

**Summary of Tribal Input and Responses to Tribal Comments
Concerning Proposed Department of Justice Eagle Feathers Policy**

In October 2011, the Department of Justice (the Department) announced that it was considering adopting a formal policy memorializing its practice of enforcing federal wildlife laws in a manner that facilitates the ability of members of federally recognized tribes to use the feathers and other parts of eagles and other migratory birds for tribal cultural and religious purposes. The Department solicited tribal views on this policy proposal in October 2011, and received significant and helpful comments. Some tribes requested further government-to-government consultation on the proposed policy, and the Department agreed to this request.

On June 11, 2012, the Department invited the leaders of all federally recognized tribes to consult on the proposed policy. At the same time, the Department provided a framing paper that set forth the Department's initial responses to tribal input that had been received up to that point. The Department also posted the invitation to consult and framing paper on its website.

Through the consultation process, the Department has received additional useful feedback from tribes, tribal organizations, and individuals, which is summarized below. This document sets forth both the Department's initial responses to the first round of tribal input and further responses to comments raised during the most recent consultation period.

1. Comment: The Department should provide additional information about the proposed policy regarding possession and use of the feathers and other parts of eagles and other migratory birds (collectively, migratory bird parts) and an opportunity for further tribal consultation.

Initial Response: The Department agrees that further tribal consultation and coordination on the proposed policy is appropriate. Providing additional information will help to ensure that any such policy will appropriately reflect tribal views and concerns on this important issue. The Department is therefore providing this summary of the comments it has received thus far and its initial responses to those comments, as well as seeking further tribal input. The Department plans to hold teleconference consultations to discuss the proposed policy on June 22, 2012, and on July 11, 2012, and will hold an in-person consultation in Tama, Iowa, on July 19, 2012, at a meeting of the Midwest Alliance of Sovereign Tribes. The Department also welcomes written comments. Tribes that wish to discuss the proposed policy further can contact the Department's Office of Tribal Justice directly.

Response after Further Consultation: The Department appreciates the valuable input it received through the tribal consultation sessions described above. Those sessions were supplemented with feedback received during in-person discussions at the Mid-Year Conference of the National Congress of American Indians, the Native American Fish and Wildlife Society's Southwest Regional Conference, and a listening session with tribes in New Mexico. The Department also received significant and helpful feedback through written comments. The Department has

closely reviewed all comments and incorporated tribal feedback as appropriate in the newly adopted policy (the “Policy”).

2. Comment: There is significant confusion in Indian country as to whether tribal members must have a permit from the Department of the Interior’s Fish and Wildlife Service (FWS) to be in legal possession of migratory bird parts. The Department should clarify whether or not such a permit is necessary.

Initial Response: The Department agrees that this clarification is important in light of the confusion regarding the relationship between the Morton Policy and the FWS permit system. The Department wishes to make clear that members of federally recognized tribes do not need FWS permits in order to be covered by the Morton Policy or the Department’s proposed policy. Tribal members can show that they are covered by the policy – and thus that they are free to possess or use migratory bird parts – simply by showing that they are members of a federally recognized tribe (by producing, for example, a tribal identification card). To eliminate any confusion, the Department proposes to clarify in the policy that members of federally recognized tribes do not need permits to possess or use migratory bird parts.

Response after Further Consultation: The Department received additional tribal comments supporting the proposed clarification. Accordingly, the Policy makes clear that tribal members do not need FWS permits to possess or use migratory bird parts.

3. Comment: The Department should clarify the terms “buying or selling” and “compensation” and explain what “exchanges” of migratory bird parts would be permissible.

Initial Response: The Department agrees that clarification of these terms would be helpful. The Morton Policy uses but does not define the terms “buying or selling” and “compensation.” The Department proposes to define “buying or selling” or “compensation” to include the exchange of migratory bird parts for anything other than migratory bird parts, including any exchange involving cash, services, or goods. The proposed policy would thus make clear that while members of federally recognized tribes may exchange migratory bird parts for other migratory bird parts, tribal members may not barter migratory bird parts for other types of goods or for services of any type.

