

Department of the Interior Departmental Manual

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Series: Intergovernmental Relations

Part 513: Native Hawaiian Community

Chapter 2: Procedures for Consultation with the Native Hawaiian Community

Originating Office: Office of the Secretary

513 DM 2

2.1 **Purpose.** This chapter provides the procedures and process for government-to-sovereign consultation between the Department of the Interior (Department) officials and the Native Hawaiian Community through Native Hawaiian Organizations (NHOs).

2.2 **Scope.** All Department Bureaus and Offices shall follow the processes in this chapter for consultation with the Native Hawaiian Community.

2.3 **Authority.** State of Hawai'i Admission Act, 73 Stat. 4, approved March 18, 1959; Hawaiian Homes Commission Act, 1920, as amended, 42 Stat. 108; Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 357; 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 (establishing the Office of Native Hawaiian Relations and making appropriations therefor). 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.

2.4 **Consultation.**

A. Requirement for Consultation. Bureaus and Offices must consult with the Native Hawaiian Community whenever a Departmental action with Native Hawaiian Community implications, as described in 513 DM 1.4(A), arises.

B. Appropriate Representatives.

(1) The Department official with authority to decide on the proposed Departmental action triggering consultation must participate in the consultation.

(2) The Native Hawaiian Community, through NHOs, may designate representatives to participate in the consultation.

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(3) Bureau or Office staff with subject matter expertise for the topic or program may be involved in the consultation.

C. Coordination. Bureaus and Offices will work with each other and with other Federal agencies, where appropriate, to coordinate consultations.

D. Facilitation Support. In planning consultation, Bureaus and Offices should consider best practices for engagement including, but not limited to, the use of neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution. Such support is available through the Office of Collaborative Action and Dispute Resolution (CADR). If the consulting parties encounter an impasse, the parties may utilize the impartial facilitation, mediation, and consensus-building services provided by CADR

E. Conduct in Consultation. Bureaus and Offices must be open and candid with the Native Hawaiian Community during consultations and incorporate their views in the decision-making processes. Consultations, whether initiated by the Native Hawaiian Community, NHO(s), or the Department, must be respectful of the special political and trust relationship between the United States and the Native Hawaiian Community.

F. Confidential or Sensitive Information. When the matter under consultation involves confidential or culturally sensitive information, the Bureau or Office will work with the Native Hawaiian Community to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If disclosure of information received during consultation would negatively impact a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of the Native Hawaiian Community or applicable NHO(s), the information will be deemed confidential, unless otherwise provided by applicable law, regulation, or policy.

G. Support Principles/Models. The basis of consultation is rooted in meaningful dialogue where the viewpoints of the Native Hawaiian Community, often through NHO(s), and the Department, including its Bureaus and Offices, are shared, discussed, and analyzed. Self-government and self-determination build upon policies supportive of and supported by the Native Hawaiian Community. The Department directs agencies to explore and, where appropriate, use the following principles/models, or any combination of them, when seeking the support of the Native Hawaiian Community for a Departmental agency plan or action:

(1) Broad-Based Community Support consistent with 43 C.F.R. Part 50.

(2) Consensus Seeking – As a corollary to Executive Order 13175, the Department directs agencies to explore and, where appropriate, use consensual mechanisms for developing regulations that relate to Native Hawaiian Community self-governance, Native Hawaiian trust resources, or other Native Hawaiian rights. Such consensual mechanisms involve

good-faith efforts to meet the interests of all Department and Native Hawaiian Community stakeholders and seek agreement with and among the Native Hawaiian Community.

- (a) Consensus includes:
 - (i) pooling opinions;
 - (ii) listening effectively;
 - (iii) discussing ideas and differences;
 - (iv) not getting all you want; and
 - (v) coming to an agreement that everyone “can live with.”
- (b) Consensus is not:
 - (i) a unanimous vote;
 - (ii) majority or minority rule;
 - (iii) one person rule; or
 - (iv) bargaining.
- (c) Consensual mechanisms may include:
 - (i) Traditional Native Hawaiian Community consensus-seeking methods and values;
 - (ii) Informal methods or more structured methods such as brainstorming, multi-voting, and nominal group technique.
- (d) Conditions necessary to achieve consensus include stakeholders having:
 - (i) A common goal – Defining aims and how to achieve them.
 - (ii) A clear process – Identifying a clear process for how consensus will be sought.
 - (iii) A commitment to consensus – Recognizing and valuing the many ways participants can contribute to achieving the common goal.

