

THE BALD AND GOLDEN EAGLE PROTECTION ACT

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I. INTRODUCTION

In 1782, the Continental Congress adopted the bald eagle as the symbol of our emerging nation.¹ In 1940, to protect this national symbol from extinction, Congress enacted legislation popularly known as the Bald Eagle Protection Act.² Over two decades later, in 1962, the act was amended to include protection for the golden eagle and became known as the Bald and Golden Eagle Protection Act (“BGEPA” or “the Act”).³ The amendments also provided that if “compatible with [their] preservation,” the Secretary of the Interior, under duly promulgated regulations, could issue permits authorizing “the taking, possession, and transportation of [eagle] specimens . . . for the religious purposes of Indian tribes.”⁴ In 1972,

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¹ Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 705 (2000) (proclaiming that as “[a]dopted by the Continental Congress as the symbol of a newly formed America in 1782, the bald eagle represents honor and dignity in American society”).

² Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940).

³ Bald and Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (1962). Presently, the bald eagle is also protected under the Migratory Bird Treaty Act of 1948 (“MBTA”) (16 U.S.C. §§ 703–711) and the Endangered Species Act (“ESA”) (16 U.S.C. §§ 1531–1543). See 50 C.F.R. § 17.11 (2003) (listing the bald eagle as threatened); Amie Jamieson, *Will Bald Eagles Remain Compelling Enough to Validate the Bald and Golden Eagle Protection Act After ESA Delisting? The Ninth Circuit’s Analysis in United States v. Antoine*, 34 ENVTL. L. 929, 936 (2004) (noting that the bald eagle is protected by the BGEPA, the MBTA, and the ESA). As a “migratory bird,” the golden eagle is also protected under the MBTA. See 50 C.F.R. § 10.13; Kathryn S. Kanda, *Validity and Application of the Religious Freedom Restoration Act in the Tenth Circuit after City of Boerne v. Flores*, 79 DENV. U. L. REV. 295, 311–12 (2002) (noting how golden eagles are protected under the MBTA).

⁴ 16 U.S.C. § 668a (2000); see Brett Anderson, *Recognizing Substance: Adoptees and Affiliates of Native American Tribes Claiming Free Exercise Rights*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY. L.J. 61, 70 (2001) (“In order to accommodate the religious beliefs of Native Americans, Congress allows Native Americans to obtain a permit to possess eagles and eagle parts.”); see also Kanda, *supra* note 3, at 311–12.

the BGEPA, which only had a criminal misdemeanor prohibition,⁵ was amended by the addition of a civil penalty provision,⁶ as well as a provision allowing the cancellation of grazing agreements for those convicted of violating the Act, or failing to comply with any permit or regulation issued under it.⁷ The criminal penalties for violating the Act also were increased.⁸

This article, which is divided into three parts, examines the criminal and civil penalty provisions of the BGEPA. First, and by way of background, the article provides an overview of the evolution of the BGEPA and its key provisions. The article then analyzes the evolving case law interpreting the criminal penalty provision of the Act and the regulations governing the civil penalty provision.

II. OVERVIEW

In 1940, Congress passed the Bald Eagle Protection Act to protect the bald eagle from extinction.⁹ At the time of its enactment, the Act provided a maximum criminal penalty in the form of a \$500 fine and six months' imprisonment for anyone who took, possessed, transported, or otherwise engaged in commerce with dead or living eagles or their parts, including their nests and eggs.¹⁰ The act incorporated, in *haec verba*, section 5 of the Migratory Bird Treaty Act granting authorized Department of the Interior employees the power to arrest persons and execute warrants relating to the migratory bird laws, as well as the forfeiture of said birds or their

⁵ 16 U.S.C. § 668 (1940).

⁶ Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064.

⁷ *Id.* (permitting a "head of any Federal agency who has issued a lease, license, permit, or other agreement authorizing the grazing of domestic livestock on Federal lands" to revoke the same, if the person to whom such license is granted violates the provisions of 16 U.S.C. § 668).

⁸ *Id.*

⁹ Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940). While the enacting clause made reference to the fact that the bald eagle was "threatened with extinction," use of the term "threatened" was not meant to reflect the listed status of bald eagles under the ESA since the ESA was not passed until 1973. Jamieson, *supra* note 3, at 931 n.11.

¹⁰ Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940). The text of the act stated, in relevant part:

[W]hoever, within the United States or any place subject to the jurisdiction thereof, except the Territory of Alaska, without being permitted so to do as [provided in sections 668-668d of this title], shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, alive or dead, or any part, nest, or egg thereof, shall be fined not more than \$500 or imprisoned not more than six months, or both.

Id. The act defined the term "take" to include "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb." *Id.*

parts, eggs, or nests.¹¹ The act created an exemption to the possession or transportation of any live or dead eagle or its parts, nest, or eggs lawfully taken prior to its enactment.¹² Additional exemptions, evidenced by the issuance of a permit under duly promulgated regulations, were established for the taking, possession, and transportation of eagle specimens for scientific or exhibition purposes, and the taking of eagles to protect wildlife and agriculture.¹³

In 1962, Congress amended the act, extending the ban to golden eagles.¹⁴ Congress also provided that the Secretary of the Interior could exempt, under regulations, takings of golden and bald eagles “for the religious purposes of Indian tribes.”¹⁵ The amendments further provided for the taking of golden eagles to protect livestock.¹⁶

In 1972, the then popularly known Bald and Golden Eagle Protection Act was amended again in several important respects.¹⁷ First, the *mens rea* required for a criminal conviction under section 668 was changed from “willfully” to “knowingly, or with wanton disregard for the consequences of [one’s] act.”¹⁸

Second, the criminal penalty provision was increased from a

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246. The amendment also exempted from the Act’s prohibitions the transportation or possession of any dead or live golden eagle or its parts, nest, or eggs lawfully taken prior to October 24, 1962. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064.

¹⁸ *Id.* Even after the 1962 amendments, the Act continued to define the term “take” to include “pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb.” 16 U.S.C. § 668c (1964) (emphasis added). As explained in the legislative history:

The change from “willfully” in the present law to “knowingly, or with wanton disregard for the consequences of his act” [wa]s intended to lessen the degree of knowledge required to be proven in order to convict violators. The word “knowingly” means that the offender knew what he was about to do and, with such knowledge, proceeded to do the act. The additional words “with wanton disregard for the consequences of his act” were also added to lessen the degree [of] knowledge required to be proved in order to obtain a conviction under the Act. The evidence would have to show more than mere negligence; while there is no intent to injure, the person must be conscious from his knowledge of surrounding circumstances and conditions that his conduct will naturally and probably result in injury.

S. REP. NO. 92-1159, at 5 (1972), reprinted in 1972 U.S.C.C.A.N. 4285, 4289; see *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1086 (D. Colo. 1999) (noting how the 1972 amendments “reduce[ed] the *mens rea* required for conviction”); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 535 (E.D. Cal. 1978) (noting how new language was added “in order to reduce the *scienter* requirements”) (emphasis added).

maximum of a \$500 fine and six months' imprisonment to a maximum \$5,000 fine and one year's imprisonment.¹⁹ Furthermore, "in the case of a second or subsequent conviction" under the Act, the maximum penalty was increased to a \$10,000 fine and two years' imprisonment.²⁰ Under the Criminal Fines and Improvement Act of 1987, the maximum amount of a fine in the case of a misdemeanor offense was increased to \$100,000 and \$250,000 in the case of an individual for a misdemeanor and a felony conviction, respectively, and \$200,000 and \$500,000 in the case of an organization for a misdemeanor and a felony conviction, respectively.²¹

Third, a civil penalty provision was added.²² Under this provision, anyone,²³ who without authority as provided under the Act, takes, possesses, transports, purchases, sells, barter, or offers to do any of these acts, or imports or exports any dead or live golden or bald eagle, any part thereof, or any egg or nest, or violates any permit or regulation is subject to a \$5,000 penalty for each violation.²⁴ If the person or entity neglects to pay the assessed penalty, the Secretary may request that the Attorney General institute a civil action to collect the penalty.²⁵

Fourth, the Act was amended to allow "the taking, possession, and transportation of golden eagles for the purposes of falconry" in areas where they were engaged in the depredation of wildlife or livestock.²⁶ In addition, a grazing provision was added.²⁷ Under this provision, anyone convicted under the Act, or found guilty of violating any regulation or permit issued under it, is subject to

¹⁹ Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064.

