

Legal Responsibilities of USAG-HI with respect to Cultural Resources Management

The goal of this section is to provide a clear but concise description of the responsibilities imposed on the USAG-HI by law, regulation, and other authoritative guidance. This section begins that presentation with a simple listing of the most pertinent legal authorities by type. It next provides a brief description of the provisions that most directly concern cultural resources management decisions at USAG-HI.

Primary Laws, Regulations, and Other Authoritative Guidance Pertinent to Cultural Resources Management at USAG-HI

Federal Statutes

Name	Citation	Common Abbreviation
American Indian Religious Freedom Act of 1978	P.L. 95-341; 92 Stat. 469, 42 U.S.C. § 1996	AIRFA
Americans with Disabilities Act of 1990	P.L. 101-336, 104 Stat. 327, 42 U.S.C. § 12101	ADA
Antiquities Act of 1906	16 U.S.C. § 431-433; 34 Stat. 225	
Archaeological and Historic Preservation Act of 1974	16 U.S.C. § 469-469c P.L. 93-291	AHPA or “Moss-Bennett Act”
Archaeological Resources Protection Act of 1979	16 U.S.C. § 470aa-470mm	ARPA
Coastal Zone Management Act of 1972	16 U.S.C. § 1451-1456	CZM
Historic Sites Act of 1935	16 U.S.C. § 461-467	HSA
National Environmental Policy Act	42 U.S.C. § 4321-4370c	NEPA
National Historic Preservation Act of 1966, as amended	16 U.S.C. § 470-470w	NHPA
Native American Graves Protection and Repatriation Act of 1990	P.L. 101-601; 25 U.S.C. 3001-3013	NAGPRA
Public Buildings Cooperative Use Act	40 U.S.C. § 3306	PBCUA
Federal Records Act	44 U.S.C. § 2101-2118, 2301-2308, 2501-2506, 2901-2909, 3101-3106, 3301-3324	FRA
Religious Freedom Restoration Act	42 U.S.C. § 2000bb	RFRA

Executive Orders

Name	Citation	Date
Protection and Enhancement of the Cultural Environment	EO 11593	13 May 1971
Locating Federal Facilities on Historic Properties in Our Nation’s Central Cities	EO 13006	21 May 1996
Indian Sacred Sites	EO 13007	24 May 1996
Consultation and Coordination With Indian Tribal Governments	EO 13175	6 November 2000

Preserve America	EO 13287	3 March 2003
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Presidential Memoranda

Subject	Date
Government to Government relations with Native American Tribal Governments	29 April 1994
Tribal Consultation	5 November 2009

Federal Regulations

Citation	Title	Issuing Agency
18 CFR 1312	Protection of Archaeological Resources	Tennessee Valley Authority (Uniform ARPA regulations appear in four separate locations in the CFR, once for each agency mandated to issue enforcing regulations. Supplemental regulations appear with Dept. of Interior version at 43 CFR 7.)
15 CFR 930	Federal Consistency with Approved Coastal Management Programs	National Oceanic and Atmospheric Agency
32 CFR 229	Protection of Archaeological Resources	Department of Defense
32 CFR 651	Environmental Analysis of Army Actions	Department of the Army
36 CFR 60	National Register of Historic Places	Department of Interior, National Park Service
36 CFR 63	Determinations of Eligibility (for National Register of Historic Places)	Department of Interior, National Park Service
36 CFR 65	National Historic Landmarks	Department of Interior, National Park Service
36 CFR 67	Historic Preservation Certifications Pursuant To Sec. 48(G) And Sec. 170(H) Of The Internal Revenue Code Of 1986	Department of Interior, National Park Service
36 CFR 68	Secretary of the Interior's Standards for Treatment of Historic Properties	Department of Interior, National Park Service
36 CFR 78	Waiver of Federal Agency Responsibilities, Under Section 110 of the National Historic Preservation Act	Department of Interior, National Park Service
36 CFR 79	Curation of Federally Owned and Administered Archaeological Collections	Department of Interior, National Park Service
36 CFR 296	Protection of Archaeological Resources	Department Agriculture
36 CFR 800	Protection of Historic Properties	Advisory Council on Historic Preservation (ACHP)
40CFR 1500-1508	Conducting Environmental Reviews	Council on Environmental Quality
43 CFR 3	Preservation of American Antiquities	Secretary of Interior
43 CFR 7	Protection of Archaeological Resources: Uniform Regulation (Subpart A) and Supplemental Regulation (Subpart B)	Secretary of Interior

