

[DRAFT]
BEST PRACTICES GUIDE
FOR FEDERAL AGENCIES REGARDING
TRIBAL AND NATIVE HAWAIIAN SACRED SITES

[INSERT GRAPHIC]

**WORKING GROUP OF THE MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY
COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIGENOUS SACRED SITES**

Advisory Council on Historic Preservation, U.S. Department of Agriculture, U.S. Department of Energy,
U.S. Department of the Interior, U.S. Department of Transportation, U.S. Environmental Protection
Agency, White House Council on Environmental Quality, Tennessee Valley Authority

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FOREWORD

The federal government manages a diverse range of lands and waters that contain sites held sacred by Tribes and the Native Hawaiian Community.¹ In light of federal authorities related to access and protection of sacred sites, federal agencies have a continuing responsibility to weigh the potential impacts of their actions on Tribal and Native Hawaiian sacred sites and historic properties of traditional cultural and religious importance.

In recognition of their ongoing responsibilities, eight federal agencies (“Participating Agencies”)² signed the [Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites](#) (“Sacred Sites MOU”). The Participating Agencies affirmed their commitment to working together to improve the protection and accessibility of Tribal and Native Hawaiian sacred sites on federal lands. The Participating Agencies agreed to give early consideration to sacred sites protection and accessibility in agency decision-making and regulatory procedures. To achieve their goals, each of the Participating Agencies also agreed to take steps to improve protection of and access to sacred sites and to develop enhanced public outreach on the value and importance of maintaining sacred sites.

This Guide identifies best practices for federal agencies in the following areas related to sacred sites: consultation, co-stewardship, supporting Tribal and Native Hawaiian capacity, access, protection, confidentiality, training, and public outreach. It will assist the Participating Agencies and other federal agencies in improving their policies related to sacred sites and in integrating consideration of sacred sites into each agency’s consultation procedures. The Guide was developed by a working group formed in 2022 pursuant to the Sacred Sites MOU. It incorporates the input and advice of Tribes and Native Hawaiian Organizations as collected in listening sessions convened by the [White House Council on Native American Affairs](#) on March 9, 2022, and February 15, 2023, and by the Advisory Council on Historic Preservation on March 17 and 21, 2022, and as submitted by Tribes and Native Hawaiian Organizations in written comments.

WHO IS THIS GUIDE FOR?

The Best Practices Guide is intended as a source of practical information for different audiences. The first is federal agencies. Agency leadership may use this Guide to update agency-specific guidance or to inform the development of new agency policies and procedures. The Guide is also intended to provide federal employees and contract staff with an understanding of sacred sites and the federal policies that govern Tribal consultation and federal decision-making on sacred sites.

¹ While the best practices in this Guide are crafted primarily for land-managing agencies, there are many other federal agencies who may find this Guide useful, including those that approve or fund projects and are responsible for assessing and considering the potential impacts of their decisions on sacred sites.

² Advisory Council on Historic Preservation, U.S. Department of Agriculture, U.S. Department of Energy, U.S. Department of the Interior, U.S. Department of Transportation, U.S. Environmental Protection Agency, White House Council on Environmental Quality, Tennessee Valley Authority (together, the “Participating Agencies”), *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites* (Nov. 2021) (available at <https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf>).

The second audience is Tribes and Native Hawaiian Organizations, whose comments and recommendations helped shape this Guide and whose engagement with federal agencies will be key to the successful protection of sacred sites.

Third is the public, whose cooperation is essential to achieving the goal of protecting sacred sites, and on whose behalf Participating Agencies steward federal lands, waters, and activities.

THINGS YOU SHOULD KNOW

1. What is a Tribe?

Tribes are independent political communities whose sovereign powers of self-government existed before the United States was founded. A Tribe's sovereign right to govern itself through its own form of government is inherent in the Tribe itself. The United States has a unique, government-to-government relationship with federally recognized Tribes, which stems from the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The United States recognizes the inherent right of Tribes to self-government and seeks to protect and support Tribal sovereignty and self-determination. The Secretary of the Interior publishes an annual list of federally recognized Tribes in the Federal Register.³

For purposes of this Guide, the term "Tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, known as the "Federally Recognized Indian Tribe List Act of 1994."

2. What is the Native Hawaiian Community?

The Native Hawaiian Community is a Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.⁴ Because Native Hawaiians do not presently have an organized government,⁵ Congress has charged federal agencies to work with the Community through Native Hawaiian Organizations ("NHOs"), which are informal representatives.⁶ The Department of the Interior's Office of Native Hawaiian Relations maintains a non-exhaustive list of NHOs.⁷

3. What is Tribal Sovereignty?

Tribes have existed as independent, self-governing nations since long before the arrival of Europeans in North America. The United States, like the English Colonies before it, has recognized Tribes as distinct and independent political communities with their own powers of self-government.⁸ Tribal sovereignty

³ See, e.g., 88 Fed. Reg. 2112 (Jan. 12, 2023). See also Pub. L. No. 103-454, § 104, 108 Stat. 4791, 4792 (Nov. 2, 1994).

⁴ 43 C.F.R. § 50.4; 81 Fed. Reg. 71278 (Oct. 14, 2016) (Native Hawaiian community has unique legal relationship with the United States as well as inherent sovereign authority that has not been abrogated or relinquished).

⁵ 81 Fed. Reg. 71278 (Oct. 14, 2016).

⁶ U.S. Dept. of the Interior, Office of Native Hawaiian Relations, *Standard Operating Procedure for Consultation with the Native Hawaiian Community 2* (Oct. 2020).

⁷ www.doi.gov/hawaiian/NHOL.