²⁰ *Id.* The amendments provided that each taking or other prohibited act would "constitute a separate violation" and also that one half of any fine assessed, up to \$2,500, would be paid to the person(s) providing information that leads to a conviction. *Id.* In *United States v. Street*, the court ruled that the enhanced penalty provision in case of a "second or subsequent conviction" applied to a second count in an indictment, even though the guilty plea and convictions may have been entered simultaneously. 257 F.3d 869, 870 (8th Cir. 2001).

²¹ 18 U.S.C. §§ 3571(b)-(c) (2000). If a death is involved, the maximum fine for misdemeanor offenses increases to \$250,000 in the case of a person and \$500,000 in the case of an organization. *Id.* §§ 3571(b)(4), (c)(4).

²² See Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064.

²³ The civil and criminal penalty provisions apply to persons, associations, corporations, and partnerships. 16 U.S.C. § 668c (2000).

²⁴ 16 U.S.C. § 668(b). A person must be given notice and a hearing before any penalty may be assessed. *Id.* In calculating the amount of a penalty, "the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary." *Id.* Further, "[f]or good cause shown, the Secretary may remit or mitigate any such penalty." *Id.*

²⁵ *Id.* The district court "must sustain the Secretary's action if supported by substantial evidence." *Id.*

²⁶ *Id.* § 668a.

²⁷ *Id.* § 668(c).

having his grazing lease, license, permit, or other agreement cancelled.²⁸

Lastly, in 1978, the BGEPA was amended to authorize “the taking of golden eagle nests which interfere with resource development or recovery operations.”²⁹ In this instance, Congress was concerned with potential conflicts arising from a “stringent construction of the [Act] and future coal mining activities in the Western States, including leasing, mining, and reclamation.”³⁰

III. THE CRIMINAL PENALTY PROVISION

Section 668(a) of the BGEPA provides for criminal sanctions against persons or entities who “knowingly, or with wanton disregard for the consequences of [their] act[s] take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import” bald or golden eagles, or their parts, nests, or eggs.³¹ For individuals, in the case of a first offense, the maximum penalty is a \$100,000 fine and one year’s imprisonment.³² The maximum penalty for a subsequent offense is a \$250,000 fine and two years’ imprisonment.³³

Criminal prosecutions under the BGEPA have come under various challenges. Defendants have argued that the BGEPA infringes on the free exercise of religion,³⁴ unlawfully modifies or

²⁸ *Id.* The Act’s provision incorporating in *haec verba* section 5 of the MBTA was amended by spelling out the enforcement powers related to arrest, warrants, forfeiture, and application of the customs laws. S. REP. NO. 92-1159 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4285, 4290; *see* 16 U.S.C. §§ 668b(a)–(c).

²⁹ Act of Nov. 8, 1978, Pub. L. No. 95-616, § 9, 92 Stat. 3114. *Cf.* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1427 n.7 (10th Cir. 1986) (“No such authority exists with respect to *bald eagle* nests, however, whether they interfere with resource development or recovery operations and whether they occur on public or private lands.”).

³⁰ S. REP. NO. 95-1175, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7641, 7645. *See generally* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 876 (2002) (“Although the legislative history . . . focused on coal development in the West, the Act neither defines the term ‘resource development or recovery,’ nor provides any standards to guide the Secretary’s exercise of this authority.”). There is no private right of action under the Act authorizing a private party to bring an action against the Department of the Interior to enforce it. *See Protect Our Eagles’ Trees v. City of Lawrence*, 715 F. Supp. 996, 998 (D. Kan. 1989) (“[T]here is no language in that Act purporting to create a private right of action against the Department of the Interior.”).

³¹ 16 U.S.C. § 668(a).

³² *Id.*; 18 U.S.C. § 3571(b)(5).

³³ 16 U.S.C. § 668(a); 18 U.S.C. § 3571(b)(3).

³⁴ *See United States v. Antoine*, 318 F.3d 919, 920 (9th Cir. 2003), *cert. denied*, 540 U.S. 1221 (2004); *United States v. Hardman*, 297 F.3d 1116, 1119 (10th Cir. 2002); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001); *United States v. Hugs*, 109 F.3d 1375, 1377 (9th Cir. 1997); *United States v. Gonzales*, 957 F. Supp. 1225, 1226 (D.N.M. 1997); *United States v. Jim*, 888 F. Supp. 1058, 1059 (D. Or. 1995).

abrogates treaty rights respecting the taking and killing of eagles,³⁵ represents an unlawful exercise of power under the Commerce Clause,³⁶ effects a taking in violation of the Fifth Amendment,³⁷ violates the right to privacy,³⁸ and does not apply to certain takings and possession of eagles.³⁹ Each of those challenges is analyzed below.

A. *The Free Exercise of Religion*

Challenges to criminal prosecutions under the BGEPA principally have been raised under the Religious Freedom Restoration Act ("RFRA").⁴⁰ Before analyzing the cases, it is instructive to review, generally, the provisions of the RFRA and the regulatory exception against the taking, possession, or transportation of bald or golden eagles for Indian religious ceremonies.⁴¹

1. The Religious Freedom Restoration Act and Indian Religious Ceremonies Involving Eagles

Under the RFRA, a federal law that "substantially burden[s] a person's exercise of religion"⁴² will not be enforced unless the government can demonstrate that the law "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁴³ The

³⁵ See *United States v. Dion*, 476 U.S. 734, 745 (1986); *United States v. Fryberg*, 622 F.2d 1010, 1011 (9th Cir. 1980).

³⁶ See *United States v. Bramble*, 103 F.3d 1475, 1479 (9th Cir. 1996); *United States v. Lundquist*, 932 F. Supp. 1237, 1244 (D. Or. 1996).

³⁷ See *United States v. Kornwolf*, 276 F.3d 1014, 1015 (8th Cir. 2002).

³⁸ See *Lundquist*, 932 F. Supp. at 1243.

³⁹ See *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1072 (D. Colo. 1999); *United States v. Hetzel*, 385 F. Supp. 1311, 1316 (W.D. Mo. 1974).

⁴⁰ 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

⁴¹ See *United States v. Hugs*, 109 F.3d 1375, 1379 (9th Cir. 1997) ("The BGEPA contains no exceptions for religious use without a permit."); Todd L. Tisdale, Note, *Culture v. Conservation: Does a Proposed Special Regulation Threaten the Integrity of the National Park System?*, 29 B.C. ENVTL. AFF. L. REV. 111, 116 (2001) ("As a result of the 1962 Amendment, Native Americans may only take, transfer, or possess golden eagles, their parts, feathers, eggs, or nests for religious purposes through BGEPA permits granted pursuant to the statute and accompanying DOI regulations.").

⁴² 42 U.S.C. § 2000bb-1(a).

⁴³ *Id.* § 2000bb-1(b). The RFRA was passed in response to the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court there held that even if a statute substantially burdened a person's right to the free exercise of religion, it would still be constitutional if it was both neutral and generally applicable. *Id.* at 892-93; see S. REP. NO. 103-111, at 2 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893 ("[The RFRA] responds to the Supreme Court's decision in *Employment Division* . . . by creating a statutory prohibition against government action substantially burdening the exercise of religion.") (footnote

purposes of the RFRA are “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened” and “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”⁴⁴

As noted previously, the BGEPA provides that if “compatible with [their] preservation,” the Secretary may issue permits authorizing the “taking, possession, and transportation of [eagle] specimens . . . for the religious purposes of Indian tribes.”⁴⁵ Under the governing regulations, which are administered by the U.S. Fish and Wildlife Service (“FWS”), the issuance of permits is limited to Indians who are enrolled members of federally recognized tribes under the Federally Recognized Tribal List Act of 1994,⁴⁶ and require the carcass or any of its parts for religious purposes.⁴⁷ In addition, the FWS will consider the effects which granting the permit will have “upon the wild populations of bald or golden eagles,” as well as whether the applicant is “authorized to participate in *bona fide* tribal religious ceremonies.”⁴⁸

In the 1970s, the FWS established the National Eagle Repository (the “Repository”) in Denver, Colorado.⁴⁹ It provides a central

omitted).

