

THE WHITE HOUSE
WASHINGTON
February 27, 1996



MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA
HAROLD M. ICKES

SUBJECT: Proposed executive order on Indian sacred sites

Action-forcing event

You have recently expressed interest in the status of the Administration's efforts to protect Indian sacred sites. The Departments of Interior, Agriculture and Justice have proposed an executive order to protect Indian sacred sites on federally-owned lands.

Background:

In an April 1994 speech, you made a general commitment to protect Indian religious freedom and urged Congress to pass legislation designed, among other things, to protect Indian sacred sites. You also issued two memoranda: one directing agency heads to meet with Tribes on a government-to-government basis whenever taking an action affecting tribes; and one streamlining the process used by Tribes to obtain eagle feathers for religious ceremonies.

During the summer of 1994, Senator Inouye introduced broad legislation, covering both public and private lands, offering strong protection to sacred sites, including the creation of a private right of action against both government and private landowners. This legislation, strongly opposed by the timber industry and other business interests, never got out of committee in either the Senate or the House.

Early last year, Secretary Babbitt advised Tribal leaders that the Administration would take concrete steps -- including the issuance of an executive order -- to protect Indian sacred sites and provide at least some protections that had been included in the 1994 Inouye bill.

White House staff (Deputy Chief of Staff, Domestic Policy Council, White House Counsel) have worked with the Departments of the Interior, Agriculture, Justice, Energy and Defense to draft an executive order that provides workable standards for protecting sacred sites, while taking account of limits on Presidential authority, the Republican majority in Congress, the ongoing debate over the "war on the West," and the practical implications for affected agencies. The attached draft executive order reflects a consensus among the departments involved in the drafting process.

The issuance of this executive order will likely produce some advantages and some disadvantages:

Advantages

- Responds to a very high priority for the Tribes.
- Continues the Administration's commitment to the protection of religious liberty.
- Provides protection not offered by the Indian Religious Freedom Restoration Act.
- Does not impose a substantial administrative/legal burden on agencies.
- Is unlikely, according to Secretary Babbitt, to generate much opposition from the business community or cowboys because the order does not impose significant regulatory burdens.
- Should not, in light of limited scope, generate substantial opposition in Congress.

Disadvantages

- Provides substantially less than Tribal leaders desire or expect from the Administration -- although some of what the Tribes want, such as private rights of action, can only be established by legislation.
- Will thus likely lead to some criticism by Tribes, including that the order's scope is too limited; that the order does not impose a strict enough legal standard on agencies; that the order only covers federally owned lands; and that the order requires no regulatory changes, but instead only a "report" and "proposals" after one year.
- Because the order affects federal land management, it could be criticized in the context of the "war on the West" debate.
- The order could be criticized as an effort to impose by executive order rules that even a Democratic Congress was unwilling to adopt.

Recommendation

It is the consensus view of the Departments of the Interior, Justice, Agriculture, Energy and Defense that you should implement the proposed Executive Order on Indian Sacred Sites because, on balance, the advantages of the order outweigh the disadvantages. It would be our plan to arrange for meetings with Tribal leaders, prior to issuance of the order, to explain the order and encourage their support.

_____ AGREE _____ DISAGREE _____ DISCUSS

EXECUTIVE ORDER NO. _____

INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and laws of the United States of America, in furtherance of federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of sacred sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, permitted by law and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands.

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly-delineated location on federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

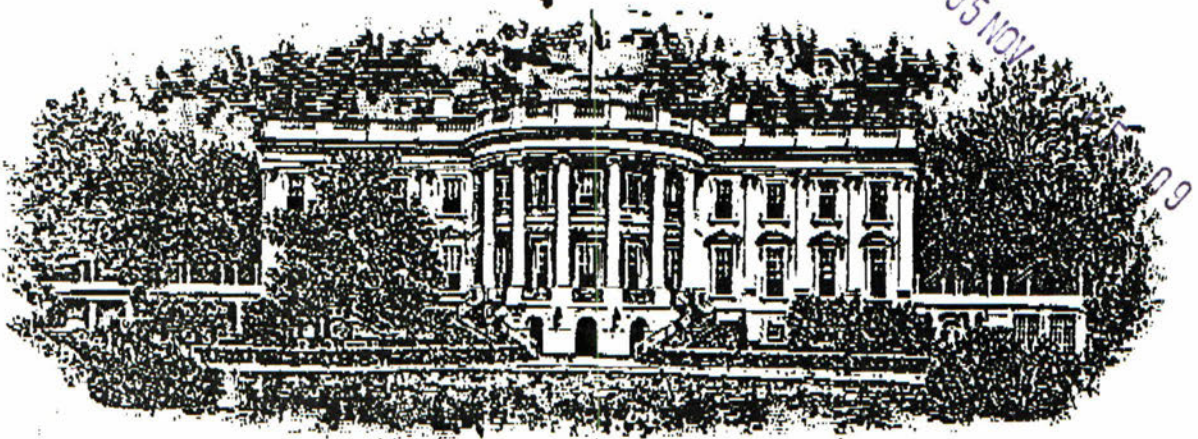
Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, as practicable and appropriate, any additional procedures relating to public notice of prospective agency action in the management of federal lands.

