



United States Department of the Interior

BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:

SEP 16 1998

W-6100

MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
Attention: PN-1000, MP-100, LC-1000, UC-100, GP-1000
Director, Reclamation Service Center
Attention: D-1000
Director, Program Analysis
Attention: D-5000, D-5300, D-5400, D-5500
Director, Technical Service Center,
Attention: D-8000

From: Eluid L. Martinez **SGD ELUID L. MARTINEZ**
Commissioner

Subject: Reclamation compliance with Indian Sacred Sites Executive Order (No. 13007)

On April 28, 1997, I signed into effect Reclamation's interim guidance for implementing Executive Order 13007 (EO). Attached is the final guidance, which shall replace the interim guidance effective immediately, as well as a copy of the associated Departmental Manual Chapter. Copies of these documents should be distributed to all Reclamation Regional and Area staff who may have to work with sacred sites issues, including Area Managers, managers and staff working in the areas of NEPA compliance, realty, cultural resources, etc.

I also hereby reaffirm Reclamation's commitment to manage Federal lands under its jurisdiction to: (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. These actions shall be carried out to the extent practicable, permitted by law and not clearly inconsistent with essential agency functions. This policy shall be carried out in a manner consistent with Reclamation's government-to-government policy for working with Indian tribes, including consulting with tribally designated representatives whenever it appears that Reclamation activities may compromise the integrity of or access to sacred sites.

Within the guidelines established by the EO, Reclamation's goals shall be to ensure that:

- a. its actions do not adversely affect Indian sacred sites, to the extent practicable;
- b. access to and ceremonial use of Indian sacred sites is accommodated;

c. reasonable advance written notice is given to affected tribes of proposed actions, plans, projects, activities, or decisions which may adversely affect Indian sacred sites or restrict access or ceremonial use of such sites;

d. consultation with federally recognized tribes is carried out when contemplated Reclamation actions could cause adverse effects, or to discuss other issues associated with the EO; and

e. confidentiality of information relating to sacred sites is protected.

I am also directing the Regional Directors to provide copies of this guidance to tribes in their regions who may have sacred sites potentially affected by Reclamation actions. Copies should also be sent to tribes outside of the Reclamation states who are thought to have an interest in sacred sites located within that region.

Questions or comments about this document should be directed to Ms. Adrienne Marks, W-6100, via electronic mail, or faxed at 202-208-6688 or she can be reach at (202) 208-5000.

Attachments

bc: (w/att):
W-6100 (Marks)
W-6100 (Kenney)
W-6000 (Magnussen)
PN-1060 (Dooley)
GP-1130 (Eggers)
MP-120 (Sullivan)
UL-212 (Parry)
NAAO-1100(Saint)
D-6100 (Peterson)
SOL-6416 (Geigle)
UC-293 (Cook)
UC-3240 (Harrison)
D-5300 (Friedman)
D-5100 (Cawley)
ALB-151 (Larralde)
GP-2100 (Zontek)
DK-602 (Banks)
PN-6651 (McDonald)
LC-2212 (Hicks)
MP-152 (West)

W-5000 (Buckey)

W-5000 (Troast)

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Bureau of Reclamation
Guidance for Implementing Indian Sacred Sites Executive Order (No. 13007)

I. Background: Indians have encountered numerous obstacles in seeking to practice their traditional religions. Such obstacles have at times included: laws, regulations and policies that limited certain practices, limited access to sacred sites; and, particularly before the enactment of the National Environmental Policy Act (NEPA), adverse impacts to sacred sites caused by Federal actions taken without advance consideration of potential adverse effects on Indian religious practices.

II. Executive Order 13007 (EO): To address these obstacles insofar as they affect sacred sites, on May 24, 1996, President Clinton signed Executive Order 13007. (See Appendix B.) Section 1 of the EO requires all executive agencies to manage Federal lands under their jurisdictions to:

- (i) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and
- (ii) avoid adversely affecting the physical integrity of such sacred sites.

These goals are to be implemented to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

Section 2 requires each agency to develop procedures for implementing this EO. This guidance has been prepared for use by Reclamation staff in satisfaction of this Section 2 requirement.

III. Reclamation policy, procedures and guidance pertaining to protecting sacred sites and providing access to them by Indian religious practitioners: Consistent with the EO, Reclamation will manage Federal lands under its jurisdiction to: (i) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners¹, and (ii) avoid adversely affecting the physical integrity of such sacred sites. Activities to achieve these goals will be carried out to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

¹“Practitioner” and “practitioners” are used interchangeably in this document. Also, “religious practitioners” and “practitioners” as used in this document refer only to Indian religious practitioners as defined by the EO.

