PEER's Comments On

PROPOSED NPS REGULATION
OFWUPATKI NATIONAL MONUMENT

JANUARY 22, 2001

I. Introduction and Summary

On January 22, 2001 the Department of the Interior proposed a special regulation at 36 CFR 7.101 that would authorize members of the Hopi Tribe to take golden eagles from Wupatki National Monument, Arizona for religious ceremonial purposes (66 Federal Register (FR) 6316-6521). Wupatki is part of the national park system.

On August 25, 1916, Congress charged the Secretary of the Interior, through the National Park Service (NPS), to "conserve" the wildlife within the parks. The proposed rule is contrary to an understanding of the Organic Act (16 U.S.C. 1 *et seq*.) resolutely held by the National Park Service from its inception. Few agencies of the Federal Government possess an interpretation of their governing statute as enduring as that of the NPS. The proposed rule immediately alters the long history of the national parks and monuments as strict sanctuaries for wildlife and conflicts with laws and regulations that span decades.

When an agency so abruptly reverses a fundamental principle, that reversal must rely upon a thoroughly reasoned analysis. The proposed rule and its preamble lack a reasoned analysis. The proposed rule does not, indeed cannot, point to any recent enactment of Congress or decision of the Federal courts that alters the meaning of the Organic Act mandate to conserve wildlife. Under orders from the Assistant Secretary for Fish and Wildlife and Park, the Departmental solicitors struggled for the better part of a year to craft a memorandum on whether the take of Wupatki's golden eagles by the Hopi at Wupatki was consistent with the laws governing the national park system. The solicitors failed in the effort to craft a reasoned analysis compelling enough to support the demands of the Department. The solicitors threw in the towel. In September 2000, having aborted the effort to write a reasoned analysis, the Department decided to amend NPS general rules with a special regulation to allow the taking of eagles at Wupatki.

The proposed rule ignores the evolution of law, regulation and policy that protects park wildlife. The Department abandons long-held principles. The rule is an about-face in the most profound ways.

In place of reasoned analysis, the proposed rule attempts to support the taking of park wildlife (an abrupt change that is apparently not obvious to the Department), on laws that affirm the First Amendment rights of free exercise of religion. That

explanation also represents an abrupt change in agency statutory interpretation. One of these laws, the American Indian Religious Freedom Act (AIRFA) (42 U.S.C 1996) was enacted in 1978. The Department and the NPS considered the effect of AIRFA on NPS laws and regulations that protect wildlife and found no basis for waiving the protection the law and regulation afford to wildlife. The Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. 2000bb) is the other mainstay of the proposed rule. RFRA simply restates a yardstick for measuring First Amendment free exercise claims by adherents of any religion that dates to a 1963 Supreme Court decision. There is no evidence that the Department ever interpreted that 1963 yardstick to affect NPS rules that protect wildlife until the proposed rule of 2001 "discovered" it. Lastly, the proposed rule cites an inapt Executive Order on Sacred Sites (EO 13007) for authority.

The proposed rule masquerades as if its effect is limited only to Wupatki. However, the arguments that the Department advances for the proposed rule apply throughout the national park system. AIRFA and RFRA are not limited only to Wupatki. It is not only the Hopi who possess rights of free exercise of religion. Nor are the rules that protect eagles at Wupatki the only rules subject to agency reversal or court challenge under AIRFA and RFRA. The rules that protect wilderness or endangered species are undermined by the rationale advanced in this proposed rule. The Department has constructed the broadest possible arguments to explain and justify the proposed Wupatki rule and those arguments may apply to a far wider geographic area and range of issues than we can fully know. The proposed rule openly invites and implicitly supports similar rule changes for many other parks. The proposed rule hands a powerful device to any sincere religious adherent who may challenge NPS general rules that are neutral in content because the rules incidentally burden religious practice. The proposed rule would irrevocably alter the special nature of national parks and monuments as sanctuaries for wildlife.

The proposed rule adopts an "impairment" test in an attempt to assure the public that the NPS will allow the taking of eagles at Wupatki only in conformity with the Organic Act mandate. That mandate requires that the Secretary of the Interior permit the enjoyment of park resources only "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." This use of the impairment test conflicts with NPS's own interpretation of the very limited discretion the Organic Act accords the Secretary to permit any take of wildlife. The impairment test, even if it were proper, is a charade since any take of an eagle in Wupatki would likely constitute "impairment." The structure of the proposed rule is as ill conceived, as the rule is unjustified.

II. The Relevant Law

The 1916 Organic Act created the National Park Service and defined its purpose in relevant part as follows:

> The service…shall promote and regulate the use of the Federal areas known as the national parks, monuments 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 wild life 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 (emphasis added). 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 "may also 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 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 (commonly referred to as the Redwood Amendments (emphasis added.)

Congress first addressed the taking of wildlife inside a national park in 1894, with an amendment to the Yellowstone National Park Act that provides:

> All hunting, or killing, wounding, or capturing at any time of any kind of bird or wild animal, except dangerous animals, when it is necessary to prevent them from destroying human life or inflicting

> an injury, is prohibited within the limits of said park; nor shall any fish be taken out of the waters of the park by means of seines, nets, traps, or by the use of drugs, or any explosive substances or compounds, or in any other way than by hook and line, and then only at such seasons, and in such times and manner as may be prescribed by the Secretary of the Interior. The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for…the protection of the animals and birds in the park, from capture or destruction, or to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park.

This provision is notable both because it established a bright line prohibition against taking wildlife in Yellowstone (except for human safety) and because it drew a distinction between fish and wildlife. The 1894 amendment reflected the prevailing and growing sentiment of the time that national parks were created as sanctuaries or refuges for wildlife.

III. National Park Service Policy

The "parks-as-wildlife-sanctuaries" idea reverberates through the history of national parks and the National Park Service. In a letter of May 13, 1918, Secretary of the Interior Franklin K. Lane instructed the first Director of the NPS, Stephen Mather, that "the national parks must be maintained in absolutely unimpaired form… Every activity of the Service is subordinate to the duties imposed upon it to faithfully preserve the parks for posterity in essentially their natural state." (emphasis added).

In his Second Annual Report to the Secretary, Director Mather wrote "The National Park Service holds no one of its several public charges in greater reverence than the care, maintenance, and development of the wild animals which live free and normal lives within its reserves." (p. 22, Second Annual Report (1918)). Mather described proposals to allow the killing of buffalo and elk in Yellowstone to augment the nation's food supply during World War I as a "very grave and insidious" peril to the parks. (Ibid., p. 23).

The Third Annual Report states that "[N]o opportunity to improve the condition of wild life of the national parks has been neglected by the Service during the past year, nor have we relaxed in any degree our vigilant protection of these reservations. All are refuges for wild animals…" (p. 34, Third Annual Report (1919)). The Fourth Annual Report states that "[T]he great primary principle that the national parks must forever be maintained in absolutely unimpaired form…has been firmly established by Congress, and until Congress…by

legislative mandate annuls or changes this principle it must be faithfully, unequivocally, and unilaterally adhered to." (p. 37, Fourth Annual Report (1920)). In the 1921 report, Director Mather speaks of the "complete and absolute protection afforded the wildlife within (park) boundaries…" (p. 37, Fifth Annual Report (1921)).

