

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 2269

To protect Native American cultures and to guarantee the free exercise of religion by Native Americans.

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IN THE SENATE OF THE UNITED STATES

JULY 1 (legislative day, JUNE 7), 1994

Mr. INOUE introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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## A BILL

To protect Native American cultures and to guarantee the free exercise of religion by Native Americans.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “Native American Cultural Protection and Free Exercise  
6 of Religion Act of 1994”.

7 (b) TABLE OF CONTENTS.—

- Sec. 1. Short title; table of contents.
- Sec. 2. Policy.
- Sec. 3. Definitions.

TITLE I—PROTECTION OF NATIVE AMERICAN SACRED SITES

- Sec. 101. Findings.
- Sec. 102. Federal Lands Access.

★(Star Print)

- Sec. 103. Land management decisions; planning, identification, and notice.
- Sec. 104. Consultation.
- Sec. 105. Administrative proceeding.
- Sec. 106. Tribal authority over Native American sacred sites on Indian lands.
- Sec. 107. Application of other laws.
- Sec. 108. Confidentiality.
- Sec. 109. Criminal sanctions.

TITLE II—TRADITIONAL USE OF PEYOTE

- Sec. 201. Findings.
- Sec. 202. Traditional use of peyote.

TITLE III—PRISONERS' RIGHTS

- Sec. 301. Rights.

TITLE IV—CULTURAL AND RELIGIOUS USE OF EAGLES AND OTHER ANIMALS AND PLANTS

- Sec. 401. Cultural and religious use of eagles.
- Sec. 402. Other animals and plants.

TITLE V—JURISDICTION AND REMEDIES

- Sec. 501. Jurisdiction and remedies.

TITLE VI—MISCELLANEOUS

- Sec. 601. Savings clause.
- Sec. 602. Severability.
- Sec. 603. Authorization of appropriations.
- Sec. 604. Regulations.
- Sec. 605. Protections.
- Sec. 606. Effective date.

1 **SEC. 2. POLICY.**

2       It is the policy of the United States, in furtherance  
3 of the policy established in the joint resolution entitled  
4 “Joint Resolution American Indian Religious Freedom”,  
5 approved August 11, 1978 (42 U.S.C. 1996), to protect  
6 and preserve the inherent right of any Native American  
7 to believe, express, exercise and practice his or her tradi-  
8 tional culture and religion, including, but not limited to,  
9 access to any Native American sacred site, use and posses-

1 sion of sacred objects, and the freedom to worship through  
2 ceremonial and traditional rites.

3 **SEC. 3. DEFINITIONS.**

4 For the purposes of this Act:

5 (1) The term “adverse impact” means any ac-  
6 tion or any potential action which has the effect or  
7 which will have the effect of—

8 (A) altering, disturbing, desecrating or de-  
9 stroying a Native American sacred site;

10 (B) inhibiting, infringing upon or interfer-  
11 ing with Native American traditional cultural  
12 practices; or

13 (C) imposing a burden upon the free exer-  
14 cise of a Native American religion.

15 (2) The term “aggrieved party” means any Na-  
16 tive American, Indian tribe, Native Hawaiian organi-  
17 zation, Native American practitioner or Native  
18 American traditional leader as defined by this Act,  
19 and to whom the provisions of this Act apply.

20 (3) The term “consultation” means, at a mini-  
21 mum, agency-initiated outreach activities which will  
22 result in a meaningful process for face-to-face delib-  
23 erations and conferral with all Indian tribes, Native  
24 Hawaiian organizations and Native American tradi-  
25 tional leaders that should be consulted and which is

1 conducted in a realistic manner that is cognizant of  
2 the cultural values, socioeconomic factors and ad-  
3 ministrative structures, if any, of the Indian tribes  
4 or Native Hawaiian organizations with an interest in  
5 the land in question.

6 (4) The term “covered Federal activity”  
7 means—

8 (A) any new or reauthorized project, pro-  
9 gram or activity, or any new phase of existing  
10 projects, programs and activities, under the di-  
11 rect or indirect jurisdiction of a Federal agency  
12 including but not limited to—

13 (i) those carried out by or on behalf  
14 of the agency, on Federal or State lands,  
15 or involving navigable waters;

16 (ii) those activities on Federal or  
17 State lands, or involving navigable waters,  
18 requiring a Federal permit, license or ap-  
19 proval;

20 (iii) those taking place on Federal or  
21 State lands, or involving navigable waters,  
22 subject to state regulation pursuant to a  
23 delegation or approval by a Federal  
24 agency;

- 1 (iv) those carried out with more than  
2 de minimis Federal financial assistance;
- 3 (v) renewals, reauthorizations, reli-  
4 censing, and similar decisions;
- 5 (vi) regular and cyclical reviews of  
6 land management plans by agencies;
- 7 (vii) programs funded by Federal  
8 highway funds;
- 9 (viii) activities subject to licensing by  
10 the Federal Energy Regulatory Commis-  
11 sion, or the Nuclear Regulatory Commis-  
12 sion;
- 13 (ix) the siting of hazardous, low-level  
14 nuclear or transuranic waste or toxic waste  
15 disposal, and disposal facilities, and the  
16 disposal of such materials; or
- 17 (x) those activities that would not be  
18 covered Federal activities by virtue of sec-  
19 tion 3(4)(B)(i), if an Indian tribe affirma-  
20 tively elects to have the provisions of this  
21 Act apply to a particular covered Federal  
22 activity on Indian lands which are subject  
23 to the tribe's jurisdiction;
- 24 (B) the term "covered Federal activity"  
25 does not include—

1 (i) regulations, projects, activities, or  
2 programs operated, approved, or sponsored  
3 by Indian tribes, including, but not limited  
4 to, those projects, activities, or programs  
5 which are funded in whole or in part by  
6 Federal funds pursuant to contract, com-  
7 pact, grant or agreement, or which require  
8 Federal permits, licenses or approvals, un-  
9 less the Indian tribe invokes section  
10 3(4)(A)(x);

11 (ii) ongoing and continuing activities  
12 underway prior to enactment of this Act,  
13 or activities for which a final commitment  
14 has been made prior to enactment of this  
15 Act and for which substantial funds have  
16 been spent or implementation is substan-  
17 tially underway;

18 (iii) routine activities that an agency  
19 determines through negotiations with In-  
20 dian tribes or Native Hawaiian organiza-  
21 tions to be unlikely to affect Native Amer-  
22 ican sacred sites or traditional cultural  
23 practices, and maintenance activities in-  
24 volving structures or projects existing at  
25 the time of enactment of this Act or later

1 constructed in compliance with this Act  
2 which do not change the size or scale or  
3 the existing use of those projects or struc-  
4 tures;

5 (iv) activity on State land with de  
6 minimis Federal funding and no other  
7 Federal role;

8 (v) any actions on private lands, other  
9 than those enumerated in subsection (A),  
10 even though those actions are subject to  
11 Federal permit, license, or approval, or  
12 State regulation of private lands under a  
13 Federal delegation of authority, or con-  
14 ducted with de minimis Federal funding;  
15 or

16 (vi) direct Federal loans and Federal  
17 loan guarantees to private entities.

18 (5) The term “ Federal agency” means any de-  
19 partment, agency, or instrumentality of the United  
20 States Government.

21 (6) The term “governmental agency” means  
22 any agency, department, or instrumentality of—

23 (A) the United States; or

24 (B) a State, in the case of a covered Fed-  
25 eral activity described in paragraph (4)(A)(iii).

1 The term “governmental agency” does not include  
2 an agency, department, or instrumentality of an In-  
3 dian tribe.

4 (7) The term “Indian” means an individual  
5 who is a member of an Indian tribe; an Alaska Na-  
6 tive, or an individual who meets the definition in  
7 section 809(b) of the Indian Health Care Improve-  
8 ment Act (25 U.S.C. 1679(b)), except that an In-  
9 dian community need not be served by a local pro-  
10 gram of the Indian Health Service in order to qual-  
11 ify as an Indian community for purposes of this defi-  
12 nition.

13 (8) The term “Indian lands” means all lands  
14 within the limits of any Indian reservation notwith-  
15 standing the issuance of any patent; public domain  
16 Indian allotments; all other lands title to which is ei-  
17 ther held in trust by the United States for the bene-  
18 fit of any Indian tribe or individual or held by any  
19 Indian tribe or individual subject to restriction by  
20 the United States against alienation; all dependent  
21 Indian communities; and all fee lands owned by an  
22 Indian tribe.

23 (9) The term “Indian tribe” means any tribe,  
24 band, nation, pueblo, or other organized group or  
25 community of Indians, including any Alaska Native

1 village (as defined in, or established pursuant to, the  
2 Alaska Native Claims Settlement Act (43 U.S.C.  
3 1601 et seq.)), which is recognized as eligible for the  
4 special programs and services provided by the Unit-  
5 ed States to Indians because of their status as Indi-  
6 ans.

7 (10) The term “land” or “lands” means surface  
8 and subsurface land within the jurisdiction of the  
9 United States or the respective States, including  
10 submerged land of any kind or interest therein, and  
11 all water and waterways occupying, adjacent to, or  
12 running through the land.