⁴⁴ 42 U.S.C. § 2000bb(b). By enacting the RFRA, Congress intended to restore the law to comport with prior Supreme Court jurisprudence which held that “any incidental burden on the free exercise of . . . religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)); see Jamieson, *supra* note 3, at 942 (“Congress . . . passed [the] RFRA to reinstate the ‘compelling interest’ test from *Sherbert v. Verner*, which courts had applied prior to *Smith*.”) (footnotes omitted); Perkins, *supra* note 1, at 710.

⁴⁵ 16 U.S.C. § 668a (2000); see Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 774–78 (1995) (discussing significance of eagles to Native American religions).

⁴⁶ Pub. L. No. 103-454, 108 Stat. 4792 (1994) (codified at 25 U.S.C. § 479a–1).

⁴⁷ 50 C.F.R. §§ 22.22(a)(4)–(5) (2004). The applicant for a permit must identify the number of eagles, parts or feathers requested, the tribe to which he or she belongs, and the nature of the religious ceremony. *Id.* §§ 22.22(a)(1), (3)–(4). The applicant also must attach certification that he is an enrolled member of a federally recognized tribe. *Id.* § 22.22(a)(5). A permit may not be issued if the applicant was assessed a civil penalty or convicted of any criminally related law, made false statements or failed to disclose material information, failed to demonstrate a valid justification for the permit and a showing of responsibility, or is otherwise not qualified. *Id.* §§ 13.21(b)(1)–(5). An applicant is disqualified from obtaining a permit if he has a felony conviction under the Lacey Act, the MBTA, or the BGEPA. *Id.* § 13.21(c)(1); see De Meo, *supra* note 45, at 787 (discussing restrictions and disqualifying factors).

⁴⁸ 50 C.F.R. §§ 22.22(c)(1)–(2). The regulations also provide that upon obtaining a permit allowing their possession, eagles or their parts may not be transferred, except that they “may be handed down from generation to generation or from one Indian to another in accordance with tribal or religious customs.” *Id.* § 22.22(b)(1).

⁴⁹ See U.S. Fish & Wildlife Service, Office of Law Enforcement, National Eagle Repository,

location for the collection and distribution of dead bald or golden eagles and their parts.⁵⁰ Applications for a permit must be submitted to the U.S. Fish and Wildlife Service, Wildlife Permit Office servicing the state where the applicant resides.⁵¹ If approved, the application is then sent to the Repository.⁵² Orders are filled on a first-come basis, and given the backlog, the waiting time is approximately two and one-half years.⁵³

2. The Cases

The RFRA has been raised as a defense to criminal prosecutions under the BGEPA in two types of cases.⁵⁴ First are those cases

at <http://www.le.fws.gov/EagleRepository.htm> (last modified Oct. 21, 2004); *see also* U.S. Fish & Wildlife Service, How Can I Obtain Eagle Feathers or Parts?, at <http://faq.fws.gov/featherfaq.html> (last visited Apr. 10, 2005).

⁵⁰ *See* U.S. Fish & Wildlife Service, Office of Law Enforcement, National Eagle Repository, at <http://www.le.fws.gov/EagleRepository.htm> (last modified Oct. 21, 2004). As noted by the FWS in its web site:

The Repository serves as a collection point for dead eagles. Most of the dead golden and bald eagles received have been salvaged by State and Federal wildlife personnel. Many of these birds have died as a result of electrocution, vehicle collisions, unlawful shooting and trapping, or from natural causes. When eagles are received at the Repository, the condition of each eagle and its feathers is noted, and the species and age is recorded. If part of the bird is missing, damaged or broken, FWS staff may add replacement parts from another bird to make it complete. The bird is then stored in a freezer until it is ready to be shipped to the recipient, usually within 3-5 days.

U.S. Fish & Wildlife Service, How Can I Obtain Eagle Feathers or Parts?, at <http://faq.fws.gov/featherfaq.html> (last visited Apr. 10, 2005).

⁵¹ *See* Department of the Interior, U.S. Fish & Wildlife Service, Eagle Parts for Native American Religious Purposes, Permit Application & Shipping Request, available at <http://permits.fws.gov/forms/eaglereligious.pdf> (last visited April 10, 2005); U.S. Fish & Wildlife Service, Office of Law Enforcement, National Eagle Repository, available at <http://www.le.fws.gov/EagleRepository.htm> (last modified Oct. 21, 2004).

⁵² *See* U.S. Fish & Wildlife Service, Office of Law Enforcement, National Eagle Repository, available at <http://www.le.fws.gov/EagleRepository.htm> (last visited Apr. 10, 2005).

⁵³ *See* U.S. Fish & Wildlife Service, How Can I Obtain Eagle Feathers or Parts?, available at <http://faq.fws.gov/featherfaq.html> (last visited Apr. 10, 2005). On April 29, 2004, following a meeting with representatives of all federally recognized tribal governments, the President issued an executive memorandum directing departments and agencies to "take steps to improve their collection and transfer of eagle carcasses and eagle body parts . . . for Native American religious purposes." Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22,953, 22,953 (Apr. 29, 1994).

⁵⁴ While the Court in *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997), ruled that the RFRA does not apply to state actions, federal courts of appeals have held that the RFRA applies to claims against the federal government. *See, e.g.*, *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002) (en banc) (applying RFRA in context of prosecutions under the BGEPA); *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002) (finding that "RFRA is constitutional as applied in the federal sphere"); *United States v. Oliver*, 255 F.3d 588 (8th Cir. 2001) (same); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 861 (8th Cir. 1998) (RFRA is constitutional as applied to the federal government); *see also Adams v. Comm'r*, 170 F.3d 173, 175 (3d Cir. 1999) (parties did not contest the applicability of RFRA thus for purposes of the appeal, the court "assume[d] without deciding that RFRA is

involving members of federally recognized tribes who could have applied for a permit to possess and transport eagles or their parts for religious purposes but failed to do so. The second type is comprised of those who are not members of federally recognized tribes, and, therefore, are ineligible from ever obtaining a permit. In both cases, for a free exercise claim to be considered, the defendant must not have been involved in purely commercial activity.⁵⁵

With respect to members of federally recognized tribes who did not seek to obtain a permit and where prosecuted under the BGEPA, the United States Courts of Appeal for the Ninth and Eighth Circuits ruled in *United States v. Hugs*⁵⁶ and *United States v. Oliver*,⁵⁷ respectively, that the protection of eagles serves a compelling government interest.⁵⁸ Further, these courts held that

constitutional as applied to the federal government"); *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998); *but see United States v. Sandia*, 6 F. Supp. 2d 1278, 1281 (D.N.M. 1997) (rejecting the argument "that RFRA is not wholly unconstitutional and has continued vitality when applied to the federal government"). When analyzing a free exercise challenge, the possible application of the RFRA before examining the question under the First Amendment is consistent with the well-recognized principle "that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine*, 415 U.S. 528, 547 (1974).

⁵⁵ See *United States v. Hugs*, 109 F.3d 1375, 1377-78 (9th Cir. 1997) ("A defendant prosecuted under the BGEPA for purely commercial rather than religious activities may not assert a claim that the free exercise of religion has been infringed by the Act."); *cf. United States v. Sandia*, 188 F.3d 1215, 1218 (10th Cir. 1999) ("[A] defendant may not claim First Amendment or RFRA protection for the taking and possession of a protected bird [under the Lacey Act] when he subsequently sells it for pure commercial gain."). See also *De Meo*, *supra* note 45, at 804 ("Prosecutions of Native Americans under the Act for violations occurring in pursuit of commercial enterprises do not even implicate free exercise concerns."); *Jamieson*, *supra* note 3, at 943 ("[A] defendant cannot use RFRA to challenge the BGEPA if he has unlawfully taken the eagles for commercial, rather than religious, use.").

⁵⁶ 109 F.3d 1375 (9th Cir. 1997).

⁵⁷ 255 F.3d 588 (8th Cir. 2001).