The 1922 report affirms that "[T]he national parks and monuments play a very important part in the conservation of wildlife, for in them, all animals, with the exception of predatory ones, find safe refuge and complete protection, and live unhampered in natural environment." (p. 22, Sixth Annual Report (1922)) (emphasis added).

The early history of the NPS leaves no doubt that wildlife was to be protected from all take in the parks except as Congress provided otherwise. There is nothing in NPS history that reasonably leads to a conclusion that the protection of park wildlife was less than ironclad or that the Secretary possessed discretion to allow the take of wildlife except as provided for in law. If there were any doubt, the NPS soon adopted regulations that gave unyielding protection to park wildlife.

IV. NPS Regulations

The NPS' first formal regulations for the national park system, published in the Federal Register's first volume in 1936, included the statement that "[t]he parks and monuments are sanctuaries for wildlife of every sort, and all hunting, or the killing, wounding, frightening, capturing, or attempting to capture at any time of any wild bird or animal except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited." The national park system consisted, with some minor exceptions, almost entirely of "parks" and "monuments." But the regulations, then, as today, gave the same protection to wildlife in monuments and wildlife in parks.

With the closing of Hoover Dam and the filling of Lake Mead on the Colorado River in the mid-1930's, the NPS obtained management authority over what was then called the Boulder Dam Recreation Area by agreement with the Bureau of Reclamation. With the advent of the 1960's the NPS obtained many more "recreation areas" both by administrative agreements and acts of Congress. In most but not all of these areas, as discussed in further detail below, the agreements or the enabling legislation permitted hunting, and, in fewer cases, trapping of wildlife.

To address the variety of new additions to the national park system, Secretary of the Interior Stewart Udall instructed the NPS Director to develop a set of guidelines for the management of "each of these categories of areas." The NPS restructured its regulations in 1966 to create three categories of national park

system areas, as described by Secretary Udall – natural, historic, and recreational. The 1966 regulations read, in pertinent part: "[T]he hunting, killing, wounding, frightening, capturing, or attempting to kill, wound, frighten, or capture at any time of any wildlife is prohibited, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal property." The 1966 regulations differed from the 1936 regulations by applying this prohibition only to natural and historical areas of the national park system and national parkways. The 1966 regulations authorized the hunting and trapping of wildlife only in recreational areas of the system. The 1966 rules were followed in August 1968 by a set of three NPS-issued administrative policy manuals – one for each park category.

As the park system continued to grow in size and variety, the NPS continued to deliberate internally about the viability and usefulness of the three management categories. Congress gave further impetus to the discussion with the enactment of the Redwood Amendments in 1978. Through these amendments, Congress reaffirmed the fundamental purpose of preserving park resources in all units of the national park system, and directed that all the various areas of the system be managed consistent with the fundamental purpose of the Organic Act. 16 U.S.C.1a-1. The Senate Report on the bill put it this way:

> The Secretary is to afford the highest standard of protection and care to the natural resources within…the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided…[T]his restatement of these highest principles of management is intended to serve as the basis for any judicial resolution of competing private and public values and interests in areas of the National Park System.

S. Rep. No. 528, 95th Cong., 1st Sess. 13-14 (1977) (emphasis added); see also H.R. Rep. No. 581, 95th Cong., 1st Sess. (1977) ("the Secretary is to afford the highest duty of protection and care" to park resources.)

As a direct result of the 1978 legislation, the NPS proposed to revise its regulations and end the management categories. The preamble to the proposed rule stated, with regard to park wildlife, that "[I]n cases where the legislation for a park area does not authorize hunting or trapping, the taking of wildlife is prohibited."

A year later, in 1983, the NPS completed the thorough revision of its regulations proposed in March 1982. The preamble explained that a "major effect of this rulemaking is the elimination of the management categories…Pursuant to this statutory mandate, activities and uses in derogation of park values and purposes can be allowed only under a park's enabling legislation or other express statutory authorization."

The regulations for wildlife protection were brought into conformity with this standard and the regulations have remained substantially unchanged since 1983. Under the 1983 revision of the rules, the NPS may allow the taking of wildlife only in those areas of the system where specifically and directly provided for by Congress.

NPS regulations specifically address wildlife take in several sections. The basic provision prohibits "possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:…[l]iving or dead wildlife or fish, or the parts or products thereof, such as antlers or nests" except as otherwise provided. 36 CFR 2.1(a)(1). Subsection 2.2(a) repeats the prohibition of the "taking of wildlife, except by authorized hunting or trapping activities conducted in accordance with paragraph (b) of this section."

Subsection 2.2(b)(1) and (3) allows hunting and trapping in park areas only "where such activity is specifically mandated by Federal statutory law." Under subsection 2.2(b)(2), the Secretary may also permit hunting (but not trapping!) "in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law."

NPS regulations at 36 CFR 2.2(a) prohibit the take of wildlife except by "authorized hunting or trapping." NPS rules define "take" as "to pursue, hunt, harass, harm, shoot, trap, net, capture, collect, kill, wound, or attempt to do any of the above." Subsection 2.2(b) establishes that "authorized hunting or trapping" may occur only in parks where "specifically authorized" or "mandated by Federal statutory law." Hunting or trapping are not authorized within Wupatki. Thus the NPS cannot permit the taking of golden eagles within the monument. The Department does not dispute this. The proposed rule of January 22, 2001 recognizes that allowing the take of golden eagles from Wupatki violates Sections 2.2.

Subsection 2.1(d) also directly addresses the issue raised by the Hopi request, providing that Section 2.1 "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]." This provision was added in response to public comments that sought to exempt Indian ceremonial or religious activity from the prohibition on "take." The preamble to the final rule explained that the prohibitions found at section 2.1 (and 2.2 (wildlife protection) and 2.3 (fishing) were "…intended to cover activities undertaken by Native Americans." The preamble continued:

> The Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations. The NPS 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 regulation from authorizing the consumptive use of park resources." (emphasis added)

In explaining the new paragraph (d), the preamble repeated why AIRFA does not provide the specific statutory authorization to satisfy the test of 2.1(d) and, this time, added the following sentence: "This statute (AIRFA) does not create additional rights or change existing authorities."

Recognizing that the present regulations close the door on the Hopi request to take eagles, the Department proposes a special regulation to circumvent Sections 2.1 and 2.2. In 1983, the Department found that Native American take of park wildlife, among other things, violated the law as well as 2.1 and 2.2. A special regulation cannot evade the law. NPS thinking on this matter has not changed since 1983 or since Director Mather's early Annual Reports of nearly a century ago.

In a June 17, 1999 letter to the Hopi, NPS Regional Director John Cook stated:

> While we wish to, and do, accommodate the practice of religious activities by the Hopi, we can only do so within the context of the laws and regulations governing units of the national park system. Congress has specifically directed the National Park Service to conserve the wildlife in those areas. We also must be cognizant of our responsibility to manage them in such a way as to "leave them unimpaired for the enjoyment of future generations."

On July 26, 1999, the Acting Director of the NPS wrote to the Hopi Tribe that, "…with respect to the collection of live eaglets and hawks, the National Park Service is constrained to act within a well-established legal framework." The letter continued "[I]n the course of reviewing the National Park Service's statutory authority, courts repeatedly have stressed that "the paramount objective of the park system with respect to its indigenous wildlife…was, from the beginning, one of protectionism." After citing the legal and regulatory history, the July 29, 1999 memo states "Because hunting and trapping are not authorized within Wupatki National Monument, the National Park Service may not permit the taking of wildlife –even the taking of wildlife for Indian religious purposes - within the national monument."