A. Carrying out the EO – Threshold issues:

1. Defining sacred sites: The EO defines a sacred site as "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"

Some tribes have sacred sites on non-Federal lands, which are not covered by the EO. However, as noted below, such sites should also be considered when analyzing the potential impacts of Reclamation activities.

2. Identifying sacred sites: For the EO to apply, the "tribe or appropriately authoritative representative of an Indian religion [must inform] the agency of the existence of such a site." To insure that the government-to-government relationship is respected, Reclamation will ask tribes to inform Reclamation of the existence of sacred sites by means of a tribal resolution or other official means authorized by the tribal governing body. The resolution or communication should identify the site, specify the general area in which the site is found, or designate an "authoritative representative of an Indian religion" who can identify the location of the sites. To insure that a tribe has the opportunity to inform Reclamation about the existence of sacred sites in a potentially affected area, Reclamation should undertake to do early consultation with potentially concerned tribes, as discussed later in this document.

At a minimum, Reclamation needs to be informed that a sacred site is located on Reclamation lands or is in an area that could be affected by proposed Reclamation actions, so that Reclamation will know to consult with the appropriate tribal representatives to attempt to avoid adverse impacts to the sacred site. It will usually be preferable that the location be delineated with as much specificity as possible, and in some cases it may be impossible to provide the desired level of protection to the site without a specific location. However, in some cases it will be unnecessary for a site's precise location to be provided to Reclamation. Reclamation staff should never attempt to pressure tribal representatives to provide more information concerning the location than they are comfortable giving. Unless otherwise delegated by the Regional Director, the Regional Offices will have the lead to coordinate with tribes concerning sacred site identification.

While Reclamation may ask questions necessary to determine that a site is covered by the EO (i.e., that a site is a "specific, discrete, narrowly delineated location on Federal land" that has been identified by the tribal government or individual authorized by the tribal government), Reclamation will not question the religious validity of the site, as doing so could create a

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problem with the First Amendment's "Establishment Clause."³ As a practical matter, if a tribal government passes a resolution indicating that a sacred site as defined by Section 1(b)(iii) of the EO is located at or within a designated area, there is no information about the site that can properly be demanded of a tribe or practitioner. Rather, as indicated above, the best course will be to work with the designated tribal representatives to determine if adverse impacts are likely and what sort of changes would be required to avoid them.

Example: Reclamation is planning a canal alignment. Reclamation should consult with any potentially concerned tribes in the early planning stages to identify areas in which sacred sites are located and determine which alignments avoid adversely impacting the sites. If an alignment that Reclamation wishes to consider further would cause adverse impacts, Reclamation should inform the tribe of such and ask if additional information can be provided that would allow it to formulate a new alternative that would avoid or minimize adversely impacting the site. In some cases, the tribal representatives may provide enough additional information and it may be possible to formulate a new alternative; in other cases, they may be unable to do so. In the latter case, the alignment that would adversely impact sacred sites need not be eliminated from further consideration. However, if that alternative is presented to the decisionmaker for his consideration, it must be explained that choosing this alignment will cause adverse impacts to the tribe's sacred site, and any associated adverse social or cultural impacts included in the NEPA analysis. If this alternative is recommended, an explanation should be included as to why selecting it is not inconsistent with the EO.

3. **Whose access is to be accommodated?** The EO states that access is to be provided to "Indian religious practitioners." Generally Reclamation will assume that the EO applies to any tribal member who: (i) belongs to a federally-recognized tribe that has indicated an interest in a sacred site, and (ii) who identifies himself as a religious practitioner seeking access to the sacred site. In some cases a tribe may not recognize as a religious practitioner a member who is asking Reclamation for access to a sacred site. Such cases will be dealt with on a case-by-case basis. At

³The "Establishment Clause" of the U.S. Constitution's First Amendment precludes the government from enacting laws respecting the "establishment of religion." Generally this has been interpreted by the courts to prohibit governmental support intended to favor one religion over others, or intended to favor religion over non-religion. The application of this clause precludes excessive government "entanglement" with religion; this means, among other things, that governmental officials should not pass judgement concerning the validity of religious beliefs. The courts have applied specific tests to determine whether or not an action violates the Establishment Clause. An attorney knowledgeable in this area should be consulted when it is suspected that there may be a problem. If a problem is identified and cannot be worked around, Reclamation's Director, Native American Affairs Office should be notified.

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all times, the EO and this guidance should be implemented in a manner respectful of the government-to-government relationship.