43 CFR 10	Native American Graves Protection and Repatriation Regulations	Secretary of the Interior
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Department of Defense Instructions and Guidance

ITEM	TITLE	DATE
DoD Instruction 4715.16	Cultural Resources Management	18 September 2008
DoD Instruction 4710.02	DoD Interactions with Federally-Recognized Tribes	14 September 2006
Policy	American Indian and Alaska Native Policy	20 October 1998
Directive Type Memo 11-001	Protocol for Consultation with Native Hawaiian Organizations	3 February 2011
DoD Instruction 4710.03	Consultation With Native Hawaiian Organization (NHOs)	25 October 2011

U.S. Army Regulations and Guidance

ITEM	TITLE	DATE
AR 200-1	Environmental Protection and Enhancement	13 December 2007
AR 210-20	Real Property Master Planning for Army Installations	16 May 2005
AR 350-19	The Army Sustainable Range Program	30 August 2005

Secretary of the Interior's Standards and Guidelines

ITEM	Source
Archaeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines (9/29/1983)	48 Federal Register 44716-44740. Current version available at: http://www.nps.gov/history/local-law/arch_stnds_1.htm
Standards and guidelines for Preservation Planning	
Standards and guidelines for Identification	
Standards and guidelines for Evaluation	
Standards and Guidelines for Registration	
Standards and guidelines for Historic Documentation	
Standards and Guidelines for Architectural and Engineering Documentation	
Standards and Guidelines for Archaeological Documentation	
Standards and Guidelines for Historic Preservation Projects, including Professional Qualification Standards	
The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act ("Section 110 Guidelines")	63 FR 2049-20508, 24 April 1998 Web version: http://www.nps.gov/history/hps/fapa_110.htm

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Advisory Council On Historic Preservation

ITEM	SOURCE
Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook June 2011	http://www.achp.gov/Native%20Hawaiian%20Consultation%20Handbook.pdf

State of Hawaii Statutes and Rules (Although they are not summarized individually, the relevance of these statutes is comprehensively summarized at the end of this document.)

Title	Reference
Prehistoric and Historic Burial Sites	HRS Section 6E-43
Inadvertent Discovery of Burial Sites	HRS Section 6E-43.6
Island Burial Councils; creation; appointment; composition; duties	HRS Section 6E-43.5
Rules Governing Procedures for Historic Preservation Review for Government Projects covered under 6E-7 and 6E-8, HRS	HAR 13-275, HI ADC § 13-275
Rules Governing Standards for Archaeological Inventory Surveys and Reports	HAR 13-276, HI ADC § 13-276
Rules Governing Requirements for Archaeological Site Preservation and Development	HAR 13-277, HI ADC § 13-277
Rules Governing Standards for Archaeological Data Recovery Studies and Reports	HAR 13-278, "HI ADC"
Rules Governing Standards for Archaeological Monitoring Studies and Reports	HAR 13-279, "HI ADC"
Rules Governing Procedures for Inadvertent Discoveries of Historic Properties During a Project Covered by Historic Preservation Review Process	HAR 13-280, "HI ADC"
Rules Governing Professional Qualifications	HAR 13-281, "HI ADC"
Rules Governing Permits for Archaeological Work	HAR 13-282, "HI ADC"
Rules Governing Standards for Osteological Analysis of Human Skeletal Remains	HAR 13-283, "HI ADC"§
Rules Governing Procedures for Historic Preservation Review to Comment on Section 6E-42, HRS Projects	HAR 13-284, "HI ADC"
Rules of Practice and Procedure Relating to Burial Sites and Human Remains	HAR 13-300, "HI ADC"

Federal Statutes

- **American Indian Religious Freedom Act, 1978 -- AIRFA-- P.L. 95-341; 42 U.S.C. § 1996; 92 Stat. 469**

This short statute declares a policy that the United States will protect and preserve the right of Indian tribes and other indigenous people to practice their traditional religions. Native Hawaiians are specifically included within the declaration. The declared policy includes access to sites, possession of sacred objects, and freedom to worship through ceremonials and traditional rites.
- **Americans with Disabilities Act of 1990 P.L. 101-336, 104 Stat. 327, 42 U.S.C. § 12101**

The Americans with Disabilities Act is a wide-ranging legislation intended to establish a clear and comprehensive prohibition of discrimination based on disability. It establishes standards for accessibility for public buildings, including historic properties. Proper treatment and maintenance of historic buildings must also attend to accessibility under this statute.
- **Antiquities Act of 1906 16 U.S.C. § 431-433; 34 Stat. 225 (aka National Monument Act)**

