



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Office of Law Enforcement  
P.O. Box 3247  
Arlington, VA 22203-3247



File No: ENF 3-14

LE - 3 (Rev. 1)

Date: SEP 15 1999

### LAW ENFORCEMENT MEMORANDUM

**SUBJECT:** Native American Possession of Migratory Bird and Eagle Feathers and their Parts.

**PURPOSE:** To establish policy regarding the possession of Migratory Bird/Eagle Feathers and their parts. This revision replaces LE - 3, dated March 19, 1999, by correcting a typographical error in the last sentence of paragraph A2. The word "not" has been removed to agree with the Morton policy.

#### **POLICY:**

A. In keeping with Departmental policy (Morton Policy, released February 5, 1975, copy attached), the Service will not seek or institute legal action under the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the ESA, or the Lacey Act for the following:

1. Native Americans who merely possess, carry, use, wear, give, loan, or exchange among other Native Americans without compensation, all federally protected birds, as well as their parts or feathers. This restriction on prosecution does not apply in circumstances where evidence exists that the Native Americans unlawfully took the protected birds or knew that such birds were illegally taken.
2. Native Americans who wish to possess bird feathers or parts to be worked on by tribal craftsmen for eventual use in Native American religious or cultural activities. Feathers or parts may be transferred to tribal craftsmen without charge. The craftsmen however, may be compensated for their work.

B. The Service conducts investigations pertaining to the purchase, sale, trade, or barter of feathers or feathered items of Federally protected birds. This includes investigations of alleged illegal transactions which occur between Native Americans and non-Native Americans, or between Native Americans themselves. A written request must be sent to the Office of Law Enforcement (WO/LE), attention of the Special Agent-in-Charge, Branch of Investigations for concurrent approval with the Associate Solicitor, Conservation and Wildlife before a special agent seeks prosecution of a native American for any fish or wildlife violation. Prosecution includes seeking grand jury Indictments, filing a criminal Information or Complaint, issuance of a Notice of Violation, or initiating a civil penalty and/or forfeiture action. Region 7 has been (is) specifically exempted from this requirement by Memorandum dated March 3, 1998, signed by John Leshy, Solicitor (Copy attached).

C. The Service aggressively enforces the Federal laws and regulations concerning the illegal commercial activities associated with the sale of migratory birds, eagles and their parts.

**Background:** The USFWS, Division of Law Enforcement continues to intensify investigative efforts and seek prosecution of persons who traffic in migratory birds and eagles, their parts, feathers, nests or eggs. The objective of this enforcement activity is to reduce and subsequently eliminate the illegal taking of migratory birds and eagles by prosecuting not only persons who take such birds, but the dealers, traffickers, and importers of these items as well. The investigative emphasis will remain on those who take, sell, or otherwise traffic in migratory birds and eagles, and their parts, particularly those who deal in large quantities.


Mere possession of migratory birds and eagles, including live or mounted specimens, feathers, parts, nests or eggs, is unlawful only if there is sufficient evidence to establish that such migratory birds or eagles were taken after the effective date of Federal protection, (see 50 CFR 21.2 and 50 CFR 22.2). Special agents must establish that no regulation or valid permit authorizing this activity has been issued, and, regarding Native Americans, that the migratory birds or eagles were not taken pursuant to recognized Treaty rights. In criminal prosecutions for possession of migratory birds and eagles, the United States must prove, beyond a reasonable doubt, (1) that such migratory birds and eagles were in fact acquired after the effective date of Federal protection, and (2) that a regulation or permit has not been issued when the defendant puts "pre-Act" status in issue as an affirmative defense. When a serious question exists, as to whether the available evidence establishes that such specimens were taken after Federal protection applied to them, seizures should generally not be made unless first approved by the U.S. Attorney's Office for the district where the seizure will occur, or by the Department of Justice, Environment and Natural Resources Division, Wildlife and Marine Resources Section, Washington, D.C.

Illegal commercial activity involving protected birds, specifically the sale or offer for sale is prohibited regardless of when the birds were taken or acquired is the enforcement priority of the Service. Special problems exist when investigating Native Americans for alleged violations of the MBTA, the Bald and Golden Eagle Protection Act (BGEPA), the Endangered Species Act (ESA), and the Lacey Act. First, the Department has a trust obligation to all Native American people, whether on or off their reservations. Second, treaties have been negotiated with Native Americans throughout the United States. In many of these treaties, the hunting and fishing rights have been reserved for Treaty lands, (either specified or implied.) Conservation laws may limit Treaty Native American hunting or fishing rights even while on the Treaty lands. Also, reserved treaty hunting rights may allow Native Americans to engage lawfully in conduct that the law otherwise prohibits.

In addition, the Religious Freedom Restoration Act, (RFRA), 42 U.S.C. 2000bb, *et seq.*, may provide a defense to prosecution of non-Native Americans for possession of protected bird parts necessary to the exercise of the defendant's religion. The Service has prevailed in such a challenge with respect to eagle feathers because the United States has a compelling interest in

providing eagle feathers only to members of federally-recognized tribes under the BGEPA, (see *U.S. v. Lundquist*, 932 F. Supp. 1237). However, this argument would not apply to the feathers of other migratory birds, because the MBTA does not contain an express religious exception limited to Native Americans.

The Service gives eagle feathers to Native Americans for religious purposes under a permit, (see 50 CFR 22.13 and 22.22). However, some eagle feathers given to Native Americans for religious purposes have been placed in commercial channels and this activity must be stopped. The Service understands that Native Americans have a legitimate interest and need for eagle feathers, and certain other migratory bird feathers, for their religious activities. When available, migratory bird feathers are provided to Native Americans by permit or regulation. The Service continually examines current policies in this area and works closely with the Bureau of Indian Affairs to resolve problems in a way that accommodates Native Americans, and to carry out the mission of the Service to protect migratory birds and eagles.

  
Acting Director

Attachments