

**I MINA'TRENTAI OCHO NA LIHESLATURAN GUÁHAN
RESOLUTIONS**

Resolution No.	Sponsor	Title	Date Intro	Date of Presentation	Date Adopted	Date Referred	Referred to	PUBLIC HEARING DATE	DATE AUTHORS REPORT FILED	NOTES
144-38 (COR)	Sabina Flores Perez Chris Barnett Therese M. Terlaje Telo T. Taitague	Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.	2/13/26 12:56 p.m.			2/17/26	Author	3/5/26 9:00 a.m.	3/20/2026	



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

March 16, 2026

The Honorable Frank F. Blas Jr.
Speaker

I Mina'trentai Ocho na Liheslaturan Guåhan

Guam Congress Building

163 Chalan Santo Papa

Hagåtña, Guam 96910

VIA: Honorable Vice Speaker V. Anthony Ada 
Chairperson, Committee on Rules

RE: Report on Resolution No. 144-38 (COR) - As Introduced

Buenas yan Håfa adai, Speaker Blas,

Transmitted herewith for the consideration of the Body is the Report on Resolution No. 144-38 (COR), as introduced - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations,”** which had publicly hearing on March 5, 2026.

Sincerely,

Sabina Flores Perez

Senator Sabina Flores Perez



COMMITTEE ON RULES

RECEIVED:

March 16, 2026 9:08 p.m.

Marie Crisostomo



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

AUTHOR'S REPORT

RESOLUTION NO. 144-38 (COR), As Introduced

SPONSORED BY:

Sabina Flores Perez, Chris Barnett,
Therese M. Terlaje, Telo T. Taitague

“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

March 17, 2026

MEMORANDUM

TO: All Senators

FROM: Senator Sabina Flores Perez
Author

SUBJECT: Author's Report on Resolution No. 144-38 (COR) - As Introduced

Transmitted herewith for the consideration of the Body is the Author's Report on Bill No. 144-38 (COR), as introduced - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – **“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations,”** which was publicly hearing on March 5, 2026.

This report includes the following:

- Copy of COR Referral of Resolution No. 144-38 (COR)
- Notice of Public Hearings
- Public Hearing Agenda
- Public Hearing Sign-in Sheet
- Submitted Testimonies and Supporting Documents
- Author's Report Digest
- Resolution No. 144-38 (COR), As Introduced

Should you have any questions or concerns, please do not hesitate to contact me.

Si Yu'os ma'åse



COMMITTEE ON RULES

Vice Speaker V. Anthony Ada, Chairperson
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

February 17, 2026

To: **Rennae V. C. Meno**
Clerk of the Legislature

Attorney Darleen E.H. Phillips
Legislative Legal Counsel

From: **Senator Christopher M. Dueñas** 
Acting Chairperson, Committee on Rules

Subject: **Referral of Resolution No. 144-38 (COR)**

Håfa Adai,

As per authority as Acting Chairperson of the Committee on Rules and subject to §§ 7.03(e) and 7.04(b) Rule VII of our Standing Rules, I am forwarding the referral of **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague.– “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on *Guåhan*, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect *CHamoru* cultural resources for future generations.”

Please ensure that the subject Resolution is referred to Senator Sabina Flores Perez, Author of the Resolution. I also request that the same be copied to Management Information Services (MIS) for posting on our website.

A copy of the resolution is available on our legislative website.

Should you have any questions or concerns, please feel free to contact Kamarin Nelson, Committee on Rules Director at 671-472-2461.





OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

February 25, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: **First Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.**

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025**.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Docomo Channel 117, and stream online via *I Liheslaturan Guåhan*'s live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia>. A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.



Senator Sabina Perez <senator.perez@guamlegislature.gov>

FIRST NOTICE of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 8:00 AM

To: phnotice@guamlegislature.gov

Bcc: senator.perez@guamlegislature.gov

February 25, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: First Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.


Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025**.


In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Docomo Channel 117, and stream online via *I Liheslaturan Guåhan's* live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia>. A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.

2 attachments

 **First Notice Memo_Res. 144 (March).pdf**
419K

 **Res. No. 144-38 (COR).pdf**
1490K


FIRST NOTICE OF PUBLIC HEARING


 PRINT

FIRST NOTICE OF PUBLIC HEARING

PUBLIC HEARING



 **Posted on:** 02/25/2026 06:00 AM

 **Posted by:** Glenn Meno, Glenn Meno - Policy Analyst

 **Public Hearing Date:** 03/05/2026 09:00 AM

 **Department(s):**
GUAM LEGISLATURE (/notices?department_id=92)

 **Division(s):**
OFFICE OF SENATOR SABINA FLORES PEREZ (/notices?division_id=265)

 **Notice Topic(s):** PUBLIC HEARING (/notices?topic_id=74)

 **Types of Notice:** PUBLIC HEARING (/notices?type_id=7)

 **For Audience(s):** PUBLIC (/notices?public=1)

 **Share this notice**

February 25, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: First Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov (<mailto:office.senatorperez@guamlegislature.gov>) or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov (<mailto:office.senatorperez@guamlegislature.gov>), no later than **4:00 p.m., Tuesday, March 10, 2025**.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21

THE HEARING WILL BROADCAST ON LOCAL TELEVISION, GTR CHANNEL 21,

Docomo Channel 117, and stream online via *I Liheslaturan*

Guåhan's live feed on YouTube at

<https://www.youtube.com/@GuamLegislatureMedia>

(<https://www.youtube.com/@GuamLegislatureMedia>). A

recording of the hearing will be available online via Guam

Legislature Media on YouTube after the hearing.

We look forward to your participation.



New Order	Revised/Add-On	Info. Update
Advertiser Name I Liheslaturan Guahan - 38TH GUAM LEGISLATURE Address 710 Marine Corps Drive *Bell Tower, Ste. 303A Hagatna, Guam 96910 Point of Contact Office of Senator Sabina Perez		

Order Number	GL38.T29
Order Entry Date	2.23.26
Customer PO #	
Product Code	

RECEIVABLES ACCOUNT		
<input checked="" type="checkbox"/>	Cash	
<input type="checkbox"/>	Trade	
<input type="checkbox"/>	Other	

ORDER DESCRIPTION

PRODUCTION INFORMATION		
Cart #	Title:	Length:

FOR INTERNAL PURPOSES ONLY		Media Consultant KUAM
Notary Required	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	Package <input checked="" type="checkbox"/>
Billing	Per Spot <input checked="" type="checkbox"/>	Trade <input type="checkbox"/>

Station	Inc Acct	Rate	Start Date	End Date	AbsTime/Prog. Event	Length	Spot Type	Cart #	M	T	W	TH	F	SA	SU	Per Wk	Total #	Total \$	
TV8		\$ 160.00	2/25/2026	3/3/2026	07:00-07:30	:30	PH: Res 144-38:5DAY/48HR	401C		0	1	1	0	0	0	0	2	2	\$ 320.00
TV8		\$ -	2/25/2026	3/3/2026	17:30-17:59	:30	PH:Res 144-38:5DAY/48HR	401C		0	1	1	0	0	0	0	2	2	\$ -
PROD		\$ 300.00	2/23/2026	2/23/2026	PROD	:30	Production of PH for Res. 144-38	n/a		1	0	0	0	0	0	0	1	1	\$ 300.00

BILL AS INDICATED	SPECIAL INSTRUCTIONS A 4% fee will be added for credit card transactions	ORDER TOTALS Total Spots <u>4</u> Total Dollars <u>\$ 620.00</u>
--------------------------	--	---

TV COMMERCIAL FORMAT: We ask that all commercials be formatted to originate in HD 1920x1080 and conform to a 4x3 pillar for Title Safe dimensions for graphics.

RESTRICTIONS: 48-hour deadline is KUAM's quality control to ensure that your advertisement airing meets the highest standards. If there is a rush, KUAM is not responsible for quality and standard concerns on behalf of the client.

PAYMENT IS DUE UPON RECEIPT OF NOTICE. In the event of cancellation of this contract prior to its scheduled expiration date and/or failure to remit payment of invoice(s) within 60 days of invoice date, all spots that have run prior to the cancellation date and/or schedules adhered to will be billed at the Rate Card. Client understands and agrees that a finance charge of 1.5% per month shall accrue on all accounts remaining unpaid one (1) month after invoice date. Client agrees to pay a USD\$25.00 service fee per returned check. If payment is not made as required, KUAM may, its option, without notice or demand payment, declare Client's credit account in default, in which case Client's entire balance(s) that are due and payable will be forwarded for collection. Client agrees to accept all consequences and to pay all costs, including attorney's fees, court fees, court costs and other expenses incurred as deemed necessary by KUAM to settle the account.

NON DISCRIMINATION CLAUSE: KUAMPacific Telestations, LLC does not discriminate on the basis of race or ethnicity in the placement, scheduling and completion of purchase of advertising. Any order for advertising that includes any such restriction will not be accepted.

Sabina Flores Perez
ACCEPTED BY CLIENT

ACCEPTED BY STATION



THE OFFICE OF SENATOR

Sabina Flores Perez



NOTICE OF PUBLIC HEARING
Guam Legislature, Public Hearing Room
Thursday, March 5th, 2026 beginning at 9:00 A.M.

AGENDA

The Committee will hear and accept testimony on the following:

Resolution No. 144-38 (COR) - *Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague* – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”



THE OFFICE OF SENATOR

Sabina Flores Perez



Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than Tuesday, March 3rd, 2026, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagatña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than 4:00pm, Tuesday, March 10, 2026.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

March 3, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: Second Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) - Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025**.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Docomo Channel 117, and stream online via *I Liheslaturan Guåhan's* live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia>. A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.



Office Senator Perez <office.senatorperez@guamlegislature.gov>

SECOND NOTICE of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Tue, Mar 3, 2026 at 8:00 AM

To: phnotice@guamlegislature.gov

Bcc: Senator Sabina Perez <senator.perez@guamlegislature.gov>, Ariana SenatorPerez <ariana.senatorperez@guamlegislature.gov>, Helen Yeung <helen.senatorperez@guamlegislature.gov>, George SenatorPerez <george.senatorperez@guamlegislature.gov>, Glenn SenatorPerez <glenn.senatorperez@guamlegislature.gov>

March 3, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: **Second Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.**

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) - Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.


Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025**.


In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Docomo Channel 117, and stream online via *I Liheslaturan Guåhan's* live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia>. A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.

2 attachments

 **Second Notice Memo_Res 144-38 (March 3).pdf**
339K

 **Res. No. 144-38 (COR) (1).pdf**
1490K


SECOND NOTICE OF PUBLIC HEARING

 PRINT

SECOND NOTICE OF PUBLIC HEARING

PUBLIC HEARING



 **Posted on:** 03/03/2026 06:00 AM

 **Posted by:** Glenn Meno

 **Public Hearing Date:** 03/05/2026 09:00 AM

 **Department(s):**
GUAM LEGISLATURE (/notices?department_id=92)

 **Division(s):**
OFFICE OF SENATOR SABINA FLORES PEREZ (/notices?division_id=265)

 **Notice Topic(s):** PUBLIC HEARING (/notices?topic_id=74)

 **Types of Notice:** PUBLIC HEARING (/notices?type_id=7)

 **For Audience(s):** PUBLIC (/notices?public=1)

 **Share this notice**

March 3, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: Second Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov (<mailto:office.senatorperez@guamlegislature.gov>) or via phone at (671) 989-2968, no later than **Tuesday, March 3, 2026**, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, *Hagåtña*, Guam 96910, or via email to office.senatorperez@guamlegislature.gov (<mailto:office.senatorperez@guamlegislature.gov>), no later than **4:00 p.m., Tuesday, March 10, 2025**.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Decome Channel 117, and stream online via *Lihaslaturan*

Docomo Channel 117, and stream online via *Lingsituran Guåhan's* live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia> (<https://www.youtube.com/@GuamLegislatureMedia>). A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.



New Order	Revised/Add-On	Info. Update
Advertiser Name <u>I Liheslaturan Guahan - 38TH GUAM LEGISLATURE</u>		
Address <u>710 Marine Corps Drive *Bell Tower, Ste. 303A</u> <u>Hagatna, Guam 96910</u>		
Point of Contact <u>Office of Senator Sabina Perez</u>		

Order Number	<u>GL38.T29</u>
Order Entry Date	<u>2.23.26</u>
Customer PO #	<u></u>
Product Code	<u></u>
RECEIVABLES ACCOUNT	
<input checked="" type="checkbox"/> <u></u> Cash	<input type="checkbox"/> <u></u> Trade <input type="checkbox"/> <u></u> Other
ORDER DESCRIPTION	
<u></u>	
PRODUCTION INFORMATION	
Cart #	Title: <u></u> Length: <u></u>
<u></u>	<u></u>
<u></u>	<u></u>

FOR INTERNAL PURPOSES ONLY		Media Consultant <u>KUAM</u>
Notary Required	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	Package <input type="checkbox"/> Trade <input type="checkbox"/>
Billing	Per Spot <input checked="" type="checkbox"/>	

Station	Inc Acct	Rate	Start Date	End Date	AbsTime/Prog. Event	Length	Spot Type	Cart #	M	T	W	TH	F	SA	SU	Per Wk	Total #	Total \$	
TV8		\$ 160.00	2/25/2026	3/3/2026	07:00-07:30	:30	PH: Res 144-38:5DAY/48HR	401C		0	1	1	0	0	0	0	2	2	\$ 320.00
TV8		\$ -	2/25/2026	3/3/2026	17:30-17:59	:30	PH:Res 144-38:5DAY/48HR	401C		0	1	1	0	0	0	0	2	2	\$ -
PROD		\$ 300.00	2/23/2026	2/23/2026	PROD	:30	Production of PH for Res. 144-38	n/a		1	0	0	0	0	0	0	1	1	\$ 300.00

BILL AS INDICATED	SPECIAL INSTRUCTIONS	ORDER TOTALS
	A 4% fee will be added for credit card transactions	Total Spots <u>4</u> Total Dollars <u>\$ 620.00</u>

TV COMMERCIAL FORMAT: We ask that all commercials be formatted to originate in HD 1920x1080 and conform to a 4x3 pillar for Title Safe dimensions for graphics.

RESTRICTIONS: 48-hour deadline is KUAM's quality control to ensure that your advertisement airing meets the highest standards. If there is a rush, KUAM is not responsible for quality and standard concerns on behalf of the client.

PAYMENT IS DUE UPON RECEIPT OF NOTICE. In the event of cancellation of this contract prior to its scheduled expiration date and/or failure to remit payment of invoice(s) within 60 days of invoice date, all spots that have run prior to the cancellation date and/or schedules adhered to will be billed at the Rate Card. Client understands and agrees that a finance charge of 1.5% per month shall accrue on all accounts remaining unpaid one (1) month after invoice date. Client agrees to pay a USD\$25.00 service fee per returned check. If payment is not made as required, KUAM may, its option, without notice or demand payment, declare Client's credit account in default, in which case Client's entire balance(s) that are due and payable will be forwarded for collection. Client agrees to accept all consequences and to pay all costs, including attorney's fees, court fees, court costs and other expenses incurred as deemed necessary by KUAM to settle the account.

NON DISCRIMINATION CLAUSE: KUAMPacific Telestations, LLC does not discriminate on the basis of race or ethnicity in the placement, scheduling and completion of purchase of advertising. Any order for advertising that includes any such restriction will not be accepted.

Sabina Flores Perez
ACCEPTED BY CLIENT

[Signature]
ACCEPTED BY STATION



THE OFFICE OF SENATOR

Sabina Flores Perez



NOTICE OF PUBLIC HEARING
Guam Legislature, Public Hearing Room
Thursday, March 5th, 2026 beginning at 9:00 A.M.

