

DEPARTMENT OF THE INTERIOR

National Park Service

36 C.F.R. Part 7.101

RELIGIOUS CEREMONIAL COLLECTION OF WILDLIFE IN WUPATKI NATIONAL MONUMENT

AGENCY: National Park Service (NPS), Interior

ACTION: Proposed Rule

SUMMARY: The National Park Service (NPS) has preliminarily determined that under certain circumstances it is appropriate to allow the Hopi Tribe to collect eaglets within Wupatki National Monument, a unit of the national park system, for religious ceremonial purposes. This rule would authorize this activity upon terms and conditions sufficient to protect park resources against impairment and consistent with the Bald and Golden Eagle Protection Act.

DATES: Written comments will be accepted by mail, fax, or electronic mail through (insert date 60 days from the date of publication in the Federal Register).

ADDRESSES: Comments should be addressed to:

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:

Existing Regulations:

A subsection of NPS regulations, promulgated in 1983, prohibits "possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state" living or dead wildlife, fish, plants, paleontological specimens, or mineral resources, or the parts or products of any of these items, except as otherwise provided. 36 CFR 2.1(a).

Another provision of these regulations authorizes NPS to issue permits allowing the collection of national park system resources for research under certain conditions. 36 CFR 2.5. No such permit may be issued except to:

an official representative of a reputable scientific or educational

institution or a State or Federal agency for the purpose of research, baseline inventories, monitoring, impact analysis, group study, or museum display when the superintendent determines that the collection is necessary for the stated scientific or resource management goals of the institution or agency and that all applicable Federal and State permits have been acquired, and that the intended use of the specimens and their final disposal is in accordance with applicable law and Federal administrative policies.

In addition, a permit may not be issued if "removal of the specimen would result in damage to other natural or cultural resources, affect adversely environmental or scenic values, or if the specimen is readily available outside of the park area."

Subsection 2.5(c) prohibits issuing a permit to take a specimen that is listed as an endangered species under state or federal law unless the specimen "cannot be obtained of the park area and the primary purpose of the collection is to enhance the protection or management of the species." Subsection 2.5(f) prohibits issuing a research collection permit in park areas where the enabling legislation prohibits the killing of wildlife.

NPS regulations allow a park superintendent to "designate certain fruits, berries, nuts or unoccupied seashells for personal use or consumption" if the gathering or consumption will not adversely affect park wildlife, the plant species or park resources." 36 CFR 2.1(c)(1). Another subsection addresses the ceremonial use of NPS resources, stating that the regulations "shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights, or in accordance with 2.2 [hunting] or 2.3 [fishing]." 36 CFR 2.1(d). The preamble to this provision explained that the provision was added in response to comments that had "questioned the applicability" of the regulation in such circumstances, and went on to say:

The Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practices consistent with statutory management obligations. The Service intends to provide reasonable access to, and use of, park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is limited by law and regulations from authorizing the consumptive use of park resources.

48 Fed. Reg. 30,252 (1983).

The Need to Revise the Regulations

In 1999, members of the Hopi Tribe requested permission from the National Park Service (NPS) to take golden eagles from Wupatki National Monument for religious purposes. Citing the National Park Service Organic Act and 36 C.F.R. 2.1, 2.2, 2.5, the NPS denied the Hopi request. The Assistant Secretary for Fish and Wildlife and Parks then withdrew the NPS denial in order to reconsider the issue. Upon advice of the Solicitor, as explained below, the proposal is being made to change the regulation to allow favorable action on the Hopi request.

The practice of eagle gathering is at the heart of the Hopi religious ceremonial cycle and the Hopi culture. The eagle serves as the link between the spiritual world and the physical world of the Hopi, a connection that embodies the very essence of Hopi spirituality and belief. Eaglets are gathered from nests soon after birth and are kept and raised to fledglings in Hopi villages (sic they are) during the Niman Kachina ceremony, sacrificed and "sent" to their spiritual home. The eagles' feathers are subsequently used in all Hopi religious ceremonies such as the Kachina ceremony, Plume ceremony, Snake ceremony, and social dances. The cyclical relationship between the eagle and the Hopi is renewed annually through the practice of eagle gathering, sustaining the connection between the spiritual and physical worlds for the next generation of Hopi.

