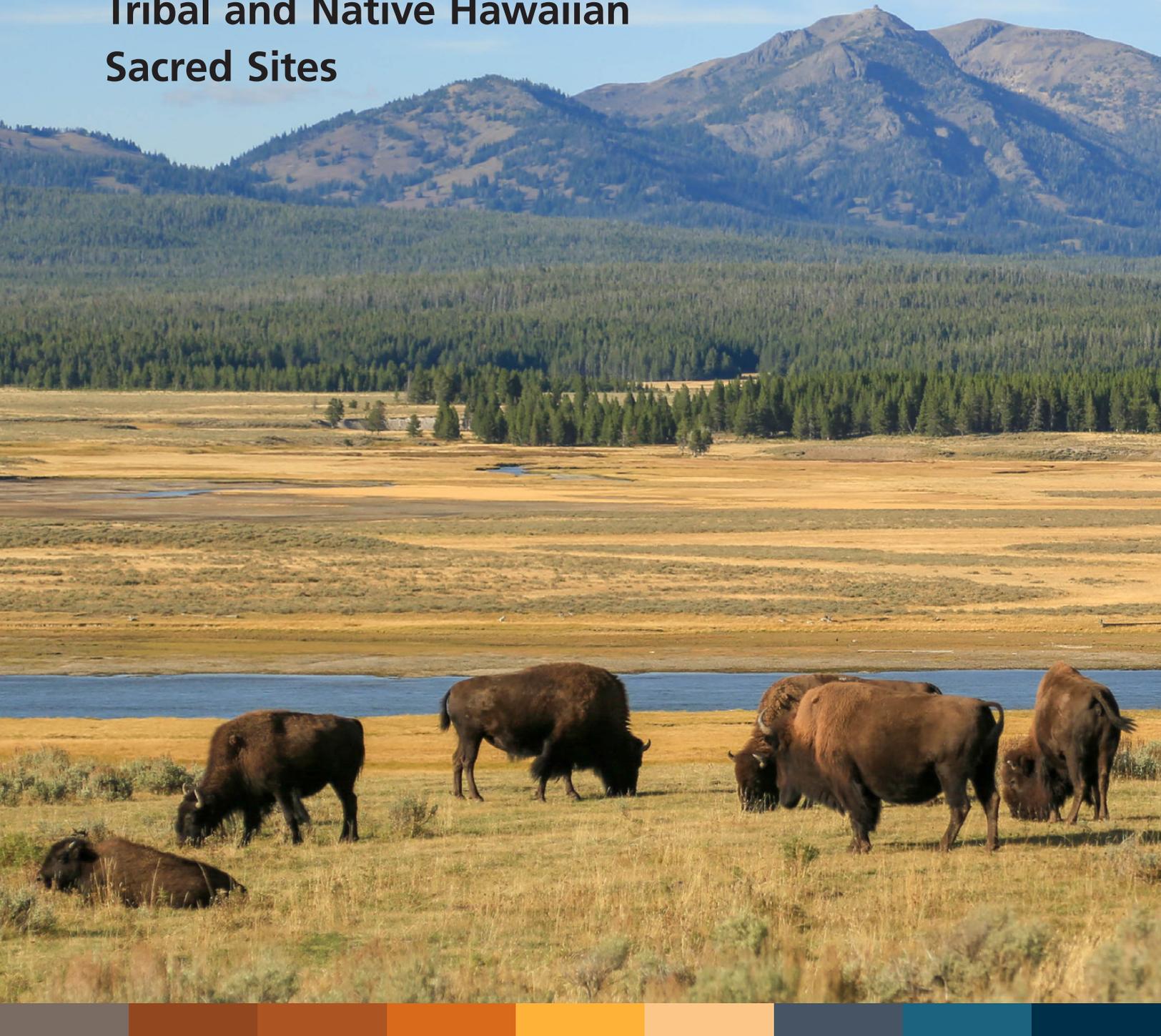


# **BEST PRACTICES GUIDE**

## **For Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites**



**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



# CONTENTS

<b>FOREWORD</b> .....	1
<b>WHO IS THIS GUIDE FOR?</b> .....	3
<b>THINGS YOU SHOULD KNOW</b> .....	4
1. What is a Tribe? .....	4
2. What is the Native Hawaiian Community? .....	4
3. What is Tribal Sovereignty?.....	5
4. What are Indian Treaties? .....	5
5. What is the Trust Responsibility? .....	5
6. What is Tribal and Native Hawaiian Consultation? .....	6
7. What is Indigenous Knowledge? .....	6
8. What is Co-Stewardship?.....	7
<b>SACRED SITES</b> .....	8
1. What is a Sacred Site? .....	8
2. What is the Federal Government’s Responsibility with Respect to Sacred Sites? .....	9
3. What is the Sacred Sites Memorandum of Understanding? .....	10
4. What is the National Historic Preservation Act .....	10
and How Does It Relate to Sacred Sites? .....	11
<b>BEST PRACTICES FOR FEDERAL AGENCIES REGARDING TRIBAL AND NATIVE HAWAIIAN SACRED SITES</b> .....	13
1. Build Sustainable Relationships with Tribes and Native Hawaiian Organizations .....	13
A. Practice Early and Sustained Consultation and Engagement .....	13
B. Use Co-Stewardship Agreements .....	18
C. Remain Accountable .....	20
2. Support Tribal and Native Hawaiian Capacity .....	21
3. Fully Exercise Discretion to Permit Tribal and Native Hawaiian Access to Sacred Sites .....	22
4. Protect Sacred Sites by Engaging with Tribes and Native Hawaiian Organizations to: .....	23
A. Anticipate the Impacts of Agency Actions on Sacred Sites .....	23
B. Implement Physical Protection of Sacred Sites .....	25
C. Safeguard Indigenous Knowledge of Sacred Sites.....	25
5. Ensure Adequate Training for the Federal Workforce .....	29
6. Help Educate the Public About Sacred Sites .....	31
<b>CONCLUSION</b> .....	33
<b>SUMMARY OF TRIBAL AND NATIVE HAWAIIAN COMMENTS</b> .....	34
<b>COPYRIGHT INFORMATION AND DISCLAIMER</b> .....	36
<b>APPENDIX</b> .....	38

Photos in this Guide (credited on Page 40) were chosen to provide visual interest only. While some photos may depict lands or waters held sacred by Indian Tribes or Native Hawaiians, the photos are not intended to identify or disclose any location as a sacred site.





## FOREWORD

The federal government manages a diverse range of lands and waters that contain sites held sacred by Tribes and the Native Hawaiian Community.<sup>1</sup> 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)<sup>2</sup> 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 also recognized that the United States has supported the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP)<sup>3</sup> subject to applicable federal law.<sup>4</sup> 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, accountability, 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. The first draft of the Guide incorporated the input and advice of Tribes and Native Hawaiian Organizations (NHOs) as collected in

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<sup>1</sup> While the best practices in this Guide are crafted primarily for land-managing agencies, there are many other federal agencies that 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.

