

Department of the Interior Departmental Manual

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Series: Intergovernmental Relations

Part 513: Native Hawaiian Community

Chapter 1: Department of the Interior Policy on Consultation with the Native Hawaiian Community

Originating Office: Office of the Secretary

513 DM 1

1.1 **Purpose.** This chapter provides the requirements for consultation between the Department of the Interior (Department) officials and the Native Hawaiian Community. This chapter affirms and honors the special political and trust relationship between the United States and the Native Hawaiian Community, characterized as a government-to-sovereign relationship;¹ and confirms the Department’s intent to apply the principles of the Presidential Memorandum of January 26, 2021,² and Executive Order (EO) 13175, titled “Consultation and Coordination with Indian Tribal Governments,” in its relations with the Native Hawaiian Community.³

1.2 **Scope.** The policy and requirements in this chapter apply to all of the Department’s Bureaus and Offices. It complements, but does not supersede, any existing Federal laws, rules, statutes, or regulations that guide consultation participants and processes.

¹ As discussed in the preamble to the final regulations at 43 C.F.R. part 50 (Procedures for reestablishing a formal government-to-government relationship with the Native Hawaiian Community), the Native Hawaiian Community has a unique legal relationship with the United States, as well as inherent sovereign authority that has not been abrogated or relinquished. The Native Hawaiian Community has been without a formal government for over a century. However, Congress recognizes that a special political and trust relationship exists between the United States and the Native Hawaiian Community. It is important to note that a special political and trust relationship may continue to exist even without a formal government-to-government relationship. 81 Fed. Reg. 71,278 (Oct. 14, 2016).

² Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 29, 2021).

³ Congress has directed Federal agencies to consult with the Native Hawaiian Community, through Native Hawaiian Organizations, who are the informal representatives of the Community, before taking actions that could significantly impact their rights, lands, or resources. See, e.g., the National Historic Preservation Act of 1966, 54 U.S.C. § 302706; the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3002(c)(2), 3004(b)(1)(B); American Indian Religious Freedom Act, 42 U.S.C. §§ 1996 – 1996a; and the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 445; the Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 357 (HHLRA).

1.3 **Authority.** State of Hawai‘i Admission Act, 73 Stat. 4, approved March 18, 1959 (Admission Act); Hawaiian Homes Commission Act, 1920, as amended, 42 Stat. 108 (HHCA); Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 357 (HHLRA); 5 U.S.C. § 301; 25 U.S.C. §§ 2 and 9; 43 U.S.C. § 1457; the Apology Resolution of 1993, 107 Stat. 1511; the National Historic Preservation Act of 1966, 54 U.S.C. § 302706; the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3002(c)(2), 3004(b)(1)(B); American Indian Religious Freedom Act, 42 U.S.C. §§ 1996– 1996a; and the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 445. The authority also stems from the special political and trust relationship established by Congress pursuant to its power under the United States Constitution to legislate in matters affecting the Aboriginal or Indigenous peoples of the United States.

1.4 **Definitions.**

A. Action with Native Hawaiian Community Implications (Action) – In addition to any activity with a statutory requirement to consult with the Native Hawaiian Community, an Action includes any Departmental rulemaking, policy, guidance, legislative proposal, plan, programmatic or operational activity, or grant or funding formula changes⁴ that may have a substantial direct effect on the Native Hawaiian Community on matters including, but not limited to:

- (1) Native Hawaiian land interests on or off Ceded lands, Trust lands, ancestral lands and waters, and sacred sites or lands;
- (2) Native Hawaiian cultural practices, lands, waters, natural and cultural resources, or access to traditional areas of cultural or religious importance on federally managed lands and waters;
- (3) The ability of the Native Hawaiian Community to govern or provide services to its members; or
- (4) The Native Hawaiian Community’s relationship with the United States.

B. Ceded lands – Means, for the purposes of this consultation policy, those ancestral lands set aside under section 5(b) of the Admission Act, which are part of a Federal trust vested

⁴ Advice from the Office of the Solicitor is not a regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula change, or operational activity with any direct effect on a party outside the Department, but rather an internal legal opinion. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgt.*, CV 17-8587-GW(ASX), 2019 WL 2635587, at *12 (C.D. Cal. June 20, 2019). Such advice is also protected from disclosure under the attorney-client privilege. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). Any such advice, therefore, is not within the scope of this chapter. Furthermore, matters that are in litigation or in settlement negotiations, or matters for which a court order limits the Department’s discretion to engage in consultation are also outside the scope of this chapter.

in, and held in trust by, the State of Hawai'i and for which the United States may bring action against the State should it use those lands for purposes other than those listed in the Admission Act, which include the betterment of the conditions of the Native Hawaiian people.