On September 12, 1999, Assistant Secretary of the Interior Donald Barry withdrew the Director's denial to the Hopi. He did not explain his view of the laws governing the national park system. Barry's action led to the rule proposed on January 22, 2001.

In staff meetings in his office in September 1999, Mr. Barry argued that NPS regulations themselves provide another exception to the prohibition at 2.1(a). Under 36 CFR 2.1(c), a park superintendent may designate certain "fruits, berries and nuts" that persons may gather "by hand for personal use or consumption." If, Mr. Barry argued, the Secretary possessed such discretion, then he must possess the discretion to authorize the Hopi (and other Tribes) to take of wildlife. For this reason, the proposed special rule for Wupatki cites subsection 2.1(c). The proposed rule, without saying as much, implies that subsection 2.1(c) demonstrates the Secretary's discretion to allow the take of park wildlife, including the taking of an eaglet from the only golden eagle nest in Wupatki.

A regulation that allows the taking of the eagle, apparently, is as consistent with the Organic Act as allowing hikers to eat some blueberries as they move along a trail in Denali.

V. Judicial Guidance

The 1983 regulations prohibiting the take of wildlife in all units of the National Park System except by authorized hunting or trapping as provided for in a specific statute were promptly challenged by the National Rifle Association (NRA). In defending the regulations, the NPS argued that the Organic Act gave the Secretary no discretion to allow the hunting or trapping of wildlife, and, even if it did, the Secretary had the discretion to prohibit all take of wildlife, as it did in 36 CFR 2.2. In upholding the NPS, the district court in National Rifle Association v. Potter, 628 F. Supp. 903 (D.D.C. 1986) decided that the NPS' rigid interpretation of the Organic Act and subsequent enactments was well within the meaning of the law.

The district court found that the firmly asserted position of the NPS that it could not authorize the take of wildlife from parks without specific authority in law was well grounded. The district court noted the development of the "management categories" and the 1966 regulations under which the NPS "began to allow hunting, trapping and fishing on its own initiative if otherwise in accordance with federal, state and local laws." The district court pointed out how the General Authorities Act of 1979 and the Redwood Amendments of 1978 caused the Park Service to review its actions. "Perceiving in these amendments an implied reproof for having strayed from the true purpose of the Organic Act (and, specifically, for its "management categories" system), NPS concluded that Congress conceived of the park system as an integrated whole, wherein the Park Service was to permit hunting or trapping only where it had been specifically authorized, or discretion given it to do so, by Congress in the applicable enabling act."

The NRA contended that the 1966 regulations appropriately allowed NPS discretion to permit hunting or trapping except where Congress expressly forbids it. The NRA accurately pointed out that Congress does not expressly forbid the take of wildlife in the Organic Act or in many of the enabling acts that created areas of the national park system, among them many national parks and national monuments. In such areas of the system, the NRA asserted that properly regulated hunting or trapping is quite consistent with the Organic Act requirement that the NPS "conserve wildlife." In the absence of a direct prohibition, the NRA argued that the Organic Act authorizes "the Secretary to

Exercise his own good judgment in the matter."

To the NRA assertions, the district court recounts, the NPS responded "that conservation of wildlife (in the Organic Act) means just that: safeguarding from harm, whether from natural or human causes." The district court deferred to the NPS. Continuing further, the court stated that the NRA's interpretation of the Secretary's authority under the Organic Act is also "inconsistent with that principle of statutory interpretation known as *expressio unius est exclusio alterius*, i.e., that omissions from enumerated specifics are generally presumed to be deliberate exclusions from the general unless otherwise noted."

The district court pointed out that "[H]ad Congress intended section one of the Organic Act to allow the Secretary discretion to permit hunting and trapping…it would hardly have been necessary to grant him specific authority elsewhere to destroy (park wildlife)."

Turning to legislative history to further illuminate the intent of the Organic Act, the district court found that "...the legislative history of the Organic Act…leads[s] to the conclusion that Congress did not contemplate any so-called "consumptive" uses of the new park system it was creating. Lastly, the court found that the NPS' early history supported these conclusions.

The NPS now changes its construction of the legal mandates governing the parks and claims a degree of discretion it renounced in NRA v. Potter. It is no surprise that the proposed rule gives no mention to this, and related, decisions. A discussion of the NRA case in the proposed special rule would remind us of the complete reversal the NPS now proposes.

Unable to find firm ground that supports NPS discretion to allow the take of park wildlife, the proposed rule compares allowing the take of golden eagles in Wupatki to the existing regulations at 36 CFR 2.5. Section 2.5 authorizes the NPS to issue permits allowing the taking of wildlife, among other things, for research. But such permits may be issued only if taking the wildlife "has the potential for conserving and perpetuating the species subject to collection." (36 CFR 2.5(e), emphasis added). The NPS issues permits that authorize the take of wildlife for research because such take is directly related to the Organic Act

mission to "conserve" that wildlife. Section 2.5 reinforces, not undermines, the principle in NRA v. Potter that the NPS mission is to conserve wildlife and not to allow its take except in service to that mission. Allowing the religious or ceremonial take of wildlife from parks does not serve the "conservation" mission of the NPS.

VI. Congressional Practice

Although the general ban on the take of park wildlife has existed since the creation of the National Park Service, Congress has established a number of park-specific exceptions to it. Hunting was allowed in Mount McKinley National Park for a time by miners and prospectors "for their actual necessities when short of food." 39 Stat. 938 (1917). Congress repealed this provision in 1928. 16 U.S.C. 352. Congress authorized the take of wildlife by hunting and/or trapping in over fifty areas of the national park system.

Congress knows how to provide for Native Hawaiian or Indian Tribal take of park resources. Congress has authorized the following:

- Bandelier National Monument – "The Secretary of the Interior shall allow enrolled members of the Pueblo of San Ildefonso and the Pueblo of Santa Clara to collect plants, including the parts or products thereof, and mineral resources within the Bandelier National Monument for traditional and cultural purposes." P.L. 106-246 - Section 2101, Military Construction Appropriations Act for FY 2001; July 13, 2000.

- Big Cypress National Preserve - Members of the Miccosukee and Seminole Tribes "shall be permitted…to continue their usual and customary use of Federal...lands and waters within the preserve, including hunting, fishing, and trapping on a subsistence basis…" 16 U.S.C. 698j.
- Death Valley National Park – "The areas described in this subsection shall be the nonexclusive special use areas…(in which) the Secretary shall permit the (Timbisha Shoshone) Tribe's continued use of Park resources for traditional tribal purposes, practices, and activities." "[A]ny use of Park resources by the Tribe for traditional purposes, practices and activities shall not include the taking of wildlife." P.L. 106-423; November 1, 2000.
- El Malpais National Monument – "the Secretary shall assure nonexclusive access to the…monument by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts." 16 U.S.C. 460uu-47.
- Grand Canyon National Park – "The Secretary…shall permit the (Havasupai) tribe to use lands within the Grand Canyon National Park which are designated as "Havasupai Use Lands" on the Grand Canyon National Park boundary map described in section 3 of this Act…for grazing and other traditional purposes." 16 U.S.C. 228i(e).
- Kaloko-Honokohau National Historical Park – "…subsistence fishing and shoreline food gathering activities…shall be permitted…" under certain circumstances, presumably by Native Hawaiians. 16 U.S.C. 396d(d)(3).
- Organ Pipe Cactus National Monument – "the administration of the monument shall be subject to: "(1) Right of the Indians of the Papago Reservation to pick the fruits of the organ pipe cactus and other cacti, under such regulations as may be prescribed…" Proclamation 2232, April 13, 1937.