(b) Within one year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders, and the expeditious resolution of disputes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. § 551(13).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers or any person.

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE:

11/7/95

TO:

TODD STERN

FACSIMILE NUMBER:

62215

TELEPHONE NUMBER:

62702

FROM:

STEVE NEUWIRTH

TELEPHONE NUMBER:

67903

PAGES (WITH COVER):

4

COMMENTS:

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DRAFT - 11/7/95 (same as draft inadvertently marked 6/31/95)
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FOR INTERNAL FEDERAL AGENCY DISCUSSION ONLY

EXECUTIVE ORDER NO. _____

INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and laws of the United States of America, in furtherance of federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of sacred sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, permitted by law and not inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands.

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly-delineated location on federal land that is identified by an Indian tribe, or individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, as practicable and appropriate, any additional procedures relating to public notice of prospective agency action in the management of federal lands.

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MARKING Per E.O. 13526

Sec. 3.2(C) Initials: DB Date: 8/7/19

2019-0774-S

(b) Within one year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders, and the expeditious resolution of disputes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. § 551(13).

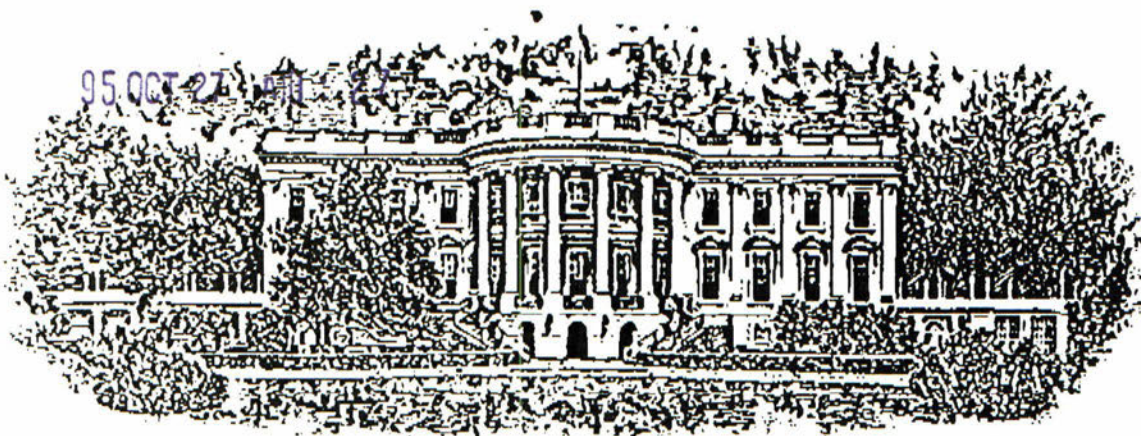
Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers or any person.

*Think
Parties?*

In reviewing the current draft of the executive order, the Justice Department has requested that consideration be given to an alternative version of section 1(a):

In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent permitted by law, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adverse affects on the physical integrity of such sacred sites, unless there is no feasible and practicable alternative to an agency in light of its essential agency functions.

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 10/27
TO: Todd Stern
FACSIMILE NUMBER: 62215
TELEPHONE NUMBER: 62702
FROM: Steve N.
TELEPHONE NUMBER: 67903
PAGES (WITH COVER): 3
COMMENTS: Please call me you've reviewed.

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REVISED DRAFT - 6/26/95
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FOR INTERNAL FEDERAL AGENCY DISCUSSION ONLY

EXECUTIVE ORDER NO. _____

INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and laws of the United States of America, in furtherance of federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of sacred sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, permitted by law and not inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands.