4. **Other considerations:** The goals of the EO are not absolute, but are to be tempered by other provisions of the EO. These include:

a. **Not clearly inconsistent with essential agency missions:** This means that activities carried out pursuant to the EO should not interfere with carrying out authorized project or program purposes. A clear statement of the project or program purposes should be provided to a tribe or religious practitioner so requesting.

b. **Practicability:** Carrying out the EO should not impose a significant operational or financial burden on Reclamation (e.g., altering the operation of power generation facilities and thereby significantly reducing power revenues; operating a dam in a way that is incompatible with an approved Endangered Species Act recovery plan). However, this is not to say that Reclamation cannot incur any additional costs in association with sacred sites, or that changes cannot be sought to approved operating plans. For example, in some cases it might be allowable and appropriate to adjust a dam release schedule, or to modify the hours for recreational use of an area, although doing so may reduce user fees somewhat.

c. **Shall not cause interference with vested property interests or enforceable rights:** Reclamation shall not interfere with vested third party rights when implementing the EO. In other words, activities undertaken to carry out the EO should not put Reclamation in the position of being the losing party in a lawsuit brought by somebody whose vested rights or property interests (e.g., leasing rights, water rights, easements) have been interfered with. When in doubt as to whether there is probable merit to a third party's claim of interference, consult the Solicitor's Office.

d. **Consistent with other laws, rules, regulations:** The EO does not authorize activities that are inconsistent with other laws, rules, or regulations by which Reclamation is bound; it neither grants rights that are not otherwise provided by law or treaty, nor limits such rights. Rules, regulations, or policies subsequently found to be inconsistent with the EO should be called to the attention of the Director, Native American Affairs Office and other appropriate Reclamation managers.

e. **Federal lands:** For purposes of implementing the EO, sacred sites are limited to those located on Federal lands, where Federal lands are defined as the United States' interests in land, including but not limited to leased lands and rights-of-way, but excluding Indian trust lands. When there are existing leases under which Reclamation is either the lessor or lessee, Reclamation will generally be agreeable to changing the terms of the lease to accommodate the EO if the other party is agreeable. However, no changes in leases will be made if doing so will interfere with vested property interests, or if Reclamation is asked to provide significant additional benefit to the other contracting party in exchange for agreeing to the changes. When

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Reclamation enters into a new lease, it will endeavor to ensure that the goals of the EO are met.

Some proposed Reclamation actions will have the potential to affect sites located on non-Federal lands and which are considered sacred by Indian religious practitioners. Although such actions fall outside the scope of the EO, as the EO only applies to sacred sites located on Federal lands, impacts to such sites located on non-Federal lands should be considered and discussed along with impacts to sacred sites on Federal lands.

f. Federally recognized tribes: The application of the EO is limited by its terms to federally recognized Indian tribes and members of such tribes. More precisely, the EO defines an "Indian tribe" as "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 Public Law No. 103-454, 108 Stat. 4791." A list of Federally recognized tribes is published periodically in the Federal Register and the most recent list can be found on the Bureau of Indian Affairs website. However, as a tribe may gain recognition prior to the next issuance of the list, the absence of a tribe's name should not be taken as conclusive evidence that it is not a Federally recognized tribe. When in doubt as to whether a tribe is federally recognized, one of the following sources should be consulted: the Bureau of Indian Affairs, Reclamation Regional or Area Office Indian program managers, or the Solicitor's Office. When dealing with members of non-federally recognized tribes, Reclamation cannot apply the EO, but will endeavor to use other appropriate authorities, procedures or policies to provide protection for or access to such sites.

B. Accommodating access and ceremonial use:

1. Generally: All Reclamation managers with responsibility for approving requests for land use are to grant requests in accord with the EO, applicable laws and regulations, this document, and other Reclamation guidance on this subject. New leases and land and recreation management agreements that Reclamation enters into with other entities will be evaluated for compliance with this EO, and if necessary, language included to ensure that the future managing entity will also comply. When requested by federally recognized tribes, Reclamation will generally be agreeable to amending existing leases and management agreements to comply with the EO, so long as the other parties to the lease/agreement concur; however, this does not mean that Reclamation is obligated to renegotiate other provisions of the lease/agreement or that it needs to make additional concessions for the amendments.

2. Reclamation Manual - Directives and Standards: Procedures concerning land use will be found in the Reclamation Manual (RM) - Directives and Standards for "rights of use," which are currently in the review process. Also, the new RM will contain Directives and Standards for comprehensively managing recreation areas, which are expected to be implemented in 1999. These Directives and Standards will accommodate the EO requirements.

