

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, 2021² and Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) in its relations with the Native Hawaiian Community.

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

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; 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

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), a government-to-government relationship encompasses the political relationship between sovereigns and a working relationship between the officials of those two sovereigns. 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).

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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) – Generally includes any Departmental rulemaking, policy, guidance, legislative proposal, operational activity, or grant or funding formula changes³ 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 Trust lands, ancestral or ceded lands and waters, and/or sacred sites or lands; or
- (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; or
- (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. 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.

C. Consultation or Consult – Generally means representatives of the government engaging in an open discussion process that allows interested parties to provide input regarding potential government issues, changes, or actions. Consultation does not transfer or cede government decision-making authority. 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

³ 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.

means. The complexity of the actions, the geographic location of the actions, and the potential effects that the matter may have on the Native Hawaiian Community and its interests 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 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 agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding an action with Native Hawaiian Community implications. 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.

D. 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).

E. Department — Means the Department of the Interior.

F. 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.

G. 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.

H. Native Hawaiian Organization (NHO)

(1) Any organization that:

a) serves and represents the interests of Native Hawaiians;

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

Native Hawaiians; and

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c) has expertise in Native Hawaiian affairs;

(2) Includes but not limited to:

a) Native Hawaiian organizations registered with the Department of the Interior's Office of Native Hawaiian Relations (ONHR); and

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

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

J. Native Hawaiian Community Liaison Officer (NLO) — One or more individuals officially designated by 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.

K. 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 and the Admission Act.

L. 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 NHOs for Departmental plans or actions with Native Hawaiian Community implications. All Bureaus and

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Offices shall engage in robust, interactive, pre-decisional, informative, and transparent consultation on their plans or actions with Native Hawaiian Community. Agencies should seek consensus with the Native Hawaiian Community through the consultation process, where agency 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 United States 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.

C. Government-to-Sovereign relationship and reconciliation. In furtherance of the government-to-sovereign relationship and reconciliation between the United States and the Native Hawaiian Community,

The United States –

(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, Native Hawaiian 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.** NHOs are the informal representatives of the Native Hawaiian Community. The requirement to work with 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.⁴

The Native Hawaiian Community’s leading organizations have varying 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. ONHR maintains the Department’s NHO List at www.doi.gov/hawaiian, in part to help Federal

⁴ 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.

Officials identify the most appropriate Native Hawaiian Community leaders to work with on a particular project.

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) Leading and managing the Department's consultation efforts to ensure effective government-to-sovereign relationship with the Native Hawaiian Community.
- (3) Overseeing Departmental compliance with the policy in this chapter, Executive Order 13175, and other consultation requirements pertaining to government-to-sovereign consultation.
- (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 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 their Bureau or Office.

(3) Reporting to the NHC GO 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 shall 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). CADR is responsible for assisting in planning and facilitating an effective consultation process, negotiated rulemaking, or other collaborative approach to decision-making.

1.8 **Secretary Native Hawaiian Community Leader Engagement Sessions (SNES)**. The Secretary or their senior leadership representative shall 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 as part of the Department's continuing initiatives to fulfill the United States' unique trust obligation to the Native Hawaiian Community.

1.9 **Native Hawaiian Community Consultation Procedures**. When taking Departmental action that has Native Hawaiian Community implications Bureaus and Offices will initiate consultation with NHOs. In undertaking this consultation, Bureaus and Offices shall use the procedures for consultation with the Native Hawaiian Community described in 513 DM 2. When taking Departmental action that implicates Native Hawaiian Trust Lands, Bureaus and Offices shall coordinate with ONHR to ensure compliance with the Federal statutory trust responsibility imposed by the HHCA, HHLRA, and the State of Hawai'i Admission Act, 1959.

1.10 **Departmental Database**. ONHR will maintain the Departmental databases for all properly registered NHOs and HBAs.

1.11 **Native Hawaiian Community Consultation Annual Report**. On an annual basis, Bureaus and Offices shall develop a report of the results of their efforts to promote consultation with the Native Hawaiian Community. The report is due to the NHC GO by December 31 of each year. Reporting is intended to be a comprehensive list 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 highlight significant consultation efforts conducted one-on-one with the Native Hawaiian Community. 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 the 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 on a one-on-one basis 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.
5. Summarize successes and accomplishments and include recommendations for improvements to the consultation process.

Prepared By:

Date Prepared:

Approving Official:

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