



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), as defined in 36 C.F.R. § 800.16(s)(1), in the historic preservation review process under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 (Section 106) and its implementing regulations, 36 C.F.R. part 800. In 1992, Congress amended the NHPA to clarify that properties of religious and cultural importance to 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, and its recognition of 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.

In 2021, the ACHP published the guidance document entitled [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 2022, 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 on this guidance, and advance and encourage the use and integration of Indigenous Knowledge in the Section 106 process, in 2024 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 to advance 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 NHPA in 1992, the ACHP revised its regulations to set forth how agencies must consult 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 ACHP has identified that certain federal agencies reviewing undertakings involving NHOs, specifically those utilizing Indigenous Knowledge, were experiencing challenges in meeting Section 106 requirements despite the fact that the undertakings themselves consisted of historic preservation activities. Examples of such projects have included, in the past, federal grant activities to NHOs, such as

grants for agricultural restoration in He'eia and maintenance activities at Ulupō Heiau in Kailua, and federal land management actions.

The ACHP elicited views from NHOs on this exemption. Representative comments during consultation on this exemption include:

- “Chair Bronin referenced visits to Ulupō Heiau in Kailua, Pā‘aiāu Loko I‘a at Pu‘uloa, and the traditional agricultural restoration work being done in the He‘eia ahupua‘a by Kāko‘o ‘Ōiwi. These communities serve as shining examples for the many others that are practicing their traditional and customary rights and practices to manage and restore their biocultural resources. This exemption could further support and expand their work, including clearing the barriers toward better management of fisheries through appropriate signage, restoration of loko i‘a (fishpond infrastructure), and lo‘i kalo (traditional wetland taro agriculture), care and restoration of spiritual sites such as heiau, and protection of burials sites, to name a few.” (Kua‘āina Ulu ‘Auamo)
- “Our non-profit, Hanona, received a Native Hawaiian Education Federal Grant a couple of years ago. A portion of our grant project is to restore Kealaka‘ihonua Heiau on the island of Maui. We are currently in the midst of the Section 106 process to restore Kealaka‘ihonua Heiau. While it may be too late for an exemption for our Kealaka‘ihonua Heiau Restoration project, we feel the proposed Section 106 exemption may be beneficial to other Native Hawaiian Organizations and be pertinent for similar projects or actions that may qualify for Federal funding in the future.” (HANONA)
- “We commend the ACHP for its efforts to recognize and facilitate the integration of Indigenous Knowledge in the Section 106 review process. The proposed exemption represents a significant step towards honoring the cultural practices of Native Hawaiians and ensuring that their traditional knowledge is incorporated into federal decision-making processes.” (‘Āina Momona)
- At the June 14 consultation meeting, the President of this club expressed support for the exemption based on her group’s experience working with the Navy to restore Loko Pa‘aiāu fishpond, work that is ongoing and expanding, and subject to Section 106. (Ali‘i Pauahi Hawaiian Civic Club)
- At the June 14 consultation meeting, the President of this association expressed support for the exemption and identified a variety of activities, including fencing and boundary creation, that he hoped would be included in the exemption for Section 106 projects. (Kauhako Ohana Association)
- In addition, the State of Hawai‘i Office of Hawaiian Affairs recognized in written comments a “shared concern about Federally funded NHO preservation-type projects being subject to the same review standards as development-type projects.”

ACHP members consulted with and took into account the views of stakeholders – including federal and state officials, NHOs, historic preservation organizations, and individuals – to identify 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 includes several safeguards to limit the covered undertakings’ effects to those that are minimal or

not adverse, including: the requirements that covered activities include only those informed by Indigenous Knowledge of the NHO and related to the traditional cultural practices of Native Hawaiians; a requirement that the NHO attest to its involvement in the undertaking and its relationship to the property, and the undertaking's relationship to Native Hawaiian cultural practice; a carefully prescribed list of covered activities, each tied to Indigenous Knowledge of the NHO and traditional cultural practice of Native Hawaiians; and careful limits on the types of materials, construction techniques, and activities of the covered activities.