Response after Further Consultation: The Department received additional tribal comments seeking clarification of the difference between permissible “exchanges” and impermissible “compensation” or “buying and selling.” Some comments suggested that the exchange of migratory bird parts for “other cultural items” should be permissible, while others cautioned that it was important to limit the types of “exchange” that were allowed. The Policy provides that tribal members may exchange migratory bird parts for other migratory bird parts, without compensation, but treats the exchange of migratory bird parts for other types of goods (or for cash or services) as the buying or selling of migratory bird parts, and thus prohibited. To do

otherwise would involve inquiring into whether a particular exchange of migratory bird parts for other goods is for legitimate cultural or religious purposes. The Department agrees with multiple tribal comments urging that the policy should not require federal agents or prosecutors to assess the cultural or religious legitimacy of particular items or actions. In addition, the Department notes that allowing the exchange of migratory bird parts for other items, particularly items that have a monetary value, would in effect create a market for migratory bird parts that could pose significant problems for enforcement of wildlife laws.

4. Comment: The policy should address whether and when tribal members can travel domestically and/or internationally with migratory bird parts.

Initial Response: The Department recognizes that the issue of travel with migratory bird parts is of great importance to tribal members and agrees that it would be helpful for the proposed policy to specifically address this issue. The Department proposes to do this by clarifying that members of federally recognized tribes can travel domestically with migratory bird parts and by describing the requirements for international travel with such items.

Response after Further Consultation: The Department received additional tribal comments emphasizing the importance of addressing whether and how tribal members can travel with migratory bird parts in their possession. Accordingly, the Policy explains that tribal members can travel domestically with migratory bird parts. The Policy further explains that tribal members can travel internationally with migratory bird parts, but that permits may be required for certain international travel. There is information on the website of the FWS Office of Law Enforcement that explains how international travel requirements apply to members of federally recognized tribes: <http://www.fws.gov/le/transport-eagle-items.html>. In addition, specific fact sheets addressing travel to Canada and other international travel are available at: <http://www.fws.gov/le/travel-to-canada-or-mexico-with-eagle-items.html> and <http://www.fws.gov/le/travel-over-seas-with-eagle-items.html>. Tribal members with further questions about international travel with migratory bird parts can use the contact information available at those web pages to contact FWS.

5. Comment: The policy should permit tribal members to acquire feathers they find in the wild (*i.e.*, “found feathers”) and to gift such feathers to other tribal members.

Initial Response: Several comments stated that found feathers are of special religious significance for particular tribes and asked that the policy permit tribal members to acquire such feathers and to gift them to other tribal members. The Department acknowledges the importance of this issue and proposes to clarify that members of federally recognized tribes may acquire from the wild, without compensation, naturally molted or fallen feathers of migratory birds.

Response after Further Consultation: The Department received additional tribal comments supporting the Department’s proposal for addressing found feathers. Accordingly, the Policy

provides that tribal members may acquire from the wild, without compensation of any kind, naturally molted or fallen feathers of federally protected birds, without molesting or disturbing the birds or their nests. In response to questions raised during consultation, the Department has clarified that the Policy does not permit salvage of carcasses or bird parts (or of anything from carcasses or bird parts) but only the collection of naturally molted or fallen feathers. This is consistent with the views expressed by most tribal members during consultation.

6. Comment: The Department should define “federally protected birds” and clarify that the proposed policy applies not just to eagles but also to other migratory birds.

Initial Response: The Morton Policy uses but does not define the term “federally protected birds.” The Department proposes addressing this comment by identifying federal laws that protect birds and by defining a “federally protected bird” as a bird that is protected under any federal law.

Response after Further Consultation: The Department received additional tribal comments supporting this clarification. Accordingly, the Policy defines “federally protected bird,” and identifies federal wildlife laws that protect birds.

