



INTER TRIBAL COUNCIL of ARIZONA

July 12, 2012

MEMBER TRIBES

- AK-CHIN INDIAN COMMUNITY
- COCOPAH TRIBE
- COLORADO RIVER INDIAN TRIBES
- FORT McDOWELL YAVAPAI NATION
- FORT MOJAVE TRIBE
- GILA RIVER INDIAN COMMUNITY
- HAVASUPAI TRIBE
- HOPÍ TRIBE
- HUALAPAI TRIBE
- KAIABAB-PAIUTE TRIBE
- PASCUA YAQUI TRIBE
- PUEBLO OF ZUNI
- QUECHAN TRIBE
- SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
- SAN CARLOS APACHE TRIBE
- TOHONO O'ODHAM NATION
- TONTO APACHE TRIBE
- WHITE MOUNTAIN APACHE TRIBE
- YAVAPAI APACHE NATION
- YAVAPAI PRESCOTT INDIAN TRIBE

VIA US MAIL

Dan Ashe, Director
 U. S. FISH AND WILDLIFE SERVICE
 1849 C Street, NW
 Washington, DC 20240

ELECTRONIC SUBMISSION (www.regulations.gov)

Public Comments Processing
 Attn: FWS-R9-MB-2011-0054 & FWS-R9-MB-2011-0094
 Division of Policy and Directives Management
 U.S. FISH AND WILDLIFE SERVICE
 4401 North Fairfax Drive, MS 2042-PDM
 Arlington, VA 22203-1610

Re: *Inter Tribal Council of Arizona, Comments to Proposed Revisions to Regulations Governing Permits for "Take" of Bald and Golden Eagles (FWS-R9-MB-2011-0054 and FWS-R9-MB-2011-0094)*

Dear Director Ashe and Division of Policy and Directives Management:

This letter is submitted to the United States Fish and Wildlife Service ("Service") on behalf of the Member Tribes of the Inter Tribal Council of Arizona, ("ITCA") and will supplement ITCA's prior letter to you on this subject, dated April 19, 2012, which is incorporated here by reference.

The ITCA appreciates this opportunity to outline certain of ITCA Member Tribes' concerns regarding the two proposals discussed above. The ITCA requests that the Service immediately stay its consideration of the proposed rule discussed in these comments until appropriate government-to-government consultation can be undertaken with ITCA Member Tribes.

To discuss this matter further and to arrange consultation meetings with Tribal Leaders of the ITCA, please contact me directly at (602) 258-4822. I would also suggest that you contact the ITCA Member Tribes directly to discuss individual Tribal consultation options. On behalf of ITCA's Member Tribes, we look forward to your response.

Yours Truly,

Shan Lewis,
 President, Inter Tribal Council of Arizona
 Vice-Chairman, Fort Mojave Indian Tribe

Attachment



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Dear Director Ashe and Division of Policy and Directives Management:

This letter is submitted to the United States Fish and Wildlife Service ("Service") on behalf of the Member Tribes of the Inter Tribal Council of Arizona, ("ITCA") and will supplement ITCA's prior letter to you on this subject, dated April 19, 2012, which is incorporated here by reference.

The ITCA was established in 1952 to provide a united voice for Tribal governments located in the State of Arizona to address common issues and concerns. Currently, ITCA's membership includes 20 of the 22 Tribes of Arizona. The representatives of ITCA are the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents and governors. Accordingly, the ITCA has been directed by its Member Tribes to provide the Service with written comments on the following:

1. The Service's proposal to extend the maximum term for programmatic permits for "take" of Bald and Golden Eagles from a period of 5 years to 30 years ("tenure rule") under regulations implementing the Bald and

Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA” or “the Act”).¹

2. The Service’s advanced notice of proposed rulemaking soliciting comments on the possible revisions to regulations to “create more efficient permit process” relative to the issuance of “take” permits under the BGEPA.²

The ITCA has chosen to consolidate its comments on both of the above listed proposals because the Service’s proposed changes to the tenure rule and the advanced notice of proposed rulemaking should not have been bifurcated by the Service in the first instance. The Service’s decision to bifurcate these two important proposals has resulted in unnecessary confusion and duplication of effort and has wrongfully attempted to segment the impacts of the tenure rule change relative to the Service’s proposal to once again change its “take” regulations for Eagles under the BGEPA.

In Section I of these comments, ITCA provides an overview of the importance of the continued existence of Bald and Golden Eagles to its ITCA Member Tribes. In Section II, we discuss the proposed changes to the tenure rule (FWS-R9-MB-2011-0054), including the fact that the changes to the tenure rule cannot be categorically excluded under NEPA as the Service proposes, and that the proposed rule upsets the delicate balance struck by Congress under the BGEPA. In Section III, ITCA discusses the Service’s advanced notice of proposed rulemaking pertaining to possible additional revisions to its take regulations under BGEPA (FWS-R9-MB-2011-0094), including that Tribal consultation and coordination protocols should be established as part of the Eagle take permitting process by means of regulation and that the Service should address the United Nations Declaration on the Rights of Indigenous People before issuing any additional changes to its take regulations under BGEPA. In Section IV, ITCA provides its relevant contact information and request that the Service make individual and appropriate direct contact with each of the ITCA’s Member Tribes regarding these proposals.

