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Public Comments Processing
Attn: FWS-R9-MB-2011-0060
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, MS 2042-PDM
Arlington, VA 22203-1610

Re: Comments on Docket FWS-R9-MB-2011-0060

Dear Sir or Madam:

I am a professor of environmental law and co-director of the Pace Environmental Litigation Clinic at Pace University School of Law. I am also a licensed master falconer and I hold state and federal raptor propagation permits. Some of the captive-bred raptors I produce are hybrids of native and non-native species produced through artificial insemination. I offer the following comments on the above-referenced docket, Proposed Rule to revise the definition of "hybrid" in the federal falconry regulations as it relates to birds protected under the Migratory Bird Treaty Act (MBTA), as published by the Department of the Interior, Fish and Wildlife Service (Service) in the Federal Register Vol. 76, No. 216, pp. 69223-25 on November 8, 2011.

I. Introduction

The Proposed Rule correctly asserts that the present definition of "hybrid" in 50 CFR 21.3 applies only to hybrids of two species on the list of migratory birds at 50 CFR 10.13. Prior to 2008, the Service had never codified a definition of the term "hybrid" specifically relating to raptors. When amending the falconry regulations in 2008, the Service added a definition of "hybrid" in § 21.3 meaning "offspring of birds listed as two or more distinct species in § 10.13..." Federal Register 73:196 (October 8, 2008) p.59465. This definition exempted from regulation hybrids of one listed species and one unlisted species because it requires *both* parent species to be listed in § 10.13.

The intent of the Proposed Rule is to allow the Service to broaden the definition of "hybrid" in § 21.3 to include "offspring of any bird of a species listed in § 10.13... and any bird of a species not listed in § 10.13... and any progeny of those birds." This includes offspring of any species listed in § 10.13 when *either* parent species is listed, meaning that offspring of one listed species and one unlisted species, as well as offspring of all subsequent generations, will be captured under the revised definition.

One stated reason for this change is to harmonize the existing definition of § 21.3 with conflicting language in 50 CFR 10.12 and 50 CFR 23.5. Section 10.12 implements the MBTA, Lacey Act, Endangered Species Act *et al.*, and defines migratory bird to include "a hybrid of any such bird" listed in § 10.13. Section 23.5 implements CITES and defines "migratory bird" as "any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed [in § 10.13] or which is a mutation or hybrid of any such species."

In support of the Proposed Rule, the Service cites case law from *U.S. v. Richards*, 583 F.2d 491, 10th Cir. 1978, and *Andrus v. Allard*, 444 U.S. 51 (1979). In *Richards* the court held that captive-bred raptors listed as migratory birds are under the Service's authority to regulate. In *Andrus* the court upheld the validity of regulations prohibiting commercial transactions in parts of birds legally killed before the birds came under the protection of the statute. Of note is that neither case is on point to the issue of hybrid raptors. Discussion of the Proposed Rule as it *does* relate to hybrid raptors follows.

II. The Proposed Rule Conflicts With Superseding Law

In the supporting text of the Proposed Rule, the Service omitted the fact that in 2004 and pursuant to a request from the Secretary of the Interior (Secretary), Congress amended the MBTA to limit application of the statute "only to species that are native to the United States or its territories." 16 U.S.C. § 703(b)(1). The amendment defines "native to the United States or its territories" as "occurring in the United States or its territories as the result of natural biological or ecological processes" (§ 703(b)(2)(A)) and further limits the statutory application in § 703(b)(2)(B): "a migratory bird that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native..." The amended MBTA is referred to as the Migratory Bird Treaty Reform Act (MBTRA) and is the controlling statute that clearly defines the Secretary's authority to regulate native bird species.

There is no reference to the MBTRA in the Service's discussion of the Proposed Rule. Instead, to illustrate the broad authority courts have conferred on the Secretary, the Service cited the two aforementioned court cases that are in no way dispositive of the issue of regulating hybrid raptors. The Service cited no statutory or case law that confers discretion on the Secretary to promulgate regulations that are contrary to superseding law.