3. Interim guidelines: Until the new RM takes effect, the following guidance will be

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followed in the absence of an agreement between Reclamation and the tribe to do something else concerning providing access to sacred sites. Following the adoption of the RM sections mentioned above, the following should be considered as interpretive guidance to supplement other existing procedures, although in the event of any contradictions, language found in regulations or in the RM should control.

a. Receiving requests: Requests for access to a sacred site or for a particular land use should be made by the tribal representative or Indian religious practitioner to the Area Manager for the Reclamation office having jurisdiction over the lands. If the request is made to other Reclamation staff, the person receiving the request shall forward it to the appropriate person within Reclamation and notify the tribe of such. When doubt exists as to whom the "appropriate person" is, the request should be forwarded to the Regional Native American program manager, who will ensure that the request is correctly forwarded and the tribe notified. The request should not be returned to the tribe on the basis that it was directed to the "wrong person" within Reclamation. As some requests are time sensitive, a procedure should be implemented to insure that requests can be processed in a timely manner, even during a prolonged absence by key staff.

b. Granting requests: The management level at which the requests are granted will be in accordance with other Reclamation procedures and will usually depend on the nature of the use being sought and the delegations of authority in the affected region.

c. Denying requests and appealing denials: Requests made by parties covered by the EO for access to sacred sites on Reclamation-managed lands will generally be granted unless doing so would exceed the limitations of the EO. If a request for access is denied, the tribal representative can appeal through the procedures described in 43 CFR Sec. 429 concerning decisions and appeals. When access is denied, the deciding official will ensure that: (i) the requestor is immediately informed of his appeal rights pursuant to 43 CFR Sec. 429; (ii) the requestor has a copy of this or other Reclamation guidance documents on the EO; and (iii) notification of the denial shall be provided to the Director, Native American Affairs Office. The tribe may request that the Director, Native American Affairs Office, or another mutually agreed upon person act in a mediatory capacity. When this occurs, Reclamation will inform the tribe in writing that the 30-day period that they have for lodging an appeal will not begin tolling until further written notice; this is necessary to ensure the tribe does not lose appeal rights because of their willingness to pursue a Reclamation-mediated resolution.

4. Confidentiality of information: When a tribe is granted access rights through existing Reclamation procedures, information about the access location generally becomes part of the public record and is also releasable through Freedom of Information Act (FOIA) requests. All efforts should be made to protect confidentiality; however, because of existing laws, it may not be possible to withhold sensitive information coming into Reclamation's possession. The issue of confidentiality should therefore be thoroughly analyzed and explained to the tribe or religious practitioners prior to issuing permits or other formal instruments. See Section III.E.1 below for

additional information concerning confidentiality issues

5. *Recovery of costs associated with use:* Reclamation should avoid assessing user charges for uses of Reclamation lands associated with the EO to the maximum practicable extent. However, under existing Federal regulations and Office of Management and Budget (OMB) policy, Reclamation may be required to assess user charges and administrative fees, depending on the nature of the requested use, although no fees should be collected when the cost of doing so would represent an unduly large part of the fee for the activity. Examples: user fees will generally be charged when additional staff is required to be on-duty to allow activities to take place; no fees should be assessed when a tribe is granted access to a place normally accessible to the general public to conduct activities that do not significantly add to Reclamation's costs for maintaining the area.

Additional material concerning the circumstances under which Reclamation must charge for rights-of-use and when it has discretion to waive these costs are in 43 CFR 429. These regulations allow for the waiver of charges for nonprofit organizations when the use will not interfere with the authorized current or planned use. However, rights-of-use by other governmental agencies are to be made with a fair market value reimbursement unless one of the stated exceptions applies. Agencies are also required by OMB Circular A-25 to collect user fees from "identifiable recipients(s) for special benefits" from Federal activities beyond those received by the general public. For purposes of determining what, if any, use fees must be charged, requests by a tribe or Indian religious practitioner seeking access to sacred sites in accordance with the EO should be given the most favorable treatment allowable by applicable law, regulation, and policy.

Coordination with the appropriate realty office is essential when attempting to determine what charges are required and where there may be discretion to waive them. If problems are encountered in having to charge fees that the responsible officials believe are more appropriately waived, a short report of such should be provided to the Director, Native American Affairs Office, and other appropriate Reclamation managers. If such reports are received, it may be possible to seek a blanket waiver for collection of fees in certain situations.

6. Other issues:

a. *Accommodating access may include partial closures:* A tribe or Indian religious practitioners may sometimes request that areas open to the general public be closed during a particular time period to accommodate their access or ceremonies. Reclamation may agree to such closures when consistent with applicable laws, regulations, EOs and other policy and guidance. Proposed temporary or permanent closures will be considered on a case-by-case basis and should be implemented in coordination with the Solicitor's Office to avoid conflicts with the First Amendment's "Establishment Clause."

b. *Accommodating "access to and ceremonial use of" sacred sites may include*

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consumptive use: When requesting access to a sacred site, a tribe or practitioner may request to collect and consumptively use resources associated with the ceremonial use of the site. When the collection would occur on Reclamation managed lands and is consistent with other laws and regulations, the request should be granted. The terms of the agreed-upon use will usually be formalized in a use permit, Memoranda of Agreement (MOA), or other instrument. However, the EO does not diminish other rights a tribe may have to use a site, so that even in the absence of a use permit or MOA, any existing treaty or other tribal rights must be respected.