7. Comment: The Department should clarify that a craftsperson who works on migratory bird parts must be a member of a federally recognized tribe and should use the term “craftspersons” rather than “craftsmen.”

Initial Response: The Department proposes accepting these suggestions.

Response after Further Consultation: The Department received some comments asking that the policy’s reference to craftspersons not be limited to members of federally recognized tribes; other tribal comments supported this limitation. Because the Policy is based on the unique, government-to-government relationship between the United States and federally recognized tribes, it covers only situations in which a member of a federally recognized tribe provides migratory bird parts to a craftsperson who is also a member of such a tribe. While other statutes (pertaining to matters unrelated to wildlife laws) may define an Indian craftsperson or artisan differently, those statutes apply in different contexts and have limited relevance here.

8. Comment: The policy should address the permissibility of killing migratory birds for tribal religious and cultural purposes.

Initial Response: The Morton Policy does not address this issue, but it is addressed in FWS regulations. 50 C.F.R. 22.22. The Department proposes addressing this request by acknowledging that members of federally recognized tribes may legally take (including kill) live eagles or other migratory birds only if they obtain and comply with appropriate FWS permits.

Response after Further Consultation: The Department received additional tribal comments requesting confirmation that the Department recognizes the validity of FWS permits allowing tribal members to take eagles and other migratory birds for tribal religious purposes.

Accordingly, the Policy confirms that members of federally recognized tribes may legally take federally protected birds, but only if they obtain and comply with appropriate FWS permits. The Department will not prosecute individuals for actions taken in compliance with valid FWS permits.

9. Comment: The policy should confirm that the Department will prosecute those who kill eagles and those who sell bird parts for profit.

Initial Response: The Department is committed to protecting eagles and other migratory birds. The proposed policy would make clear that the Department will continue to prosecute those who violate federal law by killing eagles or other migratory birds without a permit or by buying, selling, or otherwise commercializing migratory bird parts.

Response after Further Consultation: The Department received additional tribal comments asking that the policy state clearly that both tribal members and non-members will be subject to prosecution for killing eagles or other migratory birds without a permit, or for buying or selling eagle feathers or other migratory bird parts. The Policy includes such a statement. In addition, the Department notes that the Policy protects tribal members from prosecution for possession and other activities covered by the Policy only if those tribal members do not also violate federal wildlife laws by illegally killing federally protected birds or by commercializing the parts of federally protected birds.

10. Comment: The policy should emphasize the government-to-government relationship and should foster tribal self-determination and self-governance.

Initial Response: The Department agrees that the proposed policy reflects the important government-to-government relationship that the United States shares with federally recognized tribes. The Department believes that the proposed policy is integral to its commitment to fostering tribal self-determination and self-governance.

Response after Further Consultation: The Policy confirms the Department's commitment to the principles of tribal self-determination and self-governance.

11. Comment: The policy should leave it to individual tribes – rather than the federal government – to determine whether a practice is a bona fide tribal religious or cultural practice.

Initial Response: The Department agrees that the proposed policy should not require federal agents or prosecutors to assess the legitimacy of tribal religious or cultural practices. The Department proposes to address this issue by having the applicability of the policy hinge on the

type of conduct at issue – *e.g.*, possessing or gifting migratory bird parts as opposed to selling them – rather than on a subjective determination of whether a particular tribal member was engaged in “legitimate” tribal cultural or religious practices.

Response after Further Consultation: The Department received additional tribal comments stating that the policy will best foster tribal self-determination if it allows tribes, rather than the federal government, to regulate the legitimacy of their members’ cultural and religious practices. Accordingly, the Policy intentionally avoids placing federal agents or prosecutors in the position of having to determine whether particular conduct or items serve legitimate tribal cultural or religious purposes.

12. Comment: The policy should more clearly define the “legitimate needs of Indians” and make clear that selling sacred items in the pow-wow arena is not part of such needs.

