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7 United States of America

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JOHN DAVID BITTNER (1),

14 Defendant.

Criminal Case No. 13-CR-01391-DHB

Date: July 11, 2013  
Time: 1:30 p.m.  
Courtroom: 1D

Before the Hon. David H. Bartick

**GOVERNMENT'S SENTENCING  
MEMORANDUM**

17  
18 I

19 STATEMENT OF THE CASE

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21 On April 18, 2013, an Information was filed, charging defendant John David Bittner  
22 ("Bittner") with the Unlawful Taking of a Golden Eagle, in violation of Title 16,  
23 United States Code, Sections 668(a). Bittner entered a plea of guilty to the Information  
24 that same day.  
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## II

SENTENCING CONSIDERATIONS

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3 Section 3553(a) of Title 18 of the United States Code sets forth the factors that the  
4 Court must consider when imposing sentence. These factors will be addressed herein, in  
5 discussing how the Government arrived at its sentencing recommendation.  
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7 The Nature and Circumstances of the Offense and History and Characteristics of  
8 Bittner

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9 Bittner is the owner and operator of a non-profit organization that employs  
10 approximately 12 other paid staff members, as well as numerous volunteers. Bittner  
11 makes his living by banding birds, and gathering data on the movement of those birds,  
12 primarily to assist in the preparation of environmental impact statements for power lines  
13 and wind power generators. In 2010, during the time of the instant offense, Bittner's non-  
14 profit organization was paid approximately \$625,000.00 by various clients for its services.  
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17 In order to band a bird, it must be trapped, captured or taken out of its nest. These  
18 activities are considered to be a "take" of the bird and require a permit under both the  
19 Migratory Bird Act and the Bald and Golden Eagle Protection Act (to take eagles). There  
20 are only 2,000 federal Master Bander permits issued throughout the entire United States.  
21 Only 181 Master Banders are authorized to band Golden Eagles. These permits are issued  
22 by the federal Bird Banding Lab ("BBL") in Laurel, Maryland, under the auspices of the  
23 U.S. Geological Survey.  
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27 Bittner first obtained a federal bird banding permit while living in Ohio on July 15,  
28 1964. On August 13, 1980, the BBL sent a letter to Bittner, advising him that his permit

1 was revoked due to “various discrepancies in your bird banding operation.” The BBL  
2 requested that he return any unused bands. This action was taken after the State of Ohio  
3 had revoked Bittner’s 1979 state banding permit and requested that Ohio be removed from  
4 the list of states in which Bittner was permitted to band birds. State of Ohio officials  
5 advised the BBL that Bittner’s permit was revoked after a conviction for taking wild  
6 turkey eggs, an arrest for having wild turkey vultures without a permit, his illegal  
7 possession of a Snowy Owl, and failure to file banding reports required by law. Ohio  
8 officials further advised that Bittner had banded turkey vultures in Ohio after his state  
9 permit was revoked.  
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13 Bittner responded by letter to the BBL, advising that he was busy and had moved  
14 several times, causing him to be late in applying for his state banding permits, and late in  
15 providing reports to the state. Bittner described himself as a “reliable biologist who is  
16 simply overextended” and requested that his permit be placed on inactive status, rather  
17 than revoked. The BBL subsequently agreed to keep the permit status as inactive, rather  
18 than revoked.  
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21 Bittner had no active federal permit to band birds from 1980-1997, in contradiction  
22 to Bittner’s statement to Probation that the period involved in the instant case was the first  
23 time in 48 years that his permit had lapsed. In January 1997, Bittner wrote to the BBL  
24 from his new location in Ramona, California, requesting that his permit be re-activated.  
25 Bittner requested that authorization to band eagles (Bald and Golden) be added to the  
26 permit. The permit was activated on April 30, 1997, and included authorization to band  
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1 Golden Eagles. After the permit was re-activated, Bittner wrote to the BBL, advising that  
2 he had retained nearly 2,500 bird bands and asked if he would be permitted to use them  
3 (he was).

4  
5 The permit at issue in this case had authorized Bittner to band all non-endangered  
6 species of migratory birds, and also California Condors and Golden Eagles. Like all such  
7 permits, his permit limited the permitted activities to specific states and stated that the  
8 federal permit was not valid “unless accompanied by any required State permits or  
9 licenses.”  
10

11 In California, a permit from the Department of Fish and Game (“DFG”) is required  
12 to band Golden Eagles, as well as other migratory birds. Ever since 2000, Bittner has not  
13 possessed a valid permit from the State of California, due in large part to his failure to  
14 provide the required data in reference to past activities. An email from Bittner’s  
15 organization to DFG on March 2, 2011, regarding their efforts to obtain the state permit,  
16 stated “We have client proposals on hold because they are requesting a copy of our permit  
17 so time is of the essence for us.” On May 9, 2011, Bittner provided DFG with a report on  
18 936 raptors (including 200 Golden Eagles) that he had banded during the period from  
19 2000–2011. The report noted that the birds had been encountered in San Diego, Imperial,  
20 Orange, Riverside, San Bernardino, and Kern counties. The report noted that in addition  
21 to banding, the “majority of the golden eagles were also marked with orange patagial tags,  
22 38 were fitted with VHF transmitters and 6 with satellite transmitters.”  
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1 The lack of a permit from the State of California invalidated the federal permit held  
2 by Bittner with respect to collecting and banding of those 936 birds in California during  
3 the period from 2000-2011. However, during that same period, although no permit was  
4 issued, DFG received checks from Bittner's organization for renewal of the permit and  
5 cashed them. This prosecution has focused only on the time period during which Bittner  
6 possessed no valid federal permit at all.  
7

