



Proposed Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian Organizations

Section A. Background

For over three decades, the Advisory Council on Historic Preservation (ACHP) has been working to expand the participation of Native Hawaiian organizations (NHOs) in the historic preservation review process under Section 106 process of the National Historic Preservation Act, 54 U.S.C. § 306108, 36 C.F.R. part 800 (Section 106). In 1992, Congress amended the National Historic Preservation Act to clarify that properties of religious and cultural importance to Native Hawaiian Organizations (NHOs) may be eligible for listing in the National Register of Historic Places and that federal agencies, in carrying out their Section 106 responsibilities, must consult with any NHO that attaches religious and cultural significance to historic properties that may be affected by an undertaking. The ACHP incorporated the provisions in the Section 106 regulations, [36 C.F.R. Part 800, “Protection of Historic Properties.”](#)

The ACHP in 2008 adopted the [ACHP Policy Statement on the ACHP’s interaction with Native Hawaiian Organizations](#). This policy set forth the ACHP’s commitments to ensure that NHOs are fully included and allowed the opportunity to effectively participate in the federal historic preservation program. The policy also set forth the ACHP’s consideration of Native Hawaiian values, such as a deep love and understanding of the land and a respect for the powerful forces of nature, also recognizing the significant contribution Native Hawaiians make towards the enrichment of this nation. In 2010, President Obama announced U.S. support for the United Nations Declaration on the Rights of Indigenous Peoples and in 2013 the ACHP became the first agency to formally adopt its intent with the [ACHP Plan to Support the U.N. Declaration on the Rights of Indigenous Peoples \(Declaration\)](#). The plan calls for the ACHP to incorporate the principles and aspirations of the Declaration into its work regarding Native Hawaiian historic preservation issues.

The ACHP published the 2021 [Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants](#) to help inform federal agencies of their obligation to incorporate traditional knowledge in the Section 106 decision making and noting the ACHP believes that Native ways of knowing are important to a full understanding of historic properties

that must be considered in the Section 106 review process. In 2023, the White House Office of Science and Technology Policy and the Council on Environmental Quality issued government-wide [Guidance for Federal Departments and Agencies on Indigenous Knowledge](#).

To further elaborate, advance, and encourage Indigenous Knowledge in the Section 106 process the ACHP adopted the [ACHP Policy Statement on Indigenous Knowledge and Historic Preservation](#). The policy includes principles that should be applied by federal agencies, state and local governments, and nongovernmental institutions, including private contractors, to advance the integration of Indigenous Knowledge into historic preservation decision making. Principle 3 of that policy states:

For purposes of Section 106, the term “Indigenous Knowledge” includes, but is not limited to, the experiences, insights, and knowledge held by Indian Tribes and NHOs that can assist federal agencies in identifying, evaluating, assessing, and resolving adverse effects to historic properties that may be of religious and cultural significance to them. While the NHPA directs federal agencies to make the final decisions in the Section 106 review, the law also directs agencies to consult with Indian Tribes and NHOs in carrying out the review process. Deference can and should be provided to the expertise of designated representatives about Indigenous Knowledge that is provided to inform decision making in the Section 106 process. A reasonable and good faith effort includes the responsibility that federal agencies, consistent with 36 CFR § 800.2(c)(2)(ii)(A), consider Indigenous Knowledge in a successive and cumulative manner throughout the four-step Section 106 process.

Principle 4 of that policy states: “Section 106 agreement documents and program alternatives that relate to or include the identification of, assessment of effects to, or resolution of adverse effects to historic properties of religious and cultural significance to an Indian Tribe or NHO should include language or stipulations that address the role of Indigenous Knowledge in informed decision making and how designated representatives would be involved in any ongoing reviews or consultation.”

This exemption constitutes a Section 106 program alternative that is designed to advance the recognition of Indigenous Knowledge in informed decision making by federal agencies and advances the ACHP’s application of these and other principles within the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation and prior relevant ACHP documents and statements.