Initial Response: The Department believes that it is up to individual Indian tribes to define their legitimate cultural and religious needs. The proposed policy, like the Morton Policy, would make it clear, however, that members of federally recognized tribes may be prosecuted whenever they buy or sell migratory bird parts or barter them for other types of goods or services. The Department is not contemplating any exception to this prohibition.

Response after Further Consultation: The Department received additional tribal comments expressing concerns that some members of federally recognized tribes use migratory bird parts in ways that are not consistent with legitimate tribal cultural or religious practices. The Policy does not take any position on what constitutes a legitimate tribal cultural or religious practice. This is a matter that each Indian tribe determines for itself and its members. The Department recognizes that each tribe is unique and has its own cultural and religious practices. Whether the members of a particular tribe use migratory bird parts in a manner consistent with that tribe’s practices is a matter for the tribe, and not the federal government, to address. The Policy, on the other hand, applies consistently throughout the nation. The Policy thus makes clear that the buying or selling of migratory bird parts is prohibited under all circumstances, with no exceptions, and that no one may kill a migratory bird without a valid FWS permit.

13. Comment: The policy should state that its protection of the “legitimate interests” of American Indians is an issue of religious freedom and expression.

Initial Response: The Department is deeply committed to ensuring religious freedom for all Americans, including members of federally recognized tribes and other Native Americans. However, the proposed policy would be based on the government-to-government relationship between the United States and federally recognized tribes.

Response after Further Consultation: No further response.

14. Comment: The Department should coordinate with tribal governments when violations occur on tribal lands and/or involve tribal members and should consider whether tribes can address violations so as to eliminate the need for federal prosecution.

Initial Response: The Department agrees that this is an important issue. The Department proposes using the policy to further encourage federal prosecutors to consider whether particular cases could be appropriately handled by tribal prosecutorial authorities. Given the wide range of circumstances and issues that can arise in any individual case, this is an issue best addressed on a case-by-case basis. The Department understands and appreciates that many tribes would urge greater involvement in enforcing laws protecting eagles and other wildlife and looks forward to continuing to work with tribes on a number of fronts to increase tribal capacity and responsibilities for this enforcement work. The Department, for example, is in the process of developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing wildlife and environmental laws that affect tribal lands. This training is intended to promote federal-tribal partnerships, foster communication between federal and tribal enforcement officials and prosecutors, and develop tribal capacity to assume a greater role in enforcement.

Response after Further Consultation: The Department received additional tribal comments urging greater tribal involvement in enforcing the laws protecting eagles and other migratory birds. The Department supports this goal. The Policy therefore encourages prosecutors to consider whether particular cases would be more appropriately handled by tribal authorities rather than by federal prosecution.

15. Comment: We would like additional information on the joint federal/tribal training program on enforcement of wildlife and other environmental laws, which was described in the Department's October 2011 Request for Tribal Input. When will the Department be holding this training?

Initial Response: The first such training program will be held the week of October 15, 2012, at the Department's National Advocacy Center in Columbia, South Carolina. The training will provide federal and tribal law enforcement officers and prosecutors with additional tools for sensitive and effective enforcement of the laws protecting tribal lands and resources,

Response after Further Consultation: The Department is sponsoring the Tribal and Federal Training on Wildlife and Pollution Enforcement Issues Affecting Tribal Lands, which will be held October 16-18, 2012. The Department's Office of Legal Education will pay lodging and travel expenses for all participants. The training is intended to foster federal and tribal cooperation in enforcing the laws that protect tribal lands and resources.

16. Comment: What if the Department of the Interior's Morton Policy and the DOJ policy differ? Will the federal government have a consistent policy?

Initial Response: This is a very important point. The Department has worked very closely with the Department of the Interior on the proposed policy, and will continue to do so. The Department will not issue such a policy without coordinating closely with the Department of the Interior to ensure that the federal government has a single, consistent policy.