AGENDA

The Committee will hear and accept testimony on the following:

Resolution No. 144-38 (COR) - *Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague* – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”



THE OFFICE OF SENATOR

Sabina Flores Perez



Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than Tuesday, March 3rd, 2026, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagatña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than 4:00pm, Tuesday, March 10, 2026.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

February 25, 2026

Transmitted via electronic mail

patrick.lujan@dpr.guam.gov

michelle.yamasta@dpr.guam.gov

Patrick Lujan
Guam State Historic Preservation Officer,
Division Supervisor
490 Chalan Palasyo, Agana Heights, 96910, Guam

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai SHPO Lujan,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez

Sabina Flores Perez

Senator, *I Mina'trentai Ocho Na Liheslaturan Guåhan*



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 4:02 PM

To: Patrick Lujan <patrick.lujan@dpr.guam.gov>, Michelle Yamasta <michelle.yamasta@dpr.guam.gov>

Cc: Senator Sabina Perez <senator.perez@guamlegislature.gov>

Håfa Adai SHPO Lujan,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR):

“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

We greatly appreciate your time and attention to this matter, and look forward to hearing from you.


Please confirm receipt of this email.

Si Yu'os ma'åse,
- Office of Senator Perez

3 attachments

 **First Notice Memo_Res. 144 (March).pdf**
419K

 **[SHPO] PH Invite_Res 144.docx.pdf**
452K

 **Res. No. 144-38 (COR).pdf**
1490K



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

February 25, 2026

Transmitted via electronic mail

rnelson@achp.gov

achp@achp.gov

Reid Nelson
Executive Director
401 F Street NW, Suite 308
Washington, DC 20001

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai Executive Director Nelson,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez
Sabina Flores Perez

Senator, *I Mina'trentai Ocho Na Liheslaturan Guåhan*



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 3:29 PM

To: melson@achp.gov, achp@achp.gov

Cc: jloichinger@achp.gov, sbeimers@achp.gov, Senator Sabina Perez <senator.perez@guamlegislature.gov>

Greetings and Håfa Adai Executive Director Nelson,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR):

“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”


We greatly appreciate your time and attention to this matter, and look forward to hearing from you.

Thank you and Si Yu'os ma'åse,
- Office of Senator Perez, 38th Guam Legislature

3 attachments

 **First Notice Memo_Res. 144 (March).pdf**
419K

 **[ACHP] PH Invite_Res 144.docx.pdf**
451K

 **Res. No. 144-38 (COR).pdf**
1490K



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Li Heslaturan Guahan
38th Guam Legislature

February 25, 2026

Transmitted via electronic mail
brett.w.mietus.mil@us.navy.mil

Brett Mietus
Rear Admiral
Commander, Joint Region Marianas
Affairs Office
PSC 455 Box 211
FPO AP, Guam 96540

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai Rear Admiral Mietus,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez
Sabina Flores Perez

Senator, *I Mina'trentai Ocho Na Li Heslaturan Guåhan*



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 3:36 PM

To: brett.w.mietus.mil@us.navy.mil

Cc: randel.i.sablan.civ@us.navy.mil, Senator Sabina Perez <senator.perez@guamlegislature.gov>

Håfa Adai Rear Admiral Mietus,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR):

“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

We greatly appreciate your time and attention to this matter and look forward to hearing from you.

Please confirm receipt of this email.

Si Yu'os ma'åse,
- Office of Senator Perez

3 attachments

First Notice Memo_Res. 144 (March).pdf
419K

[CJRM] PH Invite_Res 144.docx.pdf
450K

Res. No. 144-38 (COR).pdf
1490K



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

February 25, 2026

Transmitted via electronic mail

melvin.borja@guam.gov

Melvin Won Pat-Borja
President
Department of CHamoru Affairs
Guam Museum
193 Chalan Santo Papa Juan Pablo Dos
Hagatna, Guam 96910

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai President Won Pat-Borja,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez
Sabina Flores Perez



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Senator, *I Mina'trentai Ocho Na Liheslaturan Guåhan*

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)

cc: Linda Taitano Reyes, Simeon Palomo



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

2 messages

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 3:12 PM

To: melvin.borja@guam.gov

Cc: simeon.palomo@dca.guam.gov, [REDACTED], Senator Sabina Perez
<senator.perez@guamlegislature.gov>

Håfa Adai President Won Pat-Borja,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR).

We greatly appreciate your time and attention to this matter and look forward to hearing from you.

Please confirm receipt of this email.

Si Yu'os ma'åse,

- Office of Senator Perez

3 attachments

First Notice Memo_Res. 144 (March).pdf
419K

Res. No. 144-38 (COR).pdf
1490K

[DCA] PH Invite_Res 144.docx.pdf
451K



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

February 25, 2026

Transmitted via electronic mail

jcpreservation@guam.net

rspreservation@guam.net

Joseph E. Quinata
Chief Program Officer
Guam Preservation Trust
Historic Lujan House
167 Padre Palomo Street
Hagatna, Guam 96910

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai Chief Program Officer Quinata,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez

Sabina Flores Perez
Senator, *I Mina'trentai Ocho Na Liheslaturan Guåhan*



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 4:06 PM

To: jqpreservation@guam.net, rspreservation@guam.net

Cc: Senator Sabina Perez <senator.perez@guamlegislature.gov>

Håfa Adai Chief Program Officer Quinata,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR):

“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”


We greatly appreciate your time and attention to this matter, and look forward to hearing from you.


Please confirm receipt of this email.

Si Yu'os ma'åse,
- Office of Senator Perez

3 attachments

 [GPT] PH Invite_Res 144.pdf
219K

 First Notice Memo_Res. 144 (March).pdf
419K

 Res. No. 144-38 (COR).pdf
1490K



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

February 25, 2026

Transmitted via electronic mail

laura.souder@kumision.guam.gov

souder@betances.com

Dr. Laura Souder

Chairwoman

Kumisión i Fino' CHamoru

710 West Marine Corps Dr., Suite 203

Hagåtña, Guam 96910

Subject: Notice of Public Hearing: Thursday, March 5, 2026 at 9:00 a.m.

Håfa Adai Chairwoman Souder,

The Office of Senator Sabina Flores Perez will be conducting a public hearing on **Thursday, March 5, 2026 at 9:00 a.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

9:00 a.m.

- **Resolution No. 144-38 (COR)** – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Our office respectfully requests that you or your designee attend the public hearing to present and submit written testimony on the agenda items, and you are welcome to invite other members of your team who will provide valuable input. Please contact the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671)989-2968 if further guidance is needed.

Written testimonies may be submitted in advance. All testimony should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **4:00 p.m., Tuesday, March 10, 2025.**

We look forward to your participation.

Si Yu'os ma'åse,

Sabina Flores Perez
Sabina Flores Perez

Senator, *I Mina'trentai Ocho Na Liheslaturan Guåhan*



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
38th Guam Legislature

Attachments (3): First Public Notice
Resolution No. 144-38 (COR)



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Hearing Invitation - Thursday, March 5, 2026 at 9:00 a.m.

1 message

Office Senator Perez <office.senatorperez@guamlegislature.gov>

Wed, Feb 25, 2026 at 3:57 PM

To: laura.souder@kumision.guam.gov, souder@betances.com
Cc: Senator Sabina Perez <senator.perez@guamlegislature.gov>

Håfa Adai Chairwoman Souder,

Please see attached invitation and public notice memo from Senator Sabina Flores Perez regarding an upcoming Public Hearing on Resolution No. 144-38 (COR):




“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

We greatly appreciate your time and attention to this matter and look forward to hearing from you.

Please confirm receipt of this email.

Si Yu'os ma'åse,
- Office of Senator Perez

3 attachments

-  **First Notice Memo_Res. 144 (March).pdf**
419K
-  **[Kumision] PH Invite_Res 144.docx.pdf**
453K
-  **Res. No. 144-38 (COR).pdf**
1490K



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

AGENDA

PUBLIC HEARING

Thursday, March 5, 2026, at 9:00 a.m.

Guam Congress Building, Public Hearing Room

The agenda is as follows:

9:00 a.m.

Resolution No. 144-38 (COR) – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 5, 2026, 9:00 a.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Jarren Saratu	N/A	X		X		
Robert Underwood	self	X	X	X		
Veronica Guez	self	X				



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guahan
 38th Guam Legislature

Public Hearing Sign-In Sheet
 March 5, 2026, 9:00 a.m.
 Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guahan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
MONAEICA FLORES	PRUTEH GUAHAN	✓		✓		
Paulista Agmo		✓		✓		



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 5, 2026, 9:00 a.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Monika DeDio	self		✓	✓		
HOPE CRISTOBAL	Self			✓		



OFFICE OF SENATOR SABINA FLORES PEREZ
I Mina'trentai Ocho Na Liheslaturan Guåhan
 38th Guam Legislature

Public Hearing Sign-In Sheet
 March 5, 2026, 9:00 a.m.
 Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Eva Cruz			✓	✓		[REDACTED]
Jesse Chagacalan	Independent Guåhan		✓	✓		



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 5, 2026, 9:00 a.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Jovin Zanudo				✓		
Kallen Perez	self	✓		✓		
Maira Hernandez	Self Hita Litekym	✓				



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 5, 2026, 9:00 a.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Chris Barnett	SELF	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

March 06, 2026

MEMORANDUM

To: All Senators, Stakeholders, and Media

Fr: Senator Sabina Flores Perez

Subject: Notice of Public Hearing Continuation on March 11, 2026

The Office of Senator Sabina Flores Perez will resume the public hearing for Resolution No. 144-38 (COR) on **Wednesday, March 11, 2026 at 2:00 p.m.** The public hearing will take place in the Guam Congress Building, Public Hearing Room. The agenda is as follows:

2:00 p.m.

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – “Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.”

Those interested in participating, please confirm your attendance by contacting the Office of Senator Sabina Flores Perez via email at office.senatorperez@guamlegislature.gov or via phone at (671) 989-2968, no later than **Monday, March 09, 2026**, for further guidance.

Testimonies should be addressed to Senator Sabina Flores Perez, and will be accepted via hand delivery to our mailbox at the Guam Congress Building at 163 Chalan Santo Papa, Hagåtña, Guam 96910, or via email to office.senatorperez@guamlegislature.gov, no later than **5:00 p.m., Wednesday, March 11, 2026**.

In compliance with the Americans with Disabilities Act, individuals requiring special accommodations or services should contact the Office of Senator Sabina Flores Perez at (671) 989-2968.

The hearing will broadcast on local television, GTA Channel 21, Docomo Channel 117, and stream online via *I Liheslaturan Guåhan's* live feed on YouTube at <https://www.youtube.com/@GuamLegislatureMedia>. A recording of the hearing will be available online via Guam Legislature Media on YouTube after the hearing.

We look forward to your participation.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

AGENDA

PUBLIC HEARING

Thursday, March 11, 2026, at 2:00 p.m.

Guam Congress Building, Public Hearing Room

The agenda is as follows:

2:00 p.m.

Resolution No. 144-38 (COR) – Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague – Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 11, 2026, 2:00 p.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
<i>P. Byrd</i>		✓	✓	✓		
<i>Jarren Sarda</i>		✓		✓		
<i>Dave Letz</i>		✓	✓	✓		
<i>Patrick Lujan</i>	<i>Guam SHPO</i>					



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 11, 2026, 2:00 p.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Kallen Perez	self	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		
LaD Catling	SELF	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Public Hearing Sign-In Sheet

March 11, 2026, 2:00 p.m.

Guam Congress Building, Public Hearing Room

Resolution No. 144-38 (COR) - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague - **Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.**

NAME (please print)	AGENCY/ ORGANIZATION	Oral Testimony	Written Testimony	In Favor	Not In Favor	CONTACT INFORMATION
Kyle Rordan	Myself	✓	✓	✓		[REDACTED]

KUMISIÓN I FINO' CHAMORU YAN I FINA'NÁ'GUEN I HISTORIA YAN I LINA'LA' I TAOTAO TĀNO'

*Commission on CHamoru Language and the Teaching of the History
and Culture of the Indigenous People of Guam*



February 20, 2026

I Honorâble Sabina Flores Perez
Sinadora, 38th Liheslaturan Guåhan
710 West Marine Corps Dr., Bell Tower, Suite 303A
Hagåtña, Guam 96910

RE: Kumisión Testimony at Public Hearing March 5, 2026 on **Resolution No. 144-38 (COR)**
Senator Sabina Perez - "Relative to calling for the withdrawal of the Draft 2025 Programmatic
Agreement and the 2008 Programmatic Agreement governing Department of Defense
undertakings on Guåhan, and demanding full implementation of the National Historic
Preservation Act Section 106 process to protect CHamoru cultural resources for future
generations."

The Kumisión supports Resolution No. 144-38 (COR). It is imperative that accountability for
current and past actions under the Draft 2025 Programmatic Agreement and the 2008
Programmatic Agreement be upheld. Further, it is incumbent upon the federal government to
engage community organizations such as the Kumisión i Fino' CHamoru yan i Fina'ná'guen i
Historia yan i Lina'la' i Taotao Tāno' in providing essential feedback on planned actions
relative to land use to protect the vulnerable resources of our land and our ancestral legacy. It
is for these reasons wholeheartedly agree with the findings of Resolution No. 144-38 (COR)
and support legislative action to achieve its end.

Kon Respetu,

Dr. Laura M. Torres Souder,
Gé'helo', I Kumisión i Fino' CHamoru

TESTIMONY ON RESOLUTION 144-38

Robert A Underwood

March 5, 2026

Buenas yan Hafa Adai todos hamyo, man distengge na senadot!

I want to first of all thank Senator Sabina Perez for having the foresight and courage to introduce this resolution along with her current co-sponsors, Senators Therese Terlaje, Chris Barnett and Telo Taitague.

I want to thank you the opportunity to testify on this vital statement of purpose and renewal of commitment to preserve and protect the resources of our island of Guahan. In examining this statement, I take the time to remind everyone in the Legislature that you take many oaths of allegiance. You take the oath of office which is required by law under the laws of the United States for almost every official position. You also take the Inferesi which is a voluntary statement to protect the CHamoru people, their resources both human-formed as in culture and natural as in the physical environment.

In some ways, the programmatic agreement which is under consideration purports to carry this purpose out by mentioning CHamoru cultural and historical resources mostly archaeological. It outlines a renewed effort based on an older programmatic agreement. Like any agreement, a renewed agreement depends upon the history and the implementation of the previous one. I don't think we have the full story of the implementation of the previous agreement since there is little public discussion and transparency about all the construction and destruction which has already occurred.

It is interesting to note that in the name of construction, we engage first in destruction and disruption. In this case, the US Government will be again seeking to process the destruction of historically significant sites through what appears to be a balanced approach. In reality, it seeks to implement a process which is less rigorous than existing federal law. As the resolution points out, the island and, more importantly, our past would be better served by applying the National Historic Preservation Act (section 106) which is not included in the current proposed Programmatic Agreement.

As is true in all forms of institutional behavior, trust and mutuality is required for successful implementation of programs and policies. There is not much trust because there is not much transparency from the 2008 agreement and the results of the implementation of that document. When there is little trust, there must be processes of verification and increased mutuality. There is a reduction in "mutuality" in the proposed agreement.

In addition to this, the draft agreement doesn't mention any provisions to address environmental impacts associated with construction or operations including the effects of runoffs in order to protect the aquifer. The Government of Guam has no delegated authority under the Clean Water Act and DPW permits are not necessary for these construction projects. The new agreement only covers cultural resources. Where is the effort to protect the environment?

I know that many will say, the federal government is already obligated to adhere to environmental standards. I hasten to point out that those standards are being weakened under the current administration. The need to increase transparency and mutuality based on environmental disruption and degradation is also there. I urge you to raise those concerns as well.

The two most ominous words in this rapid militarization of our island is destruction and mitigation. There will be resources destroyed and there will be environmental assets disrupted. As always, there will always be "mitigation" projects outlined and proposed. The end result will be a series of new DMZ's on the island- Destruction, Mitigation Zones. I hope that we can get beyond such efforts and empower our own local agencies so that there is more mutuality and transparency.