The Antiquities Act is one of the oldest federal statutes enacting protections of places now considered cultural resources (some designations of Civil War battlefields as National Military Parks preceded it). This act provides protection for archaeological sites and “objects of antiquity” on federal lands. It prohibits excavation or destruction of such antiquities without a permit; it establishes a permitting process and it authorizes the President to designate areas of public lands as a National Monument. The permitting provisions in the Archaeological Resources Protection Act have superseded the Antiquities Permits, but recent Presidents have continued to use the authority to establish National Monuments. This is a very brief summary, but provides a succinct overview of what the Act encompasses.
- **Archaeological and Historic Preservation Act of 1974—AHPA—P.L. 93-291; 16 U.S.C. § 469-469c**

This statute provides for the preservation of historical and archaeological data (including relics and specimens) that might otherwise be lost as the result of the construction of a dam or any alteration of the terrain resulting from Federal construction project or federally licensed activity or program. The AHPA authorizes expenditures from funds appropriated for the construction project for purposes of recovering important archaeological data.

The procedures in this statute usually are superseded by proper compliance with section 106 of the National Historic Preservation Act and provision for data recovery as mitigation under the terms of that process. The provisions of this statute may apply in inadvertent discovery situations where section 106 has not properly been completed prior to initiation of the project.
- **Archaeological Resources Protection Act of 1979 -- ARPA—P.L. 96-95; 16 U.S.C. § 470aa-470mm**

This statute replaces the Antiquities Act as the primary authority regulating how federal agencies should control and carry out archaeology on public lands. It does the following:

 - Sets standards for conducting archaeology on federal lands
 - Requires permits from the Federal Land Manager for archaeological excavations. (Army Regulations specifically designate the Garrison Commander as the Federal Land Manager for USAG-HI with respect to implementation of ARPA.)
 - Establishes both criminal and civil penalties for excavating without a permit

- Requires the federal land manager to establish trained, effective law enforcement capability with respect to unpermitted excavations
- Requires public education regarding both archaeological resources and the protections provided by this law.

The regulations implementing this Act provide an exemption for ARPA permits so that the Garrison does not have to issue ARPA permits to itself in order to conduct archaeological investigations needed to comply with other laws (most notably, the National Historic Preservation Act) so long as the archaeological work still meets or exceeds the standards normally required for ARPA permits. These include:

- Direct oversight of the project by professionally qualified archaeologists;
- Consultations with Native Hawaiian Organizations and other interested parties in advance of approval of the archaeological work;
- Adequate provision for long term care of the resulting collections and associated records

ARPA also establishes that transporting, exchanging, selling, receiving, or offering to sell archaeological resources in interstate commerce is a federal crime if those resources were obtained in violation of state or local laws.

- **Coastal Zone Management Act of 1972; 16 USC § 1451-1456**

The Coastal Zone Management Act intends to preserve important coastal features and characteristics important to the economic, environmental, and cultural well being of communities dependent on coastal and adjacent marine resources. Under the terms of the act, each State sets out plans and goals for management of coastal resources. Federal agencies such as USAG-HI are directed to assure that their actions and undertakings in the coastal zone are consistent with these state goals. In Hawaii, the coastal zone is the entire state.

- **Historic Sites Act of 1935; 16 U.S.C. § 461-467**

This statute declares a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. It established the program to designate National Historic Landmarks. It authorized the National Park Service to record, document, acquire, and manage places that are important in the interpretation and commemoration of the nation's history. Programs to compile detailed records of important buildings and structures such as the Historic American Buildings Survey (HABS) and the Historic American Engineering Record (HAER) have authorization in this act. Agreements resolving adverse effects under the National Historic Preservation Act frequently use the standards and requirements of these documentation programs.

- **National Environmental Policy Act -- NEPA -- 42 U.S.C. § 4321-4370c**

The NEPA requires federal agencies to examine the environmental impacts of major federal actions significantly affecting the quality of the human environment using an environmental impact statement. If the preliminary environmental assessment reveals that the action will not significantly affect the environment, then the federal agency must submit a finding of no significant impact. The statute requires that decisions about significant federal actions be fully informed regarding the foreseeable impacts to the human environment, including those aspects of the environment that are also cultural resources. It also requires solicitation of opinions, comments, and concerns from the public in advance of reaching decisions. The act institutes a process for informing decisions, but does not directly constrain the decision a federal agency may ultimately reach. The decision making process in NEPA is similar in many respects to the

decision making process supported through the National Historic Preservation Act, so the two processes often interact as planners consider alternatives for various projects. Army installations frequently find it a recurring concern to provide proper coordination of these two independently mandated reviews with each other and with project planning, budgeting, and implementation.