The Proposed Rule clearly conflicts with the statutory criteria exempting non-native birds from regulation. Because § 21.3 sets forth the definition of "hybrid" in the Service's falconry regulations, the Proposed Rule applies to the three orders of native raptors used in falconry (*i.e.*, *Falconiformes, Strigiformes, Accipitriformes.*) Although a small number of other migratory bird taxa may hybridize with some regularity as a result of natural biological or ecological processes, such as certain anatids and parulids, this is not the case with native raptors. Hybrid raptors are produced through artificial insemination in captivity and exist "solely as a result of intentional or unintentional human-assisted introduction" (whether introduced to captivity or to the wild) as defined in the MBTRA. Therefore, such hybrids are *non-native* and are not subject to regulation under the superseding statute.

In addition, §§ 10.12 and 23.5, both of which were promulgated decades before the MBTRA superseded them, regulate *all* migratory bird hybrids whether one or both parents are native species. Therefore, both of these regulations are also in conflict with the MBTRA requirement that *all* such offspring be "the result of natural biological or ecological processes." However, the Service's remedy for the regulatory inconsistency between §§ 10.12, 23.5 and 21.3 is to amend § 21.3 so that all three regulations are harmonized yet *all three* are in direct conflict with the MBTRA.

In *Chevron U.S.A. Inc. v NRDC*, 467 U.S. 837, 832-43 (1984) the Supreme Court set forth the standard of review when examining an agency's statutory interpretations. The predicate test requires that if "Congress has directly spoken to the precise question at issue… [and] the intent of Congress is clear,… [then] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." It is only "if the statute is silent or ambiguous with respect to the specific issue" that the petitioner will have standing to compel the court to rule on "whether the agency's answer is based on a permissible construction of the statute."

The Proposed Rule arbitrarily classifies all hybrids as native when such is clearly not the case. The plain text of the MBTRA clearly and unambiguously limits statutory protection to native species that are the result of natural biological or ecological processes and *not* a result of intentional or unintentional human-assisted introduction. These issues are neither silent nor ambiguous in the plain text of the MBTRA as it relates to hybrid raptors. The Proposed Rule, however, seeks to regulate clearly defined, non-native birds contrary to the statutory requirements of the MBTRA.

III. The Service's Support of the Proposed Rule is Without Merit

The Service claims that the Proposed Rule will be consistent with a purpose of the (pre-2004) MBTA to "regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed." Notwithstanding the fact that possession of "foreign birds" is unregulated and they may be lawfully introduced at will "in localities where they have not heretofore existed," hybrid raptors are neither American nor foreign birds—they are not listed in § 10.13 or on any foreign country's list of native birds. Under the Proposed Rule, the Service therefore proposes to regulate the introduction of non-American and non-foreign birds, which is beyond the Secretary's scope of authority and is inconsistent with the above-stated purpose of the MBTA. The Proposed Rule is also inconsistent with Executive Order 13186 (2001), which defines migratory bird as "any bird listed in 50 C.F.R. 10.13" and therefore excludes hybrid raptors because they are not listed.

The Service further ignores the fact that captive-bred hybrid raptors are not disposable commodities that licensed breeders produce in stockpile quantities and intentionally release to the wild. Falconers do not purchase hybrids at considerable expense with the intent to introduce them to native raptor populations. In addition, the frequency of hybrid escapes is low and the Service has no basis to suggest that escapes will increase unless hybrid raptors are regulated under the Proposed Rule.

The Service also claims that the Proposed Rule will mitigate the potential threat that introduced hybrids would pose to native birds through competition or crossbreeding, and will facilitate the work of wildlife law enforcement and border inspectors in regulating trade in hybrid raptors, which the Service alleges may be difficult to distinguish from native species. These claims are addressed below.