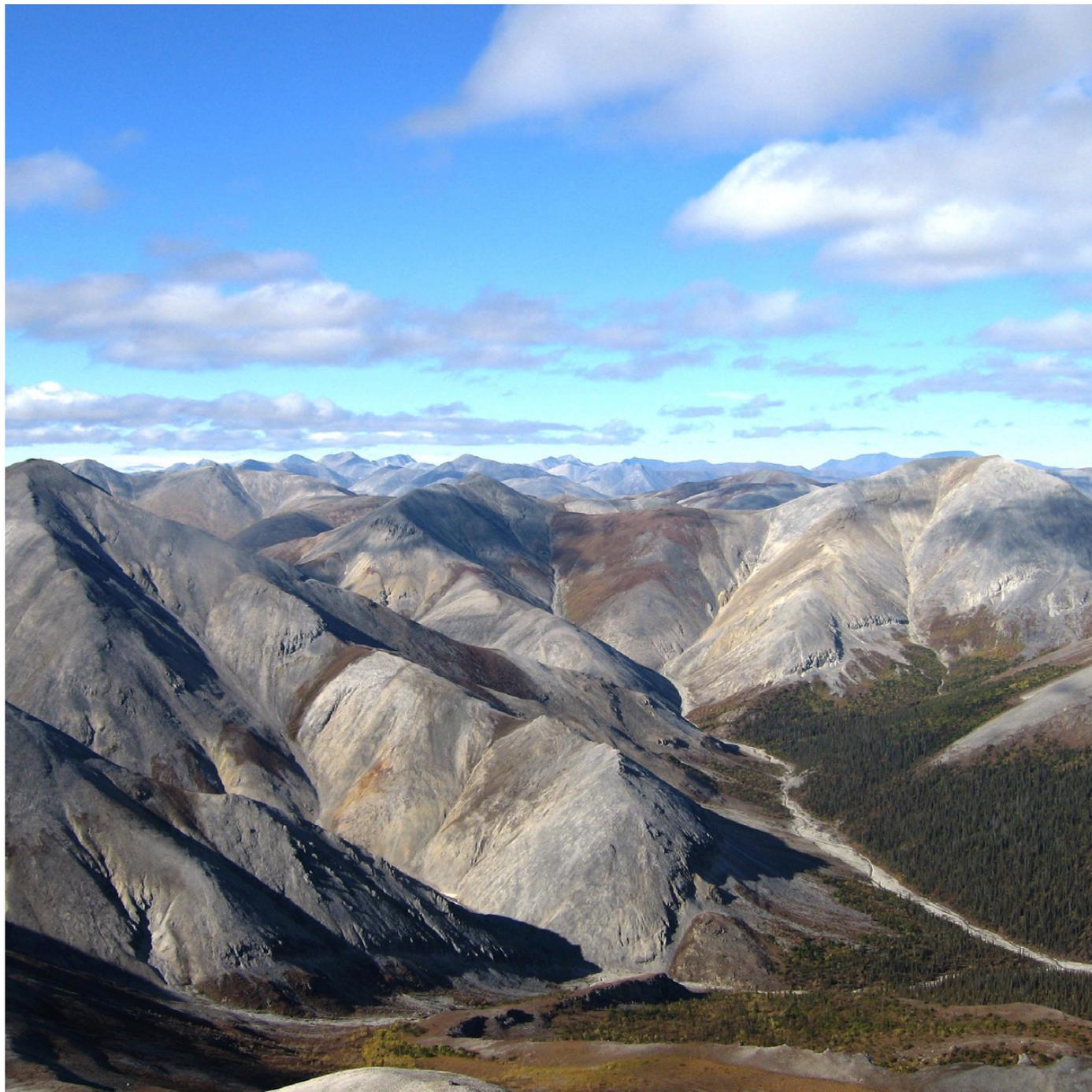
<sup>2</sup> U.S. Dept. of the Interior, U.S. Dept. of Agriculture, U.S. Dept. of Transportation, U.S. Dept. of Energy, U.S. Environmental Protection Agency, White House Council on Environmental Quality, Advisory Council on Historic Preservation, and Tennessee Valley Authority (together, the "Participating 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> (hereinafter "2021 MOU").

<sup>3</sup> U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/68, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

<sup>4</sup> 2021 MOU at 2-3. "While not legally binding, the UN DRIP affirms the responsibility of the Parties to recognize, respect, and consider Tribal interpretations of their own treaty and reserved rights." 2021 MOU at 3.

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 (ACHP) on March 17 and 21, 2022,<sup>5</sup> and as submitted by Tribes and NHOs in written comments. The draft Guide was then sent to Tribal and Native Hawaiian leaders for review in July 2023. The

Participating Agencies heard feedback on the draft Guide during a nationwide virtual consultation session held in August 2023 and received written comments from Tribes and NHOs in September 2023. All of the feedback received was seriously considered by the Participating Agencies, and much of it has been incorporated into the final version of the Guide.



<sup>5</sup> See Summary of Nationwide Listening Sessions with Indian Tribes and Native Hawaiian Organizations regarding ACHP's Tribal and Native Hawaiian Sacred Sites and Historic Properties Action Plan (Jun. 28, 2022), available at <https://www.achp.gov/sites/default/files/2022-06/SummaryofACHPsNationwideListeningSessionswithIndianTribesandNativeHawaiians20220629.pdf>.



## WHO IS THIS GUIDE FOR?

This Guide is intended as a source of practical information for different audiences. The first is federal agencies. Tribes and NHOs report that federal agencies still have much to learn about federal-Tribal and federal-Native Hawaiian relations. 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 and Native Hawaiian consultation and federal decision-making on sacred sites.

The second audience is Tribes and NHOs, 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 the 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.<sup>6</sup>

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 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.<sup>7</sup> Because Native Hawaiians do not presently have an organized government,<sup>8</sup> Congress has charged federal agencies to work with the Native Hawaiian Community through Native Hawaiian Organizations (NHOs), which are its informal representatives.<sup>9</sup> The Department of the Interior's Office of Native Hawaiian Relations maintains a non-exhaustive list of NHOs.<sup>10</sup>



<sup>6</sup> 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).

<sup>7</sup> See, e.g., Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(12)–(20); Native Hawaiian Education Act, 20 U.S.C. § 7512(8), (10)–(12); 43 CFR § 50.4; and 81 Fed. Reg. 71278 (Oct. 14, 2016).

<sup>8</sup> 81 Fed. Reg. 71278 (Oct. 14, 2016).

<sup>9</sup> See, e.g., Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005, and National Historic Preservation Act, 54 U.S.C. § 302706. See also U.S. Dept. of the Interior, Office of Native Hawaiian Relations, Standard Operating Procedure for Consultation with the Native Hawaiian Community 2 (Oct. 2020).

<sup>10</sup> [www.doi.gov/hawaiian/NHOL](http://www.doi.gov/hawaiian/NHOL).

### 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 British Colonies before it, has recognized Tribes as distinct and independent political communities with their own powers of self-government.<sup>11</sup> Tribal sovereignty refers to Tribes' original, inherent authority to govern themselves, their lands, and their resources. It is not a power delegated to Tribes by Congress but is instead an inherent power that has never been extinguished.<sup>12</sup> 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 typically 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.<sup>13</sup> Treaty rights are generally not waived by prior non-performance on the part of the United States. Under the U.S. Constitution, ratified treaties are the supreme law of the land, and their terms may be changed only by Congress.<sup>14</sup> Treaties are substantive federal law of equal importance to other federal laws and obligations. The U.S. Constitution's Treaty Clause, Article II, Section 2, Clause 2, authorizes the President to make treaties with the concurrence of two-thirds of the Senate. In total, the United States ratified approximately 374 treaties with Tribes. Between 1778 and 1871, Tribes ceded much of the land now managed

by the federal government through treaties, often through coercion. After 1871, other legal mechanisms were used by the various branches of government to recognize Tribal rights, including, but not limited to, Executive orders, military decrees, federal legislation, and judicial decisions.

The Supreme Court has long applied canons, or rules of interpretation, for Indian treaties. These include: (1) treaty language must be construed as the Indians would have understood it at the time of treaty negotiation; (2) doubtful or ambiguous expressions in a treaty should generally be resolved in favor of the Tribes; and (3) treaty provisions should be interpreted in light of the surrounding circumstances and history.<sup>15</sup> Furthermore, Congress must clearly express any intent to abrogate Indian treaty rights.<sup>16</sup> Agencies should be cognizant of these canons when making decisions that impact Tribal treaty rights, reserved rights, or other similar rights.<sup>17</sup>

### 5. What is the Trust Responsibility?

The general, ongoing trust relationship is between the United States (including all agencies of the federal government) and Tribes, in which the government "has charged itself with moral obligations of the highest responsibility and trust."<sup>18</sup> The United States also has an ongoing trust relationship with the Native Hawaiian Community.<sup>19</sup> The nature of the trust relationship is defined by federal law (i.e., treaties, statutes, Executive orders, federal regulations) and can include particular duties or fiduciary obligations.<sup>20</sup>

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<sup>11</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>12</sup> *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

<sup>13</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905). Some treaties do grant rights to Tribes

<sup>14</sup> U.S. Const. art. VI, cl. 2.

<sup>15</sup> See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); and *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

<sup>16</sup> *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019).

<sup>17</sup> For more information on Indian treaties, see Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making (Nov. 30, 2022), available at [https://www.bia.gov/sites/default/files/dup/inline-files/best\\_practices\\_guide.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf).