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. In comments provided during consultation, the Historic Hawai'i Foundation offered the following observation related to this point: "By its nature, the Section 106 process is generally for federal actions that are for other purposes, where impacts to the historic properties are collateral damage or, at best, an afterthought. In the vast majority of the cases, the Section 106 process is meant to avoid, minimize or mitigate effects from an undertaking that is designed for some purpose and need other than preservation. ... there are instances where the undertaking itself is for the purpose of stewardship for a cultural resource or historic property. The most relevant examples are financial assistance (grants, cooperative agreements, in-kind support) from an agency to a public or nonprivate partner to implement a preservation project. While inherently different in intent and scope, these actions are also federal undertakings, which trigger the Section 106 process. ... HHF has long been an advocate for providing a streamlined method for Section 106 for actions that are for the purpose of preservation and stewardship."

As described below, the exemption will be restricted to only specific activities undertaken with or by NHOs, and to those projects that benefit historic and cultural preservation 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 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 satisfy the policy principles set forth in the ACHP's Policy Statement on Indigenous Knowledge.

The ACHP advises federal agencies that 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 permitting, licensing, funding, or other assistance decisions. Because such activities do not require Section 106 review, they are not included in the list of exempt undertakings specified by this exemption.

Section C. Public Participation and Consultation

In accordance with 36 CFR § 800.14(c)(2), public participation regarding exemptions must be arranged on a level appropriate to the subject and scope of the exemption. The exemption is not nationwide action and would only have effect within the State of Hawai‘i. Unlike policy actions that have Tribal implications, consultation requirements of Executive Order 13175 are not triggered for this exemption as there are no Indian Tribes with a government-to-government relationship located within, nor have interests in Hawaii.

In mid-April 2024, Chair Bronin met with many representatives of NHOs while visiting several historic sites on Oahu with leaders from the Office of Hawaiian Affairs, Historic Hawai‘i Foundation, and the Department of the Interior (DOI) Office of Native Hawaiian Relations. Chair Bronin and former ACHP Member Reno Franklin further met with numerous Native Hawaiians on Maui, including the Cultural Monitor of Federal Emergency Management Agency (FEMA) recovery efforts in Lahaina. During these meetings, Chair Bronin and Member Franklin heard comments about improving the Section 106 process for NHOs assisting federal agencies. The NHOs identified issues related to unnecessary delays and expense associated with federal historic preservation reviews of Native Hawaiian cultural practice, and potential interference by non-Indigenous authorities in Indigenous Knowledge-informed activities. In addition, there was significant concern that Section 106 reviews of any proposed reconstruction and restoration of traditional Native Hawaiian sites in and around Lahaina would significantly delay or thwart the implementation of such undertakings.

In mid-May, Chair Bronin announced her intent to draft an exemption at the ACHP Tribal and Indigenous Peoples Committee meeting with the stated support of Chairman Franklin and creation of a proposed working group consisting of Vice Chair Jordan Tannenbaum and representatives of the Department of Homeland Security (DHS), the Department of Defense (DOD), the DOI, the National Trust for Historic Preservation (NTHP), and the National Association of Tribal Historic Preservation Officers (NATHPO).

After circulating a draft of the exemption to the above-referenced working group on May 16, 2024, Chair Bronin met with the NATHPO and NTHP. Based on these meetings and exchanges among the working group, Chair Bronin addressed comments and incorporated feedback into the draft. On May 22, the Office of Tribal and Indigenous Peoples distributed to the ACHP’s NHO listserv a notice of intent to propose an exemption, including a link to the ACHP’s webpage explaining the proposal, a notification of two NHO consultations and one public meeting on the proposal, along with a notice that written comments would be taken until July 7. After Chair Bronin met with Hawai‘i State Historic Preservation Officer Dawn Chang on May 28 to discuss the draft exemption, the draft of the exemption consolidating all preliminary input was posted on the ACHP website.

The ACHP and Chair Bronin promoted the proposal and opportunities for public engagement and NHO consultation on social media, including LinkedIn, X, and Facebook. Chair Bronin further published an op-ed in Hawai‘i’s largest newspaper, the *Honolulu Star-Advertiser* (circulation 107,191), describing the proposed exemption, explaining its history and rationale, and inviting

public comment with a link to the ACHP webpage. This newspaper piece was promoted by Chair Bronin and the ACHP on the above-referenced social media platforms.