Please be aware that the comments provided here are intended to address certain overarching concerns expressed by ITCA Member Tribes regarding the Service’s current proposals. These comments are not intended to speak on behalf of any one Member Tribe or to provide specifics regarding the traditional, religious and cultural concerns that any one of our Member Tribes may have on this topic. As explained in ITCA’s letter of April 19, 2012, the Service should “[e]ngage in immediate and meaningful government-to-government consultation with ITCA Member Tribes (through appropriate level officials) as required by the United States’ trust responsibility to Indian Tribes and applicable law.” The Service’s decision to decline consultation is a matter of serious concern to the ITCA’s Members Tribes.

¹ 77 Fed. Reg. 22267 (April 13, 2012) and 77 Fed. Reg. 27174 (May 9, 2012).

² 77 Fed. Reg. 22278 (April 13, 2012).

I. OVERVIEW

“The Bald Eagle blesses the land and us. The Land blesses the Eagle and us. We bless the Eagle and the land.” Elder from Bylas, Arizona, 2008.

As you are aware, ITCA Member Tribes have, over the years, repeatedly explained to the Service the fundamental role that Bald and Golden Eagles play in Tribal religion, traditions and culture, and indeed, in the very identify and health of Tribal People. For purposes of clarification for these comments, while ITCA Member Tribes often refer to both Bald and Golden Eagles collectively as “Eagles” or “the Eagle” in general conversation, the Tribes distinguish between the two for more specific conversation, ecological reference, and ceremonial practice. The Tribes recognize the characteristics, qualities, ecological function, place and power specific to each Eagle.

Some populations of Eagles remain under the watch and protection of ITCA Member Tribes due to the location of Eagle nests and wintering and foraging habitat on our Member Tribes’ Reservations in Arizona, California and New Mexico. Certain of ITCA’s Member Tribes are also expressly charged under their Tribal Constitution with the responsibility and authority to manage and regulate the wildlife and habitat found within their Reservations, including Eagle habitat.

Eagles are important beings, whose lives are inextricably intertwined with the continued existence of all human beings on this Earth. For many ITCA Member Tribes, the Eagle figures prominently in their oldest creation songs and stories, and in almost all of the ancient prayer song cycles. Indeed, many of these songs can be regularly heard today during the Tribal ceremonies that are conducted throughout the year, sung word-for-word the way they have been sung for generations.

Given the transcendent importance of Bald and Golden Eagles to our Member Tribes, many of their songs and stories about the Eagle include specific information about the range, habitat, breeding and fledging chronology, physical characteristics and other aspects of the Eagle, as well as the locations of existing and historical nesting and foraging locations within Tribal ancestral lands – lands that once spanned many millions of acres throughout the Southwest and what is now the Republic of Mexico. This knowledge predates modern Western knowledge of the Eagle by many centuries. The longstanding importance of Bald and Golden Eagles to ITCA’s Member Tribes is not a matter of temporary concern that can be lightly cast aside or ignored by the Tribes, and the Service should not do so here.

ITCA Member Tribes have (with little success) sought good faith government-to-government consultation with the Service in the past with respect to many of the Service’s decisions involving Eagles, including the Desert Nesting Bald Eagle. This has included (among other things) the Service’s decision to remove the Bald Eagle and its habitat from protection under the Endangered Species Act, the Service’s repeated decisions to deny protections to the Desert Nesting Bald Eagle under the ESA as a Distinct Population Segment, the Service’s 2009 decision (74 Fed. Reg. 46836) to allow for the “take” of Eagles under the Bald and Golden Eagle

Protection Act, among other actions, and the Service's recent actions with regard to the precedential proposal to issue "take" permits for the West Butte facility.³

Sadly, it appears that rather than making any real or meaningful effort to engage our Member Tribes on this very important issue, the Service (at its highest levels) continues to view Tribal consultation to be of little value -- as if it is nothing more than a chore to be undertaken as infrequently as possible. Of course, this attitude not only violates the letter and spirit of numerous Executive and Secretarial Orders, Presidential Memoranda and Policies,⁴ it also fosters a relationship of distrust, where the sharing of religious, traditional and cultural information with the Service is not perceived to be valued by the Service and thus, it is not freely given by the Tribes.

The Service's disregard for its consultation responsibilities also continues to deprive the Service of valuable traditional ecological knowledge maintained by Tribes regarding the persistence of Bald and Golden Eagles in the Southwest. There is much the Service could learn from Tribes as it looks to sighting wind energy and other projects on Tribal ancestral lands. This includes traditional ecological knowledge maintained by Tribes over many centuries pertaining to the known presence of Eagles and other avian species at potential wind energy locations.⁵ Tribal information of this type could assist the Service (among other things) to better understand its own wildlife surveys (and those of the applicant) and it could provide valuable information regarding whether or not a wind energy facility should be sited in a particular location in the first

³ It is not lost on ITCA Member Tribes that the Service has frequently touted the BGEPA as a partial justification for removing Bald Eagles and their habitat from the protections of the Endangered Species Act, including Desert Nesting Bald Eagles here in the Sonoran Desert ("DNBE"). The Service's credibility as an advocate for Eagles and other species is undermined by this type of argument (which was repeated just recently in litigation before the Federal District Court on the DNBE) given the fact that the Service has, at the very same time, undertaken a plan of action to change the regulations implementing the BGEPA to permit a broad range of take of Bald and Golden Eagles to benefit commercial and other interests.

