one or more river drainages in addition to the Salt and Verde Systems.

**Achievements** 40 occupied breeding areas were reported for 1998 with 36 of those in Arizona and 4 in New Mexico. Productivity was estimated at 0.63 per occupied breeding area. Breeding has expanded beyond the Salt and Verde Systems into the Gila, Bill Williams, and San Carlos River systems in Arizona and the Rio Grande in New Mexico. The number of breeding pairs has more than doubled in the last 15 years.

Bald eagle recovery team members met in 1996 and discussed delisting criteria for the region. Potential reduction of support for the Arizona Nestwatch Program is a significant regional concern. Since the 1980's, the Nestwatch Program has rescued 48 eagles and eggs, and documented 52 cases of fishing line or tackle posing a threat to the nesting eagles and eaglets. At least 15 percent of the bald eagle production is due to the assistance provided by Nestwatch volunteers and staff. The State of Arizona is working with us and other partners to develop a Conservation Agreement which would insure the longevity of the Nestwatch Program.

#### **Previous Federal Action**

On July 12, 1995, we published the final rule to reclassify the bald eagle from threatened in 5 States and endangered in the remaining lower 48 States, to threatened throughout the lower 48 States (60 FR 36000). With that action, the Service recognized one population of bald eagles in the lower 48 States. Previous to that action, the proposed rule to reclassify the bald eagle was published on July 12, 1994, (59 FR 35584) and an advanced notice of a proposed rule was published on February 7, 1990 (55 FR 4209). Listing actions are discussed in the Background section.

#### **Summary of Factors Affecting the Species**

Section 4 of the Act and the regulations (50 CFR part 424) promulgated to implement its listing provisions, set forth the procedures for listing, reclassifying, and delisting species on the Federal lists. A species will be listed if the Secretary of the Interior determines that one or more of 5 factors listed in section 4(a)(1) of the Act threatens the continued existence of the species. A species may be delisted, according to 50 CFR 424.11(d), if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened for one of the following reasons: (1) Extinction, (2) recovery, or (3) original data for classification of the species were in error.

The bald eagle is proposed for delisting due to recovery. Discussion of the 5 listing factors and their application to the recovery of the bald eagle are discussed below.

#### *A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*

Nesting and wintering habitats are both critical to the continued survival of the bald eagle. Based on increasing population trends, neither nesting nor wintering habitats appear to be limiting, and there are no indications that

availability of these habitats will limit the bald eagle population in the near future. Bald eagle habitat on Federal lands will remain protected under the regulatory mechanisms listed in factor D below, though to a lesser degree. Activities on private lands involving a Federal action will be subject to many of the laws listed in factor D. With the knowledge of habitat management gained through the recovery process, we expect that federal actions that result in a loss of habitat will be at an acceptable level and will not affect the population's stability.

*B Over-Utilization for Commercial, Recreational, Scientific, or Educational Purposes*

There is no legal commercial or recreational use of bald eagles. We consider future legal and enforcement measures sufficient to protect the bald eagle from illegal activities, including trade. We exercise very strict control over the use of bald eagles or their parts for scientific, educational, and Native American religious activities. To respond to the religious needs of Native Americans, we have established the National Eagle and Wildlife Property Repository in Commerce City, Colorado, which serves as a collection point for dead eagles. As a matter of policy, all Service units transfer salvaged bald eagle parts and carcasses to this center. Members of Federally recognized tribes can obtain a permit from us authorizing them to receive and possess whole eagles, parts, or feathers from the repository for religious purposes. After removal from protection under the Endangered Species Act, we will still issue permits for limited exhibition and educational purposes, selected research work, and other special purposes consistent with the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d). We will not issue these permits if the status of the bald eagle will be adversely effected.

*C Disease or Predation*

Predation is not a significant problem for bald eagle populations. Incidents of mortality due to territorial disputes have been reported by National Wildlife Health Research Center pathologists based on examination of carcasses.

Diseases such as avian cholera, avian pox, aspergillosis, tuberculosis, Mexican chicken bug, and botulism may affect individual eagles, but are not considered to be a significant threat to the population. According to the National Wildlife Health Research Center in Madison, Wisconsin, only 2.7 percent of bald eagles submitted to the Center between 1985 and 1990 died of infectious disease. Its widespread population distribution generally helps to protect the bald eagle from these catastrophic events.