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any specific, discrete, narrowly-delineated location on federal land that is identified by an Indian tribe, or individual determined to be an [appropriately authoritative] representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order.

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2019-0774-5

(b) Within one year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders, and the expeditious resolution of disputes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. § 551(13).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers or any person.

Fax To Steve Neuwirth:

Steve:

How about the following as a formulation for Section 1:

Section 1. Accommodation of Sacred Sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent permitted by law, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adverse affects on the physical integrity of such sacred sites unless there is no practicable alternative available to the agency in light of essential agency functions.

Seth

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DRAFT ORDER

PROVIDING PROTECTIONS FOR THE RELIGIOUS
PRACTICES OF INDIAN TRIBES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Historic Preservation Act, 16 U.S.C. 470, and in furtherance of federal treaties, and the policy proclaimed in the American Indian Religious Freedom Act, 42 U.S.C. 1996, and in order to accommodate Indian religious practices, it is hereby ordered:

Section 1. Definitions. For the purposes of this order:

(a) "Agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. 551(13).

(b) "Federal lands" means any land or interests in land owned by the United States, except Indian trust lands.

(c) "Federal land management agency" means any agency, as defined by 5 U.S.C. 551(1), that has statutory or administrative responsibility for the management of federal lands.

(d) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe.

(e) "Sacred site" means any specific, discrete geographical or geophysical area or feature that is sacred to Indian practitioners by virtue of its religious significance to or ceremonial use by an Indian religion.

Sec. 2. To the greatest extent practicable and permitted by law, each federal land management agency shall:

(a) Manage federal lands in a manner that accommodates access to and ceremonial use of sacred sites by Indian religious practitioners, and that avoids adversely affecting the physical integrity of such sites;

(b) Provide reasonable notice to and consult with potentially affected Indian tribes and appropriate **religious** leaders of such tribes before undertaking any agency action that

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2019-0774-5

delimited with some specificity

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may adversely affect the physical integrity of, access to, or ceremonial use of sacred sites on federal land that are known to the federal government; and

(c) Within ~~240~~ ~~180~~ days of the issuance of this order, revise regulations, policies, procedures, practices, and internal agency guidance as necessary to implement this order.

Sec. 3. To the extent permitted by law, federal land management agencies may take reasonable and appropriately tailored measures to assure that compliance with this order does not:

(a) affect national security interests;

(b) cause ~~direct~~ harm to the environment or ~~have direct negative effects on~~ **interfere with** the implementation of the Endangered Species Act (16 U.S.C. 1531); or

(c) present immediate threats of physical harm to any person.

Sec. 4. Within ~~150~~ ~~180~~ days of the issuance of this order, the Attorney General, the Secretary of the Interior, and the Director of the Office of Management and Budget, in consultation with other interested agencies, shall **issue guidelines interpreting this order and** establish a process to facilitate the **expeditious** resolution of disputes that may arise under this order regarding proposed agency action that may adversely affect access to or ceremonial use of sacred sites by Indian practitioners or adversely affect the physical integrity of sacred sites. In establishing this process, due regard shall be given to third parties who may be adversely affected or aggrieved by agency action related to such sites.

Sec. 5. To the extent practicable and permitted by law, agencies shall seek to protect from public disclosure confidential information regarding Indian religious practices and the location of sacred sites.

Sec. 6. This order applies to prospective agency action that is proposed after the issuance of this order. Nothing in this order shall be construed to require a taking of vested property interests.

Sec. 7. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

DRAFT

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EXECUTIVE ORDER NO. _____

INDIAN SACRED SITES

By the authority vested in me as President by the Constitution and laws of the United States of America, in furtherance of federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of sacred sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, permitted by law and not inconsistent with essential agency missions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) ~~protect~~ the physical integrity of such sacred sites. *not avoid adversely affecting*

(b) For purposes of this order:

(i) "Federal lands" means any land or interests in land owned [or leased] by the United States, except Indian trust lands.

(ii) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and

(iii) "Sacred site" means any discrete, specifically-delineated area on federal land that is identified by an Indian tribe, and known to the federal government, as sacred by virtue of its religious significance to, or ceremonial use by, an Indian religion.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order.