Si Yu'os ma'ase',

Si Robert Underwood

Taotao Guahan, sumasaga Tamuneng

To: Sen. Sabina Flores Perez
Office of Senator Sabina F. Perez
163 Chalan Santo Papa, *Hagåtña*, Guam 96910

Testimony of Approval of Resolution No. 144-38

Buenas, Senadora yan Senadot-Siha. Si yu'os ma'ãse put todú i minapot-miyu para hami gi islã-ta. Malagu yu' bai sangãni hamyu' para hãfa mangaige hami guini. Este na "Programmatic Agreement" ti maolek para i taotao-ta, i famagu'on-ta yan i famagu'on-ñiha. Hu sapopotta i yimute put este na "PA." Bai sangãni i rason-hu siha gi fino' Ingles asi'ki todú na taotao guini siña mankomprende.

Allow me to explain what this PA is exactly about. I promise to be as unbiased as I can while also keeping it fast and brief. The Programmatic Agreement is a stated, legally binding agreement between the Guam State Historic Preservation Office and the Joint Region Marianas, specifically mentioning the Commander of the JRM and the SHPO's Preservation Officer. The PA is a mutual contract of agreement between the JRM and the SHPO in regards to the Department of Defense's undertakings of the Island of Guam. An undertaking defined in this instance as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." as per the National Historic Preservation Act of 1966.

The PA essentially states the actions and steps that the JRM will have to follow while maintaining current acquisitions as well as future acquisitions of land here on our island. These said steps and actions are meant to ensure full preservation of the island's historic resources, landmarks, and archaeological findings should they be discovered if not already have been discovered within what the PA calls the CJRM's "Area of Responsibility." The AOR is referred to in the PA as "Department of Defense property in the Island of Guam." It is also mentioned about allowing access to cultural sites through a development made by the CJRM called the Public Access Plan (PAP) with the purpose of "providing the

local community access to collect medicinal and other plants used for traditional purposes and providing access to spaces that hold special significance to the local community.”

Many of these seem promising at a first glance. However, there are some very concerning prospects that no one seems to talk about. In that regard, I also asked for the advice and review of the PA by Guam’s State Archaeologist for the SHPO. Stipulation II.A.3 states the following "Traditional Cultural Place (TCP) studies and eligibility determinations will be carried out by, or under the oversight, or supervision of, a person or persons having a graduate degree in Anthropology, History, or closely related field; documented experience or expertise involving Pacific island cultures and previous experience conducting TCP studies and evaluations.” While this is true, it is highly recommended said person or persons should also meet the SOI’s Qualification Standards for Anthropology.

Stipulation V.B states, “CJRM (Commander of the Joint Region Marianas) will provide the SHPO with all updates to the GIS (Geological Information System) during the quarterly reporting update.” In previous times, the GIS updates given were wrong in the past. For example, there was an instance in which the CJRM had excluded a site that was on their maps from the GIS. The exclusion was a site that is on Ordnance Annex, or formerly known as Naval Magazine. Just to note, Naval Magazine is the original location of the latte stones that were relocated to Latte Stone Park (Sen. Angel Santos Park) in Hagåtña. For that reason, it should also be mentioned that any and all updates given to the SHPO from the CJRM are to be double checked to ensure complete accuracy.

Continuing with Stipulation VIII.A.1, “CJRM shall use good faith effort to provide at least 72 hours advance notice to the SHPO in an area identified as No Archaeological Sensitivity in Appendix B or the most recent finalized Archaeological Sensitivity Maps submission.” followed with “In circumstances where prior notice is not practicable, CJRM shall endeavor to provide notice as soon as thereafter as possible.” Firstly, a 72 hour advance notice is almost insulting as all necessary measures should be followed as there is no absolute way to tell

whether an area with No Archaeological Sensitivity is true before groundbreaking can be made, even if an area is said to be not historically significant. Secondly, to quote the last sentence, there should at least be an example of an event or events that could possibly take place in which the CJRM would be unable to give prior notice to the SHPO.

Jumping forward to the PA's Standard Operating Procedure (SOP) for human remains. Stipulation I. talks about the initial discovery and the procedures that should be followed when coming across remains. It does not mention, however, about giving any notice to the SHPO, only mentioning that the CJRM and the CRM (Cultural Resources Manager) are to be notified immediately. The fact of the matter is that the SHPO must be informed of any and all discoveries as all discoveries are archaeological in nature and need to be reported as such, especially prehistoric and WWII remains and a full report must be provided, no exceptions.

We can not expect full historic preservation when we have these blatant loopholes and pathways in which the JRM can bypass the SHPO. Our people deserve better and this Programmatic Agreement is far from it. These are facts that must be taken into account before we can move forward. Otherwise, we are no better than dogs who roll belly up when the alpha comes around. The SHPO's Historic Preservation Officer has failed in his duty and responsibility by letting this PA go through to the desk of the Governor. Now that the opportunity to rewind the horrible mistake that has been presented, this is no longer a debate. The withdrawal of the Draft 2025 PA and 2008 PA must go forward without delay, or we shall risk more of our land being taken away from us and the continued destruction of our history. Si yu'os ma'åse ta'lu ya Biba Mes CHamoru.

Put Respetu,



Jarren Saralu

Stipulation VIII.A.3, Line 3 - "If a previously approved work plan exists for a relevant prior project (e.g. same geographic location and/or same activities) that plan may be cited to fulfill the requirement."

Plan should be made based on a shovel test down 1 meter for every 15 meters for all undertakings.

Stipulation IX.A.1 (In the case where previously unrecorded resources are encountered during construction or other undertaking, the CJRM will adhere to the following) - "Halt work in the immediate area and fully record the resources, taking reasonable measures to protect the find until consultation is completed. CJRM will notify the SHPO of the find."

Who will be fully recording the resources and what is the timeframe that the CJRM will notify the SHPO of the finding?

Stipulation IX.A.3 - If the CJRM determines the find to not be eligible for the National Registry of Historic Places, then the project will proceed following documentation of the discovery and completion of a SHPO site form. CJRM shall submit a report of findings to the SHPO following completion of ground disturbance."

There must be consultation with the SHPO on whether a find should be eligible for the NRHP. The CJRM has no right to determine that solely on his own.

Stipulation XI - "The SHPO may request an audit of activities carried out pursuant to this PA. CJRM will cooperate with all document requests, provided it will not result in delay or loss of Military Construction (MILCON) or other funding, or mission execution. The Signatories recognize that mission, operational, or other matters of national security may affect the schedule of any deliverable."

No timeframe set for audit nor mention of releasing the audit to the public. Should be sent once a year.

Stipulation II. - (SOP for Human Remains) - "The installation CRM shall confirm the skeletal remains are human. If the installation CRM is unable to confirm the remains are human, they will seek the opinion of a professional trained in the identification of human remains such as an archaeologist, physical anthropologist, forensic specialist. If the skeletal remains are identified as human (or human cannot be ruled out), then proceed to Step III."

The CRM should NOT be determining if the remains are human or not. Much less examining them. An SOI qualified Osteologist should be present to take over examination of any remains.

Stipulation II.E.1, Line 5 (If the skeletal remains are determined to be older than 50 years and are not associated with WWII) - "If a local organization, family, or agency expresses an interest in participating in the consultation process, they must submit a written request expressing their desire to participate and identify their relationship to the remains. All comments received during consultation will be considered in making final disposition determinations."

Does not state in what way the CJRM or responsible persons will inform the community and interested parties. How would these people know? What lengths is the CJRM willing to go through?

Final Public Testimony: Support for Resolution No. 144-38 (COR)
Presented by: Baltazar Bordallo Aguon
Date: March 5, 2026

Hafa Adai, Chairperson Perez and members of the Committee;

My name is Baltazar Bordallo Aguon. I am the son of Edward LG and Katherine B. Aguon. I stand in **full support of Resolution No. 144-38 (COR)** to withdraw the Draft 2025 Programmatic Agreement.

This Draft Agreement is effectively a **pre-authorization for the erasure of our history**. It prioritizes **MILCON construction timelines** over the ethical care of our ancestors, **I Manmo'na**. I urge this Committee to reject this draft based on these four points:

1. The Commander-as-Judge (The Central Flaw)

Under **Stipulation XIII**, the JRM Commander is the final authority on all disputes. Even if the Advisory Council on Historic Preservation (ACHP) provides expert recommendations, the Commander can simply "document his rationale" and proceed anyway.

- **The Problem:** We are being asked to trust a process where the person building the project, is also the person deciding if the project's impact is "acceptable".

2. The SHPO: Collaboration in a Hollow Agreement

The State Historic Preservation Officer (SHPO) is mandated to be our primary check and balance. Instead, the SHPO has collaborated in the creation of a **legally hollow agreement** that hands all real oversight to the military Commander.

- **The Abdication:** By being a party to the creation of this draft, the SHPO has essentially abdicated his duty to the people of Guam.
- **Contractor Custody:** This draft allows a military "Cultural Manager" to be the gatekeeper who decides if our ancestors are "significant" enough to warrant protection, while allowing private contractors to hold our ancestral remains and artifacts in their laboratories.

3. Emergency Erasure (Stipulations XVII & IX.B)

This draft agreement grants "Emergency" powers that allow for major impacts to be declared and acted upon within **72 hours** of a disaster.

- **The Overbroad Definition:** These powers are dangerously broad, allowing the Commander to declare an "emergency" based on vague "operational needs" or manpower issues.
- **The Typhoon Analogy:** Imagine our community in the wake of a devastating typhoon. While our families are struggling for water, power, and survival, this PA gives the military a 72-hour window to clear protected sites while no one is looking, without any community oversight. It is predatory "streamlining" at our most vulnerable moment.

4. Failure of Informed Consent (The "404" Consultation)

You cannot have "Informed Consent" when the data is hidden behind broken links.

- **The Problem:** Searches on the SHPO and JRM websites for the "Draft PA 2025" consistently yield **"404 Page Not Found"** errors for critical documents. While the Governor's website links to the agreement, **Appendix A** (JRM landholdings) and **Appendix B** (Archaeological Sensitivity Maps) are either missing or irrelevant. It is impossible for the public to know what they are actually agreeing to.

Conclusion: Law Over "Streamlining"

Stipulations IX and XI of this draft suggest that preservation compliance can be bypassed or rushed simply to meet **"MILCON" construction timelines**. This proves that this Draft PA is about a deadline, not about protection.

I am not here to ask for a "better" Programmatic Agreement. I am here to demand a return to the **full Section 106 process** as intended by the National Historic Preservation Act. We need a **"Single Point of Truth"**—a transparent system where the public can actually see the data. We need a process that respects our perpetual connection to our land, not a "streamlined" agreement designed to **manage us out of the way**.

I ask the Committee to support Resolution 144-38 and return us to the full Section 106 process.

Si Yu'os yan Saina Ma'åse'.
/s/ Baltazar B. Aguon

SUPPLEMENTAL TESTIMONY IN SUPPORT OF RESOLUTION 144-38

Baltazar B. Aguon

March 11, 2026

Håfa Adai yan Buenas Chairwoman Perez, Senators Terlaje, Barnett, and Taitague.

Si Batasåt Butdazu Aguon yu, låhen difuntu Edward LG Aguon yan Katherine Butdazu Aguon. Taotao Tomhom yu. And I stand in full support of Resolution 144-38.

I. The Choice of Law

Senator Perez's Resolution is a demand for the rule of law. **Section 106** of the **National Historic Preservation Act (NHPA)** is a federal mandate designed to ensure the public has a decisive voice in protecting our heritage.

The 2008 Programmatic Agreement (PA) replaced that public voice with a "closed-door" policy, leaving us a legacy of broken promises. Because the military and the SHPO have failed to deliver the status reports and cultural assessments mandated nearly two decades ago, the 2008 PA stands in **total breach**. Instead of holding the military accountable, the SHPO has collaborated on this 2025 draft—an insane legal maneuver to wipe the slate clean. We must see it for what it truly is: a **Strategic Reset Button** co-authored by the very office meant to protect us, intended to erase eighteen years of failed oversight.

How can our elected leaders be expected to trust a new "Umbrella" agreement when the military and SHPO remain in open default of the 2008 PA?

II. The Betrayal of Trust

The SHPO's primary role is to be an advocate for the people of Guahan. Instead, we are witnessing an abdication of that duty.

On February 3rd, I submitted formal comments to the SHPO and the ACHP. In Section 7, Point C, I specifically addressed the missing Appendices A and B. Despite numerous public requests to provide these documents, there has been **zero** action and **zero** answers. Is this silence intentional? What is being hidden? Did the SHPO review a complete document, or is he intentionally keeping the public in a **"Strategic Fog"**?

By ignoring demands for transparency and allowing a draft with missing vital documents to proceed, the SHPO has betrayed the public trust and abandoned his role as our advocate.

III. The Invisible Border

These missing appendices drops a wide, steel-cage over our island. The **"Area of Potential Effect"** (APE) in this draft is dangerously vague.

Because the APE is undefined, **Tun Pete's farm** near Andersen could be reclassified as a **"security necessity"** without a single public hearing. Because this cage covers the entire

island, families in **Piti and Hågat** could wake up to find their ancestral lands absorbed for "Naval expansion" under the guise of this superseding agreement.

By refusing to draw a hard line on the APE, the military has turned Guahan into a playground where our farms and forests are treated as "**disposable**." This APE is effectively **infinite**—granting the JRM a blank check to identify, claim, and take land **without public consent**.

IV. The Future Land Takings (Appendix A)

The most alarming part of this draft is exactly what is *not* being said. While the APE creates the legal cage, Appendix A is the map of the targets inside it. This map—detailing JRM landholdings and potential "**required**" lands—remains hidden from public view. Why?

They will claim "National Security." But whose security? The citizens of the Continental U.S.? It certainly isn't ours. Until we have a voting Representative in Congress and two Senators in the Senate to fight for our rights to Life, Liberty, and the Pursuit of Happiness, **we are not truly part of the democratic fabric of the US.** True security is the safety of our water, the health of our soil, and the preservation of the culture that makes the Marianas a home worth fighting for. This PA is a land-grab in disguise.

V. The Real Debt

We don't need "hiking trails" to lands we can't access, or studies of caves on land stolen from indigenous families. **We need the Law.** For thirty years, we have lived with the "**Toxic 12**"—twelve major sites of military contamination across our island. While the 2008 PA sat in **breach**, these toxins didn't wait; they leached into our soil and migrated into our water.

Because the military expects a "Fast Pass" through our history while our Northern Aquifer is poisoned by their legacy, it is time they pay the real debt:

- **\$20 Million for the Naftan Mañaina-ta:** To finally lay to rest the ancestors collected by Hornbostel, and those unearthed at Sabånan Fadang and Tailålo who remain in private labs.
- **\$55 Million for Water Remediation:** To treat the Dieldrin still appearing in our wells decades after it was "identified."
- **\$100 Million for PFAS/PFOS Soil Remediation:** To stop the "forever chemicals" from destroying our primary source of life.
- **The Immediate Return of Ancestral Lands** to the original landowners.

VI. Conclusion

To the Senators who have not yet signed on to Resolution 144-38:

Because the 2025 PA seeks to **legalize the seizure of our history and our land**, I urge you to stand with the sponsors. **We must demand a return to the transparency of Section 106.** Rejecting this "Umbrella" PA is the only path that ensures **Tun Pete has a fighting chance to save his farm.** It is the only way to guarantee that the families of **Piti and Hâgat can still pass down a sacred inheritance**—not a toxic legacy—to the generations that follow.

Senators, we are asking you to choose our **people** over a **"Strategic Reset."**

As our elected leaders, you are our only shield.

Si Yu'os yan Saina Ma'âse,

A handwritten signature in black ink, appearing to read 'Baltazar B. Aguon', written in a cursive style.

Baltazar B. Aguon

March 5, 2026

Senator Sabina Perez
38th Guam Legislature
Hagatna, Guam

Re: Resolution 144-38 regarding the withdrawal of the Draft 2025 Programmatic Agreement (PA) and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guahan and demanding full implementation of the National Historic Preservation Action 106 process to protect CHamoru cultural resources for future generations.