⁴ See, e.g., Secretarial Order No. 3175 (November 8, 1993) (requiring all agencies, bureaus, and offices within the Department of the Interior to identify potential effects of Departmental activities upon Indian Trust resources and mandating meaningful consultation with Tribes where activities directly or indirectly affect such resources); Secretarial Order No. 3206 (June 5, 1997) (actions taken under the authority of the Endangered Species Act and implementing regulation that may affect Indian tribes and its government-to-government relationship should be carried out in consultation with the affected tribe to harmonize such actions with the Federal trust responsibility); Presidential Memorandum of April 29, 1994, titled "Government-to-Government Relation with Native American Tribal Governments" (also requiring proper consultation with Indian tribes to the greatest extent practicable prior to taking any actions that affect such tribes); Department Manual, 512 DM 2.1 (discussing and embodying these same requirements in the Department Manual); see also Executive Order No. 13175 (November 6, 2000) (requiring all agencies, bureaus, and offices within the Federal Government to establish regular and meaningful consultation and collaboration with tribal official in the development of Federal policies that have tribal implications).

⁵ In general, traditional ecological knowledge is recorded and transmitted through oral tradition (often through stories) over a period of many hundreds of years through direct contact with the environment. Traditional ecological knowledge is based in the ways of life, belief systems, perceptions, cognitive processes, and other means of organizing and transmitting information in a particular culture. This form of knowledge includes an intimate and detailed knowledge of plants, animals, and natural phenomena, the development and use of appropriate technologies for hunting, fishing, trapping, agriculture, and forestry, and a holistic knowledge, or "world view" which parallels the scientific discipline of ecology. TRADITIONAL ECOLOGICAL KNOWLEDGE, Sarah E. Rinkevich, School of Natural Resources, University of Arizona.

place. The two proposals that are subject to comment today only perpetuate questionable activities on the part of the Service.

II. PROPOSED CHANGES TO THE TENURE RULE (FWS-R9-MB-2011-0054)

The Service is proposing to extend the maximum term for programmatic take permits for Bald and Golden Eagles from the original 5-year period approved by the Service in April 2009 to a term of 30 years, specifically to benefit renewable energy projects, such as wind and solar. *See, e.g.* 77 Fed. Reg. at 22267. While the proposed rule focuses on wind energy, the Service also admits that “other business sectors, such as railroads, timber companies, and pipeline companies could also apply for programmatic permits,” though the Service speculates (without support) that “we anticipate the number of permit applicants in such sectors to be very small.” *Id.* at 22274.

Under the proposal, programmatic take permits would include reoccurring long-term disturbance and direct mortality of Eagles, in particular disturbance and mortality resulting from collisions with rotating wind turbines, *id.* at 22267 (although Eagles can also be impacted by towers, power lines, or related structures, and as a result of habitat destruction from the siting of turbines, power lines, and access roads). The Service anticipates that the proposed 30-year take permits will “be in high demand, particularly from wind power generator farms, as the lifecycle of these plants are expected to last longer than 30 years.” *Id.* at 22272. Indeed, according to the American Wind Energy Association, the level of production for wind farms is expected to double by the end of this century. *Id.* Therefore, at present, the Service estimates it could issue up to 1,108 programmatic take permits over the next 30 years – each up to 30 years long under the proposed changes to the tenure rule (43 C.F.R. 22.26). *Id.* This proposal raises numerous concerns that have not adequately been considered or addressed by the Service.

A. The Proposed Changes to the Tenure Rule Cannot be Categorically Excluded under NEPA

Despite the sweeping nature of changes proposed here (in particular the 30-year term of the permit and its allowance for Eagle mortalities), the Service has concluded that the rule change would have “negligible new effects” relative to those impacts previously considered by the Service under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (“NEPA”) and the Service’s Final Environmental Assessment; Proposal to Permit Take as Provided Under the Bald And Golden Eagle Protection Act, April 2009 (“2009 FEA”). *See* 77 Fed. Reg. at 22275. Based on this rationale, the Service has determined that the proposed change to 50 C.F.R. 22.26; that is, its decision to the increase of the permit’s tenure from 5 years to 30 years, is purely procedural, technical or administrative in nature. Accordingly, the Service concludes that the proposed change does not require any further analysis and it is, therefore, categorically excluded from any further NEPA review under 43 C.F.R. 46.210(i). *Id.* at 22275-22276.

It simply strains understanding (and the bounds of NEPA) for the Service to conclude that the issuance of up to 1,108 new 30-year programmatic Eagle take permits, including permits that would allow for significant mortality of Eagles, is merely a procedural, technical or

administrative change to existing regulations that “would fully comply with the [2009] FEA”, *id.* at 22275. The Service should reconsider this decision.

1. *The Tenure Rule Change and the Impacts Stemming from Such Change Were Not Considered in the 2009 FEA*

As an initial matter, the 2009 FEA did not analyze, in any meaningful way, the impacts to Eagles or to the human environment (including the religious, cultural and traditional practices of Indian Tribes) that are likely to result from the type of large-scale renewable energy projects currently being anticipated by the Service in its new proposal. Furthermore, while the 2009 FEA did provide for the possibility of the issuance of 5-year permits that could result in lethal take of Eagles, the Service made clear in the 2009 FEA that “[t]he majority of authorized take will be non-lethal and will simply allow activities to disturb eagles in a way that will result in a loss or reduction of one year’s productivity by a nesting pair.” 2009 FEA at Summary (emphasis added).⁶ This assumption permeates the 2009 FEA and it cannot be ignored now. In addition, the 2009 FEA contemplated that a take resulting in mortality or “TRM” would only occur after and “despite all efforts to avoid it.” *Id.* at 3, n.1; *see also id.* at 43, Sec. 2.6.3 (emphasizing “[p]roper siting and placement of infrastructure known to be lethal or injurious to eagle are essential to avoid take.”). Moreover, Alternative 3 was seemingly chosen by the Service over the other alternatives because the provisions in Alternative 3 for programmatic permits to reduce TRM provide an important mechanism to reduce lethal take of Eagles, and to improve conditions for Golden Eagle populations. Without measures for programmatic reduction in TRM as contained in Alternative 3, the Service’s actions are unlikely to be compatible with the preservation of the Golden Eagle. *See* May 19, 2009, Finding of No Significant Impact (“2009 FONSI”).