(b) Within one year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to protect and preserve Indian religious sites and practices, and (ii)

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in agency lead comment practice
Sec. 3.2(C) Initials: DB Date: 8/7/19
2019-0774-S

procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders, and the expeditious resolution of disputes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests, or rights of use of federal lands, granted to third parties prior to the effective date of this order. [This order applies to prospective agency action that is proposed after the issuance of this order. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. § 551(13).]

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers or any person.

Leshy draft 10/26

Current version:

"Sacred site" means any discrete, specifically-delineated area on federal land that is identified by an Indian tribe, and known to the federal government, as sacred by virtue of its religious significance to, or ceremonial use by, an Indian religion.

Proposed substitute for underlined language:

"that is identified by an Indian tribe or other appropriately authoritative entity or individual to the applicable federal agency, with appropriate safeguards for confidentiality,"

alternative: "tribe or authoritative traditional religious leader [or spokesperson]" [circumstances vary from tribe to tribe; the alternative doesn't fit very well where there may be a group of leaders]

second alternative - as a matter of drafting, the confidentiality reference might be stated separately, since it really doesn't belong in the definition: perhaps a subsection (iv) - "federal agencies shall install safeguards to protect the confidentiality of sacred sites as appropriate."

Explanation: The substitute would accomodate both confidentiality and separation of church/state concerns: The former by the last clause (and also, by changing the focus from the "federal government" to the "federal agency," so as not to suggest there will be some sort of government-wide list floating around.

The latter objective is achieved by not making "the tribe" the exclusive designee of the sites. "Other appropriately authoritative entity or individual" would encompass Indian religious leaders either designated by a tribe to speak to Indian religious concerns, or, where the tribal government cannot involve itself in religious issues, who do lay claim to speak to such concerns.

This might still leave the land managing agencies with an occasional problem of identifying whether a person or group claiming to be religious leaders are "appropriately authoritative," but the language leaves the agency ample room to reject claims.

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Section 1. Accommodation of Sacred Sites. (a) In managing federal lands, each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, to the extent practicable, **consistent with national security, and** permitted by law ~~and not inconsistent with essential agency missions,~~ (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) protect the physical integrity of such sacred sites.

(b) For the purposes of this order:

(i) "Federal lands" means any land or interests in land ~~owned~~ held by the United States, **including leasehold interests**, except Indian trust lands.

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(iii) "sacred site" means any ^{specific} discrete, ^{narrowly} ~~specifically~~-delineated ^{location} area on federal land that is identified by an Indian tribe **or appropriate Indian religious practitioner**, ~~and known to the federal government,~~ as sacred by virtue of its religious significance to, or ceremonial use by, an Indian religion. ^{established}

[ALTERNATIVE LANGUAGE:]

'sacred site' means any discrete, specifically-delimited area on federal land that is identified by a tribe **or an appropriate Indian religious practitioner**, ~~and known to the federal government,~~ following notice of proposed agency action, as sacred by virtue of its religious significance to, or ceremonial use by, an Indian religion, **provided that the tribe has informed the federal government of the existence of such a site.]**

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2019-0774-S

or representative

Sec. 2. (a) Each executive branch agency with statutory or administrative responsibility for the management of federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order.

(b) Within one year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to protect and preserve Indian religious sites and practices, and (ii) procedures implemented or proposed to facilitate consultation with appropriate tribes and religious leaders, and the expeditious resolution of disputes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. **Nor shall this order be construed to impair enforceable rights of to use of federal lands, that have been granted to third parties through final agency action.** ~~prior to the effective date of this order. [This order applies to prospective agency action that is proposed after the issuance of this order.~~ For the purposes of this order, "agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. §551(13).†

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers or any person.

The issuance of this executive order will likely produce some advantages and some disadvantages:

Advantages

- Responds to a very high priority for the Tribes.
- Continues the Administration's commitment to the protection of religious liberty.
- Provides protection not offered by the Indian Religious Freedom Restoration Act.
- Does not impose a substantial administrative/legal burden on agencies.
- Is unlikely, according to Secretary Babbitt, to generate much opposition from the business community or cowboys because the order does not impose significant regulatory burdens.
- Should not, in light of limited scope, generate substantial opposition in Congress.