<sup>18</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

<sup>19</sup> See 43 C.F.R. § 50.4.

<sup>20</sup> *United States v. Jicarilla Apache Nation*, 6564 U.S. 162 (2011). Federal agencies and departments may further inform their trust responsibility to Tribes and the Native Hawaiian Community through the development of policy, statements, or other resources unique to their mission and authorities. For example, see the ACHP's "Policy Statement Regarding the ACHP's Relationships with Indian Tribes" (2000), <https://www.achp.gov/sites/default/files/policies/2018-07/ACHPPolicyStatementRegardingtheCouncilsRelationshipswithIndianTribes.pdf>, and "The Advisory Council on Historic Preservation's Statement on Its Trust Responsibility" (2004), <https://www.achp.gov/sites/default/files/2018-06/TheACHPsStatementOnItsTrustResponsibility.pdf>.

## 6. What is Tribal and Native Hawaiian Consultation?

Grounded in the government-to-government relationship,<sup>21</sup> Tribal and Native Hawaiian consultation is a process for communication between the federal government and Tribes and the Native Hawaiian Community. Tribes and the Native Hawaiian Community are not merely part of the public, and consultation is distinct from public participation. Effective Tribal and Native Hawaiian 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 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.<sup>22</sup> As discussed more thoroughly below, there are specific legal requirements for Tribal consultation under the National Historic Preservation Act (NHPA) and other federal authorities such as:

- [Executive Order 13175](#) on Consultation and Coordination with Indian Tribal Governments
- [Executive Order 13007](#) on Indian Sacred Sites
- [The Presidential Memorandum on Uniform Standards for Tribal Consultation](#)
- [Executive Order 14096](#) on Revitalizing Our Nation's Commitment to Environmental Justice for All

Agencies also consult with Tribes in conjunction with fulfilling their obligations under the National Environmental Policy Act (NEPA) as discussed further below.

## 7. 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.<sup>23</sup> 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.



<sup>21</sup> Or when consulting with the Native Hawaiian Community, the government-to-sovereign relationship.

<sup>22</sup> While this Guide focuses on Tribes (including federally recognized Alaska Native Tribes) and NHOs, federal agencies are also 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. H § 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).

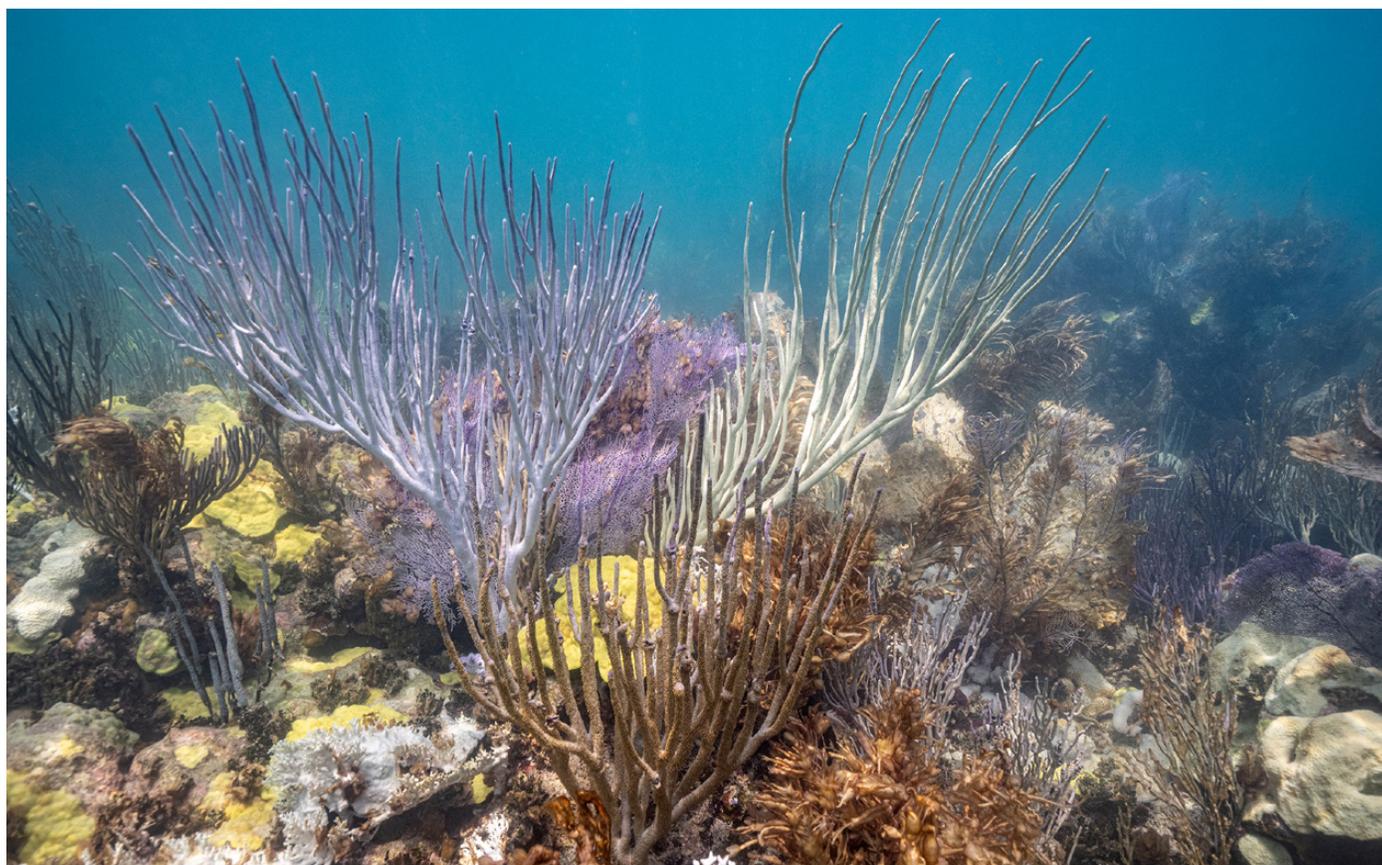
<sup>23</sup> Indigenous Knowledge may also be referred to as "Native Science," "traditional ecological knowledge," or "Indigenous traditional ecological knowledge."

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. Accordingly, the federal government has issued guidance to agencies on incorporating Indigenous Knowledge in federal decision-making.<sup>24</sup> 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, the Wilderness Act, the National Forest Management Act, the Federal Land Policy and Management Act, and the National Environmental Policy Act.<sup>25</sup>

## 8. 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, and associated flora, fauna, and resources. 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 including under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5301 *et seq.*).



<sup>24</sup> See Memorandum for the Heads of Departments and Agencies Regarding Indigenous Traditional Ecological Knowledge and Federal Decision Making (Nov. 15, 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

<sup>25</sup> See also Exec. Order 14096 § 1 (“The Federal Government must also continue to respect Tribal sovereignty and support self-governance by ensuring that Tribal Nations are consulted on Federal policies that have Tribal implications. In doing so, we must recognize, honor, and respect the different cultural practices—including subsistence practices, ways of living, Indigenous Knowledge, and traditions—in communities across America.”).



## 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.<sup>26</sup>

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, coral reefs, groves, petroglyphs, burial sites, boarding school grounds, battlegrounds and massacre sites, trails, shelters, traditional harvesting areas,

or places that afford views of important areas of land, water, or of the sky and celestial bodies. It is also important to understand that the same site can be held sacred by different Tribes or Native Hawaiian Organizations (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 cultural or geographic landscapes or traditional systems 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

<sup>26</sup> 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.



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."

Although sacred sites can be present on any lands, this Guide, like the Sacred Sites MOU, specifically addresses the responsibilities of federal agencies in connection with sacred sites located on federal lands.<sup>27</sup> At the same time, the principles set forth in this Guide can be instructive for non-federal actors and situations involving sacred sites on non-federal lands. The term "federal lands," as used in this Guide, excludes lands held in trust by the United States on behalf of an Indian Tribe or its members.<sup>28</sup>

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 sacred sites in honor of recent events and spiritual dynamics. For reasons such as these, and as discussed more thoroughly below in the "Best Practices" section, 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 promote settlement, develop natural resources, and preserve wilderness areas and endangered species, unaware how such laws could affect Indigenous religious practices and without fully considering their impact.<sup>29</sup> Starting in the 1970s, however, Congress began to realize that such laws and their administration severely interfered with the free exercise of Indigenous religions,<sup>30</sup> such as by interfering in ceremonial religious events or by denying Tribal access to sacred sites.<sup>31</sup>

In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA).<sup>32</sup> 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."<sup>33</sup> AIRFA also instructed the President to direct federal agencies "to evaluate

<sup>27</sup> Id. at 2.