8  
9 Bittner's federal banding permit expired on January 31, 2010. On January 9, 2010,  
10 a U.S. Fish and Wildlife Service ("FWS") special agent observed Bittner in Ramona,  
11 giving an educational program to the public. Bittner stated to the assembled crowd that  
12 three of the birds (two red-tailed hawks and a kestrel) used in the program had been  
13 caught that morning and would be banded and released. Bittner explained that the birds  
14 had been captured and placed in a tube about the width of the birds' shoulders (with its  
15 wings folded). When Bittner brought out the first wild hawk, it began flapping and  
16 struggling. The program also included two rescued birds that were conditioned to  
17 humans, which showed no sign of stress while near the crowd.  
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21 On January 12, 2010, the same FWS special agent visited Bittner at his office and  
22 asked if he had any permits for the use of wild birds in educational programs. Bittner  
23 admitted that he did not. The FWS agent reminded Bittner that his bird banding permit  
24 did not authorize the use of wild birds in educational and outreach programs, and that the  
25 24 hour holding period referenced in his permit allowed birds to be retained during those  
26 24 hours only for research, or when the health of the bird was in question. The agent  
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1 recommended that Bittner get a special use permit for educational birds, so that he could  
2 keep a non-releasable educational bird for his programs. The agent also reminded Bittner  
3 that his banding permit was about to expire at the end of the month, and he would need to  
4 renew it.  
5

6 On February 13, 2010, Bittner emailed the BBL, and stated “My permit expired on  
7 January 31, 2010 but was just renewed on July 14, 2009 only five months before. Permits  
8 are supposed to be valid for two years. What’s up?” A BBL biologist responded, noting  
9 that the activity in July of 2009 involved adding a sub-permittee, and did not  
10 automatically renew the permit. The biologist noted that Bittner had not reported data on  
11 300–400 bands and that as soon as the data was received, the permit would be renewed.  
12  
13 Eventually, on August 12, 2010, the federal permit was renewed.  
14

15 During the period January 31, 2010 through August 12, 2010, while Bittner had no  
16 state or federal bird banding permit, 164 birds were illegally trapped and marked  
17 (including 37 eagles); 144 of those birds were trapped in San Diego or Imperial Counties.  
18 Of those 144 birds, 29 were Golden Eagles and the banding cards filled out at the time the  
19 birds were marked indicated that Bittner, the only permit holder in the organization, was  
20 personally present on at least 18 of those occasions, some of which involved multiple  
21 birds.  
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25 During the period when Bittner had no federal permit, he also captured and tagged  
26 five Golden Eagles on June 1, 2010, in Nevada, while working on a wind power project.  
27 Not only did Bittner have no federal permit to capture eagles, he also had no permit at the  
28

1 time from the State of Nevada. A representative of the Nevada Department of Wildlife  
2 contacted Bittner a month later and asked if he had a federal permit for the work. Bittner  
3 admitted that he did not; stating that the permit process would take too long and he  
4 believed that his California permit (which he did not actually have either) would suffice  
5 since they were probably California birds. (Data submitted by Bittner showed that the  
6 birds were located in Nevada when marked.) Bittner further stated that he knew that the  
7 State of Nevada would not give him a permit since he did not have a federal permit.  
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10 Also during the period that he had no federal permit, Bittner was involved in the  
11 banding and release of Golden Eagle E-74 on February 26, 2010 (see photos attached as  
12 Exhibit 1). This bird had been found injured and Bittner was engaged to tag and release  
13 the bird. In spite of notes in Bittner's files that indicate some concern regarding the  
14 release condition of the bird, Bittner banded the bird, and fit it with patagial tags, a  
15 backpack mounted satellite transmitter, and a second radio transmitter attached to its  
16 wing. Persons observing the release of the bird reported that it appeared to have difficulty  
17 flying. Bittner noted that the bird was found dead about two months later, apparently the  
18 victim of a wind turbine. However, no flight data on this bird was provided to the DFG  
19 by Bittner in his report of 2011, although the report was represented to be comprehensive.  
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1 BBL employees noted that Bittner's federal permit did not allow him to apply the  
2 radio transmitter attached to the wing of E-74.<sup>1</sup> Moreover, other eagle experts contacted  
3 by FWS stated that they were unaware of any scientific reason to apply more than one  
4 device to a single bird. The FWS Raptor Coordinator expressed concern over the  
5 mortality rate associated with the eagles to which Bittner had attached telemetry devices.  
6 In a presentation given by Bittner in the fall of 2011, it was stated by several persons  
7 present that Bittner reported a nine month mortality rate of approximately 90% for birds  
8 mounted with transmitters, when they would expect to see a survivorship rate of  
9 approximately 85%. Mortality records provided by Bittner to date indicate a 20%  
10 mortality rate for the eagles banded during the period when the federal permit was not  
11 valid.  
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15 On February 2, 2012, FWS agents interviewed Bittner about his banding activities.  
16 When asked why he continued to band birds when he knew he needed both federal and  
17 state permits wherever he was working, Bittner stated that he did not have time to manage  
18 eight permits in different states. (This is the same excuse Bittner had offered in 1980  
19 when advised that his permit would be revoked.) Bittner said he believed that the satellite  
20 telemetry data he obtained was his own intellectual property that he should not be required  
21 to give to others. Bittner claimed that DFG was selling the information, which would  
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26 <sup>1</sup> A 2009 newsletter from Bittner's organization contains a photograph of another  
27 Golden Eagle that had also been marked with patagial tags, a backpack satellite  
28 transmitter, and a second radio transmitter attached to its wing, indicating that the 2010  
marking with three separate devices was not an isolated event.