Disadvantages

- Provides substantially less than Tribal leaders desire or expect from the Administration -- although some of what the Tribes want, such as private rights of action, can only be established by legislation.
- Will thus likely lead to some criticism by Tribes, including that the order's scope is too limited; that the order does not impose a strict enough legal standard on agencies; that the order only covers federally owned lands; and that the order requires no regulatory changes, but instead only a "report" and "proposals" after one year.
- Because the order affects federal land management, it could be criticized in the context of the "war on the West" debate.
- The order could be criticized as an effort to impose by executive order rules that even a Democratic Congress was unwilling to adopt.

Recommendation

It is the consensus view of the Departments of the Interior, Justice, Agriculture, Energy and Defense that you should implement the proposed Executive Order on Indian Sacred Sites because, on balance, the advantages of the order outweigh the disadvantages. It would be our plan to arrange for meetings with Tribal leaders, prior to issuance of the order, to explain the order and encourage their support.

_____ AGREE _____ DISAGREE _____ DISCUSS

Indian Sites mty 9-7-15

Mark —

Jim ^{OW} —

Craig —

- Indians want now disclo. of site

- could put broad constraints
on liability of developers
since tribes could protest so
that the developer will
deserve an undisclosed site

- Nat'l Historic Pres. Act would
ID^R sites but discloses them

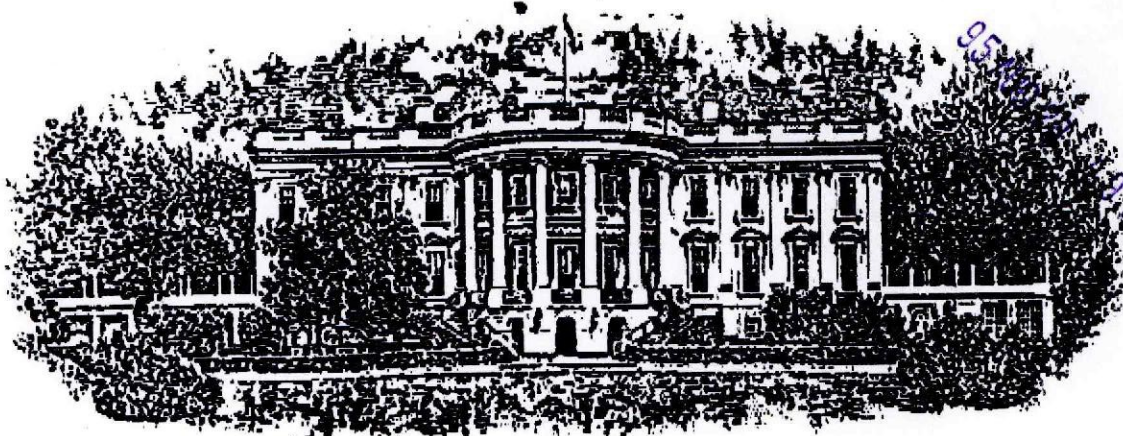
- 3rd party wouldn't really get
to know the loc'n of the
site

- chess

- budget / strategy

- 105th & 102nd Cong as leg. -
to extend RHPRA-like
protec'tns

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COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: August 28, 1995

TO: Todd Stern

FACSIMILE NUMBER: 6-2215

TELEPHONE NUMBER: 6-2702

FROM: Steve Neuwirth

TELEPHONE NUMBER: 6-7903

PAGES (WITH COVER): 4

COMMENTS:

for the 8/28
mtg w/ Mac &
Steve -
Steve to take
notes back
to DOJ

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**U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
OFFICE OF TRIBAL JUSTICE
WASHINGTON, D.C. 20530**

**FAX NUMBER (202) 514-9078
CONFIRMATION NUMBER (202) 514-8812**

DATE: August 25, 1995

FROM: Craig Alexander
Deputy Director

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NUMBER OF PAGES TO BE TRANSMITTED (including cover): 3

TO: Stephen Neuwirth

PHONE NUMBER:

MESSAGE:

Enclosed is a new version of the Sacred Sites EO, which incorporates your advice from our 8/24 meeting. The EO has been circulated within Justice and to DOI. Before I finalize this draft, however, I'd like to make sure that it is consistent with your advice.