- Pipestone National Monument - "The quarrying of the red pipestone in the lands described in section (a) of this section is expressly reserved to Indians of all tribes, under regulations to be prescribed by the Secretary of the Interior." 16 U.S.C. 45(c).

This list does not include parks in Alaska open to subsistence by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). 16 U.S.C. 3111 *et seq*. ANILCA subsistence is open to rural residents of Alaska and is not based upon affiliation with an Indian, Aleut or Eskimo group. Nor does this list contain several national park system areas containing tribal trust lands. Among these are Canyon DeChelly, Lake Mead and Badlands. The nature of the lands as tribal trust and, in some cases, the laws for these units, explicitly protect some or all rights, including hunting, by the particular tribe for whom the lands are held in trust.

If the Organic Act of 1916 gave to the NPS a broad authority to allow the taking of park wildlife or other natural resources by Native Americans each of the above laws would be superfluous language that needlessly clutters the U.S. Code. But that approach violates a cardinal rule of statutory interpretation. Every time Congress allows a Native American (or, for that matter, any American) to take plants, minerals or animals from parks, it creates and reinforces the compelling case that such taking requires authorization in law.

Just as the Department proposes a special rule to open Wupatki, and potentially many other parks and monuments, to Indian ceremonial or religious "take" of wildlife, Congress gave fresh evidence that the Department lacks the broad latitude to do so. That evidence arrived in P.L. 106-455 (November 7, 2000), called the Glacier Bay National Park Resource Management Act.

In 1999 Alaska Senator Frank Murkowski introduced S. 501, the predecessor of P.L. 106-455, called the Glacier Bay Fisheries Act. The bill had implications well beyond fish. In addition to subsistence fishing, the bill proposed to allow gathering sea gull eggs in Glacier Bay National Park. The Department opposed the Murkowski bill. Assistant Secretary of the Interior for Fish and Wildlife and Parks Donald Barry testified before Murkowski's committee on April 15, 1999. The Department opposed opening Glacier Bay National Park to subsistence fishing because, in Alaska, "subsistence" privileges are available to ALL local rural Alaskans in the vicinity of the Park, and not just Native Americans. The Department supported the provision to allow local Tlingit Indians of Hoonah Village to take sea gull eggs from the Park under certain conditions. Like the taking of eagles, the gathering of sea gull eggs in Glacier Bay is an integral part of the spiritual existence of the Tlingit people, particularly the Chookaneidi Clan of the Eagle Tribe.

Congress, in the final bill, did not open Glacier Bay National Park to subsistence fishing or Tlingit egg gathering. Instead, Congress directed the Secretary to study the sea gulls in the park and "assess whether sea gull eggs can be collected on a limited basis without impairing…the sea gull population." After such a study is

complete, Congress required the Secretary to submit the results and his recommendations to Congress. Then, Congress will consider whether to enact law to allow the Tlingit to take sea gull eggs.

If the premise of the proposed Wupatki special rule were sound or correct, the Secretary may also allow the Tlingit to take sea gull eggs by simply adopting another special regulation, in particular, for Glacier Bay. There would be no greater need for Congress to enact a law at Glacier Bay than there is for Wupatki. Perhaps, the Department believes that the golden eagles of Wupatki are, somehow, less protected under the Organic Act, than the sea gull eggs of Glacier Bay.

VII. Freedom of Religion

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"

The preamble for proposed special rule for Wupatki is the most bewildering and perilous when it attempts to discuss the First Amendment, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, and the Executive Order on Sacred Sites.

A. The American Indian Religious Freedom Act.

The American Indian Religious Freedom Act, enacted in 1978, declares "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites." 42 U.S.C.1996. The purpose of the law was "...to insure that policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no law abridging the free exercise of religion."

AIRFA does not create any right of action or rights greater than other Americans enjoy under the First Amendment.

The proposed Wupatki special rule ignores the NPS' well-considered delineation of AIRFA's effect on NPS rules at 36 CFR 2.1 and 2.2, as if the words from the 1983 general rulemaking were never written, or as if Congress has since amended AIRFA to supersede them. The NPS did not arrive at its 1983 conclusion so lightly that the Department can dismiss it now. The preamble for the special rule omits mention of the 1978 AIRFA

guidance to the NPS Director from the Associate Solicitor for Conservation and Wildlife and the 1979 AIRFA Compliance Report of the NPS Director.

On September 21, 1978, five weeks after AIRFA's enactment, Associate Interior Department Solicitor for Conservation and Wildlife James Webb advised the NPS Director that, in evaluating any conflict between Indian religious practices and the Service's policies/regulations, NPS must be guided by the injunction that "(t)he authorization of activities, and the administration of these areas shall be conducted in light of the high public value and integrity of the National Park System...". This provision of the Act of March 27, 1978 (the Redwood Amendments), he continued "...elevates the decisionmaking and management standards of the National Park Service in favor of greater protection for park resources and values."

Associate Solicitor Webb advised that, "In this context, this special provision (the Redwood Amendments) reiterates an overriding governmental interest in the protection of park resources, and values and reinforces the limitations on the Secretary's discretion and flexibility in making those administrative changes to accommodate religious activities that would have adverse effect on park resources and values. As a consequence, the National Park Service should, more so than other agencies, seek express congressional guidance and specific legislative solutions on identified conflicts." (emphasis added). Clearly, the highest legal advisor to the NPS in the Department of the Interior did not believe that AIRFA suspended laws or regulations protecting park resources. The Department cannot now ignore the contemporaneous agency interpretation of AIRFA by one of its highest legal officials.

On April 2, 1979, NPS Director William Whalen submitted to the Secretary of the Interior an internal review of NPS compliance with the requirements of AIRFA, dated March 23, 1979. The review recommended that the Department "seek legislation to provide a blanket amendment to all National Park System statutes to give the Secretary of the Interior discretionary authority, providing it will not compromise the basic values for which an area was established nor significantly alter established strategies for resource management - to allow, under special circumstances…the taking of surplus animals and plants except endangered or threatened species. Such taking would be judged on a case by case basis and would be, so far as management could determine for bona fide endeavors." (emphasis in original). The NPS did not believe that AIRFA, at the time of its enactment, modified existing NPS regulations that protect park wildlife (or plants). Nor did the NPS believe that it possessed sufficient authority, absent direction from Congress, to permit the take of park wildlife. Even had Congress enacted legislation described

above, it would not encompass golden eagles, which can hardly be classified as "surplus animals."

The special rule for Wupatki takes one additional step and proposes to cite AIRFA as one of the very authorities, along with the Organic Act of 1916, that supports the take of park wildlife. This is a first in the annals of the Federal Government. No Federal agency with resource management responsibility has ever found in AIRFA an authority that modified their basic laws. Now, the NPS, whose discretion is more circumscribed by law than most, raises AIRFA to the level of the Organic Act for all of 36 CFR Part 7. Part 7 contains special rules for 100 of the nearly 400 areas of the national park system.

