

NORTHERN ARAPAHO CODE

TITLE 13. RELIGIOUS FREEDOM

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Section 101 - Findings.

(a) The traditional ceremonies of the Northern Arapaho Tribe are an integral part of the Tribe itself and essential to the survival and well-being of the Tribe and its members.

(b) The freedom to participate appropriately in traditional ceremonies, in accordance with ceremonial law, is guaranteed to the Tribe and its members in accordance with the law, tradition, and sovereignty of the Tribe itself. This freedom is guaranteed against interference by non-Arapaho individuals or governments by Northern Arapaho law and by the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, and other federal law.

(c) Provisions of the Shoshone and Arapaho Law and Order Code ("S&A LOC") which prohibit for all purposes the taking of an eagle are contrary, in some circumstances, to the traditional and federal rights of the Northern Arapaho Tribe and its members with respect to the right to take an eagle for traditional ceremonial purposes. Such provisions also conflict with S&A LOC 14-13-4, which declares the policy of the Tribes to protect "the safeguards afforded to individuals by the Constitution of the United States and the Indian Civil Rights Act."

(d) Reasonable tribal regulations are necessary for the taking of an eagle which accommodate the religious rights and freedoms of individuals guaranteed by tribal law, the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, and other federal law.

(e) Federal regulations in effect at the time of enactment of this Code provide that the federal government "will issue a permit only to members of Indian entities [Tribes]..." 50 C.F.R. 22.22. This federal system is restrictive, burdensome, and unresponsive and fails to accommodate the religious needs of members of the Northern Arapaho Tribe for a number of reasons, including, without limitation: (1) the law and tradition of the Northern Arapaho Tribe does not permit the taking of an eagle for traditional purposes unless the individual involved has the appropriate ceremonial role and approval from within the Tribe; (2) the federal government cannot and shall not determine who does or does not meet the qualifications and conditions of tribal law and tradition; and (3) the issuance of permits only (and directly) to a single person does not accommodate or respect the Tribe's traditional processes involved in authorizing or

conducting ceremonies. Only the Tribe itself can permit an individual to take an eagle under tribal law and tradition, and the Tribe is entitled to do so without federal or other interference, intrusions, burdens, or restrictions.

(f) The authority of the Tribe to grant eagle take permits to its tribal members extends at least to that territory recognized and reserved by the Tribe as the territory of the Arapaho in the 1851 Treaty of Fort Laramie and the 1868 Treaty with the Northern Arapaho. The rights to hunt, fish, and pass over such territory, and to roam and hunt there while game shall be found in sufficient quantities, as reserved by those Treaties, include the right to take an eagle pursuant to Northern Arapaho law and the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, and other federal law.

(g) For most of the history of the United States, the federal government has actively discouraged and even outlawed the exercise of traditional tribal ceremonies. As a result, the United States now has a heightened moral, legal, and trust obligation to protect what it has historically tried to extinguish.

Comment: "From the 1890's to the 1930's, the [federal] government moved from beyond promoting voluntary abandonment of tribal religions to, in some instances, affirmatively prohibiting those religions. On those reservations where it had authority, the Bureau of Indian Affairs outlawed the 'sun dance'... It was not until 1934 that the federal government fully recognized the right of free worship on Indian reservations." Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. Rev. & Soc. Change 373, 374 (1993).

(h) The United States has made a hypocrisy of the regulatory process for the taking of an eagle for traditional ceremonial purposes and has shown a callous indifference to the rights and traditions of the Tribe and its members. The enactment of this written Code is necessary in part to address problems created by the federal regulatory process.

Comment: In U.S. v. Friday, No.05-CR-260-D, WL 3592952, the U.S. District Court found as a matter of fact that the Bald and Golden Eagle Protection Act "expressly contemplates a permitting process for the taking of eagles for Indian religious purposes," but that the USFWS' implementation of the permitting process was a "hypocrisy" that showed "callous indifference" to traditional practices. U.S. v. Friday, 525 F.3d 938 (10th Cir. 2008) (rev'd on other grounds - defendant could not challenge permit system unless he had permit application pending).