1 permit the public to find the location of eagles' nests.<sup>2</sup> Bittner was shown the photographs  
2 of eagle E-74 (see Exhibit 1), showing the two transmitters and the tags on the bird.  
3 When advised that other experts had advised that too many tags and transmitters would  
4 impact the bird's flight and ability to catch prey, Bittner stated that he had been tagging  
5 and banding birds for 40 years and had more experience and knowledge than anyone else,  
6 and he knew that the transmitters and tags would not impact the bird's ability to hunt and  
7 survive.  
8

9  
10 On June 4, 2012, FWS agents visited Bittner at his office to again inquire about his  
11 bird banding techniques. Bittner said that he was not currently requesting permission to  
12 place more than one tracking device on a single eagle, and added that the satellite  
13 transmitter he used weigh approximately 70 grams. Bittner said he first began using  
14 transmitters in 2007 and that he generally recovered about 80% of the transmitters after  
15 the eagles had died. Bittner claimed that they did not recover the dead eagles, but only  
16 photographed the carcasses, noting that he was aware he could not bring dead eagles  
17 across state lines.  
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20 Agents then asked Bittner if he currently had any eagle carcasses, and he said he  
21 might because they sometimes recovered local eagles. Agents asked if he would show  
22 them his freezers and he agreed. Bittner took the agents to four freezers on the property,  
23 all of which contained dead birds. Bittner noted that the regulations allowed him to  
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25  
26 <sup>2</sup> A DFG representative advised that persons can subscribe to the data obtained by  
27 the DFG regarding eagles, but they must first submit an application justifying a scientific  
28 need for the data. Subscribers would not receive pinpoint data, but only data regarding  
general zones of eagle habitat.

1 salvage and donate the birds, although the birds must be donated within six months, and  
2 the eagles must be turned in immediately to the National Eagle Repository.<sup>3</sup> 50 CFR  
3 § 21.2(c)(3). In fact, his permit had specific conditions setting forth those requirements.  
4  
5 There were 26 migratory birds covered by the permit in the freezers, including 11 golden  
6 eagles. Based on the dates marked on the bags containing the birds, many had been there  
7 for 2–3 years. In fact, all the birds but one were recovered between May 15, 2006 and  
8  
9 June 1, 2010. One of the eagles had documentation attached indicating that it had been  
10 recovered in Nevada. Bittner then abandoned the carcasses to the agents.

11 In March 2012, Bittner applied to the National Park Service for a Scientific  
12  
13 Research and Collection Permit to conduct a ground and arial survey of Golden Eagles in  
14 Joshua Tree National Park. On March 29, 2012, Bittner was informed that his request was  
15 denied because “the disturbance from the use of mechanized equipment (helicopter) is not  
16  
17 compliant with the park’s management of park lands and designated wilderness in the area  
18 proposed without strong justification,” and other ground surveys of the eagles in that area  
19 of the park had already been approved and it was felt that “your survey would largely just  
20  
21 duplicate that effort.” Thereafter, park officials obtained a copy of a report issued by  
22 Bittner’s organization on January 8, 2013, for a survey of Golden Eagles prepared for a  
23  
24 client involved in the building of a power substation in the area. The report detailed the  
25 results of an arial survey conducted by Bittner’s organization by helicopter on June 1,

26 <sup>3</sup> The National Eagle Repository is a place where Native Americans can request  
27 eagle feathers and eagle parts for use in religious ceremonies. Upon information and  
28 belief, there is a waiting list of approximately two years at this repository for Native  
Americans to obtain eagle feathers.

1 2012, with data points in the area within the park for which Bittner had been denied the  
2 permit. Although the report provided Global Positioning System (“GPS”) coordinates for  
3 the other data points in the arial survey, no GPS coordinates were provided for the data  
4 points within Joshua Tree National Park.  
5

6 While Bittner has devoted his life to wildlife, the facts and circumstances  
7 surrounding this offense suggest that over the years, Bittner has come to believe that  
8 because of his experience in the field, the requirements of permits need not apply to him.  
9 Bittner repeatedly violated the law by capturing and banding birds without federal and  
10 state permits, placing unpermitted devices on birds, conducting arial surveys after  
11 authorization was denied, using wild birds in educational programs without a permit,  
12 allowing an eagle carcass to be brought across state lines, failing to properly transfer  
13 migratory bird carcasses in a timely manner, failing to immediately send eagle carcasses  
14 to the National Eagle Repository, and failing to provide the data he obtained to the  
15 government in a timely manner. Similar issues were raised when action against his permit  
16 was taken in 1980, and yet history is apparently repeating itself in 2010. Accordingly, a  
17 just punishment must be devised.  
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### 22 The Need for the Sentence to Deter, Protect and Provide Just Punishment

23 Section 3553(a)(2) requires the Court to consider the need for the sentence imposed  
24 to reflect the seriousness of the offense, to promote respect for the law, and to provide just  
25 punishment for the offense; to afford adequate deterrence to criminal conduct; to protect  
26 the public from further crimes of the defendant and to provide the defendant with needed  
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1 educational or vocational training, medical care, or other correctional treatment in the  
2 most effective manner.

3 Because Bittner has devoted his lifetime to working with migratory birds, it is  
4 believed that a custodial sentence is not necessary to deter him from future misconduct.  
5 The \$10,000.00 fine agreed on by the parties is sufficient, but not greater than necessary  
6 to reflect the seriousness of the offense, and to deter others.  
7

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9 The Presentence Report correctly notes that the maximum penalty set forth in the  
10 Bald and Golden Eagle Protection Act for the offense of conviction, which is a Class A  
11 misdemeanor, is one year in custody and/or a \$5,000.00 fine. The Presentence Report  
12 also correctly notes that pursuant to Title 18, United States Code, Section 3571(b)(5), the  
13 maximum fine for a Class A misdemeanor is \$100,000.00.  
14

15 The Presentence Report, however, fails to properly interpret Section 3571(e). That  
16 section provides that if the law setting forth the offense specifies a lower fine “and such  
17 law, by specific reference, exempts the offense from the applicability of the fine otherwise  
18 applicable under this section, the defendant may not be fined more than the amount  
19 specified in the law setting forth the offense.” In other words, unless the language of the  
20 offense of conviction contains a specific exemption from the applicability of  
21 Section 3571(e), the fines in Section 3571(b) shall become the maximum penalty. “The  
22 plain language of §3571(e)<sup>4</sup> means that the maximum fine for all previously enacted  
23 provisions of the U.S. Code is increased, unless Congress takes affirmative action to  
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28 <sup>4</sup> Section 3571 was enacted in 1984.