In contrast, the proposal at issue today will provide for the large-scale issuance of programmatic take permits for wind project and other facilities for up to 30 years, despite the fact that today such projects and facilities plainly contemplate the lethal take of Eagles. It is also crucial to understand that the changes to the tenure rule are being made by the Service not to fulfill its responsibility to ensure that permits are issued in a manner “compatible with the preservation of the bald eagle or the golden eagle,” 16 U.S.C. § 668a, but rather, as acknowledged by the Service, because “the 5-year term limit imposed by the 2009 regulations ... needed to be extended to better correspond to the timeframe of renewable energy projects.”⁷

It is also highly problematic that while the Service admits it has “relatively little information on the impacts of wind energy on eagles” (though it admits that such impacts will occur potentially due to “turbine design or operation, location of a facility or even a single

⁶ *See also* 2009 FEA at 3 (explaining that the proposal being analyzed under NEPA is to amend the current regulations at 50 C.F.R. 22.26 and 22.27 to (among other things) only authorize “take resulting in mortality (TRM) under limited circumstances,” and noting that the take provisions will “primarily authorize disturbance”).

⁷ This approach also appears to be contrary to the mission of the Service, which includes, among other things, the obligation to “provide the federal leadership to conserve, protect and enhance fish and wildlife and their habitats for the continuing benefit of the people” and to provide for “balanced development of the Nation’s natural resources.” 46 Fed. Reg. at 7657 (January 23, 1981).

turbine, weather conditions, or other factors,” 77 Fed. Reg. at 22268), the Service needs to prioritize its activities by conducting research first then issuing informed permits later. The Service makes clear that despite limited information about impacts from wind energy on Eagles, it will include requirements in the permit, including advanced conservation practices, which are intended to limit impacts to Eagles and it promises to “monitor” for future impacts to Eagles (including mortality). If unexpected impacts or fatalities occur during the term of the 30-year permit, the Service explains that it will require some form of mitigation or amendment to the permit, albeit after the fact. These promises lack any real explanation or substantive support. If the Service, by its own admission, does not have enough information about the impact of wind energy on Eagles at this time, it is difficult to understand how the Service will have any ability to craft permits (especially 30-year permits) that truly offer real and concrete protections for Eagles.

Furthermore, it is well documented that the only known way to avoid injury and lethal harm to Eagles resulting from wind energy projects is to avoid siting these projects nearby and within Eagle use areas in the first place, including migration corridors. In fact, the Service makes clear in its proposal that it “strongly encourages wind energy developers and other project proponents to avoid known eagle-use areas when siting their projects.” *Id.* at 22269. However, once a wind project is developed and adverse impacts to Eagles are realized, there is little that can be done to effectively avoid additional unanticipated lethal takes of Eagles, absent shutting down the facility – an action that, after the investment is made in upfront construction and other costs, seems unlikely.

Accordingly, it is difficult to understand (and the Service does not explain) precisely how “additional specific mitigation measures” might be triggered and what form such mitigation measures might take in the event that additional mitigation measures become necessary “for the preservation of the eagles.” *Id.* at 22268. For this same reason, the fact that the Service promises to engage in “periodic” evaluation of the site in order to ascertain whether the permitted take of Eagles is being exceeded and whether the conservation measures being implemented are “sufficient,” *id.*, offers little comfort, since little is likely to be done to avoid an unanticipated level of lethal take of Eagles after the facility is developed. To be sure, the Service’s assertion that it would be willing to actually revoke a permit for take as a “last option” when nothing else can be done to ensure the activity is compatible with the preservation of the Eagle also rings hollow. Practical, financial and political constraints will likely make it virtually impossible for the Service to live up to this assertion. This could leave the wind energy or other developers free to engage in a virtual unlimited take of Eagles over the life of the project, though the Service will require some form of “mitigation” for such take. However, the potential for success of this type of mitigation on such a potentially large scale is not discussed in the Notice and it is not anticipated by the 2009 FEA.

Finally, none of the Service’s references to mitigation address how the potential loss of Eagles resulting from the issuance of new 30-year programmatic take permits, and the development of wind energy and other projects they will facilitate, will impact the fabric of countless natural ecosystems to which the continued health and vitality of Eagles remains fundamental. Rather, the Service appears to now be fixated on a population-based approach to permitting and mitigation that merely crunches population numbers in order to purportedly ensure that permits remain “consistent with the goal of stable or increasing breeding

populations.” 77 Fed. Reg. at 22280. This fails to consider environmental impacts to local and regional environments and the fabric of the natural world as a whole resulting from Eagle mortality and disturbance.

