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ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Approval of Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian Organizations

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) has approved an exemption that would relieve Federal agencies from the historic preservation review requirements under Section 106 of the National Historic Preservation Act regarding the effects of various undertakings in Hawaii that are proposed or directed by a Native Hawaiian Organization (NHO), or substantially led, designed, or managed by an NHO, informed by Indigenous Knowledge of that NHO, and related to traditional cultural practices of Native Hawaiians.

DATES: The exemption went into effect on October 18, 2024.

FOR FURTHER INFORMATION CONTACT: William Dancing Feather, (202) 517-0195, wdancingfeather@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 (Section 106 and NHPA), requires Federal agencies to consider the effects of projects they carry out, license/permit/approve, or assist (undertakings) on historic properties, and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. Historic properties are those properties that are listed in the National Register of Historic Places (National Register) or eligible for such listing.

The NHPA authorizes the ACHP to promulgate regulations for exempting undertakings from any or all of the requirements of Section 106. 54 U.S.C. 304108(c). The section 106 regulations, found at 36 CFR part 800, detail the process for the approval of such exemptions at 36 CFR 800.14(c).

After following that process, on October 18, 2024, the ACHP membership, by a vote of 17 in favor,

none against, and three abstentions, approved the exemption reproduced at the end of this notice.

I. Background

The ACHP acknowledges that Native knowledge and expertise are crucial to a full understanding of historic properties that must be recognized in the Section 106 review process. Accordingly, the ACHP published the 2021 *Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants* document to keep Federal agencies apprised of their duty to incorporate traditional knowledge in Section 106 decisions. Most recently, in March 2024, the ACHP adopted a *Policy Statement on Indigenous Knowledge and Historic Preservation* calling for the respectful integration of Indigenous Knowledge at all levels of the Section 106 review process. In particular, Principle 3 of this policy describes “Indigenous Knowledge” for purposes of Section 106 to include, but is not limited to, the “experiences, insights, and knowledge held by Indian Tribes and NHOs that can assist Federal agencies in identifying, evaluating, assessing, and resolving adverse effects to historic properties that may be of religious and cultural significance to them.” Moreover, Principle 4 of the policy explains that section 106 agreement documents and program alternatives that relate to historic properties of religious and cultural significance to an Indian Tribe or NHO should recognize Indigenous Knowledge in informed decision making.

II. Exemption Criteria

As mentioned, exemptions are a program alternative under 36 CFR 800.14(c) which may be proposed by a Federal agency or by the ACHP. Exempted categories must meet the following three criteria: (i) the actions within the program or category would otherwise qualify as “undertakings” as defined in § 800.16; (ii) the potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) the exemption of the program or category is consistent with the purposes of the NHPA.

The actions covered by the exemption are undertakings. The ACHP identified that certain Federal agencies reviewing undertakings involving NHOs, specifically those utilizing Indigenous Knowledge, were experiencing challenges in meeting section 106 requirements despite clear compliance with the broad goals and outlines of

Federal historic preservation policy. Examples of such projects have included, in the past, Federal grant activities to NHOs, such as grants for agricultural restoration in He‘e‘ia and maintenance activities at Ulupō Heiau in Kailua, and select Federal land management actions.

The exemption applies to certain types of undertakings to be carried out, licensed, permitted, or assisted by Federal agencies that are (1) proposed, directed, or authorized by an NHO, or substantially led, designed, or managed by an NHO, (2) informed by Indigenous Knowledge of that NHO, (3) related to traditional cultural practices of Native Hawaiians, and (4) preceded by the submission of an attestation statement by the NHO to the relevant Federal agency. The types of activities that are included are landscaping practices; agricultural practices; rehabilitation, preservation, restoration, or reconstruction of water features and systems, including fishponds, historic pathways, sacred and traditional sites, traditional Native Hawaiian buildings and structures, properties of religious and cultural significance to NHOs; installation of interpretative signage; and transfer of Federal property or interest in Federal property to an NHO.

The undertaking’s potential effects are likely to be minimal or not adverse. In considering the likely potential effects of the undertakings informed by NHOs on historic properties, the ACHP Chair and staff met with many representatives of NHOs, Federal agencies, the Hawai‘i State Historic Preservation Office, and other preservation partners. In addition, the ACHP conducted public engagement and consultation as further described below.

