

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

No. 06 MJ 4013 PCT MEA

BERRA TAWAHONGVA, )

MEMORANDUM AND ORDER

Defendant. )

Before the Court is Defendant's Motion to Dismiss, asserting a conviction on the charge against him, a violation of the Migratory Bird Treaty Act, would be unconstitutional. Defendant contends his conviction would violate his right to the free exercise of his religion, guaranteed by the First Amendment to the United States Constitution. Defendant argues that requiring him to acquire a permit prior to taking golden eagles constitutes a substantial burden on the free exercise of his religion and, therefore, that the Religious Freedom Restoration Act prohibits his prosecution for failing to obtain such a permit.

The Court conducted an evidentiary hearing on Defendant's motion on August 22, 2006. For the reasons that follow, Defendant's motion to dismiss the charge against him is **denied.**

1 **Factual Background and Procedural History**

2 Pursuant to a search warrant, in early June of 2005  
3 United States Fish and Wildlife Service officers searched a  
4 fenced area behind Defendant's residence within the boundaries  
5 of the Hopi reservation and seized two live golden eagles.  
6 Prior to executing the warrant the officers ascertained the Hopi  
7 tribal government had not issued a permit to Defendant to take  
8 or possess golden eagles. Defendant was charged with violation  
9 of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a)  
10 and 18 U.S.C. § 2 (Count I); violation of the Migratory Bird  
11 Treaty Act, 16 U.S.C. § 703 and 18 U.S.C. § 2 (Count II); and  
12 violation of the Lacey Act and Hopi law regarding possession of  
13 golden eagles without a permit (Count III). On May 4, 2006, the  
14 Court granted the government's motion to dismiss counts one and  
15 three of the complaint. The remaining charge is a Class B  
16 misdemeanor, punishable by imprisonment for a term of up to six  
17 months and a fine of up to \$15,000, or both. See 16 U.S.C. §  
18 707(a) (2000 & Supp. 2006).

19 The Migratory Bird Treaty Act ("MBTA"), codified at 16  
20 U.S.C. 703-712,<sup>1</sup> provides:

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22 \_\_\_\_\_  
23 <sup>1</sup> The federal regulations governing compliance with and  
24 enforcement of the MBTA are found in section 50 of the Code of Federal  
25 Regulations, at Part 13 and Part 21. Part 13 and Part 21 do not  
26 explicitly provide for an exception to the MBTA for the religious  
27 purposes of American Indian tribes.

28 Part 22, governing the enforcement of the Bald and Golden Eagle  
Protection Act, codified at 16 U.S.C. §§ 668-668d, provides:

26 This part controls the taking, possession, and  
27 transportation within the United States of bald and golden  
28 eagles for scientific, educational, and depredation control  
purposes and for the religious purposes of American Indian  
tribes. . . .

50 C.F.R. § 22.1 (2006).

1 Unless and except as permitted by regulations  
2 made as hereinafter provided in this  
3 subchapter, it shall be unlawful at any time,  
4 by any means or in any manner, to pursue,  
5 hunt, take, capture, kill, attempt to take,  
6 capture, or kill, possess, offer for sale,  
7 sell, offer to barter, barter, offer to  
8 purchase, purchase, deliver for shipment,  
9 ship, export, import, cause to be shipped,  
10 exported, or imported, deliver for  
11 transportation, transport or cause to be  
12 transported, carry or cause to be carried, or  
13 receive for shipment, transportation,  
14 carriage, or export, any migratory bird, any  
15 part, nest, or egg of any such bird, or any  
16 product, whether or not manufactured, which  
17 consists, or is composed in whole or part, of  
18 any such bird or any part, nest, or egg  
19 thereof, [including golden eagles].

20 Id. § 703(a).

21 The MBTA was enacted in 1918. Congress ratified the  
22 relevant international treaties<sup>2</sup> regarding protection of  
23 migratory bird species and enacted the MBTA to effectuate the

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24 <sup>2</sup> The Migratory Bird Treaty Act was originally enacted to  
25 implement a 1916 treaty between the United States and Great Britain  
26 (acting on behalf of Canada). See Convention for the Protection of  
27 Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702. Other  
28 similar treaties were entered into with Mexico in 1936, with Japan in  
1972, and with the former Soviet Union in 1976. See Convention for  
the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb.  
7, 1936, 50 Stat. 1311; Convention for the Protection of Migratory  
Birds and Birds in Danger of Extinction, and Their Environment,  
U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; Convention Concerning the  
Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R.,  
Nov. 19, 1976, 29 U.S.T. 4647. Each of these treaties has been  
modified since its adoption by additional conventions and protocols,  
generally to enhance protection of the listed species. For a general  
discussion of the treaties and conventions concerning the MBTA, see  
United States v. Hardman, 297 F.3d 1116, 1121 n.10 (10th Cir. 2002)  
(en banc); Hill v. Norton, 275 F.3d 98, 105-06 (D.C. Cir. 2001);  
United States v. Moon Lake Electric Association, Inc., 45 F. Supp. 2d  
1070, 1080 (D. Colo. 1999). See also Kevin J. Worthen, *Eagle Feathers  
and Equality: Lessons on Religious Exceptions from the Native American  
Experience*, 76 U. Colo. L. Rev. 989 (2005); Hye-Jong Linda Lee, *The  
Pragmatic Migratory Bird Treaty Act: Protecting "Property,"* 31 B.C.  
Envtl. Aff. L. Rev. 649 (2004).

1 United States' compliance with those treaties in recognition of  
2 the harm posed by unregulated taking of golden eagles and other  
3 migratory birds to those species' existence. See 74 Stat. 866;  
4 H.R. Rep. No. 1787, 86th Cong., 2d Sess. (1960); S. Rep. No.  
5 1779, 86th Cong., 2d Sess. (1960). See also Andrus v. Allard,  
6 444 U.S. 51, 62, 100 S. Ct. 318, 325 (1979). The United States  
7 Congress has repeatedly avowed the purpose of the MBTA and  
8 amending legislation to be maintaining healthy populations of  
9 migratory birds in North America. See, e.g., S. Rep. No. 92-  
10 1159, 92nd Cong., 2d Sess. 1972, 1972 U.S.C.C.A.N. 4285; North  
11 American Wetlands Conservation Act of 1989, Pub. L. No. 101-233,  
12 § 2(a), 103 Stat. 1968, codified at 16 U.S.C. § 4401. Congress'  
13 desire to protect golden eagles was clearly evidenced by  
14 amendment of the 1940 Bald Eagle Protection Act in 1962 to add  
15 golden eagles to bald eagles as a species protected by this  
16 legislation.<sup>3</sup>

17           The MBTA prohibits the possession and taking of golden  
18 eagles except as otherwise provided by law. Federal law allows  
19 for the otherwise prohibited taking and possession of live  
20 golden eagles for religious uses by practitioners of American  
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22           <sup>3</sup> See Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat.  
23 1246 (1962), codified as amended at 16 U.S.C. § 668 (2000 & Supp.  
24 2006). Protection was extended to golden eagles, *inter alia*, because  
25 it is difficult to distinguish between the eaglets of golden eagles  
26 and bald eagles. Therefore, "protection of the golden eagle will  
27 afford greater protection for the bald eagle ... because the bald  
28 eagle is often killed by persons mistaking it for the golden eagle."  
Id. In addition to the Native American religious use exception, the  
1962 Act authorized "the taking of golden eagles for the purpose of  
seasonally protecting domesticated flocks and herds...." Id. § 668a.  
However, all exceptions to the prohibition against taking eagles are  
subject to the requirement that the permitted activity be "compatible  
with the preservation" of the species. Id.

1 Indian religions. To accommodate the religious practice of the  
2 Hopi, specifically, the United States Fish and Wildlife Service  
3 ("USFWS") has promulgated regulations allowing Hopi to lawfully  
4 obtain and possess golden eagles for their religious use.