Response after Further Consultation: The Department of Justice and the Department of the Interior worked very closely together to finalize the Policy and will continue to work closely together to ensure that it is implemented consistently by both Departments.

17. Comment: Will this policy be applied consistently throughout the Department and by all U.S. Attorneys' Offices?

Initial Response: Yes. The policy would cover the whole Department. It would provide guidance for all prosecutors in the Department, regardless of which Division or U.S. Attorney's Office they are in. In addition, such a policy would provide a mechanism for internal coordination to ensure that it would be interpreted consistently throughout the Department.

Response after Further Consultation: The Policy, which was signed by the Attorney General, applies to the entire Department including all United States Attorneys and the Environment and Natural Resources Division. It therefore provides direction to all federal prosecutors who enforce the federal bird protection laws and should ensure a consistent and uniform approach across the nation.

18. Comment: The policy should state in plain language what it means for tribal members.

Initial Response: The Department agrees that a clear statement of what tribal members can and cannot do is very important. The Department plans to work closely with the Department of the Interior to develop additional materials (such as a "Fact Sheet" or "Frequently Asked Questions" document) that explain the scope of the policy in plain language. These materials would be available if and when the policy is issued.

Response after Further Consultation: The Department will issue a Fact Sheet that describes the policy in plain language.

19. Comment: The Department should make sure that the final policy is distributed as broadly as possible so that tribal members are aware of it and can use it to guide their behavior.

Initial Response: The Department agrees that this is important and would work to ensure that the final policy and any explanatory materials for the public are widely available. The Department welcomes input on how best to achieve this goal.

Response after Further Consultation: The Department continues to believe that broad distribution of the Policy to tribal members is important and will work with tribal leaders and tribal organizations to achieve this goal.

20. Comment: The Department should ensure that all federal, state, and tribal law enforcement agents receive clear guidance regarding what is permissible under the policy and what is not.

Initial Response: The Department agrees that providing information to federal, state, and tribal law enforcement agents is essential. The Department plans to work closely with the Department of the Interior to develop appropriate informational materials and ensure that they are broadly distributed to federal, state, and tribal law enforcement officials. In addition, the new training program described above will include guidance for federal and tribal law enforcement agents on the policy. The Department welcomes input on how best to achieve this goal.

Response after Further Consultation: The Department continues to believe that it is important to provide guidance for law enforcement agents regarding the scope of the Policy and will work to do so with the Department of the Interior and other federal, state, and tribal law enforcement partners.

21. Comment: The Department should provide training for tribal rangers and tribal law enforcement officers on the policy.

Initial Response: As mentioned above, the Department is developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing wildlife and environmental laws that affect tribal lands. This training, which will be held the week of October 15, 2012, will include training for both tribal and federal law enforcement officers on enforcement of laws protecting eagles and other migratory birds and on the proposed policy, as well as on other important issues regarding the enforcement of laws protecting tribal lands and resources.

Response after Further Consultation: The upcoming Department-sponsored Tribal and Federal Training on Wildlife and Pollution Enforcement Issues Affecting Tribal Lands, to be held October 16-18, 2012, will include training on the Policy.

22. Comment: The Department should not only educate tribal members about FWS and enforcement issues but also learn from tribes and tribal members about tribal religious and cultural practices that involve the use of migratory bird parts.

Initial Response: The Department agrees that a two-way educational process between tribes and federal officials is essential. That is one reason that the training program the Department is developing on enforcing wildlife laws that affect tribal lands is for both tribal and federal law enforcement officials and prosecutors. This training program will provide an opportunity for

federal agents and prosecutors to learn directly from tribal members about the significant role that migratory birds and bird parts can play in tribal religious and cultural practices and to learn how to effectively enforce wildlife laws in a culturally sensitive manner. The Department also notes that the federal government works with tribal cultural and religious leaders to provide training for federal law enforcement officers in other contexts as well. The Department welcomes input on additional ways to foster this goal.