Based on the foregoing, it is clear that the proposed changes to the tenure rule exceed the bounds of what was considered and analyzed in the 2009 FEA and therefore, the 2009 FEA cannot be relied upon by the Service to invoke compliance with NEPA in this instance. The Service must conduct further NEPA analysis regarding the impacts of the proposed changes to the tenure rule.

2. *The Obligation to Consult with Indian Tribes Was a Requirement of the Mitigated FONSI Issued by the Service on the 2009 Take Regulations*

As the Service has long been aware, *see, e.g.*, 2009 FEA, the potential for the issuance of increased take permits under the BGEPA to harm Eagles and their habitat, including Tribal sacred sites and Traditional Cultural Properties, is a point of particular concern for ITCA Member Tribes who rely on the continued existence of Bald and Golden Eagles in the natural world to practice their religion and maintain traditional culture and life ways that directly support, among other things, their spiritual and physical health. In addition, ITCA Member Tribes exercise jurisdiction over resident and migratory Eagles and their habitat on their Member Tribes’ Indian Reservations throughout Arizona, New Mexico and California. It is well documented that there are less than 50 breeding pairs of Desert Nesting Bald Eagles remaining in the Sonoran Desert. Golden Eagles are also documented to be in decline, both here in the Southwest and throughout their migratory range.

ITCA Member Tribes are also concerned with how the wind industry will engage in monitoring and potentially self-reporting of any injuries and lethal take caused by their facilities during the 30-year life of the permit. This is not adequately explained in the Federal Register notice or discussed in the 2009 FEA. ITCA’s Member Tribes have asked how will the Service become aware of any unanticipated harms to Eagles resulting from the operation of the facilities and how will the Service’s “periodic” visits to the facilities be adequate to avoid unanticipated harms to Eagles. Finally, certain Member Tribes have expressed concern regarding how injured or killed Eagles will be treated or disposed of by facility operators, given the relationship between Eagles and ITCA Member Tribes as a religious and cultural matter and the backlog of unfilled requests for Eagle feathers and parts through the National Repository. None of this is discussed in the proposed rule.

ITCA Member Tribes therefore remain concerned that the changes to the BGEPA’s implementing regulations could have a serious adverse impact on Eagles and their habitat (homeland), and thereby the religious, cultural and traditional practices and identity of Tribal people. None of these Tribal concerns appear to have been considered by the Service in its proposal.

In fact, despite ITCA’s direct request dated April 19, 2012 for consultation with its Member Tribes on this proposal, and despite the Service’s decision to extend the deadline for comment on this proposal, the Service has declined to engage in government-to-government

consultation with ITCA Member Tribes. In this regard, and given the Service's historical refusals to consult with Tribes regarding Eagle take permits, it is clear that the Service has failed to undertake any effort, as promised in the 2009 FEA, to fulfill its legal and trust responsibilities to the Tribes through consultation and Tribal coordination. It is important to recall that in the Service's May 19, 2009, Finding of No Significant Impact, the Service incorporated additional measures into its final proposal in order to "mitigate and/or minimize adverse effects to religious, cultural, and biological resources." 2009 FONSI at 5. These mitigation measures expressly included specific requirements for the Service to undertake enhanced consultation and coordination with Indian Tribes, none of which have been followed through with by the Service. Specifically, the 2009 FONSI at 5 provides:

As a response to comments received on the DEA and proposed rule, we will develop and implement two improvements in coordination and consultation, to be initiated in implementation guidance for this proposal. As we provided in 2.6.4.2 *Improved Implementation of Service Trust Responsibilities to Tribes*, the implementation guidance will contain guidelines for the Division of Migratory Bird Management on how to better implement government-to-government consultation with Tribes, to which we have committed in this permit program. In addition, the implementation guidance will contain provisions for structured coordination between the Service and State and Tribal wildlife jurisdictional agencies, using the provisions and elements in 2.6.4.1 *Structured-Coordination Process with State and Tribal Wildlife Jurisdictional Entities*. The coordination structure will be used to identify specific regions, such as the Chesapeake Bay, that are critical to the maintenance of the continental bald eagle population, and other locations important to the long-term health of the golden eagle population. Enhanced coordination will help to identify critical foraging, roosting, and concentration areas, and will also facilitate modification of take thresholds on a localized scale, as conditions warrant. We intend to actively seek the assistance of States and tribes as we develop the guidance, which will undergo public review and comment.

The promises set forth in the 2009 mitigated FONSI have never come to fruition, even in the face of continued Tribal requests to the Service seeking consultation and coordination on the Eagle. As discussed in Section III(A), below, the Service did eventually issue DRAFT Implementation Guidance for Eagle Take Permits, which included specific Tribal consultation and coordination requirements for the Migratory Bird Program and Services Regional Offices in issuing Eagle take permits,⁸ but these Implementation Guidance documents have never been finalized by the Service. This ongoing failure by the Service is in violation of NEPA and Council of Environmental Quality ("CEQ") Regulations, as explained in CEQ's January 14, 2011, *Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, Sec. II, Ensuring that Mitigation Commitments are Implemented* ("Federal Agencies should take steps to ensure that mitigation commitments are actually implemented...").

⁸ See DRAFT Implementation Guidance, Appendix C, "Government-to-Government Consultation with Native American Tribes, and Compliance with Section 106 of the National Historic Preservation Act."

Indeed, the Service makes clear in the Federal Register notice that it has no intention of undertaking any true and meaningful efforts to understand the potential impacts of this rule change on Tribal religion, traditions and culture, because they have already concluded (without the benefit of further NEPA analysis or discussion with the Tribes) that “eagles would be sufficiently protected under this proposal.” 77 Fed. Reg. at 22276.