5           The USFWS has issued permits to take eagles to the Hopi  
6 annually since 1986. See Docket No. 40, Attach.<sup>4</sup> The USFWS  
7 permitted the Hopi to "take" from Hopi reservation lands from  
8 twelve to an unlimited number of golden eagles per year for  
9 religious use from 1986 through 1996. Id. The permitted annual  
10 "take" from 1997 through 2005 from reservation lands has been 40  
11 golden eagles. Id. The reported annual take of golden eagles  
12 by the Hopi from reservation lands from 1997 through 2003 has  
13 varied from as few as two birds to as many as 38 birds. Id.,  
14 Attach. Additionally, the State of Arizona has permitted the  
15 Hopi to take ten golden eagles per year from state lands, and  
16 the Navajo Nation has permitted the Hopi to take twelve eagles  
17 per year from Navajo reservation lands each year from 1998  
18 through 2003. Id.

19           A USFWS agent has represented to the Court that the  
20 USFWS issued a permit in 2005 in the name of Wayne Taylor, Jr.,  
21 Chairman and Chief Executive Officer of the Hopi Tribe, allowing  
22 the Chairman "and tribal members designated by him" to "take"  
23 forty golden eagles in the year 2005.<sup>5</sup> Docket No. 1, Attach.

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25           <sup>4</sup> United States Fish and Wildlife Service, Statement of Decision,  
26 Migratory Bird Treaty Act Permit to Take Golden Eagles for Religious  
27 Purposes by the Hopi Tribe on Ancestral Lands (Apr. 2003).

28           <sup>5</sup> At the evidentiary hearing Defendant asserted the permit system  
is contrary to law because the governing section of the Code of  
Federal Regulations, 50 C.F.R. 22.2 requires the United States Fish  
and Wildlife Service to issue the permits to take golden eagles to

1 (Statement of Probable Cause).

2           Additionally, the Hopi Tribal Council has adopted  
3 tribal regulations, involving a permit system, for the taking of  
4 live golden eagles for religious purposes from Hopi reservation  
5 lands, from state trust lands, from the former Navajo-Hopi joint  
6 use area, and from exclusively Navajo tribal lands. See Hopi  
7 Tribe Wildlife Ordinance Nos. 48, 7.11, 7.16. The tribal  
8 regulations were enacted in accordance with the Hopi tribal  
9 government's obligation to Hopi people to negotiate with other  
10 sovereign entities to preserve the traditional Hopi practice of  
11 gathering golden eagles for religious purposes.

12           The Hopi eagle permit system is administered by the  
13 tribal Cultural Preservation Office ("CPO"). The testimony  
14 presented at the hearing indicated the CPO regulates the  
15 issuance of permits to ensure that specific golden eagle  
16 acquiring sites historically utilized by specific village and  
17 clan affiliations are not trespassed upon by others,<sup>6</sup> and to

18 \_\_\_\_\_  
19 "individuals." However, Defendant did not present this argument in  
20 his motion to dismiss and the Court deemed the argument waived as not  
21 properly before the Court because the government had not been allowed  
22 time to evaluate this assertion. Cf. United States v. Sandia, 188  
23 F.3d 1215, 1218 n.2 (10th Cir. 1999) (holding appellant who did not  
raise issue until oral argument had waived it). Furthermore, a new  
motion to dismiss predicated on this defense would not be timely  
filed. Pursuant to the Court's order of May 8, 2006, at Docket No.  
23, pretrial motions were to be filed no later than June 2, 2006.

24           <sup>6</sup>  
25           Throughout the entire 1882 reservation, and beyond, the  
26 Hopis had numerous ceremonial shrines, some of which they  
27 had maintained and visited for hundreds of years. These  
28 Hopi shrines were of two kinds, the Kachina shrines and the  
eagle shrines. The Kachina shrines were the same for all  
Hopi mesas and clans, but the eagle shrines belonged to one  
or the other of the clans of the different pueblos. Eagle  
shrines were associated with the collection of young eagles  
from the eagle nests in the cliffs, at least one eagle

1 preserve the longevity of the golden eagle population  
2 historically resident on Hopi reservation land.

3 A Hopi tribal natural resources officer testified a  
4 Hopi individual may obtain a permit to take a golden eagle by  
5 going to the CPO office and filling out the requisite  
6 application, without any required waiting period or prepayment  
7 of any fee.<sup>7</sup> The testimony presented at the hearing indicates  
8 the eaglets are optimally "taken" in May or June, when they are  
9 fledged, and that they are sacrificed, or returned, during the  
10 Niman Kachina ceremony in July. The hearing testimony indicated  
11 that, on some occasions, the CPO has issued a permit after an  
12 eagle has been taken. It is not disputed that, in 2005, only 21  
13 of the 40 available permits were dispensed by the Cultural  
14 Preservation Office; 19 permits were available that year to  
15 qualified individuals, including Defendant, had they applied for  
16 the permits.

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19 always being left in the nest. The hunting of eagles was  
20 accompanied by rituals involving the use of corn pollen and  
21 prayer sticks, conducted at a particular site before the  
22 young eagles were seized. The young eagles were then taken  
23 back to the villages, raised to a certain size when they  
24 were killed, and the feathers used for ceremonial purposes.  
The Navajos as well as the Hopis had sacred places both  
within and without the 1882 reservation. These were, for  
the most part, eagle-catching shrines, but the Navajos  
probably had less need than the Hopis for the use of eagle  
feathers in their ceremonials.

25 Healing v. Jones, 210 F. Supp. 125, 192 (D. Ariz. 1962).

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<sup>7</sup> One must be an enrolled tribal member to acquire a permit to  
take a golden eagle on Hopi reservation land. The Court notes some  
Hopi, who are sometimes referred to as "traditional," believe it an  
affront to be required to have someone else formally acknowledge them  
as being Hopi, and that traditional Hopi do not agree that the tribal  
and federal forms of government currently in place validly exercise  
authority over them.

1           The parties do not dispute Defendant is an enrolled  
2 member of the Hopi, a federally-recognized American Indian  
3 tribe, who, as such, is eligible to receive a permit to take  
4 golden eagles. The government does not dispute that Defendant,  
5 who is a member of the Coyote clan, is an elder in the One-Horn  
6 kiva of Mishongnovi, and that to fulfill his religious duties to  
7 the kiva he must collect golden eagles each year. The parties  
8 do not dispute the use of live golden eagles is a central tenet  
9 of Hopi religious practice, which has continued since "time  
10 immemorial."<sup>8</sup> The Court notes that evidence presented at the

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12           <sup>8</sup>

13           The practice of eagle gathering is at the heart of the  
14 Hopi religious ceremonial cycle and the Hopi culture. The  
15 eagle serves as the link between the spiritual world and  
16 the physical world of the Hopi, a connection that embodies  
17 the very essence of Hopi spirituality and belief. Golden  
18 eaglets are gathered from nests soon after birth and are  
19 kept and raised to fledglings in Hopi villages. Later,  
20 during the Niman Kachina ceremony, the golden eagles are  
21 sacrificed and "sent" to their spiritual home. The eagles'  
22 feathers are subsequently used in all Hopi religious  
23 ceremonies such as the Kachina, Flute, and Snake  
24 ceremonies. The cyclical relationship between the eagle and  
25 the Hopi is renewed annually through the practice of eaglet  
26 gathering, sustaining the connection between the spiritual  
27 and physical worlds for the next generation of Hopi.

28           The importance that the Hopi attach to the ceremonial  
gathering of eagles is expressed in Article IV of the  
Tribal Constitution approved by Secretary of the Interior  
Ickes on December 19, 1936:

          The Tribal Council shall negotiate with the  
United States Government agencies concerned, and  
with other tribes and other persons concerned, in  
order to secure protection of the right of the  
Hopi Tribe to hunt for eagles in its traditional  
territories, and to secure adequate protection  
for its outlying, established shrines.

          Only a few of the Hopi clan and religious societies bear  
the important ceremonial obligation of eagle gathering, and  
each of these has a traditional area from which it--and no  
other clan or society that is not related to it--may gather  
eagles. Hopi clan ownership of traditional eagle nests is  
well documented in the anthropological literature. . . . "The  
territory around the Hopi villages where eagles may be

1 hearing indicated that, in 2005, a Kikmongwi<sup>9</sup> from the village  
2 of Mishongnovi was issued a permit to take eagles by the CPO.