13 (11) With respect to the cultural protections  
14 provided under this Act, the term “Native Amer-  
15 ican” means any Indian or Native Hawaiian.

16 (12) With respect to the cultural protections  
17 provided under this Act, the term “Native American  
18 practitioner” means any Native American who prac-  
19 tices a Native American religion as part of a Native  
20 American traditional culture.

21 (13) With respect to the cultural protections  
22 provided under this Act, the term “Native American  
23 religion” means any traditional religion which is  
24 practiced by Native Americans, the origin and inter-

1       pretation of which is deeply embedded or rooted in  
2       a Native American traditional culture.

3               (14) With respect to the cultural protections  
4       provided under this Act, the term “Native American  
5       Sacred Site” means any geophysical or geographical  
6       area or feature which is sacred by virtue of its tradi-  
7       tional cultural or religious significance or ceremonial  
8       use, or by virtue of a ceremonial or cultural require-  
9       ment, including a religious requirement, that a natu-  
10      ral substance or product for use in Native American  
11      traditional ceremonies be gathered from that par-  
12      ticular location.

13              (15) The term “Native American traditional  
14      culture” means the traditional practices, customs,  
15      belief systems, lifeways, ceremonies, and rituals, in-  
16      cluding religious practices and beliefs, that are inte-  
17      gral to and unique aspects of Native American cul-  
18      tural traditions and heritage.

19              (16) With respect to the cultural protections  
20      provided under this Act, the term “Native American  
21      traditional leader” means any Native American  
22      practitioner who is recognized by an Indian tribe or  
23      traditional tribal community or Native Hawaiian  
24      community as being responsible for performing du-  
25      ties relating to the cultural traditions, including reli-

1 religious traditions of the tribe or traditional tribal  
2 community or Native Hawaiian community or as  
3 having a leadership role in an Indian tribe or tradi-  
4 tional tribal community or Native Hawaiian commu-  
5 nity based upon its traditional cultural or ceremonial  
6 practices, including religious practices.

7 (17) With respect to the cultural protections  
8 provided under this Act, the term “Native Hawai-  
9 ian” means any individual who is a descendant of  
10 the aboriginal Polynesian people who, prior to 1778,  
11 occupied and exercised sovereignty and self-deter-  
12 mination in the area that now comprises the State  
13 of Hawaii, and who is recognized as eligible for the  
14 special programs and services provided by the Unit-  
15 ed States to Native Hawaiians because of their sta-  
16 tus as Native Hawaiians or Native Americans.

17 (18) With respect to the cultural protections  
18 provided under this Act, the term “Native Hawaiian  
19 organization” means any organization which is com-  
20 posed primarily of Native Hawaiians, and serves and  
21 represents the traditional cultural interests of Native  
22 Hawaiians and whose members—

23 (A) practice a Native American culture, in-  
24 cluding a Native American religion, or conduct  
25 traditional ceremonial rituals, or

1 (B) utilize, preserve and protect Native  
2 American sacred sites.

3 (19) The term “public land” means any land as  
4 defined in section 3(10) of this Act which is owned  
5 by the United States, or the respective States, or po-  
6 litical subdivisions thereof, but shall not include In-  
7 dian lands as defined in section 3(8).

8 (20) The term “State” means any State of the  
9 United States and any and all political subdivisions  
10 thereof, and the District of Columbia.

11 **TITLE I—PROTECTION OF NA-**  
12 **TIVE AMERICAN SACRED**  
13 **SITES**

14 **SEC. 101. FINDINGS.**

15 The Congress finds that—

16 (1) the traditional cultural practices, including  
17 religious practices, of Native Americans are integral  
18 and inseparable parts of their cultures, traditions  
19 and heritages which greatly enhance the vitality of  
20 Native American communities and tribes and the  
21 well-being of Native Americans in general;

22 (2) the European concept that religion is an ac-  
23 tivity or belief that is separate from all other aspects  
24 of daily life, or that religion is separable from cul-

1       ture, is a concept that has no application in the tra-  
2       ditional cultures of Native Americans;

3           (3) throughout American history, the mani-  
4       festation of Native American traditional cultures, in-  
5       cluding the free exercise of Native American reli-  
6       gions, has been infringed upon, interfered with, and  
7       even prohibited by the Federal Government and the  
8       devastating impact of these governmental actions  
9       continues to the present day;

10          (4) the United States has a unique, govern-  
11       ment-to-government relationship with Indian tribes  
12       and a special historic trust relationship, which per-  
13       mits the United States to take measures to protect  
14       against interference with the continuing cultural co-  
15       hesiveness and integrity of Indian tribes and Native  
16       American traditional cultures;

17          (5) as part of the historic Federal-Indian trust  
18       relationship it is the intent of the United States to  
19       pursue enforceable Federal policies which will pro-  
20       tect the Native American community and tribal vi-  
21       tality and cultural integrity, and which will not in-  
22       hibit, interfere with or infringe upon Native Amer-  
23       ican traditional cultural practices or impose a bur-  
24       den on the free exercise of Native American reli-  
25       gions;

1           (6) many Native American traditional cultures,  
2 including Native American religions, hold certain  
3 lands or natural formations in the United States to  
4 be sacred, and in order for those sites to be in a con-  
5 dition appropriate for cultural use, including reli-  
6 gious or ceremonial use, the physical environment,  
7 water, plants and animals associated with those sites  
8 must be protected;

9           (7) such Native American sacred sites are an  
10 integral and vital part of, and inextricably inter-  
11 twined with, many Native American traditional cul-  
12 tures, including Native American religions, and the  
13 practices associated with such traditional cultures;

14           (8) the traditional use and gathering, harvest-  
15 ing, or maintaining of natural substances or natural  
16 products for cultural purposes, including religious  
17 and ceremonial purposes, are an integral and vital  
18 part of, and are inextricably intertwined with, many  
19 Native American traditional cultures, including Na-  
20 tive American religions;

21           (9) many of these Native American sacred sites  
22 are found on lands which were part of the aboriginal  
23 territory of Indians or Native Hawaiians, but which  
24 now are held by the United States, or are the sub-  
25 ject of Federal activities;

1           (10) governmental land use decisions have the  
2 potential to have an adverse impact on Native Amer-  
3 ican traditional cultural practices, including Native  
4 American religions;

5           (11) many Native American traditional cultural  
6 practices, including religious and ceremonial prac-  
7 tices, require a measure of privacy and isolation; and  
8 certain traditional cultural ceremonies and activities  
9 cannot be performed if nonparticipants can observe  
10 the practices or ceremonies or activities, even from  
11 a distance, and in some situations the lack of pri-  
12 vacy or isolation inhibits, infringes upon, interferes  
13 with, or precludes certain Native American tradi-  
14 tional cultural practices, including traditional reli-  
15 gious practices;

16           (12) some Indian tribes, such as the Pueblos of  
17 New Mexico, as well as some aspects of Native Ha-  
18 waiian culture, have traditional cultural and reli-  
19 gious tenets which prohibit disclosure of information  
20 concerning their sacred sites and their traditional  
21 beliefs and practices, mandate secrecy and impose  
22 internal sanctions to enforce these prohibitions,  
23 making it impossible for them to identify the man-  
24 ner in which any particular governmental activity  
25 would have an adverse impact on their traditional

1 cultures or impose a burden on the free exercise of  
2 their religions;

3 (13) lack of sensitivity to, or understanding of,  
4 Native American traditional cultures, including Na-  
5 tive American religions has resulted in the absence  
6 of a coherent policy for the protection of Native  
7 American sacred sites and the failure to consider the  
8 impacts of Federal activities upon Native American  
9 sacred sites;

10 (14) the Supreme Court of the United States,  
11 in the case of *Lyng v. Northwest Indian Cemetery*  
12 *Protective Association*, 485 U.S. 439 (1988) ruled  
13 that the free exercise clause of the First Amendment  
14 does not restrict the Government's management of  
15 its lands, even if certain governmental actions would  
16 infringe upon or destroy the ability to practice reli-  
17 gion, so long as the Government's action does not  
18 compel individuals to act in a manner which is con-  
19 trary to their religious beliefs;

20 (15) the Supreme Court's holding in the case of  
21 *Lyng v. Northwest Indian Cemetery Protective Asso-*  
22 *ciation* creates a chilling and discriminatory effect  
23 on Native American traditional cultures and on the  
24 free exercise of Native American religions;

1           (16) the Congress has enacted numerous laws  
2           which regulate and restrict the discretion of Federal  
3           agencies for the sake of environmental, historical,  
4           economic, and cultural concerns, but has never en-  
5           acted a judicially enforceable law comparably re-  
6           stricting agency discretion for the sake of the site-  
7           protective requirements specifically associated with  
8           the protection of Native American traditional cul-  
9           tural practices, including the free exercise of Native  
10          American religions;

11          (17) the lack of a judicially-enforceable Federal  
12          law and of a coherent Federal policy to accommo-  
13          date the uniqueness of Native American traditional  
14          cultures, including Native American religions, results  
15          in unique and adverse impacts on Native American  
16          traditional cultures, burdens the free exercise of Na-  
17          tive American religions, and impairs the vitality of  
18          Indian tribes, traditional tribal communities, and  
19          Native Hawaiian communities; and

20          (18) the Congress has the authority to enact  
21          laws to assure the protection and preservation of  
22          Native American traditional cultures, including the  
23          free exercise of Native American religions, based  
24          upon the special trust relationship, and pursuant to  
25          section 8, article I of the United States Constitution

1 and the first, fifth, and fourteenth amendments to  
2 the United States Constitution.