In short, the full scope of impacts stemming from the Service’s proposed change in the tenure rule was not considered in the 2009 FEA and the Service is not fulfilling the requirements of its mitigated 2009 FONSI. Certainly, the changes proposed here are not merely procedural, technical or administrative in nature, and thus, they cannot be addressed through the issuance of categorical exclusion as proposed.

3. *Extraordinary Circumstances Exist that Preclude the Use of the Categorical Exclusion Process*

Even assuming that the change in the tenure rule initially qualified for a categorical exclusion under 43 C.F.R. 46.210(i) (which it does not), the use of this process is nevertheless precluded due to the existence of certain extraordinary circumstances as outlined in 43 C.F.R. 46.215; in particular, those extraordinary circumstances which implicate protections for the religious, cultural and historic concerns of Tribes, including those protections found under the American Indian Religious Freedom Act (“AIRFA”) (42 U.S.C. 1996), Section 106 of the National Historic Preservation Act of 1966, as amended (“NHPA”) (16 U.S.C. 470 *et seq.*), the Religious Freedom Restoration Act of 1993 (“RFRA”) (42 U.S.C. 2000bb *et seq.*), Executive Order 13007, Indian Sacred Sites (61 Fed. Reg. 26771, May 29, 1996) and Executive Order 13175, Consultation and Coordination with Tribal Governments (65 Fed. Reg. 67249, Nov. 9, 2000), among others laws and requirements.

For example, the Service’s drastic change in the length of the tenure rule, coupled with an anticipated increase in lethal take of Eagles (and the commensurate harm to Eagle habitat which will be facilitated by the construction of projects due to the availability of 30-year take permits) is likely to have a significant impact on listed and eligible Traditional Cultural Properties (“TCPs”) under Section 106 of the NHPA within the meaning of the extraordinary circumstance listed at 43 C.F.R. 46.215(g) and 46.215(b).

As the Service is aware, many of ITCA Member Tribes recognize Eagles and their nests, as well as certain Eagle roosting and foraging sites, as TCP’s given the Eagle’s longstanding role in the religion, tradition and culture of Tribes. Similarly, the proposed rule and the development it is likely to facilitate will also potentially limit access to and ceremonial use of Indian sacred sites and/or impact the physical integrity of such sites under E.O. 13007, through habitat destruction and the loss of live Eagles and/or Eagle nests that are paramount to the integrity of such sacred sites. This falls within the extraordinary circumstance listed in 43 C.F.R. 46.215(k). These impacts can, in turn, directly impact both the spiritual and physical health of Tribal members, within the meaning of circumstance 43 C.F.R. 46.215(a), and such impacts may separately or cumulatively violate tribal or federal laws relative to the protection of these rights, including AIRFA, RFRA, and the NHPA, all within the meaning of circumstance 43 C.F.R. 46.215(i).

In addition to the foregoing, it is important to understand that the likely breadth and scope of the proposed change in the tenure rule also has the potential to decrease Golden Eagle population numbers in the Southwest, making it more difficult for those ITCA Member Tribes who rely on the ceremonial and religious take of Golden Eagles (as they have for centuries), to secure their own permits for take under the BGEPA. The proposed rule does not explain how such Tribes' longstanding religious and traditional take of Golden Eagles will be addressed in the event Golden Eagles suffer unanticipated levels of take resulting from wind energy or other projects in the Southwest.

Similarly, Western Apaches (among other Member Tribes) rely on the continued existence and vitality of the Desert Nesting Bald Eagle in its homeland for a variety of key religious and cultural purposes, including the ability to secure feathers from live Eagles. There are less than 50 breeding pairs of these Eagles alive in the Southwest and the proposed rule does not address how the Western Apaches' reliance on live Eagles residing in their homeland can be reconciled with the proposed rule and its potential to impact these remaining Eagles. Accordingly, the proposed rule change also involves "unresolved conflicts concerning alternative uses of available resources" within the meaning of Section 102(2)(E) of NEPA and extraordinary circumstance 43 C.F.R. 46.215(c).

In sum, the Service has failed to address or simply ignored the above-described extraordinary circumstances that preclude the use of a categorical exclusion in this instance. This violates, among other things, NEPA and its implementing regulations. *See, e.g.*, 40 C.F.R. 1508.4, 1508.27. The Service should stay any final decision on the proposed changes to the tenure rule until the Service can undertake a complete NEPA analysis of the proposal and proper government-to-government consultation can be arranged with affected Indian tribes, including ITCA Member Tribes.

B. The Service's Proposal to Issue 30-Year Programmatic Take Permits for Bald and Golden Eagles, which Includes Lethal Permits, Unlawfully Upsets the Delicate Balance Struck by Congress under the BGEPA

The United States has long asserted that it has a "compelling interest" in protecting and preserving Eagles under the BGEPA. *See, e.g., United States v. Dion*, 476 U.S. 734 (1986). Indeed, in light of Congressional intent expressed in the BGEPA to "ban all conceivable threats to bald eagles," courts have even held that the BGEPA abrogates longstanding and express Tribal treaty rights to take Bald and Golden Eagles for religious and traditional purposes. *See Dion*, 476 U.S. at 738-739; *see also United States v. Fryberg*, 622 F.2d 1010, 1016 (9th Cir. 1980). In *Dion*, the United States Supreme Court observed that the protection afforded to Eagles under the BGEPA are "sweepingly framed" with the enumeration of forbidden acts under the Act being "exhaustive and careful." 476 U.S. at 740 (internal citations and quotation marks omitted).