On May 31, 2024, a second notice of the proposed exemption was distributed to the ACHP's NHO listserv, restating key information in the May 22 notice and pointing out that the final draft of the proposed NHO Exemption had been posted on the ACHP website. Chair Bronin further explained the proposed exemption while urging feedback and ACHP engagement in a webinar of the American Planning Association Division on Urban Design and Historic Preservation on May 22. More than 1,000 people registered for this event. On June 12, Chair Bronin led a public engagement meeting about the proposed exemption with participating members including representatives of federal agencies, the State of Hawai'i State Historic Preservation Division, and members of the general public. Chair Bronin addressed comments and questions from participants, including several representatives of the SHPO, federal agencies, and cultural resources practitioners.

To meet the consultation requirements in 36 CFR § 800.14(c), the ACHP developed and executed a plan to consult with Native Hawaiian Organizations. The plan included the conduct of two NHO consultations organized by the ACHP and directly facilitated by Chair Bronin. On June 14, Chair Bronin led a first NHO consultation meeting with a second meeting on June 27. At the first consultation meeting, representatives of NHOs were in attendance, including the President of the Kauhako Ohana Association, the Ahupua'a Accelerator Initiative Coordinator of the Hawai'i Conservation Alliance, and the President of the Ali'i Pauahi Hawaiian Civic Club. At the second consultation meeting, representatives of NHOs were again in attendance, including the Vice President of 'Āina Momona, Executive Director of Kua'āina Ulu 'Auamo, and a representative from the Kauai Sea Farm, among others, as well as a representative of the State of Hawai'i Office of Hawaiian Affairs.

At both meetings, attendees expressed support for the intent and overall content of the exemption and raised specific suggestions about covered activities to include in the list (including, among others, fencing to protect cultural sites, climate change-related adaptation measures, and new construction of traditional structures such as hale and hālau wa'a), urged that there be safeguards (such as public notice or reporting) on the exemption, and that the exemption provide for documentation that the NHO proponent meets the definition of an NHO (pursuant to NHPA and 36 C.F.R. § 800.16(s)(1)). In addition, attendees asked that undertakings known to have the potential to infringe on the Indigenous Knowledge-informed cultural practice by other NHOs not be included in the scope of the exemption, and asked for clarification about the applicability of other state and federal laws. Chair Bronin addressed comments and questions from the attendees, and those unable to attend had the opportunity to contact staff through a dedicated email address monitored by staff to guarantee a timely response.

Chair Bronin and OTIP staff have reviewed the comments and questions from NHOs and the general public while making adjustments as needed in preparation for the final draft of the exemption. The written comment period closed on July 7.

Section D. Response to Public Comment *[as of August 1, 2024 – will continue to be amended in response to the second comment period]*

Comments from members of the public, state and federal agencies, and NHOs covered a range of topics, including: strengthening protections for historic and cultural properties not involved with a covered undertaking; addressing several issues related to NHO connections to properties at issue and NHO capacity; refining the scope of covered activities and excluded activities; confirming federal agency responsibilities; adding notice to the public, periodic reporting, and reviews; and several minor suggestions. In response to these comments, the ACHP revised the exemption to more clearly define the range of actions that can occur using the exemption and added additional detail to the conditions under which an undertaking may fall within the scope of this exemption.

Several comments suggested strengthening the provisions in the exemption to clarify how historic and cultural properties not involved with a covered undertaking would be protected against adverse effects. In response, the ACHP revised the exemption to: require a statement by an NHO participating in the exemption that explains the NHO's connection to the property and its members' current or ancestors' prior relationship to the property, as well as a statement that the NHO knows of no other NHO's traditional cultural practice being infringed upon and that no other properties on or eligible for the National Register will be potentially demolished or removed; indicate that the federal agency remains responsible for identification and considering the effects of the covered activities on other surrounding sites; and explicitly exclude from the exemption undertakings known by the agency or NHO to be contrary to or limiting of another NHO's traditional cultural practice. Such provisions were added to other existing protections, including the explicit exclusion from the exemption the demolition or removal of properties listed or known to be eligible for the National Register.

