

# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

300 Westgate Center Drive  
Hadley, MA 01035-9589

August 30, 2017

Dear Tribal Leader:

The U.S. Fish and Wildlife Service (Service) is considering changing the language in the current federal regulation (50 CFR § 22.22) regarding eagle permits for Indian religious purposes. Because any change to the current regulation could affect Federally Recognized Tribes (Tribes) or their members, the Service is offering government-to-government consultations to solicit information from Tribes on how best to proceed.

The changes the Service is considering will formalize that permits authorizing eagle possession (aka National Eagle Repository permits) will be issued to Tribes rather than their individual members. Individual members will still be able to apply for and receive an eagle or eagle feathers from the National Eagle Repository, but under the authority of their Tribe's permit.

This regulation change is intended to formalize the United States Government's position that the National Eagle Repository facilitates Tribes and their member's acquisition of eagles and eagle parts, not other members of the public. Recent legal challenges to this position have caused the Service to consider changes to this regulation, and we intend to conduct consultations with interested Tribes on how to best accomplish our collective goal with the least amount of burden to Tribes, their members, and the Service.

During consultation we would like to discuss how to accomplish any permitting changes and application processes in a manner that best meets the needs of all Tribes. We would also like to discuss whether the Repository should continue to be accessible to only Tribes and their members, or whether access to non-tribal persons is acceptable or desirable. Lastly, we would like to discuss whether the Repository should be operated by a Tribe, or whether continuing operation by the U.S. Fish and Wildlife Service is desirable. Please read the attachment enclosed with this letter, concerning some options for consideration during consultation.

Because of the potential impact to your Tribe and individual Tribal members, the Service extends the opportunity for you, or your officially designated representative(s) to consult with us about these potential changes. Please note that these will be Tribal, not public, meetings.

The Service encourages your participation, or your officially designated Tribal representative's participation, in this endeavor either by oral or written statement during the consultation meeting listed below; or by telephone consultation; or by submission of a written statement to the contact listed below.

Due to the large number of potentially affected Tribes, and in order to accomplish this endeavor in a reasonable amount of time, we are proposing a consolidated government-to-government consultation meeting at the location listed below. The location is:

<u>Date/Time</u>	<u>Location</u>
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October 12, 2017. 2:00-5:00 P.M.	Harrah's Cherokee Casino Resort
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Hickory Meeting Room 777 Casino Drive Cherokee, NC 28719
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If you would prefer to speak with the Service individually, you may request a government-to-government consultation by phone by calling the Service's Office of Law Enforcement at (303) 236-7540. The Office of Law Enforcement funds and operates the National Eagle Repository, and they will coordinate the consultation request between your officially designated Tribal representative(s) and Special Agent in Charge Steve Oberholtzer.

To respond in writing, please send your Tribe's comments to U.S. Fish and Wildlife Service, Office of Law Enforcement, 134 Union Blvd., Suite 640, Lakewood, CO 80228. The timeframe to submit comments is calendar year 2017.

The Service shall protect, to the maximum extent practicable, Tribal information that has been disclosed to or collected by us. However, please be aware that any information kept in our file is subject to public disclosure under specific circumstances (e.g., through a Freedom of Information Act request).

Please let us know if there are any other considerations for safeguarding sensitive Tribal information. If you have any questions, please contact Timothy Binzen (Liaison) at [Timothy.Binzen@fws.gov](mailto:Timothy.Binzen@fws.gov) or (413) 253-8731. Please refer to the attached background document for more detailed information.

Sincerely,

*Steve Oberholtzer*  
Steve Oberholtzer  
Special Agent in Charge

Attachment

## Attachment

### ***Background***

The Bald and Golden Eagle Protection Act (“Eagle Act”) prohibits the taking, possession, and transportation of bald eagles, golden eagles, and their parts. 16 U.S.C. § 668. The Eagle Act provides, however, that the Secretary of the Interior may, by regulation, authorize those activities for the religious purposes of Indian tribes if the Secretary determines that doing so is compatible with the preservation of those species. *Id.* § 668a. Our current regulations state that the United States Fish and Wildlife Service (“FWS”) will only issue permits for the religious purposes of Indian tribes to members of federally recognized tribes. 50 C.F.R. § 22.22. We are considering modifying this regulation to specify that we will only issue a permit to federally recognized tribes on behalf of members of those tribes, not to members of the general public who seek to use feathers for religious purposes. Individual members of federally recognized tribes would still be able to obtain eagle parts and feathers from the National Eagle Repository (Repository) under the authority of their tribe’s permit.

### ***Why is the Service considering these changes?***

On August 20, 2014, the Fifth Circuit Court of Appeals held that the Department of the Interior (DOI) did not provide sufficient evidence that the current permitting process limiting religious use permits to members of federally recognized tribes complies with the requirements of the Religious Freedom Restoration Act (“RFRA”) under the facts before the court in that case. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5<sup>th</sup> Cir. 2014). The court held that DOI had not met its burden of demonstrating that the current permitting system is the least restrictive means of fulfilling its responsibilities to Federally Recognized Tribes. *Id.* at 28.

As a result of this decision and a subsequent settlement agreement, the plaintiffs in that case, as well as other similarly situated plaintiffs, individuals who are not members of a federally recognized tribe, have been granted access to the Repository to obtain eagles or eagle feathers. Through rulemaking we anticipate gathering and presenting additional information to support limiting acquisition of eagles and eagle feathers from the Repository to federally recognized tribes and their members. The regulation modification described above would more closely align with federal law and provide a firmer legal foundation for reserving access to the Repository only for members of federally recognized tribes.

The Repository, located in Commerce City, Colorado, receives and distributes bald and golden eagles to members of federally recognized tribes for their religious use. The Repository receives approximately 3,000 eagles annually, and fills approximately 4,000 feather or whole bird orders annually. The demand (orders) exceeds our supply of eagles, which has resulted in long wait times for some applicants, especially those requesting a whole eagle. Any additional increases in orders/applicants, would increase demand, and subsequent wait times for federally recognized tribe’s members.

We would like to hear your Tribe’s comments on whether continuing to limit access to the Repository to Federally Recognized Tribes is important to your tribe, how to modify the regulations in a manner that ensures the integrity of the application process while avoiding any unnecessary administrative burden to your tribe, your tribe’s members, and the Service.