Based on this input and input from ACHP members, the likely effects of the exempted undertakings on historic properties (including those not of religious and cultural significance to NHOs), would be minimal or not adverse, as such effects are defined in 36 CFR 800.16(i) and 800.5 respectively. The exemption includes several safeguards to limit the covered undertakings’ effects to those that are minimal or not adverse, including: the requirements that covered activities include only those informed by Indigenous Knowledge of the NHO and related to the traditional cultural practices of Native Hawaiians; a requirement that the NHO attest to its involvement in the undertaking and the undertaking’s relationship to Native Hawaiian cultural practice; a carefully prescribed list of covered activities, each tied to Indigenous Knowledge of the NHO and traditional cultural

practice of Native Hawaiians; and careful limits on the types of materials, construction techniques, and activities of the covered activities.

Overall, the exemption aims to exempt those activities that are themselves cultural preservation. By the terms of the exemption, these are activities for the preservation, restoration, rehabilitation, reconstruction, repair, maintenance, and stabilization of historic properties of significance to NHOs, utilizing their expert Indigenous Knowledge about such properties. Deference to an NHO's understanding of their own cultural preservation activities is consistent with the formal position of the ACHP as expressed in its *Policy Statement on Indigenous Knowledge and Historic Preservation* which states that Federal agencies should "recognize and defer to Tribal or NHO interpretation of the property's significance and integrity. Members of the preservation community are not the experts on what constitutes Indigenous Knowledge or how it should be utilized to identify or evaluate the eligibility of a property that may be of religious and cultural significance to an Indian Tribe or NHO."

The exemption does not apply to demolition or removal of properties listed or known to be eligible for listing on the National Register of Historic Places, unless the demolition or removal decision has previously completed review pursuant to Section 106; the construction of new buildings or structures not expressly allowed in the covered activities section; the treatment or disposition of burial sites, human remains, and funerary objects in a manner contrary to the ACHP *Policy Statement on Burial Sites, Human Remains, and Funerary Objects*; agency decisions to provide or retract permission to access agency owned or controlled land; and undertakings known by a Federal agency or the relevant NHO to be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of another NHO or to demolish or remove properties on or eligible for the National Register of Historic Places. Moreover, the exemption includes language, similar to that in other exemptions, where Federal agencies remain responsible for considering the effects of undertakings on historic properties other than those directly addressed by the activities covered by the exemption.

In sum, the ACHP consulted with and took into account the views of stakeholders—including Federal and State officials, NHOs, historic preservation organizations, and individuals—to identify a limited set of

undertakings whose potential effects upon historic properties are foreseeable and likely to be minimal or not adverse and where exemption of the undertakings would be consistent with the purposes of the NHPA. The exemption includes several safeguards to limit the covered undertakings' effects to those that are minimal or not adverse, including: the requirements that covered activities include only those informed by Indigenous Knowledge of the NHO and related to the traditional cultural practices of Native Hawaiians; a requirement that the NHO attest to its involvement in the undertaking and its relationship to the property, and the undertaking's relationship to Native Hawaiian cultural practice; a carefully prescribed list of covered activities, each tied to Indigenous Knowledge of the NHO and traditional cultural practice of Native Hawaiians; and careful limits on the types of materials, construction techniques, and activities of the covered activities.

The exemption is consistent with the purposes of the NHPA. Among other things, the NHPA establishes as the policy of the government to "provide leadership in the preservation of the historic property of the United States and . . . in the administration of the national preservation program", to "administer federally owned, administered, or controlled historic property in the spirit of stewardship for the inspiration and benefit of present and future generations", and to "contribute to the preservation of nonfederally owned historic property in a spirit of stewardship for the inspiration and benefit of present and future generations." 54 U.S.C. 30101(2), (3), (4).

The exemption aligns with the requirements of the NHPA reflecting an effort to promote historic preservation by enabling types of restoration and rehabilitation projects that are essentially preservation activities. This effort also aligns with ACHP's work over the course of three decades to expand the participation of NHOs in the historic preservation review process under Section 106 and its implementing regulations. In 1992, Congress amended the NHPA to clarify that properties of religious and cultural importance to NHOs may be eligible for listing in the National Register of Historic Places and that Federal agencies, in carrying out their Section 106 responsibilities, must consult with any NHO that attaches religious and cultural significance to historic properties that may be affected by an undertaking. The ACHP incorporated the provisions in the

Section 106 regulations, 36 CFR part 800, "Protection of Historic Properties."