From 1994-1999, 58 eagles died at man-made lakes in Arkansas from apparent avian brain lesion syndrome (also referred to as vacuolar myelinopathy), and more recently, the disease has been detected in eagles in North Carolina. At present, this is a poorly understood disease and is present in other avian species (primarily coots and recently found in several species of waterfowl) in the southeast. While a toxic agent is suspected in the deaths of the eagles and other avian species, cooperative efforts are underway to determine the prevalence of this disease and its origin. Although these mortalities can have a localized \*36459 impact on bald eagles, there is currently no evidence that the overall recovery of the population is affected.

*D The Inadequacy of Existing Regulatory Mechanisms*

After removal from the list of species protected by the Act, the bald eagle remains fully protected by the following Federal wildlife laws in the United States. We believe these laws and related State statutes are adequate to protect and sustain a recovered bald eagle population.

The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) prohibits without specific authorization take, possession, selling, purchase, barter, offer to sell, purchase, or barter, transport, export or import, of any bald or golden eagle, alive or dead or any part, nest or egg thereof. Use of bald eagles for falconry is prohibited. Take under this act is defined as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" (50 CFR 22.3).

The Migratory Bird Treaty Act (16 U.S.C. 703-711) prohibits, without specific authorization, the possession, transport, or take of any migratory bird (including bald eagles), their parts, nests or eggs. Take prohibitions under this statute includes actions to pursue, hunt, take, capture, kill, possess, sell, barter, purchase, ship, export or import

protected species

The Lacey Act (16 U.S.C. 3372 and 18 U.S.C. 42-44) among other provisions, makes it unlawful to export, import, transport, sell, receive, acquire, or purchase any bald eagle, (1) taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law or (2) to be taken, sold, or transported in interstate or foreign commerce, in violation of any law or regulation of any State or in violation of any foreign law

In addition to Federal laws governing the taking of bald eagles within the United States, international agreements govern the transport of bald eagles across international borders. International trade in bald eagles to and from the United States is strictly regulated. The Convention on International Trade in Endangered Species (CITES) is an international treaty for the regulation of trade in species threatened with extinction and those that may become threatened if trade is not regulated. The bald eagle is currently listed under Appendix I of CITES, and, as a result, international trade in bald eagles not otherwise prohibited is restricted by the United States and 145 other signatory nations.

Section 101 (a) of the Clean Water Act (33 U.S.C. 1251-13287) states that the objective of this law is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and provides the means to assure the "protection and propagation of fish, shellfish, and wildlife" (section 101 (a)(2)). This statute contributes in a significant way to the protection of bald eagles and their food supply through provisions for water quality standards, protection from the discharge of harmful pollutants, contaminants (section 303(c), section 304(a), and section 402) and discharge of dredge or fill material into all waters, including wetlands (section 404).

Another important regulatory mechanism affecting bald eagles is the requirement that pesticides be registered with the Environmental Protection Agency. Under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136), the Environmental Protection Agency requires environmental testing of new pesticides. Testing the effects of pesticides on representative wildlife species before the pesticide is registered is specifically required. It is meant as a safeguard to avoid the type of environmental catastrophe that occurred from organochlorine pesticides which led to the listing of this species.

The Federal Land Policy and Management Act (43 U.S.C. 1701-1784) requires that public lands be managed to protect the quality of scientific, ecological, and environmental qualities and to preserve and protect certain lands in their natural condition to provide food and habitat for fish and wildlife.

The Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) requires that Federal agencies sponsoring, funding, or permitting activities related to water resource development projects request review of these actions by us and the State natural resources management agency. These comments must be given equal consideration with other project purposes.

The National Environmental Policy Act (42 U.S.C. 4321-4370d) requires the Federal agencies to evaluate the potential effects of their proposed actions on the human environment and requires the preparation of an environmental impact statement whenever projects may result in significant impacts. Federal agencies must identify adverse environmental impacts of their proposed actions and develop alternatives that undergo the scrutiny of other public and private organizations as a part of their decision making process.

Recovery actions developed under the Endangered Species Act have provided the baseline of knowledge for management of bald eagles. Recommendations for management and protection of bald eagles will continue to be made in accordance with all applicable environmental laws.