⁸ *Worcester v. Georgia*, 31 US 515, 559 (1832).

refers to Tribes' original, inherent authority to govern themselves and their lands. It is not a power delegated to Tribes by Congress but is instead an inherent power that has never been extinguished.⁹ Because of their unique status as sovereigns, federally recognized Tribes have a direct, government-to-government relationship with the federal government.

4. What are Indian Treaties?

Indian treaties are agreements between Tribes and the United States as sovereigns. They are not grants of rights to Tribes but grants of rights *from* Tribes *to* the United States and a reservation of those rights not granted, ceded, or relinquished.¹⁰ Under the U.S. Constitution, ratified treaties are the supreme law of the land and their terms may be changed only by Congress. Treaties are substantive federal law of equal importance to other federal laws and obligations. Between 1778 and 1871, Tribes ceded much of the land now managed by the federal government through treaties. These treaties are to be interpreted in light of the parties' intentions and their terms construed in the sense they would naturally have been understood by Tribes,¹¹ with any ambiguities resolved in their favor.¹² Most Indian treaties remain in effect and are therefore a key source for determining Tribal rights. Integrating consideration of Tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized Tribes and with fundamental principles of good government.

5. What is Tribal Consultation?

Grounded in the government-to-government relationship,¹³ Tribal consultation is a process for communication between the federal government and Tribes and NHOs. Effective Tribal consultation involves the free flow of information and ideas that emphasizes trust, respect, and shared responsibility. Such exchanges of information are intended to ensure meaningful and timely input by Tribes and NHOs in the development of federal regulatory policies having Tribal or Native Hawaiian implications, including regulations, legislation, and policy statements or actions that may have substantial direct effects on Tribes and NHOs. As discussed more thoroughly below, there are specific legal requirements for Tribal consultation under the National Historic Preservation Act (NHPA) and other federal authorities.¹⁴

⁹ *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

¹⁰ *United States v. Winans*, 198 U.S. 371, 381 (1905).

¹¹ *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citing *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 208 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)).

¹² *Id.*

¹³ Or when consulting with the Native Hawaiian Community, the government-to-sovereign relationship.

¹⁴ While this Guide focuses on Tribes and NHOs, federal agencies should also consider consulting with Alaska Native corporations as appropriate. By statute, federal agencies are required to "consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175." Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. II, § 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H., Title V, § 518, 118 Stat. 2809, 3267 (2004).

6. What is Indigenous Knowledge?

Indigenous Knowledge refers to those bodies of observations, oral and written knowledge, innovations, practices, and beliefs developed by Indigenous peoples through their interaction and experience with the environment and passed on across generations that is applied to phenomena across biological, physical, social, cultural, and spiritual systems.¹⁵ Deeply rooted in Indigenous communities having distinct cultures, geographies, and societies, Indigenous Knowledge is heterogeneous and can be expressed in different ways.

Indigenous Knowledge has much in common with scientific methodologies. Both, for example:

- Seek systematic ways of understanding and explaining ways of knowing;
- Use empirical approaches to conduct practical, curiosity-driven investigations;
- Use standard practices, such as systematic observation, innovation, and verification;
- Derive from directly engaging with the environment; and
- Evolve and adapt to new observations;

For these reasons, Indigenous Knowledge can often provide accurate and valuable insights and information.

Indigenous Knowledge is a valid form of self-supporting evidence that should be included in federal policy, research, and decision-making, as appropriate. It can also be relevant to implementing federal authorities having Tribal implications, such as the Endangered Species Act, the Marine Mammal Protection Act, the Magnuson-Stevens Fishery Conservation and Management Act, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the National Environmental Policy Act.

7. What is Co-Stewardship?

Co-stewardship is an umbrella term that refers broadly to collaborative or cooperative agreements between federal agencies and Tribes or NHOs with respect to their shared interests in the management, conservation, and protection of federal lands and waters. Co-stewardship can take a wide variety of forms, including, but not limited to, sharing technical expertise and Indigenous Knowledge; combining federal and Tribal or Native Hawaiian capabilities to improve resource management; integrating Tribal and Native Hawaiian knowledge, views, and experience into the public's experience of federal lands; and, where applicable, funding arrangements with Tribes under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*).

¹⁵ Indigenous Knowledge may also be referred to as “Native Science,” “traditional ecological knowledge,” or “Indigenous traditional ecological knowledge.”

SACRED SITES

1. What is a Sacred Site?

The Sacred Sites MOU defines a sacred site as follows:

“[S]acred site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe or Native Hawaiian organization, or Indian or Native Hawaiian individual determined to be an appropriately authoritative representative of an Indian or Native Hawaiian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian or Native Hawaiian religion; provided that the Tribe, Native Hawaiian organization or appropriately authoritative representative of an Indian or Native Hawaiian religion has informed the agency of the existence of such a site.¹⁶

Sacred sites can consist of geological features, bodies of water, archaeological sites, ceremonial sites, places of origin, birthing grounds, burial locations, stone and earth structures, or other features or combinations of features. Examples might include, mountains, volcanoes, rocks, dunes, cave systems, animal tracks, swamps, bodies of water, coral reefs, groves, petroglyphs, burial sites, trails, shelters, traditional harvesting areas, or places that afford views of important areas of land or water or of the sky. It is also important to understand that the same site can be held sacred by different Tribes or NHOs for the same or different reasons. These are examples of sacred sites and by no means exhaustive.

While the MOU’s definition requires that the Tribe or NHO must have “informed the agency of the existence of such a site,” this requirement does not mean that the Tribe or NHO must disclose the specific location of a site. Issues related to sensitive and confidential information are discussed below in the section on safeguarding Indigenous Knowledge of sacred sites.