RECEIVING FAX NUMBER: 456-1647

~~CONFIDENTIAL~~/FOIA EXEMPT
FOR INTERNAL FEDERAL AGENCY DISCUSSION ONLY

DRAFT ORDER

PROVIDING PROTECTIONS FOR THE RELIGIOUS
PRACTICES OF INDIAN TRIBES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Historic Preservation Act, 16 U.S.C. 470, and in furtherance of federal treaties, and the policy proclaimed in the American Indian Religious Freedom Act, 42 U.S.C. 1996, and in order to avoid significant interference with Indian religious practices, it is hereby ordered:

Section 1. Definitions. For the purposes of this order only:

(a) "Agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. 551(13).

(b) "Federal lands" means any land or interests in land owned by the United States, except Indian trust lands.

(c) "Federal land management agency" means any agency, as defined by 5 U.S.C. 551(1), that has statutory or administrative responsibility for the management of federal lands.

(d) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe.

(e) "Sacred site" means any specific, discrete geographical or geophysical area or feature that is sacred to Indian practitioners by virtue of its religious significance to or ceremonial use by an Indian religion.

Sec. 2. To the greatest extent practicable and permitted by law, each federal land management agency shall:

(a) Manage federal lands in a manner that accommodates access to, and ceremonial use of, sacred sites by Indian religious practitioners, and avoids agency action that adversely affects the physical integrity of such sites;

(b) Provide reasonable notice to and consult with potentially affected Indian tribes and appropriate leaders of such tribes before undertaking agency action that may adversely affect the physical integrity of, access to, or ceremonial use of a sacred site on federal land that is known to the federal

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Sec. 3.2(C) Initials: DB Date: 8/7/9
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government; and

(c) Revise regulations, policies, procedures, practices, and internal agency guidance as necessary to implement this order.

Sec. 3. To the extent permitted by law, federal land management agencies may take reasonable and carefully tailored measures to assure that compliance with this order does not:

- (a) ^{affect} impact national security interests; *appropriately*
- (b) cause direct harm to the environment or have direct negative effects on the implementation of the Endangered Species Act; or
- (c) present immediate threats of physical harm to any person.

Sec. 4. Within 120 days of the issuance of this order, the Attorney General and the Secretary of the Interior, in consultation with interested agencies, shall take necessary action to implement this order and shall establish a process to facilitate the resolution of disputes that may arise under this order regarding proposed agency action that may adversely affect the physical integrity, access to, or ceremonial use of, sacred sites. In establishing this process, due regard shall be given to third parties who may be adversely affected or aggrieved by agency action, as defined by 5 U.S.C. 702. *to act on DMB*

Sec. 5. To the extent permitted by law, agencies shall seek to protect from public disclosure of confidential information regarding either religious practices or the location of sacred sites.

Sec. 6. This order applies to prospective agency action that is proposed after the issuance of this order and nothing in this order shall be construed to require a taking of vested property interests.

Sec. 7. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

*related to
Sacred Sites
Policy*

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DRAFT ORDER

PROVIDING PROTECTIONS FOR THE RELIGIOUS
PRACTICES OF INDIAN TRIBES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Historic Preservation Act, 16 U.S.C. 470, and in furtherance of federal treaties, and the policy proclaimed in the American Indian Religious Freedom Act, 42 U.S.C. 1996, in order to accommodate Indian religious practices that historically have been significantly interfered with, it is hereby ordered:

Section 1. Definitions. For the purposes of this order only:

(a) "Agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. 551(13).

(b) "Appropriate religious leader" means an Indian practitioner of an Indian religion who is either designated by a tribe to speak to the concerns of an Indian religion or, in the case that the tribe does not or cannot speak to religious issues, an Indian practitioner who claims to speak to the concerns of such a religion and whom the tribe, following consultation between the tribe and the land management agency, takes no action to disavow.

(c) "Federal lands" means any land, interests in land (including mineral interests and submerged lands) owned by the United States without regard to how the United States acquired ownership of the land or interest and without regard to the federal land management agency having responsibility for management thereof, except Indian trust or restricted lands, recognizing that Indian tribes and Indian individuals have authority over such Indian trust or restricted lands.

(d) "Federal land management agency" means any agency, as defined by 5 U.S.C. 551(1), that has statutory or administrative responsibility for the management of federal lands.

(e) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Pub. L. No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe.

(f) "Adversely affected or aggrieved by agency action" has the same meaning as in the Administrative Procedure Act, 5 U.S.C. 702.

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(g) "Sacred site" means any specific, discrete geographical or geophysical area or feature that is sacred to Indian practitioners by virtue of its religious significance to or ceremonial use by an Indian religion.