IV. Competition and Crossbreeding

It is baffling that Congress amended the MBTA at the request of the Secretary precisely to remove protection from non-native birds, and now the Secretary seeks to protect non-native birds under the Proposed Rule. In *Hill v. Norton*, 275 F.3d 98 (D.C. Cir. 2001), pursuant to a suit brought against the state of Maryland, the state was compelled to protect Mute Swans (*Cygnus olor*), a non-native species, under provisions of the MBTA. The court held that nothing in the statute supported an exclusion of Mute Swans from protection under the MBTA as a non-native species. In 2004, the Secretary successfully petitioned Congress to amend the MBTA so that Mute Swans no longer satisfied the definition of "native" birds and the state of Maryland could then lawfully proceed to eradicate them from Chesapeake Bay. Now Mute Swans may be exterminated under federal law but the Proposed Rule protects hybrid raptors, which are also non-native birds. There is simply no rational basis to grant protection to hybrid raptors based on the Service's scientifically indefensible claims that they may pose a threat to native raptor populations through competition or crossbreeding.

A. Native X Native Hybrids

The practice of falconry has been legal in the United States for over 30 years and the Service recognizes that free-flying raptors used in both falconry and bird abatement programs sometimes escape from their handlers. Many of the birds used in falconry and abatement programs are hybrids of native species, e.g. Peregrine Falcons (*Falco peregrinus*) crossed with Prairie Falcons (*Falco mexicanus*). However, despite the facts that Peregrines and Prairie Falcons have shared sympatric distribution for 10,000 years and Peregrine x Prairie hybrids have escaped from captivity for over 30 years, no hybrid population has ever established within the shared home ranges of these two species. This demonstrates that competition and crossbreeding with hybrids are non-issues regarding these species.

The karyotypes of native falcon species do not share the same number of chromosomes. Most F_2 hybrids are sterile, and even in the rare instance when an F_2 hybrid could be fully viable its hybrid genotype would revert to one of the native parent species through back-crossing (introgression) over subsequent generations. In addition, native species are better adapted than hybrids to compete for mates and limiting resources, so selection favors their ability to survive and reproduce within their distribution. Therefore, the Service's requirement that licensed raptor propagators surgically sterilize or imprint captive-bred hybrids to humans is superfluous and arbitrary.

Even if the Service were able to cite an anomalous instance where two native raptor species hybridized as a result of natural biological or ecological processes, the frequency of such interactions would be so negligible that federal protection of their offspring would be

unwarranted. The utter scarcity of those offspring, and their low potential to survive and reproduce, would render them incapable of contributing to either parent population. (The same would hold true if a listed raptor species were to hybridize with an unlisted species—their offspring would be selected out of the native population through attrition, competition or introgression.)

The Service has no scientific basis to support its assumption that deregulation of hybrid raptors, as required under the MBTRA, will increase the frequency of escapes beyond its current recognized, accepted and benign level either to extirpate or "mongrelize" native wild raptor populations. The Service's claim that crossbreeding could pose a threat to native populations is further undermined by the well established fact that if two individuals can successfully breed to establish a self-sustaining population, then they are by definition *the same species.* The fact that no native raptor species has established a wild population through crossbreeding demonstrates that artificially-produced raptor crosses are true hybrids and are not native birds subject to regulation under the MBTRA.

B. Native X Non-Native Hybrids

Captive-bred hybrid raptors that result from crosses between allopatric species, especially Old World and New World species, can be geographically isolated from either parent species, affirmatively eliminating their introduction to native parent populations. For example, the Proposed Rule would regulate Gyrfalcon (*Falco rusticolus*) x Barbary Falcon (*Falco pelegrinoides*) crosses even though these hybrids would never occur as "the result of natural biological or ecological processes" but solely as a result of "human-assisted introduction." Because their parent species are allopatric, these hybrids could never occur in the breeding range of either parent species within the contiguous United States. (If the state of Alaska, where Gyrfalcons do occur, has concerns with the introduction of Gyrfalcon hybrids within the Gyrfalcon's breeding range, then the *state* can rightfully exercise its authority to regulate their possession.) Furthermore, there is no evidence to suggest that these hybrids could supplant the niches of native species that have spent millennia adapting to their environment and evolving species-specific predator-prey relationships.