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

In 2021, the ACHP published the guidance document entitled *Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants* to help inform Federal agencies of their obligation to incorporate traditional knowledge in the Section 106 decision making and noting the ACHP's position that Native knowledge and expertise is essential to a full understanding of historic properties that must be considered in the Section 106 review process. In 2022, the White House Office of Science and Technology Policy and the Council on Environmental Quality issued government-wide Guidance for Federal Departments and Agencies on Indigenous Knowledge.

To further elaborate on this guidance, and advance and encourage the use and integration of Indigenous Knowledge in the Section 106 process, in 2024 the ACHP adopted the ACHP *Policy Statement on Indigenous Knowledge and Historic Preservation*. The policy includes principles that should be applied by Federal agencies, State and local governments, and nongovernmental institutions, including private contractors, to advance the integration of Indigenous Knowledge into historic preservation decision making. Principle 3 of that policy states:

For purposes of Section 106, the term "Indigenous Knowledge" includes, but is not limited to, the experiences, insights, and knowledge held by Indian

Tribes and NHOs that can assist Federal agencies in identifying, evaluating, assessing, and resolving adverse effects to historic properties that may be of religious and cultural significance to them. While the NHPA directs Federal agencies to make the final decisions in the Section 106 review, the law also directs agencies to consult with Indian Tribes and NHOs in carrying out the review process. Deference can and should be provided to the expertise of designated representatives about Indigenous Knowledge that is provided to inform decision making in the Section 106 process. A reasonable and good faith effort includes the responsibility that Federal agencies, consistent with 36 CFR 800.2(c)(2)(ii)(A), consider Indigenous Knowledge in a successive and cumulative manner throughout the four-step Section 106 process.

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

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

The exemption is restricted to only specific activities undertaken with or by NHOs, and to those projects that benefit historic preservation and cultural perpetuation by reconstructing, interpreting, restoring, rehabilitating, and preserving historic properties significant to NHOs. Further, this exemption offers NHOs engaged with Federal agencies the ability to identify the appropriate paradigm, cultural methods, and practices in which proposed undertakings would be carried out in order to support the cultural perpetuation goals of NHOs as well as meeting the policy principles within the ACHP's *Policy Statement on Indigenous Knowledge*. Accordingly, the proposed exemption meets the final criterion for an exemption.

III. Summary of Consultation and Public Participation

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

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

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

After circulating a draft of the exemption to the above-referenced working group on May 16, 2024, Chair

Bronin met with the NATHPO and NTHP. Based on these meetings and exchanges among the working group, Chair Bronin addressed comments and incorporated feedback into the draft. On May 22, the Office of Tribal and Indigenous Peoples distributed to the ACHP's NHO 106 contacts listserv a notice of intent to propose an exemption, including a link to the ACHP's web page explaining the proposal, notification of two NHO consultations and one public meeting on the proposal, and a notice that written comments would be taken until July 7. After Chair Bronin met with Hawai'i State Historic Preservation Officer Dawn Chang on May 28 to discuss the draft exemption, the draft of the exemption consolidating all preliminary input was posted on the ACHP website.

The ACHP and Chair Bronin promoted the proposal and opportunities for public engagement and NHO consultation on social media, including LinkedIn, X, and Facebook. Chair Bronin further published an op-ed in Hawai'i's largest newspaper, the Honolulu Star-Advertiser (circulation 107,191), describing the proposed exemption, explaining its history and rationale, and inviting public comment with a link to the ACHP web page. This newspaper piece was promoted by Chair Bronin and the ACHP on the above-referenced social media platforms.

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

The ACHP developed and executed a plan to consult with Native Hawaiian Organizations. The plan included the conduct of two NHO consultations organized by the ACHP and directly facilitated by Chair Bronin. On June 14,

Chair Bronin led a first NHO consultation meeting with a second meeting on June 27. At the first consultation meeting, representatives of NHOs were in attendance. At the second consultation meeting, representatives of NHOs were again in attendance.

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

The first consultation period closed on July 7. Chair Bronin and ACHP staff reviewed the comments and questions from NHOs and the general public and made adjustments to create a second draft of the exemption.

ACHP members discussed the public comments and preliminary version of the second draft at the ACHP Tribal and Indigenous Peoples Committee meeting on July 11 and at the ACHP Business Meeting on July 18. Members discussed a timeline for a second round of consultation on a second draft, and an updated draft was posted to the ACHP website.

On August 15, Chair Bronin led a third NHO consultation meeting. Representatives of NHOs were in attendance.