The preamble to the proposed rule cites for support Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); a case in which the religious claims of the Hopi Tribe, under AIRFA, were completely defeated. In Wilson, the Hopi Tribe sued to halt the Forest Service from authorizing the expansion of a ski area on Federal land within the Coconino National Forest, Arizona. The lands subject to the expansion are in the San Francisco Peaks and they are sacred to the Hopi and several other Tribes. The Hopi asserted that this use of Federal lands would deprive them of the privacy they need to conduct religious rites and consequently infringe on their rights of free exercise of religion, confirmed in AIRFA. The court rejected that claim and refused to protect the Hopi religion from the unintended infringement caused by the Forest Service authorization to expand the ski area.

The court decision in Wilson is exceptionally hostile to the Hopi claim, going so far as to assert that the Forest Service would have violated the First Amendment's establishment clause, if the Forest Service refused to allow the expansion, solely on the grounds of protecting Hopi religious practice. Though the Hopi appealed the case to the Supreme Court, cert. was denied. The circuit court find that the Forest Service fulfilled the mandate of AIRFA by meeting with the Tribe to consider how the ski area expansion might affect the Hopi's religious practice and means to ameliorate any negative effects.

The preamble to the proposed rule also cites Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439(1988), as the "leading judicial guidance" on Indian religion and Federal non-Indian lands. Lyng, though a complete and utter defeat of the Indian religionists' claim, provides an unsuitable basis upon which to scrutinize NPS prohibition on the take of park wildlife under the Organic Act and NPS regulations.

Lyng is the pinnacle of a large class of similar Indian religion decisions. But, the decisions differ crucially from claims that a Federal law or regulation, for example 36 CFR 2.1, may unconstitutionally prohibit or

penalize Indian religious conduct. The Lyng type of Indian religion decisions concern Federal agency land management decisions, not Federal agency prohibitions or penalties, and whether such decisions may violate Indian free exercise of religion. Lyng, specifically, concerned the construction of a road by the Forest Service in the Six Rivers National Forest in Northern California. The Indians asserted, and the Court recognized, that the road construction would interfere significantly with Indians' religious practice

Justice O'Connor, writing for the Lyng majority, opined that even if the public program (in this case, road construction) "would virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondent's (Indians') legal claim (of violation of free exercise rights). However much we might wish that it were otherwise, government simp1y could not operate if it were required to satisfy every citizen's religious needs or desires." Justice O'Connor continued: "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."

The words in Lyng that the proposed Wupatki special rule finds more comforting are that "…the Government's rights to the use of its own land…need not and should not discourage it from accommodating [Indian] religious practices." We agree. Still, the preamble for the proposed rule cites this language as if it were the central conclusion of Lyng. In reality this admonition to the Federal agency was a bit of a salve the Supreme Court administered to a thoroughly defeated plaintiff. The admonition in Lyng does not direct the NPS to accommodate Indian religious practices that violate the Organic Act and NPS regulations. In short, neither AIRFA, nor the Supreme Court's application of it in Lyng, gives the NPS discretion to accommodate the Hopi request at Wupatki where such discretion does not otherwise exist.

The Supreme Court has made clear that the Free Exercise Clause "...affords an individual protection from certain forms of governmental compulsion." Such compulsion may involve forcing an individual to act contrary to their religious beliefs, or forcing an individual, under direct or indirect threat of sanctions to refrain from religiously motivated conduct. In the end, Lyng found no government compulsion involved in the road project. Not so for the NPS laws and regulations that prohibit the take of park wildlife. NPS laws and regulations clearly prohibit and penalize the Hopi, or members of other Indian Tribes, from engaging in religious conduct. Thus, we must turn to a very different test and a wholly different set of cases for guidance.

B. The Free Exercise Clause and the Religious Freedom Restoration Act.

Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993. The proposed Wupatki special rule is unusual in both its breadth and novelty. The proposed rule essentially looks to RFRA to undermine the protection afforded golden eagles in Wupatki by existing NPS regulations at 36 CFR 2.1 and 2.2. The Department actually proposes RFRA as one of the authorities for 36 CFR Part 7 where the NPS houses special rules for all of its parks, alongside AIRFA and the Organic Act of 1916.

By its use of RFRA, the preamble for the Wupatki special rule puts at risk the viability of the Organic Act protections for wildlife throughout the system. Any sincere religious claim, whether by the Hopi at Wupatki or evangelical snake-handlers in the Great Smoky Mountains may find support in the proposed special rule. RFRA is not an "Only Indians Need Apply" law! Using RFRA is like using a constitutional H-bomb to kill, well, an eagle.

The proposed rule speculates that the 36 CFR 2.1 and 2.2 prohibitions on taking park wildlife may not meet the RFRA test because of the burden imposed on Hopi religious practices. If that were true, then NPS regulations that protect wildlife may not meet the RFRA test when they burden the religious practices of others--Indian or non-Indian alike. Indeed, if the Department's concern for RFRA is correct, the Department could (and should) repeal 36 CFR 2.1(d) in its entirety and replace it with a regulation that allows the take of any natural resource in a park by any party who can show impermissible burden under RFRA. The use of RFRA to support the special rule threatens 36 CFR 2.1 and 2.2 protection of wildlife in all parks where a Tribe can state that the taking of animals is part of their religious practice.

The preamble makes a weak attempt to distinguish the facts at Wupatki from other places, perhaps to limit the applicability of RFRA in other parks. The rule questions the effect on RFRA of NPS prohibitions at 36 CFR 2.1 and 2.2 because of the "Hopi religion's necessity of taking a golden eagle from a specific location of historical and religious importance…Wupatki National Monument." Taking an eagle in Wupatki may well be essential to the Hopi religion. But, other Indian Tribes hold areas of the national park system equally central to their religious practice. Not only are many national parks within the ancestral home of one or more tribes, those tribes can sincerely claim that specific locations within a park are central to their religious practices or rituals. Any NPS ethnographer can confirm that. In short, once the Department subjects 36 CFR 2.1 or 2.2 to RFRA at Wupatki, RFRA will be applied to the restrictions that protect wildlife elsewhere. RFRA can also be raised to question if the NPS (and other Federal agency) restrictions on operating a motor vehicle in wilderness burdens Indian religious practices if the restrictions prevent access to sacred sites in wilderness.

The Department cannot attribute the relative novelty of RFRA principles to explain why these principles are cited in NPS rules for the first time only on January 22, 2001. Assertions that NPS wildlife rules unconstitutionally burden

religious practice have been made long before the Hopi arrived at Wupatki's door in May 1999 seeking eagles and hawks and sparking the proposed special rule.

RFRA is a young law, but RFRA upholds principles much older than the preamble pretends. In RFRA, Congress, with partial success, simply reimposed 1963 and 1972 Supreme Court tests as the yardstick by which to judge the constitutionality of generally applicable and neutral laws that incidentally burden religious conduct. The test is that such laws must:

- serve a compelling governmental interest, and
- be the least restrictive means of furthering that interest.

The Supreme Court has long recognized that the free exercise clause of the First Amendment does not exempt religious practitioners from legitimate governmental regulation. In Braunfield v. Brown 366 U.S. 599 (1961) the Court prescribed a balancing test that weighs governmental regulation against free exercise of religion. The Court said "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

In Sherbert v. Verner, 374 U.S. 398(1963) the Supreme Court further illuminated the Braunfield standard and developed a two part test to determine if governmental regulation may violate "free exercise." First a court finds that the purpose or effect of a regulation infringes upon religious exercise, whether by coercion or by impeding practice. Second, the court determines whether a "compelling governmental interest" outweighs the "infringement." In RFRA Congress explicitly reinstated this test.