Removal of the bald eagle from the Federal list of endangered and threatened species will not affect its status under State laws as a threatened or endangered species or suspend any other legal protections provided by State law. States may have more restrictive laws protecting wildlife, and these will not be affected by this Federal action. Also, some States may choose to remove the bald eagle from their list of threatened and endangered species.

Finally, the Endangered Species Act remains an important regulatory mechanism should an unexpected decline in

bald eagle numbers occur. In the event that a significant decrease in the bald eagle population occurs, we could relist the species through normal or emergency procedures as a threatened or endangered species.

*E. Other Natural or Manmade Factors Affecting Its Continued Existence*

Bald eagles are subject to direct and indirect mortality from a variety of human related activities. Intentional shooting, poisoning, and smuggling still occur, as well as deaths due to electrocution and strikes by wind turbines. Death and reproductive failure resulting from exposure to pesticides and secondary lead poisoning are well documented.

In recent years, the use of harmful chemicals known to impair reproduction in bald eagles has declined throughout the United States. A few areas still exist where concentrations of these chemicals impair reproductive success. However, these areas are geographically restricted and have not prevented recovery of the population nationally. There is no evidence to indicate that the use of harmful organochlorines in Latin America impact the bald eagle since the eagle's southern range is not known to extend south of northern Mexico.

The pesticide DDT came into widespread use after World War II. DDT ingested through the eagle's diet of fish, waterfowl, gulls, and other prey resulted in egg shell thinning. As a result, many eggs broke when incubated by the parent, while others suffered embryonic mortality and failed to hatch. By the early 1960s, recruitment had dropped and population numbers plummeted. In response to human health risks associated with DDT it was banned from use in 1972. Reductions in DDT levels in freshwater fish over time have coincided with a steady increase in bald eagle numbers (Figure 2).

BILLING CODE 4310-55-P

Image 2 (5" X 5.25") Available for Offline Print

BILLING CODE 4310-55-C

By 1976, registrations of dieldrin, heptachlor, chlordane, and other toxic persistent pesticides, were canceled for all but the most restricted uses in the United States. Most uses of PCBs were restricted in 1977 and continued to be phased out during the 1980s (Schmitt and Bunck 1995).

During the 1970s, the Service implemented a monitoring program to examine the long-term trends in the presence of pesticides and other harmful chemicals in fish and wildlife (Schmitt and Bunck 1995). Fish, starlings and duck wings were collected nationwide between 1972 and 1985. The program tracked a downward trend of DDT concentrations in fish, starlings, and duck wings paralleled by declining DDE (a degradation product of DDT) concentrations in bald eagle eggs and increasing eagle eggshell thickness (Wiemeyer et al. 1993). Concentrations of other persistent insecticides such as heptachlor, dieldrin, endrin, and chlordane were also documented as declining nationally in fish, starlings and duck wings.

While there has been a national decline in concentrations of these harmful organochlorine compounds, some areas of the country still harbor high concentrations and reproduction of bald eagles in these areas is depressed. For instance, the Channel Islands area of southern coastal California continues to have severe problems related to DDE impacts to bald eagle productivity (Garcelon 1994, Sharpe and Garcelon 1999). The Palos Verdes Shelf is contaminated from historic releases from a nearby manufacturing plant. Bald eagles in the Channel Islands are present only through reintroduction efforts. Wiemeyer et al. (1993) found that addled bald eagle eggs collected from the Klamath Basin and Cascade Lakes region in Oregon ranked second (behind Maine) in DDE concentrations among the fifteen States sampled, indicating potential residual problems. Coastal areas which were sprayed for mosquitos and for cotton and orchard pests still have higher concentrations of DDE than other lands (Schmitt and Bunck 1995). DDE concentrations along the Great Lakes remain a concern for that area.

Residues of PCBs, which are persistent and toxic much like DDT, have also declined throughout the United States (Figure 2). They remain a problem in some areas, most notably the Great Lakes. Atmospheric transport and the



internal cycling of contaminants already present in these lakes will likely keep PCB concentrations elevated (Schmitt and Bunck 1995) Bowerman (1993) has documented lower reproduction among eagles nesting along the coasts of the Great Lakes in Michigan compared to those nesting further inland The severity of the problem along the Great Lakes coast apparently is being compensated for by eagles produced from the interior of the State seeking territories along the Great Lakes coast Michigan's bald eagle population has increased, though at a slower rate than other states with major bald eagle populations