⁵⁸ *Hugs*, 109 F.3d at 1378 ("protecting eagles as a threatened or endangered species" serves a compelling government interest); *Oliver*, 255 F.3d at 589 (affirming ruling by district court that government had "a compelling governmental interest in preserving the bald eagle population"); *United States v. Jim*, 888 F. Supp. 1058, 1063 (D. Or. 1995) ("[T]he BGEPA is promoting a compelling [state] interest in protecting the declining numbers of golden eagles."). In 1999, the FWS proposed removing the bald eagle from the endangered and threatened species list. See Proposed Rule to Remove the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 64 Fed. Reg. 36,454 (proposed July 6, 1999) (to be codified at 50 C.F.R. pt. 17). Courts have found that this proposal does not lessen the compelling interest in eagle protection. See *United States v. Antoine*, 318 F.3d 919, 922 (9th Cir. 2003) ("A party claiming that time has transformed a once-valid application of a statute into an invalid one must adduce evidence . . . that a *substantial* change in relevant circumstances has occurred. The proposal to delist does not meet this standard."); *Oliver*, 255 F.3d at 589 ("The bald eagle has not been removed from the endangered species lists as of this date, therefore, sufficient evidence demonstrating the removal of the compelling governmental interest has not been presented."). See also *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (stating that the government has an interest in protecting

“the statute and permit system provide[d] the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes.”⁵⁹

Two district court opinions from the United States District Court for the District of New Mexico (in the Tenth Circuit) held that the permit system is not the least restrictive means of accomplishing the government’s compelling interest in the survival and propagation of the bald or the golden eagle. In *United States v. Abeyta*,⁶⁰ defendant, a lifelong member and resident of the Isleta Pueblo, was charged with killing a golden eagle to use its feathers in a religious ceremony.⁶¹ In dismissing the charge, the court ruled that defendant’s taking of the golden eagle in these circumstances was a protected expression of religious liberty secured by the Treaty of Guadalupe Hidalgo⁶² and the First Amendment.⁶³ The court noted that the golden eagle was not an endangered species and that even though no permit had ever been issued to kill a golden eagle for religious purposes, permits had been issued “to non-Indian ranchers to take depredating golden eagles.”⁶⁴ In fact, in that case, there was uncontradicted testimony that some golden eagles could be killed without unfavorably affecting the population.⁶⁵ But even if there was a compelling interest, the court found that the administrative process established by the regulations for the protection of golden eagles did not advance the government’s interest applying the least restrictive means to accomplish this end

eagles because “[t]he bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles”); Jamieson, *supra* note 3, at 946 (“The legislative history indicates Congress’s desire to protect bald eagles for reasons other than conservation and implies that Congress would want bald eagles to be protected regardless of their status under the ESA.”).

⁵⁹ *Hugs*, 109 F.3d at 1378; see *Oliver*, 255 F.3d at 589 (affirming a ruling by the district court “that the means employed . . . were the least restrictive means available for preserving and protecting the eagle population”); *Jim*, 888 F. Supp. at 1065 (holding “that the means employed by the government [were] the least restrictive capable of accomplishing the compelling interests of preventing the decline of the golden eagle population and protecting the bald eagles’ slow recovery”). The permit scheme also has been held to advance a compelling government interest using the least restrictive means under the Free Exercise Clause. See *United States v. Top Sky*, 547 F.2d 486, 488–89 (9th Cir. 1976).

⁶⁰ 632 F. Supp. 1301 (D.N.M. 1986).

⁶¹ *Id.* at 1303.

⁶² *Id.* at 1306. The court found that the Treaty of Guadalupe Hidalgo was “an international compact securing *religious freedom* to Mexican citizens in the ceded territories[.]” and that it could not infer an intent by Congress to abrogate that treaty when it enacted the BGEPA. *Id.*

⁶³ *Id.* at 1307–08. Relying on *Sherbert* and other Supreme Court cases, the court framed the First Amendment inquiry as whether application of the Act advanced a compelling governmental interest by the least restrictive means. *Id.* at 1307.

⁶⁴ *Id.* at 1304.

⁶⁵ *Id.*

because “[t]he application process [was] cumbersome, intrusive and demonstrate[d] a palpable insensitivity to Indian religious beliefs.”⁶⁶

In *United States v. Gonzales*,⁶⁷ echoing some of the concerns identified in *Abeyta*, the district court ruled that the provisions of the regulations in effect at that time—requiring a defendant to identify the name of the ceremony for which he sought the bald eagle and to obtain certification from a religious leader that he was authorized to participate in that ceremony—constituted a substantial burden on the defendant’s exercise of his religion.⁶⁸ As a result, the court dismissed the information.⁶⁹

In the case of persons who are *not* members of federally recognized tribes, the circuit rulings differ. In *United States v. Antoine*,⁷⁰ the United States Court of Appeals for the Ninth Circuit held that that the BGEPA’s permit system served a compelling government interest and employed the least restrictive means to avoid substantial burdens on religion “because reconfiguration would necessarily restrict *someone’s* free exercise”⁷¹ and “an alternative [could not] fairly be called ‘less restrictive’ if it place[d] additional burdens on other believers.”⁷² In *United States v.*

⁶⁶ *Id.* at 1307. The court stated:

[T]he intricate application procedure, as it currently operates, is itself unnecessarily intrusive and hostile to religious privacy when viewed in light of the conservation goals it seeks to achieve. The applicant must certify that he is an Indian and will use the feathers or parts for religious purposes. He must identify religious leaders and ceremonies to federal officials so that the government may gauge the religious character of the proposed use. These procedures invade the private, even secret, province of Indian religious conviction and offend the ancient tradition of pueblo religious independence.

Id. at 1304.

⁶⁷ 957 F. Supp. 1225 (D.N.M. 1997).

⁶⁸ *Id.* at 1228; see 50 C.F.R. §§ 22.22(a)(4), (6) (1996). In *Gonzales*, the defendant, a member of the San Ildefonso Pueblo, shot and killed a bald eagle claiming he was going to use the carcass in a religious ceremony. *Gonzales*, 957 F. Supp. at 1226.

⁶⁹ *Gonzales*, 957 F. Supp. at 1230. The regulations subsequently were amended. They no longer require certification from a religious elder that the applicant is authorized to participate in the identified ceremony. See 50 C.F.R. §§ 22.22(a)(1)–(5) (2004). Further, while the regulations still require a description of the “tribal religious ceremony(ies)” for which the bald or golden eagle is required, the application now provides that an applicant need not disclose that information “if doing so would violate [the applicant’s] religious beliefs.” *Id.* § 22.22(a)(4); Department of the Interior, U.S. Fish & Wildlife Service, Eagle Parts for Native American Religious Purposes, Permit Application & Shipping Request, available at <http://forms.fws.gov/3-200-15.pdf> (last modified Apr. 10, 2005).

⁷⁰ 318 F.3d 919 (9th Cir. 2003), *cert. denied*, 540 U.S. 1221 (2004).

⁷¹ *Id.* at 924. In *Antoine*, defendant was a member of the Cowichan Band of the Salish Indian Tribe in British Columbia and therefore ineligible to apply for a permit. *Id.* at 920.

⁷² *Id.* at 923. The court observed in *Antoine*:

[I]n this case, the burden on religion is inescapable; the only question is whom to burden and how much. Both member and nonmember Indians seek to use eagles for religious purposes. The government must decide whether to distribute eagles narrowly and thus burden nonmembers, or distribute them broadly and exacerbate the extreme delays

Hardman,⁷³ on the other hand, the United States Court of Appeals for the Tenth Circuit remanded part of the case to the district court so that the parties could develop a record and the district court could rule under the RFRA “whether these regulations represent[ed] the least restrictive means of advancing the government’s interests.”⁷⁴

B. Abrogation of Treaty Rights

It is well-established that Congress has the power “to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.”⁷⁵ After passage of the Act, the circuit courts confronted the issue of whether the BGEPA abrogated treaty hunting rights to eagles on reservations.

already faced by members. Religion weighs on both sides of the scale. The precise burdens depend on how many nonmember applicants there would be, but not in any illuminating way: Fewer nonmember applicants means shorter additional delays for each member if the restrictions are removed, but also fewer people burdened if they are left in place.

Id.; see *United States v. Lundquist*, 932 F. Supp. 1237, 1243 (D. Or. 1996) (“[T]he BGEPA employs the least restrictive means of promoting the dual government interests of (1) preserving eagles and (2) preserving access to eagle parts by those Indians who meet the criteria for and have acquired the appropriate permit, and strikes the proper balance between the two.”); see also *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (holding, in context of administrative denial of application, that regulations limiting applicants for eagle parts to members of federally recognized tribes was the least restrictive means of furthering the government’s compelling interest in fulfilling its treaty obligations with federally recognized tribes); *Rupert v. Director, United States Fish & Wildlife Serv.*, 957 F.2d 32, 35–36 (1st Cir. 1992) (holding, in context of administrative denial of application, that regulations limiting applicants for eagle parts to members of federally recognized tribes did not violate the Establishment Clause).