Response after Further Consultation: The upcoming Department-sponsored Tribal and Federal Training on Wildlife and Pollution Enforcement Issues Affecting Tribal Lands, to be held October 16-18, 2012, will include opportunities for tribal members to educate federal officials on a variety of enforcement issues related to tribal religious and cultural practices.

23. Comment: The policy should define “American Indian” or otherwise state more clearly who is covered by the policy.

Initial Response: The Departments of Justice and the Interior consistently have interpreted the Morton Policy to apply only to members of federally recognized tribes. The Department agrees that it would be helpful to make this clear in the proposed policy.

Response after Further Consultation: The Policy covers members of federally recognized tribes.

24. Related comments (addressing appropriate scope of proposed policy):

- a. The policy should continue to apply only to members of federally recognized tribes.
- b. The policy should apply only to those who have CDIB (Certificate of Degree of Indian or Alaska Native Blood) cards issued by the Department of the Interior’s Bureau of Indian Affairs.
- c. Application of the policy should be tied to possession of a federally-recognized tribal-enrollment identification card.
- d. The policy should be extended to all indigenous peoples in the United States.
- e. The policy should apply only to those whose DNA establishes that they are of Native American ancestry.
- f. The policy should be extended to members of historic tribes who have maintained their cultural lifeways and practices.
- g. The policy should defer to tribal officials (from federally recognized, state-recognized, or historic tribes) as to who is an American Indian.

Initial Response: The Department received a wide range of comments regarding who should be covered by the proposed policy, with some arguing that it should continue to cover only members of federally recognized tribes, while others urged the Department to extend the proposed policy to members of non-federally recognized tribes or others of Native American heritage.

After carefully reviewing and considering all comments received, the Department proposes that, consistent with the long-standing policy and practice of both the Departments of Justice and the Interior, the policy would apply only to members of federally recognized tribes. As stated above, the Departments of Justice and the Interior both interpret the Morton Policy to apply only to members of federally recognized tribes and have consistently done so. It is precisely because the Morton Policy is based on the political, government-to-government relationship between the United States and federally recognized tribes that courts have upheld that Policy.¹

Basing the proposed policy on race or ethnicity, or on a claim or assessment of “legitimate” religious need, would be inappropriate and would present serious legal concerns. Moreover, as courts have held, extending the policy beyond members of federally recognized tribes “would in fact harm” members of such tribes. *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011).² “If the government extended eligibility, every permit issued to a nonmember would be one fewer issued to a member. This is the inescapable result of a demand that exceeds a fixed supply.” *United States v. Antoine*, 318 F.3d 919, 923 (9th Cir. 2003). Expanding the policy therefore “would not forward the government’s compelling interest in protecting the religion and culture of federally-recognized tribes” but “would do that interest a disservice.” *Wilgus*, 638 F.3d at 1293-94.

In sum, the proposed policy represents a careful balancing of the federal government’s responsibility to protect migratory birds and its commitment to support the cultural and religious practices of federally recognized tribes. As the Court of Appeals for the Tenth Circuit explained:

By allowing only members of federally-recognized tribes an essential though otherwise prohibited commodity (eagle feathers and parts), the United States ensures that those tribes are able to continue to practice their traditional culture to

¹ See *United States v. Eagleboy*, 200 F.3d 1137, 1138 (8th Cir. 1999) (upholding the Morton Policy because it “rests on the non-racial basis of ... membership in a federally-recognized tribe”). Courts have held that the United States’ political relationship with federally recognized tribes gives the federal government the requisite interest in “protecting and fostering” the culture and religion of those tribes. See, e.g., *United States v. Wilgus*, 638 F.3d 1274, 1285-88 (10th Cir. 2011). It is this unique interest that allows the federal government to provide members of federally recognized tribes with exclusive access to a resource – migratory bird parts – that is not available to other Americans. *Id.*; see also *United States v. Winddancer*, 435 F. Supp. 2d 687, 697 (M.D. Tenn. 2006) (holding that the Department of the Interior “struck a careful balance between eagle preservation, and the preservation of Native American cultures” by using a “political categorization [*i.e.*, membership in a federally recognized tribe], and not a religious one” as the basis of its eagle feathers policy).