Tribes and NHOs may have different understandings of the concept of sacred sites and may use different terminology to describe these sites. Individual sacred sites are in many cases associated with larger traditional cultural or geographic landscapes that have attributes distinguishing them as extraordinary or significant, often in a religious or spiritual sense, for the Tribe or for the Native Hawaiian Community. Many Tribes and NHOs prefer to use the terms “sacred place” or “sacred landscape” instead of “sacred site,” in part because they do not necessarily limit a site’s geographic boundary. For example, a petroglyph panel may be a sacred site that makes the hill on which it is located a sacred place and the mountain range it forms part of a sacred landscape. While these larger places or landscapes in themselves may not in some cases meet the MOU’s definition of a sacred site because they are not “specific, discrete, [and] narrowly delineated,” the MOU instructs federal agencies to “consider these broader areas and connections to better understand the context and significance of sacred sites.”

Many sacred sites may not have been previously disclosed by Tribes and NHOs to the federal government. In addition, the spiritual and cultural significance of sacred sites to Tribes and the Native Hawaiian Community remains dynamic and vibrant over time and is directly tied to Tribal identity, language, and way of life. Sacred sites are not frozen in time and can evolve with future identification of

¹⁶ *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites* (Nov. 2021). This definition is based on the definition included in Executive Order 13007, except that the Executive Order omits Native Hawaiian sacred sites. EO 13007 further defines “Federal lands” to mean “any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands.”

sacred sites in honor of recent events. For reasons such as these, and as discussed more thoroughly below in the Best Practices, federal agencies should regularly consult and engage with Tribes and NHOs to deepen the agencies' understanding of sacred sites and incorporate Indigenous Knowledge in federal decision-making.

2. What is the Federal Government's Responsibility with Respect to Sacred Sites?

Before the 1970s, Congress enacted numerous laws to preserve wilderness areas and endangered species, unaware how such laws could affect Indigenous religious practices and without fully considering their impact.¹⁷ Starting in the 1970s, however, Congress began to realize that such laws and their administration severely interfered with the free exercise of Indigenous religions,¹⁸ such as by interfering in ceremonial religious events or by denying Tribal access to sacred sites.¹⁹

In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA).²⁰ AIRFA makes it the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."²¹ AIRFA also instructed the President to direct federal agencies "to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."²²

Consistent with AIRFA's policies, President William J. Clinton issued Executive Order 13007 to protect and preserve Indian religious practices at sacred sites on federal lands.²³ EO 13007 directs every federal agency responsible for managing federal lands to accommodate access to and ceremonial use of sacred sites by Indian religious practitioners. It also directs federal agencies to avoid adversely affecting the physical integrity of such sacred sites and, where appropriate, to maintain the confidentiality of sacred sites.²⁴

By entering into the Sacred Sites MOU, the Participating Agencies have further committed themselves to the letter and spirit of AIRFA and EO 13007. All employees of the Participating Agencies should become familiar with these authorities and, as appropriate, integrate them into their daily work.

3. What is the Sacred Sites Memorandum of Understanding?

In 2021, eight federal agencies entered the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for The Protection of Indigenous Sacred Sites to affirm their commitment to coordinating and collaborating to improve the protection and accessibility of Indigenous sacred sites on federal lands consistent with EO 13007. In so doing, the Participating Agencies committed to taking certain steps to improve sacred site protection and accessibility within each

¹⁷ H. Rpt. 95-1308 at 2 (June 19, 1978).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Pub. L. No. 95-341, 92 Stat. 469 (Aug. 11, 1978).

²¹ AIRFA, § 1, codified at 42 U.S.C. § 1996.

²² AIRFA, § 2.

²³ Executive Order No. 13007, Indian Sacred Sites (May 24, 1996), 61 Fed. Reg. 26771 (May 29, 1996).

²⁴ EO 13007, sec. 1(a).

Agency. Among the most important is ensuring that each Participating Agency integrates consideration of sacred sites into their respective decision-making, regulatory, or consultation processes at an early stage. Equally important is that each Participating Agency seek to ensure access by Tribes and Native Hawaiians consistent with their applicable authorities and with EO 13007.²⁵ Another important step is to develop best practices and guidance on the following specific issues:

- ❖ Ways to manage and protect sacred sites and identify federal-level impediments to doing so;²⁶
- ❖ Ways to incorporate Indigenous Knowledge into federal management and protection of sacred sites;²⁷
- ❖ Ways to collaborate with Tribes and NHOs in the stewardship of sacred sites;²⁸
- ❖ Ways to meaningfully consult with Tribes and NHOs regarding sacred sites;
- ❖ Ways to protect sensitive information about sites sacred to Tribes and the Native Hawaiian Community;²⁹ and
- ❖ Ways to help build Tribal and Native Hawaiian capacity to engage in meaningful consultation and to share Tribal and Native Hawaiian expertise.³⁰

This Best Practices Guide has been developed by the Participating Agencies as part of their efforts to fulfill their Sacred Sites MOU commitments.

4. [What is the National Historic Preservation Act and How Does It Relate to Sacred Sites?](#)

Locations identified as sacred sites are frequently understood by Tribes and NHOs to also be historic properties of religious and cultural significance under the National Historic Preservation Act (NHPA).

The NHPA sets forth the federal government’s national policy for historic preservation. Section 106 of the NHPA requires each federal agency to take into account the effects of any project, program, or activity it proposes to carry out, license, permit, or fund on historic properties and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment.³¹ A historic property is defined in the NHPA as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register [of Historic Places], including artifacts, records, and material remains related to such a property.”³² Further, section 101(d)(6)(A) of the NHPA clarifies that properties of traditional religious and cultural significance to an Indian Tribe or Native Hawaiian Organization may be eligible for the National Register of Historic Places (National Register).³³

²⁵ These include developing enhanced public outreach on the value and importance of maintaining sacred sites and the need for public stewardship to protect and preserve their integrity.

²⁶ 2021 MOU, sec. II(3).

²⁷ 2021 MOU, sec. II(4), (7).

²⁸ 2021 MOU, sec. II(6).

²⁹ 2021 MOU, sec. II(10).

³⁰ 2021 MOU, sec. II(8)).

³¹ 54 U.S.C. § 306108.

³² 54 U.S.C. § 300308.

³³ 54 U.S.C. § 302706.

The Section 106 implementing regulations at 36 CFR Part 800 outline the process by which federal agencies identify and evaluate historic properties, assess a proposed undertaking's effects on such properties, and seek ways to resolve any adverse effects to historic properties. Per the NHPA and the Section 106 regulations, a federal agency must consult with any Indian Tribe or NHO that attaches religious and cultural significance to a property that may be affected by a proposed undertaking.³⁴

Pursuant to Executive Order 13007, in managing property under its jurisdiction or control, a federal agency should accommodate access to and ceremonial use of sacred sites and avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, the agency shall maintain the confidentiality of sacred sites. The responsibility to consider access to and protection of sacred sites is separate from and not limited to an agency's Section 106 review for any proposed undertakings.

It is important to note that a sacred site may not meet the National Register criteria as a historic property and that, conversely, a historic property may not constitute a sacred site. However, where an undertaking may affect a historic property that is also considered by an Indian Tribe or NHO to be a sacred site, including burial sites, the federal agency should consider access to and ceremonial use of the property consistent with EO 13007 in the course of the Section 106 review process. Consultation regarding the identification and evaluation of historic properties of religious and cultural significance to an Indian Tribe or NHO could include the identification of those properties that are also sacred sites. Similarly, consultation to address adverse effects to such historic properties/sacred sites and associated agreements could include discussions regarding access and ceremonial use.

Agencies must also be aware that sacred sites often occur within a larger landform or are connected through physical features or ceremonies to other sites or a larger sacred landscape. These broader areas and connections should be accounted for when seeking to understand the context and significance of sacred sites. Having access to a location, including the ability to conduct cultural practices or perpetuate Indigenous Knowledge, can contribute to the significance of a Traditional Cultural Place,³⁵ a sacred site, or historic property and may be necessary to retain the integrity of these locations. The care for and access to these locations may also be part of an ongoing cultural practice or may serve to revitalize traditions or customs, among other purposes, that are important to an associated community.

³⁴ The NHPA includes definitions of "Indian tribe" (54 U.S.C. §300309), "Native Hawaiian" (54 U.S.C. §300313), and "Native Hawaiian organization" (54 U.S.C. §300314).

³⁵ A traditional cultural place, or tradition cultural property, (TCP) is defined as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. See National Register Bulletin 38 (available at <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Compleatweb.pdf>).

BEST PRACTICES FOR FEDERAL AGENCIES REGARDING TRIBAL AND NATIVE HAWAIIAN SACRED SITES

1. Build Sustainable Relationships with Tribes and NHOs

A. Practice Early and Sustained Consultation and Engagement

Government-to-government consultation, or government-to-sovereign consultation in the context of Native Hawaiian relations, is a cornerstone of the federal-Tribal/Hawaiian relationship. When a federal agency pursues policies or contemplates activities with Tribal or Native Hawaiian implications, the agency must consult with Tribes and NHOs³⁶ consistent with applicable laws and policies such as Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments, the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the Presidential Memorandum on Uniform Standards for Tribal Consultation, the National Historic Preservation Act, and the agency's consultation guidance.³⁷ As discussed in this Guide and elsewhere, federal agencies are encouraged to go above and beyond the applicable requirements for Tribal consultation by developing improved relationships with Tribes and NHOs through many forms and levels of engagement.

In the context of consultation and engagement on sacred sites, a number of themes emerge.³⁸ The first is the importance of Indigenous Knowledge. The perspective of a Tribe or NHO with regard to sacred sites rests upon the vast knowledge of the environment that encompasses natural resources holding cultural significance. A Tribe or the Native Hawaiian Community may have lived in the vicinity, observed, or interacted with a sacred site for hundreds of years or since time immemorial. To achieve meaningful consultation or engagement on sacred sites, it is imperative that Indigenous Knowledge about sacred sites be respected equally as other sciences and incorporated into the federal decision-making process.

A second theme is ensuring early involvement by Tribes and NHOs in federal decision-making that could affect sacred sites. It is difficult to convey in words the importance of sacred sites to Tribes and the Native Hawaiian Community. Sacred sites are irreplaceable. If a sacred site is disturbed, desecrated, or destroyed, it may forever disrupt a Tribe or NHO's ability to practice their religion or traditional customs. Tribal and Native Hawaiian officials report that the federal government's current practice of Tribal consultation is often "too little, too late." Federal agencies should seek to alter this experience by moving towards a new and improved dynamic of engagement with Tribes and NHOs that is "early and often," consistent with applicable authorities.

Federal agencies should involve Tribes and NHOs as early as possible in the planning stages of a project to properly identify potential impacts to sacred sites and to assess whether mitigation measures will be sufficient to allay Tribal or Native Hawaiian concerns. Because mitigation will not always be sufficient to

³⁶ And as appropriate, Alaska Native Corporations. See footnote 14.

³⁷ Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000), 65 FR 67249 (Nov. 9, 2000); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021); Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022); National Historic Preservation Act, 54 U.S.C. § 306108.

³⁸ Because this Guide focuses on best practices regarding consultation and engagement on sacred sites, it is not meant to be comprehensive with respect to Tribal consultation more generally. For further reading on Tribal consultation, see the materials listed in the Appendix.

protect sacred sites, federal agencies should remain open to all available project alternatives, including the no-action alternative. These principles also apply when the federal government is considering adopting a policy or promulgating a regulation with Tribal or Native Hawaiian implications.

A third theme is the importance of respecting a Tribe's or NHO's customs and protocols. As discussed below in the section on safeguarding Indigenous Knowledge about sacred sites, Tribes and NHOs may not wish to share much, if at all, about sacred sites or practices. Federal agencies are responsible for building an inclusive process that empowers Tribes and the Native Hawaiian Community to determine for themselves if, and how, to share knowledge and information about sacred sites. Another aspect of respecting customs and protocols is that federal agencies should ensure they engage or consult with the appropriate Tribal or Native Hawaiian officials. Such officials, whether appointed or elected, should be identified by the Tribe or NHO as having delegated authority to represent the Tribe or NHO in a particular Tribal consultation or engagement session.

Agencies should also recognize that sacred sites can be held sacred by different Tribes or NHOs for the same or different reasons. Federal agencies should notify and invite all potentially affected Tribes and NHOs to consult when contemplating a policy or action that could affect a sacred site or sites. Because Tribal or Native Hawaiian ancestral, traditional, and historical lands and associated sacred sites may be located far from a Tribe or NHO's existing reservation or headquarters, federal agencies should invite Tribes or NHOs that attach significance to the project area to consult regardless of their current location.

The themes identified here are not meant to be exhaustive. Additional best practices for consultation and engagement with Tribes and NHOs on sacred sites include:

[Bulleted list to be added after Tribal consultation on this Guide]

B. Use Co-Stewardship Agreements

By means of the Sacred Sites MOU, the Participating Agencies agreed to take a forward-thinking approach and not only seek to avoid adverse actions to sacred sites but collaborate with Tribes and NHOs to ensure good stewardship of federal lands and allow Tribes and NHOs their rightful access to and use of certain public lands. Each Agency also acknowledged that one way of doing this is through collaborative and cooperative co-stewardship agreements.

Federal agencies should consider co-stewardship arrangements as opportunities for involving Tribes and NHOs in an agency's activities that may impact the protection and accessibility of sacred sites. Co-stewardship arrangements can help establish ongoing working relationships tailored to the details and context of a particular sacred site and may also provide terms for the handling and sharing of sacred and Indigenous Knowledge.

The details of any co-stewardship arrangement will be shaped in part by the relevant authorities that may be applicable to a federal agency and to the federal lands or waters at issue. Co-stewardship arrangements should contain clear benchmarks and goals for their implementation, which should always aim to protect the integrity of sacred sites. Every co-stewardship arrangement related to management of a sacred site should, among other things, be built on consultation and cooperation; acknowledge Tribal and Native Hawaiian connections to the sacred site; incorporate Indigenous Knowledge when appropriate; establish terms for the collection and protection of information about sacred sites that a Tribe or NHO considers confidential, including acknowledging legal limitations on an agency's ability to

keep such information confidential; and include terms for accessing and making use of sacred sites by Tribes, NHOs, and the public, as relevant.

Several federal agencies already have co-stewardship arrangements in place for activities involving lands and waters under their respective jurisdictions. One prominent example is the agreement reached between the Bureau of Land Management, the U.S. Forest Service, and the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Tribe of the Uintah and Ouray Reservation, and the Zuni Pueblo to collaborate on the management of the 1.36-million-acre Bears Ears National Monument in Utah. The Bears Ears agreement gives participating Tribes a leading role in the management of their ancestral lands and sacred sites and to apply their knowledge to the environmental challenges confronting those lands from drought, erosion, and visitation.

2. Support Tribal and Native Hawaiian Capacity

Many Tribes and NHOs operate with limited resources. As a result, they may not be able to employ dedicated staff, such as Tribal Historic Preservation Officers, to participate in consultations with federal agencies. These factors can restrict a Tribe or NHO's ability to collaborate and cooperate with a federal agency or to do so in short order. To the extent practicable and consistent with applicable authorities, federal agencies should support Tribal and Native Hawaiian capacity whenever possible, such as by:

- Extending consultation timeframes;
- Offering technical assistance;
- Utilizing Tribes and NHOs' preferred methods of communication;
- Sharing knowledge and information about a federal agency's own operations and constraints;
- Hiring individuals with demonstrated professional experience consulting and collaborating with Tribes and NHOs;
- Compensating Tribes, NHOs, and knowledge holders for their expertise through available agency mechanisms.

When preparing their annual budgetary requests, federal agencies should consider requesting direct and contract funding to Tribes and NHOs for consultation-related costs and staff training. Federal agencies should also consider funding to Tribes and NHOs for the protection of sacred sites during emergency declarations. Agencies are also encouraged to work with other funding recipients, including state and local governments, to encourage early coordination with Tribes and NHOs on the protection of sacred sites.

3. Fully Exercise Discretion to Permit Tribal and Native Hawaiian Access to Sacred Sites

Federal agency decision-makers should consider fully exercising their discretion, consistent with applicable authorities, to accommodate Tribes and NHOs and assist traditional practitioners in accessing and utilizing sacred sites on federal lands. Concurrently, agencies should also consider whether to limit activities by others that may interfere with Tribal or Native Hawaiian use, such as by temporarily closing areas of land to public access during sensitive times.

Authorities related to access and closure vary among federal agencies. For example, the Cultural and Heritage Cooperation Authority authorizes the Secretary of Agriculture to "temporarily close from public

access specifically identified National Forest System land to protect the privacy of tribal activities for traditional and cultural purposes.”³⁹

It is important to remember that the same area of land may contain sites that are considered sacred by more than one Tribe or NHO. In such cases, federal agencies will need to exercise particular sensitivity and discretion to ensure that all Tribes and NHOs are treated equitably in federal decision-making.

4. Protect Sacred Sites by Engaging with Tribes and Native Hawaiian Organizations to:

A. Anticipate the Impacts of Agency Actions on Sacred Sites

Federal agencies need assistance anticipating all the potential impacts their actions may have on Tribal and Native Hawaiian sacred sites. To ensure that sacred sites receive the consideration and protection they are due, federal agencies should engage with and learn from Tribes and NHOs and, in some situations, agencies are required to do so. For example, Executive Order 13175 requires Tribal consultation before an agency promulgates “any regulation that has tribal implications.” Such engagement gives Tribes and NHOs the opportunity to provide federal agencies with a deeper understanding of the potential consequences of their intended activities in areas that contain sacred sites. Thereafter, federal agencies should incorporate Tribal and Native Hawaiian input into federal policies and decision-making that may affect sacred sites.

In addition, federal agencies should include Tribes and NHOs as much as possible in early and long-term planning efforts, including for ongoing property management. This engagement should come before a proposed project is formulated so that the project and subsequent decision-making could be informed by early Tribal and NHO input.

Moreover, given that climate change impacts (e.g., severe wildfires, flooding, or drought) can adversely impact sacred sites, federal agencies should also endeavor to consider the potential impacts of climate change on sacred sites in their policy and decision-making work.

B. Implement Physical Protections of Sacred Sites

In addition to engaging with Tribes and NHOs to understand the effects of their actions on sacred sites, federal agencies should, consistent with applicable authorities, collaborate with Tribes and NHOs on developing frameworks for the physical protection of known sacred sites. Federal agencies may wish to examine current policies, such as management plans and use maps, to assess the adequacy of existing measures for the physical protection of sacred sites. In areas that need greater physical protection, agencies may consider the use of fences, signs, surveillance cameras, or security personnel. Implementation of new physical protections, however, should only occur after Tribal consultation with or in cooperation with the appropriate Tribes and NHOs who consider the site sacred. In addition, training for federal employees regarding sacred sites should emphasize that employees should avoid known sacred areas when possible and note the penalties for disturbing or desecrating sites. Federal agencies may also wish to develop pilot projects to explore the best options for the physical protection of sacred sites on federal lands.

³⁹ 25 U.S.C. § 3054(b)(1).

C. Safeguard Indigenous Knowledge of Sacred Sites

Indigenous Knowledge about sacred sites is itself often considered sacred. Tribal or Native Hawaiian laws, protocols, and customs may discourage or prohibit members from sharing information about sacred sites with non-members, especially details about the significance or precise location of sacred sites. Additionally, members may not be able to speak about sacred sites at particular times of the year. Indigenous Knowledge about sacred sites that is shared by Tribes or NHOs with federal agencies should be treated and regarded with respect. This knowledge belongs to the Tribe or NHO. If shared with federal agencies, such knowledge should be protected from disclosure to the extent permitted by law. Disclosure of the location or attributes of a sacred site may be enough to damage that site or adversely affect a Tribe or NHO's ability to access or use that site for ceremonial or religious purposes or practices. Unauthorized disclosures can also substantially harm agency relationships with Tribes and NHOs which can impact future collaboration.

At the same time, federal agencies are required by federal law to identify a rational basis for their decisions.⁴⁰ For example, if an agency plans to temporarily close public access or otherwise manage access to a sacred site to allow a Tribe exclusive access for religious or cultural purposes, the agency must develop a record that supports that decision and must in most cases disclose that record if challenged in court. In these situations, federal agencies and Tribes and NHOs should have a transparent discussion about a Tribe or NHO's requirements for confidentiality and the agency's need to explain its actions to the public.

When interacting with Tribes and NHOs regarding sacred sites or other sensitive Indigenous Knowledge, federal agencies should also be aware of the requirements of the Freedom of Information Act ("FOIA").⁴¹ FOIA provides public access to all federal agency records except records that are protected from disclosure by one of the enumerated exemptions or exclusions.

One FOIA exemption that can be used to safeguard sensitive Indigenous Knowledge in certain situations is Exemption 3, which applies to information that is "specifically exempted from disclosure by [another] statute."⁴² In the context of sacred sites, there are several federal statutes that may shield sensitive Indigenous Knowledge from disclosure, such as, but not limited to:

- Section 304 of the National Historic Preservation Act provides the head of a federal agency the authority to withhold from disclosure to the public information about the location, character, or ownership of a historic property if, after consultation with the Secretary of the Interior, the head of a federal agency determines that disclosure may cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners.⁴³
- The Archaeological Resources Protection Act generally prohibits disclosure of information concerning the nature and location of any archaeological resource for which excavation or

⁴⁰ See the Administrative Procedure Act, 5 U.S.C. § 706 (providing that a court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

⁴¹ 5 U.S.C. § 552.

⁴² 5 U.S.C. § 552(b)(3).