C. Avoiding adverse impacts to sacred sites:

1. Generally: The EO directs agencies to avoid adversely impacting sacred sites, subject to the specified limitations. While the NEPA compliance process is the primary vehicle through which the goals of the EO are accomplished, other Reclamation programs will also take into account the objectives of the EO. Information is also provided in this section concerning consultation and coordination, as well as some key issues associated with seeking to avoid adverse impacts to sacred sites.

2. NEPA compliance process: Reclamation's NEPA compliance process has been modified to clarify the process for analyzing impacts of proposed Reclamation activities on the physical integrity of sacred sites and access to the sites. Modifications to Reclamation's NEPA process include:

(i) Categorical Exclusion Checklist (CEC) - Revised CEC addresses compliance with the EO's requirements.

(ii) NEPA Handbook - Revised NEPA Handbook to address sacred sites. The handbook is currently in the review process.

3. Integrating EO objectives with other Reclamation programs: Some Reclamation programs define management strategies. The EO will be considered when defining these strategies. The following are some of the programs identified, although this is not intended to be a comprehensive listing:

a. Resource Management Plans (RMPs): During the development of RMPs, resource or other management concerns are identified for a designated project area through public meetings, tribal consultations, and research. Management strategies are then defined to appropriately manage the identified concerns. RMPs can be used as an avenue to consult with tribes about sacred site concerns in the study area. They can also document agreed-upon processes to accommodate sacred sites' access or to implement programmatic impact avoidance strategies.

b. Cultural Resources Management Programs: These programs complete

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inventories to identify cultural resources, and develop and implement strategies for their management and protection. These activities are carried out under various authorities, including the NHPA and the Archeological Resources Protection Act (ARPA). Some of the archeologically, historically, and culturally significant locations may be considered sacred sites by tribes and Indian traditional religious practitioners. When they are, and to the extent they are covered under the EO, development of an appropriate management strategy or treatment will be carried out in consultation with the appropriate tribes .

c. Recreation Management Program: This program provides for the management of recreation on Reclamation lands and at its facilities by other Federal or non-Federal entities through various instruments, such as MOAs, cooperative agreements and contracts. These instruments are frequently used to transfer certain limited jurisdictional or administrative responsibilities to other entities and to describe the responsibilities of the parties. Through these instruments, access and avoidance of adverse impacts to sacred sites can be addressed. Also, as noted above, the Reclamation Manual section pertaining to recreation management will address the EO's requirements.

4. Ongoing adverse impacts: If a tribe or its authorized representative notifies Reclamation that ongoing Reclamation actions are adversely impacting a sacred site or their access to the site, Reclamation will work with the tribe to determine feasible alternatives that would avoid or adequately mitigate the impacts and are otherwise consistent with the EO. An effort should be made to select an alternative that avoids non-mitigatable adverse impacts, although doing so will depend on the availability of adequate authority and funds.

5. Consultation: Meaningful consultation with Indian tribes and potentially affected individuals will be carried out in accordance with existing Reclamation guidance for consultation and government-to-government relationships, and will include consideration of the tribe's own consultation process. For additional information, refer to Reclamation's *Protocol Guidelines: Consulting with Indian Tribal Governments* (February 3, 1998), as well as Appendix A which briefly summarizes considerations to take into account when carrying out consultation concerning sacred sites. In some cases, Reclamation may be aware of two or more tribes with an interest in a sacred site. When this is so, Reclamation should work with each of the tribes, either jointly or individually, as the tribes and Reclamation determine is appropriate.

6. Coordination with other agencies or land managers: When other Federal agencies are managing lands on which Reclamation facilities are located, the land managing agency will have the lead for consulting with tribes regarding access to sacred sites. When non-Federal entities manage such lands, Reclamation will have the lead to consult. Reclamation will work with the non-Federal entities to inform them of the EO and explain what compliance entails. In the absence of an agreement to the contrary, requests for access to sacred sites should be forwarded to designated Reclamation staff. Actions proposed by state agencies on Reclamation lands will generally be covered by NEPA and the EO. The EO will be considered during the NEPA planning process for those actions, and these considerations reflected by appropriate

language in documents and agreements concerning the lands.