The BGEPA has also withstood numerous Constitutional challenges brought by Tribal members who have been burdened by the Act's permit provisions and other requirements of the Act relative to the possession of Eagle feathers and parts for religious purposes. *See, e.g., United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997). At the core of these cases is the recognition that in

enacting the BGEPA, Congress considered the special Constitutionally protected religious and cultural interests of the Tribes, but “balanced those needs against the conservation purposes of the statute” by providing a narrow exception for Tribes for the taking of Eagles and the possession of Bald and Golden Eagle feathers and parts. *See Dion*, 476 U.S. at 743-744.

While the Secretary of the Interior is also authorized by the BGEPA to prescribe regulations permitting the “taking, possession, and transportation of [Eagles]” for certain other purposes, including “other interests in any particular locality,” 16 U.S.C. 668a, the Secretary cannot by means of regulation abrogate his responsibilities under the Act, including his obligation to exercise the United States’ compelling interest in protecting Eagles.

The Service’s proposal to provide renewable energy developers and other commercial interests with programmatic 30-year permits for take (including lethal take) of Eagles upsets the balance set by Congress in the BGEPA. Indeed, Congress’s intent to ban all conceivable threats to Eagles under the Act would appear now to be subjugated to the Service’s determination that wind energy and other commercial interests purportedly “need” 30-year permits for take in order “to better correspond to the timeframe of renewable energy projects.” 77 Fed. Reg. at 22268. This is not the “narrow” exception contemplated by the BGEPA and the Service should carefully consider the delicate balance Congress struck in this Act before it continues on its course of providing increasingly broad and potentially unlawful permits for take to commercial interests like wind energy.

It is also not lost on ITCA Member Tribes that while their Tribal members are required to apply for and receive individual permits from the Service to even possess Eagle feather or parts – despite the Constitutional rights and religious freedoms of Tribal people that have long been acknowledged in the law – the Service now intends to issue permits for take to wind energy and other interests (including potentially for lethal take) for up to a 30-year term simply because, according to the Service, “the industry has indicated that it desires a longer permit.” 77 Fed. Reg. at 22270. The inequities in this determination are questioned by ITCA Member Tribes. Such a determination may also violate the BGEPA. The Service should stay any decision to move forward with this proposed rule until it can address this question and perform a full NEPA review of the proposal, which should include meaningful consultation with affected Indian tribes.

III. THE SERVICE’S ADVANCED NOTICE OF PROPOSED RULEMAKING PROPOSING POSSIBLE ADDITIONAL REVISIONS TO THE TAKE REGULATIONS UNDER THE BGEPA (FWS-R9-MB-2011-0094)

In its advanced notice of proposed rulemaking, 77 Fed. Reg. 22278, the Service explains that during the two years that its new take regulations have been in effect, “some stakeholders have expressed concerns with some of the provisions of the rule.” *Id.* While the Service does not explain who these stakeholders are or what the substance of their concerns might be, the Service is nevertheless requesting comments and suggestions on possible revisions to its take regulations under the BGEPA “that would create a more efficient permit process while continuing to adequately protect eagles.” *Id.* at 22279. Specifically, the Service is seeking public comments regarding (1) clarifying the criteria for issuance of programmatic and standard permits; (2) the manner and means for compensatory mitigation; (3) and the Eagle Act preservation standard. *Id.*

For purposes of these comments, the ITCA expressly incorporates here as if set forth in full its comments and objections to the Service's tenure rule proposal (FWS-R9-MB-2011-0054) contained in Section II, above. In addition, with regard to the technical and other aspects of the Service's advanced notice, the ITCA expressly incorporates by reference the comments to FWS-R9-MB-2011-0094, which were jointly submitted by the Conservation Law Center and American Bird Conservancy on July 12, 2012. The ITCA writes separately here to request that the Service address (by means of regulation) several other additional issues that arise from the Service's quest to "streamline" the take permitting process under the BGEPA.

A. Tribal Consultation Protocols Should be Established by the Service Through Regulation

Most fundamentally, the Service should address the need for government-to-government consultation with Indian Tribes in new take regulations, including through the development of a final protocol for consultation with Tribes in advance of the issuance of Eagle take permits on Tribal ancestral lands. The Service has a questionable record of engaging in government-to-government consultation with Indian Tribes, including ITCA's Member Tribes, with regard to its past (2009) and present revisions to its regulations for take under BGEPA. ITCA Member Tribes are therefore highly concerned that the Service will also fail to engage in proper, advanced and meaningful government-to-government consultation with affected Indian Tribes prior to the issuance of the type of programmatic Eagle take permits being contemplated by the Service here. As the Service is aware, this point has been raised in the past by certain ITCA Member Tribes in response to, *inter alia*, the publication of the Draft Environmental Assessment for the 2009 take regulations and with regard to the Service's February 18, 2011, Draft Eagle Conservation Plan Guidance (76 Fed. Reg. 9529) and Draft Land-Based Wind Energy Guidance (76 Fed. Reg. 9590).

It is interesting to the ITCA that while the Service explains it is potentially reopening its take regulations due to the fact that "some stakeholders have expressed concerns with some provisions of the rule," 77 Fed. Reg. 22278, this clearly does not include the concerns express by Indian Tribes regarding the need to memorialize the Service's Tribal consultation obligations and protocols for potential issuance of individual or programmatic take permits under the BGEPA within Tribal ancestral lands. Now that the Service intends to "streamline" this process, ITCA's concerns are only magnified.