Sherbert was the applicable rule when the NPS adopted its present regulations at 36 CFR Part 2, or the predecessor rules in 1966. The Organic Act, and the NPS interpretation of the Act, that support the prohibition on take in 36 CFR 2.1(a) and (d), met the Sherbert test then, and meet the Sherbert test now. Fortunately, the preamble for the proposed rule concedes that the NPS possesses a "compelling government interest" in protecting park wildlife from take. However, the preamble then speculates, but does not answer, whether the prohibition on the take of wildlife at 36 CFR 2.1 and 2.2 meets the "least restrictive means" test.

RFRA lies at an intersection where Congress and the Supreme Court collide over which branch of the Federal Government applies the standard that governs the constitutionality of neutral laws that incidentally burden religious practice. In 1990, the Supreme Court limited the 1963 Sherbert "compelling governmental interest" standard by which to judge the constitutionality of general laws that incidentally burden religious conduct. The Court found that Sherbert applies only to certain limited cases.

The Supreme Court decision in Employment Division v. Smith (1990) found the "compelling governmental interest test" does not apply to neutral laws of general applicability that incidentally interfere with religious practice. Under Smith, a law need not serve a "compelling governmental interest" to be found constitutional. Such a law must merely serve a valid state purpose. The Court stated, "…if prohibiting the exercise of religion is not the object…but merely the incidental effect of a generally applicable and otherwise valid provision (of law), the First Amendment has not been offended." In contrast to the more demanding "compelling governmental interest test," the Court continued that "[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." The Court continued "The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" United States v. Lee, 455 U.S. 252, 263, n.3 (1982)."

The 1990 Smith decision caused such a furor that Congress itself overturned the lower threshold in Smith and stated that the "compelling governmental interest" test from Sherbert will again apply to neutral laws that indirectly burden religious conduct. Congress reinstated Sherbert by enacting RFRA.

In June 1997, the Court decided its first case (City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997)) brought under RFRA, and used the occasion both to reaffirm the Smith standard and strike down RFRA as unconstitutional. Thus Smith now stands as the standard for judging the constitutionality of a general state law that incidentally burdens religious practice. In April 1998, the Eighth Circuit Court of Appeals held that RFRA still applied to Federal laws.

In the tug-of-war between Congress and Court, it is the Supreme Court that may ultimately decide whether the Smith or Sherbert is the applicable test. Either way, NPS rules that prohibit the taking of animals and other natural resources pass muster. The NPS regulations at 36 CFR 2.1 and 2.2 prohibit hunting and removing natural resources from national park system areas. The regulations prevent the Hopi, under threat of sanctions, from engaging in what is religious conduct. No one disputes that the NPS general regulatory prohibition on taking of wildlife burdens a religious observance. However, such a burden does not render the NPS regulations improper. In any case, the Hopi or other religious practitioners are free to lodge a RFRA complaint to the Organic Act and its wildlife protective rules at any time.

The Organic Act and its regulations serve a compelling government interest in the conservation of wildlife in strict park sanctuaries. The prohibition on taking park wildlife is the least restrictive means to further that interest. There is no less restrictive means of conserving park wildlife in a sanctuary than to prohibit the killing, capture or removal of park animals.

The preamble then questions if the NPS prohibition on taking park wildlife imposes a "substantial burden on (the Hopi) religion," as if the level of burden were a test over and above RFRA's test. Under Sherbert, a burden on religious conduct imposed by neutral and generally applicable laws is constitutional even if the burden was "substantial." Sherbert and, thus RFRA, apply precisely because a law substantially burdens religious practice. RFRA requires any law that substantially burdens religion must, to be constitutional, result from a law that serves a compelling government interest and is the least restrictive means of furthering that interest. If the law meets those two tests, a substantial burden is permissible.

The preamble, after its scattered discussion, leaves RFRA behind. The Department does not defend the 36 CFR 2.1 and 2.2 prohibitions that protect park wildlife. Instead, the Department satisfies RFRA by deciding that the NPS should "accommodate the Hopi Tribe's religious ceremonial collection of golden eaglets at Wupatki National Monument."

C. Accommodation and Special Treatment

The free exercise clause and the establishment clause of the First Amendment are, at times, a difficult fit. The two clauses of this proscription inevitably overlap, and the Supreme Court is occasionally faced with drawing a perplexing boundary between the two clauses. If, for example, the government protects the right of free exercise too vigorously, that protection may well violate the establishment clause. The proposed rule for Wupatki does not appear to raise establishment clause questions.

In some cases where the courts must draw a fine line, the Supreme Court developed the principle of "accommodation." While governmental actions that accommodate religious practice are very often subject to establishment clause scrutiny, the Court has found that the government may constitutionally "accommodate" religious observance through laws that alleviate special burdens on a religion.

Congress has enacted laws that specifically accommodate Indian religious practices. For example the Bald Eagle Protection Act permits the Secretary of the Interior to allow the otherwise prohibited possession of eagles or their parts for the "religious purposes of Indian tribes." 16 U.S.C. 668(a). The American Indian Religious Freedom Act Amendments of 1994 prohibit Federal or State law from interfering with Indian use of peyote for traditional ceremonial purposes. 42 U.S.C. 1996.

The preamble properly cites these congressional accommodations of Indian religious practice. The First Circuit Court of Appeals rejected a claim by a non-Indian that permits for Indian tribes violated the establishment clause of the First Amendment (Rupert v. U.S. Fish and Wildlife Service, 957 F. 2nd 32 1st Cir.

(1991)). The Court found that the Bald Eagle Act exception for Indian tribes was rationally related to the Government's "unique obligation toward the Indians."

The preamble raises the Supreme Court decision in Morton v. Mancari, 417 U.S. 535 (1974) as an example of special treatment for Indian Tribes. Morton does uphold such treatment but not in the context of religion or accommodation. At issue was the Indian hiring preference for employment at the Bureau of Indian Affairs. Similar statutory preferences for Indians have existed since 1934.

Each of the instances cited by the preamble demonstrate that Congress may enact laws that accommodate Indian religious practice or laws that single out Indians for special treatment of religion or other aspects of their life. Congress has not enacted a law to suspend the Organic Act or its rules that protect wildlife in the national park system or Wupatki. If Congress had done so, there would be nothing to debate. In the absence of congressional action, according special treatment or accommodation, as this rule proposes, undermines existing law and raises serious Equal Protection concerns; concerns that only a rational and specific decision by Congress could deflect.

The NPS recognizes this. In a June 17, 1999 letter to the Hopi, NPS Regional Director John Cook stated:

> While we wish to, and do, accommodate the practice of religious activities by the Hopi, we can only do so within the context of the laws and regulations governing units of the national park system. Congress has specifically directed the National Park Service to conserve the wildlife in those areas. We also must be cognizant of our responsibility to manage them in such a way as to "leave them unimpaired for the enjoyment of future generations."

The important principle of accommodation of religion, and the longstanding practice of according special treatment to Indians provide no basis for an agency action that proposes to reverse the NPS' equally longstanding interpretation of the Organic Act. Accommodation and special treatment must operate within the confines of the law.