1 amend a provision to exempt it from §3571.” United States v. Eisenberg, 496 F. Supp.2d  
2 578, 582 (E.D. Pa. 2007).

3 The Presentence Report incorrectly concludes that Bittner may only be fined  
4 \$5,000.00. The Bald and Golden Eagle Protection Act, Title 16, United States Code,  
5 Section 668(a), last amended in 1972, does not specifically exempt itself from the  
6 provisions of Section 3571.<sup>5</sup> Accordingly, the fine schedule in Section 3571(b) is  
7 applicable. United States v. Versaglio, 85 F.3d 943, 946 (2nd Cir.1996) [§ 3571(e) means  
8 that the fine levels specified in Section 3571(d) apply unless a lower fine is specified in  
9 the offense of conviction and that statute specifically refers to § 3571]; United States v.  
10 Eisenberg, 496 F. Supp.2d 578,582 (E.D. Pa., 2007) [enactment of §3571(e) repealed the  
11 lower fines contained in the Lacey Act and the Marine Mammal Protection Act];  
12 United States v. Burgos, 968 F. Supp. 380, 383 (N.D. Ill., 1997), United States v. Pyatt,  
13 725 F. Supp. 885, 887 (E.D. Va. 1989); United States v. Looney, 152 Fed. Appx. 849, 857  
14 (11th Cir. 2005) (unpublished); United States v. Luppi, 199 F.3d 520, 522, n.2 (10th Cir.  
15 1999) (unpublished); United States v. Countryman, 82 F.3d 414 (5th Cir. 1996)

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22 <sup>5</sup> Section 668(a) of Title 16 states that “Whoever, within the United States or any  
23 place subject to the jurisdiction thereof, without being permitted to do so as provided in  
24 this subchapter, shall knowingly, or with wanton disregard for the consequences of his act  
25 take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or  
26 import at any time or in any manner, any bald eagle commonly known as the American  
27 eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing  
28 eagles, or whoever violates any permit or regulation issued pursuant to this subchapter,  
shall be fined not more than \$5,000 or imprisoned not more than one year or both;  
Provided, that in the case of a second or subsequent conviction for a violation of this  
section committed after October 23, 1972, such person shall be fined not more than  
\$10,000 or imprisoned not more than two years or both . . . .”

1 (unpublished). Therefore, the maximum fine that may be imposed on Bittner is  
2 \$100,000.00.

### 3 The Kinds of Sentences Available

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5 For the reasons set forth above, a probationary sentence is recommended in this  
6 case. However, some special conditions of probation are recommended in order to  
7 address some of the less obvious harms involved in this offense. One of the more serious  
8 issues for the FWS is the lack of data sharing by Bittner. When a bird is banded, the  
9 bander collects data about the bird's age, sex, condition, and plumage characteristics  
10 (including measurements of wings, tail and bill). This data must be reported to the BBL at  
11 minimum on an annual basis, but can be submitted electronically immediately if the  
12 bander is truly interested in scientific pursuits. When a banded bird is recaptured or  
13 otherwise observed, the BBL provides information to the person providing the current  
14 information regarding the place and date of the initial banding, and also provides the data  
15 on the current location to the initial bander. The bird banding data is critical to the  
16 mission of the FWS. This data is relied upon by FWS biologists in making many  
17 important decisions, including evaluating the range, migration patterns, reproductive  
18 success, mortality rate, and population growth (or decline) of migratory birds and eagles.  
19 Such data has become increasingly important as wind power turbines proliferate and their  
20 ultimate impact on the bird population is still unknown.  
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26 Moreover, unlike many of his peers, Bittner has not published any scientific papers  
27 discussing the results of his surveys. Bittner's results are only provided to his paying  
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1 clients. The BBL did a comprehensive review of the data submitted by Bittner and found  
2 literally thousands of outstanding unreported bird bands issued to Bittner for which they  
3 have received no data. A copy of the listing is attached hereto as Exhibit 2. Bands  
4 reported as lost or destroyed are not contained in this inventory. It is respectfully  
5 requested that the Court order Bittner, as a condition of probation, to either return the  
6 outstanding bands to the BBL (as they are federal property), or submit the banding data.  
7 Such a condition is needed, given that Bittner failed to return or provide data for bird  
8 bands he possessed for 17 years when his permit was not active from 1980 to 1997.  
9

11 In addition, Bittner has not provided the government with the data obtained from  
12 the platform terminal transmitters (“PTT”)<sup>6</sup> he attached to various eagles. This data is  
13 important to the FWS and their understanding of the movements of Golden Eagles in  
14 evaluating the impact that man’s encroachment may have on these birds’ hunting and  
15 mating activities. This data would allow the FWS to more effectively fulfill their mission  
16 to protect the species. For example, if the telemetry data showed that an eagle was  
17 consistently circling a particular ridge line when hunting, the FWS would find that  
18 information to be very valuable when evaluating a request to place a wind turbine on that  
19 same ridge line. It is respectfully requested that Bittner be required, as a condition of  
20 probation, to provide the raw data points produced from the telemetry attached to eagles  
21 from 2007–2012 (as opposed to summaries or interpretations of such data) to the BBL in  
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26  
27 <sup>6</sup> Unlike the bird bands, these transmitters are not issued by the BBL and are not  
28 federal property. Bittner’s organization purchased the devices in order to fulfill their  
contractual obligations to their clients.