<sup>28</sup> See Exec. Order 13007 § 1(b)(i) ("Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands . . .").

<sup>29</sup> H.R. Rep. No. 95-1308, at 2 (June 19, 1978).

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Pub. L. No. 95-341, 92 Stat. 469 (Aug. 11, 1978).

<sup>33</sup> AIRFA § 1, codified at 42 U.S.C. § 1996.

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.”<sup>34</sup>

Consistent with AIRFA’s policies, Executive Order 13007, *Indian Sacred Sites*, was issued in May 1996 to address the protection and preservation of Indian religious practices at sacred sites on federal lands.<sup>35</sup> Executive Order 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.<sup>36</sup> Executive Order 14096, *Revitalizing Our Nation’s Commitment to Environmental Justice for All*, issued in April 2023, reaffirms the direction to federal agencies to “fulfill obligations established pursuant to Executive Order 13007.”<sup>37</sup>

By entering into the Sacred Sites MOU, the Participating Agencies have further committed themselves to the letter and spirit of AIRFA and Executive Order 13007, as reaffirmed by Executive Order 14096. 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 Executive Order 13007. In so doing, the Participating Agencies committed to taking certain steps to improve sacred site protection and accessibility within each agency. Among the most important is ensuring that each Participating Agency integrates consideration of sacred sites into its respective decision-making, regulatory, or consultation processes at an early stage. Equally important is that each Participating Agency seek to ensure access by



<sup>34</sup> AIRFA § 2.

<sup>35</sup> Exec. Order No. 13007, *Indian Sacred Sites* (May 24, 1996), 61 Fed. Reg. 26,771 (May 29, 1996).

<sup>36</sup> Exec. Order 13007 § 1(a).

<sup>37</sup> Exec. Order 14096 § 3(a)(viii) (Apr. 21, 2023), 88 Fed. Reg. 25251 (Apr. 26, 2023). Executive Order 14096 also underscores the need to “respect Tribal sovereignty and support self-governance by ensuring that Tribal Nations are consulted on Federal policies that have Tribal implications,” and instructs “each [federal] agency [to] make achieving environmental justice part of its mission,” while defining “environmental justice” in part, as including “the just treatment and meaningful involvement of all people, regardless of . . . Tribal affiliation, . . . so that people . . . have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.” *Id.* §§ 1, 2(b), 3(a).

Tribes and the Native Hawaiian Community consistent with its applicable authorities and with Executive Order 13007.<sup>38</sup> 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;<sup>39</sup>
- Ways to incorporate Indigenous Knowledge into federal management and protection of sacred sites;<sup>40</sup>
- Ways to collaborate with Tribes and NHOs in the stewardship of sacred sites;<sup>41</sup>
- 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;<sup>42</sup> and
- Ways to help build Tribal and Native Hawaiian capacity to engage in meaningful consultation and to share Tribal and Native Hawaiian expertise.<sup>43</sup>



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.<sup>44</sup> 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."<sup>45</sup> 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).<sup>46</sup>

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,

<sup>38</sup> 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.

<sup>39</sup> 2021 MOU § II(3).

<sup>40</sup> 2021 MOU § II(4), (7).

<sup>41</sup> 2021 MOU § II(6).

<sup>42</sup> 2021 MOU § II(10).

<sup>43</sup> 2021 MOU § II(8)).

<sup>44</sup> 54 U.S.C. § 306108.

<sup>45</sup> 54 U.S.C. § 300308.

<sup>46</sup> 54 U.S.C. § 302706.



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.<sup>47</sup>

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 Executive Order 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,<sup>48</sup> 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.

<sup>47</sup> 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).

<sup>48</sup> A traditional cultural place or traditional 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 Native Hawaiian Organizations

### 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 relationship with Tribes and the Native Hawaiian Community. When a federal agency pursues policies or contemplates activities with Tribal or Native Hawaiian implications, the agency must consult with Tribes and Native Hawaiian Organizations (NHOs)<sup>49</sup> consistent with applicable laws and policies such as Executive Order 13175, Executive Order 14096, the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the Presidential Memorandum on Uniform Standards for Tribal Consultation, the NHPA, and the agency's consultation guidance.<sup>50</sup> As discussed in this Guide and elsewhere, federal agencies are encouraged to go above and beyond the applicable requirements for Tribal and Native Hawaiian 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.<sup>51</sup> 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 of, observed, or

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<sup>49</sup> And as appropriate, Alaska Native Corporations. See fn. 22.

<sup>50</sup> Exec. Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000), 65 Fed. Reg. 67249 (Nov. 9, 2000); Exec. Order 14096 §§ 1, 3(a)(viii) (Apr. 21, 2023), 88 Fed. Reg. 25251 (Apr. 26, 2023); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021); Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022); NHPA, 54 U.S.C. § 306108.

<sup>51</sup> 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 and Native Hawaiian consultation more generally. For further reading on Tribal and Native Hawaiian consultation, see the materials listed in the Appendix.

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 as equal to other sciences and incorporated into the federal decision-making process. Land management that is informed by Indigenous Knowledge has the additional benefits of better protecting biodiversity and endangered species, promoting carbon sequestration, increasing resiliency, and preserving landscape aesthetics.

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 toward 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 practicable and appropriate in the planning stages of a project, rulemaking, policy, or land use plan 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 may not always be sufficient to protect sacred sites, federal agencies should remain open to all available alternatives, including the no-action alternative. In order to ensure time for thorough consultation, agencies should consider inviting Tribes and NHOs to consult or comment prior to developing a preferred alternative or proposed regulation or policy. Agencies should also involve Tribes and NHOs as early as practicable and appropriate when considering a proposal that may require federal permits, financial assistance, loans, grants, studies, or procurement activities.

Early and meaningful Tribal and Native Hawaiian involvement is especially critical during agencies' land use planning processes.<sup>52</sup> Because land use plans typically govern an agency's management of an area of federal lands for years or decades, provisions related to access and protection of sacred sites that are incorporated into land use plans may be more durable than other types of decisions. Early Tribal and Native Hawaiian involvement is critical to ensure that decisions about access and protection of sacred sites receive the attention they need in these planning processes.

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<sup>52</sup> See, e.g., National Forest Management Act, 16 U.S.C. § 1600; Federal Land Policy and Management Act, 17 U.S.C. §§ 1701–1785; National Park Service Organic Act, 16 U.S.C. §§ 1–4.

Finally, these concerns regarding early involvement are also particularly heightened in the context of proposals that may result in federal lands being transferred outside of federal ownership to non-Tribal parties, since these decisions, once made by agencies, are often irrevocable and can result in the loss of certain legal protections for sacred sites.

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 or 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 whether, 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.<sup>53</sup> 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 and Native Hawaiian consultation or engagement session.



<sup>53</sup> As a first measure, federal agencies should use resources such as the Bureau of Indian Affairs Tribal Leaders Directory to identify appropriate Tribal contacts, available at <https://www.bia.gov/bia/ois/tribal-leaders-directory/>.

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.<sup>54</sup> Consistent with appropriate authorities and depending on the scope and nature of the project or decision in question, agencies may wish to consider the following strategies for ensuring notice to all potentially affected Tribes or NHOs:

- Send a direct notification to a broad group of Tribes or NHOs, such as:
  - All Tribes or NHOs;
  - All Tribes or NHOs with ancestral lands or present-day connections in a particular state or county;
  - All Tribes or NHOs with ancestral lands or present-day connections within the jurisdiction of an agency's regional or local office; and
  - All Tribes or NHOs with ancestral lands or present-day connections in a particular watershed, viewshed, mountain range, forest, or ecosystem.
- Send a direct notification to potentially affected Tribes or NHOs that have been identified through research. Such research should be conducted by a federal agency employee with subject matter expertise or by an outside historical or technical expert.
- Publish notice of a consultation on an agency's website.
- Publish notice of a consultation on a centralized federal website designed for this purpose.
- Publish a list or database of proposed projects/decisions with potential Tribal or Native Hawaiian implications to allow Tribes and NHOs to identify which federal actions may affect them.