Section B. Exemption Concept and Criteria

In 1999, following amendments to the National Historic Preservation Act (NHPA) in 1992, the ACHP regulations were clarified to require consultation with Indian Tribes and NHOs that attach religious and cultural significance to historic properties. In 2024, the ACHP approved its Policy

Statement on Indigenous Knowledge and Historic Preservation outlining, in part, the uses of Indigenous Knowledge in Section 106 reviews. Following approval of that policy statement, the Chair of the ACHP identified that certain federal agencies reviewing undertakings involving NHOs, specifically those utilizing Indigenous Knowledge, were experiencing challenges in meeting Section 106 requirements despite clear compliance with the broad goals and outlines of federal historic preservation policy. Such projects have included, in the past, federal grant activities, federal mitigation projects, and federal land management actions. ACHP members consulted with and took into account the views of stakeholders – including federal and state officials, NHOs, historic preservation organizations, and individuals – to develop a limited set of undertakings whose potential effects upon historic properties are foreseeable and likely to be minimal or not adverse and where exemption of the undertakings would be consistent with the purposes of the NHPA.

In adopting this exemption, the ACHP determined that it meets these criteria. The exemption aligns with the requirements of the NHPA reflecting an effort to promote historic preservation by enabling types of restoration and rehabilitation projects that are essentially preservation activities. As described below, the exemption will be restricted to only specific activities undertaken with or by NHOs, and to those projects that benefit historic preservation and cultural perpetuation by reconstructing, interpreting, restoring, rehabilitating, and preserving historic properties significant to NHOs, and that have effects that are foreseeable and likely to be minimal or non-adverse.

The ACHP has also determined that the exemption is an appropriate choice among the program alternatives available because of the nature of the activities and the consistency with the Policy Statement on Indigenous Knowledge and Historic Preservation, which recognize Indigenous Knowledge as "valid, sound, and self-supporting." Further, Indigenous Knowledge-informed activities, as outlined in this exemption, consist exclusively of historic and cultural preservation and perpetuation activities. This exemption offers NHOs engaged with federal agencies the ability to identify the appropriate paradigm, cultural methods, and practices in which proposed undertakings shall be carried out in order to support the cultural perpetuation goals as well as meeting the policy principles within the ACHP's Policy Statement on Indigenous Knowledge.

Section C. Public Participation and Consultation

Section D. Text of the Exemption

Section I. Exemption from Section 106

Except as noted in Section IV, all federal agencies are exempt from the Section 106 requirements of taking into account the effects of undertakings identified in Section III.

Section II. Applicability of Exemption

This exemption applies only to undertakings identified in Section III. This exemption applies to undertakings where, prior to [date of adoption], the relevant federal agency has not yet made a final decision about carrying out, licensing, or assisting the undertaking, as applicable. Federal agencies are strongly encouraged to use the applicable amendment provisions of Section 106 Memoranda of Agreement or Programmatic Agreements executed prior to [date of adoption] for undertakings that would otherwise be covered by this exemption, to consider making such agreements consistent with this exemption.

Before a lead federal agency may use this exemption, it must first request and receive from the relevant NHO a formal statement detailing how such activities meet the terms of this exemption. Such a formal statement must include:

- a.** An attestation that the entity meets the definition of an NHO in the NHPA.
- b.** A description of the NHO's proposal, direction, authorization, or support vis a vis the covered activities.
- c.** A description of the rehabilitation, preservation, restoration, or reconstruction, as identified consistent with the cultural practices of the NHO.
- d.** A statement identifying the individual (such as a chair, executive director, president, or other person) who is authorized to represent and submit on behalf of the NHO.
- e.** A statement identifying the property at issue as a property of religious or cultural significance to the NHO, if such property is neither listed on, nor previously been found eligible for inclusion in, the National Register of Historic Places.
- f.** A signature or other attribution by the above-mentioned authorized person.

Section III. Covered Activities

This exemption applies to the following undertakings when they are (1) proposed, directed, or authorized by an NHO, (2) substantially led, designed, or managed by NHOs, (3) informed by Indigenous Knowledge of that NHO, (4) related to traditional cultural practices of Native Hawaiians, and (5) preceded by the submission of the statement described in Section II by the NHO to the relevant federal agency:

- a.** Conduct of landscaping practices or activities, including but not limited to arboreal practices, invasive species removal, and other landscape maintenance, reestablishment, or facilitation.
- b.** Conduct of agricultural practices or activities, including but not limited to planting and crop rotation, harvesting, native species propagation, and soil management.
- c.** Rehabilitation, preservation, restoration, or reconstruction of water features and systems, including but not limited to fishponds and other traditional aquaculture.