3 **SEC. 102. ACCESS TO FEDERAL LANDS.**

4 (a) IN GENERAL.—Native American practitioners  
5 shall be permitted access to Federal lands at all times for  
6 Native American traditional cultural, or ceremonial or reli-  
7 gious purposes, including access to gather, harvest, or  
8 maintain natural substances or natural products for Na-  
9 tive American traditional cultural purposes.

10 (b) Federal agencies may take reasonable and nar-  
11 rowly tailored measures to assure that access and use of  
12 lands under this Act do not—

13 (1) have a direct, significant and negative im-  
14 pact upon specific national security interests or the  
15 implementation of the Endangered Species Act; or

16 (2) present an immediate threat of serious bod-  
17 ily harm to any person or immediate and serious  
18 harm to the environment.

19 Where other feasible means are available for avoiding ad-  
20 verse impacts on Native American sacred sites, Native  
21 American traditional cultural practices, and the free exer-  
22 cise of Native American religions, those means shall be  
23 utilized before access is restricted.

24 (c) Terms of access may be included in a memoran-  
25 dum of agreement pursuant to section 104(a)(3)(B).

1 (d) LIMITATIONS AGAINST VEHICLES.—Paragraph  
2 (a) does not authorize the use of motorized vehicles or  
3 other forms of mechanized transport in roadless areas  
4 where such use is prohibited by law.

5 (e) TEMPORARY PROTECTIVE MEASURES.—Upon the  
6 request of an Indian tribe, a Native Hawaiian organization  
7 or a Native American traditional leader, the Secretary of  
8 the department whose land is involved, or a local land  
9 manager where such authority has been delegated, may  
10 from time to time temporarily close to the general public  
11 use of one or more specific portions of Federal land and  
12 may take such other reasonable and temporary measures  
13 as necessary in order to protect the privacy of traditional  
14 cultural, ceremonial or religious activities in such areas  
15 by Native Americans. Any such measures shall be taken  
16 so as to affect the smallest practicable area for the mini-  
17 mum period necessary for such purposes.

18 **SEC. 103. FEDERAL LAND MANAGEMENT, IDENTIFICATION**  
19 **OF LANDS, PLANNING AND NOTICE.**

20 (a) IN GENERAL.—Each Federal agency shall man-  
21 age any lands under its jurisdiction in a manner that com-  
22 plies with the provisions of this Act.

23 (b) IDENTIFICATION OF LANDS BY SECRETARY.—

24 (1) IN GENERAL.—(A) For the purpose of as-  
25 suring that a governmental agency properly deter-

1 mines whether a proposed cover Federal activity will  
2 have an adverse impact on a Native American sacred  
3 site and which affected parties should be provided  
4 notice of a proposed activity, the head of each land  
5 managing agency, in conjunction with the Secretary  
6 of the Interior and tribal governments and Native  
7 Hawaiian organizations, shall identify land areas  
8 with which a tribe or Native Hawaiians have aborigi-  
9 nal, historic, cultural or religious ties.

10 (B) For purposes of this section, within 90 days  
11 following the date of enactment of this Act, Native  
12 Hawaiian organizations shall notify the Secretary of  
13 their desire to receive notice of proposed covered  
14 Federal activities.

15 (2) As part of its obligations pursuant to this  
16 section, within 90 days following the date of enact-  
17 ment of this Act, the Secretary of the Interior shall  
18 contact all Indian tribes, and Native Hawaiian orga-  
19 nizations to request a broad geographic description  
20 of the lands as to which each Indian tribe or Native  
21 Hawaiian organization desires notice of covered Fed-  
22 eral activity and, upon receipt of responses from In-  
23 dian tribes and Native Hawaiian organizations, shall  
24 provide such land descriptions to all Federal agen-  
25 cies.

1           (3) Within 18 months following the date of en-  
2           actment of this Act, the Secretary shall establish a  
3           list of all Indian tribes and Native Hawaiian organi-  
4           zations who have responded and the lands they have  
5           identified. Such lists shall not be published but shall  
6           be made available to agencies for the purpose of  
7           identifying Indian tribes and Native Hawaiian orga-  
8           nizations and areas for which notice of covered Fed-  
9           eral activities shall be provided.

10           (4) While the list is being developed, each Fed-  
11           eral land managing agency shall also research its  
12           own sources, including agency contacts with Indian  
13           tribes, Native Hawaiian organizations, or Native  
14           American traditional leaders and written sources, to  
15           collect information as to Native American traditional  
16           cultures and regions potentially affected by activities  
17           on land which it manages and shall make a good  
18           faith effort to identify and notify Indian tribes. Na-  
19           tive Hawaiian organizations, and Native American  
20           traditional leaders who may have an interest in pro-  
21           posed covered Federal activities.

22           (5) ONGOING IDENTIFICATION.—Nothing in  
23           this section shall preclude an agency or a tribal gov-  
24           ernment or a Native Hawaiian organization from  
25           continuing to conduct an ongoing identification proc-

1        ess, which may supplement the process required by  
2        this subsection.

3        (c) PLANNING PROCESS.—Each Federal agency man-  
4        aging lands under its jurisdiction including, but not lim-  
5        ited to, activities pursuant to the National Forest Manage-  
6        ment Act (16 U.S.C. 1600 et seq.), and the Federal Land  
7        Policy and Management Act (43 U.S.C. 1701 et seq.),  
8        shall as part of its planning process—

9            (1) consult, during the earliest possible part of  
10        the planning process, with Indian tribes, Native Ha-  
11        waiian organizations and Native American tradi-  
12        tional leaders who have notified the agency of their  
13        interest in the land in question pursuant to sub-  
14        section (b);

15            (2) in addition to the notices required in regard  
16        to covered Federal activity required by subsection  
17        (d), provide for notice of all covered Federal activity  
18        with the potential to have an adverse impact on land  
19        areas specified by an Indian tribe or Native Hawai-  
20        ian organization, in writing, as land areas that are  
21        of direct interest to the Indian tribe or Native Ha-  
22        waiians, whether or not the agency believes that  
23        such activity will or may have an adverse impact on  
24        a Native American sacred site;

1           (3) ensure that its land management plans are  
2 consistent with the provisions and policies of this  
3 Act; and

4           (4) maintain the confidentiality of specific de-  
5 tails of a Native American traditional culture or reli-  
6 gion or the significance of a Native American sacred  
7 site to that culture or religion in accordance with the  
8 procedures specified in sections 107 and 108 of this  
9 Act.

10       (d) NOTICE AND DOCUMENTATION—DUTY OF AGEN-  
11 CIES.—

12           (1) NOTICE TO TRIBES OR NATIVE HAWAIIAN  
13 ORGANIZATIONS.—Before a governmental agency  
14 proceeds on lands identified pursuant to subsection  
15 (b) with any covered Federal activity that may have  
16 an adverse impact on a Native American sacred site,  
17 the governmental agency shall consult with poten-  
18 tially-affected Indian tribes, Native Hawaiian orga-  
19 nizations and Native American traditional leaders,  
20 and after the consultation has occurred and the  
21 agency has taken into account the information ob-  
22 tained through that process, formally provide a writ-  
23 ten notice containing a geographical description of  
24 the lands affected by the activity (including informa-  
25 tion on metes and bounds of the lands in question,

1 where available), a map illustrating the lands af-  
2 fected and a description of the proposed action to  
3 each Indian tribe, Native Hawaiian organization, or  
4 Native American traditional leader which has been  
5 identified pursuant to this section as having an in-  
6 terest in the land affected by the proposed covered  
7 Federal activity and any other Indian tribe, Native  
8 Hawaiian organization or Native American tradi-  
9 tional leader known by the agency that may have an  
10 interest in the land affected by the proposed covered  
11 Federal activity.

12 (2) The governmental agency shall fully docu-  
13 ment the efforts made to provide the information to  
14 Indian tribes, Native Hawaiian organizations, and  
15 Native American traditional leaders as required by  
16 this section or any applicable regulations, guidelines,  
17 or policies.

18 (e) RESPONSE TO NOTICE.—

19 (1) IN GENERAL.—Within 90 days of receiving  
20 the notice provided under subsection (d), or within  
21 the time limit of any comment period permitted or  
22 required by any Federal law applicable to the cov-  
23 ered Federal activity, whichever is later, an Indian  
24 tribe, Native Hawaiian organization, or Native  
25 American traditional leader invoking the protection

1 of this title may provide notice in writing to the gov-  
2 ernmental agency that the proposed covered Federal  
3 activity may have an adverse impact on a Native  
4 American sacred site.

5 (2) MODIFICATION OF TIME.—Such time period  
6 may be extended by the agency at its discretion, in-  
7 cluding at the request of a noticed party, or may be  
8 extended or shortened by an agreement negotiated  
9 pursuant to section 104(a)(3)(B).

10 (3) NO DUTY TO RESPOND.—Paragraph (1)  
11 does not impose a duty upon any Indian tribe, Na-  
12 tive Hawaiian organization, or Native American tra-  
13 ditional leader to respond to any notice under this  
14 section.