### 3 **Analysis**

#### 4 **Standard for granting or denying a motion to dismiss a** 5 **criminal charge**

6 Federal Rule of Criminal Procedure 12(b)(2) provides  
7 "[a] party may raise by pretrial motion any defense, objection,  
8 or request that the court can determine without a trial of the  
9 general issue." Fed. R. Crim. P. 12(b)(2) (2006). A charge in  
10 a complaint may be dismissed if it is subject to a defense that  
11 may be decided solely on issues of law. Cf. United States v.  
12 Labs of Virginia, Inc., 272 F. Supp. 2d 764, 768 (N.D. Ill.  
13 2003) (in the context of a motion to dismiss an indictment);  
14 United States v. Flores, 404 F.3d 320, 324 (5th Cir. 2005)

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16 found is, and has been from time immemorial, divided into  
17 portions or allotments, which are controlled by certain  
18 clans or families. These territories extend as far as 50  
19 and 60 miles from the villages." H.R. Voth, Notes on the  
20 Eagle Cult of the Hopi, collected in H.R. Voth, Brief  
Miscellaneous Hopi Papers, Field Columbian Museum,  
Publication 157, 107-109, Anthropological Series  
11(2)(1912). ...

21 Proposed Rules, Special Regulations; Areas of the National Park  
22 System; Religious Ceremonial Collection of Golden Eaglets From Wupatki  
National Monument, 66 F.R. 6516, 6517 (2001).

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23 The Hopi Tribal Constitution[] grants special powers to  
24 traditional religious leaders known as Kikmongwi, who must  
25 certify village representatives to the tribal council, []  
26 and who have the power to call for an election on proposed  
27 village constitutions[]. Moreover, until otherwise  
28 organized, villages are to be governed "under the  
traditional Hopi organization, and the Kikmongwi of such  
village shall be recognized as its leader." [].  
Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions  
from the Native American Experience*, 76 U. Colo. L. Rev. at 1020 n.108  
(internal citations omitted).

1 ("[t]he propriety of granting a motion to dismiss an indictment  
2 under [Rule 12, Federal Rules of Criminal Procedure] by pretrial  
3 motion is by-and-large contingent upon whether the infirmity in  
4 the prosecution is essentially one of law or involves  
5 determinations of fact. If a question of law is involved, then  
6 consideration of the motion is generally proper."). See also  
7 United States v. Marzook, 426 F. Supp. 2d 820, 823-24 (N.D. Ill.  
8 2006); United States v. Bodmer, 342 F. Supp. 2d 176, 180  
9 (S.D.N.Y. 2004). Arguments raised in a motion to dismiss that  
10 rely on disputed facts should be denied. United States v.  
11 Caputo, 288 F. Supp. 2d 912, 916 (N.D. Ill. 2003), citing United  
12 States v. Shriver, 989 F.2d 898, 906 (7th Cir. 1992).<sup>10</sup>

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17 <sup>10</sup> This last rule is relevant in the context of whether Defendant  
18 is charged with bartering eagle parts. To prevail on a free exercise  
19 of religion defense to a charge of illegal possession of eagles, the  
20 defendant must establish his possession of the eagles was solely for  
21 a personal religious purpose, rather than a commercial purpose. See  
22 United States v. Hugs, 109 F.3d 1375, 1377-78 (9th Cir. 1997)  
23 (concluding that criminal defendants asserting a free exercise defense  
24 to charges of illegal possession of eagle parts bore the burden of  
25 establishing the eagles they were accused of possessing were acquired  
26 for their own religious use, rather than commercial use); United  
27 States v. Sandia, 188 F.3d 1215, 1218 (10th Cir. 1999) (concluding the  
28 defendant's subsequent sale of eagles collected for his religious use  
defeated his assertion he had standing to request an evidentiary  
hearing on the issue of the free exercise of his religion in the  
context of an MBTA case).

The testimony presented at the evidentiary hearing on this point  
was not clear; Defendant denied he ever bartered eagles or eagle  
parts. Testimony suggested Defendant may have received some "gifts"  
from a person to whom he had given eagle feathers; no witness  
testified Defendant had ever bartered eagles or feathers. Therefore,  
the Court presumes for the purpose of this memorandum and order only  
that the government does not assert Defendant's possession of the  
subject eagles was for other than his personal religious use.

1           **Defendant's claim his prosecution violates his**  
2 **constitutional right to the free exercise of his religion.**

3           Defendant raises a free exercise of religion challenge  
4 to the criminal charge against him, a violation of the Migratory  
5 Bird Treaty Act ("MBTA"), i.e., illegal possession of a golden  
6 eagle. In his motion to dismiss, Defendant cites, inter alia,  
7 the First Amendment, the Religious Freedom Restoration Act, and  
8 the American Indian Religious Freedom Act.<sup>11</sup> Docket No. 27.

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10           <sup>11</sup> Defendant further contends the "permits allocation regime  
11 also violates the Fifth Amendment, Title VI of the Civil Rights Act  
12 of 1964, the Omnibus Crime Control and Safe Streets Act of 1968, and  
13 the Indian Civil Rights Act of 1968." Docket No. 27 at 3. However,  
14 because Defendant did not argue the merits of a defense pursuant to  
15 any of these statutes in his pleadings or at the evidentiary hearing,  
16 to the extent Defendant's motion to dismiss is predicated on any of  
17 these causes of action, the motion is denied.

18           Additionally, Defendant's citation to the American Indian  
19 Religious Freedom Act (AIRFA) as a defense is misplaced. The AIRFA,  
20 enacted in 1978, declares it "the policy of the United States to  
21 protect and preserve for American Indians their inherent right of  
22 freedom to believe, express and exercise the[ir] traditional religions  
23 ... including but not limited to access to sites, use and possession  
24 of sacred objects, and the freedom to worship through ceremonials and  
25 traditional rites." 42 U.S.C. 1996 (2003 & Supp. 2006). The AIRFA  
26 requires federal agencies to consider, but not necessarily to defer  
27 to, Indian religious values. See Wilson v. Block, 708 F.2d 735, 747  
28 (D.C. Cir. 1983). See also Havasupai Tribe v. United States, 752 F.  
Supp. 1471, 1488 (D. Ariz. 1990). However, there is no private cause  
of action under AIRFA, i.e., it does not provide for individual  
judicially-enforceable rights, and it does not provide a defense to  
a criminal charge. See Lyng v. Northwest Indian Cemetery Protective  
Ass'n, 485 U.S. 439, 455, 471 (1988). Defendant does not cite to the  
published opinion of a federal court indicating the AIRFA provides a  
defense to the charge against Defendant.

23           Furthermore, any assertion that Defendant's prosecution is barred  
24 by the existence of a treaty between the Hopi and the United States  
25 government is precluded by the United States Supreme Court's opinion  
26 in United States v. Dion, 476 U.S. 734, 746, 106 S. Ct. 2216, 2224  
27 (1986) ("We hold that the Court of Appeals erred in recognizing Dion's  
28 treaty defense to his Eagle Protection Act and Endangered Species Act  
prosecutions. For the reasons stated in n. 3, supra, we do not pass  
on the claim raised by amici that the [BGEPA], if read to abrogate  
Indian treaty rights, invades religious freedom"). See also United  
States v. Fryberg, 622 F.2d 1010, 1012 (9th Cir. 1990) (following  
other federal courts in concluding that Congress' exception from the  
absolute prohibitions of the BGEPA for Native Americans established

1           The factual predicate for Defendant's free exercise  
2 defense, as stated in his motion to dismiss, is the assertion  
3 that the Hopi Tribal Chairman, acting through the tribal  
4 Cultural Preservation Office, does not fairly distribute the  
5 permits allocated to the Hopi by the USFWS for "taking" golden  
6 eagles on, in this particular case, Hopi reservation land.  
7 Defendant did not present any evidence to support this  
8 contention at the evidentiary hearing.

