



U.S. DEPARTMENT OF DEFENSE

**DEPARTMENT OF DEFENSE INSTRUCTION
NUMBER 4710.03:
CONSULTATION POLICY WITH
NATIVE HAWAIIAN ORGANIZATIONS**



Department of Defense INSTRUCTION

NUMBER 4710.03

October 25, 2011

USD(AT&L)

SUBJECT: Consultation With Native Hawaiian Organizations (NHOs)

References: See Enclosure 1

1. PURPOSE. This Instruction:

- a. Reissues Directive-Type Memorandum 11-001 (Reference (a)) as a DoD Instruction in accordance with the authority in DoD Directive 5134.01 (Reference (b)).
- b. Establishes policy and assigns responsibilities for DoD consultation with NHOs when proposing actions that may affect a property or place of traditional religious and cultural importance to an NHO.
- c. Provides the DoD Components in Hawaii with a framework to develop localized processes to facilitate consultation.

2. APPLICABILITY. This Instruction:

- a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the DoD (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD with consultation responsibilities to NHOs (hereinafter referred to collectively as the "DoD Components").
- b. Is intended only to improve the internal management of the DoD Components regarding their consultation responsibilities and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the DoD, its Components, officers, or any person.

3. DEFINITIONS. See Glossary.

4. POLICY. It is DoD policy that:

a. The DoD respects the traditions and cultures of all native peoples of the United States as well as the strong desire of Native Hawaiians to maintain their rich history and tradition amidst other prevalent influences in American society.

b. The DoD recognizes the special status afforded NHOs by the U.S. Government through various Federal laws, regulations, and policy. The Military Services' long presence in Hawaii has provided the DoD with a strong appreciation for the importance of consultation when proposing actions that may affect a property or place of traditional religious and cultural importance to an NHO.

c. The DoD shall conduct meaningful consultation for the purpose of avoiding or minimizing, to the extent practicable and consistent with law, the effects of DoD Component actions on a property or place of traditional religious and cultural importance to an NHO.

5. RESPONSIBILITIES. See Enclosure 2.

6. PROCEDURES. Enclosure 3 provides procedures and requirements for when, with whom, and how to consult with NHOs, including considerations for natural and cultural resources.

7. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

8. EFFECTIVE DATE. This Instruction is effective upon its publication to the DoD Issuances Website.



Frank Kendall
Acting Under Secretary of Defense for
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Enclosures

1. References
2. Responsibilities
3. Procedures
4. Compliance Measures of Merit

Glossary

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ENCLOSURE 1

REFERENCES

- (a) Directive-Type Memorandum 11-001, “Consultation with Native Hawaiian Organizations,” February 3, 2011 (hereby cancelled)
- (b) DoD Directive 5134.01, “Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)),” December 9, 2005
- (c) Sections 691-716 of title 48, United States Code (also known as “The Hawaiian Homes Commission Act, as amended”)
- (d) Public Law 86-3, “The Admission Act,” March 18, 1959
- (e) Sections 4321-4370f¹ and 2000bb-1² of title 42, United States Code
- (f) Sections 470-470x-6 of title 16, United States Code (also known as “The National Historic Preservation Act of 1966 (NHPA), as amended”)
- (g) Sections 3001-3013 of title 25, United States Code (also known as “The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), as amended”)
- (h) DoD Instruction 4710.02, “DoD Interactions with Federally-Recognized Tribes,” September 14, 2006
- (i) Public Law 103-150, “Overthrow of Hawaii,” November 23, 1993 (also known as “The Apology Resolution”)

¹ Also known as “The National Environmental Policy Act of 1969, as amended”

² Also known as “The Religious Freedom Restoration Act of 1993, as amended”

ENCLOSURE 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS (USD(AT&L)). The USD(AT&L) shall establish DoD policy for interactions with federally recognized tribes and requirements for DoD consultation with NHOs.

2. DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT (DUSD(I&E)). The DUSD(I&E), under the authority, direction, and control of the USD(AT&L), shall:

- a. Develop policy and guidance for interactions with federally recognized tribes and for consultation with NHOs.
- b. Designate responsibilities and provide procedures for DoD consultation with NHOs.
- c. Enhance DoD Component understanding of NHO issues and concerns through education and training programs and outreach activities.
- d. Assist the DoD Components in identifying requirements of Presidential Memorandums, Executive orders, statutes, and regulations governing DoD consultations with NHOs.
- e. Designate an NHO liaison within the Office of the DUSD(I&E) (ODUSD(I&E)) to coordinate DoD consultation activities.
- f. As requested, assist the DoD Components with consultation with NHOs.