Senator Perez:

I am in support of Resolution 144-38 for the following reasons:

First, the PA omits any further involvement by the public and the Advisory Council on Historic Preservation both of which are required to be involved. For example, Section 106 regulations mention the public 62 times and the draft PA does not mention the public once.

Second, the PA is incomplete as Appendix A, Joint Region Marianas Landholding, and Appendix B, Archaeological Sensitivity Maps, are not included.

Third, the PA has a reference to future military land acquisitions with no description of these future land takings. Early on in the military buildup, DoD stated there would be no land acquisition on Guam.

Fourth, no projects are described or their impacts on our cultural resources.

This draft 2005 PA is just designed to abdicate Guam State Historic Preservation Officer's (SHPO) responsibilities to the military which is unacceptable.

Beyond passage of this resolution, I recommend that legislation be enacted to ensure that Guahan policies of historic preservation reflect community values and concerns to include the following:

First, policy making and oversight responsibilities for the Historic Resources Division should be assigned to the Guam Review Board for Historic Preservation.

Second, public review procedures should be established by law for all Section 106 undertakings.

Third, the web page for the Historic Resources Division shall post all Section 106 documents.

Fourth, the Guam SHPO shall publish a yearly public report of all Federal and Guam undertakings reviewed.

Respectively submitted,



David Lotz



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Public Comment in support of Resolution 144-38

3 messages

Cassie Bordallo [REDACTED]

Thu, Mar 5, 2026 at 9:22 AM

To: "office.senatorperez@guamlegislature.gov" <office.senatorperez@guamlegislature.gov>

Håfa adai Senator Perez,

Guåhu si Cassie Bordallo, and I'm writing as a daughter of Guåhan and a concerned community member who cares deeply about protecting our island's cultural heritage and natural environment. I am writing in support of Resolution 144-38 to withdraw the Draft 2025 and 2008 Programmatic Agreement.

I oppose the Draft 2025 Programmatic Agreement (PA) because it weakens transparency, limits public participation, and gives the Department of Defense too much unchecked authority over our cultural resources. This agreement would allow a wide range of undertakings such as construction, clearing, demolition, and even future land acquisitions to move forward without the project-specific Section 106 of the National Historic Preservation Act (NHPA) reviews that our community relies on to stay informed and involved.

The 2025 Draft Programmatic Agreement does not meet the standards laid out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the United States has committed to uphold. Articles 12, 18, 19, and 32 recognize the rights of Indigenous peoples to protect our ancestral remains, to be meaningfully involved in decisions that affect us, and to give free, prior, and informed consent before any project moves forward on our lands. This current draft does not create space for formal Indigenous participation, nor does it ensure that we have full access to information or the real ability to give or withhold our consent.

Additionally, before replacing the 2008 PA, the public deserves a full accounting of what happened under it: what was built, what was damaged, what was discovered, and how ancestral remains were treated. None of that information has been shared, yet we're being asked to accept an even broader agreement.

The draft also sidelines CHamoru cultural practitioners and community organizations. Decisions about discoveries, burials, and cultural sites should not rest solely with CJRM and SHPO. Indigenous voices must be part of the process from the beginning, not after the fact.

Finally, the scope of this PA is too broad. High-impact projects, including major military expansions, should undergo full, transparent review, not to be covered under a blanket agreement.

For these reasons, I support your resolution to withdraw the Draft 2025 and 2008 Programmatic Agreement and require a process that is transparent, accountable, and inclusive of meaningful community participation.

Si Yu'os Ma'åse,

Cassie Bordallo



Office Senator Perez <office.senatorperez@guamlegislature.gov>

144-38 comment_opposition to SHIPO Agreement

4 messages

Victoria Manley [REDACTED]

Thu, Mar 5, 2026 at 9:56 AM

To: Office Senator Perez <office.senatorperez@guamlegislature.gov>, Senator Darrel Christopher Barnett <malafunkshun@guamlegislature.gov>, "senatorterlajeguam@gmail.com" <senatorterlajeguam@gmail.com>

Hafa adai to my trusted senators,

my name is Victoria Manley. I was not able to attend todays hearing.

I would like to have on digital record that I oppose the SHIPO agreement to leave out, bypass, omit public engagement and comments for these projects by the military institutions on Guahan.

There is simply too much taken away.

There are still families that know where their ancestral lands are and we must keep that knowledge.

We must advocate for our inclusion as people of this land.

My recommendation is similar to Moneka flores from prutehi Guahan as she has done a vast amount of research. Essentially I want easily accessible information and knowledge of projects that is comprehensible and invitation to changes, burials and open transparency. This agreement does not privy to any of these needs as a CHamorro citizen.

Thank you for your work, time and energy.



Office Senator Perez <office.senatorperez@guamlegislature.gov>

Deep Concerns re: Draft 2025 PA under the NHPA Section 106

6 messages

molly ann [REDACTED]
To: office.senatorperez@guamlegislature.gov, office@senatorperez.org

Thu, Mar 5, 2026 at 11:30 AM

Dear Senator Perez, Sabina,

I am writing to formally express my concerns regarding the Draft 2025 Programmatic Agreement under NHPA Section 106. **I totally disagree with this proposal, and our future Generations were not taken into consideration**

As a teacher who serves many students in our community, I feel a strong responsibility to advocate for the protection of Guam's cultural heritage. After reviewing and learning more about it, I am deeply concerned about the lack of transparency in its timing. The limited opportunity for community involvement and the insufficient safeguards for our Island's cultural and historical resources.

The people of Guam deserve a meaningful and inclusive review process. I respectfully urge you to ensure that our community is given adequate time to fully examine this Draft Programmatic Agreement and to participate in genuine public consultation. Each project that may impact our cultural heritage should be reviewed individually, with careful consideration and active community engagement.

Our history, traditions, and sacred sites are invaluable. Decisions that affect them must not be Rushed or handled without the voices of the people most connected to this land.

Thank you for your time and consideration. I sincerely hope you will take these concerns into account and support a transparent, thorough, and community-centered review process.

Respectfully,
Molly Aguon-Diaz
Concern Citizen for the FUTURE
[REDACTED]

March 8, 2026

To: Senator Sabina Perez
From: Kisha Borja-Quichocho-Calvo
Subject: Comment in Support of Resolution No. 144-38 (COR)

Håfa Adai Senator Perez,

My name is Kisha Borja-Quichocho-Calvo, and I am a CHamoru daughter of Guåhan. I am submitting this comment in support of Resolution No. 144-38 (COR), which calls for the withdrawal of the Draft 2025 and the 2008 Programmatic Agreements and the full enforcement of the National Historic Preservation Act Section 106 process to protect CHamoru cultural artifacts and cultural sites.

The Draft 2025 Programmatic Agreement (PA) presents multiple problems which are concerning for our community of Guåhan. First, it allows for mere consultation of the Agreement, rather than seeks the consent of the people of Guåhan. It solely depends on the approval of only two signatures, that of the Commander of the Joint Region Marianas (CJRM) and that of the Guam State Historic Preservation Officer (SHPO). This is problematic because only two individuals are making decisions about the protection and the potential destruction of the lands, ocean waters, and air spaces of Guåhan. However, the input on and approval (or disapproval) of our natural resources and of the protection and potential destruction of our island should include the voices of the larger community of Guåhan. This includes our local leaders, our community groups, our cultural groups, and other general members of our community. If the PA affects Guåhan and its people, then genuine discussion with the people of the island and the consent of the people should be sought and achieved.

Another problem with the PA is that it reduces the transparency of the US military and disregards the procedures outlined in Section 106 of the National Historic Preservation Act (NHPA). While Section 106 of the NHPA is supposed to provide greater protection for places like Guåhan and is supposed to hold a US federal institution, in this case the US military, accountable for its plans and actions, this Draft PA overlooks this process and attempts to bypass it. This is concerning because how can our community hold the military accountable if it ignores protections that have been put in place for our island and if it continues to do what it wants, without, for example, fulfilling Step 1 in Section 106 of NHPA? It is critical that we protect our sacred sites, inclusive of our ancestral burial grounds and our cultural artifacts, particularly for our community cultural groups, traditional CHamoru practitioners, and general community members who stand to lose much of our history and culture with the destruction, clearing, and erasure of our sacred sites.

Third, the Draft 2025 PA expands the scope of the original 2008 PA by automatically including all future land acquisitions by the CJRM. This is problematic because it means that this proposed 2025 Draft PA will serve as an umbrella Agreement, superseding other previous and existing documents related to US military activities in Guåhan, such as the Enhanced Integrated Air and Missile Defense System (EIAMDS), the 2020 Mariana Islands Training and Testing, and the 2011 Relocation agreements. This is unacceptable as each military

project — which could potentially harm our environment, destroy parts of our CHamoru history and culture, impact our natural resources and the health of our people — should be formally reviewed at length by and discussed with the people who stand to lose the most and the people who stand to be the most impacted, the people of Guåhan. A blanket Agreement is not only lazy; it seeks to serve only one side of the equation, the US military, meanwhile ignoring the people of Guåhan.

The Draft 2025 PA further lacks information, specific details about what it covers, what projects the military plans to pursue, and what areas are going to be affected. One should never sign any document that does not reveal all of the relevant and necessary details that needs to be known about a project, activity, or anything for that matter. So why should our community accept this Draft 2025 PA? Why should we commit to something that we are in the dark about or that we are not consulted about? This Agreement privileges only one voice in our community, that of the SHPO, while also ignoring the voices of the people of Guåhan. It also makes it seem as if the people of Guåhan accept the PA and all of the military projects and activities it covers, which is not the truth.

There are too many problems with the Draft 2025 Programmatic Agreement, hence its other name, “Problematic Agreement”. It does not reflect discussion, collaboration, and consent between all relevant parties in our community. This proposed PA should not be signed before real discussions are had with our community and without the involvement of the community it affects the most. Please ensure that these discussions are held and that more detailed information on the potential military projects and land takings are provided to us.

Throughout the past century, too much of our lands and waters have been stolen and destroyed by the US military. How much more do we have to sacrifice for this federal institution? Esta nahong. Enough is enough.

Si Yu'os ma'åse',
Kisha Borja-Quichocho-Calvo
Mangilao, Guåhan

Written Testimony

Ian Catling

Currently: Science Teacher (Southern High School)

Former: Historic Preservation Specialist

Former: Alternate State Liaison Officer(Land Water Conservation Funds – DPR)

Former: Senatorial Candidate for the 37th Guam Legislature

As a former Historic Preservation Specialist for the Office of the SHPO, I speak with the hopes of educating the greater Guahan public as well as the esteemed members of congress.

I will start by making a few recommendations:

First: It is within the power of the Legislature to change the title of SHPO'S Office to a more appropriate title, which is THPO (Tribal Historic Preservation Office). What is the significance of this change? First, let's define the term State. In this context, State has two meanings: An independent country that controls its own borders AND generates its own GDP. We do neither. The other more obvious definition is anyone of the States part of the United States. As an unincorporated Territory, we do not fit this definition either. THPO is more appropriate given that we (the CHamoru people) are, not just a Tribe, but THE Tribe of the Marianas. The language used affects the outcome.

The second recommendation is for the island constituents and the Gubernatorial candidates gearing up for this election season. We do not have a SHPO. Pat Lujan is a GHPO, NOT a SHPO. In the absence of a Gubernatorially appointed SHPO, the Guam Historic Preservation Officer acts in the capacity of SHPO. If the conflict of interest is too great for the community to have a SHPO who is also employed by the military, then reach out to the Executive branch and let them appoint a SHPO. We've been here before, SHPO takes on Federal projects whereas GHPO handles local projects. There is already an established system in place for instances such as these. The reason for the classified position of GHPO is to guarantee continuity of service to the greater island community. Each new Executive administration can appoint their own SHPO, so having a new SHPO every 4 to 8 years can cause disruption of service to the greater island community.

Third Recommendation is to consult the Advisory Council on Historic Preservation before bringing this law to the floor. The ACHP is the federal agency charged with overseeing the Section 106 process. The ACHP actively mediated between the residents on the island of Tinian and the military when there were differences with expectations and outcomes.

Guam State Historic Preservation Officer Testimony

(Draft Programmatic Agreement Response)

Håfa Adai. For the record, my name is Patrick Quenga Lujan, and I serve as the Guam State Historic Preservation Officer.

I want to begin with an apology for my absence at last week's hearing. However, I believe you will understand why: just last night, I had the honor of bringing four of our ancestors home from the American Museum of Natural History in New York City. Alongside our CHamoru diaspora—led by Fran Lujan, Heidi Chargualaf, Tina Delisle, Manny Crisostomo, Judge Johnny Gogo, Jesi Bennett and others—we held a beautiful send-off ceremony with the Native American Lenape Nation. After more than a century in a museum, and far longer away from their soil, our ancestors are finally back. They will eventually rest at the Naftan Manaiña-ta once it is complete.

I am also deeply humbled that the children of the late Angel Santos entrusted me to wear this adze, which belonged to their father. I wore it in New York, and I wear it today, hoping to honor the legacy of a man who fought so fiercely for our people. It will go back to the family after this hearing.

Regarding the Programmatic Agreement (PA):

I want to express my sincere appreciation to everyone who has submitted comments so far. I assure you that every single voice is being heard, accessed, and addressed. Since we opened the public comment window in December, we have granted two extensions—

totaling 105 days—to ensure everyone has the opportunity to review and comment – March 20th being the deadline. This is transparency!

However, I must be honest: our **dialogue** thus far has been confined to formal letters, FOIA requests, newspaper banter, and this public hearing. I believe that mature, professional dialogue could have cleared up much of the misinformation currently fueling public tension.

I have been criticized by some who say my military background makes me unfit for this role. I disagree. Now retired after 24 years in the Air Force Reserve and three deployments dealing with the Middle East, I have seen firsthand how sovereign nations negotiate with the Department of Defense. I have sat at high-level negotiation tables at U.S. Central Command. I know that an "agreement" is not a surrender; it is the result of sometimes grueling diplomacy. That is what we have done for the last three years regarding this PA. We had the difficult conversations with JRM to ensure we had a solid draft before bringing it to the public. And who am I negotiating with on the other side of the fence? Fellow CHamorus and people who call Guam home. Believe it or not, they too, have the best interest for Guam.

To those who doubt my intentions: Just because I wore the cloth of your enemy does not make me an enemy. My blood is thicker than any fatigues.

My father used to say: believe none you hear, and half you see.

The Risks of Termination

Now let's talk about the 'ask' from your Resolution. The Ask to terminate the existing Agreement and kick the draft into the landfill.

Well, let's ask ourselves: What happens if we terminate this PA? Do we terminate all other PAs that we currently have with the military and other federal agencies?

To be clear, the Advisory Council on Historic Preservation **encourages** the use of PAs as a key tool for streamlining compliance with Section 106 of the National Historic Preservation Act.

If we walk away, we don't just lose this seat; we potentially trigger nationwide PAs managed by the ACHP. In those scenarios, we lose local control entirely. **And I guarantee you (100%) that's what they will do.** Will the Legislature or the Attorney General provide the critical legal support required to navigate that complex fallout?

Under previous and existing Agreements with the military, Guam has negotiated and gained – among other things - the Cultural Repository, the Guam Synthesis Study, much-needed technical expertise, a Public Access Plan, and mandatory cultural sensitivity training for military personnel. All unique to our island.

With this new draft, we have secured a Commitment Letter for four additional major items – not to mention updating the archaeological probability maps and finetuning the reporting processes. Such agreement really encourages long-term cooperation with institutional relationships, not based on the

rotating military door and ever-changing personalities. They are binded to the Agreement.

If we revert to project-by-project reviews as asked by your Resolution, we lose all of that. We lose the "big picture" of cumulative impact.

For those who still don't understand the process, we will offer Section 106 training for you and other stakeholders for better understanding and clarity to your questions and concerns.

As I've said in the past, this PA is an operational tool, not a political one.

A Call for Unity

So I plead with this body, the activists, and the public: work *with* me, not against me. We are on the same team. Use this same energy and attention in helping me update our local statutes, which currently fall far short of federal standards. Where is this outcry when developers, private land owners, and telecom companies run over our weak laws?