- d.** Rehabilitation, preservation, restoration, or reconstruction of historic pathways using natural materials.
- e.** Rehabilitation, preservation, restoration, or reconstruction of sacred and traditional sites, including but not limited to heiau, burial sites, walls, shrines, ahu, and similar structures and objects.
- f.** Rehabilitation, preservation, restoration, or reconstruction of traditional Native Hawaiian buildings and structures built and designed primarily by Native Hawaiians (including but not limited to palaces and residences).
- g.** Rehabilitation, preservation, restoration, or reconstruction of properties with religious or cultural significance to NHOs, as defined by NHOs.
- h.** Installation of interpretive signage related to any of the covered activities enumerated in Section III, subsections **a** through **g**.
- i.** The transfer of federal property or interest in federal property to a NHO or the grant of a nonpossessory interest in real property to an NHO for temporary use of the property, in order to carry out any of the covered activities enumerated in Section III, subsections **a** through **h**.

While the preceding categories of action have been identified as appropriate activities for this exemption, nothing in this section should be construed as to suggest that practices not herein contained are not in line with traditional practices informed by Indigenous Knowledge.

For the avoidance of doubt, the return or incorporation of Indigenous names to streets, monuments, or other locations is not an undertaking requiring Section 106 review, even if such renaming involves federal agency action (including but not limited to permitting, licensing, funding, or other assistance).

Section IV. Activities Not Covered and Exceptions

This exemption shall not cover:

- a.** Demolition or removal of properties listed or known to be eligible for listing on the National Register of Historic Places, unless the demolition or removal decision has previously completed review pursuant to Section 106.
- b.** The construction of new buildings or structures that are not for the express purpose of maintaining or reestablishing traditional cultural or religious practices informed by Indigenous Knowledge.
- c.** The treatment or disposition of burial sites, human remains, and funerary objects in a manner contrary to the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.
- d.** Components of an undertaking beyond those listed in Section III, including components added after the undertaking was first initiated or conceived.

The federal agency will remain responsible for Section 106 compliance with regard to any activities not covered by this exemption, including appropriate identification, scoping, evaluation, and consultation activities, among others.

Section V. Existing Agreements and State and Local Reviews

This exemption does not amend, invalidate, or otherwise modify Section 106 agreements in existence at the time this exemption goes into effect, provided, however, that federal agencies are strongly encouraged to use the applicable amendment provisions of Section 106 Memoranda of Agreement or Programmatic Agreements executed prior to [date of adoption] for undertakings that would otherwise be covered by this exemption, to consider making such agreements consistent with this exemption. This exemption does not modify, preempt, or replace any applicable state or local laws or regulations.

Section VI. Termination

The ACHP may terminate this exemption in accordance with 36 C.F.R. § 800.14(c)(7) if it determines that the purposes of Section 106 are not adequately met.

Section VII. Amendments

This exemption may be amended by the ACHP membership. Such amendments must be consistent with the criteria at 36 C.F.R. § 800.14(c)(1) and preceded by consultation appropriate to the scope of the amendments. Notwithstanding the foregoing, after one year after the approval of this exemption, a subcommittee of the ACHP membership consisting of the Chair, the Secretary of the Department of the Interior or his or her designee, the Secretary of the Department of Agriculture or his or her designee, the ACHP Tribal or Native Hawaiian Member, and the Chair of the National Association of Tribal Historic Preservation Officer or his or her designee may, through a majority vote, amend: Section II of this exemption to expand the applicability of the exemption to Indian tribes; or Section III to modify the list of covered activities; provided that any such amendment shall be preceded by consultation appropriate to the scope of such amendment.

Section VIII. Confidential Information

Nothing in the terms of this exemption shall be construed to require the disclosure of confidential information or sensitive information, or the publication of Indigenous Knowledge. Federal agencies shall follow the guidance contained in the ACHP 2016 Frequently Asked Questions on Protecting Sensitive Information about Historic Properties Under Section 304 of the National Historic Preservation Act and shall comply with applicable laws regarding the protection and dissemination of records.

Section IX. Definitions

This exemption uses the definitions found in 36 C.F.R. § 800.16, and for convenience these definitions are provided here, provided that in the event of any conflict between these definitions and the definitions in 36 C.F.R. § 800.16, the latter definitions shall prevail:

a. Agency: An agency as defined by 5 U.S.C. 551, including state, local, or tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

b. Historic property: Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian Organization that meet the National Register of Historic Places criteria.

c. Indian tribe: An Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

d. Native Hawaiian: 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 Hawaii.

e. Native Hawaiian Organization (NHO): Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

f. Tribal lands: All lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

g. Undertaking: A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.