15 (4) ADDITIONAL INFORMATION.—The Indian  
16 tribe or Native Hawaiian organization or its des-  
17 ignee acting pursuant to paragraph (1) may also  
18 provide the agency with information as to any Na-  
19 tive American traditional leaders or practitioners  
20 who should be included in the notice and consulta-  
21 tion requirements of this section and section 104.

22 (f) RESPONSE PERIOD AND LIMITATION ON ACTIV-  
23 ITY FOLLOWING NOTICE.—

24 (1) In order to allow a full investigation of a  
25 proposed covered Federal activity no action to ap-

1 prove, commence, or complete an activity that is  
2 subject to this section shall be taken by a govern-  
3 mental agency for a period of 90 days following the  
4 date on which notice is provided under subsection  
5 (d) to Indian tribes, Native Hawaiian organizations  
6 or Native American traditional leaders unless or  
7 until—

8 (A) the period of consultation required  
9 under section 104 has been completed;

10 (B) a sacred sites protection agreement  
11 pursuant to section 104(a)(3)(B) has been en-  
12 tered into by the affected Indian tribe or tribes  
13 or Native Hawaiian organization and the gov-  
14 ernmental agency; or

15 (C) all parties entitled to such notice con-  
16 sent to a shorter time period.

17 (2) During the notice and consultation periods  
18 under section 103 and section 104, the governmental  
19 agencies responsible for the covered Federal activity  
20 may continue to engage in planning, studies, or  
21 other preparatory matters provided that such activi-  
22 ties do not constitute a commitment to proceed with  
23 the proposed activity or project.

24 (3) During the 90-day period following formal  
25 notice to Indian tribes, Native Hawaiian organiza-

1 tions and Native American traditional leaders, the  
2 governmental agency shall have the continuing duty  
3 to seek to consult with Indian tribes, Native Hawai-  
4 ian organizations and Native American traditional  
5 leaders potentially affected by the proposed covered  
6 Federal activity.

7 **SEC. 104. CONSULTATION.**

8 (a) IN GENERAL.—

9 (1) EFFECT OF NOTICE.—In order to allow a  
10 full investigation of the consequences of a proposed  
11 covered Federal activity, if an Indian tribe, Native  
12 Hawaiian organization or Native American tradi-  
13 tional leader responds in writing within 90 days of  
14 receiving notice as provided in section 103(e), or  
15 within the time limit of any comment period per-  
16 mitted or required by any Federal law which is ap-  
17 plicable to the covered Federal activity, whichever is  
18 later, the governmental agency shall immediately  
19 discontinue such activity until the agency performs  
20 the duties described in paragraphs (3) and (4).

21 (2) AFTER ACTION DISCOVERY.—If after a cov-  
22 ered Federal activity is underway—

23 (A) the governmental agency becomes  
24 aware that the activity may have an adverse im-  
25 pact on a Native American sacred site, the

1 agency engaged in the activity shall immediately  
2 discontinue such activity until the agency per-  
3 forms the duties set forth in paragraphs (3)  
4 and (4); or

5 (B) an Indian tribe or Native Hawaiian or-  
6 ganization that did not receive notice and did  
7 not know of the covered Federal activity, be-  
8 comes aware that the activity may have an ad-  
9 verse impact on a Native American sacred site  
10 and notifies the governmental agency, the agen-  
11 cy engaged in the activity shall immediately dis-  
12 continue such activity until the agency performs  
13 the duties set forth in paragraphs (3) and (4).

14 (3)(A) CONSULTATION.—The governmental  
15 agency shall consult with any interested party with  
16 a direct interest in the Native American traditional  
17 culture or religion in question concerning the nature  
18 of the adverse impact, and consult about alternatives  
19 which can be identified that would minimize or pre-  
20 vent the adverse impact, including any alternatives  
21 identified by an Indian tribe, Native Hawaiian orga-  
22 nization or Native American traditional leader that  
23 has filed a written objection under this subsection.

24 (B) NEGOTIATED AGREEMENTS.—

1           (i) Upon the request of an Indian tribe or  
2           tribes or Native Hawaiian organization, each  
3           Federal agency or agencies involved in covered  
4           Federal activities shall enter into negotiations  
5           to identify appropriate land management proce-  
6           dures for addressing that tribe's or that Native  
7           Hawaiian organization's interest in the protec-  
8           tion and preservation of its sacred sites and to  
9           avoid any adverse impact on such sites as may  
10          be located on public lands within the jurisdic-  
11          tion of such agencies. Consistent with the public  
12          mission of such agencies and the responsibility  
13          of the United States to support Indian tribes  
14          and tribal members and Native Hawaiians in  
15          the preservation of their sacred sites, each Fed-  
16          eral agency is authorized to enter into sacred  
17          sites protection agreements with Indian tribes  
18          or Native Hawaiian organizations for the pur-  
19          pose of memorializing the land management  
20          procedures that result from consultations and  
21          negotiations. Such agreements may supersede  
22          the planning provisions of section 103(c), the  
23          notice provisions of section 103(d), the con-  
24          sultation provisions of section 103(d)(1) and  
25          section 104, and the access provisions of section

1           102 of this Act as they relate to Indian tribes  
2           or Native Hawaiian organizations that are par-  
3           ties to such an agreement if the agreement spe-  
4           cifically and explicitly includes a provision over-  
5           riding those sections of the Act, or any parts  
6           thereof. The agreements may also include provi-  
7           sion for the delegation by Federal agency offi-  
8           cials of land management responsibilities to the  
9           Indian tribe(s) or Native Hawaiian  
10          organization(s) for designated public lands de-  
11          scribed in the agreement.

12           (ii) In the case of Indian tribes, where  
13          such a delegation of management functions is  
14          included in such agreements, the Federal agen-  
15          cy and the tribe may also agree to use the pro-  
16          cedures and regulations employed under the In-  
17          dian Self-Determination Act, Public Law 93-  
18          638. The agreement may also address the appli-  
19          cation of all or part of title I of this Act to In-  
20          dian lands within the tribe's jurisdiction.

21           (4) RESPONSE TO COMMENTS.—If there is no  
22          resolution of the claims asserted by an aggrieved  
23          party pursuant to subsection (3), the governmental  
24          agency shall prepare and make available to an In-  
25          dian tribe, a Native Hawaiian organization or a Na-

1       tive American traditional leader who has been in-  
2       volved in the consultation process, a document re-  
3       sponding to the comments received. The document  
4       shall—

5               (i) set forth the adverse impact which has  
6               been asserted by the aggrieved party,

7               (ii) assess whether the interest of the gov-  
8               ernment in proceeding with the action is com-  
9               pelling; and

10              (iii) assess whether, based on an analysis  
11              of the alternatives to the proposed action, in-  
12              cluding any alternatives offered by an Indian  
13              tribe, Native Hawaiian organization or Native  
14              American traditional leader that the proposed  
15              activity is the least restrictive means of further-  
16              ing that compelling interest.

17       Where an agency determines to commence a covered  
18       Federal activity, notwithstanding notice from an ag-  
19       grieved party pursuant to section 104(a), it shall  
20       issue a written opinion providing the basis for its de-  
21       cision. The issuance of this decision shall constitute  
22       final agency action for purposes of judicial review  
23       pursuant to section 501, unless the agency estab-  
24       lishes additional administrative review procedures  
25       under section 105.

1           (5) ADDITIONAL INFORMATION.—In any case  
2           where the governmental agency is also required to  
3           prepare a document analyzing the impact of a cov-  
4           ered Federal activity or a decision pursuant to the  
5           National Environmental Policy Act (43 U.S.C. 4321  
6           et seq.), the National Historic Preservation Act (16  
7           U.S.C. 470 et seq.) or any other applicable law, such  
8           agency may incorporate the analysis required by this  
9           section into the contents of the document.

10          (b) CASES WHERE SECRECY IS REQUIRED.—

11           (1) IN GENERAL.—In the case of those Indian  
12           tribes or Native Hawaiians whose traditional cul-  
13           tural or religious tenets prohibit disclosure of infor-  
14           mation concerning their Native American sacred  
15           sites or cultural or religious beliefs or practices, and  
16           mandate secrecy and internal sanctions to enforce  
17           those prohibitions, and where the tribal government  
18           of the affected Indian tribe or a Native Hawaiian or-  
19           ganization so certifies and invokes this subsection—

20                   (A) the tribal government or Native Ha-  
21                   waiian organization shall not be required to re-  
22                   veal the location of the Native American sacred  
23                   site or in what manner the covered Federal ac-  
24                   tivity would have an adverse impact on the site

1 or any information concerning their cultural or  
2 religious beliefs or practices;

3 (B) the tribal government or Native Ha-  
4 waiian organization shall not be required to ex-  
5 plain in what manner any proposed alternative  
6 is or is not less intrusive upon the Native  
7 American cultural or religious practice or sa-  
8 cred sites which may be adversely impacted  
9 than the original proposed covered Federal ac-  
10 tivity; and

11 (C) in engaging in consultation and pre-  
12 paring any document required by this Act, the  
13 governmental agency shall not be required to  
14 include an analysis of adverse impacts upon the  
15 sacred site or the use thereof or the Indian  
16 tribe's or Native Hawaiian organization's cul-  
17 tural or religious beliefs and practices.

18 (2) AFTER CONSULTATION.—If after consulta-  
19 tion—

20 (A) the governmental agency agrees to  
21 pursue a less intrusive alternative proposed by  
22 the Indian tribe or Native Hawaiian organiza-  
23 tion or some other alternative to which the In-  
24 dian tribe or Native Hawaiian organization  
25 agrees; or

1 (B) if no reasonable alternative acceptable  
2 to the tribe or Native Hawaiian organization is  
3 identified, the governmental agency shall be  
4 deemed to have met its obligation under sec-  
5 tions 104 and 105 to consider and pursue the  
6 least intrusive alternative under this Act in re-  
7 gard to the objection raised to the covered Fed-  
8 eral activity by the Indian tribe or Native Ha-  
9 waiian organization invoking this subsection.

10 (C) RESPONSE TO COMMENTS.—If there is  
11 no resolution of the claims asserted by a tribe  
12 or Native Hawaiian organization pursuant to  
13 this subsection, the governmental agency shall  
14 prepare and make available to the tribe or Na-  
15 tive Hawaiian organization a document re-  
16 sponding to the comments received. The docu-  
17 ment shall—

18 (i) set forth the adverse impact which  
19 is asserted by the Indian tribe or Native  
20 Hawaiian organization;

21 (ii) assess whether the interest of the  
22 government in proceeding with the activity  
23 is compelling;

24 (iii) assess whether based on an anal-  
25 ysis of the alternatives the activity is a rea-

1           sonable means of furthering that compel-  
2           ling interest; and

3                   (iv) assess whether the alternatives  
4           identified in 104(b)(2) are reasonable.

5       Where an agency determines to commence a covered  
6       Federal activity, notwithstanding notice from an ag-  
7       grieved party pursuant to 104 (a) and (b) it shall  
8       issue a written opinion providing the basis for its de-  
9       cision. The issuance of this decision shall constitute  
10      final agency action for purposes of judicial review  
11      pursuant to section 501, unless the agency estab-  
12      lishes additional administrative review procedures  
13      under section 105.

14      (c) RULE OF CONSTRUCTION.—Where the provisions  
15      of subsection (b) have been invoked, those requirements  
16      shall control in all circumstances and shall supersede any  
17      conflicting provisions in this Act or any other provision  
18      of law.

19      (d) DISCLOSURE REQUIRED.—Within 30 days of re-  
20      ceipt of any written objection under subsection (a) or (b),  
21      the governmental agency proposing the covered Federal  
22      activity which gave rise to that notice shall make available  
23      to the aggrieved party, all plats, maps, plans, specifica-  
24      tions, socioeconomic, environmental, scientific, archae-  
25      ological or historical studies, and comments and informa-

1 tion in that agency's possession directly relating to said  
2 activity. The agency may withhold—

3 (1) attorney work product prepared in anticipa-  
4 tion of litigation; and

5 (2) information the release of which would jeop-  
6 ardize the litigating position of the United States on  
7 behalf of another tribe.

8 (e) SPECIAL RULE FOR PUEBLOS.—In the case of a  
9 proposed covered Federal activity affecting the manage-  
10 ment, use, or preservation of public land, or any other ac-  
11 tivity or violation under this Act involving potential ad-  
12 verse impacts on any of the Indian pueblos of New Mexico  
13 or any of their sacred sites, the only party who may file  
14 an objection or participate in consultation under this sec-  
15 tion, or file an action under section 105 or 501, shall be  
16 the governor of the affected pueblo or the governor's des-  
17 ignee.

18 (f) EMERGENCY PROVISION.—The process required  
19 by sections 103 and 104 shall not apply if the govern-  
20 mental agency determines that adherence to the process  
21 will—

22 (1) have a direct, significant and negative im-  
23 pact upon specific national security interests or the  
24 implementation of the Endangered Species Act; or

1           (2) present an immediate threat of serious bod-  
2           ily harm to any person or immediate and serious  
3           harm to the environment.

4 **SEC. 105. ADMINISTRATIVE PROCEDURES.**

5           (a) IN GENERAL.—A governmental agency, shall, by  
6 regulation, establish an administrative procedure to imple-  
7 ment the requirements of this title.

8           (b) EXHAUSTION REQUIREMENT.—An aggrieved  
9 party must use a procedure established under paragraph  
10 (a) before filing an action in a Federal district court pur-  
11 suant to section 501 of this Act.

12           (c) BURDEN ON AGENCY.—

13           (1) In the case of any administrative proceeding  
14 in which an aggrieved Indian tribe or Native Hawai-  
15 ian organization objects to the covered Federal activ-  
16 ity or an action by a State on the grounds that it  
17 is or will have an adverse impact on a Native Amer-  
18 ican sacred site, the governmental agency shall have  
19 the burden of proving by a preponderance of the evi-  
20 dence that a covered Federal activity does not or will  
21 not have an adverse impact on a Native American  
22 sacred site.

23           (2) The governmental agency's determination  
24 that a covered Federal activity does not pose or will  
25 not have an adverse impact on a Native American

1 sacred site, shall constitute a final agency action for  
2 purposes of judicial review under section 501 of this  
3 Act.

4 (3)(A) If a governmental agency determines  
5 that a covered Federal activity does pose or will have  
6 an adverse impact on a Native American sacred site,  
7 the governmental agency shall have the burden of  
8 proving by a preponderance of the evidence that the  
9 covered Federal activity—

10 (i) is in furtherance of a compelling gov-  
11 ernmental interest;

12 (ii) is a reasonable means of furthering  
13 that compelling governmental interest; and

14 (iii) in circumstances set forth in section  
15 104(b)(1), the alternatives identified under sec-  
16 tion 104(b)(2) are not reasonable.

17 (B) The agency determination under this para-  
18 graph shall constitute final agency action for pur-  
19 poses of judicial review under section 501 of this  
20 Act.

21 (d) FAILURE OF AGENCY TO MEET BURDEN.—

22 (1) The governmental agency shall retain its  
23 burden of proof at all stages of any proceeding or  
24 decisionmaking process pursuant to this title.

1           (2) If a governmental agency does not meet its  
2 burden of proof under this section, it shall not pro-  
3 ceed with the proposed covered Federal activity.

4           (3) For purposes of this section the phrase  
5 “burden of proof” means the burden of production  
6 and the burden of persuasion.

7 (e) For purposes of this section—

8           (1) a finding of an adverse impact does not re-  
9 quire that an aggrieved party be coerced to act con-  
10 trary to religious beliefs or traditional cultural prac-  
11 tices, and may include consideration of disturbing  
12 the integrity of a sacred site;

13           (2) land management activities, undertakings  
14 and actions which have the potential to have an ad-  
15 verse impact on a Native American sacred site, or  
16 which make a Native American traditional cultural  
17 practice or exercise of a Native American religion  
18 more difficult shall be deemed to constitute an ad-  
19 verse impact; and

20           (3) government ownership of land, by itself,  
21 does not establish a compelling government interest.

22 (f) SPECIAL RULE FOR NATIVE AMERICAN PRACTI-  
23 TIONERS.—For purposes of any administrative proceeding  
24 conducted under this section, Native American practition-

1 ers may elect to provide testimony about their beliefs in  
2 camera or in some other protective procedure.

3 **SEC. 106. NATIVE AMERICAN SACRED SITES ON INDIAN**  
4 **LANDS.**

5 (a) JURISDICTION OF TRIBES.—Indian tribes may  
6 regulate and protect Native American sacred sites located  
7 on Indian lands within their jurisdiction. Nothing in this  
8 Act shall be construed to alter, increase or decrease the  
9 existence or scope of tribal jurisdiction or the application  
10 of tribal law regarding protection of or access to Native  
11 American sacred sites on Indian lands. Nothing in this  
12 Act shall be construed to grant authority to one Indian  
13 tribe to regulate Native American sacred sites which are  
14 within the jurisdiction of another Indian tribe.

15 (b) TRIBAL OPTION.—None of the provisions of title  
16 I of this Act shall apply on Indian lands unless the tribe  
17 with jurisdiction over those lands affirmatively elects to  
18 have those provisions apply to all or any part of the lands  
19 affected or potentially affected. Where an Indian tribe  
20 elects to have the provisions of title I apply to all or any  
21 part of its lands, the Indian tribe shall notify the Secretary  
22 of the Interior regarding the lands to be subject to the  
23 provisions of title I and the Secretary shall publish the  
24 information in the Federal Register.

1 (c) DUTY TO NOTIFY.—This section does not relieve  
2 a governmental agency of any duty pursuant to section  
3 103 to notify an Indian tribe of a covered Federal activity  
4 on Indian lands which may result in changes in the char-  
5 acter or use of a Native American sacred site.

6 (d) NATIONAL SECURITY.—The provisions of this  
7 section shall not apply if the President determines that  
8 national security concerns are directly affected by a cov-  
9 ered Federal activity.