I have had a legislative rewrite ready and for sale since 2021—I am still waiting for someone to take it for a test drive. There has been little to no action on that initiative, but we have a cultural shakedown when a beneficial agreement with the military arises. Why?

Let us show those who look at us as a colony that we can govern ourselves with maturity, honor, and respect. We are **better** than the division we see today. ****

That concludes my testimony. I respectfully ask that any further questions be submitted in writing.

I am currently running on fumes after a long trip to bring our ancestors home.

Thank you for understanding.



11 Mar 26



DEPARTMENT OF THE NAVY
JOINT REGION MARIANAS
PSC 455 BOX 211
FPO AP 96540-1000

5090
Ser J00/ 0587
November 14, 2025

Mr. Patrick Lujan
State Historic Preservation Officer
Department of Parks & Recreation
490 Chalan Palayso
Agana Heights, Guam 96910

SUBJECT: CONTINUED COMMITMENT TO CULTURAL RESOURCE MANAGEMENT PARTNERSHIP

Håfa Adai Mr. Lujan,


As part of Joint Region Marianas' (JRM) partnership with your office, I wanted to provide you an update on several shared interests:

- Implementation and Maintenance of the Electronic State Historic Preservation Officer (E-SHPO) Portal. After the initial development of a pilot E-SHPO portal, a local contract was awarded in September 2025 for \$140K for the full launch of the portal. The initial contract was funded by Missile Defense Agency (MDA). Annual web hosting and maintenance of the portal will cost approximately \$85K (funding source still to be determined).
- Star Cave Study. The proposal was well received by the Department of War (DoW) Legacy Program, which viewed it as a strong candidate for DoW Legacy Program Funding. We are optimistic concerning approval of \$205K this fiscal year for the study and preservation of the historic rock art images within the cave.
- Cultural Resources Workforce Development Program. Designed to develop a strong cultural resources workforce on Guam, this program remains in development with the University of Guam. Estimated at \$400K, this is another project we plan to submit to the DoW Legacy Program for consideration.
- West Bonya Latte Sites Interpretive Hiking Trail. JRM is examining potential access and funding solutions. This project will require close coordination between your office, Naval Base Guam, and the National Park Service. We are committed to exploring an approach that would both meet the desired intent while maintaining the required security within the Naval Magazine.

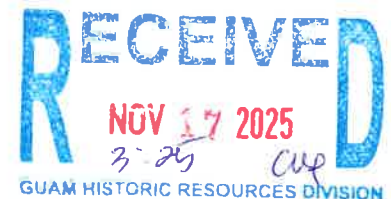
In addition to the above initiatives, we recently awarded a contract for \$482K to provide continued liaison support with your office for another year.

JRM remains committed to our continued partnership and shared goal of protecting the historic properties and cultural resources on the island. Should you have any questions, please contact Christopher King at christopher.a.king94.civ@us.navy.mil or (671) 339-3117.

Very Respectfully,


B. W. MIETUS
Rear Admiral, U.S. Navy
Commander

Date Received:	Staff Initial:
Doc. Dates:	Incoming No.:
RC No:	Other No.:
SHPO Comments:	
1.	
2.	
3.	



Public Testimony from Kyle Riordan
Regarding Resolution 144-38 and the Draft 2025 Programmatic Agreement
Governing Department of Defense Undertakings on Guåhan

Håfa Adai and thank you to all of the Senators who are here today to facilitate this public hearing.

I am here today to offer testimony in support of Resolution 144-38, which calls for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demands the full implementation of the National Historic Preservation Act Section 106 process.

Of all the options available to the public at this stage, this resolution represents the most procedurally consequential and the most defensible. It is also the most likely to produce the meaningful public participation that this process has thus far failed to deliver. My prediction is it will not produce a case-by-case section 106 review process but rather would only continue the PA drafting process and increase the time for revisions to be included from more perspectives from the ACHP and others.

I think it needs to be said that intentions don't matter in this situation, the appeal to emotion which that sentiment stems from is misplaced at best and distracting at worst. I would like to think we all have good intentions here if we have shown up here. Standing further than we are now in solidarity and in collaboration is what we need. Dreaming bigger is what we need.

Making sure more inclusive representation and collaborative drafting is conducted is long past due, regardless of intentions. The roundtable process is not just past due, the roundtable should be the SOP for drafting these PA's from the very beginning. Why that is not in place, to this day in 2026, is mind-boggling.

As the Guam SHPO stated in his comment, there are little things that are not working out quite well. I see that we are here in part because trying to address all those things that are not working out quite well is still falling well short in this new draft to replace the one already not working well. If we are here to make it better together, then perhaps the following points could be useful.

I. Why Withdrawal Is the Right Course of Action

The reason I believe this is the only viable path forward is structural, not rhetorical. Withdrawal is the only mechanism that legally obligates the Federal Agency to re-engage in substantive consultation and address the many things that are missing or made vague. Every other path leaves revision to the discretion of Joint Region Marianas and its counterparts. Only a withdrawal triggers mandatory procedural pathways — including potential Advisory Council on

Historic Preservation involvement — that the current draft process has either bypassed or foreclosed entirely.

Without withdrawal, the Federal Agency is permitted to consult more deeply. With withdrawal, it is compelled to. That distinction matters enormously. Whether the outcome is a case-by-case Section 106 review process or a new programmatic agreement drafted with genuine community input and ACHP involvement, the result will be more accountable, more transparent, and more protective of the people of Guam.

II. What Is Wrong with the Draft 2025 Programmatic Agreement

The Draft 2025 PA does not merely streamline Section 106 compliance. It substitutes a weaker consultative process for the more rigorous one the NHPA envisions, effectively using the Act's own flexibility provisions against the very public protections the Act was designed to guarantee. This is not what a Programmatic Agreement is designed to do, and I believe the community's characterization of it as a 'problematic agreement' is analytically apt — not merely rhetorical.

The accountability measures are not spelled out, and what is still missing or inadequate from the original 2008 agreement is about to be washed over completely under the guise that it's for a better agreement. I disagree and I don't see where that argument can be substantiated, it falls apart when you look at what fell through the cracks of past PA's.

The more rigorous consultative standard the NHPA envisions is only vaguely reflected in this draft. More concerning than what is missing is what the draft's mild provisions make a moot point: the incredibly passive posture the agency appears to have constructed for itself in this process. To understand just how far the draft falls short, it helps to compare it directly to the 2008 PA it would replace.

III. A Comparison of the 2008 PA and the 2025 Draft

I want to be clear that I cannot fully explain why these differences exist — because the party that drafted this PA did so behind closed doors and has not provided explanations. We are left to assume. That alone should trouble this body. With that said, here is what the record shows:

The 2008 PA was a three-party agreement among the Commander, Navy Region Marianas, the Advisory Council on Historic Preservation, and the Guam SHPO. The 2025 draft removes the ACHP as a signatory, making it a two-party agreement between the Commander, Joint Region Marianas and the SHPO only. The ACHP still plays a role in dispute resolution, but its removal as a signatory is a significant reduction in structural accountability.

The scope has expanded: where the 2008 PA covered Navy undertakings only, the 2025 draft covers all DoD undertakings within the JRM area of responsibility, including Andersen AFB and Marine Corps Base Camp Blaz. This expanded scope makes the weakening of consultative standards even more concerning.

On the positive side, the 2025 draft adds a new professional qualification standard for Traditional Cultural Place studies, requiring a graduate degree in Anthropology or a related field and documented Pacific Island cultural expertise. The 2008 PA had no TCP-specific provisions at all. The 2025 draft also formalizes a Public Access Plan with a designated coordinator and explicitly includes access for collecting medicinal plants and visiting culturally significant sites.

However, several changes represent meaningful regressions. Reporting frequency has been reduced from quarterly to twice yearly. The SHPO response window has been codified at 30 calendar days, with CJRM permitted to proceed with no response — a provision not present in the 2008 PA. And the duration of the agreement has been shortened from 50 years to a 5-year renewable term, with automatic renewal unless either party provides written notice within 30 days of the term's end. The 2008 PA required meetings every five years; the 2025 draft requires annual meetings, which is an improvement, though it must be weighed against the other regressions.

IV. Proposed Revisions to Drafted Stipulations

If the PA is revised rather than withdrawn outright, the following changes would substantially improve it. I offer these in the spirit of constructive engagement, while maintaining that withdrawal remains the most defensible course.

Stipulation X — Notification and Reporting: The twice-yearly reports currently go only to the SHPO. This section should be expanded to require a public summary version of each report made available to the community; mandate that findings be presented at an annual public forum; and include metrics on community access requests granted and denied, with reasons for denial, to create accountability.

Stipulation IX — Discoveries and Emergencies: When significant cultural discoveries are made, the current draft only requires notification to the SHPO. It should also require community notification for discoveries of broad cultural significance; establish a community liaison role separate from the SHPO for significant finds; and add language prioritizing consultation with CHamoru cultural organizations — not only the SHPO — before treatment decisions are finalized.

Stipulation IV — Archaeological Sensitivity Maps and ICRMP: The public currently has no role in ICRMP development as far as its stated in the PA draft. This should be corrected by requiring the same roundtable drafting process and the public comment period when ICRMPs are developed or updated, and by mandating that sensitivity maps be made publicly available in non-sensitive form.

What does non-sensitive form mean in practice? The four-tier sensitivity framework — No, Low, Medium, and High — could be displayed at a scale broad enough to show general areas without pinpointing specific sites. Think of it like a weather radar map: useful for understanding general conditions without revealing precise coordinates. Aggregated statistical information —

total acreage per sensitivity category, number of new sites identified per reporting period, general descriptions of site types — could be made available without disclosing locations. The historical maps and ethnohistoric data used to generate sensitivity maps could be shared in educational formats. Traditional land use patterns and village locations from historical records are often already in the public domain.

To make this operational, the 2025 draft could add language along these lines to Stipulation IV or V:

“CJRM, in consultation with the SHPO, shall develop a publicly accessible summary version of archaeological sensitivity information for each installation. This summary shall present sensitivity designations at a generalized scale sufficient to inform community awareness without compromising site security. The format and content of public summaries shall be reviewed annually and updated as part of the twice-yearly reporting process.”

This would create meaningful public benefit while keeping the protective provisions already in the draft intact. It would also align with the spirit of the Public Access Plan in Stipulation VI, creating an information access framework that parallels the physical access framework already envisioned.

Stipulation V — GIS Data: GIS sharing currently runs only between CJRM and the SHPO. The draft should include a provision for a publicly accessible, appropriately redacted version of cultural resource location data; community notification when new cultural sites are identified in areas of traditional significance; and a formal partnership with the University of Guam or the Guam Museum to make non-sensitive findings accessible for research and education.

Stipulation VI — Public Access Plan: This is the most direct area for expanding public benefit. The current language is fairly passive: the public must seek access through the Access Plan Coordinator. It should instead require proactive publication and solicitation of the PAP; establish minimum guaranteed access hours or days for culturally significant sites; create a formal community advisory role in updating the PAP annually; explicitly include CHamoru cultural practitioners rather than only generic “individuals and organizations”; and add language about educational programming or interpretive access at significant sites.

On this last point, I want to offer a concrete example of what is possible and what can be missed out on if we don’t push for deliberate concessions. The Guam Preservation Trust worked with GUMA Architects LLC and invested over \$18,000 to develop a conceptual design plan for the Mähgua’ Archaeological Site at the U.S. Naval Computer and Telecommunications Station in Finegayan. The goal was to provide meaningful interpretation of the cultural and natural resources of Guam’s upland, pre-contact sites and to foster understanding of ancient CHamoru culture across all age groups. The proposed interpretive park would have incorporate archaeological data, recovered latte structures, lusong, and native flora accessible to residents,

military personnel, and visitors alike. This is the kind of vision a robust PA should enable and support — not foreclose. However, when this was given to the DoD, despite local representatives in DoD and their intentions to implement that conceptual plan and construct the interpretive park, it was not originally a stipulation in a PA and therefore did not have approved budget and process created for it. The conceptual plan was scraped and will not be built at the visitor center at Marine Corps Base Camp Blaz because of that.

V. The TCP Gap: Research Without Protection

The 2025 draft PA demonstrates awareness that Traditional Cultural Place research requires specialized expertise and must be conducted in accordance with current guidance. These are necessary and welcome improvements. However, the TCP provisions remain incomplete in ways that are substantively significant.

The absence of structured community participation in the TCP identification and consultation process, and the absence of any requirement to nominate eligible TCPs to the National Register, mean that the PA's elevated research standards may produce robust documentation without producing meaningful protection. For the CHamoru people of Guam, whose relationship to ancestral lands on CJRM installations is both deep and historically disrupted, these gaps are not technical oversights. They reflect a broader pattern in which federal military land management has prioritized operational continuity over substantive cultural preservation.

The PA, as currently drafted, should be amended to require meaningful community engagement as a procedural element of TCP studies, to establish accessible public notice and participation mechanisms for TCP determinations, and to create a clear and time-bound obligation to pursue National Register nomination for TCPs found eligible. Without these amendments, the PA risks delivering qualified research without delivering the historic preservation outcomes that research is intended to support.

VI. Missing Stipulations and Structural Gaps

Stipulation III — Other Agreements: This section lists program alternatives but is silent on community input into those frameworks. It should be expanded to reference the importance of engaging the Guam Legislature on matters affecting cultural heritage; acknowledge the unique political status of Guam and the particular significance of land access for the CHamoru people; and include a provision for periodic community-wide consultation separate from the SHPO process — particularly for Cultural Field Monitors, as is allowable under NAGPRA.

The most significant structural gap in the 2025 draft, compared to what it could be, is the complete absence of any affirmative community benefit provisions. The document is structured almost entirely around compliance and process. What is missing are: a formal cultural stewardship partnership with CHamoru organizations; requirements for DoD to support local archaeological training and employment opportunities; language recognizing the historical context of military land use on Guam and its impact on CHamoru cultural access; and a

provision for community-nominated sites to be evaluated for cultural significance, giving the public a proactive rather than purely reactive role in heritage protection.

The 2008 PA was similarly limited. The 2025 revision represents a real opportunity to modernize the agreement in ways that reflect growing recognition of indigenous cultural rights and community stewardship principles. That opportunity appears to have been missed — and pointedly so: the word CHamoru does not appear a single time in the draft.

VII. The Closed-Door Process That Brought Us Here

The argument for withdrawal is not only about the document's content — it is also about the process that produced it. As Senator Terlaje has documented previously, one of the most recent examples of the closed communications model we are locked in began before the 2025 draft was even released. Consultations stopped being public. This was exactly what made this so problematic and why the honorable center was in the public hearing on the resolution voicing dissent to the process we are currently locked in. The SHPO and DoD came to the draft agreement, then invited public comment after the fact — placing the burden on the people of Guam to voice concerns before the agreement was signed. This history is not speculation. It supports the conclusion that the existing process has been insufficiently consultative during the drafting, not after drafting and during a comment period, and that structural intervention is warranted — hence the withdrawal stance. The drafting table needs to be open during drafting; a public comment period only is not adequate and that is apparent from the community input during the comment period.

VIII. A Path Forward: Template Language for CHamoru Consulting Party Status

I want to offer this body a concrete model for what more inclusive language could look like in a revised programmatic agreement. The following is template language that could be adapted:

“The [Lead Federal Agency] recognizes [Name of Community] as a consulting party to this Agreement pursuant to 36 CFR § 800.2(c)(5) based on [Community]’s demonstrated cultural affiliation with the APE and its concern for the effects of the Undertaking on historic properties of religious and cultural significance. Although [Community] is not a federally recognized Indian tribe within the meaning of NAGPRA (25 U.S.C. § 3001(7)), the [Lead Federal Agency] acknowledges [Community]’s cultural and ancestral ties to the project area and agrees to extend to [Community] the same consultation and monitoring participation afforded to federally recognized consulting tribes under this Agreement, consistent with the agency’s obligations under Section 106 of the NHPA (54 U.S.C. § 306108), the agency’s sacred sites obligations under Executive Order 13007, applicable state law, and the principles of the United Nations Declaration on the Rights of Indigenous Peoples. Nothing in this Agreement shall be construed to affect or prejudice [Community]’s pending or future petition for federal acknowledgment.”