Section 102 - Relation to the S&A LOC.

(a) The provisions of this Code do not purport to bind or regulate the Eastern Shoshone Tribe; nor do they purport to impede the federal rights of any individual.

(b) The provisions of this Code rescind, amend, or supercede the provisions of Shoshone and Arapaho Law & Order Code ("S&A LOC") Sections 16-1-8, 16-8-6 and 16-8-7 (Wildlife, Endangered Species, and Protected Species), or any other provisions of the S&A LOC, only to the extent they are contrary to and therefore rescinded, amended, or superceded by rights recognized under Northern Arapaho tribal law and tradition, the free exercise clause of the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, or other applicable federal law.

Section 103 - Eagle Take Permits.

(a) No person may take a bald or golden eagle except for the purpose of exercising their rights under Northern Arapaho tribal law and tradition and the free exercise clause of the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, or other applicable federal law.

(b) No person may take a bald or golden eagle on locations set forth in the following section without the permission of the Northern Arapaho Tribe, which shall be granted or denied only in consultation with the traditional ceremonial leadership of the Tribe.

(c) Applications for eagle take permits shall be submitted to the Secretary of the Northern Arapaho Business Council. The Business Council may request additional information concerning the permit application and may grant, grant with conditions, or deny the application. The decision of the Business Council, in consultation with traditional ceremonial leadership, shall be final and not subject to appeal.

Section 104 - Locations for which Eagle Take Permits May be Granted. The regulatory or other jurisdiction of the Northern Arapaho Tribe is not limited to the activities of persons on lands owned by the Tribe or tribal members. However, eagle take permits may be granted only in the following circumstances on the following locations:

(a) *Lands Owned Solely by the Northern Arapaho Tribe.* Permits may be granted to tribal members to take eagles on lands owned solely by the Northern Arapaho Tribe.

(b) *Lands Owned Solely by Individuals.* Permits may be granted to tribal members to take eagles on lands owned solely by those members or on lands of other individuals or entities which have granted written permission for the same.

(c) *Lands Owned by Both Tribes.*

(i) *Religious Rights.* The fact that some lands on the Wind River Reservation are owned by both the Northern Arapaho and the Eastern Shoshone Tribe together does not prevent the free exercise of religion on those lands by members of the Northern Arapaho Tribe pursuant to Northern Arapaho tribal law and tradition, the free exercise clause of the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, or other applicable federal law. No government may substantially burden the exercise of religion absent a showing that such burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

(ii) *Property Rights.* As co-owner and co-tenant of lands owned by both Tribes, the Northern Arapaho Tribe may permit the religious rights of its tribal members to take eagles on such lands, so long as the same does not result in a substantial injury to those lands. No more than one permit per year shall be granted under this section. To the extent practicable, the Northern Arapaho Business Council will consult with the Eastern Shoshone Business Council prior to issuance of a permit under this section and accommodate reasonable objections by that Council to a permit application.

Section 105 - Protection of Ceremonies. Nothing herein shall allow any inquiry into or disclosure of any Northern Arapaho traditional ceremonies or practices by or to any person or entity not authorized by the traditional law of the Tribe. All communication or consultation by the Northern Arapaho Business Council with traditional ceremonial leadership pursuant to this Code shall be and shall remain privileged and confidential.

Section 106 - Severability. If any provision of this Code, any regulations promulgated hereunder, or any application hereof is held invalid by a court of competent jurisdiction, the valid

provisions of this Code and the valid regulations shall continue in full force and effect.

Section 107 - Effective Date. The provisions of this Code shall be effective on the date of enactment by the Northern Arapaho Business Council.

History: 2010. Title 13. Section 101 et seq., Religious Freedom, was enacted by the Northern Arapaho Tribe by resolution of the Northern Arapaho Business Council dated November 2, 2010, Resolution No. NABC-2010-119.