In addition, the Service regulates possession of Gyrfalcons but not Saker Falcons (*Falco cherrug*) even though their genotypes are virtually identical. Saker Falcons may be lawfully released, intentionally or unintentionally, within the Alaskan breeding range of Gyrfalcons, yet the Proposed Rule would regulate possession of a Gyrfalcon x Barbary Falcon hybrid in Texas, for example? This policy illustrates the arbitrary inconsistency of the Service's argument that such hybrids could pose a threat to native populations through competition and/or crossbreeding. As with native hybrid raptors, there is no basis to assume that the deregulation of native x non-native hybrids will increase the frequency of escapes to the detriment of native populations.

Regardless of any unfounded arguments the Service advances to support the regulation of hybrid raptors, central to the issue here is whether hybrid raptors satisfy the statutory criteria to receive protection under the MBTRA. ***All native x non-native hybrid raptors occur in the United States or its territories solely as a result of human-assisted introduction of the non-native parent species, contrary to the requirement of 16 U.S.C. §703(b)(2)(B) to be considered native.***

Therefore, such hybrid raptors are non-native, they do not satisfy the criteria to receive protection under the MBTRA, and they are not subject to the Secretary's discretion to regulate under the Proposed Rule.

V. Wildlife Law Enforcement

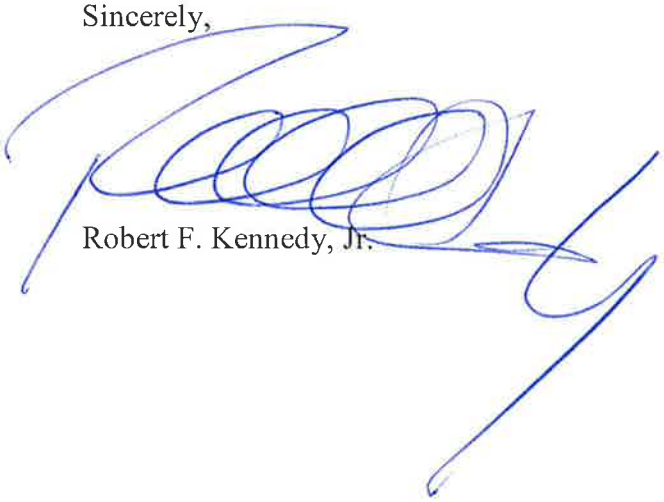
Contrary to the Service's claim, deregulation of hybrid raptors will have no impact on the ability of wildlife law enforcement officials and border inspectors to do their work. The phenotypes of Saker Falcons and gray morph Gyrfalcons in immature plumage are virtually indistinguishable, yet Gyrfalcons are regulated while Sakers are not. Immature female Barbary Falcons are virtually indistinguishable from immature male Peregrines, yet Peregrines are regulated while Barbaries are not. Immature Red-tailed Hawks (*Buteo jamaicensis*) and Auger Buzzards (*Buteo augur*), some Old World and New World Accipiters, etc., the list goes on. Most hybrid raptors are more easily distinguished from native species than any of the above species are from each other. In addition, wildlife officials have access to the trained eyes of experts at museums, falconers and raptor breeders if the possession or importation of any raptor is in question. Furthermore, possession of hybrids is lawful under falconry regulations and hybrids are not specifically identified on falconry licenses, so any existing burden on wildlife officials is static and independent of the regulation of hybrids.

VI. Conclusions

Under provisions of the MBTRA, hybrid raptors do not satisfy the requirements to be native to the United States or its territories, the result of natural biological or ecological processes, and *not* to occur solely as a result of intentional or unintentional human-assisted introduction. Hybrid raptors are statutorily non-native and therefore not subject to the same regulation as native birds. The Service proposes to revise § 21.3 so that it is consistent with existing regulations that are contrary to the superseding MBTRA. Therefore, promulgation of the Proposed Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. The Proposed Rule must be amended to provide that hybrids of raptors listed in § 10.13 are not regulated under the MBTRA.

Thank you for the opportunity to comment on this issue.

Sincerely,



Robert F. Kennedy, Jr.