² The *Wilgus* court also suggested that, if the courts were to extend the right to obtain eagle feathers to those who practice Native American religions but are not members of federally recognized tribes, then anyone who claims that his or her religion (including non-Native religions) requires the use of migratory bird parts could claim a similar right to possess eagle feathers under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1). *Wilgus*, 638 F.3d at 1293 n.9.

the greatest extent possible. And by limiting the permitting process to only members of those recognized tribes, the United States does its best to guarantee that those tribes, which share a unique and constitutionally-protected relationship with the federal government, will receive as much of a very scarce resource (eagle feathers and parts) as possible.

Wilgus, 638 F.3d at 1295.

Response after Further Consultation: The Department received additional comments about who the policy should cover. By and large, federally recognized tribes agreed that the policy was based on the unique government-to-government relationship that they share with the federal government, and that the policy should therefore continue to cover only members of federally recognized tribes. On the other hand, members of state-recognized tribes and those affiliated with other non-federally recognized groups argued that the policy should be extended to cover members of state-recognized tribes and other indigenous people. The Department has closely reviewed and considered all comments on this issue. The Department continues to believe that expanding the policy in this manner would not be consistent with the federal interests that underlie the policy, including the interest in facilitating the cultural and religious practices of those tribes with which the United States shares a government-to-government relationship.

25. Comment: It would be better for the policy, like the Morton Policy, to continue to use a broad, undefined term like “Indians” than to limit itself to members of federally recognized tribes.

Initial Response: The Department respectfully disagrees. The central goals of the proposed policy include clarity and transparency for those involved in law enforcement, for tribal members, and for others. It is important to communicate openly and clearly so that the proposed policy can guide the behavior of all concerned.

Response after Further Consultation: No further response.

26. Comment: If the policy applies only to members of federally recognized tribes, other Native Americans will fear that they will become targets of prosecutors, who will pursue them regardless of the nature or magnitude of the alleged offense.

Initial Response: The Department intends to make clear that the proposed policy is not intended to address or change how the Department handles cases involving those who are not members of federally recognized tribes. Nor would the proposed policy prevent federal prosecutors from considering all appropriate factors, such as the nature and seriousness of the offense and the culpability of the offender, in deciding whether to pursue a given case.

Response after Further Consultation: The Department received additional comments expressing concern that the policy will lead federal prosecutors to focus additional enforcement resources on

members of state-recognized tribes or other non-federally recognized groups. The Policy states explicitly that it is not intended to address or change how prosecutors handle cases that do not involve members of federally recognized tribes. The Policy further states that prosecutors in such cases retain their discretion to consider all appropriate factors in determining whether to pursue a particular prosecution. This means that prosecutors can consider factors such as the nature and seriousness of the offense in determining whether prosecution should be declined. The Policy also explains that it remains the priority of the Departments of Justice and the Interior to focus resources on wildlife cases that have the greatest negative impact on protected birds, such as the unlawful killing and unlawful commercialization of such birds.

27. Comment: Members of federally recognized tribes should be able to gift migratory bird parts to those who are not members of any federally recognized tribe where that is consistent with the tribe's own religious and cultural practices.

Initial Response: As noted above, prosecutors retain in all cases the discretion to consider all appropriate factors in determining whether to proceed with a particular prosecution. However, DOJ does not believe it would be appropriate to include in the proposed policy a general rule that would allow members of federally recognized tribes to gift migratory bird parts to non-members. As the courts have explained, "such a scheme would create well-nigh insuperable obstacles to enforcement of any restrictions on possession" and would divert migratory bird parts "away from members of federally-recognized tribes, the very people that the governmental interest protects." *United States v. Wilgus*, 638 F.3d at 1294-95 (quotation omitted). If there are tribes that feel that their specific cultural and religious practices are not adequately addressed by the proposed policy, the Departments of Justice and the Interior are open to discussing whether there may be a way to accommodate such limited practices without hampering the government's ability to enforce the law.

