

## 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

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### 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) and Native Hawaiian Community Leaders.

2.2 **Scope.** All Department Bureaus and Offices must 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; 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, Public Law No. 108-199, 118 Stat. 3, 445 (establishing the Office of Native Hawaiian Relations and making appropriations therefore). 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 on all Actions with Native Hawaiian Community implications, as defined in 513 DM 1.4.A.

B. Appropriate Representatives.

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

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(2) The Native Hawaiian Community, including through informal representative NHOs, may designate Native Hawaiian Community Leaders and representatives to participate in the consultation.

(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, including through their Native Hawaiian Community liaison officers (as defined in 513 DM 1.4.M), 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, including Indigenous Knowledge, 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, Native Hawaiian Community Leaders, NHOs, 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, which may include Indigenous Knowledge, 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 representatives, the information will be deemed confidential, unless otherwise provided by applicable law, regulation, or policy.

G. Accommodations and Flexibility. The Native Hawaiian Community, spread across the pae 'āina o Hawai'i and the United States represents a diversity of environments, circumstances, experiences, knowledge, perspectives, and cultural practices. For example, Native Hawaiian communities on the Island of Hawai'i may have different resource concerns, governance and social structures, and challenges than those on O'ahu. Thus, the Native Hawaiian Community may express a diversity of opinions and recommendations in consultation that should not automatically be viewed or assumed to be inconsistent or competing. Broader decisions and policies should take this into account and allow discretion to tailor to the specific locations and segments of the Native Hawaiian Community, as applicable.

H. Support Principles/Models. The basis of consultation is rooted in meaningful dialogue where the viewpoints of the Native Hawaiian Community, often through NHOs, 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 Bureaus and Offices to explore and, where appropriate, use the following principles and models, or any combination of them, when seeking the support of the Native Hawaiian Community for an 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 Bureaus and Offices 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) finding pathways to compromise; 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 a 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 an Action 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 (ONHR);

B. Adapted and customized 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 must, 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 activity, it is important for the Bureau

or Office to assess whether the Federal activity meets the definition of an Action with Native Hawaiian Community Implications (Action) as defined in 513 DM 1.4A. If the activity meets the definition of an Action, consultation is required, and the Bureau or Office must proceed to step 2 (planning stage).

(2) If the Federal activity does not meet the definition of an Action, the Bureau or Office may still determine consultation with the Native Hawaiian Community is otherwise necessary or advantageous. To conduct this assessment, it is important to consider the following:

- (a) What is the proposed Federal activity and its scope?
- (b) Is it controversial or precedent setting?
- (c) Is the Native Hawaiian Community aware of the proposed Federal activity and if so, what is the Native Hawaiian Community's level of awareness, interest, or concern?
- (d) What are the implications of the Federal activity to the Native Hawaiian Community, if any?

(3) If, through the assessment of the Federal activity, it is determined that consultation is necessary or advantageous, then the Bureau or Office must proceed to step 2 in the consultation process and for the purposes of this consultation policy, the Federal activity must be referred to as an Action.

(4) An NHO may request that the Department initiate consultation when the NHO believes that a Bureau or Office is considering an 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 must 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 or 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 must consider the available budget for the Action. The cost of consultation, especially if it involves in-person meetings, can be substantial across the Hawaiian Islands. Interisland travel, lodging, facility rental, and other expenses require thoughtful consideration given the Bureau's 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.

(4) When a Bureau or Office is consulting on an Action with the Native Hawaiian Community, as well as with American Indian or Alaska Native Tribes, Alaska Native Claims Settlement Act Corporations, or Pacific island territories, the Bureau or Office must coordinate with their respective field office or unit that has a working relationship with the Native Hawaiian Community, or consult with ONHR if such respective field office does not exist, to determine whether it would be beneficial to conduct such consultation with the Native Hawaiian Community in the same or separate sessions.

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 must be sent to the NHO notification list and the Homestead and Beneficiary Associations list.

(3) Notifications should include sufficient information for members of the Native Hawaiian Community to determine whether the proposed Action may affect their interests. Such information should:

(a) describe the Action and its scope;

(b) describe how the comments received from the Native Hawaiian Community will be used to inform decision making;

(c) provide supporting information and materials (frequently asked questions, maps, weblinks to reports or studies, etc.);

(d) provide a point-of-contact email, telephone, and mailing address for general questions and written input;

(e) provide the date(s) and time(s) for the consultation meeting(s). Sufficient time should be provided to interested parties and the date of the (first, if there are several) consultation meeting should be no less than 30 days from the date of the notice or invitation. If exceptional circumstances prevent notice within 30 days of the consultation, an explanation for the abbreviated notification should be provided. The Bureau or Office may contact Native Hawaiian Community Leaders to determine their availability for consultation meetings in order to increase the effectiveness of the meeting(s);

(f) provide the location(s) of the consultation meeting(s) if in-person meetings will be conducted; or provide the telephonic or video call-in information if consultation will be conducted remotely; and

(g) provide the deadline date and time for receipt of written comments.

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, teleconference or videoconference 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 must:

(a) secure appropriate means to record and convert oral comments into written electronic form;

(b) secure ‘ōlelo Hawai‘i translation, when needed, especially when the Action or impacted interests involve a cultural practice or Indigenous Knowledge;

(c) prepare and organize written transcripts or notes;

- and
- (d) establish a filing system to receive and store written comments;
  - (e) maintain files for the administrative record.

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

- Office must:
- Action they address;
- (1) When engaging in the review and deliberation of input, the Bureau or Office must:
    - (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 nonresponsive 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 preestablished 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) 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 its website, the Bureau or Office must notify participating parties that the consultation report will be made available on the 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, including Indigenous Knowledge, 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; and
- (2) Provide supporting documentation relevant to the input received from the Native Hawaiian Community, connecting the comments and rationale to the final decision.

C. Bureaus and Offices may consider implementing a post-consultation review process that invites Native Hawaiian Community feedback or considers the need for training or technical assistance concerning the Action. The post-consultation review process may 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.E. Information from the summaries should be used to develop the Annual Report described in 513 DM 1.11.