3. HEADS OF THE DoD COMPONENTS WITH CONSULTATION RESPONSIBILITIES TO NHOs. The Heads of the DoD Components with consultation responsibilities to NHOs shall:

- a. Ensure compliance with the applicable requirements of Presidential Memorandums, Executive orders, statutes, and regulations regarding DoD consultations with NHOs, and integrate required consultation activities into mission activities in order to facilitate early and meaningful consultation.
- b. Plan, program, and budget for Presidential Memorandum, Executive order, statutory, and regulatory requirements applicable to consultation with NHOs consistent with DoD guidance and fiscal policies, and within available resources.
- c. Ensure that consultation with NHOs occurs in accordance with Enclosure 3 of this Instruction.

d. Notify the DUSD(I&E) of NHO issues that are controversial, cannot be resolved at the DoD Component level, and have the potential to be elevated to the USD(AT&L) for resolution.

e. Assign NHO liaison responsibilities to staff at the headquarters level to coordinate NHO consultation issues with ODUSD(I&E).

f. Assign a point of contact in Hawaii to ensure that NHO inquiries are channeled to appropriate officials and responded to in a timely manner.

g. Develop consultation procedures and provide cultural communications training for military and civilian personnel with consultation responsibilities.

ENCLOSURE 3

PROCEDURES

1. WHEN TO CONSULT

a. The DoD Components shall consult with NHOs:

(1) When proposing an undertaking that may affect a property or place of traditional religious and/or cultural importance to an NHO.

(2) When receiving notice of or otherwise becoming aware of an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands or lands administered for the benefit of Native Hawaiians pursuant to sections 691-716 of title 8, United States Code (U.S.C.) (also known as “The Hawaiian Homes Commission Act, as amended”) (Reference (c)) and section 4 of Public Law 86-3 (Reference (d)).

(3) When proposing an action that may affect a long term or permanent change in NHO access to a property or place of traditional religious and cultural importance to an NHO.

(4) When proposing an action that may substantially burden a Native Hawaiian’s exercise of religion (as defined in the Glossary).

(5) When proposing an action that may affect a property or place of traditional religious and cultural importance to an NHO or subsistence practices, and for which the DoD Components have an obligation to consult pursuant to sections 4321-4370f of title 42, U.S.C. (also known as “The National Environmental Policy Act of 1969, as amended” (Reference (e))) or any other statute, regulation, or Executive order.

b. The DoD Components shall conduct their consultation activities early enough in the DoD project planning process to allow the information provided to be meaningfully considered by DoD project planners and decision makers.

c. Recognizing that consultation is most effective when conducted in the context of an ongoing relationship, the DoD Components are encouraged to, insofar as practicable, establish and maintain relationships with NHOs separate from consultations related to specific actions. As part of this effort, the DoD Components and NHOs may exchange information related to operational and mission requirements, concerns about stewardship of important cultural resources and culturally-important natural resources, procedures to streamline action-specific consultations, and long-term planning.

2. WHOM TO CONSULT

a. The DoD Components shall make a reasonable and good faith effort to contact and consult with NHOs whose members perform cultural, religious, or subsistence customs and practices in an area that may be affected by a proposed DoD Component activity in Hawaii.

b. As a State of Hawaii organization established to promote the interests of Native Hawaiians, the Office of Hawaiian Affairs (OHA) (see <http://www.oha.org/>) may provide the DoD Components with up-to-date information and recommendations for appropriate contacts relative to a particular proposed action. OHA may also assist the DoD Components with consultation through dissemination of notices and announcements of proposed DoD Component actions that may affect resources of religious and cultural importance to NHOs.

c. As a practical matter, the DoD Components may find it helpful to contact:

(1) Individual Native Hawaiians and others who may have specific knowledge about the history and culture of an area that may have the potential to be adversely affected by a proposed DoD Component action.

(2) Individual Native Hawaiians and others who live near an area that may be affected by a proposed DoD Component activity and who regularly use the area for cultural, religious, or subsistence purposes.

(3) The U.S. Department of Interior, Office of Hawaiian Relations, which maintains an NHO Notification List at <http://www.doi.gov/ohr/nativehawaiians/list.html>.

(4) The Hawaii State Historic Preservation Officer at <http://hawaii.gov/dlnr/hpd/hpgreeting.htm>.