⁷³ 297 F.3d 1116 (10th Cir. 2002).

⁷⁴ *Id.* at 1131. *Hardman* involved two defendants who were not members of any federally recognized tribe and were convicted for unrelated counts of illegally possessing eagle feathers in violation of the MBTA and the BGEPA, respectively, and a third defendant (also not a member of a federally recognized tribe) who successfully obtained the return of eagle feathers which had been seized from his home during the execution of a search warrant. *Id.* at 1118–19. With respect to the defendants who were convicted, the court remanded the case so that the parties could develop a record sufficient to enable the district court to undertake an RFRA analysis. *Id.* at 1131. With respect to the third defendant, whose charges under the BGEA were dismissed and who persuaded the district court to order the return of the eagle feathers pursuant to a motion filed under Federal Rule of Criminal Procedure 41(e), the court of appeals found that the government had “failed to demonstrate how the current regulations serve[d] each of its asserted interests—a necessary step in the process of showing that the regulations are the least restrictive means of serving the government’s interests.” *Id.* at 1120, 1132.

⁷⁵ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

In *United States v. White*,⁷⁶ for example, the United States Court of Appeals for the Eighth Circuit ruled that an enrolled member of Minnesota's Red Lake Band of Chippewa Indians who shot and killed a bald eagle within the boundaries of the reservation could not be convicted of "taking" an eagle within the meaning of the BGEPA.⁷⁷ This was because Congress had not, by passage of the Act, "expressly" modified or abrogated the treaty rights of the Red Lake Band of Chippewa Indians to hunt in their reservation.⁷⁸ The defendant in *White* had raised only his right to hunt on the reservation.⁷⁹

In *United States v. Fryberg*,⁸⁰ on the other hand, the United States Court of Appeals for the Ninth Circuit affirmed the conviction of an enrolled member of Washington's Tulalip Indian Tribe for shooting and killing an immature bald eagle.⁸¹ The court concluded that it was clear from the legislative history and the circumstances surrounding the enactment of the Act, "including the broad purpose of the Act to protect the bald eagle and prevent its extinction, that Congress intended to modify Indian treaty rights to prohibit the taking of bald eagles, in the absence of a permit pursuant to [Section] 668a."⁸² The district court had ruled that defendant had not killed the eagle for religious purposes and he did not challenge that finding on appeal.⁸³

In *United States v. Dion*,⁸⁴ the Supreme Court squarely addressed whether Congress intended the BGEPA to abrogate the implied treaty rights of Native Americans to hunt bald and golden eagles on reservation lands for noncommercial purposes.⁸⁵ After

⁷⁶ 508 F.2d 453 (8th Cir. 1974).

⁷⁷ *Id.* at 454.

⁷⁸ *Id.* at 457-58.

⁷⁹ *Id.* at 454. See also *United States v. Abeyta*, 632 F. Supp. 1301, 1307-08 (D.N.M. 1986) (ruling that taking of golden eagle was a protected expression of religious liberty secured in part by the Treaty of Guadalupe Hidalgo).

⁸⁰ 622 F.2d 1010 (9th Cir. 1980).

⁸¹ *Id.* at 1011.

⁸² *Id.* at 1016.

⁸³ *Id.* at 1011 n.4. In *United States v. Top Sky*, 547 F.2d 483 (9th Cir. 1976) and *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976), defendants, father and son members of Idaho's Chippewa Cree Tribe, were convicted of selling golden eagles and golden feathers in violation of the Act. 547 F.2d at 487. In affirming their convictions, the court held that the sale of eagles or their parts was beyond the scope of the treaty granting Indians on the reservation the right to hunt. *Id.* at 488. Accordingly, it was not necessary to determine whether the Act abrogated or modified treaty rights. *Id.* Further, the court found that prosecution for commercial activities did not impose a burden on defendants' free exercise of religion. *Id.*

⁸⁴ 476 U.S. 734 (1986).

⁸⁵ *Id.* at 736. The defendant in *Dion*, a member of the Yankton Sioux Tribe, was convicted

acknowledging that it had enunciated different standards on the question of abrogation of Indian treaty rights by congressional action, the Court ruled that the BGEPA, on its face, strongly suggested “Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles.”⁸⁶ Further, this view was supported by the legislative history surrounding the 1962 amendments “reflect[ing] an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to [a] permit, [was] inconsistent with the need to preserve those species.”⁸⁷

C. The Commerce Clause

Article I, Section 8 of the Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.”⁸⁸ The Supreme Court has interpreted this constitutional grant of power as authorizing Congress to regulate three types of activities.⁸⁹ First, Congress is authorized to regulate channels of interstate commerce.⁹⁰ Congress also may regulate and protect persons and things in interstate commerce, as well as the instrumentalities of

of shooting four bald eagles in violation of the ESA and selling eagle carcasses and parts in violation of the BGEPA and the MBTA. *Id.* at 735. Before trial, the district court had dismissed a charge of shooting a golden eagle in violation of the Act. *Id.* On appeal, the United States Court of Appeals for the Eighth Circuit affirmed all the convictions, except those involving the shooting of the bald eagles in violation of the ESA. *Id.* at 735–36. The Court also affirmed the dismissal of the charge of shooting of a golden eagle in violation of the Act. *Id.* at 736. Before the Supreme Court, the defendant in *Dion* did not challenge the ruling that tribal members had no treaty rights to hunt for commercial purposes, nor did he advance a religious freedom claim. *Id.* at 736 nn.2–3. The Court did not rule on the claim raised by *amici* that the BGEPA inhibited religious freedom when interpreted to abrogate Indian treaty rights. *Id.* at 746; *cf.* *United States v. Abeyta*, 632 F. Supp. 1301, 1307 (D.N.M. 1986).

⁸⁶ *Dion*, 476 U.S. at 740. The Court reasoned:

The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.

Id. at 740.

⁸⁷ *Id.* at 745; see Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 706 (1994) (discussing legislative history).

⁸⁸ U.S. CONST. art. I, § 8, cl. 3.

⁸⁹ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

⁹⁰ *Id.* at 558; see *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”).

interstate commerce.⁹¹ Lastly, Congress may regulate activities that have a “substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”⁹²

The Act criminally proscribes all commerce in bald or golden eagles and their parts.⁹³ Challenges to the Act on the grounds that the BGEPA constituted an invalid exercise of congressional power under the Commerce Clause have failed.

In *United States v. Bramble*,⁹⁴ defendant was convicted, *inter alia*, of possession of eagle feathers under the BGEPA.⁹⁵ On appeal, he argued that his conviction could not stand because the Act represented an unfounded exercise of congressional power under the Commerce Clause.⁹⁶ Specifically, he maintained that the BGEPA “ha[d] nothing to do with commerce or any economic enterprise that substantially affect[ed] commerce.”⁹⁷

In rejecting Bramble’s contention, the court of appeals found that the prohibition against possession and commerce of eagle parts, “each taken as a class, ha[d] substantial effects on interstate commerce, because both activities, even when conducted purely intrastate, threaten[ed] the eagle with extinction.”⁹⁸ Furthermore, the court held that the destruction of eagles “would substantially affect interstate commerce by foreclosing . . . several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material.”⁹⁹

⁹¹ *Lopez*, 514 U.S. at 558.

⁹² *Id.* at 559.

⁹³ 16 U.S.C. § 668a (2000); see Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1, 43 (2002) (“The Act prohibits all commerce in eagles or eagle parts, including the taking, possession, sale, purchase, barter, transportation, exportation or importation of bald or golden eagles or their parts.”) (footnote omitted).

⁹⁴ 103 F.3d 1475 (9th Cir. 1996).

⁹⁵ *Id.* at 1476–77. He was also convicted of possession of a firearm (by a felon), possession of marijuana, cultivation of marijuana, and possession of migratory birds. *Id.*

⁹⁶ *Id.* at 1480.

⁹⁷ *Id.* at 1480–81.

⁹⁸ *Id.* at 1481.