That final clause — protecting the community’s federal acknowledgment petition — is critical. Communities are sometimes concerned that participating in a process framed around non-recognition could be used against them in a future acknowledgment proceeding. Including this language removes that barrier to participation.

IX. What the Government of Guam Can and Should Do

There are also actions available to the Government of Guam that can strengthen the regulations and protocols available in this consultation process. Chief among them is the development of the local review and drafting committee for Programmatic Agreements and MOA’, as well as the development of a Cultural Monitor Legal Framework for Guam.

Public Law 26-46, the Guam Historic Preservation Act, provides local legal grounding to institute Cultural Monitoring provisions comparable to those enacted in other state and local governments across the United States — including Hawaii Revised Statutes Chapter 6E, California’s AB 52 and SB 18 compliance laws, Washington State SEPA and RCW 27.44, and Oregon HB 2020 and ORS 97.740. There are numerous models to draw from.

What needs to be developed — and what this PA could help invest in — is the structural framework for cultural monitoring that makes mitigation clear and therefore implementable. That framework would need to stipulate the purpose and applicability of cultural monitoring; qualifications and approval standards for Cultural Monitors; monitor roles, rights, and responsibilities; an inadvertent discovery protocol; monitoring zones and scheduling; reporting requirements; dispute resolution procedures; and associated costs. None of this is unprecedented. It simply has not yet been built here.

Conclusion

The resolution before you is not a rejection of historic preservation work. It is a demand that that work be done right. The Draft 2025 PA, as written, does not meet that standard. Withdrawal is the only procedural mechanism that compels the Federal Agency to return to the table and engage in the kind of substantive, community-inclusive consultation that the National Historic Preservation Act was designed to require.

The people of Guam deserve a Programmatic Agreement that acknowledges them by name, that creates meaningful pathways for participation, and that treats cultural preservation as a public benefit rather than a bureaucratic compliance exercise. I urge your support for Resolution 144-38.

Saina ma’åse,

Kyle Riordan

**PROGRAMMATIC AGREEMENT
AMONG THE COMMANDER, NAVY REGION MARIANAS,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
AND THE GUAM HISTORIC PRESERVATION OFFICER,
REGARDING NAVY UNDERTAKINGS ON THE ISLAND OF GUAM**

WHEREAS the Commander, Navy Region Marianas' (CNRM) area of responsibility (AOR) encompasses all Navy installations on the Island of Guam (Appendix A); and

WHEREAS through the Defense Base Closure and Realignment Act of 1990 as amended through the FY05 Defense Authorization Act, future acquisitions of land and/or property on Guam may occur such as a Joint Region for the Marianas; and

WHEREAS for the purposes of this Programmatic Agreement (PA), the term AOR shall refer to Navy property specifically on the Island of Guam; and

WHEREAS, CNRM, in order to meet its national defense mission requirements, authorizes, carries out or causes to be carried out a variety of undertakings including, but not limited to, dredging of its harbor, maintenance, rehabilitation, repair, construction and demolition of buildings, structures, and roads; installing, repairing, and updating utilities and infrastructure; and work regarding grounds/associated landscaping on the Island of Guam; and

WHEREAS CNRM is required to take into account the effects of its undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) and the appropriate State Historic Preservation Officer (SHPO) a reasonable opportunity to comment on those undertakings pursuant to Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and its implementing regulations, 36 CFR part 800; and

WHEREAS prior to the approval of any undertaking which may directly and adversely affect any National Historic Landmark (NHL), CNRM is required, to the maximum extent possible, undertake such planning and actions as maybe necessary to minimize harm to such an NHL, and afford the ACHP a reasonable opportunity to comment on the undertaking, in accordance with Section 110(f) of the NHPA, 16 U.S.C. 470h-2(f); and

WHEREAS, CNRM has determined that these undertakings may have an effect upon historic properties, meaning listed or eligible for listing on the National Register of Historic Places (NRHP); and

WHEREAS, pursuant to 36 CFR § 800.14(b)(1) and OPNAVINST 5090.1B, CNRM has consulted with the ACHP, and the Guam SHPO in formulating this PA; and

WHEREAS, CNRM prepared an Integrated Cultural Resources Management Plan (ICRMP) in December 2005 to guide its management of historic properties while facilitating the process of designing and constructing new facilities, as required, to support CNRM's mission on the Island

of Guam, and has identified the majority of historic sites properties on its AOR (approximately 85-90% of the land has been surveyed and the other 10-15% is currently being surveyed), and has developed probability maps for encountering surface and subsurface historic properties on land and sea for 100% of its AOR;

NOW, THEREFORE, CNRM, the ACHP, and the SHPO agree that CNRM will carry out its undertakings on the Island of Guam in accordance with the following stipulations to satisfy its responsibilities under Sections 106 and 110(f) of the NHPA.

STIPULATIONS

CNRM shall ensure that the following measures are carried out:

I. APPLICABILITY AND DEFINITIONS

- A. This PA applies to all undertakings initiated within the Navy's AOR, regardless of whether they are initiated, funded, and/or carried out by CNRM or by another command or lessee of the Navy.
- B. In the future, if the Navy acquires more land and/or property on the Island of Guam within their AOR, then these properties and/or land shall be incorporated into this PA so long that all signatories have been consulted with and are in agreement that those lands and/or properties have been adequately evaluated and categorized under Stipulation V of this PA. However, any signatory to this PA may request a formal amendment to the PA as outlined in Stipulation XII.
- B. Unless otherwise noted, this PA will utilize the definitions found at 36 CFR §800.16.

II. PROFESSIONAL STANDARDS

- A. All surveys, testing, and mitigation planning regarding archaeological resources will be carried out by, or under the oversight or supervision of a person or persons meeting the professional qualification for Archaeologist found in "The Secretary of the Interior's (SOI) Historic Preservation Professional Qualification Standards" (SOI Qualification Standards), 62 Fed. Reg. 33712.
- B. All historic property surveys and eligibility determinations for historic buildings and structures will be carried out by or under the oversight or supervision of a person or persons meeting the professional qualifications for Historical Architect under Standard a or b found in SOI Qualification Standards, 62 Fed. Reg. 33719 or Architectural Historian under Standard a or b found in SOI Qualification Standards, 62 Fed. Reg. 33713-4 or Historic Landscape Architect under Standard a or b found in SOI Qualification Standards, 62 Fed. Reg. 33720.

II. PROFESSIONAL STANDARDS (Continued)

- C. Where CNRM utilizes contracts that involve work governed by this PA that may affect historic properties, CNRM will use appropriate contract performance requirements, and/or appropriate source selection criteria which shall include minimum qualifications for historic preservation experience and satisfactory prior performance, as appropriate to the nature of the work and the type of procurement, developed with the participation of Navy professionals meeting the standards of Stipulation II.B, for projects involving historic buildings and structures, or II.A, for projects involving archaeological sites. Appropriate historic preservation requirements shall address: project planning; description or scope; adequate pre-construction survey of historic properties affected; professional qualifications of contractor personnel; refurbishment and reuse of historic materials and fixtures; minimizing demolition of historic fabric; and supervision, oversight, and accountability.

III. OTHER AGREEMENTS

Pursuant to 36 CFR §800.14, federal agencies can negotiate and adopt other types of agreements in addition to programmatic agreements.

- A. Nothing in this PA will alter, modify, or supersede the application of the following Section 106 program alternatives in the Navy's AOR:
1. World War II (WWII) Temporary Buildings Programmatic Memorandum of Agreement among the U.S. Department of Defense, the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO) executed on 7 July 1986 with 1 May 1991 amendments.
 2. Management of Historic Family Housing Units Programmatic Agreement among the U.S. Navy, the Advisory Council on Historic Preservation, and the NCSHPO executed on 17 November 2000.
 3. Wherry and Capehart Era Family Housing program comment issued by ACHP on 18 November 2004.
 4. Cold War Era (1946-1974) Unaccompanied Personnel Housing Program comment issued by the ACHP on 18 August 2006.
 5. WWII and Cold War Era (1939-1974) Ammunition Storage Facilities Program comment issued by the ACHP on 18 August 2006.

IV. IMPLEMENTATION OF GUAM ICRMP

CNRM completed an ICRMP in December 2005 to guide its management of historic properties on Navy installations. Included in this ICRMP are probability maps for encountering surface, subsurface, and submerged archaeological resources on land and sea for all Navy installations on Guam. These probability maps (Appendix B) are based on historic maps, ethno-historic data, archaeological studies, and previous consultations with the SHPO. All maps will be maintained and updated as appropriate by or under the oversight of Navy personnel meeting qualifications under Stipulation II.A as new data is collected and based on future consultations with the SHPO. Any new versions of this map will be included in the quarterly reporting requirements described in Stipulation IX.

V. IDENTIFICATION AND EVALUATION OF HISTORIC PROPERTIES

- A. In accordance with its Section 110 responsibilities and when either the 2005 ICRMP is revised or updated, or a new ICRMP is developed, CNRM shall update its existing inventory of historic properties. Currently, all known properties are listed in the 2005 ICRMP. As future studies are conducted, additional historic properties eligible for the NRHP may be identified. Any property not listed in the current ICRMP, but which may meet NRHP criteria, shall be assessed for NRHP eligibility, by or under the oversight of Navy personnel meeting applicable qualifications under Stipulation II. These historic properties will be incorporated into ICRMP as it is revised or updated, or if a new ICRMP is developed in consultation with the SHPO.
- B. Any signatories to this PA may bring to the attention of CNRM information relating to any property in the AOR believed by the signatory to be eligible for listing on the NRHP, with a request that the eligibility of the property be evaluated. If CNRM and the SHPO do not agree on a determination of eligibility, or if the ACHP so requests, CNRM will obtain a determination of eligibility from the Keeper of the NRHP.
- C. For purposes of this PA, CNRM may treat any property not previously listed or determined eligible for listing on the NRHP as National Register eligible if determined to be so eligible by Navy personnel qualified under Stipulation II.A or Stipulation II.B, as applicable. Such determination requires no SHPO review. Any such determinations will be included in the reporting requirements described in Stipulation IX.
- D. Any updates to the existing Geographical Information System cultural resource layers such as shape files showing the locations of known archaeological sites and historic buildings and structures will be shared with the SHPO. The SHPO recognizes that these layers may contain sensitive information and shall not disseminate or make them available to the public without obtaining permission of CNRM.

VI. CULTURAL ACCESS TO HISTORIC SITES.

- A. In recognition of the significance that many historic properties within the Navy's AOR have to the Chamorro people and other groups, CNRM will generally look favorably on affording access to historic sites to individuals and organizations that attach significance to these historic properties where security requirements are not prohibitive. Upon request, CNRM will consider events that celebrate and interpret historic activities tied to historic actions/events that occurred on Navy property on Guam.
- B. Requests for such access need to be submitted and received by CNRM Cultural Resource Manager at least 30 days advance of the requested visit date and must be in writing. Reasonable requests will be considered by CNRM in light of military operational requirements and anti-terrorist/force protection security conditions and other pertinent circumstances as determined by CNRM at the time.
- C. If the SHPO is approached by individuals or organizations wishing to obtain access to historic properties on Navy property, the SHPO will forward these requests to the Navy for consideration.
- D. Final approval or disapproval will be provided by the Navy in writing at least one week prior to the requested visit date. The CNRM Cultural Resource Manager will escort all visitors to these sites where access is allowed to ensure that sites are not damaged and artifacts are not removed during these visits.

VII. REVIEW AND MITIGATION OF PROJECT EFFECTS

- A. Undertakings Requiring No Further Review
 - 1. If no historic properties will be impacted by an undertaking and the undertaking is located in the following categories, then no further review is required:
 - a. No Probability Areas (Fill Lands): If an undertaking is located in fill lands represented as no probability areas within Appendix B;
 - b. Low Probability Areas: If an undertaking is located in a low probability area as shown in Appendix B, and if evaluated by or under the supervision of Navy personnel that meet Stipulations II.A or II.B, as applicable;
 - c. Listed in Appendix C

2. For purposes of Stipulation VII.A.1, alteration of a historic property consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines will not be deemed to affect historic properties.
3. All determinations that no further review is required and are listed under Stipulation VII.A.1, will be documented and reported to the SHPO in accordance with Stipulation IX.

B. Undertakings with Potential Effects, No Adverse Effects, and Adverse Effects:

1. Archaeology

As stated in Stipulation V, CNRM has developed archaeological probability maps for all Navy properties on Guam. CNRM may identify, evaluate and resolve adverse effects on archeological historic properties on the medium and high probability maps according to the following review processes (Stipulation VII.B.1.a and b), if such review is carried out by, or under the supervision of, Navy personnel meeting the qualification standards on Stipulation II. Otherwise, these archeological historic properties will be reviewed in accordance with the same review process as others under 36 CFR 800.3-800.7.

a. Medium Probability Areas

Medium Probability Areas contain no surface sites, and have never been tested. However, there is the potential to encounter subsurface historic resources.

1. Subsurface archaeological testing shall be conducted in the area prior to construction. However, in some instances this may not be feasible due to a variety of factors (such as: the area to be tested is located below an existing building/structure, or for proposed undertakings with long linear-shaped excavations such as utility replacements). In these cases, archaeological monitoring shall be required in lieu of subsurface testing.
2. Prior to conducting subsurface archaeological testing or archaeological monitoring, CNRM shall submit a work plan to the SHPO. The SHPO shall have 30 calendar days to review and approve this plan. If the SHPO disagrees with the plan within 30 calendar days from receipt of the plan, the SHPO shall advise CNRM of the reasons for the disagreement in writing; otherwise concurrence will be presumed after 30 calendar days. CNRM shall

consult with the SHPO to try and resolve the disagreement. If such consultation fails, CNRM shall request the ACHP to review the dispute in accordance with Stipulation XI – Resolving Objections.

3. If a work plan has already been approved by the SHPO for a prior project in the same area, then the same work plan can be cited and CNRM shall proceed in accordance with the approved work plan.

b. High Probability Areas

High Probability Areas have either been previously surveyed and have documented surface or subsurface sites, or are areas identified from historic maps or ethnographic accounts as areas of known land use (e.g. location of old villages).

1. If possible, CNRM will try to avoid impacting high probability areas.
2. If high probability areas cannot be avoided, then data recovery shall be required prior to construction for these areas that contain surface and/or subsurface sites.
3. Prior to conducting any archaeological data recovery study, CNRM shall submit a work plan and/or a data recovery plan to the SHPO. The SHPO shall have 30 calendar days to review and approve this plan. If the SHPO disagrees with the plan within 30 calendar days from receipt of the plan, the SHPO shall advise CNRM of the reasons for the disagreement in writing; otherwise, concurrence will be presumed after 30 calendar days. CNRM shall consult with the SHPO to try and resolve the disagreement. If such consultation fails and no agreement can be reached, then CNRM request the ACHP to review the dispute in accordance with Stipulation XI.
4. If a work plan and/or data recovery plan has already been approved by the SHPO for a prior project in the general area for a similar type of archaeological resource, then the same work plan and/or data recovery plan can be cited and CNRM shall proceed in accordance with the previously approved work plan.

2. Non-Archeological Historic Properties

Procedures outlined in 36 CFR 800.3 through 800.7 will be followed for undertakings that:

- a. Have the potential to affect a historic property eligible for the NRHP and are not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
- b. If the undertaking is not listed in Appendix C.