<sup>54</sup> Sources that can provide insight into ancestral or historical Tribal connections to land include the "Royce Maps" (found in Indian Land Cessions in the United States, 1784-1894 [U.S. Serial Set, Nos. 4014, 4015], available at <https://www.loc.gov/item/13023487/>), the Indian Claims Commission map, available at <https://www.loc.gov/item/80695449/>, and the Tribal Treaties Database, available at <https://treaties.okstate.edu/>.

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:

- Be mindful of other federal consultations that may be occurring, and schedule consultations well in advance to allow Tribes and NHOs ample time to provide meaningful input in all the consultations to which they have been invited.
- Be mindful of Tribal or Native Hawaiian religious or subsistence calendars that may affect availability for consultation.
- With the informed consent of the Tribes or NHOs involved, consider creating a transcript or recording of the consultation and making it available for the benefit of those who were unable to attend, keeping in mind the confidentiality concerns that may arise when such a transcript or recording is created.<sup>55</sup>
- Host a “Tribal forum” shortly after a consultation is announced but well before the consultation occurs, in which agency staff can provide important background information and answer questions.
- Host a “Tribal caucus” immediately prior to a consultation to allow Tribes and NHOs to discuss the framing questions among themselves before presenting their comments to federal officials.
- Ensure agency officials with the appropriate level of authority are present and engaged in the consultation.
- Open consultation by inviting Tribal or Native Hawaiian leaders or their representatives to speak first.
- When consulting with the Native Hawaiian Community and NHOs, in addition to consulting with community or organization leaders, consider engaging with the kupuna of the appropriate ‘ohana.<sup>56</sup>

<sup>55</sup> For more information on confidentiality, see Part 4C below.

<sup>56</sup> “Kupuna” generally refers to Native Hawaiian Community elders who have responsibility for a geographic place or who have specific stewardship duties for an area of practice or expertise such as shipbuilding, hula, chant, dry masonry, etc. “Ohana” means a group of people who comprise a Native Hawaiian Organization whose members have a familial or kinship relationship with each other.

Finally, while federal agencies cannot delegate their obligation to consult with Tribes and the Native Hawaiian Community to other entities such as project proponents or state governments, Tribes and NHOs may decide to engage directly with non-federal entities when activities or projects proposed by a non-federal entity may impact or otherwise harm a sacred site. Early and meaningful interactions between non-federal entities and Tribes and NHOs, where desired by Tribes and NHOs, can help non-federal entities learn about the priorities and concerns of Tribal governments and the Native Hawaiian Community; inform proposals submitted to federal agencies to better account for sacred sites or other Tribal or Native Hawaiian Community resources; lay the groundwork for productive government-to-government or government-to-sovereign consultation between Tribes and the Native Hawaiian Community and federal agencies; and provide an avenue for non-federal entities to be accountable directly to Tribes and the Native Hawaiian Community, as appropriate.<sup>57</sup> Federal agencies can encourage their non-federal partners, including state governments, to engage with Tribes and NHOs that wish to do so by providing guidance to non-federal entities on engaging with Tribes and NHOs, or even by requiring project proponents to prepare Tribal or Native Hawaiian engagement plans.<sup>58</sup>

## **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 also collaborate with Tribes and NHOs to ensure good stewardship of federal lands and allow Tribes and NHOs their rightful and relevant access to and use of certain public lands. Each Participating 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 Indigenous Knowledge.

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<sup>57</sup> Facilitating early and meaningful interactions between non-federal entities and Tribes is also consistent with Exec. Order 14096's instruction to agencies to "consider ways to encourage and, as appropriate, ensure that recipients of Federal funds—including recipients of block grant funding—and entities subject to contractual, licensing, or other arrangements with Federal agencies advance environmental justice." Exec. Order 14096 § 3(a)(xiv).

<sup>58</sup> For example, the ACHP provides guidance to federal agencies, Tribes, and non-federal entities on early engagement through its handbook *Early Coordination with Tribes During Pre-Application Processes* (2019), available at [https://www.achp.gov/sites/default/files/documents/2019-10/EarlyCoordinationHandbook\\_102819\\_HighRes.pdf](https://www.achp.gov/sites/default/files/documents/2019-10/EarlyCoordinationHandbook_102819_HighRes.pdf).



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; outline any shared responsibilities; 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; provide compensation to Tribes or NHOs for their work and expertise where appropriate and where funding is available; and include terms for accessing and making use of sacred sites by Tribes, NHOs, and the public, as relevant. To the extent allowed under relevant authorities, agencies should consider ways to maximize opportunities for Tribes and the Native Hawaiian Community to meaningfully participate in the management of co-stewarded lands, rather than serving in a solely advisory role. Federal agencies should engage on an ongoing basis with Tribes and NHOs that have existing co-stewardship agreements to discuss successes and obstacles.

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 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 in applying their knowledge to the environmental challenges confronting those lands from drought, erosion, and visitation.

## C. Remain Accountable

While consultation, engagement, and co-stewardship can help put agencies on the right path to fulfilling their obligations with regard to sacred sites, agencies should remain accountable to Tribes and NHOs throughout the course of a federal project or other action.

Consultation is a conversation that should be sustained throughout a project or decision-making process rather than being an obstacle that, once overcome, can be left in the past. Because Tribes and NHOs report that they do not always know whether or how their views have been taken into account, the 2022 Presidential Memorandum on Uniform Standards for Tribal Consultation (2022 PM) requires federal agencies to create a record of each consultation,<sup>59</sup> which must include:

1. a summary of Tribal input received;
2. a general explanation of how Tribal input influenced or was incorporated into the agency action; and
3. if relevant, the general reasoning for why Tribal suggestions were not incorporated into the agency action or why consensus could not be attained.<sup>60</sup>

The 2022 PM encourages agencies to consider publicly posting the record of consultation.<sup>61</sup> Importantly, the 2022 PM requires agencies to “timely disclose to the affected Tribe or Tribes the outcome of the consultation and decisions made as a result of the consultation.”<sup>62</sup>

When agencies enter into co-stewardship or other agreements with Tribes and NHOs, agencies should implement the agreements in good faith and consistent with governing law. To remain accountable, agencies should communicate with the relevant Tribes or NHOs throughout the life of the agreement to assess any implementation issues or potential modifications.

Federal agencies should also regularly assess and, as needed, revise their internal policies regarding consultation, co-stewardship, and sacred sites. Agencies may want to consider including an alternative dispute resolution or other process for resolving disagreements with Tribes or NHOs in those policies. The 2021 Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships

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<sup>59</sup> Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/> (hereinafter “2022 PM”). While the 2022 PM applies only to consultations with “Indian Tribes” as defined in Executive Order 13175, agencies should consider voluntarily completing a consultation record after consultations with NHOs.

<sup>60</sup> 2022 PM § 7(a).

<sup>61</sup> 2022 PM § 7(c).

<sup>62</sup> 2022 PM § 7(b).

requires each federal agency to submit to the Office of Management and Budget a detailed plan for carrying out the directives of Executive Order 13175 on Consultation and Coordination with Tribal Governments.<sup>63</sup> That memorandum also requires agencies to provide an annual progress report regarding the agency's plan.<sup>64</sup> With respect to sacred sites, the Sacred Sites MOU requires the Participating Agencies to submit an annual combined report to the White House Council on Native American Affairs that identifies significant issues raised by Tribes and NHOs and that highlights sacred sites practices and procedures developed by the Participating Agencies.<sup>65</sup> Agencies should welcome such reporting as an opportunity to set goals for improving their internal policies.

## 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; and
- Compensating Tribes, NHOs, and knowledge holders for their expertise through available agency mechanisms. That expertise may include Indigenous Knowledge, co-stewardship of federal lands, and training for federal officials provided by or developed in coordination with Tribes and NHOs.

<sup>63</sup> Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships § 1(a) (Jan. 26, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

<sup>64</sup> Id. § 1(c).