⁹⁹ *Id.*; see *United States v. Lundquist*, 932 F. Supp. 1237, 1245 (D. Or. 1996) (“[T]he possession of eagle parts is an activity which affects a broad regulatory scheme relating to commercial transactions and which, when viewed in the aggregate with similar activities nationwide, substantially affects interstate commerce.”); see also *Palila v. Haw. Dep’t of Land & Natural Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981) (“[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species, that would otherwise be lost by state inaction.”).

D. The Fifth Amendment Takings Clause

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.”¹⁰⁰ Two types of takings are protected by this clause—physical takings and regulatory takings.¹⁰¹ The cases addressing the Takings Clause in the context of a prosecution under the BGEPA are discussed below.

In *Andrus v. Allard*,¹⁰² after being prosecuted under the BGEPA,¹⁰³ petitioners brought suit for declaratory and injunctive relief alleging, in part, that if the Act and its regulations applied to prohibit the sale of eagles obtained prior to its effective date, it violated the Takings Clause of the Fifth Amendment.¹⁰⁴ In rejecting petitioners’ contentions, the Court noted that neither the Act nor its implementing regulations “compel[led] the surrender of the artifacts” they had sold containing eagle feathers, nor placed any physical restraint on them.¹⁰⁵ Further, while the law placed a significant restriction on one of the ways in which petitioners could dispose of their property, since they still held “a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle [wa]s not a taking, because the aggregate must be viewed in its entirety.”¹⁰⁶ Finally, as to the argument that the Act and the regulations “prevent[ed] the most profitable use of [petitioners’] property,” the Court determined that “loss of future profits—unaccompanied by any physical property restriction—provide[d] a slender reed upon which to rest a takings claim.”¹⁰⁷

¹⁰⁰ U.S. CONST. amend. V. The Takings Clause, also referred to as the Just Compensation Clause, is made applicable to the states through the Fourteenth Amendment. *See* *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 n.6 (2003); *see also* *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897).

¹⁰¹ *See* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321–23 (2002) (discussing the difference between physical and regulatory takings).

¹⁰² 444 U.S. 51 (1979).

¹⁰³ *United States v. Allard*, 397 F. Supp. 429, 430 (D. Mont. 1975); *United States v. Bovis*, Nos. 75-CR-63 & 75-CR-66 (D. Col. 1975). Of the two cases, it appears that only Allard was convicted. *Andrus*, 444 U.S. at 54 n.2.

¹⁰⁴ *Andrus*, 444 U.S. at 54–55. As noted previously, the Act contains an exemption to its general prohibitions with respect to the “possession or transportation” of bald or golden eagles or their parts taken prior to the date of their coverage. 16 U.S.C. § 668(a) (2000).

¹⁰⁵ *Andrus*, 444 U.S. at 65. The Court in *Andrus* also addressed challenges to the MBTA, including one under the Takings Clause. *See id.* at 59–68.

¹⁰⁶ *Id.* at 65–66. The Court found that it was “crucial that [petitioners] retain[ed] the rights to possess and transport their property, and to donate or devise the protected birds.” *Id.* at 66.

¹⁰⁷ *Id.* at 66. The Court observed that “[p]rediction of profitability [wa]s essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally

In *United States v. Kornwolf*,¹⁰⁸ defendant entered a conditional plea to violating the BGEPA and the MBTA in connection with the sale of an Indian headdress and a Sioux dance shield, both of which contained golden eagle feathers.¹⁰⁹ He had come into possession of these artifacts prior to the 1962 amendments, which extended the Act's protection to golden eagles,¹¹⁰ and received \$12,000 for the artifacts.¹¹¹ On appeal, he argued that the operation of the Act resulted in the unconstitutional taking of his property.¹¹²

In affirming the judgment entered on the conditional plea, the United States Court of Appeals for the Eighth Circuit held that *Andrus*' ruling extended to feathers acquired prior to the 1962 amendments and that it controlled the disposition of the case.¹¹³ Insofar as defendant attempted to distinguish *Andrus* on the basis of the value of the feathers, the court noted that although the value of the dance shield and the Indian headdress with and without the feathers had not been established, he had been compensated for these items.¹¹⁴ Thus, in analyzing whether there had been "just compensation," a court would have to determine whether payment *beyond* \$12,000 was warranted, thereby reducing the likelihood that there had been an unjust taking.¹¹⁵

E. The Right to Privacy

While the Constitution does not explicitly mention a right to privacy, the Supreme Court has recognized such a fundamental right based on the interests protected by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.¹¹⁶ This right, which has

been viewed as less compelling than other property-related interests." *Id.*

¹⁰⁸ 276 F.3d 1014 (8th Cir. 2002).

¹⁰⁹ *Id.* at 1014–15.

¹¹⁰ See Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246.

¹¹¹ *Kornwolf*, 276 F.3d at 1015.

¹¹² *Id.*

¹¹³ *Id.* at 1016. The court in *Kornwolf* noted that neither the parties' nor the court's own research had found any authority "that applie[d] the takings clause as a defense to criminal prosecution." *Id.* at 1017 n.5. But see *United States v. Hill*, 896 F. Supp. 1057, 1058, 1062–63 (D. Colo. 1995) (denying motion to dismiss indictment charging violations of the ESA, MBTA, and the Lacey Act on the grounds that these acts, as applied, did not result in an unconstitutional taking under the Fifth Amendment).

¹¹⁴ *Kornwolf*, 276 F.3d at 1016. Defendant had received \$5,000 for the headdress and \$7,000 for the dance shield and the district court allowed the defendant to retain those monies. *Id.* at 1016–17.

¹¹⁵ *Id.* at 1017 ("[I]nstead of removing the case from the control of [*Andrus v.*] *Allard*, [defendant's] receipt of compensation for the artifacts dictates it is more likely not to be deemed a taking without just compensation.").

¹¹⁶ See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (Due Process Clause of the Fifth and Fourteenth Amendments affords homosexuals a right to engage in consensual sexual

been used to strike down laws affecting intimate life decisions relating to abortion, contraception, procreation, marriage, education and child rearing,¹¹⁷ affects two interests: “[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”¹¹⁸

In *United States v. Lundquist*,¹¹⁹ defendant was charged with two counts of possession of golden and bald eagle parts and feathers.¹²⁰ In support of his motion to dismiss the charges, defendant argued that by prohibiting the possession of eagle parts in his home for religious purposes, the BGEPA violated his right to privacy.¹²¹ The district court rejected this contention. It found that even assuming that defendant’s right to privacy extended to the conduct he described, the government had a compelling interest in “destroying the market for [eagle] parts and reducing the illegal taking of eagles” which overrode any “hypothetical” privacy right.¹²²

F. Criminal Liability

To be guilty of a crime, a defendant generally must have committed a criminal act (*actus reus*) with a certain mental state (*mens rea*).¹²³ Prosecutions under the BGEPA have raised questions regarding the application of both of these elements to the criminal provisions of the Act.

activity at home without government intervention); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (grounding woman’s privacy right to terminate pregnancy in Ninth and Fourteenth Amendments); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (recognizing a zone of privacy within the penumbra of rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments).

¹¹⁷ See *Roe*, 410 U.S. at 152–54 (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (contraceptives); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (inter-racial marriage); *Griswold*, 381 U.S. at 485–86 (contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (procreation); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (child rearing and education); see also *Prince v. Massachusetts*, 321 U.S. 158, 166, 170–71 (1944) (family relationships).

¹¹⁸ *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (citations omitted).

¹¹⁹ 932 F. Supp. 1237 (D. Or. 1996).

¹²⁰ *Id.* at 1239. Defendant had received a feather and a golden eagle head as gifts. *Id.*

¹²¹ *Id.* at 1243.

¹²² *Id.* at 1244.

¹²³ See *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (“In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.”) (citation omitted); see *United States v. Tinoco*, 304 F.3d 1088, 1108 (11th Cir. 2002) (“As used in the common law, the ‘elements’ of an offense include each part of the *actus reus*, causation, and the *mens rea* that the government must establish before an individual can be found guilty of a crime.”) (citation omitted) (emphasis added).

1. *Mens Rea*

In *United States v. Hetzel*,¹²⁴ defendant was convicted by a magistrate judge of taking and possessing parts of a dead and decomposing bald eagle he had found on a beaver dam in the Squaw National Wildlife Refuge.¹²⁵ He kept and used the parts he found for a Boy Scout decoration.¹²⁶ On appeal, the district court reversed defendant's conviction.¹²⁷

Initially, the court found that the government had not presented evidence that defendant had willfully violated the statute.¹²⁸ As an alternative ground for reversal, the court also held that the government's literal interpretation of the statute was inconsistent with the well-established legal principle "that all laws should receive a sensible construction," and that literal interpretations which "lead to injustice, oppression, or an absurd consequence" should be avoided."¹²⁹ Under the circumstances presented, the court determined that imposition of criminal liability would violate that cardinal principle.¹³⁰

2. *Actus Reus*

In *United States v. Moon Lake Electric Ass'n*,¹³¹ a rural electric distribution cooperative was charged with seven violations of the BGEPA and six violations of the MBTA in connection with the deaths of twelve golden eagles and other migratory birds which were electrocuted on the cooperative's power poles.¹³² In support of its motion to dismiss the information, the cooperative argued that the unintentional conduct leading to the deaths of the eagles was "not the sort of physical conduct normally exhibited by hunters and

¹²⁴ 385 F. Supp. 1311 (W.D. Mo. 1974).

¹²⁵ *Id.* at 1313. At the time of defendant's conviction, the 1972 amendments had not taken effect. Thus, the Act defined the term "take" to include "pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb." Bald Eagle Protection Act, ch. 278, § 4, 54 Stat. 250, 251 (1940).

¹²⁶ *Hetzel*, 385 F. Supp. at 1316.

¹²⁷ *Id.* at 1318.

¹²⁸ *Id.* at 1315. Even if defendant had been prosecuted after the 1972 amendments took effect changing the *mens rea* requirement from "willfully" to "knowingly, or with wanton disregard for the consequences of [one's] act," Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064, the court found that the result would have been the same since "defendant simply picked up the dead eagle in anticipation of using its talons for an appropriate Scouting exhibit." *Hetzel*, 385 F. Supp. at 1318.

¹²⁹ *Hetzel*, 385 F. Supp. at 1317.

¹³⁰ *Id.* at 1318.

¹³¹ 45 F. Supp. 2d 1070 (D. Colo. 1999).

¹³² *Id.* at 1071.

poachers” which the Act proscribed.¹³³

In rejecting the cooperative’s motion, the court preliminarily ruled that whether or not it had killed the golden eagles “knowingly, or with wanton disregard for the consequences of its acts, [was] a question of fact for the jury’s determination.”¹³⁴ With respect to whether the BGEPA proscribed only physical conduct normally associated with hunting or poaching, the court noted that “[b]y prohibiting ‘poisoning,’ ‘killing,’ ‘possessing,’ ‘molesting,’ and ‘disturbing’ in addition to the acts normally associated with hunting,” the Act reflected Congress’s intent to regulate broader conduct.¹³⁵ Further, the legislative history suggested that Congress intended to prohibit conduct beyond that exhibited by poachers and hunters.¹³⁶

IV. THE CIVIL PENALTY PROVISION

The BGEPA also provides for the imposition of civil penalties by the Secretary of the Interior against anyone,¹³⁷ who without authority as provided under the Act, takes, possesses, transports, purchases, sells, barter, or offers to do any of these acts, or imports or exports any dead or live golden or bald eagle, any part thereof, or any egg or nest, or who violates any permit or regulation.¹³⁸ The maximum penalty for each violation is \$5,000.¹³⁹ If the person or entity fails to pay the assessed penalty, the Secretary may request the Attorney General to institute a civil action to collect the penalty in the federal district court located where the person resides or transacts business.¹⁴⁰ Furthermore, such an action must be sustained if the decision is “supported by substantial evidence.”¹⁴¹ Lastly, a violation of the civil penalty provision of the Act or its regulations subjects property associated with that violation to civil forfeiture.¹⁴²

¹³³ *Id.*

¹³⁴ *Id.* at 1074.

¹³⁵ *Id.* at 1086. The BGEPA proscribes the taking, possessing, selling, purchasing, bartering, transporting, exporting, importing, pursuing, shooting, shooting at, poisoning, wounding, killing, capturing, trapping, collecting, molesting, or disturbing bald or golden eagles, their parts, or their nests. 16 U.S.C. §§ 668(a), 668c (2000).

¹³⁶ See *Moon Lake Elec. Ass’n*, 45 F. Supp. 2d at 1086–88.

¹³⁷ As noted previously, the civil penalty provision applies to persons, associations, corporations and partnerships. 16 U.S.C. § 668c.

¹³⁸ 16 U.S.C. § 668(b).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See 16 U.S.C. § 668b(b); 50 C.F.R. §§ 12.2, 12.22–12.23 (2004) (addressing civil actions

A. *The Regulations Governing Assessments of Civil Penalties*

The process for assessing a civil penalty under the Act is set forth in regulations.¹⁴³ This process commences with the Director of the FWS or his authorized representative serving a putative violator with a notice of violation advising him of the facts indicating a violation, the amount of the proposed penalty, and the right to respond in writing to the notice by filing a petition for relief.¹⁴⁴ The putative violator, now a respondent, has forty-five days to respond to the notice.¹⁴⁵ The respondent's options include entering into informal discussions with the Director to resolve the case, accepting the proposed penalty (or compromise, if offered in the notice),¹⁴⁶ filing a petition for relief,¹⁴⁷ or awaiting the Director's notice assessing a penalty.¹⁴⁸

When the period for filing a petition for relief has expired, the Director is required to assess a civil penalty, taking into account the information made available to him.¹⁴⁹ Within forty-five days after the respondent is served with a notice of assessment reflecting the civil penalty, he may request a hearing.¹⁵⁰ If the respondent fails to request a hearing, the notice of assessment becomes the final administrative decision in the case forty-five days after its issuance.¹⁵¹ If the respondent requests a hearing, the case is assigned to an administrative law judge.¹⁵² The decision of the

to obtain forfeiture and administrative forfeiture proceedings); *see generally* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended at 18 U.S.C. § 983(2) (2000)) (revising standards and rules governing civil forfeiture proceedings).

¹⁴³ *See* Frank Papse, Sr., 33 I.B.I.A. 175, 1999 I.D. LEXIS 37, at *9 (Dep't of Interior Mar. 3, 1999) ("Nothing in the 1972 act requires that the Secretary publish regulations prior to assessing civil penalties. Even so, the Department has promulgated regulations under which it enforces the civil penalty provisions of the . . . Act, as well as those in other laws.")

¹⁴⁴ 50 C.F.R. §§ 1.4, 11.11(a); *see* 16 U.S.C. § 668(b) ("No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation.")

¹⁴⁵ 50 C.F.R. § 11.11(b).

¹⁴⁶ If the respondent accepts the proposed penalty or compromise, then he will not receive a notice of assessment and waives any opportunity for a hearing. *Id.* § 11.11(c).

¹⁴⁷ In the petition for relief, the respondent may contest the amount of the proposed penalty, as well as the legal and factual sufficiency of the charge(s). *Id.* § 11.12.

¹⁴⁸ *Id.* §§ 11.11(b)(1)–(4).

¹⁴⁹ *Id.* § 11.13; *see* 16 U.S.C. § 668(b) (2000) ("In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty.")

¹⁵⁰ 50 C.F.R. § 11.15.

¹⁵¹ *Id.* § 11.16(a). Respondent thereafter has "20 calendar days from the date of the final administrative decision within which to make full payment of the penalty assessed." *Id.* § 11.17.

¹⁵² *Id.* § 11.21; *see* Earl K. Fike, 4 O.H.A. 91 (Dep't of Interior Oct. 31, 1980) (denying request for appeal).

administrative law judge may be appealed to the Director of the Office of Hearings and Appeals, who will then appoint an ad hoc board to consider whether the appeal should be granted and, if so, decide the appeal.¹⁵³

While there are no district or circuit court opinions addressing the application of the Act's civil penalty provision, two general observations regarding § 668(b) are in order.¹⁵⁴ First, knowledge or intent are irrelevant in establishing a violation under § 668(b).¹⁵⁵ Second, with respect to timing, 28 U.S.C. § 2462¹⁵⁶ which governs actions, suits, or proceedings for the enforcement of civil penalties, may provide a time limitation for the commencement of administrative proceedings seeking to impose civil penalties under the BGEPA.¹⁵⁷

¹⁵³ 50 C.F.R. § 11.25.