VIII. DISCOVERIES AND EMERGENCIES

- A. If during the performance of an undertaking, previously unknown historic properties are discovered and are not accounted for in the archaeological monitoring plan, CNRM will:
 1. Halt work in the immediate area and take reasonable measure to avoid or minimize impacts to the property until consultation is completed with the SHPO on how to mitigate the impacts or document the newly discovered historic property. Work shall not resume until consultation on the treatment plan is completed with the SHPO.
 2. A qualified Navy professional meeting the relevant qualifications under Stipulation II shall inspect the discovered property and determine whether it is eligible for listing on the NRHP.
 - a. If the discovery is not eligible for the NRHP, then the Navy will proceed with the project but the discovery will be documented in the archaeological monitoring report and submitted to the SHPO.
 - b. If the Navy qualified professional determines the property is eligible, he or she shall notify the SHPO via telephone, fax or e-mail and document this discovery and report it to the SHPO in accordance with Stipulation IX. The Navy shall begin consultation with the SHPO on how to mitigate the impacts or document the newly discovered historic property and document this in a treatment plan. CNRM will also make a reasonable and good faith effort to notify Chamorro organizations or other groups that might attach significance to historic properties within the AOR. CNRM shall consider any input from such organizations within the consultation period. Consultation shall not exceed 14 workdays unless mutually agreed upon. If SHPO does not object to the recommendations cited in the treatment plan within the agreed time frame, CNRM will implement it. If there is a disagreement over treatment plan and it cannot be resolved, then the disagreement will be resolved per then Stipulation XI will be followed.

- B. If during the performance of an undertaking human burials are discovered, CNRM shall immediately halt work in the area and contact the appropriate authorities and follow the Standard Operating Procedures (SOP) specified in Appendix D. This information shall be documented and reported to the SHPO in accordance with Stipulation IX.
- C. In the event that natural disasters (such as typhoons or tidal waves), fires, sudden disruptions of utilities service, spill events or other emergency events occur, CNRM may take immediate actions to preserve life and property without having to undergo Section 106 review. However, emergency response work will take into consideration that historic properties maybe affected by recovery or emergency efforts. When possible, such emergency actions will be undertaken in a manner that does not foreclose future preservation or restoration of historic properties. CNRM will notify the SHPO by telephone of the emergency and will follow up with written documentation if any historic properties were discovered or disturbed during the emergency events. Consultation with the SHPO will be conducted as soon as practical based on the emergency circumstances. These actions will be included in the report developed in accordance with Stipulation IX.

IX. REPORTING REQUIREMENTS

CNRM shall submit a quarterly report to the SHPO within three months from execution of this PA and every three months thereafter. This report shall list a summary of actions taken under Stipulations IV, V(C), VII(A)(1), VII(A)(2), VIII(A), VIII(B) and VIII(C); to contain:

1. Project name
2. Location/Area
3. A brief description of proposed action
4. Applicable provision(s) of Appendix C (if any)
5. Name of reviewer
6. Date project was reviewed
7. Number of new historic sites discovered

X. REVIEW

The ACHP and the SHPO may elect to review activities carried out pursuant to this PA and CNRM will cooperate with the ACHP and the SHPO in carrying out their review responsibilities.

XI. RESOLVING OBJECTIONS

- A. Should any signatory to this PA object in writing to CNRM regarding any action carried out or proposed with respect to the implementation of this PA, CNRM shall consult with the objecting party. If after initiating such consultation CNRM determines that the objection cannot be resolved through consultation, it shall forward all documentation relevant to the objection to the ACHP, including CNRM proposed response to the objection.
- B. Within 30 calendar days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:
 - 1. Concur with CNRM proposed response; or
 - 2. Provide CNRM with recommendations on the proposed response. COMNAVREG shall take into account such recommendations before making a final decision on the matter and proceeding accordingly; or
 - 3. Notify CNRM that the objection will be referred to the ACHP membership for formal comment per 36 CFR §800.7(c). The resulting formal comment shall be taken into account by the Navy in accordance with 36 CFR §800.7(c). If the ACHP has not responded within the allotted time, CNRM may make a final decision on the objection and proceed accordingly.

XII. AMENDMENT

Any signatory to this PA may request that this PA be amended. Such requests will be made in writing and provided to the other signatories. The requests will include the proposed amendments and the reasons for proposing them. The parties shall consult to consider the proposed amendment. No amendment shall take effect until it has been executed by all signatories.

XIII. TERMINATION

Any signatory may propose to terminate this PA by providing 30 calendar days written notice to the other signatories explaining the reasons for the proposed termination. The signatories will consult during this period to seek agreement on amendments or other actions that would avoid termination. If the signatory proposing the termination does not withdraw the proposal by the end of the 30 day period, or a longer period agreed to by all signatories, then the PA will be terminated. In the event of termination, CNRM will comply with 36 CFR Part 800 with regard to all individual undertakings.

XIV. ANTI DEFICIENCY ACT

- A. The Anti-Deficiency Act, 31 USC § 1341, prohibits federal agencies from incurring an obligation of funds in advance of or in excess of available appropriations. Accordingly, the parties agree that any requirement for obligation of funds arising from the terms of this agreement shall be subject to the availability of appropriated funds for that purpose, and that this agreement shall not be interpreted to require the obligation or expenditure of funds in violation of the Anti-Deficiency Act.
- B. If compliance with the Anti-Deficiency Act alters or impairs CNRM' ability to implement the stipulations of this PA, CNRM shall consult with the signatories in accordance with Stipulation XI or Stipulation XII.

XV. DURATION

This PA shall become effective upon execution by all signatories and shall remain in effect for a period of 50 years unless terminated prior to that in accordance with Stipulation XIII.


XVI. MEETING

At intervals of five (5) years, beginning at the execution of this PA, the signatories shall meet to review the implementation of this PA, and determine whether any amendment to the PA is needed.

EXECUTION AND IMPLEMENTATION of this Programmatic Agreement evidences that CNRM has taken into account the effects of the undertakings under its scope on historic properties and afforded the ACHP an opportunity to comment on them.

Each of the undersigned certifies that they have full authority to bind the party that they represent for purposes of entering into this agreement.

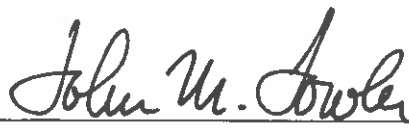
COMMANDER, NAVY REGION MARIANAS

By:  Date: 10/13/08
 W.D. French
 Rear Admiral, U.S. Navy
 Commander, Navy Region Marianas

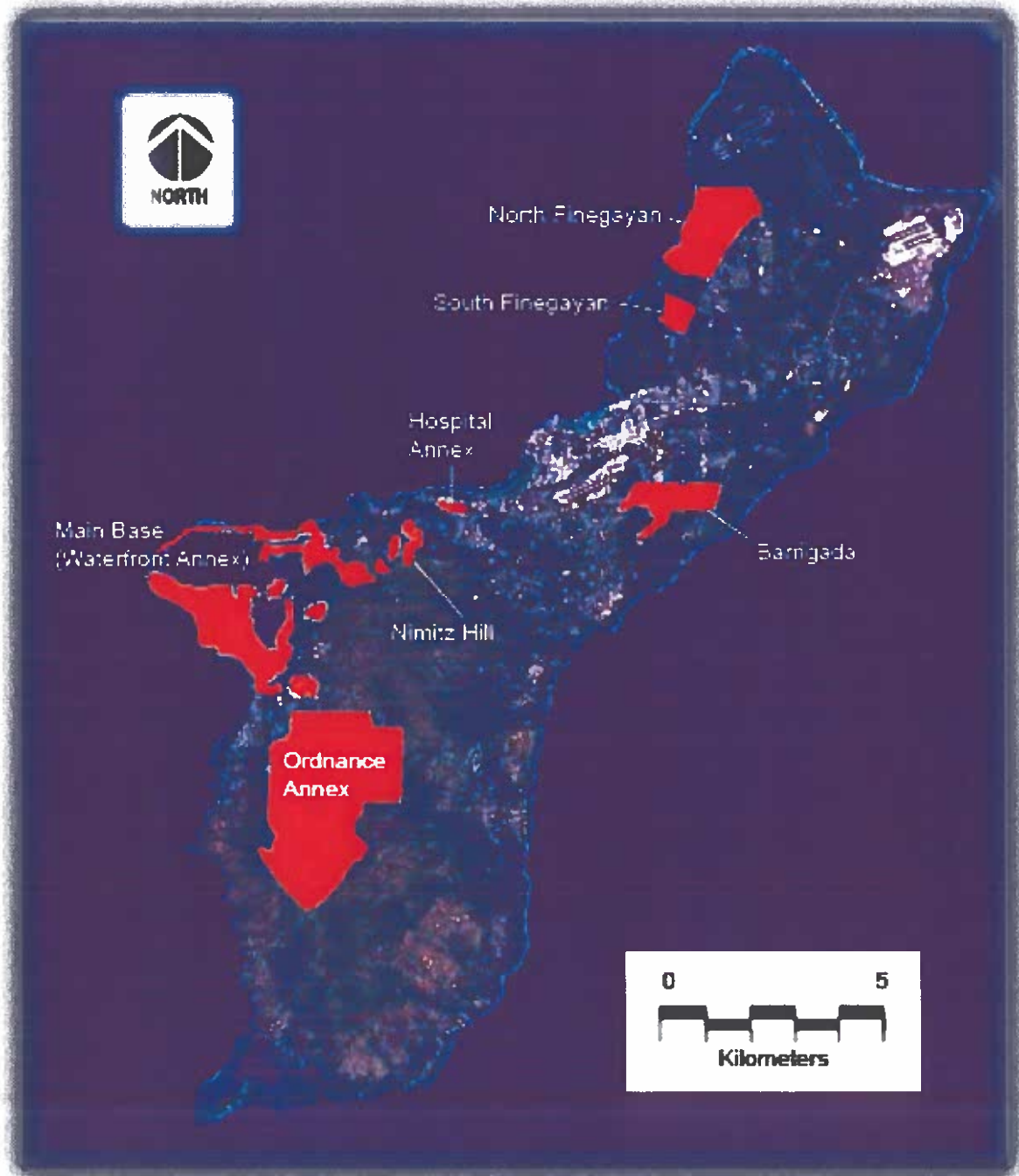
GUAM (STATE) HISTORIC PRESERVATION OFFICER

By:  Date: 10-31-08
 Joseph W. Duenas
 Acting Guam (State) Historic Preservation Officer

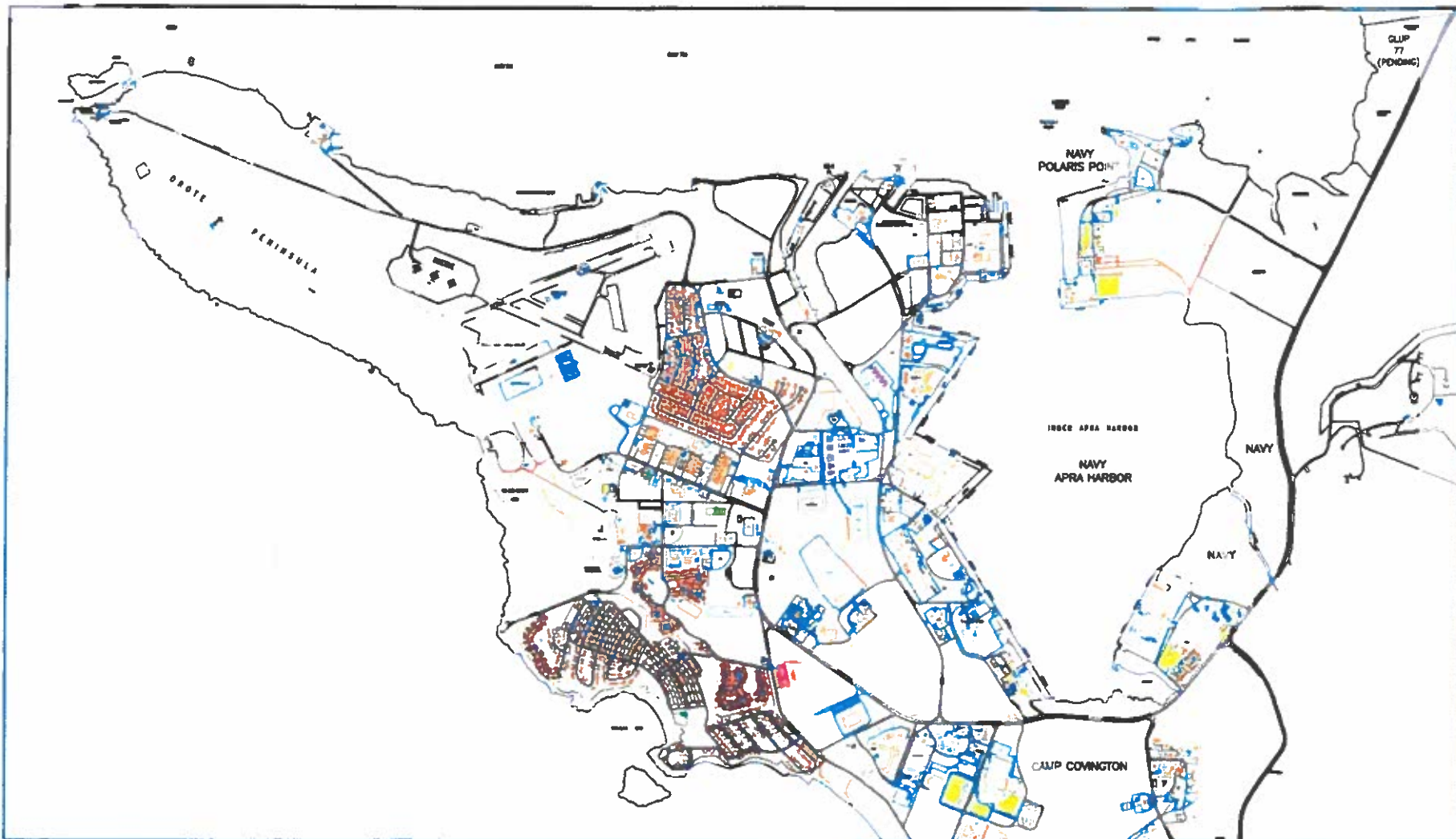
ADVISORY COUNCIL ON HISTORIC PRESERVATION

By:  Date: 11/21/08
 John M. Fowler
 Executive Director

APPENDIX A



Current Navy Installations on Guam



DZSP 121

ENVIRONMENTAL COMPLIANCE OFFICE
 P.O. BOX 68, HAGATNA, GUAM 96932
 TEL. (671) 339-2034 FAX (671) 339-7170

DRAWING for GUAM HPO SECTION 106 CONSULTATION

MAIN BASE and SURROUNDING AREAS

SHEET CONTENTS
 A SCALE = NTS

PROJECT NO.

WORK REQUEST NO.