9           Defendant asserts his possession of the eagles was for  
10 his own personal religious use and to fulfill the religious  
11 responsibilities that Defendant, as an elder of his kiva, must  
12 fulfill for the spiritual well-being of the other members of his  
13 kiva and his clan and his village. Defendant denies he ever  
14 traded or bartered for eagle feathers. Although the government  
15 does not, apparently, concede that Defendant's possession of the  
16 eagles was solely for personal religious use, the government did  
17 not present witness testimony or other evidence at the  
18 evidentiary hearing that would establish Defendant possessed the  
19 eagles in question for other than his personal religious use.

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23 Congress' intent to abrogate any broader treaty rights to take bald  
24 and golden eagles). But see United States v. White, 508 F.2d 453,  
25 457-58 (8th Cir. 1974) (holding Congress did not clearly abrogate  
26 treaty rights in enacting the BGEPA); United States v. Bresette, 761  
27 F. Supp. 658, 663-64 (D. Minn. 1991) (concluding the Chippewa treaty  
28 rights encompassed selling eagle parts and that this treaty right was  
not clearly abrogated in the MBTA); United States v. Abeyta, 632 F.  
Supp. 1301, 1307 (D.N.M. 1986); United States v. Cutler, 37 F. Supp.  
724, 725 (D. Idaho 1941). This Court is not bound by the holding of  
the Eighth Circuit Court of Appeals or other District Courts, but is  
bound by the holdings of the Ninth Circuit Court of Appeals.

1                   **Standing**

2                   The government asserts Defendant does not have standing  
3 to challenge the permit system as violating his free exercise of  
4 his religion because Defendant never applied for a permit to  
5 take a golden eagle.

6                   Defendant concedes he did not apply for or obtain a  
7 permit from the CPO to gather or possess golden eagles in 2005.  
8 Defendant concedes he has never applied for a permit to possess  
9 or take golden eagles from the Hopi Cultural Preservation Office  
10 and, therefore, that he has never been denied a permit.  
11 Defendant testified he believes his permission to take eagles is  
12 conferred by his acting in accordance with the tenets of his  
13 religious faith, i.e., that properly preparing feathers and  
14 prayer objects prior to taking the eagles, as he was taught by  
15 his uncles, should be the only "permit" required to take the  
16 eagles.

17                   Defendant does not have standing to assert an "as  
18 applied" First Amendment free exercise of religion defense to  
19 the charge against him because he has never applied for a  
20 permit. The failure to apply for a permit to take golden eagles  
21 precludes the assertion that the manner in which the MBTA  
22 permitting system is administered, with regard to Defendant,  
23 violates his personal right to the free exercise of his  
24 religion. See United States v. Hugs, 109 F.3d 1375, 1378-79  
25 (9th Cir. 1997) ("As we have noted, however, the [defendants]  
26 have never sought to use the permit system and therefore have no  
27 standing to challenge the way in which the scheme operates");  
28 United States v. Top Sky, 547 F. 2d 486, 488 (9th Cir. 1976)

1 (concluding a defendant who had previously procured a permit to  
2 possess eagles could not establish standing to challenge the  
3 BGEPA's permit system because the defendant provided no evidence  
4 the permit system had burdened his own religious exercise);  
5 United States v. Winddancer, 435 F. Supp. 2d 687, 694-95 (M.D.  
6 Tenn. 2006) (concluding a defendant who had never applied for a  
7 permit did not have standing to raise a First Amendment free  
8 exercise challenge to a charge of violating the MBTA); United  
9 States v. Lundquist, 932 F. Supp. 1237, 1242 n.4 (D. Or. 1990);  
10 United States v. Thirty-eight (38) Golden Eagles or Golden Eagle  
11 Parts, 649 F. Supp. 269, 277 (D. Nev. 1986).<sup>12</sup>

12 Defendant argued at the evidentiary hearing he has  
13 standing to raise a First Amendment challenge to the permit  
14 system based on the Tenth Circuit Court of Appeals' decision in  
15 United States v. Hardman, 297 F.3d 1116 (2002), a case involving  
16 a prosecution for violation of the Bald and Golden Eagle  
17 Protection Act. Hardman is distinguishable from the instant  
18 matter, primarily because the statutes at issue are  
19 distinguishable with regard to the defendant's eligibility for  
20 a permit to take golden eagles.

21 The BGEPA prohibits, *inter alia*, the possession of  
22 golden eagles and golden eagle parts. The BGEPA allows for the  
23 possession of these birds and parts on a limited basis for,  
24 *inter alia*, religious purposes by enrolled members of federally-  
25 recognized American Indian tribes. The BGEPA provides for the  
26 possession of golden eagle parts for religious use by means of

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27  
28 <sup>12</sup> The District of Nevada case involved the civil seizure of eagle parts, after a criminal prosecution had resulted in a hung jury.

1 a permitting system allowing the allocation of eagle parts from  
2 federal repositories of dead birds and parts. Entitled  
3 individuals may apply for possession of birds or parts from the  
4 repositories, which application ensures that the birds or parts  
5 will be used for religious, rather than commercial purposes, and  
6 only by enrolled members of federally-recognized tribes. At  
7 times, "emergency" orders for feathers from the federal  
8 repository may be filled within six months, the wait may  
9 otherwise be as long as three years for an eagle carcass. See  
10 Hardman, 297 F.3d at 1123; United States v. Jim, 888 F. Supp.  
11 1058, 1060-61 (D. Or. 1995). The BGEPA does not allow for  
12 exceptions to the prohibitions against possessing golden eagles  
13 for Native Americans who are not members of recognized tribes,  
14 unlike the MBTA, which does allow for exceptions to the  
15 prohibitions for Native Americans who are not members of  
16 recognized tribes. See Winddancer, 435 F. Supp. 2d at 693.

17           The Tenth Circuit's conclusion in Hardman, a BGEPA  
18 case, was predicated on the fact that the defendant was not a  
19 member of a federally-recognized tribe and, therefore, the  
20 defendant was not eligible for a permit to possess eagle parts,  
21 i.e., applying for a permit would be futile. The Ninth Circuit  
22 reached this same conclusion in United States v. Antoine, 318  
23 F.3d 919 (9th Cir. 2003), a case wherein the defendant was not  
24 a member of a federally-recognized tribe who had been charged  
25 with violating the BGEPA. The defendants in both Antoine and  
26 Hardman claimed the BGEPA absolutely prohibited legitimate  
27 practitioners of American Indian religions, who were not  
28 enrolled members of federally-recognized tribes, as a class,

1 from acquiring objects necessary to their practice of their  
2 religion. The question presented in those cases was whether an  
3 American Indian who was not eligible for a permit to possess  
4 eagle parts could establish his free exercise of his religion  
5 was substantially burdened by a system which rendered him  
6 completely without a means of legally obtaining eagle parts.<sup>13</sup>

7 Defendant is not similarly situated to the defendants  
8 in Hardman or Antoine. Defendant does not argue the permit  
9 system absolutely prohibits him from legally acquiring eagles,  
10 he argues his religious exercise is unduly burdened by the  
11 administration of the permit system by the Hopi tribe because it  
12 discomfits him to deal with the tribal government. Defendant  
13 testified he would comply with a permit regime if he could  
14 acquire a permit directly from the United States Fish and  
15 Wildlife Service.

16 Defendant does not have standing to assert the defense  
17 the MBTA permitting system as it is applied by the Hopi tribal  
18 government violates his constitutional right to the free  
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20 <sup>13</sup> See United States v. Hardman, 297 F.3d 1116, 1135 (10th Cir.  
21 2002) ("The question at the heart of this case is why an individual  
22 who is not a member of a federally recognized tribe is foreclosed from  
23 applying for a permit that may be used as a defense to criminal  
prosecution for possession of eagle feathers, while an identically  
situated individual may apply for a permit if she is a member of a  
federally recognized tribe.").