D. The Executive Order on Sacred Sites

The proposed rule cites as its authority three Executive Orders (EO). They are:

- EO 13007 on Indian Sacred Sites. 61 FR 26771 (1996);
- EO 13084 on Consultation and Coordination with Indian Tribal Governments. 63 FR 27655 (1998); and
- EO 13175 on Consultation and Coordination with Indian Tribal Governments. X FR X (2000).

None of these Orders provide legal authority to override existing laws that govern the management of the national park system, as the proposed rule purports. The Orders do not modify the Organic Act or the regulations that implement it. The preamble acknowledges that "[W]hile the Order (on Indian Sacred Sites) does not reach directly to the collection of plants or wildlife on federal lands for Indian religious purposes, it is suggestive of accommodation where possible." (emphasis added).

We know that the power of suggestion is reputed to be strong but is suggestion powerful enough to modify an 85-year-old law? Is suggestion so strong that the EO rises to the level of an authority governing the national park system alongside the Organic Act? Although the arguments in the preamble seem to verge on the surreal, the poor author of this proposed rule is only struggling valiantly to find an authority.

The 1996 Executive Order on Indian Sacred Sites requires that Federal agencies accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites. The plain text of the Order does not indicate any intent to include wildlife as a "sacred site." The Order defines a "sacred site" as "a specific, discrete, narrowly delineated location of Federal land" identified by tribal interests as "sacred by virtue of its established religious significance to, or ceremonial use by an Indian religion." The location of the nest from which an eagle may be taken in Wupatki ostensibly qualifies as a "sacred site," but the eagle is not a "sacred site." The EO on Indian Sacred Sites does not authorize the taking of wildlife from parks, or the revision of the NPS regulations that protect wildlife from such take.

VIII. The Impairment Test

The rule requires that the NPS issue a permit to the Hopi to take eagles from Wupatki under "under terms and conditions sufficient to prevent impairment to park resources."

The preamble does not discuss "impairment." The preamble wisely avoids the subject.

The rule proposes that the Secretary has the discretion and authority to permit the take of wildlife from a park where Congress has not specifically provided for it. The Organic Act requires that the Secretary conserve park wildlife and provide for the enjoyment of wildlife by means that will leave it "unimpaired." Law, history, judicial guidance and congressional practice show that the Secretary lacks

discretion to permit some take of park wildlife, absent authority in law, upon finding "nonimpairment." The proposed rule relies on the premise that the take of wildlife, for purposes other than NPS administration, does not, of necessity, constitute impairment of park resources. The Secretary, thus, has the power to allow some level of wildlife take as long a take does not cross the threshold of "impairment." This new interpretation is a radical departure from the standard that has governed the parks for so long that it is gospel to the NPS and society at large.

The impairment test does not apply to the take of park wildlife. Any take of park wildlife must serve the Organic Act mission of conservation or protection from detriment, or be otherwise specifically authorized in law. Allowing any take, outside of that arena violates the Organic Act. The proposed rule includes the "impairment" standard from the Organic Act, only to create an illusion that the take of eagles can somehow be made consistent with that act.

Accepting, for argument's sake, that the proposed rule employs the "impairment" test properly, the test does not work. As the proposed rule reads, the Superintendent of Wupatki National Monument has no discretion to find impairment from a particular proposal to take an eagle. The proposed rule directs that the park official "shall grant a permit to the Hopi Tribe." The sole discretion possessed by the NPS is to prescribe in the permit mandated by regulation "terms and conditions sufficient to prevent impairment to park resources."

The proposed rule does not say it but presumes that the NPS Superintendent can never find that the act of taking an individual eagle from Wupatki, itself, impairs park resources. The proposed rule seems to say that the NPS Superintendent is only able to impose terms and conditions to ensure that the Hopi do not impair other resources in the process of taking the eagle.

This rule is an exercise in circular logic. The eaglet and the nesting eagles are a protected park resource in Wupatki. Taking the eaglet automatically impairs park resources. This point is even more compelling when we know that there usually exists only one eaglet within the entire 32,000-acre park, and even then not every year. Under the impairment test, inappropriate as it is with regard to the take of wildlife, impairment is the inevitable outcome of the proposed rule.

The golden eagle nest sites at Wupatki have been protected since 1937 when the President added the area with the nest sites to the monument. Proclamation 2243; 50 Stat. 1841 (July 9,1937). The proclamation enjoined all unauthorized persons from removing any feature from the monument. Presumably, the Hopi have obeyed the law and refrained from disturbing the nesting golden eagles in Wupatki.

Scientific studies show that golden eagle pairs tend to change location of breeding activity the year after people have entered a nest to band the eaglets,

whereas pairs whose young were not banded did not. This suggests a disruptive influence of entering nests inducing adults to choose alternate nests the following year. Further study is required to determine if productivity of active pairs that moved after nest entry by humans is lower. Biologists strongly suspect that it is. These results if applicable to behavior of golden eagle pairs resident in Wupatki indicate pairs will relocate each year following take of their young, possibly outside of Wupatki. Repeated lack of success (fledging of young) may induce breeding pairs to vacate unproductive breeding areas in Wupatki altogether. This would clearly impair the golden eagle resource of Wupatki National Monument.

IX. Federalism

The proposed rule states:

> In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation will not have a substantial direct effect on the states, or the distribution of power and responsibilities among the various levels of government. The rule addresses only the collection of eaglets from Wupatki National Monument, a unit of the national park system, and such activity does not require state activity.

66 FR 6520.

The proposed rule overlooks two very important principles of law. First, outside of "Indian Country" the states have general criminal jurisdiction over all persons, Indian Tribal members included. Wupatki may be within the ancestral home of the Hopi but it is not in "Indian Country."

The states exercise criminal jurisdiction in all areas of the national park system except where a park pre-dates statehood (e.g. Yellowstone National Park) or where a state ceded its entire jurisdiction to the United States (e.g. Isle Royale National Park, Michigan). Except for areas of exclusive Federal jurisdiction, the laws of the states, including the wildlife laws, govern conduct by members of the public within a national park, unless pre-empted by Federal law or in conflict with it.

Second, in the absence of treaty rights, Indians, outside of Indian Country, are as subject to state fish and game laws as anyone else. The Department may adopt regulations that allow Indian religious, ceremonial or traditional take of park wildlife. However, in those parks where the states retain their criminal jurisdiction, state laws regarding license or permit requirements, methods and means, bag limits and seasons will continue to apply to Indians engaged in taking wildlife.

The Bald Eagle Act permit that the Hopi possess to take eagles in northwest Arizona requires that the "permit is also conditioned upon strict observance of all applicable…state…law." The proposed rule states that the Hopi taking of eagles in Wupatki is an "activity [that] does not require state activity." The Department appears not to have read the very instrument by which the U.S. Fish and Wildlife Service allows the Hopi to take eagles.

The proposed rule does not acknowledge the applicability of state laws to Indian take of wildlife outside of reservations and where a treaty right doe not exist. Does the Department assert Federal preemption of state law? Preemption may be appropriate for the Indian religious take of wildlife in Wupatki and throughout the nation. The proposed rule must identify the source of its preemptory authority. Usually preemption arises when a Federal statute either explicitly preempts state laws or occupies the entire regulatory field.

The Department's unarticulated premise appears to rest on a belief that AIRFA, and rules governing wildlife adopted pursuant to it, preempt state wildlife laws. Perplexingly, the proposed rule does not directly address this significant question.