Several comments queried how NHOs identified by a federal agency might be asked to demonstrate their connection to a particular historic property at issue. Revisions to the NHO attestation provisions in Section II refine the types of connections that must be attested to, including statements about the property's ongoing or prior traditional cultural practices related to the property and about the prior connections (including activities, support, and relationships) between key individual decision-makers and members of the NHO and the Native Hawaiian community and individuals known to have ancestral connections to the property. In addition, as a threshold matter, it was noted that some NHOs may not have the capacity to directly manage a project, though they could nonetheless propose, direct, or authorize such a project. Thus the provision in the exemption originally requiring both direct project management and proposal, direction, or authorization were combined to allow for a broader range of NHOs to participate in this exemption. This change was made in the first sentence of Section III.

Many comments addressed the list of covered activities in Section III. The draft exemption was revised to include several Native Hawaiian terms and to identify more precisely certain activities, as well as revised to acknowledge the description of Indigenous Knowledge. A comment suggesting that "properties with religious or cultural significance to NHOs" was overly broad resulted in the deletion of that provision given that other activities in the section were described in greater detail. Commenters suggested that the provision on new construction be narrowed, and specific buildings and structures identified; that provision was modified to include hale, hālau

wa‘a, and boundary structures in response to specific suggestions. Several NHOs and a state agency suggested that minor adaptations to the covered activities to respond to climate change, pollution, and invasive species be expressly allowed. A provision on this was included.

Commenters had questions and suggestions about activities not to be covered by the exemption. In response, the ACHP clarified that federal agency decisions regarding land access, undertakings known to be contrary to or limiting of NHO or Native Hawaiian cultural practices, undertakings outside the state of Hawai‘i, undertakings conducted during emergency situations, and National Historic Landmarks were not covered by the exemption.

Commenters wanted clearer language confirming federal agency responsibilities for Section 106 compliance. New language in Section II clarifies that the exemption may only be applied after a federal agency identifies an NHO for participation in an undertaking, and only after the federal agency initiates any necessary consultation. A new Section V confirms that federal agencies remain responsible for Section 106 compliance and for considering the effects of undertakings on historic properties other than those directly addressed by covered activities. It also provides clarity regarding dispute resolution if a federal agency learns of an unexpected conflict after it decides to use the exemption.

Commenters from the federal government and NHOs suggested public notice, periodic reporting, and reviews to assess the effectiveness of the exemption. To address these comments, the ACHP added a recommendation for public notice to the State of Hawai‘i or a newspaper of statewide circulation in Section II. In addition, the ACHP added Section X, which includes annual reporting by federal agencies that use the exemption. It also requires the ACHP to schedule a meeting with federal agencies that used the exemption, representatives of the State Historic Preservation Office, NHOs, federal preservation officers, and others.

Public comments also included a range of typographical and similarly minor suggestions, such as including a reference to Chapter 6(E) of the Hawaii Revised Statutes in Section VI. The ACHP largely incorporated these suggestions. In addition, commenters suggested the inclusion of definitions from the Secretary of the Interior Standards for the Treatment of Historic Properties, and Section XI now includes these. Finally, it was suggested that a reference to the provision in the policy statement promoting consultation with and deference for descendant communities in the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects be included; such a reference was added.

The ACHP declined to include several suggestions. Several NHOs suggested that the provision on new buildings and structures be expanded to include various support facilities, such as offices and housing. The ACHP declined to expand the provision on new buildings and structures in this manner, because the potential adverse effects of these buildings and structures could not be readily ascertained. At least two comments requested there be an appeals process to the ACHP of agency determinations. The ACHP declined to include an appeals process into this exemption. The exemption, as a type of program alternative, removes the requirement for Section 106 review for specified undertakings, therefore it is not the appropriate administrative vehicle to provide for a dispute resolution process. Each federal agency should consult meaningfully with NHOs in proposing and developing undertakings that may be subject to this exemption. In doing so, each

agency should utilize, and update as needed, its own NHO consultation policy and procedures. Should conflicts arise in determining whether use of the exemption is appropriate, the agency should work to resolve that conflict in accordance with its consultation policy and procedures prior to utilizing the exemption.