24 The Ninth Circuit described the question as follows:  
25 [I]n this case, the burden on religion is inescapable; the  
26 only question is whom to burden and how much. Both member  
27 and nonmember Indians seek to use eagles for religious  
28 purposes. The government must decide whether to distribute  
eagles narrowly and thus burden nonmembers, or distribute  
them broadly and exacerbate the extreme delays already  
faced by members. Religion weighs on both sides of the  
scale.

United States v. Antoine, 318 F.3d 919, 923 (9th Cir. 2003).

1 exercise of his religion because he did not apply for a permit  
2 to possess the forbidden birds. See Hugs, 109 F.3d at 1379  
3 ("the defendants [who had not applied for a permit] are  
4 precluded from challenging any deficiencies in the manner in  
5 which the permit system operates."); Top Sky, 547 F.2d at 485;  
6 Winddancer, 435 F. Supp. 2d at 693-94; Lundquist, 932 F. Supp.  
7 at 1242 n.4 ("[the defendant] has no standing to challenge the  
8 alleged imperfections of the permit process because he has never  
9 applied for a permit.").

10 Defendant's failure to apply for a permit does not,  
11 arguably, preclude him from asserting a facial challenge to the  
12 constitutionality of the MBTA in a criminal context. See City  
13 Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789,  
14 797 n. 16, 104 S. Ct. 2118, 2125 n.16 (1984) ("[o]ne who might  
15 have had a license for the asking may therefore call into  
16 question the whole scheme of licensing when he is prosecuted for  
17 failure to procure it."); Hugs, 109 F.3d at 1378; Winddancer,  
18 435 F. Supp. 2d at 694. But see Top Sky, 547 F.2d at 489.<sup>14</sup>

19 To establish the MBTA is facially unconstitutional,  
20 Defendant must persuade the Court there is no set of  
21 circumstances under which the MBTA could be enforced without

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24 <sup>14</sup>  
25 Federal courts have jurisdiction to strike down statutes as  
26 unconstitutional only when called upon to determine the  
27 legal rights of litigants in actual controversy. United  
28 States v. Raines, 362 U.S. 17, 21, 80 S. Ct. 519, 522 []  
(1960). "(O)ne to whom application of a statute is  
constitutional will not be heard to attack the statute on  
the ground that impliedly it might also be taken as  
applying to other persons or other situations in which its  
application might be unconstitutional." Id.  
United States v. Top Sky, 547 F.2d 483, 489 (9th Cir. 1976).

1 violating the First Amendment. See Ohio v. Akron Ctr. for  
2 Reproductive Health, 497 U.S. 502, 504, 110 S. Ct. 2972, 2975-76  
3 (1990) (O'Connor, J., concurring); United States v. Salerno, 481  
4 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). Defendant does not  
5 clearly assert the MBTA permitting regime is not capable of  
6 being applied without violating the First Amendment. Defendant  
7 argued in his motion that the permit system as managed by the  
8 Hopi Tribal Chairman and the Hopi Cultural Preservation Office  
9 inhibits his personal free exercise. However, Defendant acceded  
10 at the evidentiary hearing that he has never been denied a  
11 permit, and he presented no evidence of any corruption in the  
12 manner in which the Hopi Tribal Chairman administers the permit  
13 system. Indeed, Defendant stated that, if he could acquire the  
14 permit directly from the USFWS, he would acquire a permit prior  
15 to taking eagles. Additionally, unchallenged evidence was  
16 presented to the Court that "traditional" Hopi people, including  
17 one Kikmongwi, have acquired permits to take eagles, apparently  
18 without their exercise of their religion being substantially  
19 burdened. Defendant has not stated a claim, or even asserted,  
20 that the MBTA is facially invalid. Therefore, Defendant's  
21 motion to dismiss may be denied on the basis that Defendant has  
22 no standing to raise an "as applied" challenge to the MBTA and  
23 Defendant has not asserted an adequate claim that the MBTA is  
24 facially unconstitutional.

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1           **The merits of Defendant's claim that the MBTA is**  
2 **unconstitutional as applied to him because it infringes on his**  
3 **right to the free exercise of his religion**

4           Defendant contends the Religious Freedom Restoration  
5 Act of 1993 ("RFRA") bars his prosecution for violation of the  
6 MBTA because the government has not established a compelling  
7 interest in protection of the golden eagle. Defendant asserts  
8 the federal permitting requirement is unnecessary because the  
9 Hopi' taking of golden eagles has never endangered the species'  
10 existence. Defendant further maintains any government interest  
11 in protecting the golden eagle is "outweighed" by the right of  
12 individual Hopi people to "observe their ancient religious  
13 practices."

14           The Religious Freedom Restoration Act ("RFRA") was  
15 enacted in 1993 as Congress' response to the free exercise  
16 analysis espoused by the United States Supreme Court in  
17 Employment Division v. Smith.<sup>15</sup>

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20           <sup>15</sup>

21           Until 1990, the law as declared by the Supreme Court was  
22           that the First Amendment prevented infringements on the  
23           exercise of religious beliefs except when justified by a  
24           compelling interest that could not be achieved through less  
25           restrictive means.[] Then, in Employment Division v. Smith,  
26           [], the Court held that facially neutral laws would no  
27           longer be subject to this level of scrutiny under the First  
28           Amendment. However, three years later, the Religious  
29           Freedom Restoration Act of 1993 restored the "compelling  
30           interest" and "least restrictive means" tests. [] Because  
31           the RFRA restored the test used to consider free exercise  
32           challenges before Smith, we rely on pre-Smith decisions  
33           under the Free Exercise Clause in determining whether the  
34           denial of [the plaintiff's] request for an exemption is  
35           consistent with the RFRA.

36           Droz v. Commissioner of Internal Revenue Serv., 48 F.3d 1120, 1122 n.2  
37           (9th Cir. 1995) (internal citations omitted).

1 The Religious Freedom Restoration Act provides:

2 Government shall not substantially burden a  
3 person's exercise of religion even if the  
4 burden results from a rule of general  
5 applicability, except as provided in  
6 subsection (b) of this section.

(b) Exception

7 Government may substantially burden a  
8 person's exercise of religion only if it  
9 demonstrates that application of the burden  
10 to the person--

11 (1) is in furtherance of a compelling governmental interest; and  
12 (2) is the least restrictive means of  
13 furthering that compelling governmental  
14 interest.

(c) Judicial relief

15 A person whose religious exercise has been  
16 burdened in violation of this section may  
17 assert that violation as a claim or defense  
18 in a judicial proceeding and obtain  
19 appropriate relief against a government.  
20 Standing to assert a claim or defense under  
21 this section shall be governed by the general  
22 rules of standing under article III of the  
23 Constitution.

24 42 U.S.C. § 2000bb-1 (2003 & Supp. 2006).<sup>16</sup>

25 RFRA is not interpreted by the federal courts as a  
26 "separate" statutory defense to a criminal charge, but as an  
27 instruction to the courts to replace the Smith standard for  
28 evaluating First Amendment free exercise claims with the  
"compelling interest" test espoused in Wisconsin v. Yoder. See,  
e.g., United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir.  
1996); Jim, 888 F. Supp. at 1061 ("With the enactment of RFRA,  
Congress intended that the courts apply pre-Smith case law in  
determining whether a statute interferes with free expression of  
religion."). Additionally, some District Courts have added an

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<sup>16</sup> "[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.... the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title." 42 U.S.C. § 2000bb-2(3)-(4) (2003 & Supp. 2006).

1 additional element of analysis to the three-step RFRA test,  
2 citing to the pre-Smith Ninth Circuit "standard" case for these  
3 claims, Callahan v. Woods.<sup>17</sup> See Gibson v. Babbitt, 72 F. Supp.  
4 2d 1356, 1361 (S.D. Fla. 1999); Lundquist, 932 F. Supp. at 1240;  
5 Jim, 888 F. Supp. at 1061. But see Hugs, 109 F.3d 1375 (passim)  
6 (analyzing a RFRA claim without reference to Callahan or  
7 consideration of the nexus element).