<sup>65</sup> 2021 MOU § II(1)(f).

When preparing their annual budgetary requests, federal agencies should consider requesting direct and contract funding to Tribes and NHOs for consultation-related costs, staff training, and technical assistance. This may include, when funding and authorities allow, providing financial support for Tribes and NHOs for maintenance and restoration of sacred sites on federal lands. Tribes have noted the need for more direct funding to support Tribal staff involved in reviewing proposals, including Tribal Historic Preservation and natural resources staff, and staff involved in Native American Graves Protection and Repatriation Act consultation and repatriation efforts.<sup>66</sup> Tribes have shared that they are often inundated with consultation requests and that supporting federal agencies in fulfilling their responsibilities under a suite of statutes and Executive orders requires significant staffing and resources. 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 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.”<sup>67</sup> Other authorities may allow certain federal land management agencies to temporarily close areas of land under their jurisdiction for a broader range of reasons.<sup>68</sup> In all cases, it is advisable to provide as much advance notice of closure to the public as possible. Consistent with appropriate authorities, these notices of closure should avoid unnecessarily disclosing details about the site and related Tribal or Native Hawaiian activities and should seek to protect the confidentiality of sensitive Indigenous Knowledge to the extent permitted by law.

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<sup>66</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013.

<sup>67</sup> 25 U.S.C. § 3054(b)(1).

<sup>68</sup> See, e.g., 43 CFR § 8364.1(a) (authorizing the Bureau of Land Management to close an area of public lands “[t]o protect persons, property, and public lands and resources”).

Even when agencies lack discretion to fully limit activities that may interfere with sacred sites, agencies are encouraged to consider potential impacts to sacred sites. Moreover, in addition to considering restrictions on direct public access to areas of land and waters, agencies should consider using their authorities, if applicable—and requesting the assistance of other federal and non-federal entities with relevant authority—to protect sacred sites from activities or phenomena, such as noise or light pollution, that may interfere with Tribal or Native Hawaiian use of sacred sites.

When considering a Tribal or Native Hawaiian request for access or closure, federal agencies should request only the minimum information necessary to act on the request. Once a federal agency has granted a request to provide access to or temporarily close an area, the agency should ensure that all relevant federal staff and contractors have been informed so they can act in accordance with the decision. Agencies should also consider consulting with Tribes and NHOs regarding access that Tribal members or Native Hawaiians will seek on a regular or seasonal basis. If field staff are generally familiar with the calendar, cultural practices, and sacred sites of the Tribes or NHOs in their area, the staff will be better positioned to allow access when the staff encounters a member of a Tribe or the Native Hawaiian Community on federal lands.

Beyond consultation, inviting Tribes and NHOs to co-steward sacred sites on federal lands can be a useful tool for opening a dialogue and providing regular access. Some agencies may have the authority to go even further and transfer ownership of federal lands that contain sacred sites back to Tribes or NHOs.<sup>69</sup>

Finally, 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 should exercise particular sensitivity and discretion to ensure that all Tribes and NHOs are treated equitably in federal decision-making related to access and closure.

#### **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. Due to the sensitive and private nature of sacred sites, federal agencies are often unaware of the existence or location of sacred sites on federal lands. While some Tribes and NHOs may feel comfortable working with federal agencies to identify sacred sites on federal lands, others

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<sup>69</sup> See Joint Sec. Order 3403 Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021).

may be reluctant to do so, especially because agencies often cannot guarantee that they will be able to withhold information about sacred sites from the public.<sup>70</sup> With respect to sacred sites on federal land that are identified by Tribes or authoritative representatives of Tribal religions, Executive Order 13007 requires that, “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions,” agencies shall “avoid adversely affecting the physical integrity of such sacred sites.”<sup>71</sup> Furthermore, to ensure that all sacred sites, whether specifically identified or not, receive the consideration and protection they are due, federal agencies should consult with and learn from Tribes and NHOs as early as possible in the decision-making process, as required by Executive Orders 13175 and 14096, so that impacts to sacred sites can be identified and avoided or mitigated.<sup>72</sup> Such consultation 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, whether or not the Tribes identify those sacred sites under Executive Order 13007. Federal agencies should incorporate Tribal and Native Hawaiian input into federal policies, planning, 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 can be informed by early Tribal and Native Hawaiian input.

As noted earlier, agencies often consult with Tribes in conjunction with fulfilling their obligations under NEPA. Upon designation by a federal agency, Tribal agencies with special expertise regarding a proposed federal action, including knowledge about sacred sites that the action could affect, may become cooperating agencies under NEPA.<sup>73</sup> Participating as a cooperating agency is at the Tribal agency’s discretion, and Tribes are not required to be cooperating agencies in order to preserve their right to government-to-government consultation. At the same time, federal agencies should endeavor to accommodate Tribal agencies that wish to become cooperating agencies, even after the NEPA process has begun.

Moreover, given that climate change impacts (e.g., 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. At the same time, agencies should remain mindful that well-intentioned land management policies and projects can potentially cause harm to sacred sites. It is therefore imperative that agencies continue to consult with

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<sup>70</sup> For a more in-depth discussion of confidentiality, see Part 4C below.

<sup>71</sup> Exec. Order 13007 § 1(a); see also Exec. Order 14096 § 3(a)(viii) (reaffirming agencies’ obligations under Exec. Order 13007).

<sup>72</sup> Exec. Order 13175 § 3(c)(3); Exec. Order 14096 §§ 1, 3(a)(viii).

<sup>73</sup> 40 CFR § 1501.8; 42 U.S.C. § 4336a(a)(3).

Tribes and NHOs as they seek to strike the proper balance between combating threats to federal lands and the sites they contain, including from climate change, and preserving sacred sites.

## **B. Implement Physical Protection 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. Implementation of new physical protections, however, should only occur after Tribal and Native Hawaiian consultation with, or in cooperation with, the appropriate Tribes and NHOs who consider the site sacred. Additionally, agencies should consider using their authority, if applicable, to protect sacred sites from indirect intrusions such as noise and light pollution. 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.

## **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 the Native Hawaiian Community. If shared with federal agencies, such knowledge should be protected from disclosure to the extent permitted by law, as discussed further below. Disclosure of the location or attributes of a sacred site may 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 provide a reasoned explanation for their decision based on relevant facts.<sup>74</sup> For example, if an agency plans to temporarily close public

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<sup>74</sup> See 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").

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 need 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 always be aware of the requirements of the Freedom of Information Act (FOIA).<sup>75</sup> The FOIA provides public access to all federal agency records except records that are protected from disclosure by one of the FOIA's enumerated exemptions or exclusions.

One FOIA exemption that can be used to safeguard sensitive Indigenous Knowledge in limited situations is Exemption 3, which applies to information that is "specifically exempted from disclosure by [another] statute."<sup>76</sup> In the context of sacred sites, there are several federal statutes that may shield certain kinds of sensitive Indigenous Knowledge from disclosure, for example:

- The National Historic Preservation Act (NHPA) 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.<sup>77</sup> In this context, the term "historic property" means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains relating to the district, site, building, structure, or object.<sup>78</sup>

<sup>75</sup> 5 U.S.C. § 552.

<sup>76</sup> 5 U.S.C. § 552(b)(3).

<sup>77</sup> 54 U.S.C. § 307103(a). See also ACHP's Frequently Asked Questions on Protecting Sensitive Information About Historic Properties Under Section 304 of the NHPA (August 16, 2016), available at <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-protecting-sensitive-information>.

<sup>78</sup> 54 U.S.C. § 300308.

- The Archaeological Resources Protection Act (ARPA) generally prohibits disclosure of information concerning the nature and location of any archaeological resource for which excavation or removal requires a permit or other permission unless the federal land manager concerned determines that disclosure would further the purpose of ARPA, or another statute dealing with the preservation of historical and archeological data, and would not create a risk of harm to the site or its resources.<sup>79</sup>
- 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.<sup>80</sup>
- The Cultural Heritage and Cooperation Authority, which only the U.S. Forest Service may exercise, generally prohibits disclosure of (1) information related to resources, cultural items, uses, or activities that have a traditional and cultural purpose and are provided to the Forest Service under an express expectation of confidentiality by an Indian or Indian Tribe in the context of forest and rangeland research activities and (2) information related to human remains or cultural items reburied on National Forest System land.<sup>81,82</sup>

Nonetheless, a great deal of sensitive Indigenous Knowledge does not fall 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 and Native Hawaiian consultation may be required to be released if requested under the 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 the 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 the FOIA and make these risks clear well in advance of receiving Indigenous Knowledge about sacred sites.*<sup>83</sup>

<sup>79</sup> 16 U.S.C. § 470hh.