1 order to allow FWS full access to the all the information obtained relating to all of the  
2 golden eagles so marked.

3 Bittner has refused the government's request to voluntarily provide the PTT data for  
4 use by FWS biologists. However, Bittner is willing to sell this data to any member of the  
5 public. According to a 2009 newsletter issued by Bittner's organization, the group has a  
6 program that will allow any person or organization to make a tax deductible donation of  
7 \$333/month or \$4,000.00 for a year to purchase a satellite transmitter. In exchange for  
8 their donation, the person is allowed to track a Golden Eagle year round on their home  
9 computer, with monthly updates showing the satellite data. The existence of this program  
10 clearly demonstrates that Bittner's concerns regarding the release of the PTT data are  
11 based more on economics than any fear that members of the public might learn the actual  
12 location of the eagles.  
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17 Although a permit is required to place a PTT on an eagle, Bittner's federal permit  
18 does not specifically state that the PTT data must be provided to the BBL. Nonetheless,  
19 this Court has the authority under 18 U.S.C. § 3563 to order Bittner to share this data.  
20 Section 3563(b) allows the Court to set discretionary conditions of probation that are  
21 reasonably related to the factors set forth in §§ 3553(a)(1) and (2).<sup>7</sup> The Court is  
22 authorized to set such conditions to the extent that such conditions involve only such  
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25 <sup>7</sup> Those factors include the nature and circumstances of the offense and the history  
26 and characteristics of the defendant; the need for the sentence imposed to reflect the  
27 seriousness of the offense, to promote respect for the law, and to provide just punishment  
28 for the offense; to afford adequate deterrence; to protect the public from further crimes of  
the defendant and to provide the defendant with needed educational or vocational training,  
medical care, or other correctional treatment in the most effective manner.



1 deprivation of liberty or property as are reasonably necessary. There exists a general  
2 provision allowing “such other conditions as the court may impose” found at 18 U.S.C.  
3 § 3563(b)(22). *See* United States v. Pearson, 210 F.3d 1275 (9th Cir. 2000) (unpublished)  
4 [upholding imposition of a condition of probation requiring the payment of restitution  
5 under 3563(b)(22)]; United States v. Leon, 205 F.3d 1353, 1354 (9th Cir. 1999)  
6 (unpublished) [upholding a condition requiring the defendant to abstain from the use of  
7 alcohol under 3563(b)(22)]; United States v. Stevenson, 281 Fed. Appx. 85 (3d Cir. 2008)  
8 [upholding a condition permitting a search of the defendant’s place of business under  
9 3563(b)(22)]; United States v. Conte, 99 F.3d 60, 66 (2d Cir. 1996) [upholding a condition  
10 requiring truthful reports to probation under 3563(b)(22)].  
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14 There is also a specific provision permitting the Court to impose conditions  
15 allowing an individual to engage in a specified occupation under stated circumstances at  
16 18 U.S.C. § 3563(b)(5). *See* United States v. Smith, 332 F.3d 455, 461 (7th Cir. 2003)  
17 [upholding occupational restriction on truck driver convicted of theft from interstate  
18 shipment]; United States v. Choate, 101 F.3d 562 (8th Cir. 1996) [upholding prohibition  
19 on self-employment for defendant convicted of fraud through use of sham businesses];  
20 United States v. Ludvigson, 262 Fed. Appx. 880 (10th Cir. 2008) [upholding condition  
21 prohibiting defendant from holding a position where she controls the assets of others after  
22 conviction for bank fraud].  
23  
24  
25

26 Moreover, the conditions of probation “need not be related to each factor in  
27 §3553(a) and may be unrelated to one or more of the factors, so long as they are  
28

1 sufficiently related to the others.” United States v. Carter, 159 F.3d 397, 400 (9th Cir.  
2 1998) [upholding conditions requiring alcohol testing, participation in outpatient drug  
3 treatment and refraining from abuse of prescription drugs for defendant convicted of  
4 armed robbery of a mail carrier]. In this case, a condition requiring Bittner to provide the  
5 PTT data to the BBL is clearly related to the need for the sentence imposed to promote  
6 respect for the law and to provide just punishment for the offense. Bittner demonstrated  
7 disrespect for the law by continuing to band birds and obtain the telemetry data while  
8 operating without state and federal permits. A just punishment for the offense would be a  
9 condition requiring him to share his ill-gotten data with the BBL and FWS biologists who  
10 need such data to preserve and protect the very birds upon which Bittner has made his  
11 living. Such a condition is also reasonably related to the requested condition requiring  
12 Bittner to provide banding data or return the bands to the BBL. Both of these conditions  
13 are reasonable limitations upon Bittner’s ability to engage in his occupation as a wildlife  
14 biologist, and involve only such deprivation of liberty and property as reasonably  
15 necessary to achieve the goals of sentencing.

### 21 The Sentencing Guidelines

22 This offense is covered by Section 2Q2.1, which has a base offense level of 6. The  
23 base offense level is increased by two levels, pursuant to Section 2Q2.1(b)(1), because it  
24 was committed for pecuniary gain or otherwise involved a commercial purpose. A two  
25 level reduction for acceptance of responsibility is appropriate, resulting in a final offense  
26 level of 6. Because Bittner is in Criminal History Category I, the sentencing range is from  
27  
28

1 0–6 months. Given the totality of the circumstances, a term of probation long enough to  
2 permit for the full repayment of the \$10,000.00 fine agreed upon by the parties, with  
3 conditions requiring Bittner to provide the data required by FWS, as set forth in Exhibit 2,  
4 as well as the PTT raw data, together with a \$25.00 penalty assessment, is sufficient, but  
5 not greater than necessary to achieve the goals of sentencing.  
6

7 The Need to Provide Restitution

8  
9 Because there is no victim of the offense of conviction that can be compensated in  
10 this matter, no restitution is sought.