8 Defendant's RFRA claim requires the Court to engage in  
9 a burden-shifting analysis. See, e.g., Gonzales v. O Centro  
10 Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1219  
11 (2006). Defendant must first establish his personal free  
12 exercise of his religion was substantially burdened by the  
13 relevant government regulation. See Navajo Nation v. United  
14 States Forest Serv., 408 F. Supp. 2d 866, 903 (D. Ariz. 2006).  
15 If Defendant establishes the MBTA substantially burdens his  
16 personal free exercise of his religion, the burden shifts to the  
17 government to show the MBTA is the least restrictive means of  
18 furthering a compelling government interest. See id.

19 As stated supra, the burden is initially on Defendant  
20 to establish his possession of the eagles was for his own  
21 personal, as opposed to commercial, use. Defendant must also

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23 <sup>17</sup> Callahan requires a nexus between the compelling government  
24 interest and the means used to further that interest.

25 If the compelling state goal can be accomplished despite  
26 the exemption of a particular individual, then a regulation  
27 which denies an exemption is not the least restrictive  
means of furthering the state interest. A synthesis of the  
two prongs is therefore the question whether the government  
has a compelling interest in not exempting a religious  
individual from a particular regulation.

28 Callahan v. Woods, 736 F.2d 1269, 1272-73 (9th Cir. 1984), quoted in  
Gibson v. Babbitt, 72 F. Supp. 2d 1356, 1361 (S.D. Fla. 1999), citing  
Harris v. Chapman, 97 F.3d 499, 503 (11th Cir. 1996).

1 establish the burden on his free exercise of his religion is  
2 "substantial," rather than a mere inconvenience. See Thomas v.  
3 Review Bd., 450 U.S. 707, 717-18, 101 S. Ct. 1425, 1431-32  
4 (1981). See also Lundquist, 932 F. Supp. at 1242; Jim 888 F.  
5 Supp. at 1061.

6 At the evidentiary hearing, Defendant presented the  
7 following evidence that his personal free exercise of his  
8 religion is substantially burdened by the permitting requirement  
9 of the MBTA:

10 A member of the Hopi Tribal Council, Leon Koruh,  
11 testified Defendant is a traditional Hopi, with religious duties  
12 to his kiva. Mr. Koruh testified the permit system is a burden  
13 on the ability of Hopi people to practice their religion. He  
14 testified that some individuals collect eagles without a permit  
15 and are not prosecuted. Mr. Koruh testified "everyone would  
16 like an eagle."

17 Another witness testified that traditional Hopi people  
18 do not acknowledge the legitimacy of the tribal government.  
19 Defendant and the other witnesses testified that requiring a  
20 traditional Hopi person to get a permit prior to taking eagles  
21 is viewed by traditional Hopi people as unnecessary and as an  
22 affront to them, such that this requirement taints the pure  
23 spirit of heart necessary for one who is to take eagles.  
24 However, noting the differences in language, one of the  
25 witnesses who testified on behalf of Defendant regarding the  
26 burden placed on traditional Hopi to comply with the permit  
27 requirement defined the acquiring of a permit as a "hassle."  
28 Defendant testified that the permit system "messed things up."

1 Defendant testified he did not believe he should have  
2 to get a permit because those who taught him his  
3 responsibilities as an elder of a kiva did not get permits  
4 before taking eagles as part of this responsibility.  
5 Defendant's counsel asserted that applying for a permit to take  
6 a golden eagle was a "sacrilege" to Defendant's religion.

7 Defendant alleged in his motion to dismiss that the  
8 Hopi tribal government does not fairly administer the process of  
9 distributing permits to take golden eagles. Defendant's written  
10 motion alleged the tribal government "is rife with cronyism and  
11 religious discrimination." Docket No. 27 at 3. However, at the  
12 evidentiary hearing Defendant apparently abandoned this argument  
13 by not presenting any evidence of how the system of allocating  
14 permits by the Cultural Preservation Office was corrupted, i.e.,  
15 by producing testimony that any individual had been denied a  
16 permit for personal, religious, or other discriminatory reasons.

17 The Court is sympathetic to the conflicts within the  
18 Hopi community with regard to "traditional" and "non-  
19 traditional" Hopi individuals and their view of the validity or  
20 invalidity of the system of tribal government currently in  
21 place. However, this Court is not the appropriate venue for the  
22 resolution of political and cultural issues among Hopi people.

23 Although other federal courts have determined that  
24 requiring an American Indian to acquire a permit prior to taking  
25 an eagle for religious purposes constitutes a substantial burden  
26 on their free exercise of their religion, this Defendant has not  
27 presented sufficient evidence the permit requirement  
28 "substantially" burdens his personal free exercise of his

1 religion. The testimony indicated Defendant did not find  
2 applying for a permit objectionable, he found applying for a  
3 permit from the Hopi tribal government objectionable. Defendant  
4 did not testify he believed the permit requirement would require  
5 undue physical effort on his part, or require him to endure any  
6 delay in performing rites necessary to the free exercise of his  
7 religion. The testimony indicated the permit requirement places  
8 only a subjective emotional burden on Defendant. Compare Hugs,  
9 109 F.3d at 1378 ("We do not question that the BGEPA imposed a  
10 substantial burden on the practice of such religions by  
11 restricting the ability of adherents to obtain and possess  
12 eagles and eagle parts."); Gibson v. Babbit, 223 F.3d 1256, 1258  
13 (11th Cir. 2001); Hardman, 297 F.3d at 1126-27 ("Any scheme that  
14 limits [legitimate practitioners of American Indian religions]  
15 access to eagle feathers therefore must be seen as having a  
16 substantial effect on the exercise of religious belief.");  
17 United States v. Gonzales, 957 F. Supp. 1225, 1228 (D.N.M. 1997)  
18 (holding that regulations requiring the defendant "to state on  
19 an application the name of the tribal religious ceremony for  
20 which he seeks an eagle and requiring him to obtain  
21 certification from a religious elder to the effect that he is  
22 authorized to participate in that ceremony, constitute a  
23 substantial burden on his exercise of his religion.");  
24 Lundquist, 932 F. Supp. at 1242.

25 The Court concludes Defendant's free exercise of his  
26 religion, although slightly burdened, is not substantially  
27 burdened by the requirement that he acquire a permit from the  
28 Hopi tribe prior to collecting an eagle. Defendant's mental

1 discomfiture in acknowledging the legitimacy of the Hopi tribal  
2 government by applying for a permit to take eagles is analogous  
3 to the situation of a conscientious objector being forced to  
4 register for a military draft. See United States v. Bigman, 429  
5 F.2d 13, 14-15 (9th Cir. 1970) (citing the "unbroken line of  
6 authority" in the Circuit Courts of Appeal that the compulsory  
7 registration procedures of the Selective Service Act did not  
8 impermissibly burden a defendant's free exercise of his  
9 religious beliefs against compliance with those procedures).

10 **Compelling interest**

11 Whether a proffered government interest qualifies as a  
12 compelling interest is a question of law. Hardman, 297 F.3d at  
13 1127. Allowing in the abstract that Defendant has established  
14 a substantial burden on the free exercise of his religion, the  
15 burden shifts to the government to show a compelling interest in  
16 enacting the MBTA and promulgating the permitting regulations.  
17 However, to the extent Defendant is arguing something has  
18 changed with regard to the necessity for protecting golden  
19 eagles, the burden of going forward with evidence does not  
20 shift. The party claiming only that changed circumstances  
21 render a statute invalid, i.e., as serving an interest which is  
22 no longer compelling, bears the burden of producing evidence  
23 sufficient to convince the Court a substantial change in  
24 relevant circumstances has occurred. See Antoine, 318 F.3d at  
25 921-22 (concluding the government should not be forced to  
26 relitigate its compelling interest in protecting bald and golden  
27  
28

1 eagles with each prosecution for violation of the BGEPA).<sup>18</sup>

2 It has been suggested the following government  
3 interests are served by the MBTA and that these interests are  
4 compelling interests:

5 1. The United States' international treaty obligations  
6 to protect this species;

7 2. The federal government's interest in fulfilling its  
8 trust obligations to tribes, i.e., to protect tribal resources  
9 to ensure the tribes' culture and sovereign integrity;<sup>19</sup>

10 3. The United States' interest in fairly adjudicating  
11 conflicts between Navajo and Hopi people and tribal governments  
12 regarding the land area formerly known as the "joint use" area,  
13 acknowledging the conflicts were exacerbated by the federal  
14 government;

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<sup>18</sup>

[C]hanged circumstances may, in theory, transform a compelling interest into a less than compelling one, or render a well-tailored statute misproportioned. Nonetheless, the government cannot reasonably be expected to relitigate the issue with every increase in the eagle population. . . . Such an approach would plague our circuit law with inconsistency and uncertainty. A party claiming that time has transformed a once-valid application of a statute into an invalid one must adduce evidence sufficient to convince us that a substantial change in relevant circumstances has occurred. The proposal to delist does not meet this standard.