- **National Historic Preservation Act of 1966, as amended -- NHPA -- 16 U.S.C. § 470-470w**
This statute, subsequently amended many times, is the cornerstone for the modern historic preservation program throughout the United States and its territories and possessions. It establishes the National Register of Historic Places, supporting programs for the National Register, the several State Historic Preservation Offices, grants-in-aid for historic preservation and many other institutional supports for historic preservation. The two most important provisions with respect to the responsibilities of the USAG-HI are section 106 (16 U.S.C.A. § 470f) and section 110 of the NHPA (16 U.S.C.A § 470h (2)). Section 106 requires that federal agencies “take into account” the effects of their undertakings on historic properties, and in doing so, “afford an opportunity to comment” to the independent Advisory Council on Historic Preservation. Implementing regulations at 36 CFR 800 define in detail the processes for those responsibilities. Both the statute and the implementing regulations for section 106 require meaningful opportunities for consultation with Native Hawaiian Organizations, other interested parties, and the general public while there are still feasible alternatives to avoid unnecessary damage to historic properties available in the planning process.

Section 110 of the NHPA requires federal agencies to establish comprehensive programs for historic preservation that effectively accomplish a number of actions such as:

- identification of historic properties under agency jurisdiction or control,
- evaluations of historic properties,
- registration of historic properties,
- adequate and consistent treatment of historic properties,
- integrating preservation planning with other planning processes
- Consistent review of undertakings as required by section 106

The Secretary of the Interior has issued standards and guidelines to assist federal agencies in meeting the requirements of this section of the NHPA. These standards and guidelines are reflected in the checklists for periodic assessment of installation achievement through the Environmental Program Assessment System (EPAS).

- **Native American Graves Protection and Repatriation Act of 1990; NAGPRA (P.L. 101-60; 25 U.S.C. § 3001-3013)**
This law requires federal agencies to inventory their collections for human remains, funerary objects, sacred objects, and items of cultural patrimony in agency custody, then to repatriate them to the appropriate Native American tribes or Native Hawaiian Organizations. It also establishes a process for consultation concerning the disposition of the same materials as may be inadvertently discovered on federal lands, or disturbed in the course of planned projects. The act specifically requires consultations with Native Hawaiian Organizations even though these organizations differ in legal character from federally recognized Indian Tribes or Alaska Native Villages.
- **Public Buildings Cooperative Use Act of 1976; PBCUA (P.L. 94-541;; 40 U.S.C. § 3306)**
Directs the Administrator to acquire and use space in suitable buildings of historic, architectural, or cultural significance, and to encourage public access to and community use of public buildings for cultural, educational, and recreational activities. The Administrator must consult with Governors, other appropriate officials, and community leaders when necessary. Section 111 of

the National Historic Preservation Act also requires an agency to seek out productive uses of historic buildings even if not actively needed for the agency's own current missions. Executive Order 13006 further directs use of existing historic buildings and districts by Federal agencies.

- **Federal Records Act; 44 U.S.C. various sections.**

This act establishes a duty to keep agency records that meet standards set by NARA as being worthy of preservation for historical or other reasons. All persons working for the agency should be generally aware that no records should be destroyed or alienated unless in accord with the standards set forth. Records such as engineering drawings, photographs, and etc. regarding historic buildings, structures, objects, and archaeological sites should be given careful review for appropriate long-term retention before being discarded.

Records specifically associated with archaeological collections are also subject to requirements of 36 CFR 79. Records associated with archaeological sites and other historic properties will normally be permanently retained records and require resources for long-term management and care.

- **Religious Freedom Restoration Act; 42 U.S.C. § 2000bb.**

This act forbids federal agencies from actions that place a substantial burden on the exercise of religion (including religions of Native Hawaiian, Native American or other traditions) unless there is both a compelling governmental interest involved, and the means of addressing that compelling interest is the least restrictive means that would adequately meet the compelling interest.

Executive Orders

- **EO 11593 Protection and Enhancement of the Cultural Environment**

Subsequent amendments to the National Historic Preservation Act have incorporated most of the provisions of this Executive Order in current law. The executive order requires agencies of the executive branch of the Government to administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations and to initiate measures that will facilitate the preservation, restoration, and maintenance of federally owned sites, structures, and objects of historical, architectural, or archaeological significance. This order established the general obligation to affirmatively inventory previously unrecognized historic properties owned or controlled by an agency. It directed federal agencies to evaluate previously unevaluated properties, and set the standard that for purposes of section 106 compliance agencies should treat properties evaluated as eligible as if already registered.