3. HOW TO CONSULT. The DoD Components shall fully integrate, including staff officers at the installation level, the principles and practices of meaningful consultation and communication with NHOs by:

a. Providing interested NHOs an opportunity to participate in pre-decision consultation that will ensure that NHO concerns are given due consideration whenever a DoD Component proposes an action that may affect historic properties or places of traditional religious and cultural importance to an NHO as defined by sections 470-470x-6 of title 16, U.S.C. (also known and hereinafter referred to as “The National Historic Preservation Act of 1966 (NHPA), as amended” (Reference (f))).

b. Considering the advice and recommendations of OHA to facilitate effective consultation between NHOs and DoD Components, with the understanding that no single NHO is likely to represent the interests of all NHOs.

c. Consulting in good faith, whenever a DoD Component proposes an action that may adversely affect resources of traditional religious or cultural importance to NHOs, and for which the DoD Components have an obligation to consult under any Presidential Memorandum, statute, regulation, or Executive order.

d. Initiating and maintaining effective communication with NHOs using tools and techniques designed to facilitate greater understanding and participation.

e. Providing continuity by ensuring new commanders are provided, as soon as possible, information regarding existing written agreements between the installation and NHOs, points of contact, and NHO areas of special interest concerning installation activities.

f. Recognizing the importance of improving communication between the DoD Components and NHOs by establishing a process for outreach regarding DoD activities that may have an effect on a property or place of traditional religious and cultural importance to an NHO or subsistence practices on each island to foster a positive relationship between the DoD Components in Hawaii and NHOs.

g. Involving the Hawaii State Historic Preservation Officer in consultations in accordance with NHPA, and, with respect to sections 3001-3013 of title 25, U.S.C. (also known and hereinafter referred to as "The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), as amended" (Reference (g))), appropriate Burial Councils.

4. CULTURAL AND NATURAL RESOURCE CONSIDERATIONS. The DoD Components shall recognize and respect the significance that NHOs give to resources of traditional religious and cultural importance by:

a. Undertaking DoD Component actions and managing DoD lands and water resources so as to protect and preserve, to the extent practicable and consistent with the law and operational and readiness requirements, places that NHOs have identified, consistent with law, as being of particular significance to Native Hawaiian traditional religious and/or cultural practices.

b. Enhancing the ability of NHOs to help the DoD Components protect and manage a natural resource that is also a property or place of traditional religious and cultural importance to an NHO on DoD lands, through NHO participation in the development of Integrated Cultural Resource Management Plans (ICRMP).

c. Accommodating, to the extent practicable and consistent with the safety of NHO representatives, military training, security, and readiness requirements, NHO access to a property or place of traditional religious and cultural importance to an NHO for religious or cultural activities.

d. Developing written agreements to the extent practicable, appropriate, or required, among the DoD Components, the Secretary of the Interior, and NHOs to protect confidential information regarding a property or place of traditional religious and cultural importance to an NHO.

e. Developing written agreements, to the extent practicable, appropriate, or required, between the DoD Components and the Hawaii State Historic Preservation Officer, in consultation with NHOs, to address the effects of proposed DoD undertakings on a property or place of traditional religious and cultural importance to an NHO.

ENCLOSURE 4

COMPLIANCE MEASURES OF MERIT

1. POLICY IMPLEMENTATION. The ODUSD(I&E) shall assess the number of DoD Components that have incorporated a process for consultation with NHOs as part of an ICRMP when a property or place of traditional religious and cultural importance to an NHO has been identified.

2. NAGPRA. The ODUSD(I&E) shall assess compliance with NAGPRA in accordance with the compliance measures of merit included in DoDI 4710.02 (Reference (h)).

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DUSD(I&E)	Deputy Under Secretary of Defense for Installations and Environment
ICRMP	Integrated Cultural Resource Management Plans
NAGPRA	Native American Graves Protection and Repatriation Act of 1990
NHOs	Native Hawaiian Organizations
NHPA	National Historic Preservation Act of 1966
ODUSD(I&E)	Office of the Deputy Under Secretary of Defense for Installations and Environment
OHA	Office of Hawaiian Affairs
U.S.C.	United States Code
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology and Logistics

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this Instruction.

consultation. Seeking, discussing, and considering the views of other participants and, when feasible, seeking a mutually acceptable understanding regarding the matters at hand. As appropriate to the circumstances, consultation may include, but is not limited to, the exchange of written communications, face-to-face discussions, and telephonic or other means of exchanging information and ideas.

cultural patrimony. Defined in section 2(3)(D) of Reference (g).

culturally affiliated. Defined in section 2(2) of Reference (g).

exercise of religion. Defined in section 2000bb-1 of Reference (e) (also known as “The Religious Freedom Restoration Act of 1993, as amended”).

human remains, funerary objects, sacred objects, or objects of cultural patrimony. Defined in Reference (g).

Native Hawaiian. Defined in Public Law 103-150 (also known as “The Apology Resolution” (Reference (i))).

NHOs. Organizations that serve and represent the interests of Native Hawaiians have a primary and stated purpose of providing services to Native Hawaiians, and have expertise in Native Hawaiian affairs. Pursuant to NHPA and NAGPRA, NHOs include OHA and Hui Malama I Na Kupuna ‘O Hawai’i Nei (see <http://huimalama.tripod.com/>). The DoD Components may identify any other organization as an NHO if they determine that the organization meets the criteria in this definition.