To be clear, the Service has had ample opportunity to memorialize the specifics of a consultation process that would not only provide assurance that Tribal information or concerns regarding the potential issuance of take permits would be considered by the Service, but would also provide certainty to wind energy and other interests regarding this process.

For example, the Service's Eagle Conservation Plan Guidance and the Land-Based Wind Energy Guidance (collectively "Guidelines") failed to provide any solid information or guidance as to when and under what conditions the Service intends to solicit or accept Tribal input with regard to wind projects, and in particular, the potential issuance of programmatic eagle "take" permits to developers under the BGEPA. This, despite the fact that proper notice and

consultation is required by the United States' trust responsibility and pursuant to certain government-to-government consultation requirements established by federal law, Executive Orders, Presidential Memoranda and Service policies.

Indeed, a review of the Guidelines reveals little more than a generalized discussion of the "importance" of Eagles to Native American culture and religion, along with a vague commitment to consult and coordinate with, and seek the participation of Tribes whenever the Service becomes aware that its actions and activities may impact tribal resources or the exercise of tribal rights, or Indian lands. While it is true that both Guidelines documents recite (in boilerplate fashion) the authorities for federal-tribal coordination and consultation, precisely how the Service will fulfill these obligations remains unclear.

As discussed in Section II(A)(2), above, neither the Guidelines nor anything else that ITCA has seen from the Service discusses or even acknowledges the existence of the Service's 2009 Draft Implementation Guidance for Eagle Take Permits, which included specific Tribal consultation and coordination requirements for the Migratory Bird Program and Services Regional Offices in issuing Eagle take permits. *See* Appendix C, "Government-to-Government Consultation with Native American Tribes, and Compliance with Section 106 of the National Historic Preservation Act." The draft Implementation Guidance document, including Appendix C, was developed in 2009 in response to the mitigated 2009 FONSI and the issuance of the final rule to authorize "take" of Bald and Golden Eagles under the BGEPA was issued by the Service. While the take rule is now codified at 50 C.F.R. §22.26 and 50 C.F.R. §22.27, the Implementation Guidance and Appendix C have never been finalized, despite the fact that it was presumably intended to assist Service personnel in administering the two new permit programs in conformance with the 2009 FONSI rule.

The specific and detailed consultation and coordination provisions found in Appendix C and throughout the Implementation Guidance document *see, e.g.*, Bald Eagle Act Permit Processing Steps flow chart at 38, while not ideal, provide considerably more guidance to Service personnel as to when and under what conditions they should notify and involve Indian tribes, including when a potential permit for "take" (including for nests) may be issued for a Bald or Golden Eagle within the ancestral lands of an Indian tribe. In addition, Appendix C also could provide helpful guidance to Service personnel as they administer the new "streamlined" permit process that is presently being contemplated by the Service where such permits have the potential to impact Eagles as well as other fish, wildlife, plants and associated habitat that have religious, traditional or cultural importance to Indian tribes, including ITCA Member Tribes.

Pursuant to the requirements of law discussed throughout these comments, the ITCA requests that commensurate to the Service's consideration of streamlining its take regulations under the BGEPA, the Service should also revisit its regulations (in consultation with Indian Tribes) to included specific and detailed consultation requirements for all affected Indian tribes commensurate with those set forth in the 2009 Implementation Guidance and Appendix C.

B. The United Nations Declaration on the Rights of Indigenous People Should be addressed by the Service

In addition to the foregoing, the Service should also consult with Indian Tribes across the Country, including ITCA Member Tribes, in advance of finalizing any additional changes to the take regulations in order to consider how the Service should implement the United Nations Declaration on the Rights of Indigenous People (“UN DRIP”) relative to the issuance of streamlined take permits for Eagles. The importance of Bald and Golden Eagles to Tribal People has been discussed at length in these comments and in prior communications with the Service. The United States and its department and agencies, including the Service, should therefore undertake careful consideration of the UN DRIP relevant to their policies and regulations relating to Eagles and other Tribally sensitive species and habitat. This should include the proposal currently under consideration by the Service.

Consultation with Tribes regarding the UN DRIP should include, among other things, the impact of the following Articles on the Service’s take regulations: Article 19 (requiring “free, prior and informed consent” of indigenous peoples where the United States adopts or implements legislative or administrative measures which may affect them), Article 24 (clarifying, *inter alia*, that indigenous peoples have “the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals”); Article 25 (emphasizing the right of indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”).

IV. CONCLUSION

The ITCA appreciates this opportunity to outline certain of ITCA Member Tribes’ concerns regarding the two proposals discussed above. The ITCA requests that the Service immediately stay its consideration of the proposed rule discussed in these comments until appropriate government-to-government consultation can be undertaken with ITCA Member Tribes.

To discuss this matter further and to arrange consultation meetings with Tribal Leaders of the ITCA, please contact me directly at (602) 258-4822. I would also suggest that you contact the ITCA Member Tribes directly to discuss individual Tribal consultation options. On behalf of ITCA’s Member Tribes, we look forward to your response.

Yours Truly,



Shan Lewis,
President, Inter Tribal Council of Arizona
Vice-Chairman, Fort Mojave Indian Tribe

cc: Susan B. Montgomery, Esq.
MONTGOMERY & INTERPRETER, PLC

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