The importance that the Hopi attach to the ceremonial gathering of eagles is expressed in Article IV of the Tribal Constitution:

The Tribal Council shall negotiate with the United States Government agencies concerned and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories, and to secure adequate protection for its outlying, established shrines.

The Constitution was approved by the Secretary of the Interior on December 19, 1936.

Only a few of the Hopi clans and religious societies bear the important ceremonial obligation of eagle gathering, and each of these has a traditional area from which it - and no other clan or society that is not related to it - may gather eagles. Hopi clan ownership of traditional eagle nests is well documented in the anthropological literature. "The nests of eagles near village ruins are owned by the descendants of clans which once lived in their neighborhood." Jesse Walter Fewkes Property Rights in Eagles Among the Hopi, *American Anthropologist* (n.s.) 690-707, 693 (1900). "The territory around the Hopi villages where eagles may be

found is, and has been from time immemorial, divided into portions or allotments, which are controlled by certain clans or families. These territories extend as far as 50 and 60 miles from the villages." H.R. Voth, Notes on the Eagle Cult of the Hopi, collected in H.R. Voth, Brief Miscellaneous Hopi Papers, Field Columbian Museum, Publication 157, 107-109, Anthropological Series 11(2)(1912). Clan ownership of eagle nesting areas corresponds to the early settlement areas and migration routes of the clans before they arrived at their modern villages. The Hopi regard the eagles as embodying the spirits of their ancestors, and the clan areas often contain, or are very close to, Hopi clan ruins.

Anthropologists have described the Hopi's "famous nest at Wupatki" as an important area for traditional eagle gathering by the Hopi, Florence H. Ellis, *The Hopi: Their History and Use of Lands* (n.d.) 149-154, collected in *HOPHI INDIANS* (1974). Wupatki National Monument was set aside by President Calvin Coolidge in 1924 under the authority of the Antiquities Act, 16 U.S.C. 431-33. The Proclamation is silent on eagle gathering. It identified the purpose of the monument in ethnocentric language common to the time, that is to reserve and protect "prehistoric ruins built by the ancestors of a most picturesque tribes of Indians still surviving in the United States, the Hopi or People of Peace." Proc. No. 1721 (43 Stat. 1977).

Legal Considerations

The National Park Service Organic Act created the NPS and defined its purpose in relevant part as follows:

The service shall promote and regulate the use of the Federal areas known as national parks, monument and reservations by such means and measures as conform to the fundamental purpose which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1. The 1916 Act further authorizes the Secretary of the Interior to make "such rules and regulations as he may deem necessary or proper for the use and management of" the National Park System, and to "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of" units of the National Park System. 16 U.S.C. 3.

In 1978, section 1 of the Organic Act was amended to include these provisions:

Congress declares [that the] National Park System [shall be] preserved and managed for the benefit and inspiration of all the people of the

United States [and] directs that the promotion and regulation of the various areas of the National Park System shall be consistent with and founded in the purpose established by Section 1 to the common benefit of all the people of the United States.

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established except as may have been or shall be directly and specifically provided by Congress.

16 U.S.C. 1a-1.

With some exceptions, the NPS has generally prohibited consumptive uses of national park system resources except as specifically authorized by Congress. Applicable regulations generally prohibit hunting of wildlife and prohibit removal of plants, paleontological, archeological, cultural or mineral resources but allow recreational fishing and the collection of fruits, nuts, and berries for personal consumption. See 36 CFR 2.1(a).

The following discussion explains why we believe applicable laws and policies allow the NPS to accommodate the Hopi religious ceremonial interest in collecting eaglets at Wupatki to the extent it will not result in impairment of the resources protected by the National Park Service Organic Act.

Constitutional Considerations and Statutes, Court Decisions, and Executive Orders that Address Indian Religious Ceremonial Concerns

1. Constitutional considerations.

The leading judicial guidance on the interaction between management of federal non-Indian lands and Indian religious practice is *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 435 U.S. 439 (1988). The Supreme Court there made clear that the First Amendment's free exercise clause permits curtailing Indian religious practices on federal lands in appropriate circumstances. See also *U.S. v. ?*, 109 F.3d 1375 (9th Cir. 1997) (permit requirement of Bald and Golden Eagle Protection Act does not violate free exercise clause when applied to Native American religious practices, even though it imposed a substantial burden on the practice of Native American religions in which eagles and eagle parts "play a central role" because it is the least restrictive means of serving the compelling governmental interest of protecting eagles, while permitting access to eagles and eagle parts for religious purposes: *Regulation of Hardrock Mining* (Solicitor's Opinion M# _____ 1999)

(Constitution does not compel rejection of the proposed mining plan on BLM-managed public land even though it would seriously and irreparably degrade a cultural resource of importance to a nearby Indian Tribe). The Constitution does not, in other words, require the National Park Service to accommodate uses by Indians or others of national park system resources for religious ceremonial purposes.

The Supreme Court also said in *Lyng*, however that "the Government's rights to the use of its lands need not and should not discourage it from accommodating [Indian] religious practices" 435 U.S. at 454. See also Solicitor's Opinion M# _____, at _____. Such accommodation may be undertaken in appropriate cases without raising questions under the establishment clause of the First Amendment. See *Bear Lodge Multiple Use Assoc. v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), cert. Denied, 2000 WL 305849 (March 27, 2000) (upholding Park Service's encouragement of a voluntary month-long "no-climb" period at Devil's (sic) Tower National Monument in order to accommodate Indian religious practices); Office of Legal Counsel, Department of Justice, Memorandum to the Secretary of the Interior - Permissible Accommodation of Sacred Sites, September 18, 1996, p. 1 (federal government "has broad latitude to accommodate the use of sacred sites by federally recognized Indian tribes" without violating the establishment clause).

Such accommodation may appropriately provide preferences for Indian tribes and their members. Such preferences have unique and deep roots in American law, and may be upheld, where similar practices involving others may not pass muster. See e.g. *Morton v. Mancari*, 417 U.S. 535 (1974) (Bureau of Indian Affairs hiring preference for Indians upheld because policy was based on political relationship between Tribes and Federal Government; *Rupert v. Director, U.S. Fish and Wildlife Service*, 57 F.2d. 32 (1st Cir. 1992) (upholding exemption from criminal prosecution for possession of eagle feathers by members of federally recognized Tribes); *Peyote Way Church of God v. Thornburgh*, 922 F.2d. 1210, 1217, (5th Cir, 1992) (upholding statutory exemption from laws prohibiting peyote possession for Native American Church members, the court noting that the federal-tribal relationship "precludes the degree of separation of church and state ordinarily required by the First Amendment"); *United States v. Gibson*, 2000 WT, 117987 (11th Cir. Aug. 21, 2000) (limitation of religious exemption under Bald and Golden Eagle Protection Act to Indians who are members of federally recognized tribes did not violate non-Indians constitutional or statutory free exercise rights; cf. *Rice v. Cayetano*, 120 S.Ct. 1004 (2000) (Native Americans).

The Religious Freedom Restoration Act (RFRA) This Act, enacted in 19____, 42 U.S.C. 2000bb et seq., provides that the government may substantially

burden a person's exercise of religion only if the exercise is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that compelling governmental interest. (NOTE: The Supreme Court has held that RFRA is unconstitutional as applied to state government, *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), but that does not impact the federal government's obligations under RFRA.) There is a reasonable argument that the NPS regulations prohibiting collection of eagles in Wupatki may substantially burden the Hopi exercise of religion to the extent that collection may be regarded as a necessary element in the Hopi's religious ceremony.

Whether the prohibition could be sustained under RFRA would depend on whether there is a compelling governmental interest at stake, and whether the prohibition is the least restrictive means of furthering it. We do not have to reach these questions here, however, if the NPS has the authority to accommodate the Hopi Tribe's religious/ceremonial collection of eaglets at Wupatki. Plainly then, RFRA encourages, and does not prohibit, such accommodation.

3. The American Indian Religious Freedom Act (AIRFA). This Act, enacted in 1978, declares "the policy of the United States to protect and preserve for American Indians their inherent right to freedom to believe, express and exercise the[ir] traditional religions—including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional sites." 42 U.S.C. 1886. The second section of AIRFA, not codified in the U.S. Code, requires the President to direct the various federal agencies responsible for administering relevant laws to "evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices" and directed the President to report to Congress with (sic) twelve months of enactment, the results of the evaluation. 92 Stat. 469.

The Secretary of the Interior convened a task force of federal agencies, which issued the report called for by Congress. American Indian Religious Freedom Act Report (Federal Agencies Task Force, August 1979). The task force discussed, among other things, the problem of restricting the gathering of indigenous natural substances from federal lands for use in Indian religious ceremonies and practices, noting in particular that the "gathering of a specific plant or animal may be forbidden or limited by conservation statutes." *Id.* 51-53. It recommended that each agency "accommodate Native American religious practices to the fullest extent possible" under existing statutes, and also that agencies "provide exemptions from restrictions on access to and gathering, use and possession of federal property for Native American religious purposes

similar to those provided for scientific purposes." *Id.* at 63.

AIRFA does not create any judicially enforceable rights. *Lyng v. Northwest Indian Cemetery Protective Ass'n* 485 U.S. 439, 455, 471 (1988). Courts have, however, construed AIRFA to require federal agencies to:

learn about, and to avoid unnecessary interference with traditional Indian religious practices, [and to] evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices. AIRFA does not, however, declare the protection of Indian religions to be overriding federal policy, or grant Indian religious practitioners a veto on an agency action

Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir. 1983) cert. denied, 464 U.S. 956 (1983). Thus AIRFA requires federal agencies to consider, but not necessarily to defer to Indian religious values. *Id.* At 747. See also *Havasupai Tribe v. U.S.* 752 F. Supp. 1471, 1478 (D. Ariz. 1990), aff'd 943 F. 2d 32 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992); cf. *Lyng, supra*, 485 U.S. at 454.

4. Executive Orders and other Policy Statements. A 1994 policy statement, and Executive Orders issued in 1996 and 1998, have all promoted government accommodation of Indian religious practices within the limits of agency discretion. President Clinton's "Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes" (1994) recognizes the important place eagle feathers occupy in many Native American religious and cultural practices and directs executive departments and agencies to "work cooperatively with tribal governments and to reexamine broadly their practices and procedures to seek opportunities to accommodate Native American religious practices to the fullest extent under the law. 59 Fed Reg. 22,953 (Apr. 29, 1994).

President Clinton's Executive Order on Sacred Sites directs that federal agencies

Shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of sacred sites.

Exec. Order 13,007 1.61 Fed. Reg. 26,771 (1996). The Order defines "sacred sites" as a "specific, discrete, narrowly delineated location of Federal lands" identified by tribal interests as "sacred by virtue of its

established religious significance to, or ceremonial use by an Indian religion." Id. 1(b)(iii). While the Order does not reach directly to the collection of plants or wildlife on federal land for Indian religious purposes, it is suggestive of accommodation where possible. The Departmental Manual implementing the Sacred Sites Executive Order requires Interior agencies to establish procedures that accommodates "access to and ceremonial use by religious Indian practitioners of Indian sacred sites" and to "consult with tribal governments and give full consideration to tribal views in its decision making process." 512 DM 3.4(1)(b); 3.7 (1998).