C. Comment – Means information, concerns, advice, and suggestions that may be received orally or in writing through methods specified by the Department's lead Bureau or Office, including during consultation meetings. Input refers to an aggregate of comments.

D. Consultation or Consult – Generally means representatives of the Federal Government engaging in an open discussion process that allows interested parties to provide input regarding potential Federal Government issues, changes, or actions. Pursuant to applicable statutes and regulations, consultation may be targeted and tailored to those interested parties as defined in the respective statutes and regulations.

Consultation does not transfer or cede Federal Government decision making authority. Consultation does not require or indicate agreement or consent to all of the underlying premises of the consultation or proposed action. Consultation requires dialogue, which does not necessarily require formal face-to-face meetings, although such meetings are often preferred and highly recommended. Consultation may also occur through telephonic, electronic, or printed means. The complexity, geographic location, and potential effects on the Native Hawaiian Community and its interests of an Action will dictate the appropriate process and means for consultation.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision making. Consultation should consider and include Indigenous Knowledge as provided in 301 DM 7. Consultation is built upon the exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective operations and governance practices. To that end, the consulting official(s) will seek and promote cooperation, participation, and efficiencies between Bureaus and Offices with overlapping jurisdiction, special expertise, or related responsibilities regarding an Action. Federal agencies engaging the Native Hawaiian Community in the decision-making processes through consultation will also find that it helps promote future Federal actions and policies that are achievable, comprehensive, long-lasting, and reflective of the Native Hawaiian Community's input.

E. Consultation Report – Refers to a document that reports on the consultation meetings and discussions as well as the comments received relating to an Action necessitating a consultation and lists any interim and preliminary recommendations and decisions made during the consultation process, when applicable (a sample format for the report is provided in appendix 1).

F. Department – Means the Department of the Interior.

G. Indigenous Knowledge – Means the same as the term defined in 301 DM 7, titled “Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research.” The Native Hawaiian Community also refers to Indigenous Knowledge as ‘ike kūpuna.

H. Native Hawaiian – Means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i. Such individuals may also self-identify as kanaka ‘ōiwi or kanaka maoli.

I. Native Hawaiian Community – Means the distinct Native Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.

J. Native Hawaiian Community Leader – Means any Native Hawaiian leader identified and designated by the Native Hawaiian Community, including leaders of Native Hawaiian organizations, and may not be limited geographically or to organizational or executive leadership, but may include subject matter leaders or experts.

K. Native Hawaiian Organization (NHO)

(1) Any organization that:

a) principally serves, benefits, or represents the interests of Native Hawaiians;

b) has as a primary and stated purpose of the provision of services to Native Hawaiians;

c) is composed primarily of Native Hawaiians, who also control or serve in substantive leadership and decision-making roles; and

d) has demonstrated expertise in Native Hawaiian affairs (including but not limited to Native Hawaiian heritage, economic development, health and well-being, self-governance, or natural and cultural resource management); and

(2) May include but is not limited to:

a) The Office of Hawaiian Affairs (OHA) established by the constitution of the State of Hawai‘i;

b) Native Hawaiian organizations (including ‘ohana or Native Hawaiian organizations whose members have a familial or kinship relationship with each other) registered with the Department Office of Native Hawaiian Relations (ONHR); and

c) Homestead Associations and HHCA Beneficiary Associations (collectively “HBA”) as defined under 43 C.F.R. §§ 47.10 and 48.6.

L. Native Hawaiian Community Governance Officer (NHCGO) – An individual in the Department officially designated by the Secretary to carry out responsibilities described in this chapter. If there is no active NHCGO, the Tribal Governance Officer as designated pursuant to 512 DM 4 will serve as the NHCGO.

M. Native Hawaiian Community Liaison Officer (NLO) – One or more individuals officially designated by and from a Bureau or Office to carry out responsibilities described in this chapter. This official is sometimes also the Bureau or Office Tribal Liaison Officer (TLO) as designated pursuant to 512 DM 4. If there is no active NLO, the TLO of the respective Bureau or Office will serve as the NLO.

N. Trust Lands – Includes lands designated as “available lands” or with the status of “Hawaiian home lands” pursuant to the HHCA, the HHLRA, or any other Federal law designating lands of the Hawaiian Home Lands Trust and lands administered pursuant to the HHCA or the Admission Act, including Ceded lands.