At this meeting, certain individuals expressed general support for the exemption, stating that it would simplify the process for restoration and preservation activities. Many participants shared that it would be helpful in Lahaina specifically, with others remarking it had broader utility. A few participants asked for more specific details about exactly which organizations could use this exemption, and flagged concern that agency

contractors are also reflected on the DOI NHO list or otherwise may meet the criteria. Some participants expressed a concern that the exemption would allow actors who do not properly represent Native Hawaiian communities or lineal descendants in an area to take advantage of the exemption, while others noted that recent ACHP changes to the draft exemption may address these concerns. A few participants flagged a desire for public information about ongoing use of the exemption and public notice about the use of application of the exemption before it is applied, so that lineal descendants are aware of its use on properties of significance to their family and communities and can raise a dispute if needed. Some individuals requested additional outreach to consult on the proposed exemption. Chair Bronin again responded to comments and questions from the attendees and encouraged the submission of written comments.

The second consultation period closed on August 26. Chair Bronin and ACHP staff reviewed the comments and made adjustments to create a third draft of the exemption to be considered by ACHP members. Members of the ACHP-Initiated Program Alternatives Forum Committee held a meeting on September 5 to discuss a preliminary third draft. Members provided additional feedback between that discussion and September 25.

Chair Bronin and staff revised the proposed exemption extensively as a result of consultation. Below is a summary of how Chair Bronin and staff integrated suggestions or considered them in the revisions.

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

Several comments suggested strengthening the provisions in the exemption to clarify how historic and

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

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

Many comments addressed the list of covered activities in section III. The draft exemption was revised to include several Native Hawaiian terms and to identify more precisely certain activities, as well as revised to acknowledge the description of

Indigenous Knowledge. A comment suggesting that undertakings with the potential to affect “properties with religious and cultural significance to NHOs” was an overly broad category of actions to include in the proposed exemption, and this comment resulted in the deletion of that provision given that other activities in the section were described in greater detail. Commenters suggested that the provision on new construction be narrowed, and specific buildings and structures identified (or excluded); that provision was modified to include hale, hālau wa’a, and boundary structures in response to specific suggestions. Several NHOs and a State agency suggested that minor adaptations to the covered activities to respond to climate change, pollution, and invasive species be expressly allowed. A provision on this was included. Language on natural habitat conservation practices, fishing, and aquaculture was also added, reflecting the agency’s stated commitment to advancing the fact that natural resources are cultural resources.

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

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

Commenters from the Federal Government and NHOs suggested public notice, periodic reporting, and reviews to assess the effectiveness of the exemption. To address these comments, the ACHP added a recommendation for public notice to the State of Hawai‘i or a newspaper of statewide circulation in section II. In addition, the ACHP added

section X, which includes annual reporting by Federal agencies that use the exemption and biannual reporting for a subsequent period. It also requires the ACHP to schedule a meeting with Federal agencies that used the exemption, representatives of the State Historic Preservation Office, NHOs, Federal preservation officers, and others.

During the second round of consultation, comments recommended that the ACHP consider additional consultation with Native Hawaiian Organizations to address difficulty of attending consultations during working hours and to raise awareness about the proposed exemption and encourage questions and discussions about it. The ACHP did not foresee additional substantive concerns would be raised during additional consultation sessions that had not been responded to during the course of consultation.

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

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

and developing undertakings that may be subject to this exemption. In doing so, each agency should utilize, and update as needed, its own NHO consultation policy and procedures. Should conflicts arise in determining whether use of the exemption is appropriate, the agency should work to resolve that conflict in accordance with its consultation policy and procedures prior to utilizing the exemption. The ACHP also declined to include reference to blood quantum in the definition of Native Hawaiian, instead retaining the definition of Native Hawaiian in the NHPA. And finally, the ACHP declined to include reference to NAGPRA, as requested by one commentator, to avoid conflating statutory regimes.

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

IV. Text of Exemption

The full text of the approved exemption is reproduced below:

Exemption for Indigenous-Knowledge Informed Activities by Native Hawaiian Organizations

Section I. Exemption From Section 106

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

Section II. Applicability and Initiation of Exemption

a. Applicability.

This exemption applies only to undertakings identified in Section III that take place in the state of Hawai‘i. This exemption applies to undertakings where, prior to [date of adoption], the relevant federal agency has not yet made a final decision about carrying out, licensing, or assisting the undertaking, as applicable.

b. Prior Decision to Identify an NHO.