A comment also requested a definite end date for the exemption. The ACHP declined to include an end date, noting that according to Section VII of the exemption, ACHP members may terminate the exemption at any time. Another commenter suggested that the definition for NHO refer specifically to, and allow NHOs listed on, the DOI list. Because NHOs and others requested that the DOI list not be referenced or used to qualify organizations for use of this exemption, the ACHP decided to maintain the definition of NHO as in the NHPA regulations and to add additional requests for the NHO in Section II of the exemption, on attestation.

Section E. 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 ~~that take and taking place in the state of Hawai'i.~~ 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. ~~The exemption is not intended to guide the federal agency in actually identifying a Native Hawaiian Organization (NHO) for participation in a covered undertaking. It is anticipated that the federal agency will have already made this identification, pursuant to its own processes in implementing consistent with 36 C.F.R. § 800.2, and only after that identification will consider whether to use this exemption. Such a process may i~~ 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, nclude the federal agency initiation of consultation with one or more the NHOs known to have an interest in thea property or properties that are the subject of upon which the proposed undertaking to determinewould occur to confirm whether the proposed undertaking will be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of thatan NHO or those NHOs. The federal agency shall not proceed with the use of this exemption if it determines that such a conflict is likely to occur.

~~Before-After the federal agency identifies an NHO- that will be proposing or directing, or substantially leading, designing, or managing the relevant undertaking, for potential use of this exemption-but before a federal agency may use this exemption, it the federal agency must first request and receive from the relevant-identified NHO a formal statement detailing how~~

such activities meet the terms of this exemption. Such a formal statement must include, subject to Section ~~VIII-IX~~ of this exemption:

- 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,~~ leadership, design, or management vis-à-vis the covered activities;
- c. A description of the extent to which the covered activities are informed by the Indigenous Knowledge of the NHO;
- d. A statement identifying the property ~~at issue~~ upon which the covered activities are proposed to occur as a property of religious or cultural significance to the NHO and explaining the NHO's ongoing ~~or prior~~ traditional cultural practices related to the property;
- e. An explanation of current or prior connections (including activities, support, and relationships), if any, between (i) key individual decision-makers and members of the NHO and (ii) the Native Hawaiian community and individuals known to have ancestral connections to the property;
- f. A statement indicating that, to the best of the knowledge of the NHO and its authorized representative (i) no other NHO has asserted or would likely assert that the covered activities are or would be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of another NHO and (ii) the activities will not lead to 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 was previously completed during a review pursuant to Section 106;
- g. 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; ~~and-~~
- h. A signature or other attribution by the above-mentioned authorized representative.

As a federal agency may identify more than one NHO that will propose or direct, or substantially lead, design, or manage to participate in the covered activities, this statement must be submitted by each such NHO anticipated to participate in the covered activities.

The federal preservation officer of the federal agency, or another agency staff member with experience in historic preservation or Native Hawaiian issues, shall review the formal statement from the NHO ~~and other relevant information~~ and advise the lead agency official on the agency decision as to whether to proceed with the use of this exemption. The lead agency official shall document the agency decision to apply the exemption to an undertaking.

~~If the federal agency decides to use this exemption for an undertaking affecting a National Historic Landmark, the~~ The federal agency shall be encouraged to submit notice of its decision and invite public comment for a thirty-day period, to (1) the State of Hawaii Office of Planning and Sustainable Development Environmental Review Program for publication to "Environmental Notice"; (2) a newspaper of statewide circulation; or (3) any publication with similar purpose or scope if the aforementioned publications cease to exist. Such submission

should include the name of the NHO ~~proposing or directing, or substantially leading, designing, or managing the undertaking proposed to participate in the use of the exemption,~~ a reasonable description of the proposed undertaking(s), a description of the property sufficient for identification purposes, and a mechanism for contacting the federal agency. ~~For undertakings not affecting a National Historic Landmark, the federal agency is encouraged but not required to submit a notice described in this paragraph.~~

Nothing in this exemption shall be interpreted to require a federal agency to permit, license, fund, or provide other assistance to any covered activities.