O. Substantial Direct Effect – Generally refers to an effect on the Native Hawaiian Community that is directly caused by the Department’s action(s) and, as informed by Native Hawaiian Community Leaders:

- (1) has either a beneficial or adverse impact that is consequential; and
- (2) is significant in its scope.

For example, curtailing a Native Hawaiian Community member’s access to a *wahi kapu* (sacred site) on federally controlled lands is a substantial direct effect.

1.5 Policy.

A. Policy. It is the policy of the Department to recognize and fulfill its obligations to identify and protect Native Hawaiian Community Trust lands; carry out its special political and trust relationship with the Native Hawaiian Community; and consult with the Native Hawaiian Community on Actions. All Bureaus and Offices must engage in robust, interactive, pre-decisional, informative, and transparent consultation on Actions. Agencies should consider and include Indigenous Knowledge and seek consensus with the Native Hawaiian Community through the consultation process when the Actions relate to broader interests of the entirety of the Native Hawaiian Community, such as self-governance, Trust lands, or rights.

B. Self-determination. The Department recognizes and respects that the resolutions of challenges affecting the Native Hawaiian Community and its resources and interests are best

informed and implemented by the Native Hawaiian Community. The Department also recognizes that the Native Hawaiian Community may partner, cooperate, and collaborate with other entities, including the Department, in its exercise of self-determination.

C. Government-to-Sovereign Relationship and Reconciliation. In furtherance of the government-to-sovereign relationship and reconciliation between the Department and the Native Hawaiian Community, the Department:

- (1) Respects and furthers its special political and trust relationship with the Native Hawaiian Community;
- (2) Will continue to work with the Native Hawaiian Community on a government-to-sovereign basis to address concerns related to self-governance, Trust lands, and other Native Hawaiian rights and interests; and
- (3) Recognizes the right of the Native Hawaiian Community to self-government and supports Native Hawaiian sovereignty and self-determination.

1.6 **The Role of NHOs in the Consultation Process.** Congress has acknowledged that the self-determination of the Native Hawaiian Community has been exercised through a variety of NHOs, thus NHOs are the informal representatives of the Native Hawaiian Community. Relations between governments and sovereigns are generally conducted through their respective leaders, officials, and designated experts. Consultation with the Native Hawaiian Community, to include NHOs, is necessary because the Native Hawaiian Community currently lacks a unified formal government. It is also respectful of the traditional way the Native Hawaiian Community has governed itself since the 1840s.⁵

The Native Hawaiian Community's various organizations carry different roles and responsibilities. Some NHOs serve the interests of the Native Hawaiian Community as a whole, and others are focused geographically (generally *moku* (district) based) or by subject matter. The ONHR maintains the Department's NHO notification list—a voluntary, non-exhaustive list— at www.doi.gov/hawaiian, in part to help Federal officials identify the most appropriate Native Hawaiian Community Leaders to work with on a particular project.

⁵ Davianna Pōmaika'i McGregor, *Nā Kua'āina: Living Hawaiian Culture* (Honolulu: Univ of Hawai'i Press, 2007) pp. 3, 12-14, 55-59 (July petition to Kamehameha III by 1600 commoners concerning "the independence of the kingdom," and prohibiting foreigners to own land); see also Silva, *Aloha Betrayed*, pp. 38-9; E.S. Craighill Handy and Mary Kawena Pūku'i, *The Polynesian Family System in Ka'ū, Hawai'i* (Rutland, VT: Charles E. Tuttle, 1976), pp. 5-6.

1.7 Responsibilities.

A. NHCGO. The NHCGO is appointed by the Secretary and is responsible for carrying out responsibilities in this chapter including the following:

(1) Serving as the Secretary's representative when requested to do so in matters pertaining to consultation.

(2) Coordinating and managing the Department's consultation efforts to ensure effective government-to-sovereign relationship with the Native Hawaiian Community, including assisting Bureaus and Offices with implementation of 513 DM 2, as needed.

(3) Overseeing Departmental compliance with the policy in this chapter, EO 13175, and other consultation requirements pertaining to government-to-sovereign consultation, including the procedures in 513 DM 2.

(4) Implementing a Departmental reporting system to ensure that consultation efforts are documented and properly reported.

B. Assistant Secretaries. Assistant Secretaries are responsible for ensuring that all Bureaus and Offices within their reporting chain comply with the requirements of this chapter.

C. Heads of Bureaus and Offices. Heads of Bureaus and Offices are responsible for:

(1) Designating in writing one or more NLOs.

(2) Ensuring that procedures are established to carry out the consultation activities of their organizations, consistent with 513 DM 2.5 and 2.6, and ensuring compliance with those procedures.