⁴³ 54 U.S.C. § 307103(a). See also <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-protecting-sensitive-information>.

removal requires a permit or other permission unless the federal land manager concerned determines that disclosure would not create a risk of harm to the site or its resources.⁴⁴

- The Federal Cave Protection Act generally prohibits disclosure of information concerning the specific location of any significant cave or that would create a substantial risk of harm, theft, or destruction of such a cave.⁴⁵
- Although it may be invoked only by the U.S. Forest Service, the Cultural Heritage and Cooperation Authority generally prohibits disclosure of information related to resources, cultural items, uses, or activities that have a traditional and cultural purpose and that is provided to the Forest Service under an express expectation of confidentiality.^{46,47}

Nonetheless, not all sensitive Indigenous Knowledge falls within Exemption 3 or any other FOIA exemption or exclusion, so agencies, Tribes, and NHOs should expect that records created during or otherwise stemming from Tribal consultation may be required to be released under FOIA. Prior to gathering information from Tribes and NHOs, federal agencies should consult with their attorneys for advice on what records may be required to be disclosed under FOIA and what legal protections might exist to withhold or protect sensitive information. It is imperative that federal agencies be forthright with Tribes and NHOs about the potential for disclosure of sensitive Indigenous Knowledge under FOIA and make these risks clear well in advance.

In light of the foregoing, federal agencies should consider the following best practices for safeguarding Indigenous Knowledge about sacred sites:

- Build good working relationships with Tribes and NHOs to create an atmosphere of mutual trust and respect that allows for discussion of sensitive topics.
- Acknowledge that asking for Indigenous Knowledge about sacred sites is a significant request and respect Tribes' and NHOs' preferred protocols for discussing such information.
- Be forthright and transparent with Tribes and NHOs regarding the limits of an agency's ability to protect Indigenous Knowledge about sacred sites from disclosure under FOIA.
- Seek only the minimum information necessary to support agency action.⁴⁸
- Do not press Tribes or NHOs to explain how or why places, ceremonies, events, or activities may be sacred.
- Discuss in advance how the federal agency may store, access, and use Indigenous Knowledge about sacred sites, including whether it may be shared with other agencies.⁴⁹
- When responding to FOIA requests, follow up with the requester to clarify the scope of the request. In some cases, the request may have been unintentionally broad and can be narrowed to avoid disclosure of Indigenous Knowledge about sacred sites.

⁴⁴ 16 U.S.C. § 470hh.

⁴⁵ 16 U.S.C. § 4304.

⁴⁶ 25 U.S.C. § 3056(a).

⁴⁷ Please note that these summaries are provided to educate the reader about possible avenues for safeguarding Indigenous Knowledge about sacred sites. These summaries are not legal interpretations, and they do not guarantee that any particular federal record containing Indigenous Knowledge will be withheld from disclosure.

⁴⁸ In some cases, it may be appropriate for federal agencies not to retain any sensitive data but to enter an agreement with a Tribe detailing the information federal personnel may access and how.

⁴⁹ Especially in the context of co-stewardship, confidentiality or data-sharing agreements may be useful.

- Avoid disclosure of Indigenous Knowledge about sacred sites in any Federal Register notice, agency website, or other federal publication without the consent of the appropriate Tribes or NHOs.
- Avoid creating maps or guides, even those intended for internal use, that mark, outline, or signal the location of sacred sites. If a map is created, agencies should include buffer zones around these sites to avoid disclosing their precise location.

5. Ensure Adequate Training for the Federal Workforce

In addition to hiring employees who have experience working with Tribes and NHOs, federal agencies should develop training appropriate to their missions that provides their employees with an understanding of issues related to the protection and accessibility of sacred sites. Such training should be offered regularly so that new employees can be introduced to these concepts promptly and so that existing employees can frequently refresh their knowledge.

Federal agencies should ensure that their sacred sites trainings convey an understanding of the following:

- The scope and history of federal Indian law;
- The role of Indian treaties under the U.S. Constitution;
- Federal laws and policies regarding tribal consultation, especially the National Historic Preservation Act, Executive Order 13175, and the Presidential Memorandum on Uniform Standards for Tribal Consultation;
- The meaning, scope, and importance of sacred sites to Tribes and the Native Hawaiian Community;
- Federal sacred sites policies, including Executive Order 13007 and the Sacred Sites MOU;
- The value of Indigenous Knowledge, the benefits of incorporating it into federal decision-making, and federal policies on Indigenous Knowledge, including the Guidance for Federal Departments and Agencies on Indigenous Knowledge;
- The principles of co-stewardship and its implementation through collaborative and cooperative agreements;
- Federal law enforcement responsibilities for the protection of sacred sites; and
- How to communicate to the public the importance of sacred sites to Tribes and the Native Hawaiian Community.

Whenever possible, federal agency sacred sites trainings should include input or review by Tribal and Native Hawaiian subject matter experts and be tailored to different position levels.

6. Help Educate the Public About Sacred Sites

Under the Sacred Sites MOU, the Participating Agencies committed to developing and enhancing public outreach focusing on the importance of maintaining the integrity of sacred sites and the need for public stewardship to help do so. They also committed to developing and enhancing outreach to non-federal partners that focuses on the nature of the formal legal relationship between the United States and Tribes and the Native Hawaiian Community, the federal government's Tribal consultation obligations, and the importance of maintaining the integrity of sacred sites. The commitment by Participating Agencies to public outreach includes developing or updating their existing webpages to provide

information about each Agency's sacred sites responsibilities, relevant Agency contact information, as well as information and guidance related to sacred sites.

As appropriate, federal agencies should invest in public-facing cultural awareness training about sacred sites. For example, the Bureau of Indian Affairs has an Archaeological Resource Protection Act assistance contract with Archaeology Southwest to educate the public about the importance of archaeological site stewardship and protecting those important places.