Section III. Covered Activities

This exemption applies to the following categories of undertakings when they are (1) proposed ~~or~~ directed, ~~or authorized~~ by an NHO, or substantially led, designed, or managed by an NHO, (2) informed by Indigenous Knowledge of that NHO, (3) related to traditional cultural practices of Native Hawaiians, and (4) 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 ~~(including of lo'i kalo and agricultural terraces),~~ harvesting, native species propagation, and soil management.
- c. Rehabilitation, preservation, restoration, or reconstruction of any the following:
 - i. Water features and systems, including but not limited to fishponds (loko i'a) and other traditional aquaculture.
 - ii. Lo'i kalo and agricultural terraces.
 - iii. Historic pathways using natural materials, including gravel and other rock, sand, mulch, and wood.
 - iv. Sacred and traditional sites, including but not limited to heiau, burial sites, walls, shrines, ahu, and similar structures and objects.
 - v. Traditional Native Hawaiian buildings and structures built and designed primarily by Native Hawaiians, and using traditional techniques and primarily natural materials (including but not limited to palaces and residences).
- d. New construction, using traditional Native Hawaiian techniques and primarily natural materials, of the following, to the extent such new construction is for the express purpose of maintaining or reestablishing traditional cultural or religious practices informed by Indigenous Knowledge:
 - i. Hale.
 - ii. Hālau wa'a.
 - iii. Fencing, walls, natural buffer zones, flood mitigation, and other boundary techniques to protect ~~sacred religious~~ and traditional sites or burial sites, within the NHO-defined boundary area of the property of religious or cultural significance to the NHO.

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- e. Minor adaptations to the elevation ~~and~~, dimension, ~~and location~~ of ~~the~~ buildings, structures, and sites recognized by the NHO as a property of religious and cultural significance to it~~traditional cultural property~~; minor relocations of any buildings, structures, and sites within the NHO-defined boundary area of the property of religious or cultural significance to the NHO; or minor adaptations to any of the landscaping or agricultural practices and activities, related to any of the covered activities enumerated in Section III, subsections **a** through **d**, where such adaptations are necessary to mitigate the impact of sea level rise, increased precipitation, erosion, wildfire, pollution, and invasive species, and notwithstanding any requirements as to location contained in the definitions of rehabilitation, preservation, restoration, or reconstruction.
- f. Installation of interpretive signage related to any of the covered activities enumerated in Section III, subsections **a** through **e**.
- g. 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 **f**.

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, but rather that the preceding categories of action are expressly eligible for this particular exemption.

~~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 any activities not identified in Section III, nor activities involving~~including but not limited to~~:

- 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 was previously completed during a review pursuant to Section 106.
- b. The construction of new buildings or structures not enumerated in Section III.d.
- 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, including but not limited to the provisions in that policy statement requiring consultation with and deference for descendant communities.
- d. Components of an undertaking beyond those listed in Section III, meaning that a federal agency may follow the terms of this exemption for a covered activity that is a component of a larger undertaking, but must follow other applicable Section 106 procedures or agreements for any other components of such larger

~~undertaking including components added after the undertaking was first initiated or conceived.~~

e. Federal agency decisions to provide or retract permission to access agency owned or controlled land, except as outlined in Section III.g.

f. Undertakings known by a federal agency or the relevant NHO, ~~prior to the approval of the undertaking by the federal agency,~~ to be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of one or more other NHOs, or Native Hawaiian traditional cultural practice more generally, which cannot be resolved through consultation and dispute resolution processes referenced in Section V of this exemption.

g. Undertakings conducted during emergency situations and reviewed pursuant to 36 C.F.R. § 800.12.

h. Undertakings that may affect any site, object, building, or structure individually designated as National Historic Landmarks or designated as a contributing property to a National Historic Landmark district.

Section V. Federal Agency Responsibilities

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.

Each federal agency remains responsible for considering the effects of undertakings on historic properties other than those directly addressed by the activities covered by this exemption (such as ~~adjacent~~-historic properties adjacent to, on, or intermingled with the property upon which the covered properties are proposed to occur or archaeological sites that may lie within undisturbed areas) in accordance with subpart B of the Section 106 regulations or according to an applicable program alternative executed pursuant to 36 C.F.R. § 800.14.

This exemption is anticipated to be utilized in good faith by agencies and NHOs without knowledge of potential conflicts with or potential adverse effects on other historic properties (including traditional cultural properties) listed on or eligible for the National Register, the Indigenous-Knowledge informed traditional cultural practice of one or more NHOs, or Native Hawaiian traditional cultural practice more generally, and as noted in Sections IV(a) and IV(f) of this exemption, any such knowledge would bar the use of this exemption.