- **EO 13006 Locating Federal Facilities on Historic Properties in Our Nation's Central Cities**

While the title of the Executive Order focuses on central urban areas, the text of the order states a general preference for selecting and using historic properties in historic districts, or historic properties not in a district as a first choice for federal facilities. The executive order also establishes a duty to seek out and develop effective partnerships with state, local, and appropriate private organizations for the purpose of enhancing the participation of these partners in the national historic preservation program.

- **EO 13007 Indian Sacred Sites**

This executive order requires federal agencies to accommodate access to and ceremonial use of Indian sacred sites and avoid adversely affecting the physical integrity of sacred sites. It also

directs agencies to develop procedures for implementing the executive order, including notices to tribes of activities that might affect sacred sites and maintaining appropriate confidentiality regarding information about such sites. While the executive order does not explicitly include Native Hawaiian Organizations, these same responsibilities can be imputed since Native Hawaiian Organizations are explicitly mentioned in the American Indian Religious Freedom Act that also emphasizes rights to use sites for religious and traditional cultural ceremonials.

- **EO 13175 Consultation and Coordination with Indian Tribal Governments**
EO 13175 requires Federal agencies to develop a process which ensures meaningful and timely consultation and collaboration with tribal officials during the development of policies having substantial and direct effects on Indian tribes. Prior to taking any action having tribal implications, an agency must consider input from tribal officials and the principles of sovereignty and Indian self-determination. It is the policy of the Federal Government to encourage Indian tribes to develop and implement their own policies to achieve program objectives. This executive order also does not explicitly include Native Hawaiian Organizations, but since Native Hawaiian Organizations are included within other authorities that require consultations with Indian tribes, the provisions in this Executive Order provide examples of effective consultation and coordination that can be adapted to relations with Native Hawaiian Organizations.
- **EO 13287 Preserve America**
This executive order directs Federal agencies to pursue the continued productive use of historic properties. It encourages agencies to build productive partnerships with state and local governments and with appropriate private organizations to promote preservation. It also directs agencies to assess periodically the general condition and needs of historic properties in their inventory. It also directs Federal agencies to cooperate with communities to increase access to historic properties in order to increase the public benefits from them.

Presidential Memoranda

- **Government-to-Government Relations with Native American Tribal Governments**
Emphasizes the unique legal relationship between the United States Government and Native American tribal governments. Executive departments and agencies are given principles that will enable them to conduct their activities in a manner that is respectful of the sovereignty of tribal governments. While this Presidential Memorandum is not directly applicable to Native Hawaiian Organizations, those organizations have been specifically included in some similar requirements for consultation. The Garrison should consider the perspectives in this memorandum to be helpful in guiding the spirit of consultations with Native Hawaiian Organizations to the extent the different legal circumstances will allow.
- **Memorandum on Tribal Consultation**
As with the implementation of Executive Order 13175, the directives of this Memorandum do not directly apply to consultations between USAG-HI and Native Hawaiian Organizations. It does, however, provide useful guidance in regard to undertaking similar consultations. This memorandum directs agencies to consult with the relevant tribal governments to produce a plan of action for implementing required consultations. The agency is to report on the progress in implementing that plan and to keep the plan updated.

Federal Regulations

18 CFR 1312
32 CFR 229
36 CFR 296
43 CFR 7

Protection of Archaeological Resources

These four sets of regulations all contain the same uniform regulations for implementing the Archaeological Resources Protection Act. The regulations at 43 CFR 7 contain supplemental regulations more directly focused on Department of the Interior implementation of the requirements of ARPA.

The Uniform Regulations contain provisions establishing:

- The acts prohibited without permits issued by the Federal Land Manager. (Army Regulations designate the Garrison Commander to be the Federal Land Manager for purposes of ARPA administration.)
- The administrative process for issuing and enforcing ARPA permits
- Notification to Indian tribes (and by implication, to Native Hawaiian Organizations) if permitted actions may harm sites of cultural or religious importance.
- Both criminal and civil penalties that can apply independently to any non-permitted excavations
- Confidentiality of archaeological resource location information
- A requirement for public education programs about the need for archaeological resource protection and preservation

15 CFR 930 Federal Consistency with Approved Coastal Management Programs

Federal agencies are required to keep their actions and undertakings consistent with approved State plans for preserving a variety of coastal uses and resources. Historic properties and cultural resources are specifically included as important resources which these plans seek to protect. These reviews for consistency with Coastal Zone Management Plans are another venue through which State agencies and interested members of the public can participate in decisions affecting resources they value.