10 (e) DISPUTES BETWEEN TWO OR MORE TRIBES.—

11 (1) When a governmental agency proposes a  
12 covered Federal activity on Indian lands of one In-  
13 dian tribe which may result in changes in the char-  
14 acter or use of a Native American sacred site of an-  
15 other Indian tribe, and the Indian tribe whose sa-  
16 cred site is affected and the Indian tribe on whose  
17 land the site is located agree and so request, the  
18 Secretary of the Interior shall convene a committee  
19 of tribal representatives for the purpose of entering  
20 into negotiations concerning the nature of any ad-  
21 verse impact on the character or use of a Native  
22 American sacred site and alternatives that would  
23 minimize or prevent such an adverse impact.

24 (2) The committee shall consist of tribal rep-  
25 resentatives of the affected Indian tribe or tribes

1 and tribal representatives of the Indian tribe upon  
2 whose lands the sacred site is located, and commit-  
3 tee members shall be selected by the respective In-  
4 dian tribes.

5 (3) The committee shall be convened for the du-  
6 ration of the consultation and negotiation period and  
7 shall meet at the call of the Secretary upon the re-  
8 quest of the affected Indian tribe or tribes and the  
9 Indian tribe upon whose lands the sacred site is  
10 located.

11 **SEC. 107. APPLICATION OF OTHER LAWS.**

12 (a) IN GENERAL.—Nothing in this title shall be con-  
13 strued to deprive any person or entity of any other rights  
14 which might be provided under the laws, regulations,  
15 guidelines, or policies of the Federal, State, and tribal gov-  
16 ernments, including but not limited to the National His-  
17 toric Preservation Act (16 U.S.C. 470 et seq.), to receive  
18 notice of, comment upon, or otherwise participate in the  
19 decisionmaking process regarding a covered Federal  
20 activity.

21 (b) EXISTING PROCEDURES.—To the maximum ex-  
22 tent possible, the procedures required by this Act shall be  
23 incorporated into existing procedures applicable to the  
24 management of Federal lands and decisionmaking proc-

1 esses of Federal agencies engaged in covered Federal  
2 activities.

3 **SEC. 108. CONFIDENTIALITY.**

4 (a) IN GENERAL.—Notwithstanding any other provi-  
5 sion of law, whenever information has been obtained as  
6 a result of or in connection with a proceeding pursuant  
7 to sections 105 or 501 or consultation pursuant to sections  
8 103 and 104, all references pertaining to specific details  
9 of a Native American traditional cultural practice or reli-  
10 gion, or the significance of a Native American sacred site,  
11 or the location of that sacred site, shall not be released  
12 by a governmental agency or court to any party or the  
13 general public pursuant to the Freedom of Information  
14 Act (5 U.S.C. 552) or any other applicable law.

15 (b) SUPPLEMENTATION OF RECORD.—The govern-  
16 mental agency or court shall supplement the record de-  
17 scribed in subsection (a) to include the general results and  
18 conclusions of the administrative proceeding pursuant to  
19 section 105 or judicial review process pursuant to section  
20 501 to the extent necessary to provide other interested  
21 parties with sufficient information to understand the na-  
22 ture of, and basis for, a decision by the governmental  
23 agency or court.

24 (c) EXCEPTION.—This section shall not apply where  
25 all parties to a proceeding (excluding the United States

1 Government) waive its application, and in the case of a  
2 Native Hawaiian sacred site, where the information is  
3 sought by a Native Hawaiian organization for the purpose  
4 of protecting such site.

5 (d) OTHER LAW.—Indian tribes or Native Hawaiian  
6 organizations seeking to maintain the confidentiality of in-  
7 formation relating to Native American sacred sites may  
8 also seek redress through existing laws requiring that cer-  
9 tain information be withheld from the public, including,  
10 but not limited to the National Historic Preservation Act  
11 (16 U.S.C. 470w-3) and the Archaeological Resources  
12 Protection Act (16 U.S.C. 470hh).

13 **SEC. 109. CRIMINAL SANCTIONS.**

14 (a) DAMAGING SACRED SITES.—

15 (1) INITIAL VIOLATION.—Any person who in-  
16 tentiously damages, defaces, desecrates or destroys  
17 a Native American sacred site located on land as de-  
18 fined in section 3(10) of this Act with knowledge  
19 that it is a sacred site, except as part of an approved  
20 covered Federal activity authorized by a govern-  
21 mental agency with the authority to approve such  
22 activity, shall, upon conviction, be fined not more  
23 than \$10,000, or imprisoned not more than 1 year,  
24 or both.

1           (2) SUBSEQUENT VIOLATIONS.—In the case of  
2 a second or subsequent violation, a person shall be  
3 fined not more than \$100,000, or imprisoned not  
4 more than 5 years, or both.

5 (b) RELEASE OF INFORMATION.—

6           (1) INITIAL VIOLATION.—Any person who in-  
7 tentiously releases any information knowing that it  
8 is required to be held confidential pursuant to this  
9 title shall, upon conviction, be fined not more than  
10 \$10,000, or imprisoned not more than 1 year, or  
11 both.

12           (2) SUBSEQUENT VIOLATIONS.—In the case of  
13 a second or subsequent violation, be fined not more  
14 than \$100,000, or imprisoned not more than 5  
15 years, or both.

## 16 **TITLE II—TRADITIONAL USE OF** 17 **PEYOTE**

### 18 **SEC. 201. FINDINGS.**

19 The Congress finds that—

20           (1) some Indian people, such as members of the  
21 Native American Church, have used the peyote cac-  
22 tus in religious ceremonies for sacramental and heal-  
23 ing purposes for many generations, and such uses  
24 have been significant in perpetuating Indian tribes

1 and cultures by promoting and strengthening the  
2 unique cultural cohesiveness of Indian tribes;

3 (2) since 1965, this religious ceremonial use of  
4 peyote by Indians in bona fide religious ceremonies  
5 of the Native American Church has been protected  
6 by Federal regulation, which exempts such use from  
7 Federal laws governing controlled substances, and  
8 the Drug Enforcement Administration has mani-  
9 fested its continuing support of this Federal regu-  
10 latory system;

11 (3) the State of Texas encompasses virtually  
12 the sole area in the United States in which peyote  
13 grows, and for many years has administered an ef-  
14 fective regulatory system which limits the distribu-  
15 tion of peyote to Indians for ceremonial purposes;

16 (4) while 28 States have enacted laws which  
17 protect the ceremonial use of peyote by Indians, 22  
18 others have not; as a result of the diverse State  
19 laws, Indians from different tribes located in dif-  
20 ferent States, as well as from different tribes within  
21 the same State, are treated differently regarding the  
22 religious use of peyote. Legislation is therefore need-  
23 ed to assure comprehensive, equal and uniform pro-  
24 tection of the religious use of peyote by Indians

1 throughout the United States, without regard to  
2 State or reservation or residence, or tribal affiliation;

3 (5) the traditional ceremonial use by Indians of  
4 the peyote cactus is integral to a way of life, and the  
5 use of peyote plays a significant role in combating  
6 the scourge of alcohol and drug abuse among some  
7 Indian people;

8 (6) the United States has a unique, govern-  
9 ment-to-government relationship with Indian tribes  
10 and special historic Federal-Indian trust relation-  
11 ship, which permits the United States to take meas-  
12 ures to protect against interference with the continu-  
13 ing cultural cohesiveness and integrity of Indian  
14 tribes and cultures; and as part of this relationship  
15 it is the intent of the Federal Government to pursue  
16 enforceable Federal policies which will protect Indian  
17 community and tribal vitality and cultural integrity,  
18 and which will not inhibit or interfere with the free  
19 exercise of Native American religions;

20 (7) general prohibitions against the abusive use  
21 of peyote, without an exception for the bona fide re-  
22 ligious use of peyote by Indians, lead to discrimina-  
23 tion against Indians by reason of their religious be-  
24 liefs and practices;

1           (8) the Supreme Court of the United States, in  
2           the case of *Employment Division v. Smith*, 494 U.S.  
3           872 (1990), held that the first amendment does not  
4           protect Indian practitioners who use peyote in In-  
5           dian religious ceremonies, and raised uncertainty as  
6           to whether this religious practice would be protected  
7           under the compelling State interest standard; and

8           (9) the lack of adequate and clear protection for  
9           the religious use of peyote by Indians may serve to  
10          stigmatize and marginalize Indian tribes and cul-  
11          tures and increase the risk that they will be exposed  
12          to discriminatory treatment.

13 **SEC. 202. TRADITIONAL USE OF PEYOTE.**

14          (a) **IN GENERAL.**—Notwithstanding any other provi-  
15          sion of law, the use, possession, or transportation of pe-  
16          yote by an Indian for bona fide traditional ceremonial pur-  
17          poses in connection with the practice of a Native American  
18          religion is lawful and shall not be prohibited by the Fed-  
19          eral Government or any State. No Indian shall be penal-  
20          ized or discriminated against on the basis of such use, pos-  
21          session or transportation, including, but not limited to, de-  
22          nial of otherwise applicable benefits under public assist-  
23          ance programs.

24          (b) **REGULATION AUTHORIZED.**—This section does  
25          not prohibit—

1           (1) such reasonable regulation and registration  
2           by the Drug Enforcement Administration of those  
3           persons who import, cultivate, harvest or distribute  
4           peyote, as may be consistent with the purpose of this  
5           title;

6           (2) military commanders restricting the use or  
7           ingestion of peyote by active duty personnel within  
8           a reasonable period, but not to exceed 48 hours,  
9           prior to the performance of official duties in cir-  
10          cumstances where safety or military readiness may  
11          be adversely affected by such use or ingestion;

12          (3) regulations by the Secretary of Transpor-  
13          tation restricting the use or ingestion of peyote by  
14          transportation workers in safety sensitive positions,  
15          as defined by the Secretary within a reasonable pe-  
16          riod, but not to exceed 48 hours, prior to the per-  
17          formance of official duties, in circumstances where  
18          public safety may be adversely affected by such use  
19          or ingestion; or

20          (4) regulations by law enforcement administra-  
21          tors restricting the use or ingestion of peyote by  
22          sworn law enforcement personnel within a reason-  
23          able period, but not to exceed 48 hours, prior to the  
24          performance of official duties in circumstances where

1 public safety may be adversely affected by such use  
2 or ingestion.

3 (c) TEXAS LAW.—This section does not prohibit ap-  
4 plication of the provisions of section 481.111(a) of  
5 Vernon’s Texas Health and Safety Code Annotated, in ef-  
6 fect on the date of enactment of this Act, insofar as those  
7 provisions pertain to the cultivation, harvest, or distribu-  
8 tion of peyote.

9 (d) This section shall not be construed as requiring  
10 prison authorities to permit, nor shall it be construed to  
11 prohibit prison authorities from permitting access to pe-  
12 yote by Indians while incarcerated within Federal or State  
13 prison facilities.

14 (e) For purposes of this title, the term “Indian”  
15 means a member of an Indian tribe as defined in section  
16 3(9).

### 17 **TITLE III—PRISONERS’ RIGHTS**

#### 18 **SEC. 301. RIGHTS.**

19 (a) IN GENERAL.—

20 (1) ACCESS.—Notwithstanding any other provi-  
21 sion of law, Native American prisoners who practice  
22 a Native American culture or religion shall have, on  
23 a regular basis comparable to that access afforded  
24 prisoners who practice Judeo-Christian religions or  
25 any other religions, access to—

1           (A) Native American traditional leaders  
2           who shall be afforded the same status, rights  
3           and privileges as religious leaders of Judeo-  
4           Christian religions or any other religions;

5           (B) subject to paragraph (6), items and  
6           materials utilized in cultural or religious cere-  
7           monies; and

8           (C) Native American cultural or religious  
9           facilities.

10          (2) MATERIALS.—Prison authorities shall treat  
11          items and materials utilized in cultural or religious  
12          ceremonies, including traditional foods for cultural  
13          or religious diets, identified by a Native American  
14          traditional leader, in the same manner as the reli-  
15          gious items and materials utilized in ceremonies of  
16          the Judeo-Christian religions or any other religions.

17          (3) HAIR.—

18                (A) RIGHT OF PRISONER.—Except in those  
19                circumstances where subparagraph (B) applies,  
20                Native American prisoners who desire to wear  
21                their hair according to the customs of a Native  
22                American culture or religion may do so provided  
23                that the prisoner demonstrates that—

24                        (i) the practice is rooted in Native  
25                        American cultural or religious beliefs; and

1 (ii) these beliefs are sincerely held by  
2 the Native American prisoner.

3 (B) DENIAL OF REQUEST.—If a Native  
4 American prisoner satisfies the criteria in para-  
5 graph (3)(A), the prison authorities may deny  
6 such request only where they can satisfy the  
7 criteria of section 3 of the Religious Freedom  
8 Restoration Act (Public Law 103–141).

9 (4) DEFINITION OF “CULTURAL OR RELIGIOUS  
10 FACILITIES”.—The term “cultural or religious facili-  
11 ties” includes sweat lodges, tepees, and access to  
12 other secure, out-of-doors locations within prison  
13 grounds if such facilities are identified by a Native  
14 American traditional leader to facilitate a cultural or  
15 religious ceremony.

16 (5) DISCRIMINATION PROHIBITED.—No Native  
17 American prisoner shall be penalized or discrimi-  
18 nated against on the basis of Native American cul-  
19 tural or religious practices, and all prison and parole  
20 benefits or privileges extended to prisoners for en-  
21 gaging in cultural or religious activities shall be af-  
22 farded to Native American prisoners who participate  
23 in Native American cultural or religious practices.

24 (6) SCOPE OF TITLE.—This Title shall not be  
25 construed as (i) requiring prison authorities to per-

1 mit nor shall it be construed to prohibit prison au-  
2 thorities from permitting access to peyote or Native  
3 American sacred sites; or (ii) altering applicable re-  
4 quirements for exhaustion of administrative rem-  
5 edies.

6 (b) ATTORNEY GENERAL INVESTIGATION.—

7 (1) IN GENERAL.—The Attorney General shall  
8 investigate, in consultation with Native American  
9 traditional leaders and ex-offenders with corrections  
10 experience as may be recommended by Indian tribes  
11 and Native Hawaiian organizations, and Federal  
12 and State prison administrators, the conditions of  
13 Native American prisoners in the Federal and State  
14 prison systems with respect to their ability to engage  
15 in traditional cultural ceremonies and practices, in-  
16 cluding the free exercise of Native American reli-  
17 gions.

18 (2) REPORT.—Not later than 36 months after  
19 the date of enactment of this Act, the Attorney Gen-  
20 eral shall submit to the Congress a report contain-  
21 ing—

22 (A) an assessment of the recognition, pro-  
23 tection, and enforcement of the rights of Native  
24 American prisoners to practice their cultures or  
25 religions under this Act in Federal and State

1           prisons where Native Americans are incarcer-  
2           ated; and

3                   (B) specific recommendations for the pro-  
4           mulgation of regulations to implement this Act.

5 **TITLE IV—CULTURAL AND RELI-**  
6 **GIUS USE OF EAGLES AND**  
7 **OTHER ANIMALS AND PLANTS**

8 **SEC. 401. CULTURAL AND RELIGIOUS USE OF EAGLES.**

9           (a) IN GENERAL.—Within 1 year after the date of  
10 enactment of this Act, the Director of the United States  
11 Fish and Wildlife Service (hereafter in this section re-  
12 ferred to as the “Director”) shall, in consultation with the  
13 Indian tribes and Native American traditional leaders, de-  
14 velop a plan to—

15                   (1) ensure the prompt disbursement from Fed-  
16           eral repositories of available bald or golden eagles, or  
17           their parts, nests, or eggs for the traditional cultural  
18           or religious use of Indians upon receipt of an appli-  
19           cation from an Indian practitioner;

20                   (2) provide that sufficient numbers of bald or  
21           golden eagles are allocated to Indian practitioners to  
22           meet the demonstrated need where they are available  
23           by reason of accidental deaths, natural deaths, or  
24           takings permitted by Federal law;

1           (3) simplify and shorten the process by which  
2           permits are authorized for the taking, possession,  
3           and transportation of bald or golden eagles, or their  
4           parts, nests, or eggs for the traditional cultural or  
5           religious use of Indians;

6           (4) establish a mechanism for tribal disburse-  
7           ment of dead eagles discovered within the exterior  
8           boundaries of their own reservation of Native Amer-  
9           ican traditional cultural or religious practitioners;  
10          and

11          (5) establish a mechanism for tribal contacts  
12          with regional and national offices of the United  
13          States Fish and Wildlife Service on fish and wildlife  
14          resource issues.

15 **SEC. 402. OTHER ANIMALS AND PLANTS.**

16          Within two years after the enactment of this Act, the  
17          Secretaries of Interior, Agriculture, Commerce and Treas-  
18          ury, and the Administrator of the General Services Admin-  
19          istration shall, in consultation with Indian tribes, Native  
20          Hawaiian organizations and Native American traditional  
21          leaders, establish a joint uniform set of administrative pro-  
22          cedures to govern the disposition of surplus wildlife and  
23          plants or parts thereof which have been confiscated, gath-  
24          ered or are otherwise under the jurisdiction and control  
25          of their respective agencies. To the fullest extent allowed

1 under existing statutory authority, the uniform procedures  
2 shall be designed to increase the availability of natural  
3 products to Native American traditional cultural and reli-  
4 gious practitioners.

## 5 **TITLE V—JURISDICTION AND** 6 **REMEDIES**

### 7 **SEC. 501. JURISDICTION AND REMEDIES.**

8 (a) IN GENERAL.—

9 (1) An aggrieved party shall have the right to  
10 file suit against the United States or a State in the  
11 appropriate district court to enforce the provisions of  
12 this Act.

13 (2) Any appropriate United States district  
14 court shall have original jurisdiction over a civil ac-  
15 tion for—

16 (A) equitable relief; or

17 (B) damages arising from any violations of  
18 this Act.

19 (3) Nothing herein shall be construed to deprive  
20 Indian tribes of jurisdiction they would otherwise  
21 have under section 106 of this Act or any other Fed-  
22 eral law.

23 (b) FACTUAL FINDINGS.—

24 (1) If an action is filed in a United States dis-  
25 trict court after exhaustion of administrative rem-

1 edies under section 105, the court shall not defer to  
2 agency factual findings except where such findings  
3 are based on a formal hearing on the record.

4 (2) The court shall review de novo agency legal  
5 determinations concerning the extent to any adverse  
6 impact, whether the Government's interest is com-  
7 pelling and whether a particular alternative is the  
8 least restrictive.

9 (c) For purposes of an action alleging a violation of  
10 the rights protected under title I of this Act and consistent  
11 with section 106 of this Act—

12 (1) BURDEN ON AGGRIEVED PARTY.—Except as  
13 provided in subsection 501(d), the aggrieved party  
14 shall have the burden of establishing that the cov-  
15 ered Federal activity or an action by a State having  
16 an impact upon the management, use or preserva-  
17 tion of public land, is or will have an adverse impact  
18 on a Native American sacred site.

19 (2) BURDEN ON AGENCY.—If the aggrieved  
20 party meets its burden of proof under paragraph  
21 (1), the agency may proceed with the action only if  
22 it is determined by clear and convincing evidence  
23 that the covered Federal activity—

24 (A) is in furtherance of a compelling gov-  
25 ernment interest; and

1 (B) is the least restrictive means of fur-  
2 thering that compelling interest.

3 (3) For purposes of decisions pursuant to title

4 I—

5 (A) a finding of adverse impact does not  
6 require that an aggrieved party be coerced to  
7 act contrary to religious beliefs or traditional  
8 cultural practices, and may include consider-  
9 ation of disturbing the integrity of a sacred  
10 site;

11 (B) land management activities, undertak-  
12 ings and actions which have the potential to  
13 have an adverse impact on a Native American  
14 sacred site, or which make a Native American  
15 traditional cultural practice or the exercise of a  
16 Native American religion more difficult shall be  
17 deemed to constitute an adverse impact; and

18 (C) government ownership of land, by it-  
19 self, does not establish a compelling government  
20 interest.

21 (d) CASES WHERE SECRECY IS REQUIRED.—In the  
22 case of any proceeding in which an aggrieved Indian tribe  
23 or Native Hawaiian organization relies on section 104(b),  
24 if an Indian tribe or Native Hawaiian organization objects  
25 to the covered Federal activity or an action by a State

1 on the grounds that it is or will have an adverse impact on a  
2 Native American sacred site, the governmental agency  
3 shall have the burden of proving by a preponderance of  
4 the evidence that the covered Federal activity—

5 (1) is in furtherance of a compelling govern-  
6 ment interest;

7 (2) is a reasonable means of furthering that  
8 compelling interest; and

9 (3) the alternatives identified under section  
10 104(b)(2) are not reasonable.

11 (e) FAILURE OF AGENCY TO MEET BURDEN.—

12 (1) The governmental agency shall retain its  
13 burden of proof at all stages of any proceeding or  
14 decisionmaking process pursuant to title I of this  
15 Act.

16 (2) If a governmental agency does not meet its  
17 burden of proof under this section, it shall not pro-  
18 ceed with the proposed activity.

19 (3) For purposes of this section the phrase  
20 “burden of proof” means the burden of production  
21 and the burden of persuasion.

22 (f) SPECIAL RULE FOR NATIVE AMERICAN PRACTI-  
23 TIONERS.—Native American practitioners may elect to  
24 provide testimony about their beliefs in camera or in some  
25 other protective procedure.

1 (g) SOVEREIGN IMMUNITY.—Neither the sovereign  
2 immunity of the United States nor of any State, including  
3 immunity derived from the eleventh amendment to the  
4 United States Constitution, shall be a bar or defense to  
5 any civil action brought pursuant to this section to enforce  
6 the provisions of this Act, including any grant of attor-  
7 ney’s fees pursuant to subsection (h) of this section, and  
8 such immunities are hereby waived.

9 (h) ATTORNEY’S FEES.—An aggrieved party who is  
10 a prevailing party in any administrative or judicial pro-  
11 ceeding brought pursuant to this Act shall be entitled to  
12 attorney’s fees, expert witness fees, and costs under the  
13 provisions of section 504 of title 5, United States Code,  
14 and section 2412 of title 28, United States Code.

## 15 **TITLE VI—MISCELLANEOUS**

### 16 **SEC. 601. SAVINGS CLAUSE.**

17 (a) Nothing in this Act shall be construed as abrogat-  
18 ing, diminishing, or otherwise affecting—

19 (1) the inherent rights of any Indian tribe;

20 (2) the rights, express or implicit, of any Indian  
21 tribe which exist under treaties, Executive orders  
22 and laws of the United States;

23 (3) the inherent right of Native Americans to  
24 maintain their cultural integrity and religions;

1           (4) the trust responsibility of the United States  
2           or any legal obligation or remedy resulting there-  
3           from;

4           (5) the right and ability of any Indian tribe  
5           upon whose Indian lands a Native American sacred  
6           site is located to determine, exclusively pursuant to  
7           its own tribal law, whether any other Indian tribe or  
8           Native American practitioner shall have a property  
9           right in that site or have the authority to limit or  
10          prohibit covered Federal activities affecting that site;

11          (6) any traditional cultural or free exercise of  
12          religion claim of any person that does not fall within  
13          the scope of this Act;

14          (7) the right of Native Americans to obtain pro-  
15          tection for the practice of their traditional cultures  
16          or religions under any other Federal, State, or tribal  
17          law or constitution; or the authority and responsibil-  
18          ity of any governmental agency to provide protection  
19          for Native American sacred sites and the practice of  
20          Native American traditional cultures and religions  
21          under other laws or constitutions, such as the Na-  
22          tional Historic Preservation Act; and

23          (8) the authority of Federal land and program  
24          managers to provide for notice to and consultation  
25          with other religious and cultural groups not encom-

1 passed by this Act for the purpose of protection of  
2 cultural, religious, environmental and historical sites  
3 and resources under other authority.

4 (b) This Act is supplemental to the Religious Free-  
5 dom Restoration Act of 1993, and is not intended to be  
6 limited by that Act, or to limit in any way, rights available  
7 under that Act, including the application of that Act to  
8 activities which may have an adverse impact upon a Native  
9 American sacred site, whether or not said activities are  
10 explicitly covered by this Act.

11 **SEC. 602. SEVERABILITY.**

12 If any title or section of this Act, or any provision  
13 or portion thereof, is declared to be unconstitutional, in-  
14 valid, or inoperative in whole or in part, by a court of com-  
15 petent jurisdiction, such title, section, provision or portion  
16 thereof shall, to the extent it is not unconstitutional, in-  
17 valid, or inoperative, be enforced and effectuated, and no  
18 such determination shall be deemed to invalidate or make  
19 ineffectual the remaining provisions of the title, section,  
20 or provision.

21 **SEC. 603. AUTHORIZATION OF APPROPRIATIONS.**

22 There are hereby authorized to be appropriated such  
23 sums as may be necessary to carry out the provisions of  
24 this Act, including such sums as may be necessary for ex-

1 penses of Native Americans for consultations with the At-  
2 torney General provided in section 301(b)(1).

3 **SEC. 604. REGULATIONS.**

4 (a) The head of each land managing agency, in con-  
5 sultation with Indian tribes and Native Hawaiian organi-  
6 zations, shall promulgate regulations relating to—

7 (1) Federal planning processes pertaining to  
8 the management, use or preservation of land; and

9 (2) notice to and consultation with Indian  
10 tribes, Native Hawaiian organizations, and Native  
11 American traditional leaders as required by sections  
12 103 and 104 of this Act.

13 (b) The head of each land managing agency shall con-  
14 sult with the Secretary of the Interior to assure maximum  
15 possible consistency in regulations promulgated pursuant  
16 to this Act.

17 (c) The regulations shall be sufficiently flexible to en-  
18 able consultation to address the unique needs of Indian  
19 tribes, Native Hawaiian organizations, Native American  
20 traditional leaders and Native American practitioners. No-  
21 tices and procedures provided for in sections 103 and 104  
22 shall not await completion of regulations.

23 **SEC. 605. PROTECTIONS.**

24 (a) The protections of this Act shall be afforded only  
25 to bona fide persons who are defined in subsections (7),

1 (11), (12), (16), and (17) of section 3 of this Act, and  
2 to members of Indian tribes as defined in section 3(9) of  
3 this Act.

4 (b) For purposes of determining the bona fide nature  
5 of any of the persons defined in section 3, or the bona  
6 fide nature of any Native American traditional cultural  
7 practice or Native American religion, the Secretary is au-  
8 thorized to consult with Indian tribes, Native Hawaiian  
9 organizations, Native American practitioners and Native  
10 American traditional leaders.

11 **SEC. 606. EFFECTIVE DATE.**

12 (a) This Act takes effect on the date of its enactment.  
13 Application and enforcement of this Act does not depend  
14 upon the promulgation of regulations by any governmental  
15 agency. However, with respect to notice and review provi-  
16 sions under sections 103 and 104, agencies shall have a  
17 period of six months from enactment to establish applica-  
18 ble procedures.

19 (b) Except as provided in section 104(a)(2) and sec-  
20 tion 3(4)(B)(ii), this Act does not require any Federal  
21 agency to reconsider any final action or decision that it  
22 made prior to enactment of this Act or that it made in  
23 compliance with the provisions of this Act, although this

1 shall not bar application of the Act to new phases of exist-  
2 ing projects.

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