SUBMITTED ELECTRONICALLY

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Public Comments Processing
Attn: FWS-HQ-LE-2018-0078
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS: BPHC
Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-LE-2018-0078
Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act;
Religious Use of Feathers

Dear Dr. Travnicek:

Nearly a year ago, Pastor Robert Soto and the Becket Fund filed a petition (the Soto Petition) to end the criminal ban on religious worship with eagle feathers. The core of the petition was this: current law, which forever bans sincere religious believers like Robert Soto from worshiping with eagle and other bird feathers, is inconsistent with the Religious Freedom Restoration Act (RFRA) and the First Amendment and must be changed.

Today, at the close of the comment period, commenters overwhelmingly agree.\(^1\) Eighty percent of the comments support the Soto Petition. Five federally recognized tribes, eight state-recognized tribes, the Alliance of Colonial Era Tribes (Alliance), the Margery Hunter Brown Indian Law Clinic at the University of Montana School of Law, the Jewish Coalition for Religious Liberty, and professors from 17 law schools and universities filed comments supporting the Petition’s main goal of decriminalizing religious feather possession for all Native American religious believers, not just members of federally recognized tribes. The Alliance pointed out that the National Congress of American Indians (NCAI), which includes hundreds of

An Overwhelming Majority of All Comments Support the Petition

\(^1\) The analysis presented in this letter captures the data that was publicly available on docket FWS-HQ-LE-2018-0078 of regulations.gov as of 5:00 pm EST on Tuesday, July 16, 2019.
state and federally recognized tribes, officially objected to the exclusion of state-recognized tribes from the 2012 enforcement memorandum.\(^2\)

Even many federally recognized tribe members, who have the most rights under the Department’s current policy, are dissatisfied with the status quo. Thirty-eight supportive commenters identified themselves as members of federally recognized tribes. Commenter Victoria Parker, an enrolled member of the Western Shoshone tribe and a U.S. military veteran, told of placing a feather in the coffin of a fellow soldier who was not a tribe member. She wrote: “It wasn’t until a friend of mine told me about this public comment that I became aware of the fact that giving my battle buddy a feather might violate [current law].”\(^3\) The Soto Petition would protect federally recognized tribe members like Victoria Parker from criminal prosecution for practicing their faith and traditions.

The Alliance of Colonial Era Tribes, an umbrella organization which includes three federally recognized tribes (the Monacan Indians, the Rappahannock Tribe, and the Upper Mattaponi) supports the expansion of the Morton Policy to cover “all historic American Indian Tribes, whether BIA-listed or non-BIA-listed.”\(^4\) The Alliance quoted a 2011 letter from NCAI, which includes hundreds of state and federally recognized tribes, urging the government to include state-recognized tribe members in its forthcoming enforcement memorandum, as it had done for decades under the Morton Policy.\(^5\)

\(^2\) Comment No. FWS-HQ-LE-2018-0078-0251, submitted by John Norwood on behalf of the Alliance on June 24, 2019, at 12.


\(^5\) NCAI stated that excluding state-recognized tribe members was a “significant narrowing,” which “makes the proposed policy much more restrictive than the Morton Policy and conflicts with legal and legislative precedent that supports a definition of ‘Indian’ that is more expansive than federally recognized tribes, especially where issues of cultural protection and religious freedom are involved.” Comment No. FWS-HQ-LE-2018-0078-0251, submitted by John Norwood on behalf of ACET on June 24, 2019 (quoting a November 30, 2011 letter from then-NCAI Executive Director Jacqueline Johnson Pata to Deputy Assistant Attorney General Ethan Shenkman of the Environmental &
Several other federally recognized tribes filed supportive comments. The federally recognized Monacan Indian Nation and the Rappahannock Tribe expressed support for the entire Soto Petition, including expansion of legal protection to those who prove sincerity but are not enrolled members of a state or federally recognized tribe. The Pokagon Band of Potowatomi Indians similarly supports the entire Soto Petition, but does not support giving state-recognized tribe members a presumption of sincerity. The Tohono O’odham Nation, San Xavier District supports expanding the Morton Policy to cover members of state-recognized tribes and enacting the Policy into law.