(iv) Trust & openness – Establishing and maintaining trust, beginning with being transparent and candid about opportunities and limitations.

(v) Flexibility – Being flexible in accommodating changes to the process, receiving information, and adjusting preferences to meet core needs to reach common goal.

(vi) Sufficient time – Prioritizing time and resources to work through the process.

2.5 Consultation Procedures. Bureaus and Offices will carry out the consultation for a Departmental plan or action with Native Hawaiian Community implications using one of the options for procedures below.

A. Standard Operating Procedure (SOP) for Consultation with the Native Hawaiian Community developed by the Department’s Office of Native Hawaiian Relations;

B. Adapted, customized, and/or tailored SOP for Consultation with the Native Hawaiian Community for the Bureau’s or Office’s subject matter area(s); or

C. Bureau- or Office-developed procedure for consultation with the Native Hawaiian Community.

2.6 Seven Steps of the Consultation. All Bureaus or Offices who develop procedures for consultation with the Native Hawaiian Community shall at a minimum include the following seven steps.

A. Step 1: Assessment – Is Consultation Needed or Advantageous?

(1) At the outset of a proposed Federal action (“Action”), it is important for the Bureau or Office to assess whether consultation with the Native Hawaiian Community is necessary or advantageous. To conduct this assessment, it is important to consider the following:

(a) What is the proposed Action and its scope?

(b) Is it controversial or precedent setting?

(c) Is the Native Hawaiian Community aware of the proposed Federal action and if so, what is the Native Hawaiian Community’s level of awareness, interest, or concern in the proposed Federal action?

(d) What are the implications of the action to the Native Hawaiian Community, if any?

(2) If, through the Bureau or Office’s assessment of the action, it is determined that consultation is necessary or advantageous to the action, then the Bureau or Office shall proceed to the next step in the consultation process.

(3) An NHO may request that the Department initiate consultation when the NHO believes that a Bureau or Office is considering a Departmental action with Native Hawaiian Community implications. The appropriate Bureau or Office Native Hawaiian Community Liaison Officer or appropriate representative will treat an official request for consultation in an expedited fashion and respond to the NHO in writing that the Department has received the request, using the most expedient methods to communicate (e.g., by email in addition to U.S. Mail) to the NHO.

B. Step 2: Planning – Develop a Consultation Plan

(1) Once it is determined that the Bureau or Office will engage in consultation with the Native Hawaiian Community for the Action, the Bureau or Office shall prepare for this process and begin the development of a Consultation Plan. There is no “one size fits all” for consultation planning as the level of depth and detail are dependent upon the scope of the Action.

(2) At a minimum, a Consultation Plan shall include:

- (a) The basis and rationale for the consultation;
- (b) A description of how Native Hawaiian Community input will be used and reported for the Action;
- (c) An agenda/outline of the consultation meetings; and
- (d) The mode, location(s), and schedule of consultation meeting(s) with key milestones and a projected timeline of all seven steps of the consultation process.

(3) In deciding on the most effective mode of consultation, the Bureau or Office shall consider the available budget for the Action. The cost of consultation, especially if it involves in-person meetings, can be substantial in Hawai‘i. Inter-island travel, lodging, facility rental and other expenses require thoughtful consideration given the Bureau or Office’s annual budget and the scope of the Action. In some instances, while in-person meetings may be most desired by the Native Hawaiian Community, budgetary constraints may dictate that meetings be conducted remotely or by written means.

C. Step 3: Notification – Invitation to Consult

(1) Implementation of the Consultation Plan typically begins with a notification or invitation to the Native Hawaiian Community to begin consultation on the Action. Invitations and notices can take several forms including, but not limited to, notices in local newspapers or

government publications, letters to Native Hawaiian Community leaders, or electronic or telephonic communication to Native Hawaiian Community leaders.