United States v. Antoine, 318 F.3d 919, 921-22 (9th Cir. 2003).

<sup>19</sup>

The evidence presented to the Court indicates that the specific sites where eaglets are collected is important to the Hopi village and clan culture and religious purposes. In areas where the collecting of golden eagles is less-restricted by the CPO, i.e., a permit is required but the particular site is not strictly protected as to whom, by clan or village, may collect from these sites, there is a "race" to collect eaglets before they are fledged resulting in unnecessary death to the eaglets.

1           4. The acknowledged need to preserve local populations  
2 of golden eagles and bald eagles in part because of the  
3 symbolism attached to eagles by both the Hopi and United States'  
4 culture;

5           5. The golden eagles' role in maintaining the health of  
6 the local ecosystem.

7           In the context of cases asserting a defense of freedom  
8 of religious exercise by Native American individuals to a  
9 violation of the Bald and Golden Eagle Protection Act or the  
10 MBTA, the federal courts have concluded the protection of bald  
11 and golden eagles is a compelling government interest. See  
12 Hugs, 109 F.3d at 1378-79 (holding that the BGEPA served a  
13 compelling government interest); Hardman, 297 F.3d at 1127-28  
14 (citing Missouri v. Holland, 252 U.S. 416, 435, 40 S. Ct. 382,  
15 384 (1920)); Oliver, 255 F.3d at 589.

16           Defendant argues the government's interest is not  
17 compelling because the golden eagle is not endangered or  
18 threatened. The fact that the golden eagle is not listed as a  
19 threatened or endangered species does not, as a matter of law,  
20 establish the government's interest in protecting this species  
21 is less than compelling. See Antoine, 318 F.3d at 921-22  
22 (stating the defendant must produce evidence there has been a  
23 substantial change in the relevant circumstances). See also  
24 Hardman, 297 F.3d at 1128.

25           Defendant contends the government has not met its  
26 burden in establishing a compelling interest in permitting the  
27 take of golden eagles by the Hopi. At the evidentiary hearing,  
28 Defendant argued there is "no evidence this [permit requirement]

1 is not a burden" on Defendant's free exercise of his religion.  
2 Defendant has also presented a document issued by the United  
3 States Fish and Wildlife Service in 2004 regarding a 2003  
4 population survey of golden eagles in the western United States.  
5 Docket No. 36, Attach.<sup>20</sup> Defendant argues this document meets  
6 his burden of establishing changed circumstances have rendered  
7 the government's interest in protecting golden eagles less than  
8 compelling. Additionally, Defendant asserts this document is an  
9 "admission" by the government that the golden eagle is not  
10 endangered as a species in the western United States.<sup>21</sup>

11 The evidence of changed circumstances presented by  
12 Defendant does not establish the government's continued interest  
13 in regulating the take of this species has become less than  
14 compelling. The evidence presented by Defendant is not relevant  
15 to establishing any alleged increase or decrease in the number  
16 of golden eagles within the Hopi reservation; a close reading of  
17 this evidence, as presented by Defendant during the evidentiary  
18 hearing, indicates not a single golden eagle was surveyed within  
19 the boundaries of the Hopi reservation pursuant to this report.

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21 <sup>20</sup> Rhett E. Good, et al., Population Level Survey of Golden  
22 Eagles (*Aquila chrysaetos*) in the Western United States, Aug. 30, 2004  
(Prepared for the USFWS Service).

23 <sup>21</sup> Defense counsel averred he acquired this document from the  
24 Internet. Defense counsel did not present the testimony or affidavit  
25 of the report's author or any scientist regarding a proper  
26 interpretation of the report. Additionally, at the hearing the Court  
27 noted the difficulty of assessing the validity of Defendant's  
28 assertion regarding the health of the golden eagle species from the  
black-and-white copies of the maps included in the report provided by  
Defendant. Defense counsel assured the Court a color copy of the maps  
would be supplied, however, no such copy has been provided and defense  
counsel has left the Court to divine the adequacy of Defendant's  
argument from the shades of gray on the maps presented as evidence.

1 The study extrapolates an estimated population of golden eagles  
2 in the western United States in 2003 as 27,392, from transects  
3 wherein an actual 172 eagles were observed. Id., Attach. at 38.  
4 Although the document cites to prior published assessments of  
5 eagle populations, the document does not opine as to question  
6 whether the golden eagle population within the Hopi reservation  
7 boundaries is declining, stable, or increasing. The study  
8 states, with regard to these birds in Arizona, "Number of  
9 currently active territories are not known." Id., Attach. at  
10 43.<sup>22</sup>

11 At the evidentiary hearing, Defendant encouraged the  
12 Court to follow the holding of a federal court which concluded,  
13 based on the evidence presented to that court, that the  
14 government does not have a compelling interest in protecting  
15 golden eagles. See United States v. Abeyta, 632 F. Supp. 1301,  
16 1306 (D.N.M. 1986). The Court notes this decision was issued  
17 in 1986 and that every federal court which has subsequently  
18 considered this issue, including the District of New Mexico in

19 \_\_\_\_\_  
20 <sup>22</sup> The relevant document is available at:  
21 [www.r6.fws.gov/species/birds/golden\\_eagle/Final\\_Golden\\_Eagle\\_Report\\_8\\_30\\_04.pdf](http://www.r6.fws.gov/species/birds/golden_eagle/Final_Golden_Eagle_Report_8_30_04.pdf). The color map included in the document indicates that  
22 one or two eagles were located within a transect which appears to be  
23 within or close to the Hopi reservation. See Good, et al., Population Level Survey of Golden Eagles (*Aquila chrysaetos*) in the Western United States (cited supra at n.20) at 56. It appears no eagles were  
24 located within two other transects close to the Hopi reservation. Id.  
25 This information does not alter the Court's conclusion regarding the compelling nature of the government's interest in protecting golden  
26 eagles. The evidence attached to the government's response to Defendant's hearing memorandum is more relevant to, and revealing of,  
27 the compelling nature of the government's interest in limiting the taking of eagles within the confines of the Hopi reservation. See  
28 Docket No. 40, Attach. (United States Fish and Wildlife Service, Statement of Decision, Migratory Bird Treaty Act Permit to Take Golden Eagles for Religious Purposes by the Hopi Tribe on Ancestral Lands (Apr. 2003)).

1 1997, has come to the contrary conclusion. See Gonzalez, 957 F.  
2 Supp. at 1228. Additionally, subsequent to the Abeyta  
3 decision, the Ninth Circuit Court of Appeals has issued  
4 decisions binding on this Court contrary to the conclusion  
5 reached by the District of New Mexico. See Antoine, 318 F.3d at  
6 922; Hugs, 109 F.3d at 1378-79.