Federal land-managing agencies with public visitors should also consider publishing information designed to discourage the public from engaging in activities that could disrupt or desecrate sacred sites on federal lands. For example, the Bureau of Land Management's website includes a "Can I Keep This?" guide that explains that protected cultural materials may not be disturbed or removed.⁵⁰ The Bureau of Land Management's website also leverages the non-federal "Leave No Trace" public awareness campaign, which encourages outdoor enthusiasts to dispose of waste properly, minimize campfire impacts, and leave what you find, all of which can help to ensure the integrity of sacred sites.⁵¹

CONCLUSION

Federal agencies approve and fund a multitude of activities on, and are responsible for managing, millions of acres of lands and waters previously controlled and stewarded by Tribes and the Native Hawaiian Community since time immemorial. These lands and waters still contain cultural and natural resources of significance and value to Tribes and the Native Hawaiian Community, including sacred sites, burial sites, wildlife, and sources of indigenous foods and medicines. Many of these lands and waters further lie within areas subject to reserved Tribal rights to hunt, fish, gather, and pray pursuant to ratified treaties and agreements with the United States.

The Sacred Sites MOU commits the Participating Agencies to continuing their efforts to integrate consideration of sacred sites early into their decision-making, regulatory, and consultation processes to ensure that their activities both acknowledge and honor the importance of sacred sites and comply with statutory and regulatory requirements for the protection and accessibility of sacred sites for Tribes and the Native Hawaiian Community.

The government-to-government relationship of the United States to Tribes, and the government-to-sovereign relationship of the United States to the Native Hawaiian Community, is just that: a continuing and ongoing relationship.

As such there will always be opportunities for continued improvement of the Participating Agencies' commitment to protecting and preserving sacred sites in consultation with Tribes on a government-to-government basis. The protection and accessibility of sacred sites is ultimately a matter for all federal agencies, not just the Participating Agencies. The commitments made by the Participating Agencies in the Sacred Sites MOU have provided a foundation for other federal agencies to build upon.

Agencies should consider this Best Practices Guide as a foundation for consulting and collaborating with Tribes regarding sacred sites and as a guide in developing additional, agency-specific policies and

⁵⁰ <https://www.blm.gov/Learn/Can-I-Keep-This>

⁵¹ <https://www.blm.gov/outdoorethics>; <https://Int.org/why/7-principles/>

guidance. The Appendices that follow are intended to provide a source of additional information that can support such endeavors.

The Participating Agencies are encouraged to actively solicit greater participation in the Sacred Sites MOU by other federal agencies, and to explore ways to improve the Best Practices Guide.

Draft

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Disclaimer

Recommendations in this Guide do not impose legally binding obligations on any federal agency. Each of the federal agencies will act as an independent party with respect to performance of recommendations in this Guide. This Guide does not, and does not intend to, restrict the authority of any party to act as provided by law, statute, or regulation. This Guide does not, and does not intend to, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any person against the United States, its departments, agencies, or entities, its officers, employees, or agents or any other person. Each federal agency will bear its own expenses in connection with the preparation, negotiation, and execution of any recommendations of this Guide. Any activities of the agencies in implementing this Guide are subject to the availability of appropriated funds. Nothing in this Guide obligates any of the agencies to expend appropriations or to enter into any contract, assistance agreement, or interagency agreement, or incur other financial obligations.

This is not a stand-alone document, but a living document which should be read in conjunction with other agency policies, including departmental and agency Tribal consultation policies, the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for The Protection of Indigenous Sacred Sites, the commitment expressed by the White House to Elevate Indigenous Knowledge in Federal Policy Decisions, and the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters. This document contains best practices and policy goals intended to strengthen the protection of Tribal and Native Hawaiian sacred sites, agency Tribal consultation practices with respect to sacred sites, and the government-to-government relationship.

Federal agencies retain the discretion whether to adopt some or all of the best practices identified in this Guide, in accordance with their authorities, budgets, practical considerations, and other factors.

This document is not intended to be a comprehensive statement of all considerations that should go into the protection of sacred sites. This Guide is intended only to improve the internal management of the executive branch, and its provisions are not intended to be applied by an agency's administrative appeals board or court.

APPENDICES

1. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites
2. Tribal Comments
 - a. 2023 MOU Listening Session
 - b. 2022 MOU Listening Session
 - c. 2022 ACHP Listening Session
3. Authorities Relevant to Sacred Sites
 - a. EO 13007
 - b. EO 13175
 - c. NHPA
 - d. NEPA
 - e. NAGPRA
 - f. ARPA
 - g. AIRFA
 - h. RFRA
 - i. Tribal Self-Governance Act
 - j. Cultural Heritage and Cooperation Authority
4. Indigenous Knowledge Reference Materials
 - a. CEQ Guidance on IK
 - b. FWS – Integrating Use of TEK
 - c. FWS – TEK Introduction
 - d. FWS – TEK for Application by FWS Scientists
5. Consultation Reference Materials
 - a. FWS – Native American Policy 2016
 - b. FWS – 510 FW 1 – Native American Policy
 - c. BOR – NIA P10 – Indian Policy
 - d. OSMRE – Tribal Consultation Policy
 - e. DOI-DOJ – Improving Tribal Consultation 2017
 - f. DOI-DOE – Guidance on Tribal Consultation for Glen Canyon
6. Co-stewardship Reference Materials
 - a. NPS – Policy Memo 22-03 - Trust Resp in Stewardship
 - b. BLM – PIM No. 2022-011 - Co-Stewardship
 - c. FWS – DO 227 – Trust Resp in Stewardship
 - d. BIA – NPM-DBIA-2 – Supporting Tribes in Stewardship
7. Confidentiality Reference Materials
 - a. NPS Data Store User Guide: Reference Sensitivity, Proprietary and Quality Designations
 - b. NPS Ref Manual RM 66B: Handling Protected Information