Many other federally recognized tribes support some but not all of the Soto Petition’s proposals. For example, 16 tribes (including the Monacan, Tohono O’odham, Pokagon, Yankton Sioux, Confederated Tribes of Grand Ronde, Ho-Chunk, Ute, Kootenai, Seneca, and Agua Caliente Band of Cahuilla Indians) support the Soto Petition’s proposal that the Morton Policy be promulgated as a regulation. And nearly all share the Soto Petition’s concern for reforming the National Eagle Repository (Repository) and combatting commercialization.

Among federally recognized tribes that opposed some or all of the Soto Petition, objections generally fell into three categories. First, some commenters were concerned that expanding access to the Repository would make an already difficult situation completely unworkable.

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Second, a handful of commenters asserted that protecting the rights of all sincere religious believers was beyond the Department’s statutory authority. And third, some commenters state that the Soto Petition would “jeopardize the entirety of federal law and policy governing tribal-federal relations,” and would violate the Department’s trust obligation towards federally recognized tribes.\(^7\) We discuss each of these objections below.

**Issues with the National Eagle Repository.** In *Larson v. Valente*, the Supreme Court held that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”\(^8\) Thus, the current Repository system, which expressly grants rights and benefits to some Native American religious believers and not others, faces a stiff uphill climb. It is simply not enough to assert broad interests in protecting the culture and religion of federally recognized tribes, because as the Department of Justice has recognized in a different context, “Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.”\(^9\) The government must carefully tailor its actions to avoid any improper denominational preference. Above all, it may not turn away sincere religious believers like Robert Soto simply because it has failed to manage the Repository effectively. As the Fifth Circuit concluded in *McAllen Grace Brethren Church v. Salazar*, “[t]he Department cannot infringe on [religious believers’] rights by creating and maintaining an inefficient system and then blaming those inefficiencies for its inability to accommodate [those believers].”\(^10\)

Moreover, problems with the Repository cannot justify banning Robert Soto and other sincere religious believers from worshiping with feathers received outside of the Repository system.\(^11\) Access to the Repository and decriminalizing religious feather use are two separate proposals. Nothing prevents the Department from proceeding in an incremental fashion, first decriminalizing religious feather use as RFRA and the U.S. Constitution require, and then reforming the Repository over time. Decriminalization would provide immediate protection for state-recognized tribe members like Robert Soto, who face federal prosecution for their peaceful worship activities. And it would also ensure lasting legal protection for the millions of federally recognized tribe members who currently rely only on the 2012 enforcement memorandum, which could be changed at any time. The Department would then be free to

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\(^8\) *Larson v. Valente*, 456 U.S. 228, 244 (1982).


\(^10\) 764 F.3d 465, 479 (5th Cir. 2014).

\(^11\) See, e.g., Soto Petition at 29–34.
carry out reforms to the Repository and improvements to its enforcement mechanisms over time, in full consultation with federally recognized tribes.

Statutory authority. As a threshold matter, the Department is bound not just by statutes like the Bald and Golden Eagle Protection Act (BGEPA) but also by RFRA. And under RFRA, the Supreme Court routinely requires the government to accommodate religious practices that do not fall squarely within existing religious exemptions. Thus RFRA provides the Department not only with statutory authority to accommodate sincere religious believers, but a statutory duty to do so. That is the lesson of the Fifth Circuit’s decision in McAllen.

Nevertheless, some commenters insist that the Department lacks statutory authority under the BGEPA to accommodate religious believers like Robert Soto. Several of these comments cited United States v. Dion, a 1986 Supreme Court case involving a federally recognized tribe member convicted of killing eagles without a permit. The tribe member (who was also convicted of selling eagle carcasses) asserted that he had treaty rights to hunt eagles on his tribe’s reservation. The Supreme Court concluded that the BGEPA abrogated the defendant’s treaty right to hunt eagles, even on tribal lands.

The commenters that raised Dion appeared to assume that the religious exemption in the BGEPA excludes everyone other than federally recognized tribes—even state-recognized tribe members like Robert Soto. But that is simply not so. Indeed, at the time Dion was decided and for more than a decade afterward, the Morton Policy did apply to Robert Soto, along with anyone else who had a Bureau of Indian Affairs Certificate of Degree of Indian Blood, regardless of their tribal enrollment status.

Nevertheless, the commenters that raised Dion asserted that the Supreme Court rejected the inclusion of “non-Indians” under BGEPA’s religious exemption as “patronizing and strained.” This is misleading. What the Supreme Court called “patronizing and strained” was the argument that “Indians, if left free to hunt eagles on reservations, would nonetheless be unable to satisfy their own needs and would be forced to call on non-Indians [i.e., commercial poachers] to hunt on their behalf.” This was an argument about whether BGEPA abrogated treaty rights both on and off reservations, not whether “the religious

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15 McAllen, 764 F.3d at 470; see also Comment No. FWS-HQ-LE-2018-0078-0251 at 1–3 (discussing the inclusion of state-recognized tribe members under the Morton Policy prior to 2011).


17 Dion, 476 U.S. at 744.
purposes of Indian Tribes” exemption extended to state-recognized tribe members like Robert Soto. Moreover, the Dion defendant did not raise a religious freedom claim in the Supreme Court.\textsuperscript{18} Thus, the Court had no opportunity to consider—much less reject—the religious liberty claims of state-recognized tribe members and other sincere religious believers.

All of this history was raised and considered in \textit{McAllen}, where the Fifth Circuit correctly concluded that the Department had not shown that excluding sincere religious believers like Robert Soto, who had been covered by the Morton Policy for decades before being excluded under the 1999 regulations, was the least restrictive means of advancing its interests.\textsuperscript{19}

\textit{Relationship between federally recognized tribes and the U.S. government and trust obligation.} Finally, some commenters also assert that the Soto Petition’s proposal to protect the rights of all sincere religious believers would “jeopardize the entirety of federal law and policy governing tribal-federal relations” and violate the Department’s trust obligation towards federally recognized tribes.\textsuperscript{20} The underlying assumption of these arguments appears to be that the Department’s current narrow religious exemption is based solely on its treaty obligations to federally recognized tribes, and that accommodating the religious rights of any other person in this context would jeopardize the legal foundation for the many federal programs intended to benefit federally recognized tribes, including the BIA employment preferences in \textit{Morton v. Mancari}.\textsuperscript{21}

These arguments fail for two reasons. First, for years before and after the Supreme Court’s \textit{Mancari} decision in 1974, the Department accommodated the religious practices of state-recognized tribe members and other Native Americans who were not enrolled in federally recognized tribes and who thus had no official treaty relationship with the federal government. Yet the unique treaty-based legal relationship between federally recognized tribes and the federal government has endured—as well it should.\textsuperscript{22}

Second and more fundamentally, these comments misunderstand the nature of the Soto Petition’s request. As the Soto Petition explains (at 35–40), religious freedom is a right guaranteed to \textit{all} Americans. Under the Department’s current policy, power companies and wind farms have greater freedom than sincere religious believers like Robert Soto. This violates RFRA, which requires the government to treat sincere religious believers at least as well as it treats those who take similar actions for secular reasons. By lifting the criminal ban on feather possession, the Department will bring its policies into line with what RFRA

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\textsuperscript{18} Dion, 476 U.S. at 736 n.3 (“[A]n Eighth Circuit panel rejected a religious freedom claim raised by Dion. Dion does not pursue that claim here, and accordingly we do not consider it.”).

\textsuperscript{19} \textit{Id.} at 479–80.

\textsuperscript{20} Comment No. FWS-HQ-LE-2018-0078-0242 at 2.


\textsuperscript{22} The argument regarding trust obligations appears to center on access to feathers through the Repository. Comment No. FWS-HQ-LE-2018-0078-0242 at 5. But as explained above, concerns about access to eagle feathers through the Repository cannot justify criminalizing possession of feathers received outside of the Repository system. \textit{See} Soto Petition at 29–34.
requires—without endangering a single bird, and without in any way affecting the unique legal relationship between the government and federally recognized tribes.

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Since time immemorial, Native Americans have worshiped with eagle feathers. In 1999, the Department decided that only some Native Americans could continue to do so. That decision was wrong then and it is wrong now. The Department should right that wrong by broadening the Morton Policy to cover all sincere religious believers and promulgating the Policy as a regulation. More than eighty percent of commenters support the Soto Petition’s request to do just that. And the First Amendment and RFRA require nothing less.

Thank you for the opportunity to submit these comments. If you have any questions, please do not hesitate to contact me at the number below.

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