(3) Ensuring compliance with the requirements in this chapter.

D. NLOs. The NLOs are responsible for:

(1) Serving as the Bureau or Office principal point of contact for Native Hawaiian Community consultation matters.

(2) Promoting and facilitating consultation and collaboration between the Native Hawaiian Community and the Bureau or Office.

(3) Reporting to the NHCGO annually on newly-engaged national or regional consultation with the Native Hawaiian Community.

E. Departmental Staff. Any Departmental staff who will represent the Department or a Bureau or Office in consultation must complete training to promote positive relations with the Native Hawaiian Community, including a review, as applicable, of:

- (1) The history of the government-to-sovereign relationship between the Federal Government and the Native Hawaiian Community;
 - (2) The Federal trust obligation owed to the Native Hawaiian Community;
- and
- (3) The culture and history of the Native Hawaiian Community.

F. Office of Collaborative Action and Dispute Resolution (CADR). Upon request, CADR may assist in planning and facilitating an effective consultation process, negotiated rulemaking, or other collaborative approaches to decision making.

1.7 Secretary's Native Hawaiian Community Leader Engagement Sessions (SNES). As part of the Department's continuing initiatives to fulfill the United States trust obligation to the Native Hawaiian Community, the Secretary or a senior leadership representative must meet twice a year with Native Hawaiian Community Leaders, who may or may not change from meeting to meeting, to consult on matters of mutual interest.

1.8 Native Hawaiian Community Consultation Procedures. Bureaus and Offices will initiate consultation with the Native Hawaiian Community on Actions. In undertaking this consultation, Bureaus and Offices must use the procedures for consultation with the Native Hawaiian Community described in 513 DM 2. When an Action implicates Trust lands, Bureaus and Offices must coordinate with ONHR to ensure compliance with the Federal statutory trust responsibility imposed by the HHCA, HHLRA, and the Admission Act.

1.9 Departmental Database. The ONHR will maintain the primary Department database to manage the contact information for leadership of all NHOs that choose to engage with the Department, including properly registered NHOs and HBAs.

1.10 Native Hawaiian Community Consultation Annual Report. On an annual basis, NLOs must develop a report of the results of their efforts to promote consultation with the Native Hawaiian Community. The report is due to the NHCGO by December 31 of each year. Reporting is intended to provide a broad overview of all consultation efforts undertaken that year and may include, but is not limited to, the scope, cost, and activities of the consultation efforts. The report should also include proposed plans and recommendations. The report may be included as an appendix to the Tribal Consultation Annual Report required in 512 DM 4 (The format for the report is provided in appendix 2).

Appendix 1

Department of the Interior
Native Hawaiian Community Consultation Report

Bureau/Office:

A consultation report provides an overview of a Bureau or Office's consultation conducted with the Native Hawaiian Community. The information in the report should be compiled from all the information captured during the consultation. (Use as much space as needed and include the Bureau or Office name on each page.)

1. Summarize and list all consultation topics covered during the consultation.
2. Summarize and list activities conducted under Step 1: Assessment – Is Consultation Needed or Advantageous.
3. Summarize and list activities conducted under Step 2: Planning – Develop a Consultation Plan.
4. Summarize and list activities conducted under Step 3: Notification – Invitation to Consult.
5. Summarize and list activities conducted under Step 4: Dialogue – Conducting Discussion(s).
6. Summarize and list activities conducted under Step 5: Input – Receiving Comments.
7. Summarize and list activities conducted under Step 6: Consideration – Review and Deliberation of Input.
8. Summarize and list activities conducted under Step 7: Reporting – Notice and Dissemination.

Prepared By:

Date Prepared:

Approving Official:

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Appendix 2

Department of the Interior
Native Hawaiian Community Consultation Annual Report

Bureau/Office:

The annual report is a summary of all Bureau and Office consultations conducted during the fiscal year and all significant consultations conducted with individual Native Hawaiian organizations and through the Secretary's Native Hawaiian Community Leader Engagement Sessions with the Native Hawaiian Community. The information in the Annual Report is a summary of and should be compiled from all the information captured during the fiscal year. (Use as much space as needed and include the Bureau or Office name on each page.)

1. Summarize and list all consultation topics.
2. List all Native Hawaiian organizations consulted.
3. List the location of each consultation by city and county.
4. Summarize and list all issues and recommendations raised by the Native Hawaiian Community.
5. Summarize successes and accomplishments and include recommendations for improvements to the consultation process.

Prepared By:
Date Prepared:
Approving Official:

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