



## **Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian Organizations**

### **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 and Initiation of Exemption**

#### **a. Applicability.**

This exemption applies only to undertakings identified in Section III that take 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.

#### **b. Prior Decision to Identify an NHO.**

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 consistent with 36 C.F.R. § 800.2, and only after that identification will consider whether to use this exemption. Such a process may include the federal agency initiation of consultation with the NHOs known to have an interest in the property or properties that are the subject of the proposed undertaking to determine whether the proposed undertaking will be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of an NHO. The federal agency shall not proceed with the use of this exemption if it determines that such a conflict is likely to occur.

#### **c. Submission of Formal Statement by an NHO.**

After the federal agency identifies an NHO that will be proposing or directing, or substantially leading, designing, or managing the relevant undertaking, but before a federal agency may use this exemption, the federal agency must request and receive from the identified NHO a formal statement detailing how such activities meet the terms of this exemption. Such a formal statement must include, subject to Section IX of this exemption:

- i.** An attestation that the entity meets the definition of an NHO in the NHPA, including expertise in aspects of historic preservation that are significant to Native Hawaiians, which the federal agency should consider in light of the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation;
- ii.** A description of the NHO's proposal, direction, leadership, design, or management vis-à-vis the covered activities;
- iii.** A description of the extent to which the covered activities are informed by the Indigenous Knowledge of the NHO;
- iv.** A statement identifying the property upon which the covered activities are proposed to occur as a property of religious and cultural significance to the NHO and explaining the NHO's ongoing or prior traditional cultural practices related to the property;
- v.** 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;
- vi.** 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;
- vii.** 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
- viii.** 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 the covered activities, this statement must be submitted by each such NHO.

**d. Federal Agency Review and Documentation.**

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 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 and shall maintain the formal statement as part of the administrative record.

**e. Federal Agency Notice.**

The federal agency is 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, directing, or substantially leading, designing, or managing the undertaking, 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.

**f. Federal Agency Discretion.**

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 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 or aquacultural practices or activities, including but not limited to planting and crop rotation, harvesting, native species propagation, soil management, and fishing.
- c.** Conduct of species conservation and habitat conservation and management activities that are necessary to perpetuate traditional Native Hawaiian cultural practices.
- d.** 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 and objects including but not limited to heiau, burial sites, shrines, ahu, and similar sites and objects.

**v.** Traditional Native Hawaiian buildings and structures built and designed primarily by Native Hawaiians, and using traditional techniques and primarily natural materials.

**e.** 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 religious and traditional sites or burial sites, within the NHO-defined boundary area of the property of religious and cultural significance to the NHO.

**f.** Minor adaptations to the elevation and dimension of buildings, structures, and sites recognized by the NHO as a property of religious and cultural significance to it; minor relocations of any buildings, structures, and sites within the NHO-defined boundary area of the property of religious and 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 **e**, 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.

**g.** Installation of interpretive signage related to any of the covered activities enumerated in Section III, subsections **a** through **f**.

**h.** The lease, provision of an easement, or other limited transfer of property rights in federal property to a NHO, or the grant of a nonpossessory interest in real property to a NHO, for use of the property solely to carry out any of the covered activities enumerated in Section III, subsections **a** through **g** or for education, outreach, and planning related to the covered activities.

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.

#### **Section IV. Activities Not Covered and Exceptions**

This exemption shall not cover any activities not identified in Section III, nor activities involving:

- a.** Demolition, removal, or modifications that adversely affect character-defining features of properties listed or known to be eligible for listing on the National Register of Historic Places, unless the demolition, removal, or modification decision was previously completed during a review pursuant to Section 106.
- b.** The construction of new buildings or structures not enumerated in Section III.e.
- 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.
- e.** Federal agency decisions to provide or retract permission to access agency owned or controlled land, except as outlined in Section III.h.
- f.** Undertakings known by a federal agency or the relevant NHO to be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of one or more other NHO, 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 subject 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 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 in accordance with its 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, Property Rights, 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, 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 or supersede existing property rights, including access rights. 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 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.

## **Section 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 X. 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, ending September 30 annually, then every two years for six additional years. Each agency's 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. Reports are due on or before December 31 of each year, starting December 31, 2025 annually through December 31, 2029, and then biannually on or before December 31, 2031 through December 31, 2035.

Within ninety days of each report due date, the ACHP will schedule a meeting with the federal agencies that used the exemption during the relevant reporting year or biennium, as applicable, 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 meetings 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. The meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

## Section XI. Definitions and Descriptions

For purposes of this Exemption, the following definitions apply:

**a. Agency:** As 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 religious and cultural significance to an Indian Tribe or NHO that meet the National Register of Historic Places criteria.

**d. Native Hawaiian:** As provided in 36 C.F.R. § 800(16)(s)(2), 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), 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. Undertaking:** As provided in 36 C.F.R. § 800(16)(y), 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:

**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.

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