7. *Unavoidable adverse impacts:* If in the course of performing its work Reclamation suspects that its actions may adversely impact a sacred site, Reclamation will notify and consult with the affected tribe. Reclamation will attempt to coordinate with the tribe to learn what, if any, mitigating activities might be appropriate and to attempt to reach agreement with the tribe to mitigate the adverse effects. While no new mitigation authority is created by the EO, mitigation may be accomplished through various means, such as the comprehensive management planning process, RMPs, MOAs, or authorized land exchanges. No adverse action will be taken by Reclamation without adequate notification to and appropriate consultation with the tribe, unless: (i) emergency conditions prevent these steps from being taken, or (ii) the tribe has not informed Reclamation concerning the existence of sacred sites in the affected area and Reclamation is not otherwise aware of potentially impacted sacred sites.

8. *Other limitations and clarifications:*

a. *Avoiding adverse impacts:* The language of the EO calls for avoiding adversely affecting sacred sites, but not for protecting or maintaining them. However, Reclamation should not ignore a situation in which some protective or maintenance actions appear warranted. At a minimum, Reclamation should provide the sacred site the same protections afforded other parts of the unit of which the sacred site is a part. There may be cases when other applicable law will call for protection and maintenance of a sacred site, such as certain cultural resource laws when the site qualifies for protection under the act. In some instances, it may be appropriate for Reclamation to take special measures to ensure that a sacred site is afforded appropriate protection and is treated with proper respect.

b. *Physical integrity of sites:* The terms of the EO limit its application to the "physical integrity" of the sacred site, so that it does not apply to other attributes, such as spiritual integrity. Nevertheless, in attempting to avoid adverse impacts to a site, Reclamation should be sensitive to those values important to the tribe and necessary for the proper treatment of the sacred site. It is anticipated that in most cases, adverse impacts to non-physical aspects of sacred sites would involve negative social impacts, which should be addressed as part of the environmental compliance process.

c. *Sacred sites usually not trust assets* - The fact that a location may be a sacred site does not conclusively determine its status as a trust asset. As defined by the EO, sacred sites located on Federal lands will usually not be trust assets, although sites considered sacred by religious practitioners and located on Indian trust lands generally will be trust assets, deriving that status from the land on which they are located. When trying to determine if a sacred site is also a trust asset, one should look for an independent source for concluding that it has trust status (e.g., a treaty right or statute).

d. *Applicability to all sacred sites* - Reclamation interprets the EO to apply to all

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sacred sites which otherwise meet the definition provided in the EO, and not only to those sacred sites with a pattern of regular use. This interpretation is based on the understood intent of the EO and is supported by the Department's and Solicitor Office's representatives on the Department's inter-bureau EO implementation team.

D. Memorializing understandings and agreements: Reclamation will encourage the use of MOA between the appropriate regional or area office and tribe setting forth the mutual understandings and agreements of the tribe and Reclamation with regard to access and use of sacred sites on Federal lands, as well as how notice should be provided in the event there are potential adverse impacts to the site, access to the site, or the site's environs. Government-to-government protocols may also be established through MOA. Topics addressed in the MOA may include, though need not be limited to:

(i) Identification of site or geographic area of interest: The specific location of the sacred site is not necessarily required in this document, but only the understanding that a specified area contains sensitive sites and that the tribe wishes to be notified when Reclamation contemplates actions within that area.

(ii) Notification processes: This section should explain the "when, how and where" of Reclamation notification to the tribe concerning potential Reclamation actions that may affect sacred sites.

(iii) Contact persons: The Reclamation and tribal contact persons for notification, consultation, and access needs should be identified.

(iv) Special accommodations that are being sought or have been agreed to: Examples of such accommodations are specific date(s) for which access is required; and restrictions of certain activities that are not compatible with the practitioners' activities, where the restrictions have been agreed to by Reclamation and the tribe and deemed legally permissible by the Solicitor's Office.

(v) Dispute resolution and hold harmless clauses: Specify procedures that will be used to resolve potential disagreements, as well as clauses concerning liability. As required by 43 CFR 429, all rights-of-use for access to sacred sites will include an appropriate solicitor-approved hold harmless clause.

(vi) Formal land use instruments: If formal land use instruments are necessary, specify the types of instruments required and the process for obtaining them.

These memoranda or other instruments should be entered into in a manner consistent with the June 14, 1996, Reclamation policy and procedures for maintaining government-to-government relationships, the February 3, 1998, Reclamation protocol guidance, as well as with any

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subsequently issued Reclamation guidance concerning consultation with tribal governments.

Generally the actual grant or authorization to use Federal lands cannot be made through a MOA, but must be made through a formal land use instrument, such as an access permit or easement grant. When it is desired to grant authorization in a MOA, the appropriate Realty Officer or the Solicitor's Office will be conferred with. When necessary to issue a formal land use instrument, some tribes may prefer that group permits be issued to it, rather than individual permits to its members; this preference should be accommodated when feasible.

E. Other issues:

1. Confidentiality of information regarding sacred sites: Reclamation's files are generally accessible to the public, unless protected from disclosure by Federal law. If a sacred site is also a "historic property" as defined by the NHPA or an "archeological resource" as defined by the ARPA, information about such sites may qualify to be withheld from public scrutiny, as both NHPA and ARPA exempt sections of the files of qualifying cultural resources from FOIA requests. However, sensitive information could still be released if the FOIA request is successfully appealed. Furthermore, Reclamation will not be able to prevent release of sensitive information if it is subpoenaed as information during a lawsuit. Reclamation therefore strongly advises tribes to maintain in their possession all information regarding sacred sites that they believe is too sensitive for public release.

Example: A tribe's traditional religious practitioner's are concerned about possible adverse impacts of actions Reclamation is considering. The tribal council may choose to pass a resolution requesting that certain impacts in specified area be avoided because of possible harm to sacred sites within all or part of the affected areas. The resolution can become part of the public record that Reclamation can show to prove it was not arbitrary or capricious in seeking to avoid certain impacts; however, the location of the site is protected, as the resolution does not pinpoint the site.

2. No financial compensation to tribal representatives for developing sacred sites inventory: Generally Reclamation does not provide compensation for contributing information or comments as part of a compliance process, although there may be some cases when this is done. Consequently, input on sacred sites provided by Indian tribes, organizations, and individuals will usually be on a non-compensable basis. In the course of developing inventories of, or information on, sacred sites, Reclamation should try to avoid creating situations whereby travel or per diem costs are incurred. Efforts should be made to accommodate Indian participation whenever possible by holding meetings on reservations or at other mutually-determined locations, and by conferring with tribes to establish mutually agreed-upon time frames and consultation protocols.

3. Dispute resolution: When appropriate, Reclamation will work with the aggrieved tribe or religious practitioner to resolve EO disputes using ADR procedures based on non-

adversarial methods that show mutual respect for each other's interests. By mutual consent of the pertinent Reclamation office and the potentially affected tribe, agreed-upon neutral parties may be used to facilitate or mediate disputes. Although the use of ADR methods is encouraged, a tribe or Indian religious practitioner would not be precluded from using formal appeals processes that may apply in a specific situation.

4. *Evaluating implementation effort:* Reclamation managers and staff involved in implementing the EO should meet periodically with affected tribes, authorized representatives or Indian religious practitioners to assess the effectiveness of the EO implementation process and receive suggestions concerning changes in the way Reclamation implements the EO. Unless the Regional Director has established other coordination procedures, the appropriate Area Manager will coordinate these meetings.

Reclamation managers and staff should also meet periodically among themselves to discuss the effectiveness of the implementation processes, share experiences to aid other staff in addressing issues, and recommend changes in implementing the EO. These meetings will be coordinated by the Director, Native American Affairs Office. Reclamation managers and staff, as well as affected tribes and practitioners, are also encouraged to provide interim feedback to the Director concerning problems encountered in implementing the EO and, when available, recommended solutions to resolve the problems.

5. *Internal training:* Reclamation will provide training for managers and staff responsible for carrying out activities that could be affected by the EO, subject to the availability of funding and the ascertainment of need.

6. *Impact on program costs:* Overall the implementation of the EO could cause some increases in program costs. The impact on planning and environmental activities is expected to be minimal, as the EO represents more of a clarification as to what is required rather than a new policy. However, the policies stated by the EO could impact the decisionmaking process in some cases, resulting in some increased costs for project or program implementation or operations.

7. *Reclamation authority and funding for activities:* The EO does not create a new authority for carrying out or funding activities carried out to achieve its goals. Activities undertaken to implement the EO will be treated as part of existing projects or programs, and those funds will be appropriately used to ensure that the requirements of the EO are satisfied.

8. *Designation of sacred site coordinators.* - Regional Directors and Area Managers are encouraged to designate one or more staff who shall be responsible for coordinating or carrying out sacred sites activities, such as preparing the sections of the NEPA document addressing the EO or responding to requests for access to sacred sites. Regional Native American program managers are urged to maintain lists of all such coordinators, within their region and to provide copies of the current list to the Director, Native American Affairs Office. Doing this will facilitate the ability of Reclamation to respond quickly to inquiries concerning the EO.

