



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240  
21 SEP 1978

MEMORANDUM

TO: Director, National Park Service  
Director, Fish and Wildlife Service  
Director, Heritage Conservation and  
Recreation Service

FROM: Associate Solicitor, Conservation and Wildlife

SUBJECT: Review of Agency Policies and Procedures for  
their Impact on American Indians' Religious  
Freedoms

As you know, the clash between the exercise of traditional American Indian religious beliefs and the enforcement of statutory, administrative or programmatic constraints has increasingly become a matter of serious concern to American Indians, agency officials, and the Congress. The enactment of P.L. No. 95-341, 92 Stat. 469, a copy of which is attached, presents your bureau with an opportunity to undertake an intelligent, sensitive, and systematic review of agency practices, programmatic objectives, and legislative authorities for the purpose of instituting administrative changes, where possible, serving to preserve American Indians' constitutionally protected religious freedoms, or of seeking, where necessary and desirable, congressional guidance and resolution of identified conflicts through legislative action. To assist you in this process, we thought that as an initial step we should provide you with our interpretation of P.L. No. 95-341 and suggestions for its implementation. We also intend to write a separate legal memorandum providing further guidance on First Amendment and Equal Protection issues, and will use that memorandum as a vehicle for commenting on the draft Yosemite National Park General Management Plan.

The purpose of this statute is to ensure that agency policies and practices are brought into compliance with the constitutional injunction against abridging the free exercise of religion. S. Rep. No. 95-709, 95th Cong., 2d Sess. 2 (1978); H.R. Rep. No. 95-1308, 95th Cong., 2d Sess. 1 (1978). The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Enactment of P.L. No. 95-341 was motivated by the feeling that Congress, in passing such laws as the Wilderness Act, the Endangered Species Act of 1973, the Bald and Golden Eagles Protection Act and the Migratory Bird Treaty Act, had neglected their impact, and that the executive agencies, in carrying out the laws, had interfered with or denied the religious rights of Native Americans. Infringements of particular concern were: 1) denial of access to and use of certain physical locations, including burial grounds, 2) restrictions on the use of substances constituting products or parts of endangered species or hallucinogens, and 3) interference with religious events or failure to protect them from intrusions. S. Rep. No. 95-709, supra, at 2-4; H.R. Rep. No. 95-1308, supra, at 2-3.

In response to these concerns, the first section of P.L. No. 95-341 declares it to be the policy of the United States to protect and preserve for American Indians, Eskimos, Aleuts and Native Hawaiians, their right of freedom to believe, express, and exercise their traditional religions. This right includes access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. Section 2 of P.L. No. 95-341 requires the President to direct the relevant federal agencies 1) to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices, and 2) to report to the Congress within one year from enactment the results of this evaluation, setting forth

(a) any administrative changes that are made and (b) any recommendations for legislative action. From the legislative history of this act, it is clear that the National Park Service and the Fish and Wildlife Service are among those agencies intended to undertake such a review. Although the Heritage Conservation and Recreation Service is not a federal land-managing agency, it may wish to participate in this review by advocating administrative and legislative changes in its grant, historic and natural area preservation programs which would further the purposes of the statute..

This statute is not intended to amend any existing provision of state or federal law. 124 Cong. Rec. H6871-H6872 (daily ed. July 18, 1978). Where implementation of the statute's policy might raise conflicts with other existing statutes, Congress adopted the suggestion of the Department of Justice that such conflicts should be addressed to and resolved by the Congress. S. Rep. No. 95-709, supra, at 10. As explained by Representative Morris Udall, a sponsor of the House bill, the effect of the statute is not to permit American Indians to cause the extinction of an endangered species or the destruction of a wilderness area in the name of religion, but rather to ensure that the exercise of religious freedoms is not infringed without a clear decision on the part of the Congress or agency administrators that traditional native religious practices must yield to some higher consideration. 124 Cong. Rec., supra, at H6872. In effect, Congress has adopted the judicial balancing test which permits an infringement on the free exercise of religious beliefs only where the interest asserted by the government is so substantial and compelling that it outweighs the interest in religious freedom, and has stated that it, the Congress, or agency officials will engage in this balancing. People v. Woody, 394 P.2d 813 (Cal. 1964). Therefore, where an evaluation of agency policies and practices leads to the conclusion that administrative changes can be made, consistent with legislative authorities, to eliminate unwarranted restrictions on the practice of traditional native religions, the statute intends for appropriate changes to be made. Where existing restrictions are determined to be unwarranted or unnecessary, but nevertheless required because

of some underlying legislative mandate, the statute contemplates that the President would request appropriate legislative changes through his report to Congress. 124 Cong. Rec., supra, at H6872. Where upon review and evaluation restrictions are found which infringe upon religious freedoms and which are determined by the agency to be justified by compelling governmental interests which cannot be achieved through less restrictive alternatives, the agency would, in our opinion, be well advised to report to the President and the Congress its findings and the basis for its conclusion that legislative changes are not appropriate.

In undertaking this task, we suggest that you begin by the identification of problems and administrative actions that can and should, in your judgment, be taken to bring agency policies and practices into conformance with the stated policy, consistent with your statutory authorities and other provisions of the Constitution. The formulation of its draft policy statement and guidelines on its relationship with Native Americans should serve to expedite this step for the National Park Service. As the next step, you may wish to identify those conflicts which require congressional resolution. In making this determination, you will need to distinguish between those restrictions which are unwarranted or unnecessary and, therefore, which should be eliminated by congressional action, and those which are necessary to accomplish a legitimate and compelling objective and, therefore, which should be retained.

*Purpose for legislation Research*

In making its evaluation the National Park Service must in particular be guided by the injunction that "[t]he authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress." § 101(b) of the Act of March 27, 1978, 92 Stat. 163, 166, amending § 1 of the Act of August 18, 1970, 84 Stat. 825, 16 U.S.C. § 1a-1. This provision elevates the decisionmaking and management

*balance*

standards of the National Park Service in favor of greater protection for park resources and values. 124 Cong. Rec. B2017 (daily ed. Mar. 14, 1978); H.R. Rep. No. 95-581, 95th Cong., 1st Sess. 21 (1977); S. Rep. No. 95-528, 95th Cong., 1st Sess. 13-14 (1977). In this context, this special provision reiterates an overriding governmental interest in the protection of park resources and values and reinforces the limitations on the Secretary's discretion and flexibility in making those administrative changes to accommodate religious activities that would have adverse effects on park resources and values. As a consequence, the National Park Service should, more so than other agencies, seek express congressional guidance and specific legislative solutions on identified conflicts.

Agency reviews and evaluations are to include consultation with native traditional religious leaders. Although the statute is silent on this point, we presume that Congress by this action did not intend to modify the requirements of the Federal Advisory Committee Act. The Department of Health, Education, and Welfare and the Community Services Administration have contracted with the Native American Rights Fund and the Advisory Board of Indian Religious Leaders for the American Indian Law Center, to refine and consolidate native religious concerns and to propose specific actions.

It is our understanding that the Department of the Interior has been designated to coordinate federal agency reviews and to prepare the report to the President and the Congress. Susan Harjo, Special Assistant - Legislation and Tribal Relations - to the Assistant Secretary - Indian Affairs, is coordinating the Department's efforts. The target date for Interior bureaus to complete their reviews is January, 1979. All other federal agencies are being asked to submit their evaluations and recommendations to the Department by February, 1979. If you have any questions, we suggest that you contact Ms. Harjo.

(Sgd.) James D. Webb

James D. Webb