In practical terms, this proposed rule and the special rules for other parks that the Wupatki rule openly invites, could open to the take of wildlife dozens of our most famous parks that are now closed to the take of wildlife. New rules could follow that affect the tens of million of acres in over 50 national park system areas that are open by act of Congress to the take of wildlife. Invariably, Congress directed that the take of wildlife in these 50+ areas by the public conform to state laws. A series of special park rules may, like the rule for Wupatki, direct NPS park superintendents to allow Indian Tribal members to pursue, capture, trap, hunt or kill wildlife without regard to state fish and wildlife laws in their parks. This would raise particular controversy since other members of the public may take wildlife in such parks only in conformity to applicable state law.

There is a need for a Federalism Assessment here.

X. Conclusion

From this review, certain principles emerge. First, the take of wildlife is generally proscribed in areas of the national park system. See George Cameron Coggins, Protecting the Wildlife Resources of the National Parks from External Threats, 22 LAND & WATER L. REV. 1, 4 (1987) ("national parks are the only federal properties in which general hunting is unambiguously outlawed"); Coggins & Ward, The Law of Wildlife Management on the Public Lands, 60 OR. LR. REV. 59, 116-27 (1981). The proscription against hunting generally encompasses the take (or even harassment) of wildlife.

Other than the general authority in 16 U.S.C 3 for the Secretary to remove wildlife that is detrimental to a park, the exceptions to wildlife protection exist only where authorized by a specific statute. The surviving single exception to the take of park wildlife that is, arguably, not authorized by a specific statute, is the take of wildlife for research purposes under 36 CFR 2.5. Take for research, however, directly serves the overarching obligation of the Secretary to "conserve" park resources; a mandate reinforced by Congress in 1998.

On balance, the applicable legal framework is fairly read to impose a substantial burden on the Department before it may loosen the current regulatory prohibition. The burden is made heavier by several considerations. For one, the Organic Act speaks of the "fundamental purpose" of the national parks, monuments and other reservations as to the conservation of, among other things, "wildlife," so as to leave it unimpaired for future generations (16 U.S.C. 1).

The Organic Act also makes clear that visitation and enjoyment of park resources are part of its fundamental purpose. This means that the NPS plainly has a strong interest in ensuring that visitor enjoyment is not jeopardized by an activity that takes away the wildlife that the visitors come to enjoy, except as provided for in law.

Another part of the Organic Act comes into play here as well. From the beginning, the Act authorized the Secretary to remove or destroy dangerous animals or animals detrimental to the park. 16 U.S.C. 3. This narrow authorization for the Secretary to take wildlife in particular circumstances is best read to mean that no other reasons for taking park wildlife are permitted. Though in the retrospect of today's science, the NPS abused this authorization, six decades ago, the Solicitor of the Department of the Interior cautioned that the Organic Act section 3 authorization for the take of wildlife ought to be kept to a minimum. 57 Interior Dec. 567-69 (1942).

The historical context must also have a heavy influence on the legal framework. The NPS has considered the issue of Indian religious take of wildlife before and refused to permit it in the 1983 rulemaking. Again, the Solicitors Office advised the NPS Director not to lower the standards of park protection to resolve conflicts with the religious practices of Indian Tribes. Memorandum of September 21, 1978. The Department has not provided any reasoned explanation for why the proposed rule now finds support in AIRFA and Sherbert v. Verner that the Department could not find when it adopted 36 CFR Part 2.

Furthermore, Congress has generally been apprised of and has not disapproved the NPS policy of strict protection for wildlife (and on occasion has affirmed it). Congressional deliberations do not explicitly ratify the 1983 NPS regulations on this issue. However, between 1992 and 1994 Congress considered amending AIRFA with powerful language that, among other things, would have removed the permit requirement for taking eagles. In its broadest form the proposals did not

propose to modify the Organic Act or the NPS application of it in the1983 rules. In the end, Congress enacted only that provision on the traditional use of peyote.

Interior officials no doubt considered whether a proposed rule could assert that the Bald Eagle Act supersedes the Organic Act and its regulations. The Bald Eagle Protection Act of 1940 was amended in 1962 to include golden eagles. The law makes it a criminal offense to take or possess an eagle or eagle parts. The 1962 amendment also authorizes the Secretary of the Interior to issue permits for the taking and possession of eagles "for the religious purposes of Indian tribes." 16 U.S.C. 668a. Under this exception, Indian Tribes may obtain permits from the U.S. Fish and Wildlife Service. The Hopi have obtained such permits since 1986.

The Director wrote to the Hopi on July 26, 1999 and stated that Eagle Protection Act permits do "not override the National Park Service regulation of the areas under its administration. Nothing in the those acts (Bald Eagle Protection Act and the Migratory Bird Treaty Act) suggests that they amend or supersede the National Parks Service's statutory authority." If the NPS came to a contrary conclusion, the Hopi could use the permit to take eagles in Grand Canyon, Sunset Volcano, and other parks. Other tribes could use permits in parks throughout the system.

The Department may have considered that the proclamation reserving Wupatki as a national monument supported the Hopi request. Proclamation 1721 set aside Wupatki to "preserve prehistoric ruins built by the ancestors of a most picturesque tribe of Indians still surviving in the United States, the Hopi or People of Peace;" 43 Stat. 1977; December 24, 1924. The connection between the Hopi and Wupatki is palpable. The proclamation addresses the ancestors of the Hopi. But, the proclamation does not authorize the appropriation of any of the monument's features by the Hopi. If historical connection were enough to support Indian take of park wildlife, then a score of parks and monuments would be equally open to the take of park wildlife by their proclamations or laws.

No doubt, the Department sought to craft a rule allowing the Hopi to take eagles at Wupatki on narrower authorities but none were narrow enough. No matter which direction the Department pointed for support, the long shadow cast by its finger did not stop at Wupatki's borders.

By using AIRFA and RFRA, the proposed rule extends an open invitation for many more such proposed rules and perhaps a change to 36 CFR 2.1 itself. The preamble explicitly opens the door. "It is possible that the NPS will receive requests from other Tribes for similar rule changes to address their religious practices. Such requests will be addressed on their merits. Any further rule changes must follow notice and comment and other procedures required by applicable law." 66 FR 6520. The proposed rule envisions and invites the opening of other areas of the national park system to Indian take of park wildlife

one park at a time. Compliance with the procedural requirements that govern rulemaking is no substitute for a rule that violates the law.

To avoid the change in Administrations, the Department convinced the Office of Management and Budget (OMB) to forgo review of the proposed rule because of its narrow applicability to a single specimen of a single non-listed species in a single unit of the national park system. The Department and OMB believe that the rule is not significant.

On its face, the proposed rule allows the take of wildlife only in Wupatki but the rationale it adopts will be used to allow the take of wildlife for ceremonial religious use of Indian Tribes and others in many more parks. That outcome may not occur overnight. Inexorably, it will occur.

The proposed rule for Wupatki is significant because it overturns an interpretation of the National Park Service Organic Act that is decades old without any authority to do so. If the proposed rule is adopted, the status of parks as sanctuaries for wildlife will have been irretrievably lost.

A remedy exists for the Department. The Director could follow the 1978 advice of Associate Solicitor Webb and refer the perceived conflict between Indian religious practices and the Organic Act to Congress. Regardless of the merits of a particular enactment, there is no doubt that Congress alone can alter the Organic Act and the national park system to accommodate religious practices.