11 III

12 CONCLUSION

13  
14 For all of the foregoing reasons, the Government respectfully requests that the  
15 Court sentence Bittner to a term of probation sufficient to permit him to pay the agreed-  
16 upon fine, impose conditions requiring Bittner to provide the telemetry and bird banding  
17 data requested by FWS, as set forth in Exhibit 2, pay a fine of \$10,000.00, and pay a  
18 \$25.00 penalty assessment.  
19

20  
21 DATED: June 27, 2013.

Respectfully submitted,

22 LAURA E. DUFFY  
23 United States Attorney

24 *s/ Melanie K. Pierson*  
25 MELANIE K. PIERSON  
26 Assistant U.S. Attorney  
27 Attorneys for Plaintiff  
28 United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Criminal Case No. 13-CR-01391-DHB

Plaintiff,

CERTIFICATE OF SERVICE

v.

JOHN DAVID BITTNER (1),

Defendant.

I, MELANIE K. PIERSON, am a citizen of the United States and am at least 18 years of age. My business address is 880 Front Street, Room 6293, San Diego, California, 92101-8893. I am not a party to the above-entitled action. I have caused service of Government's Notice of Appearance on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

**Gerissa Santos (gerissa@criminallaw.com)**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2013.

*s/ Melanie K. Pierson*  
MELANIE K. PIERSON  
Assistant U.S. Attorney

# **EXHIBIT 1**

Photos of Golden Eagle Released by BITTNER

Photos found on the following web site:

[http://rcbfun.com/birds/eagle/slides/0226\\_1028.html](http://rcbfun.com/birds/eagle/slides/0226_1028.html)



# **EXHIBIT 2**



USGS PATUXENT WILDLIFE RESEARCH CENTER

BIRD BANDING LABORATORY

12100 BEECH FOREST ROAD

LAUREL MD 20708-4037

FAX: 301-497-5717

PHONE: 301-497-5807

E-MAIL: bbl\_bandings@usgs.gov

Thursday, May 23 2013

Permit Number: 09264 Revoked

## Band Inventory (Outstanding)

MR JOHN DAVID BITTNER

Band Span	Size	Type	Issue Date	Ac	Qty
* 2280-37901 to 38000	0	01	04/22/2002	03	100
Total bands by type 01 and size 0 :					100
Total bands by size 0 :					100

Band Span	Size	Type	Issue Date	Ac	Qty
* 2260-52901 to 53000	0A	01	05/06/2002	03	100
Total bands by type 01 and size 0A:					100
Total bands by size 0A:					100

Band Span	Size	Type	Issue Date	Ac	Qty
* 1821-77901 to 78000	1	01	08/08/2002	03	100
Total bands by type 01 and size 1 :					100
Total bands by size 1 :					100

Band Span	Size	Type	Issue Date	Ac	Qty
* 1801-24901 to 25000	1A	01	11/30/2001	03	100
Total bands by type 01 and size 1A:					100
Total bands by size 1A:					100

Band Span	Size	Type	Issue Date	Ac	Qty
* 1861-10001 to 10100	1B	01	06/28/2002	03	100
Total bands by type 01 and size 1B:					100
Total bands by size 1B:					100

Band Span	Size	Type	Issue Date	Ac	Qty
* 1202-93701 to 93800	2	01	11/30/2001	03	100
Total bands by type 01 and size 2 :					100

Band Span	Size	Type	Issue Date	Ac	Qty
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## Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qty
* 0832-79404 to 79600	2	11	08/19/1980	03	197
<b>Total bands by type 11 and size 2 :</b>					<b>197</b>
<b>Total bands by size 2 :</b>					<b>297</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1573-43901 to 44000	3	01	11/30/2001	03	100
<b>Total bands by type 01 and size 3 :</b>					<b>100</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1083-93951 to 93974	3	11	08/19/1980	03	24
* 1083-93976 to 94000	3	11	08/19/1980	03	25
* 1173-42717 to 42797	3	11	08/19/1980	03	81
* 1173-42800 to 42800	3	11	08/19/1980	03	1
* 1213-94901 to 94907	3	11	08/19/1980	03	7
* 1213-94916 to 95000	3	11	08/19/1980	03	85
<b>Total bands by type 11 and size 3 :</b>					<b>223</b>
<b>Total bands by size 3 :</b>					<b>323</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1133-10405 to 10405	3A	11	08/19/1980	03	1
* 1133-10414 to 10500	3A	11	08/19/1980	03	87
* 1223-21135 to 21138	3A	11	12/22/1972	03	4
* 1223-21153 to 21197	3A	11	12/22/1972	03	45
* 1353-54806 to 54806	3A	11	12/17/1997	03	1
* 1353-54809 to 55000	3A	11	12/17/1997	03	192
<b>Total bands by type 11 and size 3A:</b>					<b>330</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1793-44201 to 44300	3A	41	09/08/2010	03	100
<b>Total bands by type 41 and size 3A:</b>					<b>100</b>
<b>Total bands by size 3A:</b>					<b>430</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1593-93604 to 93700	3B	01	09/08/2010	03	97
<b>Total bands by type 01 and size 3B:</b>					<b>97</b>

### Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qty
* 1143-24008 to 24008	3B	11	08/19/1980	03	1
* 1143-24020 to 24020	3B	11	08/19/1980	03	1
* 1143-24024 to 24100	3B	11	08/19/1980	03	77
* 1493-31834 to 31834	3B	11	12/17/1997	23	1
* 1493-31846 to 31865	3B	11	12/17/1997	23	20
* 1493-31883 to 31900	3B	11	12/17/1997	23	18