32 CFR 651 Environmental Analysis of Army Actions

Under the National Environmental Policy Act, each Federal agency may issue its own regulations for the review of agency actions for environmental impacts, if those regulations are consistent with the more general ones issued by the Council on Environmental Quality at 40 CFR 1500. These regulations set out the process specifically adapted to use within the Department of the Army, excluding the programs under the jurisdiction of the Army Corps of Engineers. Of particular interest for cultural resources management are the provisions for categorical exclusion of some actions from formal NEPA review, and how the presence of cultural resources can prevent the use of categorical exclusions for environmental review. In general, potential cultural resources issues trigger heightened NEPA review standards. This regulation also addresses coordination of the Army's NEPA reviews with the independent review mandated by section 106 of the National Historic Preservation Act.

36 CFR 60 National Register of Historic Places

These regulations set up the National Register of Historic Places and the processes for nominating properties to be listed in that register. The most frequently used section of these regulations is 36 CFR 60.4, the formal criteria for judging whether properties are or are not eligible for such listing. Federal agencies frequently make determinations as to eligibility for the register without using the formal process of nomination. If the appropriate State Historic Preservation Officer concurs with the agency evaluation, the agency may proceed with management decisions regarding the property without seeking formal determinations from the Keeper of the National Register of Historic Places. A Federal agency and the SHPO must use the criteria at 36 CFR 60.4 in determining eligibility of possibly historic properties.

36 CFR 63 Determinations of Eligibility for inclusion in the National Register of Historic Places

These regulations provide a formal process for asking the Keeper of the National Register to make a final decision regarding the eligibility of a property. Federal agencies do not normally use this process in seeking to comply with section 106 of the National Historic Preservation Act. This process is different than the “consensus determination” defined in 36 CFR 800 in which an agency and the appropriate State Historic Preservation Officer can agree to consider a property eligible for purposes of section 106.

Federal agencies sometimes use this process to settle highly controversial and publicly contested evaluations.

36 CFR 65 National Historic Landmarks

These regulations state the criteria by which the Secretary of the Interior judges whether a property may be designated as a National Historic Landmark, and the administrative processes for nominating and considering properties for National Historic Landmark designation. The criteria for National Historic Landmark designation is more stringent than those for listing in the National Register of Historic Places. The duty to protect National Historic Landmarks is also greater than the duty to avoid damage to places eligible for the National Register of Historic Places.

36 CFR 67 Historic Preservation Certifications Pursuant to Section 48(G) and Section 170(H) of the Internal Revenue Code of 1986

These regulations define the process and the standards by which projects involving historic properties can be determined eligible for tax incentives designed to encourage rehabilitation of historic properties. These tax incentives are not normally applicable to historic properties under the jurisdiction of a Federal agency, but in some circumstances they may be a relevant tool. One such instance was the privatization of Army Family Housing as part of the Residential Communities Initiative. As historic and possibly historic properties passed into the ownership and control of the Army’s housing “partner,” the potential use of tax incentives became a tool available to the “partner” agency, though it remained unused. Access to potential tax incentives could conceivably assist in preserving some historic properties within the Garrison if other preservation partnerships are formed.

36 CFR 68 Secretary of the Interior’s Standards for Treatment of Historic Properties

These standards and guidelines are important models for consistent treatment of historic buildings, structures, and objects. They define four distinct modes of treatment: Preservation, Rehabilitation, Restoration, and Reconstruction. Guidance is offered as to circumstances that would favor adopting one mode of treatment as opposed to the others. USAG-HI will typically be applying treatments to historic properties in either the Preservation or Rehabilitation modes.

Within these modes, the standards and guidelines present a framework within which to make decisions regarding the specific work that would best retain the significant historic character of properties needing some maintenance, repair, or other attention.

36 CFR 78 Waiver of Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act

Federal agencies can waive some historic preservation responsibilities in the event of a major natural disaster or imminent threat to national security. These regulations specify the process through which a Federal agency decides to make such a waiver and notifies the Secretary of the Interior of the decision, stating the area and extent of the declared waiver.

36 CFR 79 Curation of Federally Owned and Administered Archaeological Collections

This regulation sets standards of care in administering archaeological collections owned by Federal agencies. It is important to note that curation of a collection includes care and preservation of associated records and information as well as care of the physical items in the collection. Proper maintenance of

collections is a complex and professionally challenging responsibility. The requirements include, but are not limited to the following:

- maintaining complete and accurate records of acquisitions,
- catalog and artifact inventories,
- precise location information (both of original source location and current storage location),
- photographs, field notes, recordings,
- records of periodic inspections as to condition and treatments for purposes of preserving the collection.
- Space should be available for storage, study, conservation treatments, and exhibits.
- Provide access for study by qualified researchers.
- Require staff and consultants who are responsible for managing and preserving the collection to be qualified museum professionals.