Appendix A: Consultation for EO 13007

The following, which was adapted from the November 1996 draft of the NHPA Section 110 guidelines, should be considered when consulting with Indians concerning sacred sites, absent other Reclamation guidance to the contrary. Reclamation's *Protocol Guidelines: Consulting with Indian Tribal Governments* should also be referred to for more guidance concerning carrying out consultation, including developing protocol to conduct consultation with tribes.

"Consultation" is the process of seeking and considering the views of others. It means to confer and discuss, not simply inform. Reclamation does not have to accept or act upon the input that it receives through consultation; however, it is obligated to consider that input when it is relevant to the issue(s) under study or consideration.

Reclamation will consult to: (i) gain information and a better understanding of issues, and (ii) ensure that others who may be affected by their decisions have a reasonable opportunity to provide input.

Whom to Consult

For EO purposes, consultation should occur at least with tribes indicating an interest in potentially affected sacred sites. Preferably, Reclamation should also offer to consult with tribes thought to have an interest in Reclamation activities, although they may not have expressed it, including those tribes who currently or historically have used the lands affected or potentially affected by Reclamation activities.

When to Consult

Consultation should be done as early in, and continue through, the decision-making process. Soliciting others' advice and opinions on which action to take when the course of action has already been determined is not true consultation. If Reclamation does this, it is really seeking to have a decision "ratified" or otherwise agreed with.

What to Consult About and at What Level of Detail

In determining what to consult about and at what level of detail, Reclamation should consider what it needs to know to make a wise decision. In most situations, the less specific the decision being made, then the less specific the information that is needed. Information gained through the consultation process may include such items as: areas that contain sacred sites; and understanding the tribe's position on various issues, such as what constitutes respectful treatment of a sacred site.

How to Consult

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The consultation procedures that Reclamation uses help ensure that it achieves the goals of consultation. To work, Reclamation's procedures for consulting must be both systematic and flexible. Systematic procedures allow for information to be obtained in a consistent format. Flexible procedures permit accommodation of unusual circumstances, such as consulting with groups or individuals whose cultural values or modes of communication differ from standard government methods of communication.

Whether consulting on broad agency programs or specific projects, Reclamation should:

- Approach the process in good faith, and should not assume an adversarial relationship
- Make its interests and constraints (including laws, processes, and schedules) clear at the beginning.
- Be forthcoming about the degree of confidentiality that tribes, individuals or groups can expect in terms of their identity and the information that they provide. (As a general practice, Reclamation should not request or seek confidential information unless it can demonstrate a need for such information and can ensure that it will not be released through avenues such as FOIA requests.)
- Seek to acknowledge and understand others' interests.
- Identify shared interests.
- Consider a full range of options.
- Try to identify options that satisfy all parties.

Traditionally, Reclamation has initiated consultation through formal processes, such as notices in the *Federal Register* and form letters describing its planned activities and asking for comments or attendance at meetings. Such meetings commonly are part of the NEPA public involvement processes. Reclamation should consider that some tribal governments have established, legally-based procedures for acting on requests for information or making decisions. These procedures must be followed and can sometimes be time consuming. Reclamation should take this into consideration when planning for and conducting consultations with tribal governments.

When Reclamation accommodates others in the ways it takes in information and provides information back, it benefits from doing so. Reclamation may find that asking others how they wish to be "consulted with" and agreeing on "how to consult" during the first communications will facilitate later consultation and avoid confusion and misunderstandings. Professional facilitators or mediators may be helpful.

In the spirit of these guidelines, consultation should generally start with a letter to appropriate tribal entities, then be followed up with phone calls or personal visits, if necessary, depending on the activity being considered. Regions may establish, consistent with other Reclamation consulting guidance, consultation procedures appropriate for their geographic areas and the tribes with whom they will be consulting.

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Appendix B:

President Clinton's Executive Order on Indian Sacred Sites

This document entered May 27, 1996

Released by the White House, May 24, 1996

SUBJECT: *INDIAN SACRED SITES*

By the authority vested in me as President by the Constitution and the laws of the United States, 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 Public Law 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.

Section 2. Procedures.

(a) Each executive branch agency with statutory or administrative responsibility for the

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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, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments "

(b) Within 1 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.

Section 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)).

Section 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.

Signed: *William J. Clinton*
The White House
May 24, 1996

Other Indian Sacred Sites References
(July 2004)

Department of Interior, Departmental Manual, Part 512, Chapter 3- Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites (effective Date 6/5/98)

ECM 97-2- Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands (See Indian Trust Asset attachment).

Additionally, the following reference provides guidance to carrying out consultation with federally recognized Indian tribes: Reclamation's **Protocol Guidelines: Consulting with Indian Tribal Governments**, February 3, 1998 (Revised February 9, 2001).