The exemption is not intended to guide the federal agency in actually identifying a Native Hawaiian

Organization (NHO) for participation in a covered undertaking. It is anticipated that the federal agency will have already made this identification, pursuant to its own processes consistent with 36 CFR 800.2, and only after that identification will consider whether to use this exemption. Such a process may include the federal agency initiation of consultation with the NHOs known to have an interest in the property or properties that are the subject of the proposed undertaking to determine whether the proposed undertaking will be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of an NHO. The federal agency shall not proceed with the use of this exemption if it determines that such a conflict is likely to occur.

c. Submission of Formal Statement by an NHO.

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

i. An attestation that the entity meets the definition of an NHO in the NHPA, including expertise in aspects of historic preservation that are significant to Native Hawaiians, which the federal agency should consider in light of the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation;

ii. A description of the NHO's proposal, direction, leadership, design, or management vis-à-vis the covered activities;

iii. A description of the extent to which the covered activities are informed by the Indigenous Knowledge of the NHO;

iv. A statement identifying the property upon which the covered activities are proposed to occur as a property of religious and cultural significance to the NHO and explaining the NHO's ongoing or prior traditional cultural practices related to the property;

v. An explanation of current or prior connections (including activities, support, and relationships), if any, between (i) key individual decision-makers and members of the NHO and (ii) the Native Hawaiian community and individuals known to have ancestral connections to the property;

vi. A statement indicating that, to the best of the knowledge of the NHO and

its authorized representative (i) no other NHO has asserted or would likely assert that the covered activities are or would be contrary to or limiting of the Indigenous Knowledge-informed traditional cultural practice of another NHO and (ii) the activities will not lead to demolition or removal of properties listed or known to be eligible for listing on the National Register of Historic Places, unless the demolition or removal decision was previously completed during a review pursuant to Section 106;

vii. A statement identifying the individual (such as a chair, executive director, president, or other person) who is authorized to represent and submit on behalf of the NHO; and

viii. A signature or other attribution by the above-mentioned authorized representative.

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

d. Federal Agency Review and Documentation.

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

e. Federal Agency Notice.

The federal agency is encouraged to submit notice of its decision and invite public comment for a thirty-day period, to (1) the State of Hawaii Office of Planning and Sustainable Development Environmental Review Program for publication to "Environmental Notice"; (2) a newspaper of statewide circulation; or (3) any publication with similar purpose or scope if the aforementioned publications cease to exist. Such submission should include the name of the NHO proposing, directing, or substantially leading, designing, or managing the undertaking, a reasonable description of the proposed undertaking(s), a description of the property sufficient for identification purposes, and a mechanism for contacting the federal agency.

f. Federal Agency Discretion.

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

Section III. Covered Activities

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

a. Conduct of landscaping practices or activities, including but not limited to arboreal practices, invasive species removal, and other landscape maintenance, reestablishment, or facilitation.

b. Conduct of agricultural or aquacultural practices or activities, including but not limited to planting and crop rotation, harvesting, native species propagation, soil management, and fishing.

c. Conduct of species conservation and habitat conservation and management activities that are necessary to perpetuate traditional Native Hawaiian cultural practices.

d. Rehabilitation, preservation, restoration, or reconstruction of any the following:

i. Water features and systems, including but not limited to fishponds (loko i'a) and other traditional aquaculture.

ii. Lo'i kalo and agricultural terraces.

iii. Historic pathways using natural materials, including gravel and other rock, sand, mulch, and wood.

iv. Sacred and traditional sites and objects including but not limited to heiau, burial sites, shrines, ahu, and similar sites and objects.

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

e. New construction, using traditional Native Hawaiian techniques and primarily natural materials, of the following, to the extent such new construction is for the express purpose of maintaining or reestablishing traditional cultural or religious practices informed by Indigenous Knowledge:

i. Hale.

ii. Hālau wa'a.

iii. Fencing, walls, natural buffer zones, flood mitigation, and other boundary techniques to protect religious and traditional sites or burial sites, within the NHO-defined boundary area of the property of religious and cultural significance to the NHO.

f. Minor adaptations to the elevation and dimension of buildings, structures,

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

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

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

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

Section IV. Activities Not Covered and Exceptions

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

a. Demolition, removal, or modifications that adversely affect character-defining features of properties listed or known to be eligible for listing on the National Register of Historic Places, unless the demolition, removal, or modification decision was previously completed during a review pursuant to Section 106.

b. The construction of new buildings or structures not enumerated in Section III.e.

c. The treatment or disposition of burial sites, human remains, and funerary objects in a manner contrary to the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including but not limited to the

provisions in that policy statement requiring consultation with and deference for descendant communities.

d. Components of an undertaking beyond those listed in Section III, meaning that a federal agency may follow the terms of this exemption for a covered activity that is a component of a larger undertaking, but must follow other applicable Section 106 procedures or agreements for any other components of such larger undertaking.