<sup>80</sup> 16 U.S.C. § 4304.

<sup>81</sup> 25 U.S.C. § 3056(a).

<sup>82</sup> Please note 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.

<sup>83</sup> In addition, information shared by Tribes participating as cooperating agencies under NEPA may be included in environmental review documents, which are public documents, and is generally also subject to disclosure under the FOIA unless covered by an exemption.

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 it is significant when a Tribe or NHO chooses to share Indigenous Knowledge about sacred sites with a federal agency, and respect Tribes' and NHOs' preferred protocols for discussing such information.
- Provide technical assistance when Tribes or NHOs and agencies agree to use federal information-sharing platforms to convey Indigenous Knowledge.
- Be forthright and transparent with Tribes and NHOs regarding the limits of an agency's ability to protect agency records containing Indigenous Knowledge about sacred sites from disclosure under the FOIA.
- Seek only the minimum information necessary to sufficiently support agency action.<sup>84</sup>
- Do not press Tribes or NHOs to explain how or why places, ceremonies, events, or activities may be sacred unless it is necessary to sufficiently support agency action.
- Discuss in advance how the federal agency may record, store, access, and use Indigenous Knowledge about sacred sites, including whether it may be shared with other agencies.<sup>85</sup>
- When responding to FOIA requests, follow up with the requester to clarify the scope of the request if the scope of the request is unclear. In some cases, the requester may have phrased their request unintentionally broadly and would be willing to narrow their request to avoid disclosure of Indigenous Knowledge about sacred sites. Where disclosure of Indigenous Knowledge about sacred sites may be required, consider engaging with the affected Tribes or NHOs, if possible, prior to disclosure.

<sup>84</sup> In some cases, after consulting with their attorneys but before reviewing or receiving sensitive data, 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 they may access it.

<sup>85</sup> Especially in the context of co-stewardship, confidentiality or data-sharing agreements may be useful, but they cannot overcome the legal requirements set out in the FOIA.

- Avoid disclosure of Indigenous Knowledge about sacred sites in any Federal Register notice, agency website, or other federal publication without a legal requirement or the consent of the appropriate Tribes or NHOs, and send a prompt notification if disclosure does occur.
- Avoid creating maps or guides, even those intended for internal use, that mark, outline, or signal the location of sacred sites, unless it is necessary to sufficiently support agency action. If a map is created, agencies should include irregular buffer zones around these sites to avoid disclosing their precise location.

## 5. Ensure Adequate Training for the Federal Workforce

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 new employees can be introduced to these concepts promptly and so existing employees can frequently refresh their knowledge. Agencies should review internal training materials regularly to ensure the most up-to-date information and best practices are shared with agency staff.



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

- The scope and history of federal Indian law, including the government-to-government relationship between Tribes and the United States and the government-to-sovereign relationship between the Native Hawaiian Community and the United States;
- The role of Indian treaties under the U.S. Constitution;
- Federal laws and policies regarding Tribal consultation, especially the NHPA, Executive Order 13175, and the Presidential Memorandum on Uniform Standards for Tribal Consultation, including as underscored in Executive Order 14096;
- 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 need for respect and deference to Tribes and NHOs regarding their connection to their cultural and religious practices as well as the need for confidentiality when discussing sacred sites and cultural or religious practices;
- 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.

Tribes report that they have experienced instances where some federal agency staff lack (1) an understanding of Tribal and Native Hawaiian

affairs generally and (2) cultural sensitivity toward the specific Tribes or NHOs in their area. Consequently, the burden of educating federal employees sometimes falls to Tribes and NHOs during their day-to-day interactions with agency staff. In addition to proactively training their employees on the topics listed above, federal agencies should consider partnering with Tribes or NHOs to provide cultural sensitivity training to federal employees and should compensate Tribes and NHOs for providing such training. This type of training can be particularly important with respect to sacred sites because Tribes' and NHOs' customs, beliefs, and relationships to sacred sites may vary widely within the same geographic region. The ultimate goal of cultural sensitivity training should be that federal employees have the knowledge and understanding to interact with Tribes and NHOs in a respectful manner.

In addition to training their employees, federal agencies should seek to fill vacancies with candidates who have demonstrated competence in Tribal and Native Hawaiian relations, consistent with federal hiring authorities.

Finally, federal agencies should consider ensuring, for employees who regularly work with Tribes or NHOs, performance plans reflect these responsibilities and employees are evaluated accordingly.

## **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 and Native Hawaiian 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. Activities such as these may be considered in a Participating Agency's communication plan, perhaps in a section dedicated to sacred sites.

Federal land-managing agencies should, when necessary and appropriate, develop communication plans for actions that may affect sacred sites. Such plans should be developed through consultation with the affected Tribes or NHOs and use culturally appropriate language, consistent with agency policy.

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.<sup>86</sup> 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.<sup>87</sup>



<sup>86</sup> <https://www.blm.gov/Learn/Can-I-Keep-This>.

<sup>87</sup> <https://www.blm.gov/outdoorethics>; <https://lnt.org/why/7-principles/>.



## 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. Many of 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. 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 and with the Native Hawaiian Community on a government-to-sovereign 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 Guide as a foundation for consulting and collaborating with Tribes and NHOs regarding sacred sites and as a guide in developing additional, agency-specific policies and guidance. The appendix that follows is intended to provide sources 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 this Guide.



## SUMMARY OF TRIBAL AND NATIVE HAWAIIAN COMMENTS

In addition to comments heard at a Tribal and Native Hawaiian consultation held on August 31, 2023, the Sacred Sites MOU Working Group received written comments from nine Tribes, three Tribal organizations, and Native Hawaiian Community leaders. While most Tribes expressed support for the efforts of this Guide, it was equally clear that Tribes believe there are many opportunities to improve the federal government's protection of sacred sites as well as its treatment of associated sensitive Indigenous Knowledge and cultural information. Tribal and Native Hawaiian input received identified systemic opportunities to improve the way federal agencies solicit and account for Tribal and Native Hawaiian input regarding the protection of sacred sites and emphasized the need for government-wide consistency in Tribal and Native Hawaiian consultation efforts.

Tribes, Tribal organizations, and Native Hawaiian Community leaders made numerous helpful recommendations aimed at improving this Guide. They also made comments about improving Tribal and Native Hawaiian consultation generally and made legislative recommendations. Tribes submitted recommendations that addressed the need for comprehensive training for federal employees on U.S.-Tribal and Native Hawaiian relations, the importance of Tribal treaty and reserved rights, the need to educate the public and non-federal partners about sacred sites, and the need for technical assistance funding and support, as well as compensation for Tribal and Native Hawaiian expertise.

Tribes also made a call to amend the Freedom of Information Act (FOIA) to afford greater protection of sensitive Tribal or Native Hawaiian information shared during consultation.

Tribes and Native Hawaiian Community leaders expressed gratitude toward federal agencies and the White House Council on Native American Affairs for efforts to strengthen protection of sacred sites on federal lands. To further improve Tribal and Native Hawaiian consultation, Tribes reiterated that federal officials with the appropriate decision-making authority should be present at consultations. Additionally, Tribes recommended that agencies engage in Tribal and Native Hawaiian consultation throughout a project's lifecycle. Tribes appreciated the Guide's language calling on agencies to engage Tribes and NHOs early and often in the decision-making process; however, some Tribes felt that meaningful consultation includes abiding by timelines that specify deadlines by which agencies must contact Tribes and NHOs and conduct consultations about proposed projects. Tribes want to know how the information they shared with federal agencies was used and how it may have impacted the final agency decision or regulation, or, if it did not, why their information or concerns were not used or addressed.