High concentrations of mercury cause a variety of neurological problems in bald eagles Flight and other motor skills can be significantly altered High mercury concentrations may also reduce the hatching rate of eggs Concentrations of mercury in fish declined significantly from 1969 through 1974 as a result of restriction on its uses, but concentrations have not changed appreciably since 1974 Recent findings have highlighted the importance of atmospheric transport in the maintenance of elevated concentrations and the accumulation of mercury in certain areas, such as Lake Champlain and the Florida Everglades (Schmitt and Bunck 1995)

The most important source of lead affecting bald eagles is waterfowl wounded with lead shot The requirement in 1991 to use non-toxic shot for waterfowl hunting has greatly reduced the threat of lead poisoning to bald eagles

New chemicals are entering the environment and though they may not be as persistent as their predecessors, many are toxic and their breakdown products are poorly understood Maintaining a contaminant profile of bald eagles nationwide will be an integral part of our monitoring program It will serve as a safeguard to reduce the possibility of population level effects from harmful contaminants

The shooting of bald eagles was prohibited in 1918 with the Migratory Bird Treaty Act, and again in 1940 with the Bald Eagle Protection Act (golden eagles were added in 1962) Large-scale mortality from unregulated shooting, like that which occurred early in this century, has been significantly reduced Hunter education courses routinely include bald eagle identification material to educate hunters about bald eagles and the protections that the species is afforded Although some illegal shooting of eagles is likely to occur, this is no longer considered a significant threat to the survival of species

Other causes of mortality to individual eagles continue to occur Many electrical power lines have been configured to reduce electrocution to raptors, though electrocutions still occur Problem power lines still need to be identified and modified to prevent electrocutions Areas where road-killed animals are left near the highway can result in car collisions with bald eagles, particularly in winter when eagles feed on carrion more frequently Efforts to reduce these mortalities are being undertaken locally

Human disturbance of bald eagles is a continuing threat which may increase as numbers of bald eagles increase and human development continues to expand into the rural areas Numerous studies have documented that most bald eagles will flush from the nest site if disturbed by human presence If the disturbance occurs frequently, nesting can fail, and the adults may or may not nest again Through the Endangered Species Act recovery process, management guidelines have been developed for bald eagle nesting and wintering sites in various portions of the species' range Specific conservation measures and recommendations have also been developed through the section 7 consultation process to reduce disturbance at feeding sites In areas throughout the country, land management practices have been successfully modified to reduce human disturbance to bald eagles We will make these guidelines readily available to agencies and the public to promote their widespread use

Human-related impacts will continue after the bald eagle is removed from protection under the Endangered Species Act, and may increase locally with the continued growth of the eagle population and subsequent conflicts with expanding human activities However, through remaining statutes, knowledge gained and partnerships developed in the recovery process, many of these conflicts can be avoided or minimized

#### Conclusion of Recovery Analysis and Status Review

Due to the wide distribution of the bald eagle, we established five recovery regions to outline recovery planning goals and needs on a regional basis leading to the development of five separate recovery plans for the species The

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#### Conclusion of Recovery Analysis and Status Review

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five plans, originally developed in the 1980s, described a variety of numerical target levels for breeding pairs and productivity for different regions to measure recovery success and to set criteria for reclassification and/or delisting. In 1994, after the implementation of the five recovery plans and steady increases in the population, the status of the bald eagle was reviewed. The analysis included an assessment of known movement and migratory patterns among and between recovery regions, and concluded that a rangewide status of "threatened" for a single population of bald eagles throughout the lower 48 States was appropriate. The bald eagle was then formally reclassified as a threatened species on that basis in 1995. Treating the bald eagle as a single listed population is consistent with our 1996 "Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act" (61 FR 4722).

This proposal is based on an internal status review of bald eagle recovery achievements conducted in 1998 and 1999, including an assessment of long-term nesting and productivity data (U.S. Fish and Wildlife Service, 1999, unpublished data), coordination with States and Tribes, an analysis of the five listing factors, and the definition of a "threatened" species under the Act. Decisions regarding the status of the overall bald eagle population as listed, take into consideration all of the regional recovery plan goals and established criteria, but ultimately address the status and the degree of remaining threats on a rangewide level.

Bald eagle recovery goals have generally been met or exceeded for the species on a rangewide basis. There is no sizeable area in the lower 48 states where we have not seen substantial increases in eagle numbers. Conversely, there is no sizeable area where eagle numbers continue to decline. We believe the surpassing of recovery targets over broad areas and on a regional basis, and the continued increase in eagle numbers since reclassification, effectively compensates for any local shortfall in meeting targets in a few recovery sub-areas or units.

Recovery planning for wide ranging species such as the eagle, involves \*36462 assumptions about habitat suitability and carrying capacity over large areas. In practice, the response of a species to management protections and subtle differences in habitat quality should be expected to vary across a large landscape, in this case involving many States and physiographic regions. Although we acknowledge that not every sub-area recovery target has been met for each plan, we conclude that recovery as outlined for the species as a whole, has been achieved.

We have reviewed the best available scientific and commercial data and conclude the following:

- (1) A widespread reduction in use of persistent pesticides and their adverse effects on the bald eagle is evident.
- (2) Other threats are not currently of sufficient magnitude, individually or collectively, to place the species at risk of extinction.
- (3) Sufficient knowledge has been gained through the recovery process to properly manage the bald eagle in the future.
- (4) Widespread trends in the population indicate that the bald eagle has recovered and no longer in danger of extinction nor is it likely to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

For these reasons we propose to remove the bald eagle from the List of Endangered and Threatened Wildlife.

#### Effects of This Rule

This rule as proposed will remove the protection afforded the bald eagle under the Endangered Species Act. The provisions of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act including prohibitions on the taking of bald eagles will remain in place. Bald eagles are prohibited for use in falconry under provisions of the Bald and Golden Eagle Protection Act (50 CFR 22.24). These and other laws affecting bald eagles are discussed in factor D above. This rule will not affect the bald eagle's status as a threatened or endangered species under State laws or suspend any other legal protections provided by State law. States may have more restrictive laws protecting wildlife, and these will not be affected by this Federal action. However, this rule may prompt some States to remove

protection for the bald eagle under their endangered species laws

#### Future Conservation Measures

Section 4(g)(1) of the Act requires that the Secretary of the Interior, through the Service, monitor species for at least 5 years after removal from the list of endangered and threatened species. If evidence acquired during this monitoring period shows that the bald eagle should be relisted to prevent it from becoming threatened with extinction, we may use the normal or emergency listing authority, as appropriate, provided for by the Act. At the end of the 5-year monitoring period, we intend to coordinate with our partners regarding bald eagle monitoring and will review all available information to determine if relisting is appropriate.

#### *Monitoring Plan*

The bald eagle was listed under the Act in 1978. Since that time bald eagle nesting and productivity have been monitored throughout the lower 48 States. The monitoring has provided us with information regarding the status and health of the bald eagle population. At a minimum, monitoring included a census of the number of occupied breeding areas, defined as a pair defending a nesting territory in nesting season, and the number of young produced, which has been censused near the age of fledging. This effort has produced an excellent data set and forms the basis of this delisting proposal. If the historic population monitoring effort is continued following bald eagle delisting, we believe that monitoring for contaminants may be the only additional effort needed.

In preparation of this rule, we requested each State to indicate its intentions regarding post-delisting monitoring should this rule become final. More than 80 percent of all States in the lower 48 intend to continue the same monitoring effort for at least 5 years post-delisting. Many of our Federal partners have also indicated a willingness to continue bald eagle monitoring.

As a result of the strong support from our partners, we will work to ensure that nationwide monitoring of bald eagle nesting continue annually for the 5 years following delisting. The monitoring will be the same as it has been through the time the bald eagle has been listed following the guidelines set forth in the recovery plans. It includes the following:

(1) **Number of Occupied Breeding Areas.** We will work with partners to monitor numbers of occupied breeding areas in each state annually and collate the data. This will continue the extensive data set that has been developed over the past 20 years.

(2) **Number of Young Produced.** This requires a second visit to the nesting site near time of fledging. Number of young fledged is an important indicator of reproductive health and may act as an early warning for problems such as disease, contaminant effects, lack of adequate habitat, disturbance, etc.

(3) **Contaminant Analysis and Archiving.** We are proposing to examine contaminant effects on reproduction by collecting addled eggs from those areas having past problems and where present or suspected problems occur. The eggs would be taken every year for the first 5 years, and possibly a reduced number of collections would be made thereafter. Collections should be taken from the same immediate nest site area. We are also proposing to sample blood from a small subset of nesting pairs covering a broad geographic range and a broad range of human influences. All eggs and blood will be archived by freezing at -80degreesC. In the event contamination or poisoning is suspected, archived samples will be withdrawn and properly analyzed by Service-approved laboratories. In addition, a subset of the egg samples will be analyzed each year for organochlorines which are known to adversely impact bald eagle reproductive success. A subset of blood samples will be analyzed where contaminant exposure is suspected.

#### *Five-Year Post-Delisting Assessment*

(4) At the end of 5 years post-delisting, we will review the most current bald eagle data set for the lower 48 States, assess the results and make this information available to the public. We will also consult with States and other partners to determine the need for future monitoring efforts which may include consideration of national or regional

monitoring protocols

(5) At the end of 5 years post-delisting, we will also consider evidence of any factors significantly affecting the population which may indicate that a serious decline is occurring and that relisting should be considered. These factors include but are not limited to the following: a) contaminant-related concerns which result in mortality or effects on breeding activities, b) declining numbers of occupied breeding areas, c) declining reproduction, and d) significant changes in distribution.

#### Public Comments Solicited

We request comments on three aspects of this proposed rulemaking:

##### *A Proposed Delisting*

We are soliciting comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Send your comments to the Service's bald eagle recovery \*36463 coordinator (see ADDRESSES section). We are particularly seeking comments concerning:

- (1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species,
- (2) Additional information concerning the range, distribution, and population size of this species,
- (3) Current or planned activities in the range of this species and their possible impacts on this species,
- (4) Data on population trends,
- (5) Information and comments pertaining to the proposed monitoring program contained in this proposal.

The final decision on this proposal for the bald eagle will take into consideration comments and additional information we receive during this comment period.

The Endangered Species Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of this proposal. Such requests must be made in writing and sent to the Service's bald eagle recovery coordinator (see ADDRESSES section).

##### *B Executive Order 12866*

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand, including answers to questions such as the following:

- (1) Is the discussion in the "Supplementary Information" section of the preamble helpful in understanding the proposal?
- (2) Does the proposal contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the proposal (groupings and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? What else could the Service do to make the proposal easier to understand?

(See ADDRESSES section)

##### *C Paperwork Reduction Act*

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Public Law

104-13, 44 U.S.C. 3501 et seq.) require that interested members of the public and affected agencies have an opportunity to comment on agency information collection and record keeping activities (see 5 CFR 1320.8(d)). We intend to collect information from the public during the 5-year monitoring period following delisting of the bald eagle. A description of the information collection burden and the comments requested on this collection are included in the Paperwork Reduction Act section below.

#### Paperwork Reduction Act

Simultaneous with publication of this proposed delisting rule, we have submitted an application for information collection approval from OMB. We may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number.

Section 4(g) of the Endangered Species Act requires that all species that are delisted due to recovery be monitored for a minimum of 5 years. A general description of the information that will be collected during the monitoring period was provided above in the Monitoring section of this proposal.

We intend to collect information from States, researchers and land managers associated with a variety of organizations and agencies. Some of the information gathered will be part of already ongoing State, Federal, or private monitoring programs. We will also use information from other study areas where appropriate data are available.

The information collected will allow us to detect any failure of the species to sustain itself following delisting. If during this monitoring period we determine that the species is not sufficiently maintaining its recovered status, we could relist the species as endangered or threatened under the Endangered Species Act.

We estimate approximately 60 respondents to requests for information on the status of the bald eagle per year. Different respondents may provide one or more types of information. A total of 125 burden hours per year is estimated for these 60 respondents.

OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act, require that interested members of the public and affected agencies have an opportunity to comment on information collection and record keeping activities (see 5 CFR 1320.8(d)). Comments are invited on (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility, (2) the accuracy of the agency's estimate of the burden of the collection of information, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical, or other technical collection techniques or other forms of information technology. Send comments on information collection to OMB and the Service's Information Collection Clearance Officer (see ADDRESSES section).

#### National Environmental Policy Act

We have determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. We published a notice outlining the Service's reasons for this determination in the Federal Register on October 25, 1983 (48 FR 49244).

#### *References Cited*

American Ornithologists' Union. 1983. Check-list of North American birds. 6th Edition. Allen Press, Lawrence, Kansas. 877 pp.

Bowman, William Wesley IV. 1993. Regulation of bald eagle (*Haliaeetus leucocephalus*) productivity in the Great Lakes Basin: An ecological and toxicological approach. PhD Thesis. Michigan State Univ., Dept. of Fish and

(Cite as: 64 FR 36454, \*36463)

Wildlife, Inst for Env Tox , and Ecol and Evol Biol Program 291 pp

Carson, R L 1962 Silent spring Houghton Mifflin Co , New York 368pp

Garcelon, David L 1994 Effects of organochlorine contaminants on bald eagle reproduction at Santa Catalina Island Institute for Wildlife Studies, Arcata, California 16pp

Gerrard, J M , and G R Bortolotti 1988 The bald eagle Haunts and habits of a wilderness monarch Smithsonian Institution Press, Washington and London 177pp

Herrick, R H 1932 Daily life of the American eagle Early phase Auk 49 219-323

Hunt, W G , D E Driscoll, E W Bianchi, and R E Jackman 1992 Ecology of bald eagles in Arizona Report to U S Bureau of Reclamation, Contract 6-CS-30-04470 Biosystems Analysis, Inc , Santa Cruz, CA p A-149

Peters, J L 1979 Check-list of Birds of the World Vol 1 2nd Ed Harvard Univ Press, Cambridge, Mass p 301

Schempf, P F 1997 Bald eagle longevity record from southeastern Alaska J Field Ornithology, 68 1 150-151

Schmitt, C J and C M Bunck 1995 Persistent environmental contaminants in fish and wildlife IN Our Living Resources, National Biological Service. pp 413-416

Sharpe P B and D K Garcelon 1999 Restoration and Management of Bald Eagles and Santa Catalina Island, California, 1998 Report to the U S Fish and Wildlife Service, Sacramento Field Office Institute for Wildlife Studies, Arcata, CA. 26pp \*36464

Sprunt, A I, IV, W B Robertson, Jr , S Postupalsky, R J Hensel, C E Knoder, and F J Ligas 1973 Comparative productivity of six bald eagle populations Trans of 38th N American Wildlife and Natural Resources Conf Washington, D C pp 96-106

U S Fish and Wildlife Service 1982 Southwestern bald eagle recovery plan U S Fish and Wildlife Service, Albuquerque, New Mexico 74pp

U S Fish and Wildlife Service 1983 Northern states bald eagle recovery plan U S Fish and Wildlife Service, Twin Cities, Minnesota 76pp

U S Fish and Wildlife Service 1986 Pacific bald eagle recovery plan U S Fish and Wildlife Service, Portland, Oregon 160pp

U S Fish and Wildlife Service 1989 Southeastern states region bald eagle recovery plan First revision U S Fish and Wildlife Service, Atlanta, Georgia 41pp + app

U S Fish and Wildlife Service 1990 Chesapeake Bay region bald eagle recovery plan First revision U S Fish and Wildlife Service, Hadley, Massachusetts 80pp

Wiemeyer, Stanley N , Christine M Bunck, and Charles J Stafford 1993 Environmental contaminants in bald eagle eggs--1980-84--and further interpretations of relationships to productivity and shell thickness Archives Environmental Contamination and Toxicology 24 213-227

Wood, P B , M W Collopy, and C M Sekerak 1998 Post fledging nest dependence period for bald eagles in Florida Journal of Wildlife Management 62 333-339

Author The primary author of this proposed rule is Jody Gustitus Millar, U S Fish and Wildlife Service, Rock Island Field Office (see ADDRESSES section)

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, Title 50 of the Code of Federal Regulations, as set forth below

PART 17--[AMENDED]

1 The authority citation for part 17 continues to read as follows

Authority 16 U S C 1361-1407, 16 U S C 1531-1544, 16 U S C 4201-4245, Pub L 99-625, 100 Stat 3500, unless otherwise noted

50 CFR § 17 11

§17 11 [Amended]

50 CFR § 17 11

2 Section 17 11(h) is amended by removing the entry for "Eagle, bald, *Haliaeetus leucocephalus*" under "BIRDS" from the List of Endangered and Threatened Wildlife

50 CFR § 17 41

§17 41 [Amended]

50 CFR § 17 41

3 Section 17 41 is amended by removing and reserving paragraph (a)

Dated June 21, 1999

Jamie Rappaport Clark,

Director, Fish and Wildlife Service

[FR Doc 99-16924 Filed 7-2-99, 8 45 am]

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