7           The factual and legal predicates for the Abeyta  
8 decision are clearly distinguishable from the instant matter.  
9 The District of New Mexico Abeyta court concluded the government  
10 had not established a compelling interest in protecting the  
11 birds because the golden eagle was not an endangered species,  
12 contrary to the subsequent Ninth Circuit opinion in Antoine in  
13 2003. Additionally, the Abeyta court was presented with  
14 entirely different evidence regarding the availability of  
15 permits than that presented to this Court. The judge in Abeyta  
16 was clearly concerned about what he viewed to be a racial basis  
17 for enforcement of the BGEPA as against a Native American  
18 defendant at that time. For instance, in Abeyta, the court was  
19 presented with evidence that the USFWS had permitted ranchers to  
20 kill eagles as predators, while denying American Indian people  
21 permits to take eagles for their religious use. See Jim, 888 F.  
22 Supp. at 1064. In concluding a less burdensome means could be  
23 used to serve the purpose of conserving the species, the court  
24 stated the "federal administrative apparatus" was "utterly  
25 offensive and ultimately ineffectual." Abeyta, 632 F. Supp.  
26 1307. The court also concluded the permit process was  
27 "cumbersome, intrusive and demonstrat[ing] a palpable  
28 insensitivity to Indian religious beliefs." Id.

1 Defendant has not met his burden in establishing a  
2 change in circumstance has rendered the government's interest in  
3 protecting golden eagles less than compelling. Additionally,  
4 the Court concludes the government has established the  
5 government has a compelling interest in protecting golden  
6 eagles. Therefore, the Court proceeds to the third step of the  
7 RFRA analysis.

### 8 **Least Restrictive Means**

9 To prevail on this prong of the analysis, "the  
10 government must show that [its] objectives cannot be advanced  
11 through use of a regulation that is less intrusive of [the  
12 defendant's] religious practices, and that refusing his  
13 exemption is, therefore, the least restrictive means of  
14 preserving eagle populations." Lundquist, 932 F. Supp. at 1240.  
15 The Ninth Circuit has held the government meets its burden of  
16 showing a system is the least restrictive means if "it  
17 demonstrates that it actually considered and rejected the  
18 efficacy of less restrictive means before adopting the  
19 challenged practice." Warsoldier v. Woodford, 418 F.3d 989, 999  
20 (9th Cir. 2005) (reaching this conclusion in the context of a  
21 Religious Land Use and Institutionalized Persons Act case);  
22 Antoine, 318 F.3d at 923-24.

23 Defendant argued in his motion to dismiss that the  
24 permitting system allowing the Hopi Tribal Chairman to  
25 distribute USFWS permits to take golden eagles is not the "least  
26 restrictive" means of burdening his religious practice because  
27 the Hopi tribal government does not allocate the permits fairly.  
28 At the evidentiary hearing, Defendant did not present any

1 evidence that the current Hopi tribal government has denied  
2 anyone a permit to take golden eagles. A Hopi elder testified  
3 at the evidentiary hearing that the "old system" worked better,  
4 i.e., the system of self-regulation without permits.

5 The Court is not convinced by this limited evidence  
6 that the current permit system is not the least restrictive  
7 means of addressing the compelling government interests at  
8 stake. The section of the Code of Federal Regulations<sup>23</sup> which

9  
10 <sup>23</sup>

11 *We will issue a permit only to members of Indian entities*  
12 *recognized and eligible to receive services from the United*  
13 *States Bureau of Indian Affairs listed under 25 U.S.C.*  
14 *479a-1 engaged in religious activities who satisfy all the*  
15 *issuance criteria of this section....*

16 *... You must submit applications for permits to take,*  
17 *possess, transport within the United States,... lawfully*  
18 *acquired bald or golden eagles, or their parts, nests, or*  
19 *eggs for Indian religious use to the appropriate Regional*  
20 *Director--Attention: Migratory Bird Permit Office. You can*  
21 *find addresses for the appropriate Regional Directors in 50*  
22 *CFR 2.2. ... Your application for any permit under this*  
23 *section must also contain the information required under*  
24 *this section, § 13.12(a) of this subchapter, and the*  
25 *following information:*

26 *\*\*\**

27 *In addition to the general conditions in part 13 of this*  
28 *subchapter B, permits to take, possess, transport within*  
29 *the United States... bald or golden eagles, or their parts,*  
30 *nests or eggs for Indian religious use are subject to the*  
31 *following conditions:*

32 *\*\*\**

33 *(2) You must submit reports or inventories, including*  
34 *photographs, of eagle feathers or parts on hand as*  
35 *requested by the issuing office.*

36 *(c) How do we evaluate your application for a permit? We*  
37 *will conduct an investigation and will only issue a permit*  
38 *to take, possess, transport within the United States, bald*  
39 *or golden eagle parts...for Indian religious use when we*  
40 *determine that the taking, possession, or transportation is*  
41 *compatible with the preservation of the bald and golden*  
42 *eagle. In making a determination, we will consider, among*  
43 *other criteria, the following:*

44 *(1) The direct or indirect effect which issuing such permit*  
45 *would be likely to have upon the wild populations of bald*  
46 *or golden eagles; and*

47 *(2) Whether the applicant is an Indian who is authorized to*

1 Defendant cites to as requiring the federal government to issue  
2 these permits only to individuals, is undoubtedly more  
3 cumbersome, personally intrusive, and time-consuming for  
4 applicants. Additionally, this section also requires applicants  
5 to take eagles to be enrolled members of federally-recognized  
6 tribes and, therefore, the taint of governmental interference  
7 and tribal governmental acknowledgment of one's "legitimate"  
8 Hopi status would not be cured by means of this permit system.

9           In every case except Abeyta and Hardman,, the federal  
10 courts have concluded the MBTA and BGEPA permitting regimes were  
11 the "least restrictive" means of protecting eagle populations  
12 and Native American religions. Additionally, the Hardman  
13 opinion did not conclude the BGEPA permitting system was not the  
14 least restrictive means of regulating the possession of eagles  
15 and eagle parts for religious purposes; the appellate court  
16 remanded the matter to the District Court to acquire further  
17 evidence on the least restrictive means prong of the requisite  
18 analysis.

19           The precedent of the Ninth Circuit Court of Appeals is  
20 binding on this Court. In Hugs, the Native American defendants  
21 presented a claim raised they should not be subject to the  
22 permit requirements of the BGEPA. The Ninth Circuit Court of  
23 Appeals analyzed the BGEPA under the Religious Freedom  
24 Restoration Act's "substantial burden" test and concluded the

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25  
26           *participate in bona fide tribal religious ceremonies.*  
27           ...A permit issued to you that authorizes you to take bald  
28           or golden eagles will be valid during the period specified  
          on the face of the permit, but will not be longer than 1  
          year from the date it is issued.  
50 C.F.R. § 22.22 (2006).

1 BGEPA was the "least restrictive" means of serving the  
2 compelling government interest of protecting eagles. See 109 F.  
3 3d at 1378-79. The Ninth Circuit held in Antoine that the  
4 permit system for taking bald and golden eagles established by  
5 the BGEPA did not violate the "least restrictive" means test  
6 established by RFRA, and that Hugs required it to find the  
7 permitting system was the least restrictive means. 318 F. 3d at  
8 923-24. Therefore, the Court concludes the permitting system  
9 challenged by Defendant satisfies RFRA's least restrictive means  
10 test.

### 11 **Conclusion**

12 Defendant does not have standing to raise the argument  
13 that the MBTA permit system is unconstitutional, as managed by  
14 the Hopi tribal government and as it has been applied to him.  
15 Defendant has not properly stated an argument that the  
16 permitting system he challenges, or the MBTA itself, is facially  
17 unconstitutional. Additionally, Defendant's prosecution does  
18 not violate his First Amendment right to the free exercise of  
19 his religion. Defendant has not demonstrated that his personal  
20 free exercise of his religion has been substantially burdened by  
21 the permit requirement. The government has established a  
22 compelling interest in the protection of golden eagles and that  
23 the permit system is the least restrictive means of serving that  
24 interest. Defendant has not produced sufficient evidence to  
25 establish that a substantial change in the relevant  
26 circumstances has rendered the government's interest less than  
27 compelling.

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**THEREFORE, IT IS ORDERED that** Defendant's motion to  
dismiss at Docket No. 27 is **denied**.

DATED this 11<sup>th</sup> day of September, 2006.

  
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Mark E. Asper  
United States Magistrate Judge