Sec. 2. To the greatest extent practicable and permitted by law, each federal land management agency shall undertake the following responsibilities prior to agency action that may disturb the integrity of, use of, or access to sacred sites on federal lands:

(a) Avoid adversely affecting sacred sites on federal lands.

(b) Manage federal lands in a manner that accommodates access to, and ceremonial use of, sacred sites. This accommodation shall be reflected in, among other things, management plans, regulations, policies, procedures, practices, and guidance with regard to access to and use of federal lands. Land management agencies may take reasonable and carefully tailored measures to assure that access and use of lands do not (i) have direct impacts on national security interests; (ii) have direct negative effects on the implementation of the Endangered Species Act; (iii) present immediate threats of serious physical harm to any person; or (iv) cause serious harm to the environment. This subsection does not authorize the use of motorized vehicles or other forms of mechanized transport in roadless areas.

(c) Provide reasonable notice to potentially affected Indian tribes and those religious leaders of such tribes of whom the agency is aware before undertaking an agency action that may disturb the integrity of, use of, or access to a sacred site on federal land that is known to be such a site by the federal government, and consult with the potentially affected tribes and appropriate religious leaders of such tribes concerning possible alternatives to such action prior to making any final decision.

(d) Remove unnecessary regulatory obstacles that limit access to sacred sites by Indian practitioners of Indian religions.

(e) Provide exemptions from limitations on the gathering of plants or animals found on federal lands in order to protect ceremonial use of these resources by Indian practitioners of Indian religions.

Sec. 3. To the extent permitted by law, each federal land management agency shall:

(a) Revise regulations, policies, procedures, practices, and guidance as necessary to implement this order and to provide for consideration of the protection of sacred sites on federal lands and ceremonies related to such sites prior to undertaking an agency action that may disturb the integrity of, use of, or access to such sites;

(b) Establish a process for referring to the head of the agency for resolution any disputes between the agency and Indian tribes or appropriate religious leaders of such tribes regarding compliance with this order;

(c) Upon the request of potentially affected Indian tribes or appropriate religious leaders of such tribes, negotiate with these tribes or appropriate religious leaders of such tribes to enter into a Sacred Lands Protection Agreement for the purpose of protecting sacred sites on federal lands and protecting access to such sites;

(d) Submit annual reports to the President, through the Secretary of the Interior, on the agency's progress in implementing this order; and

(e) Within three years of the date of this order, submit to the President, through the Secretary of the Interior, a report containing: (i) an evaluation of the agency's implementation of this order, including any legal or other barriers encountered by the agency in protecting the integrity of, use of, and access to sacred sites on federal lands; and (ii) recommendations regarding changes in this order or existing legislation that are necessary to protect the integrity of, use of, and access to such sites. In preparing this report, the agencies shall consult with potentially affected tribes.

Sec. 4. To the extent permitted by law, whenever any federal agency conveys to a state or local government an interest in federal land that is known by the federal government to either contain a sacred site or to be important for access to such a site, the agency shall reserve federal authority over land and resource use to protect the sites or access to the sites or require state or local accommodation of such practices and management of such areas in a manner consistent with this order.

Sec. 5. To the extent permitted by law, when disputes arise under this order between an agency and Indian tribes or appropriate religious leaders of such tribes about a proposed agency action that may disturb the integrity of, use of, or access to particular sacred sites on federal lands, the potentially affected Indian tribes or appropriate religious leaders shall be Sec. 2

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Existing Issues

① given an opportunity to utilize the dispute resolution procedures provided in this order prior to agency action.

② (a) Following utilization of internal agency procedures established pursuant to section 2 of this order or unsuccessful attempts to invoke those procedures, tribes or appropriate religious leaders of such tribes may seek the assistance of the Federal Mediation and Conciliation Service ("FMCS") to resolve the dispute. The FMCS will attempt to mediate the dispute.

③ (b) If the parties to the mediation are unable to reach agreement within 120 days of the referral to FMCS, FMCS shall appoint a fact-finder. Based on FMCS's fact-finding, the Director of FMCS shall send a report to the head of the affected agency and the parties to the mediation. The report shall include the facts concerning the dispute and the Director's recommendation for resolution of the dispute. The agency head shall issue a final decision, including a determination as to whether to adopt FMCS's recommendation, and shall inform the parties to the mediation of the basis for the decision.