If a federal agency learns of an unexpected conflict or dispute after it decides to use this exemption, the federal agency will make a reasonable and good faith effort to resolve the conflict or dispute ~~remains responsible for resolving disputes in accordance with its normal operating~~ consultation policies and procedures (including its NHO consultation policies and procedures) or in accordance with procedures specifically adopted in relation to this exemption. Federal agencies are encouraged to develop and utilize procedures that are respectful of NHOs' rights to maintain, control, protect and develop their traditional cultural heritage, Indigenous Knowledge, intellectual property, traditional cultural expressions, sciences, and technologies, and that reflect the principles contained in the 2013 ACHP

guidance. “Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: General Information and Guidance.”

Section VI. 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, or agreements executed with NHOs in accordance with 36 C.F.R. § 800(c)(2)(ii)(E)~~ 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 other federal laws, or any applicable state or local laws or regulations, including but not limited to ~~Chapter 6(E) of the~~ Hawaii Revised Statutes, Title 1, Chapter 6E, Historic Preservation.

Section VII. 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 VIII. 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 Secretary of the Department of Defense 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~~IX. 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, as applicable, and shall comply with applicable laws regarding the protection and dissemination of records.

Section IX. Annual Reports and Evaluations

For five years after the date of the adoption of this exemption, the federal agencies that use this exemption will provide a report to the ACHP for the previous reporting year. Each agency's annual report will provide a brief summary of the locations and nature of covered activities, any significant issues that arose while implementing the exemption, the manner in which such issues were addressed, and suggestions to avoid such issues in the future. Federal agencies are invited to include an assessment of the overall effectiveness of the exemption in meeting its intent in this report.

The ACHP will schedule a meeting with the federal agencies that used the exemption during the relevant reporting year, and invite representatives of the State of Hawaii Historic Preservation Division, NHOs, federal preservation officers, and others it deems appropriate, to discuss implementation of the exemption. The meeting shall provide an opportunity for attendees to provide their views on the overall effectiveness of the exemption in meeting its intent and may inform decisions such as those regarding amendments to the exemption. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

Section XI. Definitions and Descriptions

~~This exemption uses the definitions for the following words 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.~~ For purposes of this Exemption, the following definitions apply: :

a. Agency: ~~An agency as defined provided~~ 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. Effect: ~~As provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places.~~

c. Historic property: ~~As provided in 36 C.F.R. § 800.16(l),~~ 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-significance~~ to an Indian Tribe or NHO that meet the National Register of Historic Places criteria.

e. 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: ~~As provided in 36 C.F.R. § 800(16)(s)(2), a~~ 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): As provided in 36 C.F.R. § 800(16)(s)(1). ~~a~~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.~~

f. Undertaking: As provided in 36 C.F.R. § 800(16)(y). ~~a~~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.

This exemption uses the definitions for the following words found in 36 C.F.R. § 68.2, 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. § 68.2, the latter definitions shall prevail:~~

g. Preservation: The act or process of applying measures necessary to sustain the existing form, integrity and materials of an historic property. Work, including preliminary measures to protect and stabilize the property, generally focuses upon the ongoing maintenance and repair of historic materials and features rather than extensive replacement and new construction.

h. Rehabilitation: The act or process of making possible an efficient compatible use for a property through repair, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

i. Restoration: The act or process of accurately depicting the form, features and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period. The limited and sensitive upgrading of mechanical, electrical and plumbing systems and other code-required work to make properties functional is appropriate within a restoration project.

j. Reconstruction: The act or process of depicting, by means of new construction, the form, features and detailing of a non-surviving site, landscape, building, structure or object for the purpose of replicating its appearance at a specific period of time and in its historic location.

Native Hawaiian terms in this exemption, including ahu, hale, hālau wa‘a, heiau, loko i‘a, and lo‘i kalo, shall be interpreted in a manner consistent with accepted understanding of these terms by Native Hawaiians, as informed by any NHO using this exemption.

A description of Indigenous Knowledge to be used in guiding application of this exemption is set forth in the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation.