

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CLERGYMAN, NATIVE AMERICAN))	
CHURCH OF THE U.S.A.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 90-0258 P
)	
DIRECTOR, U.S. FISH & WILDLIFE))	
SERVICE,)	
)	
Defendant)	

MEMORANDUM DECISION ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT¹

The plaintiff in this case seeks a court order allowing him to possess eagle feathers. He alleges that section 668(a) of the Eagle Protection Act, 16 U.S.C. ' ' 668 - 668d, and regulations promulgated thereunder violate his rights under the Establishment Clause of the First Amendment. He asks the court to declare as unconstitutional the denial of permits to non-Indians who wish to possess eagle feathers. The defendant asserts that the applicable statute and regulations survive the constitutional challenge and are supported by compelling governmental interests.

¹ Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I. SUMMARY JUDGMENT STANDARDS

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor."

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTUAL CONTEXT

The material facts are undisputed. The plaintiff describes himself as both organizer of a Native American tribe and minister of a Native American church. Administrative Record ("Record") Exh. 1 at 1. On or about September 1, 1987 he directed a letter to Donald P. Hodel, Secretary of the Department of the Interior ("Secretary"), petitioning the Secretary to recognize the "Tribe of Pahana" as an Indian tribe.² *Id.* The plaintiff noted that such recognition would fulfill the tribal membership requirement for purposes of obtaining a permit to possess eagle feathers. *Id.* Barring formal recognition, the plaintiff requested that he be exempted from the tribal membership requirement. *Id.* The plaintiff's petition states that he is not a Native American Indian and that the Pahana tribe offers "indigenous forms of religion and lifestyle to non-Indian people." *Id.*

On October 1, 1987 the defendant Director, U.S. Fish and Wildlife Service, responded to the plaintiff's petition.³ He denied the plaintiff's request stating that, pursuant to applicable regulations, "the Fish and Wildlife Service may not issue permits for the use of eagles for religious purposes to non-Indians." Record Exh. 2. The defendant further stated that, because recognition of Indian tribes was under the jurisdiction of the Bureau of Indian Affairs, he would forward the plaintiff's petition to the Bureau for its consideration. *Id.*

² The name given to the plaintiff's tribe means "returned white brothers and sisters." Record Exh. 1 at 1.

³ The Secretary apparently directed the petition to the Director of the U.S. Fish and Wildlife Service because that department is responsible for issuing eagle permits. The Director is authorized to act on behalf of the Secretary. *See* 50 C.F.R. ' 1.2.

On or about October 8, 1988 the Bureau of Indian Affairs notified the plaintiff that his petition was rejected. Record Exh. 5. The Bureau stated that it could not recognize the plaintiff's group as a federally-recognized Indian tribe because the group "` does not consist of native American Indian descendants who are descended from a specific historical tribe" and fails to meet other regulatory requirements. *Id.*

III. STATUTORY AND REGULATORY BACKGROUND

The Eagle Protection Act provides, in part, that criminal and civil penalties will be assessed against anyone who takes, possesses, sells, purchases, barter, transports, exports or imports any bald eagle or golden eagle, or any part, nest or egg thereof, at any time and in any manner. 16 U.S.C. ' 668. Section 668a provides for certain limited exceptions to the general mandate of ' 668. One of the exceptions specifies that the Secretary, whenever it is compatible with the preservation of the bald eagle and golden eagle, is authorized "` to permit the taking, possession, and transportation of specimens thereof for the . . . religious purposes of Indian tribes." Section 668a also authorizes the Secretary to prescribe the necessary regulations pursuant to the statute and specifies that "` bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior."

The Secretary then promulgated certain regulations setting forth the permit requirements. 50 C.F.R. ' ' 22.1 - 22.31. Section 22.22, pertaining to the "` religious purposes of Indian tribes" exception, provides that the Director of Fish and Wildlife may issue a permit upon receipt of an application. In addition to other information, the application must be accompanied by a certificate from the Bureau of Indian Affairs that the applicant is an Indian. 50 C.F.R. ' 22.22(a)(5).

Pursuant to the Act the Secretary also promulgated regulations, administered by the Bureau of Indian Affairs, setting forth the Bureau's procedures and policies for establishing that an American Indian group exists as an Indian tribe. 25 C.F.R. ' ' 83.1 - 83.11. Section 83.4 states that

[a]ny Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in ' 83.7, may submit a petition requesting that the Secretary acknowledge the group's existence as an Indian tribe.

The ' 83.7 criteria include a ``statement of facts establishing that the petitioner has been identified from historical times until the present . . . as `American Indian,' or `aboriginal,'" 25 C.F.R. ' 83.7(a), and

[e]vidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

25 C.F.R. ' 83.7(b).

IV. LEGAL ANALYSIS

The plaintiff asserts his claim under the Establishment Clause of the First Amendment⁴ arguing that the Eagle Protection statute and regulations promulgated thereunder violate the Constitution by giving preferential treatment to Indian tribes' use of eagle feathers for their religious ceremonies. As a non-Indian, the plaintiff cannot enjoy the same privilege. The defendant asserts that the governmental interest in preserving the eagle population, combined with its efforts to protect Native American traditions, renders the statute constitutional.

A. Exhaustion

As an initial matter the defendant indicates that, because the plaintiff was not formally denied an eagle permit by the Fish and Wildlife Service, he has not technically exhausted his administrative remedies. The defendant nonetheless acknowledges that exhaustion would be futile in this instance in light of the Bureau of Indian Affairs' rejection of tribal recognition for the Pahana tribe. *See* Memorandum in Support of Federal Defendant's Motion for Summary Judgment ("Defendant's Memorandum") at 7 n.3. Without this recognition, the plaintiff is unable to meet the permit requirements.

The Court of Appeals for the First Circuit instructs that, when a plaintiff attacks the constitutionality of a regulation or agency policy, "`exhaustion serves little purpose; the agency's policy

⁴The defendant, in addition to responding to the Establishment Clause challenge, argues that the plaintiff's rights have not been violated under the Free Exercise Clause of the First Amendment. However, because the plaintiff insists that he is only raising an Establishment Clause challenge, I do not address the Free Exercise argument.

is well-established and unlikely to change [and] agency expertise is not particularly likely to help the court" *Doyle v. Secretary of Health & Human Servs.*, 848 F.2d 296, 300 (1st Cir. 1988). *See also Ezratty v. Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981). The resolution of this claim involves a question of law. Requiring formal exhaustion of the plaintiff's administrative remedies would be futile and would only delay the ultimate resolution of the plaintiff's claim. Accordingly, I proceed to the merits.

B. Establishment Clause Challenge

The Establishment Clause embodies the principle that neither state nor federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). The plaintiff urges this court to apply the "strict scrutiny" standard of review given the statute's preferential treatment of Native Americans. The defendant contends that the court should not be constrained by any single test but should rather view the statute in light of the government's dual objective of preserving an endangered species while accommodating Native American religious tradition. I find that, even under the "strict scrutiny" standard, the governmental interests survive the constitutional challenge.

By allowing only Native Americans to possess eagle feathers for religious purposes, 16 U.S.C. § 668a provides preferential treatment to Indian tribes. No other group is named within the "religious purposes" exception. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court applied "strict scrutiny" analysis in striking a state statute that imposed registration and reporting requirements on some religious organizations but not others. The Court found that the statute was not "justified by a compelling governmental interest." *Id.* at 247. More recently, in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), the Court again instructed that, "when it is claimed that a denominational

preference exists, the initial inquiry is whether the law facially differentiates among religions." *Id.* at 695. The Court's decisions, however, also allow for flexibility in resolving such claims. For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court rejected the "absolutist approach" of "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith." *Id.* at 678. *See also Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment) (government not precluded "from acknowledging religion or from taking religion into account in making law and policy."). Each case must be evaluated on its own terms; no single test or set of criteria applies. *Lynch*, 465 U.S. at 678-79.

A constitutional challenge involving a non-Indian's use of eagle feathers for religious ceremonies appears to be a matter of first impression. However, in a case analogous to the instant action, the Fifth Circuit adopted the Court's approach in *Lynch* to resolve an Establishment Clause claim. In *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), the plaintiff sued for a declaratory judgment that federal and state laws prohibiting peyote possession by everyone except a certain Native American church were unconstitutional. In upholding the exception the Fifth Circuit found that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 1217 (quoting *Walz v. Tax Com. of City of New York*, 397 U.S. 664, 669 (1970)).

As noted in *Peyote Way*, the Court has not hesitated to find that Congress has broad authority over Indian matters:

The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

Peyote Way, 922 F.2d at 1217. The court held that the federal exemption "` represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment." *Id.* I am persuaded by the Fifth Circuit's reasoning and find its application useful here.

The government has a compelling interest in protecting the endangered eagle population from destruction in this country, both for its inherent worth and for its traditional value. Equally compelling is the government's obligation towards the Native American tribes, including an accommodation of their cultural and religious traditions. The statute is primarily a conservation statute. It does not represent an establishment of religion; it is not sponsoring any religion. It does attempt to preserve the deeply-rooted traditions of this country's native population. The plaintiff is not a Native American. Therefore, he cannot benefit from the exemption offered to Native Americans by the challenged statute.⁵

C. Legislative History

⁵ The plaintiff's reliance on *Native Am. Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979), is misplaced. The drug enforcement statute at issue in that case was silent as to whether Indians were exempt from its provisions. The enforcing agency, however, found that Congress intended an exemption for a certain Native American church and promulgated regulations accordingly. *Id.* at 1249. That notion, however, was rejected as inconsistent with the plain language and purposes of the statute. The statute in the instant case unambiguously states that only Indians benefit from the religious purpose exemption. Resort to legislative history is not necessary to resolve the issue here; rather, its usefulness is limited to emphasizing the purpose of the challenged statute.

The plaintiff relies in part on legislative history to support his claim. Because I find the challenged statute's history helpful in understanding the policy reasons for its enactment, I summarize briefly its historical foundation.

A review of the legislative history of the Eagle Protection Act reveals that Congress recognized the need to balance the special cultural and religious interests of Native Americans against the statute's conservation purposes. The compromise is narrowly tailored to allow few exceptions to its overall purpose -- preservation of the bald and golden eagle.

The Act, originally passed in 1940, did not contain any reference to Indians.⁶ When it was amended in 1962 to include protection for the golden eagle, the subcommittee drafting the bill received a letter of overall support from the Department of the Interior. *See United States v. Dion*, 476 U.S. 734, 741 (1986). The Department, however, also noted the eagle's importance to the ability of Indian tribes to "continue ancient customs and ceremonies that are of deep religious or emotional significance to them." H.R. Rep. No. 1450, 87th Cong., 2d Sess. 4 (1962). The Department concluded that, "[i]n the circumstances, it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle. If enacted, the bill should, therefore, permit the Secretary of the Interior, by regulation to allow the use of eagles for religious purposes by Indian tribes." *Id.* The statute was enacted accordingly.

Buttressing the legislative history of the Eagle Protection Act is the history of the American Indian Religious Freedom Act, 42 U.S.C. § 1996. The report issued by the House Committee on Interior and Insular Affairs states that "Native Americans have an inherent right to the free exercise of their religion." H.R. Rep. No. 1308, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. &

⁶ The legislative history for the original Act is limited. However, the committee report leaves no doubt that the primary -- if not sole -- focus of the legislation was to preserve the eagle population. *See*

Admin. News 1262. The report also states that "a lack of U.S. governmental policy has allowed infringement in the practice of native traditional religions." *Id.* Resulting laws, such as conservation laws, "were not intended to relate to religion and because there was a lack of awareness of their effect on religion, Congress neglected to fully consider the impact of such laws on the Indian's religious practices." *Id.* at 1263. The report also notes that the natural objects used by the Indians, including eagle feathers, "are necessary to the exercise of rites of the religion [and] to the cultural integrity of the tribe." *Id.*

The plaintiff cites to the bill's floor debate to support his claim that Congress intended for this bill to include anyone who practices Native American religion. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Memorandum") at 7-8. While floor debate may assist in determining Congressional intent, it is not conclusive. The committee reports provide a more accurate assessment of the collective legislative intent. In this case, the reports reflect concern for the aboriginal Native American tribes as opposed to non-Indians. The plaintiff failed to include the sponsor's comment that the joint resolution "specifically talks about the traditional religions of the American Indian, Eskimo, Aleut, and native Hawaiians." 124 Cong. Rec. 21,444, 21,445 (1978). As noted above, the plaintiff readily admits that he is not a Native American. He therefore falls outside the scope of the definition of Indian as well as the exemption at issue in this case.

V. CONCLUSION

I find that the federal exemption allowing tribal Native Americans to continue their tradition of using eagle feathers in their religious ceremonies is supported by compelling governmental objectives

S. Rep. No. 1589, 76th Cong., 3d Sess. 2 (1940).

and survives this constitutional challenge. Accordingly, I **DENY** the plaintiff's motion for summary judgment and **GRANT** the defendant's motion for summary judgment.

Dated at Portland, Maine this 31st day of July, 1991.

David M. Cohen
United States Magistrate Judge