**Total bands by type 11 and size 3B: 118**

**Total bands by size 3B: 215**

Band Span	Size	Type	Issue Date	Ac	Qty
* 0804-07101 to 07200	4	02	09/08/2010	03	100
* 0804-16256 to 16300	4	02	09/08/2010	03	45
* 0804-24541 to 24590	4	02	09/08/2010	03	50

**Total bands by type 02 and size 4 : 195**

Band Span	Size	Type	Issue Date	Ac	Qty
* 0614-14701 to 14750	4	11	01/15/1975	03	50
* 0614-14752 to 14752	4	11	01/15/1975	03	1
* 0614-14764 to 14800	4	11	01/15/1975	03	37

**Total bands by type 11 and size 4 : 88**

Band Span	Size	Type	Issue Date	Ac	Qty
* 0614-09517 to 09520	4	12	08/19/1980	03	4
* 0614-09522 to 09522	4	12	08/19/1980	03	1
* 0614-09538 to 09550	4	12	08/19/1980	03	13
* 0614-09552 to 09598	4	12	08/19/1980	03	47
* 0614-09600 to 09600	4	12	08/19/1980	03	1
* 0614-20723 to 20746	4	12	08/19/1980	03	24
* 0614-20749 to 20773	4	12	08/19/1980	03	25
* 0614-20781 to 20800	4	12	08/19/1980	03	20

**Total bands by type 12 and size 4 : 135**

**Total bands by size 4 : 418**

Band Span	Size	Type	Issue Date	Ac	Qty
* 0704-99001 to 99100	4A	11	12/17/1997	23	100

## Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qnty
<b>Total bands by type 11 and size 4A:</b>					<b>100</b>
<b>Total bands by size 4A:</b>					<b>100</b>
Band Span	Size	Type	Issue Date	Ac	Qnty
* 0655-03053 to 03053	5	11	12/22/1972	03	1
* 0655-03055 to 03062	5	11	12/22/1972	03	8
<b>Total bands by type 11 and size 5 :</b>					<b>9</b>
Band Span	Size	Type	Issue Date	Ac	Qnty
* 0695-00409 to 00413	5	12	10/14/1966	03	5
* 0695-00462 to 00468	5	12	10/14/1966	03	7
* 0695-00484 to 00490	5	12	10/14/1966	03	7
* 0695-00492 to 00498	5	12	10/14/1966	03	7
* 0695-00500 to 00500	5	12	10/14/1966	03	1
* 0745-15312 to 15400	5	12	01/15/1975	03	89
* 0745-31101 to 31102	5	12	08/19/1980	03	2
* 0745-31108 to 31108	5	12	08/19/1980	03	1
* 0745-31115 to 31200	5	12	08/19/1980	03	86
<b>Total bands by type 12 and size 5 :</b>					<b>205</b>
Band Span	Size	Type	Issue Date	Ac	Qnty
* 1115-10001 to 10200	5	42	09/08/2010	03	200
<b>Total bands by type 42 and size 5 :</b>					<b>200</b>
<b>Total bands by size 5 :</b>					<b>414</b>
Band Span	Size	Type	Issue Date	Ac	Qnty
* 0816-17401 to 17401	6	11	01/15/1975	03	1
* 0816-17463 to 17467	6	11	01/15/1975	03	5
<b>Total bands by type 11 and size 6 :</b>					<b>6</b>
Band Span	Size	Type	Issue Date	Ac	Qnty
* 0576-92382 to 92382	6	12	09/20/1966	03	1
* 0576-92388 to 92400	6	12	09/20/1966	03	13
* 0816-25304 to 25304	6	12	08/19/1980	03	1
* 0816-25352 to 25360	6	12	08/19/1980	03	9

### Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qnty
* 0816-25393 to 25400	6	12	08/19/1980	03	8
* 0816-26706 to 26755	6	12	12/22/1976	03	50
* 0816-26766 to 26800	6	12	12/22/1976	03	35
<b>Total bands by type 12 and size 6 :</b>					<b>117</b>

Band Span	Size	Type	Issue Date	Ac	Qnty
* 1156-10001 to 10200	6	42	09/08/2010	03	200
<b>Total bands by type 42 and size 6 :</b>					<b>200</b>
<b>Total bands by size 6 :</b>					<b>323</b>

Band Span	Size	Type	Issue Date	Ac	Qnty
* 1687-29501 to 29800	7A	02	09/08/2010	03	300
* 1807-75546 to 75550	7A	02	02/25/1999	03	5
* 1807-75582 to 75582	7A	02	02/25/1999	03	1
<b>Total bands by type 02 and size 7A:</b>					<b>306</b>

Band Span	Size	Type	Issue Date	Ac	Qnty
* 0987-19302 to 19400	7A	12	08/27/1975	03	99
* 0987-19417 to 19417	7A	12	08/27/1975	03	1
* 0987-19426 to 19450	7A	12	08/27/1975	03	25
* 0987-19455 to 19500	7A	12	08/27/1975	03	46
* 0987-31308 to 31308	7A	12	12/22/1976	03	1
* 0987-31312 to 31312	7A	12	12/22/1976	03	1
* 0987-31315 to 31316	7A	12	12/22/1976	03	2
* 0987-31320 to 31334	7A	12	12/22/1976	03	15
* 0987-31336 to 31363	7A	12	12/22/1976	03	28
<b>Total bands by type 12 and size 7A:</b>					<b>218</b>
<b>Total bands by size 7A:</b>					<b>524</b>