36 CFR 800 Protection of Historic Properties

The Advisory Council on Historic Preservation issued these regulations to implement Section 106 of the National Historic Preservation Act. These regulations guide how Federal agencies “take into account” the effects of undertakings on historic properties. They set out the process by which Federal agencies meet the requirements for making decisions about undertakings with adequate information as to what historic properties may be at risk due to the undertaking and requirement that decisions be made with appropriate input from State and local governments and other interested parties. The regulations also provide access to “program alternatives” that can streamline agency compliance while still accomplishing the intent of the normal regulations (well informed, balanced decisions with appropriate public participation).

40 CFR 1500-1508 Conducting Environmental Reviews

These regulations implement the procedural review of Federal agency actions under the National Environmental Policy Act (NEPA). This procedural review is similar to, but independent of the review required by section 106 of the National Historic Preservation Act. Coordination of the two reviews is encouraged by both authorities (Council on Environmental Quality and the Advisory Council on Historic Preservation) but this coordination can be complex for particular Federal actions or undertakings.

43 CFR 3 Preservation of American Antiquities

These regulations implement the protections and permits authorized by the Antiquities Act of 1906. ARPA permits for archaeological resources have superseded the Antiquities Permits. The Act stipulates that no permit shall be granted for removal of any ancient monument or structure that can be permanently preserved under United States control. The protections for “objects of antiquity” on Federal lands are one source for protection of paleontological resources controlled by the Garrison.

43 CFR 10 Native American Graves Protection and Repatriation Regulations

These regulations set out the procedures for completing inventories and repatriation of human remains, funerary items, sacred objects, and objects of cultural patrimony, collectively referred to as cultural items. The NAGPRA statute and the implementing regulations both specifically include Native Hawaiian Organizations among the entities entitled to participate in notices and consultations. The regulations set up procedures for consultation in advance of archaeological excavations that may affect cultural items, and also procedures for consultation in the event of an unexpected discovery of cultural items. Objects are excavated or removed following the requirements of the Archaeological Resources Protection Act and its implementing regulations.

Department of Defense Instructions and Guidance

DoD Instruction 4715.16 Cultural Resources Management

This instruction defines responsibilities in common for all of the military service components and defines standards and metrics for assessing the scale and effectiveness of cultural resources programs within service components. These instructions establish Integrated Cultural Resources Management Plans as a fundamental tool at the installation or Garrison level for deciding goals and priorities related to cultural resources.

DoD Instruction 4710.02 DoD Interactions with Federally-Recognized Tribes

This instruction did not originally specifically address Native Hawaiian Organizations. The policies in the 3 February 2011 Directive Type Memo (see below) regarding Native Hawaiian Organizations has been incorporated into this instruction. The original instruction stresses the government-to-government nature of consultations and responsibilities with respect to federally recognized Indian tribes. The new policies incorporated into the instruction establish practices appropriate for consultations with Native Hawaiian Organizations since the government-to-government framework is not applicable in those consultations.

DoD Policy Statement American Indian and Alaska Native Policy

This policy is also applicable only by implication and example to consultations with Native Hawaiian Organizations. Consultations share many similarities but are not situated within government-to-government relations. The purpose of this policy is to ensure an effective implementation of a government to government relationship with American Indian and Alaska Native tribal governments. Underlining principles include DOE recognition of the federal trust relationship with tribal governments, to establish mechanisms for outreach, to comply with all cultural resource protection laws, and to conduct periodic summits between the secretary of energy and tribal leaders.

Directive Type Memo 11-001 Consultation with Native Hawaiian Organizations (NHOs)

This memo addresses the specific circumstances applicable to consultations with Native Hawaiian Organizations. It specifically acknowledges the special status afforded NHOs in various federal laws, regulations and other policies and it declares a policy of meaningful consultation for the purpose of avoiding or minimizing the effects of actions on places of traditional religious and cultural importance to the extent practicable and consistent with law. The directive also provides instruction on when DoD components should carry out consultations with Native Hawaiian Organizations. It encourages the development of on-going consultative relations not connected to any specific proposed action.

DoD Instruction 4710.03 Consultation with Native Hawaiian Organizations (NHOs)

This instruction formally incorporates the Directive Type Memo 11-001 into full DoD Instruction format and supersedes the Directive Type Memo.