Tribal and Native Hawaiian comments acknowledged that, by intentionally incorporating Indigenous Knowledge about sacred sites into the federal decision-making process, the Participating Agencies are taking a critical step forward in

protecting and respecting sacred sites. Tribes requested that the Guide also be adopted by all federal agencies. Further, Tribes questioned how federal agencies will be kept accountable and suggested creating a mechanism through which Tribes and NHOs can report issues and concerns regarding federal agency consultation efforts. One Tribe recommended implementing an alternative dispute resolution process for Tribes and NHOs to contest agency decisions that ignore Tribal or Native Hawaiian input.

The topic of free, prior, and informed consent was raised by multiple Tribes. Tribes expressed that they are the experts of their own cultures and have intimate knowledge of their sacred sites. Accordingly, agencies need to defer to Tribal or Native Hawaiian expertise in a consensus-building consultation relationship. Tribes believe that as inherent sovereigns, Tribal Nations must have the right to give or withhold consent to projects affecting their culture, religion, land, and resources. Where there may be impacts to sacred sites, Tribes asserted that agencies need to secure the free, prior, and informed consent of Tribal Nations.

Sacred sites are a complicated issue, and protection and management of sacred sites requires extra care and sensitivity; therefore, Tribes strongly recommended requiring that federal employees and contractors receive education and training on Tribal and Native Hawaiian sovereignty and U.S.-Tribal and Native Hawaiian relations. In addition, many Tribes requested that training materials further educate federal staff on the importance of sacred sites and how to handle sensitive Indigenous Knowledge and cultural information. The training should be designed in consultation with Tribes and NHOs and updated and revised as appropriate. Mandatory training for all federal agencies should be coupled with annual reviews for staff, executives, and appointees.

Some Tribes voiced concern over treatment of sacred sites by non-federal partners, including state governments, who conduct projects on federal lands. Tribes stated that the Guide is very helpful but needs to include clarification on how

federal agencies will educate their non-federal partners and the public on the importance of protecting sacred sites. This education should include the importance of collaborating with Tribes and NHOs, and how the federal government may hold their non-federal partners accountable to the Guide's policies.

While grateful about the federal government's increased intention to collaborate with Tribes and NHOs on co-stewardship of sacred sites on federal lands, many Tribes reiterated that they lack the capacity to meaningfully engage in the increasing number of consultations. Therefore, Tribes ask that federal agencies prioritize technical assistance funding to Tribes and NHOs and suggest that annual agency budgetary requests include additional funds for Tribes and NHOs to hire the necessary personnel required to participate in consultations and review of documents. The annual budgetary request should also include provisions related to compensation for Tribes and NHOs that take part in trainings as well as compensation for Tribal or Native Hawaiian work done to incorporate their educational materials in the trainings.

Tribes voiced concern over how agencies plan to protect sensitive Tribal and Native Hawaiian cultural information and Indigenous Knowledge from FOIA requests, and about interagency sharing of sensitive cultural information and Indigenous Knowledge. Tribes recommended that agencies can increase transparency by explaining to Tribes and NHOs how their sensitive Indigenous Knowledge and cultural data will be kept secure within agency data systems. Tribes also recommended that interagency requests for Tribal or Native Hawaiian cultural information and Indigenous Knowledge requires informing the respective Tribes or NHOs of a request and attaining Tribal or Native Hawaiian consent to share. Additionally, a few Tribes suggested parameters to follow when addressing FOIA requests that could include sensitive Indigenous Knowledge and cultural information. Multiple Tribes requested that the Administration seek an amendment to FOIA to exempt culturally sensitive information shared with agencies during consultation from public disclosure.



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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 standalone document, but a living document which should be read in conjunction with other agency policies, including departmental and agency Tribal and Native Hawaiian 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 and Native Hawaiian consultation practices with respect to sacred sites, and the government-to-government relationship.

Federal agencies retain discretion on 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.





## APPENDIX

1. [Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites](#)
2. Authorities Relevant to Sacred Sites
  - a. [Executive Order 13007: Indian Sacred Sites](#)
  - b. [Executive Order 13175: Consultation and Coordination With Indian Tribal Governments](#)
  - c. [Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All](#)
  - d. [National Historic Preservation Act](#)
  - e. [National Environmental Policy Act](#)
  - f. [Native American Graves Protection and Repatriation Act](#)
  - g. [Archaeological Resources Protection Act](#)
  - h. [American Indian Religious Freedom Act](#)
  - i. [Religious Freedom Restoration Act](#)
  - j. [Cultural Heritage and Cooperation Authority](#)
3. Consultation Reference Materials
  - a. [White House – Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships \(Jan. 26, 2021\)](#)
  - b. [White House – Memorandum on Uniform Standards for Tribal Consultation \(Nov. 30, 2022\)](#)
  - c. [ACHP – Handbook – Early Coordination with Indian Tribes During Pre-Application Processes](#)
  - d. [DOI-FWS – Native American Policy \(2016\)](#)
  - e. [DOI-BOR – Indian Policy of the Bureau of Reclamation](#)
  - f. [DOI-OSMRE – Tribal Consultation and Protection of Tribal Trust Resources](#)
  - g. [DOI & DOJ & Army – Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions \(Jan. 2017\)](#)
  - h. [DOI & DOE – Guidance on Tribal Consultation for the Glen Canyon Dam Adaptive Management Program](#)
  - i. [USDA-FS – FS Handbook – Consultation with Indian Tribes and Alaska Native Corporations](#)

- j. [USDA-FS – FS Manual – 1563.1 – Consultation with American Indian and Alaska Native Tribes](#)
  - k. [USDA-FS – Strengthening Tribal Consultation and Nation to Nation Relationships: USDA Forest Service Action Plan](#)
4. Co-stewardship Reference Materials
- a. [USDA & DOI – JSO 3403 – Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters](#)
  - b. [DOI-NPS – Fulfilling the National Park Service Trust Responsibility to Indian Tribes, Alaska Natives, and Native Hawaiians in the Stewardship of Federal Lands and Waters](#)
  - c. [DOI-BLM – Co-Stewardship with Federally Recognized Indian and Alaska Native Tribes Pursuant to Secretary’s Order 3403](#)
  - d. [DOI-FWS – Fulfilling the Trust Responsibility to Tribes and the Native Hawaiian Community, and Other Obligations to Alaska Native Corporations and Alaska Native Organizations, in the Stewardship of Federal Lands and Waters](#)
  - e. [DOI-BIA – Supporting Tribal Nations in Stewardship of Federal Lands and Water](#)
5. Indigenous Knowledge Reference Materials
- a. [CEQ-OSTP Memorandum: Indigenous Traditional Ecological Knowledge and Federal Decision Making \(Nov. 15, 2021\)](#)
  - b. [CEQ-OSTP Memorandum: Guidance for Federal Departments and Agencies on Indigenous Knowledge \(Nov. 30, 2022\)](#)
  - c. [DOI-NPS - Introduction to Traditional Ecological Knowledge in Wildlife Conservation](#)
  - d. [DOI-FWS – Traditional Ecological Knowledge for Application by FWS Scientists](#)
  - e. [ACHP – Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants](#)
6. Confidentiality Reference Materials
- a. [DOI-NPS - Data Store User Guide: Reference Sensitivity, Proprietary and Quality Designations](#)
7. Other Reference Materials
- a. [Interagency Working Group – Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making \(Nov. 30, 2022\)](#)
  - b. [ACHP – Policy Statement on Burial Sites, Human Remains, and Funerary Objects \(Mar. 1, 2023\)](#)

## PHOTO CREDITS

Photos in this Guide were chosen to provide visual interest only. While some photos may depict lands or waters held sacred by Indian Tribes or Native Hawaiians, the photos are not intended to identify or disclose any location as a sacred site.

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Inside Front Cover	Craters of the Moon National Monument and Preserve, NPS
Opposite Forward	Big Thicket National Preserve, NPS/Scott Sharaga
Pg. 2	Kobuk Valley National Park, NPS
Pg. 3	Great Sand Dunes National Park and Preserve NPS/Mackenzie Reed
Pg. 4	Hawai'i Volcanoes National Park, NPS
Pg. 6	Jean Lafitte National Historical Park and Preserve, NPS
Pg. 7	Biscayne National Park NPS
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Pg. 32	Oglala National Grassland, USFS/Sarlyn McCormick
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