Band Span	Size	Type	Issue Date	Ac	Qnty
* 0877-23048 to 23076	7B	12	08/19/1980	03	29
* 0877-23078 to 23100	7B	12	08/19/1980	03	23
* 0877-36202 to 36300	7B	12	01/15/1975	03	99
* 0877-36303 to 36304	7B	12	01/15/1975	03	2
* 0877-36330 to 36331	7B	12	01/15/1975	03	2

### Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qty
* 0877-36345 to 36397	7B	12	01/15/1975	03	53
* 0877-36400 to 36400	7B	12	01/15/1975	03	1
* 0877-51834 to 51836	7B	12	08/19/1980	03	3
* 0877-51842 to 51850	7B	12	08/19/1980	03	9
* 0877-51896 to 51896	7B	12	08/19/1980	03	1
* 0877-51900 to 51900	7B	12	08/19/1980	03	1
* 0877-58401 to 58500	7B	12	12/09/1977	03	100
* 0877-58505 to 58518	7B	12	12/09/1977	03	14
* 0877-58532 to 58532	7B	12	12/09/1977	03	1
* 0877-58534 to 58537	7B	12	12/09/1977	03	4
* 0877-58539 to 58548	7B	12	12/09/1977	03	10
* 0877-58550 to 58550	7B	12	12/09/1977	03	1
* 0877-58563 to 58570	7B	12	12/09/1977	03	8
* 0877-58592 to 58700	7B	12	12/09/1977	03	109
<b>Total bands by type 12 and size 7B:</b>					<b>470</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1957-02201 to 02400	7B	42	09/08/2010	03	200
* 1957-04301 to 04400	7B	42	09/08/2010	03	100
<b>Total bands by type 42 and size 7B:</b>					<b>300</b>
<b>Total bands by size 7B:</b>					<b>770</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 1207-04002 to 04100	7D	12	12/09/1977	03	99
* 1207-04104 to 04136	7D	12	12/09/1977	03	33
* 1207-04157 to 04157	7D	12	12/09/1977	03	1
* 1207-04160 to 04167	7D	12	12/09/1977	03	8
* 1207-04174 to 04201	7D	12	12/09/1977	03	28
* 1207-04238 to 04298	7D	12	12/09/1977	03	61
* 1207-04300 to 04300	7D	12	12/09/1977	03	1
* 1207-04303 to 04400	7D	12	12/09/1977	03	98
* 1207-04411 to 04450	7D	12	12/09/1977	03	40
* 1207-04455 to 04500	7D	12	12/09/1977	03	46
<b>Total bands by type 12 and size 7D:</b>					<b>415</b>

### Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qty
* 1967-06501 to 06800	7D	42	09/08/2010	03	300
<b>Total bands by type 42 and size 7D:</b>					<b>300</b>
<b>Total bands by size 7D:</b>					<b>715</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 0608-23876 to 23879	8	12	08/19/1980	03	4
* 0608-23883 to 23900	8	12	08/19/1980	03	18
* 0608-36602 to 36606	8	12	12/22/1976	03	5
* 0608-36612 to 36615	8	12	12/22/1976	03	4
* 0608-36631 to 36637	8	12	12/22/1976	03	7
* 0608-36639 to 36644	8	12	12/22/1976	03	6
* 0608-36673 to 36700	8	12	12/22/1976	03	28
* 0788-09801 to 09900	8	12	07/08/1999	23	100
<b>Total bands by type 12 and size 8 :</b>					<b>172</b>
<b>Total bands by size 8 :</b>					<b>172</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 0629-44459 to 44459	9	06	05/15/2001	03	1
* 0629-46140 to 46140	9	06	05/08/2002	03	1
* 0629-46175 to 46175	9	06	05/08/2002	03	1
* 0629-46188 to 46191	9	06	05/08/2002	03	4
* 0629-46369 to 46375	9	06	05/30/2002	03	7
* 0679-04401 to 04500	9	06	09/08/2010	03	100
<b>Total bands by type 06 and size 9 :</b>					<b>114</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 0599-23701 to 23710	9	12	01/15/1975	03	10
* 0599-51154 to 51200	9	12	12/17/1997	03	47
<b>Total bands by type 12 and size 9 :</b>					<b>57</b>

Band Span	Size	Type	Issue Date	Ac	Qty
* 0629-26738 to 26749	9	16	05/26/1987	40	12
* 0629-26754 to 26760	9	16	05/26/1987	40	7
* 0629-30656 to 30657	9	16	01/02/2003	23	2
* 0629-30681 to 30690	9	16	01/02/2003	23	10

## Band Inventory (Outstanding)

Band Span	Size	Type	Issue Date	Ac	Qty
<b>Total bands by type 16 and size 9 :</b>					<b>31</b>
<b>Total bands by size 9 :</b>					<b>202</b>
Band Span	Size	Type	Issue Date	Ac	Qty
* 0799-00251 to 00300	9A	46	03/12/2013	03	50
<b>Total bands by type 46 and size 9A:</b>					<b>50</b>
<b>Total bands by size 9A:</b>					<b>50</b>
Band Span	Size	Type	Issue Date	Ac	Qty
* 0719-00658 to 00665	9C	46	09/08/2010	03	8
* 0719-00669 to 00675	9C	46	09/08/2010	03	7
* 0719-00679 to 00680	9C	46	09/08/2010	03	2
* 0719-00682 to 00700	9C	46	09/08/2010	03	19
<b>Total bands by type 46 and size 9C:</b>					<b>36</b>
<b>Total bands by size 9C:</b>					<b>36</b>
<b>Total bands by permit 09264:</b>					<b>5,489</b>

\* Outstanding Bands

**AC Translator**

03 NEW ISSUE/ACKNOWLEDGED  
 23 REISSUE/ACKNOWLEDGED  
 40 TRANSFER/BANDS OUTSTANDING