U.S. Army Regulations

AR 200-1 Environmental Protection and Enhancement

These regulations address the full range of Army Environmental Programs. Chapter 1, section 24 enumerates many general environmental responsibilities assigned to the Garrison Commander. Many of these general responsibilities have an indirect connection to cultural resources responsibilities, but the responsibilities specific to cultural resources programs at an Army installation are set out in Chapter 6.

Within this chapter of the regulations, the Garrison Commander (GC) is specifically designated and tasked to:

- Appoint a qualified Army employee as the Cultural Resources Manager for the Installation.
- Act as the Federal Agency Official for purposes of the National Historic Preservation Act.

- The GC must assure that undertakings are not started before the section 106 reviews are completed and the results of those reviews incorporated into the way the undertaking is carried out.
- The GC must assure that appropriate public involvement happens throughout the planning process for undertakings
- Act as the Federal Land Manager for purposes of the Archaeological Resources Protection Act. The GC:
 - Assures law enforcement responds appropriately to possible looting activities.
 - Assesses civil penalties for permit violations.
 - Issues and enforces the terms of permits for archaeological investigations.
 - Is the Federal agency official with management authority over archaeological collections.
- Ensure early coordination between project proponents and the Cultural Resources Manager.
- Determine which cultural resources require restriction of public disclosure of various kinds of information.
- Act as the Federal agency official for purposes of the Native American Graves Protection and Repatriation Act

The Garrison Commander remains generally responsible for ensuring that the Garrison meets all of the other general Cultural Resources Program requirements. The Cultural Resources Manager will be directly involved with many of these responsibilities, but achieving them also requires cooperation and action from other programs and officials within the Garrison as well.

AR 210-20 Real Property Master Planning for Army Installations

These regulations cover the requirements and functions of master planning. Master Planning is a process for unifying the planning and programming for installation real property management, development, and associated services. The process and the scope of resources needed to support the installation should be recorded in a Real Property Management Plan (RPMP). The RPMP needs to take note of the known inventory of historic properties and other cultural resources, to flag the historic status of properties in real property databases and records, and enact policies fostering the preservation and adaptive re-use of historic buildings.

AR 350-19 The Army Sustainable Range Program

The long-term viability of training areas and ranges for continued use is a high priority concern for the Army. These regulations define a management program for these areas with emphasis on maintaining both current and long-term ability to train. Conservation of natural and cultural resources are given strong emphasis in these regulations. The regulations require inclusion of cultural resources in various Range and Training Lands plans, and coordination of range programs and projects to avoid conflicts with cultural resources concerns to the degree possible.

Secretary of the Interior's Standards and Guidelines

The National Historic Preservation Act tasked the Secretary of the Interior to provide guidance and to set standards for Federal agencies to use in fulfilling the purposes set forth in that statute. The Secretary of the Interior issued the following sets of standards and guidelines responsive to that task.

Archaeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines

These are general guidance issued by the Secretary of the Interior to promote effective and consistent historic preservation efforts by all Federal agencies. They offer advice regarding appropriate professional practice for the general kinds of historic preservation tasks entailed by the National Historic Preservation

Act – Planning, Identification, Evaluation, Registration, Documentation, and Implementation of Preservation Projects. Agreement documents and contracts for historic preservation work often incorporate references to these standards, particularly the standards for professional qualifications in preservation related disciplines.

The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs pursuant to the National Historic Preservation Act

These standards and guidelines are usually called “the Section 110 guidelines.” They describe the necessary components of the full program mandated in section 110 of the National Historic Preservation Act.

Advisory Council on Historic Preservation

Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook

This handbook from the Advisory Council on Historic Preservation states the current advice from the Council as to best practices for consulting with Native Hawaiian Organizations as required to comply with section 106 of the National Historic Preservation Act.

State of Hawaii Statutes and Rules

These statutes and rules do not uniformly apply to actions by Federal agencies with respect to historic properties. However, Hawaii Revised Statutes (HRS) governing the treatment and disposition of Native Hawaiian human remains are germane to NAGPRA compliance and to consultations with Native Hawaiian Organizations and individuals.

These statutes and associated rules also set up the Hawaii Register of Historic Places with criteria materially similar though not identical to the criteria for inclusion in the National Register of Historic Places. USAG-HI should reasonably expect the State Historic Preservation Division, acting in its capacity as the SHPO for the State of Hawaii, to offer comments, advice, and opinions for Federal undertakings informed by the standards, definitions, and practices defined in these State authorities.