(2) At a minimum, notifications and invitations to consult shall be sent to the NHO List and the Homestead & Beneficiary Associations List posted to www.doi.gov/hawaiian.

D. Step 4: Dialogue – Conducting Discussion(s)

(1) Engaging the Native Hawaiian Community in dialogue is the most important aspect and the heart of the consultation process. As such, it is vital that it be conducted in a manner that not only informs the Native Hawaiian Community of the Action and its implications, but also creates a suitable environment through which meaningful comments and feedback can be shared and received. Determining the mode of dialogue (written correspondence, tele- or video-conference calls, in-person discussions, etc.) is best performed during consultation planning (Step 2). However, there may be times when it is necessary to modify the means and level of dialogue with the Native Hawaiian Community even after an initial notification has been sent out to the Native Hawaiian Community.

E. Step 5: Input – Receiving Comments

(1) When receiving comments, the Bureau or Office shall:

- (a) Secure appropriate means to record and convert oral comments into written electronic form;
- (b) Secure ‘Ōlelo Hawai‘i translation, if needed;
- (c) Prepare and organize written transcripts or notes;
- (d) Establish a filing system to receive and store written comments; and
- (e) Maintain files for the administrative record.

F. Step 6: Consideration – Review and Deliberation of Input

(1) When engaging in the review and deliberation of input, the Bureau or Office shall:

- (a) Review all comments received during the consultation;
- (b) Organize the comments according to the issues and aspects of the Action they address;
- (c) Decide what to do with non-responsive comments;

- (d) If necessary, seek clarification of the comments received;
- (e) If dealing with potentially sensitive information regarding human remains and associated funerary objects, list only locational information that would be required in a notice, which includes the county and State where the human remains and associated funerary objects originated, if known;
- (f) Adhere to regulatory or pre-established timeframes for completing the review of comments and provide justification if a time extension is necessary; and
- (g) Prepare a Consultation Report that, at a minimum, includes the following summaries:
 - (i) Federal action necessitating the consultation,
 - (ii) Comments received through consultation, and
 - (iii) Interim and preliminary recommendations and decisions made during the consultation process, when applicable.

G. Step 7: Reporting – Notice and Dissemination

(1) The Bureau or Office must post the Consultation Report on its website or send it to the participating parties. If only posting the Consultation Report on the Bureau or Office website, the Bureau or Office must notify participating parties that the Consultation Report will be made available to them on the Bureau or Office website. The Bureau or Office must also include a copy of the Consultation Report in the Action's administrative record.

2.7 **Decision-making.**

A. While the Bureau or Office may retain the ultimate authority to decide whether to proceed with an Action, it is important to support that decision with sound information. To this end, informed and effective decision-making is the ultimate objective of the consultation process. In some situations, the Bureau or Office makes decisions throughout the consultation process. In others, the Bureau or Office makes decisions only after the consultation process has concluded. No matter at what step the decisions are reached, it is always beneficial to document how that decision was made and the role the consultation played in that decision. By doing so, the Bureau or Office supplements its authority with the expertise from the Native Hawaiian Community to better inform the Bureau or Office's decision-making. Whether the final decision aligns with or differs from the positions of the Native Hawaiian Community, documenting and sharing this information is also an important tool in building trust with the Native Hawaiian Community and securing their future participation and assistance.

B. When documenting decision-making, the Bureau or Office may revise the Consultation Report and administrative record to:

- (1) Update any change in interpretation or understanding of the comments received;
- (2) Connect the comments and rationale to the final decision; and
- (3) Provide supporting documentation relevant to the input received from the Native Hawaiian Community.

C. Bureaus and Offices may consider implementing a post-consultation review process that invites Tribal feedback or considers the need for training or technical assistance concerning the final Action. The post-consultation review process shall not limit the Department's deliberative process privilege regarding internal considerations or any other applicable privilege.

2.8 **Consultation Report.** Upon completion of the consultation, Bureaus and Offices must prepare a summary of the consultation activities as described in 513 DM 1.4(D). Information from the summaries should be used to develop the Annual Report described in 513 DM 1.11.