President Clinton's 1998 Executive Order on Consultation and Coordination with Indian Tribal Governments states in pertinent part that "each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribal government for a waiver of statutory or regulatory requirements. No. 13,084, 63 Fed reg. 27,655 (May 14, 1998).

None of these executive directives purport to (nor could they) provide legal authority to override existing laws such as those that govern the management of the national park system. To the extent permitted by law, however, they direct federal agencies to accommodate uniquely Indian religious needs.

5. General discussion and conclusion. In light of the statutes, court decisions, executive orders and other legal considerations discussed above we believe that the NPS has a reasonable legal basis for promulgating a regulation that allows the Hopi Tribe to collect eaglets at Wupatki National Monument for religious/ceremonial purposes. The collection of eaglets is an important part of the Hopi religion, and there is ancestral and historic connection between the Hopi Tribe and Wupatki National Monument. The proposed regulation would allow the NPS to include terms and conditions, including gathering times, take limits, and permit tenure, that are sufficient to protect park resources against impairment, and would require compliance with the Bald and Golden Eagle Protection Act.

The proposed regulation, and the accompanying environmental analysis, applies only to this narrow situation. Nevertheless, the question arises as to whether and the extent to which this proposal may be a precedent for future proposals to allow collection of resources for religious ceremonial purposes in national park system units, either by individual Indian Tribes or on a more generic basis.

>From time to time, in the past, local park superintendents have exercised discretion to permit collection of resources for religious

ceremonial purposes on a local level, and the National Park Service has considered this subject in a more generic way. For example, more than two decades ago the NPS prepared a draft assessment of possible measures to implement AIRFA which recommended, among other things, seeking legislation to clarify matters (unnumbered appendix to the task force report discussed earlier, dated March 23, 1979, p. 5). NPS followed up a few months later with a supplemental report that it had supplied buffalo (from surplus stock, problem animals and road kill) from Badlands, Theodore Roosevelt and Wind cave National Parks for spiritual needs of Indians and that "[m]any park areas have permitted Native Americans to gather plants for ceremonial purposes and have gathered and shipped plants to medicine men." (Appendix B, July 10, 1979).

It is possible that the NPS will receive requests from other tribes for similar rule changes to address religious practices. Such requests will be addressed on their merits, and any rule changes would follow the same process as being followed here. It is also possible at some point that the NPS may consider doing a more generic rulemaking on the subject, and again the rulemaking and related administrative requirements of law, including compliance with the National Environmental Policy Act, would be followed. It bears emphasis, however, that the current proposal is to deal strictly and exclusively with the Hopi Tribe's proposal to collect eaglets at Wupatki.

PUBLIC PARTICIPATION:

DRAFTING INFORMATION: The principal author of this proposed interpretive rule John Leshy. Solicitor, Department of the Interior.

(NOTE: WHAT FOLLOWS IS THE NEW LANGUAGE THAT WILL APPEAR IN NPS RULES

AS PROPOSED BY THE DEPARTMENT OF THE INTERIOR)

Part 2 - Wildlife Protection

1. The authority citation for Part 2.2 continues to read as follows:

Authority: 16 U.S.C. 1, 3; 42 U.S.C. 2000bb; 42 U.S.C. 1996, Executive Orders No.

---_____.

Section 7.101 will be added as follows:

Wupatki National Monument.

(a) Collection of Eagles from Wupatki National Monument by Hopi Tribe.

Upon terms and conditions sufficient to prevent impairment to park resources, and upon a showing that the Tribe has a valid permit to collect eagles under the Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d, the Superintendent of Wupatki National Monument shall grant a permit to the Hopi Tribe to collect eagles from Wupatki National Monument for religious and ceremonial purposes.