¹⁵⁴ The FWS's enforcement of § 668(b) has led to decisions at the administrative judge level interpreting that section of the Act. Decisions at this level make clear that the government bears the burden of establishing a violation by a preponderance of the evidence. *See, e.g.*, U.S. Fish & Wildlife Serv. v. Angel Nunez, No. Boston 79-79, at 8 (Oct. 9, 1979) (finding violation established by a "preponderance of the reliable, credible, probative, and substantial evidence"); *cf.* U.S. Fish & Wildlife Serv. v. Kenneth J. Bush, No. Portland 79-76, at 5 (Dec. 18, 1979) ("Government . . . unable to present a preponderating amount of evidence to support a finding to justify a civil sanction against the respondent."). Furthermore, the initiation of administrative proceedings and ultimate assessment of civil penalties following a criminal acquittal for the same charges does not violate principles of *res judicata* or double jeopardy. *See* U.S. Fish & Wildlife Serv. v. George J. Gordon, No. Atlanta 85-82, at 4-5 (Sept. 22, 1986).

¹⁵⁵ *See* Jamieson, *supra* note 3, at 937 ("In contrast to criminal violations . . . civil violations need not be committed intentionally or with wanton disregard for the consequences.") (citation omitted); *cf.* United States v. Lynch, 233 F.3d 1139, 1145 (9th Cir. 2000) (contrasting statutory "knowing" requirement found in criminal prohibition of Archaeological Resources Protection Act with civil prohibition which did not contain such a requirement). A violator's degree of willfulness, however, may be considered as a mitigating factor in determining the amount of the penalty. *See* 16 U.S.C. § 668(b) (2000) ("In determining the amount of the penalty . . . the demonstrated good faith of the person charged shall be considered by the Secretary.").

¹⁵⁶ 28 U.S.C. § 2462 (2000). The statute states:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Id.

¹⁵⁷ *See id.* The limitations period in section 2462 has been interpreted by some courts to apply to the initiation of administrative proceedings whose goal is the imposition of civil penalties. *See, e.g.*, Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 662 (4th Cir. 1997) (reviewing administrative action by Office of Surface Mining Reclamation and Enforcement ("OSM") linking a corporation to the company which owed OSM delinquent abandoned mine land penalties and fees); 3M Co. v. Browner, 17 F.3d 1453, 1454 (D.C. Cir. 1994) (involving review of Environmental Protection Agency's assessment of civil penalties for violations of Toxic Substances Control Act). The term "penalty" is not defined by section 2462 and judicially it has been interpreted to mean "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the

B. Civil Forfeiture

In *United States v. Thirty-Eight Golden Eagles or Eagle Parts*,¹⁵⁸ the government brought a forfeiture action against thirty-eight golden eagles carcasses and their parts which had been obtained by FWS agents from Adam Norwall, a member of the Red Lake Band of Chippewa Indians.¹⁵⁹ In opposing the forfeiture action, Norwall argued that the seizure of the eagles and their parts violated his First Amendment right to the free exercise of religion.¹⁶⁰ The district court rejected this contention, ruling that the BGEPA and its implementing regulations advanced a compelling governmental interest in the protection of eagles and that “exempting all Indians from the regulatory procedures would be disastrous to the eagles, in that their numbers could be severely reduced.”¹⁶¹

V. CONCLUSION

The BGEPA and its accompanying regulations are aimed at protecting eagles and preserving Native American culture.¹⁶² Through the enforcement of the criminal and civil penalty provisions, these important governmental interests are advanced. Other than in the forfeiture context, there are no federal cases addressing the civil penalty provision.¹⁶³ The evolving case law concerning criminal prosecutions under the BGEPA, however, reveals the following.

First, with respect to free exercise of religion challenges involving

harmed parties by the defendant’s action.” *Johnson v. SEC.*, 87 F.3d 484, 488 (D.C. Cir. 1996) (emphasis added); *accord Proffitt v. FDIC*, 200 F.3d 855, 860–61 (D.C. Cir. 2000); *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998). If the amount recoverable under the BGEPA’s civil penalty provision is deemed to be remedial in nature, the limitations period under section 2462 may not control. *See Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (discussing meaning of penalty under section 2462’s predecessor); *cf. United States v. Perry*, 431 F.2d 1020, 1024–25 (9th Cir. 1970) (holding an action to recover sums paid in violation of Anti-Kickback Act not one for enforcement of civil penalty under section 2462 since sanctions “designed to make the United States whole by recovering the extra costs that occurred when kickbacks were paid”); *SEC v. Lorin*, 869 F. Supp. 1117, 1122–23 (S.D.N.Y. 1994) (explaining that disgorgement is not a “fine, penalty, or forfeiture” within meaning of section 2462 since the sanction is “strictly remedial”).

¹⁵⁸ 649 F. Supp. 269 (D. Nev. 1986), *aff’d*, 829 F.2d 41 (9th Cir. 1987).

¹⁵⁹ *Id.* at 271, 274.

¹⁶⁰ *Id.* at 271.

¹⁶¹ *Id.* at 276–77 (citation omitted).

¹⁶² *See United States v. Hardman*, 297 F.3d 1116, 1127–29 (10th Cir. 2002) (identifying compelling interests as protection of eagles and preservation of Native American culture and religion).

¹⁶³ *See United States v. Thirty-Eight Golden Eagles or Eagle Parts*, 649 F. Supp. 269 (D. Nev. 1986), *aff’d*, 829 F.2d 41 (9th Cir. 1987).

members of federally recognized tribes who could but did not apply for permits, the Eighth and Ninth Circuits have ruled that under the RFRA, the protection of eagles serves a compelling governmental interest and that the BGEPA and the regulations provide the least restrictive means of accomplishing that goal.¹⁶⁴ Insofar as persons who are not members of federally recognized tribes are concerned, the Ninth Circuit has ruled that the exclusion of non-members from the permit program represents the least restrictive means to address the government's compelling interest in the preservation of eagles,¹⁶⁵ while the Tenth Circuit has left the question open.¹⁶⁶ It also bears noting that in the administrative context, courts have ruled that the regulations' limited applicability to members of federally recognized tribes represents the least restrictive means of furthering the government's compelling interests in fulfilling treaty obligations with federally recognized tribes,¹⁶⁷ and does not violate the Establishment Clause.¹⁶⁸

Second, the BGEPA abrogates the implied treaty rights of Native American Indians to hunt bald and golden eagles on reservation lands for noncommercial purposes.¹⁶⁹ It also does not represent an unlawful exercise of power under the Commerce Clause,¹⁷⁰ effect a taking in violation of the Fifth Amendment,¹⁷¹ or violate a federal right to privacy.¹⁷²

Lastly, with respect to the taking of eagles, the Act criminally proscribes conduct broader than that associated with hunting and poaching.¹⁷³

¹⁶⁴ See *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001); *United States v. Hugs*, 109 F.3d 1375, 1378–79 (9th Cir. 1997).

¹⁶⁵ *United States v. Antoine*, 318 F.3d 919, 923–24 (9th Cir. 2003), *cert. denied*, 540 U.S. 1221 (2004).

¹⁶⁶ See *Hardman*, 297 F.3d at 1132–33.

¹⁶⁷ See *Gibson v. Babbitt*, 223 F.3d 1256, 1257–59 (11th Cir. 2000).

¹⁶⁸ See *Rupert v. Director, United States Fish & Wildlife Serv.*, 957 F.2d 32, 34–36 (1st Cir. 1992).

¹⁶⁹ See *United States v. Dion*, 476 U.S. 734, 738 (1986); *United States v. Fryberg*, 622 F.2d 1010, 1016 (9th Cir. 1980).

¹⁷⁰ See *United States v. Bramble*, 103 F.3d 1475, 1480–82 (9th Cir. 1996); *United States v. Lundquist*, 932 F. Supp. 1237, 1244–45 (D. Or. 1996).

¹⁷¹ See *United States v. Kornwolf*, 276 F.3d 1014, 1017 (8th Cir. 2002).

¹⁷² See *Lundquist*, 932 F. Supp. at 1243–44.

¹⁷³ See *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1085–88 (D. Colo. 1999).