④ (c) Third parties who would be adversely affected or aggrieved by agency action shall be given an opportunity to comment or otherwise participate prior to a final agency decision or a final FMCS recommendation. The format of such participation (other than the opportunity to comment) shall be subject to agreement by the agency and the parties that sought the assistance of FMCS.

Sec. 6. Issues of what is an Indian religion, who is a religious leader of an Indian religion, and who has standing to represent potentially affected tribes in consultations and dispute resolution procedures with an agency, are to be resolved by Indian tribal governments.

Sec. 7. To the extent permitted by law, agencies and FMCS shall seek to protect from public disclosure specific information pertaining either to religious practices or the location of sacred sites when such facts have been identified by Indian tribes or appropriate religious leaders of such tribes as confidential.

Sec. 8. Nothing in this order limits federal agency discretion to pursue other options for addressing tribal concerns regarding preservation and access to sacred sites, such as granting the appropriate Indian tribe jurisdiction over or management of such a site. Nor does this order limit the duty of the federal government to consult with Indian tribes before taking action that will affect those tribes.

Sec. 9. Nothing in this order shall be construed to require a taking of vested property interests.

Sec. 10. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

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PROPOSED SACRED SITES ORDER

* Agency Duties Pursuant to Draft Order --

1) Preservation of Sites & Access to such Sites -- The Order requires agencies "[t]o the greatest extent practicable and permitted by law [to] avoid adversely affecting sacred sites" through federal action, to accommodate access to such sites by Indian religious practitioners, and to provide notice and engage in consultation prior to agency action that has the potential to affect such sites or access to them. These provisions provide substantive protections for sacred sites while leaving federal land management agencies with the ability to take into account what measures are practicable given the statutory and financial constraints under which agencies operate.

2) Regulations & Agreements -- To the extent permitted by law, agencies are to revise regulations and policies to protect sacred sites and, upon request by tribes, enter into sacred lands protection agreements.

* **Who Speaks for Tribes** -- The draft Order requires federal agencies to notify potentially affected Indian tribes and Indian religious leaders so that they may raise concerns about agency action that may affect sacred sites. If a tribal government or its designee objects to agency action, the consultation process begins. If a religious leader objects to agency action, the agency would consult with the political leadership of the tribe concerning the objection. In general, the tribe would have the option of designating the leader as a spokesperson on religion for the tribe.

If the tribe does not or cannot speak to religious issues, an Indian religious leader would be permitted to participate in the consultation and dispute resolution process if, following consultation between the tribe and the land management agency, the tribe takes no action to designate or disavow the religious leader's role.

* **Scope of Federal Action Covered By Order** -- In general, the draft Order covers agency action on federal lands.¹

* **Dispute Resolution Processes** -- The Order provides several mechanisms to ensure effective implementation of protections for sacred sites. These mechanisms include: internal agency review of a federal land manager's decisions, if a dispute exists concerning that decision; if disputes are not resolved within the agency, mediation of disputes by the Federal Mediation and Conciliation Service (FMCS), a federal entity outside the agency; if mediation

¹ Because Indian tribes have jurisdiction over Indian country, these lands are not included within the definition of federal lands.

fails to resolve the dispute, FMCS engagement in a fact finding process and a recommendation by FMCS to the agency secretary; and a requirement that agencies prepare annual progress reports for the President on the implementation of the Order.

*** How the Process Works**

The process contemplated by the draft order is designed to respond to tribes' interest in having a consultation process as well as a private judicial cause of action to protect sacred sites. Executive Orders, however, generally do not create private rights of action. As a substitute for judicial review, the draft Order creates a mediation/fact-finding mechanism, which would allow for an impartial outsider to facilitate resolution. The process would work as follows:

1) the federal agency notifies potentially affected Indian tribes and known Indian religious leaders so that they may raise concerns about agency action on federal lands that may affect sacred sites;

2) consultation process begins, if a tribal government or its designee objects to agency action (if a religious leader objects to agency action, the agency would consult with the political leadership of the tribe concerning the objection);

3) internal agency review of initial agency decision, if tribe or appropriate religious leader objects to initial decision;

4) mediation of disputes by the Federal Mediation and Conciliation Service (FMCS), a federal entity outside the agency, if disputes are not resolved within the agency;

5) FMCS engagement in a fact-finding process and a recommendation by FMCS to the agency secretary, if mediation fails to resolve the dispute; and

6) agency makes final decision.