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

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

g. Undertakings conducted during emergency situations and subject to 36 CFR 800.12.

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

Section V. Federal Agency Responsibilities

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

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

This exemption is anticipated to be utilized in good faith by agencies and NHOs without knowledge of potential conflicts with or potential adverse effects on other historic properties (including traditional cultural properties) listed on or eligible for the National Register, the Indigenous-Knowledge informed traditional cultural

practice of one or more NHOs, or Native Hawaiian traditional cultural practice more generally, and as noted in Sections IV(a) and IV(f) of this exemption, any such knowledge would bar the use of this exemption.

If a federal agency learns of an unexpected conflict or dispute after it decides to use this exemption, the federal agency will make a reasonable and good faith effort to resolve the conflict or dispute in accordance with its consultation policies and procedures (including its NHO consultation policies and procedures) or in accordance with procedures specifically adopted in relation to this exemption. Federal agencies are encouraged to develop and utilize procedures that are respectful of NHOs' rights to maintain, control, protect and develop their traditional cultural heritage, Indigenous Knowledge, intellectual property, traditional cultural expressions, sciences, and technologies, and that reflect the principles contained in the 2013 ACHP guidance, "Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: General Information and Guidance."

Section VI. Existing Agreements, Property Rights, and State and Local Reviews

This exemption does not amend, invalidate, or otherwise modify Section 106 agreements in existence at the time this exemption goes into effect, provided, however, that federal agencies are strongly encouraged to use the applicable amendment provisions of Section 106 Memoranda of Agreement, Programmatic Agreements, or agreements executed with NHOs in accordance with 36 CFR 800(c)(2)(ii)(E) executed prior to [date of adoption] for undertakings that would otherwise be covered by this exemption, to consider making such agreements consistent with this exemption. This exemption does not modify or supersede existing property rights, including access rights. This exemption does not modify, preempt, or replace any other federal laws, or any applicable state or local laws or regulations, including but not limited to Hawaii Revised Statutes, Title 1, Chapter 6E, Historic Preservation.

Section VII. Termination

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

Section VIII. Amendments

This exemption may be amended by the ACHP membership. Such

amendments must be consistent with the criteria at 36 CFR 800.14(c)(1) and preceded by consultation appropriate to the scope of the amendments.

Section IX. Confidential Information

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

Section X. Reports and Evaluations

For five years after the date of the adoption of this exemption, the federal agencies that use this exemption will provide a report to the ACHP for the previous reporting year, ending September 30 annually, then every two years for six additional years. Each agency's report will provide a brief summary of the locations and nature of covered activities, any significant issues that arose while implementing the exemption, the manner in which such issues were addressed, and suggestions to avoid such issues in the future. Federal agencies are invited to include an assessment of the overall effectiveness of the exemption in meeting its intent in this report. Reports are due on or before December 31 of each year, starting December 31, 2025 annually through December 31, 2029, and then biannually on or before December 31, 2031 through December 31, 2035.

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

Section XI. Definitions and Descriptions

For purposes of this Exemption, the following definitions apply:

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

b. *Effect*: As provided in 36 CFR 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places.

c. *Historic property*: As provided in 36 CFR 800.16(l), any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of religious and cultural significance to an Indian Tribe or NHO that meet the National Register of Historic Places criteria.

d. *Native Hawaiian*: As provided in 36 CFR 800(16)(s)(2), any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii.

e. *Native Hawaiian Organization (NHO)*: As provided in 36 CFR 800(16)(s)(1), any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

f. *Undertaking*: As provided in 36 CFR 800(16)(y), a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a Federal permit, license or approval.

This exemption uses the definitions for the following words found in 36 CFR 68.2, and for convenience these definitions are provided here:

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

materials and features rather than extensive replacement and new construction.

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

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

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

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

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

(END OF DOCUMENT)

(Authority: 36 CFR 800.14(c))

Dated: November 4, 2024.

Javier Marqués,
General Counsel.

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