Response after Further Consultation: The Department received additional comments from members of federally recognized tribes regarding situations in which tribal religious and cultural practices include sharing migratory bird parts with, or gifting migratory bird parts to, certain non-tribal members who are closely affiliated with their tribes. The Department appreciates that all tribes have unique traditions and identities, reflected in a wide variety of cultural and religious practices. Nonetheless, the special situations that may be posed by particular tribal practices cannot feasibly be addressed in a generally applicable policy such as this. Moreover, categorically expanding the policy to cover gifts to non-members would present significant enforcement problems. As noted above, the Departments of Justice and the Interior are open to discussing with particular tribes whether there may be ways to accommodate specific tribal practices in a manner that is consistent with the Policy's focus on federally recognized tribes and would not hamper the government's ability to enforce federal bird protection laws.

28. Comment: The policy should be expanded to be consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP).

Initial Response: The proposed policy is consistent with the UN DRIP. As described in the Announcement of United States Support for the UN DRIP, the “United States’ existing recognition of, and relationship with, federally recognized tribes” is the “basis for the special legal and political relationship . . . pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including . . . culture [and] religion.” The Department, of course, values the religious freedom of all Americans, but it is the government-to-government relationship that the United States shares with federally recognized tribes that forms the underpinning for the proposed policy.

Response after Further Consultation: No further response.

Additional Comments Following Further Tribal Consultation:

29. Comment: The Department should clarify the rules regarding compensation for tribal craftspersons who create religious and cultural objects from migratory bird parts.

Response: The Policy explains that tribal craftspersons may be compensated for their labor in crafting religious or cultural objects, but that there can be no compensation or charge for the migratory bird parts used in such objects.

30. Comment: It should not be illegal for any Native American to possess or use eagle feathers or other migratory bird parts. The federal government has no business interfering with tribal use of migratory bird parts at all.

Response: Federal wildlife laws, including the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, play a crucial role in protecting and preserving eagles and other migratory birds for all Americans. They do so, among other things, by prohibiting the take (including killing), possession, buying, or selling of eagles and other migratory birds and the feathers or other parts of such birds. Thus, the prohibition on possession or use of eagle feathers or other migratory bird parts is a matter of longstanding statutory law. It is not a consequence of the Department of the Interior’s Morton Policy or the new Department of Justice Policy. On the contrary, the new Department of Justice Policy reflects the federal government’s decision, consistent with its government-to-government relationship with tribes, to exercise its discretion in a manner that enables members of federally recognized tribes to possess and use eagle feathers and other migratory bird parts without fear of prosecution.

Comments Beyond the Scope of the Proposed Policy

The Department received a significant number of comments that raise issues and concerns about the enforcement of laws protecting birds, or that make proposals for additional tribal involvement in the enforcement of such laws, which fall outside the scope of the Policy, which focuses on the Department’s

exercise of its discretion not to prosecute members of federally recognized tribes for possession and use of migratory bird parts.

Such issues include: creating additional tribal repositories; improving the National Eagle Repository; authorizing tribes to regulate the retrieval of migratory bird parts and distribution to their members; providing funding to tribal officers or for tribal conservation programs; addressing the process for seeking return of seized items that include migratory bird parts that were commercialized or taken from birds that had been illegally killed; more quickly processing requests for permits for migratory bird parts or for the take of live birds; and moving away from a permit system altogether.

Although these are matters that fall outside of the scope of the Policy, the Department is open to discussing, in conjunction with the Department of the Interior and other relevant federal agencies, whether there are ways to address these issues and proposals in other contexts. The Department remains committed to working closely with tribes and with the Department of the Interior to increase the tribal role in enforcing laws protecting migratory birds and to address further tribal concerns about enforcement issues related to these laws.