PREPARED BY
 M. LANGANAN

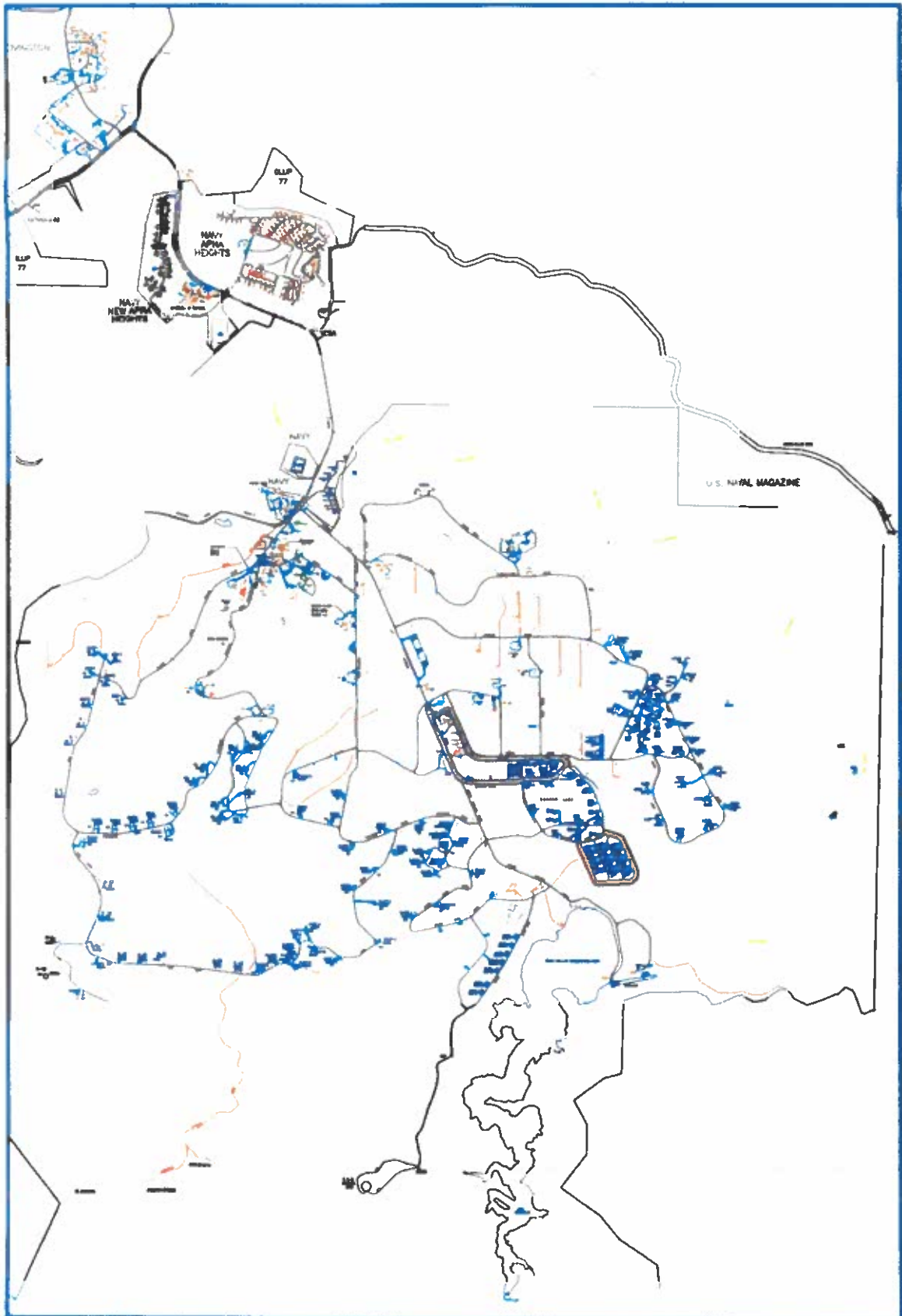
DATE:

16 OCT 01

SHEET NO.

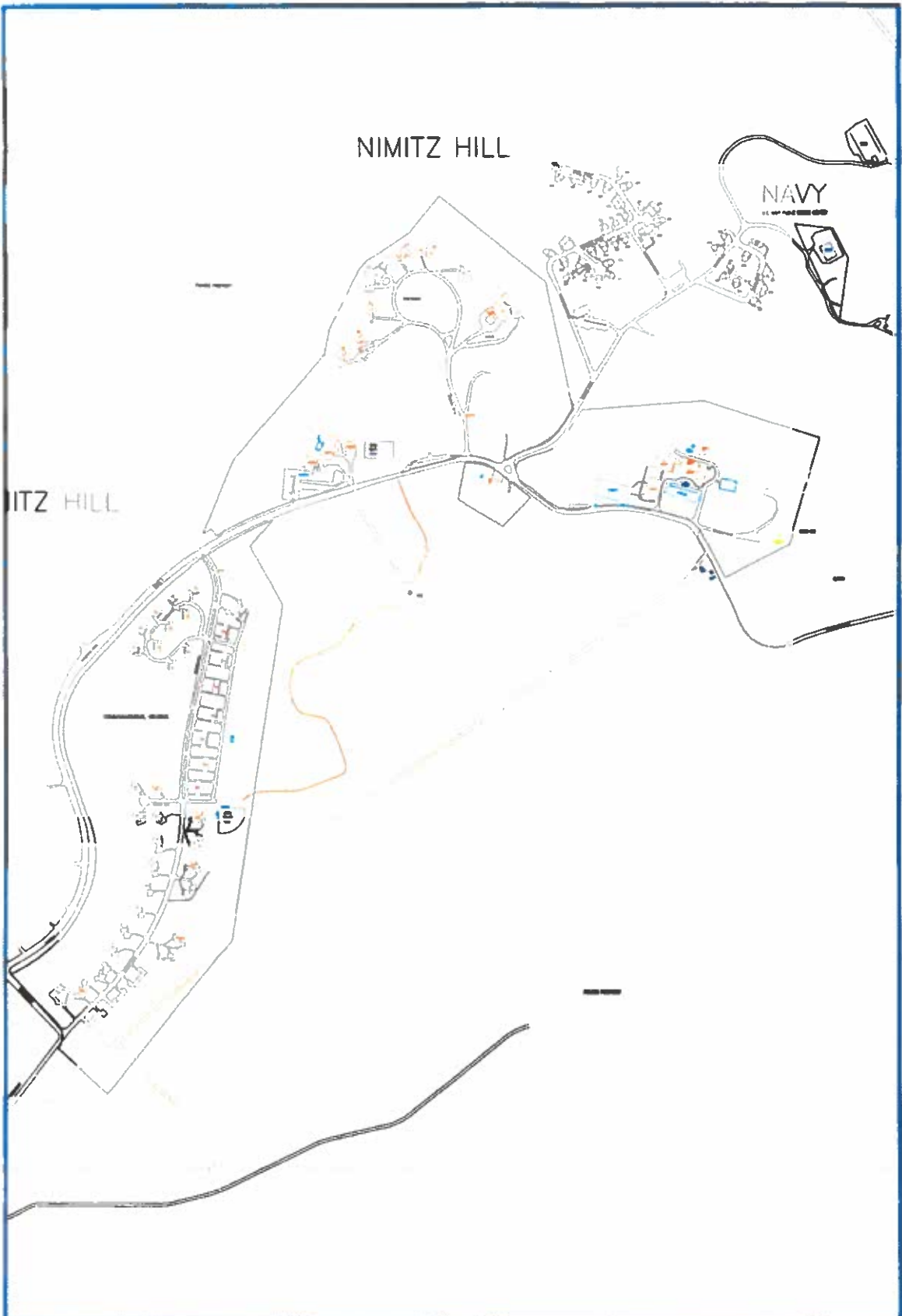
1 of 9

ENCLOSURE (1)



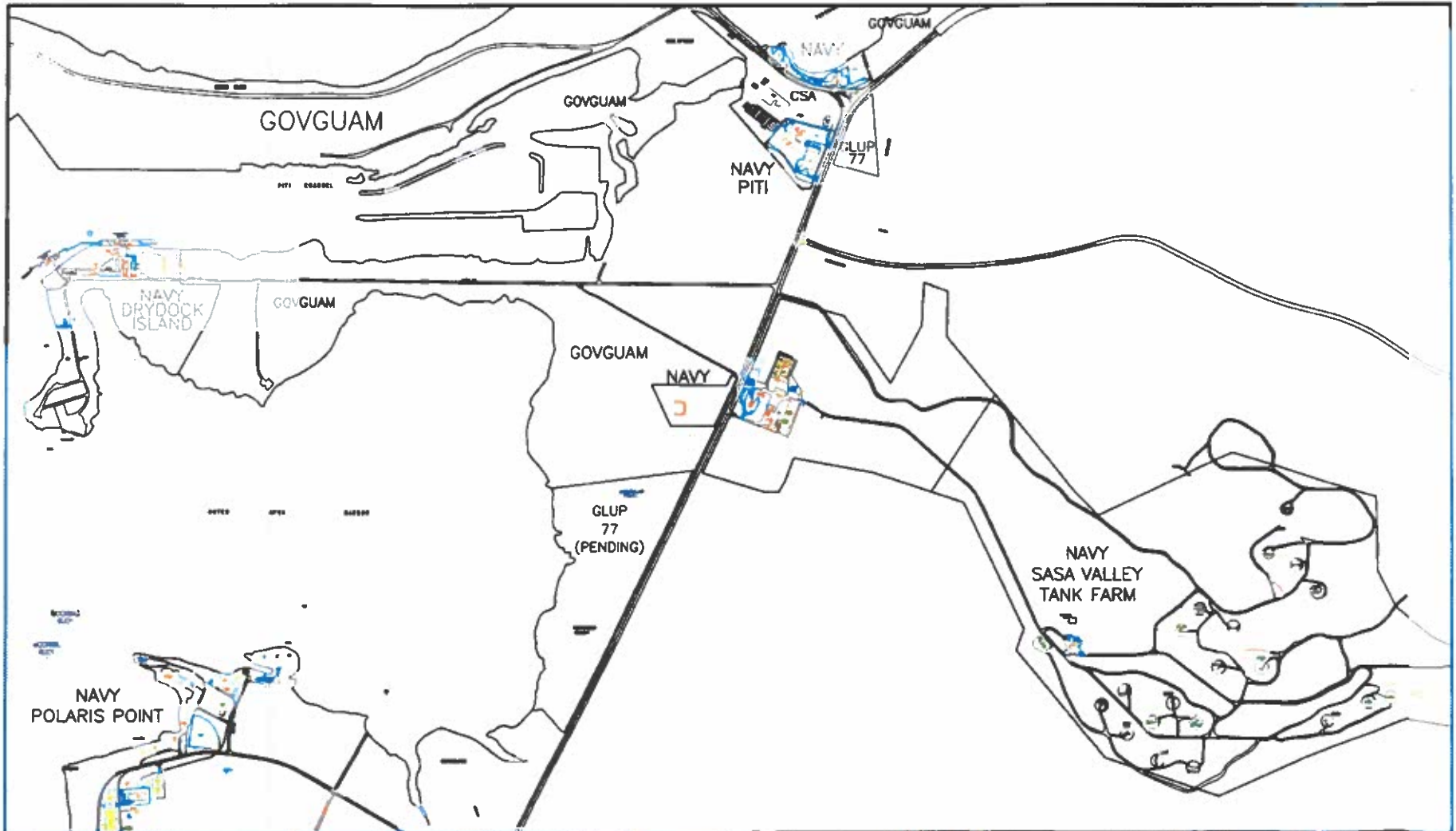
<p>DZSPI 21 ENVIRONMENTAL COMPLIANCE OFFICE P.O. BOX 504 HAGA TIA GUAM 96941 TEL: 671-326-2034 FAX: 671-326-2170</p>	<p>SHEET CONTENTS / PROJECT NOTES A SCALE = NIS</p>	<p>DRAWING FOR GUAM MPD SECTION 106 CONSULTATION NAVAL MAGAZINE and SURROUNDING AREAS</p>	<p>DESIGNED BY M. LAYMAN DATE 16 OCT 07 SHEET NO. 2 of 9</p>
--	---	---	--

ENCLOSURE (1)



<p>OZSPI 21 ENVIRONMENTAL COMPLIANCE OFFICE P.O. BOX 504 MAGA'NA GUAM 96932 TEL: (671) 236-2034 FAX: (671) 326-2170 WWW.OCOFFICE.GU GOV</p>	<p>SHEET CONTENTS / PROJECT NOTES A SCALE = NTS</p>	<p>DRAWING FOR GUAM IFCO SECTION 100 CONSULTATION</p> <p>NIMITZ HILL and SURROUNDING AREAS</p>	<p>PREPARED BY M. LANSANEAN</p> <p>DATE 16 OCT 07</p> <p>SHEET NO. 3 of 9</p>
--	---	---	---

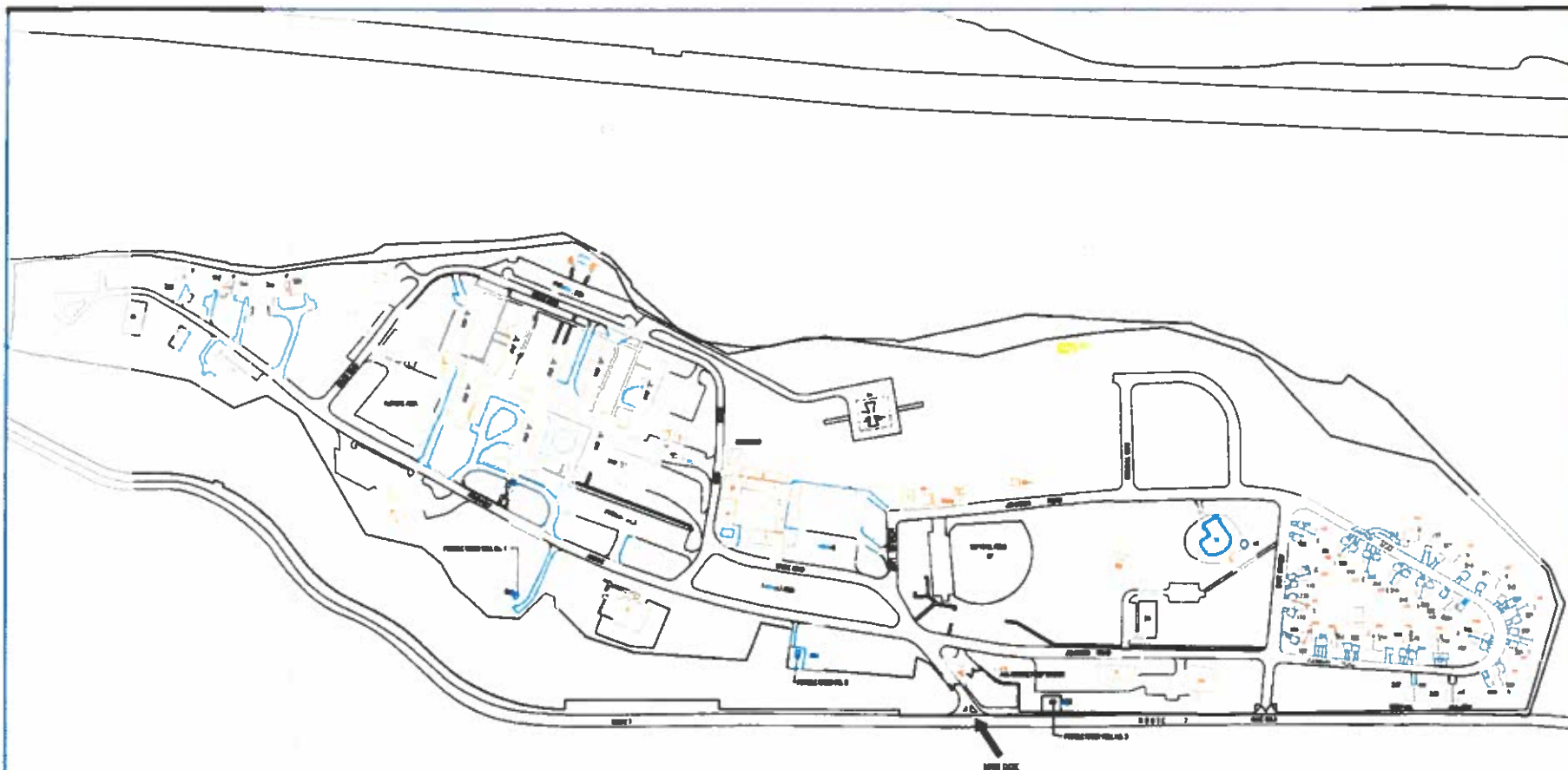
ENCLOSURE (1)



DZSP 21 ENVIRONMENTAL COMPLIANCE OFFICE P. O. BOX 61, HAGA'NA, GUAM 96932 TEL: (671) 339-2034 FAX: (671) 339-7170	DRAWING for GUAM HPO SECTION 106 CONSULTATION	SHEET CONTENTS: A. SCALE = NTS	PROJECT NO. PREPARED BY: M. LANSANGAN
	SAGA VALLEY and SURROUNDING AREAS	WORK REQUEST NO.	DATE: 16 OCT 07
			SHEET NO. 4 of 9

dzsp21: 11/17

ENCLOSURE (1)



U. S. NAVAL HOSPITAL, GUAM

DZSP121

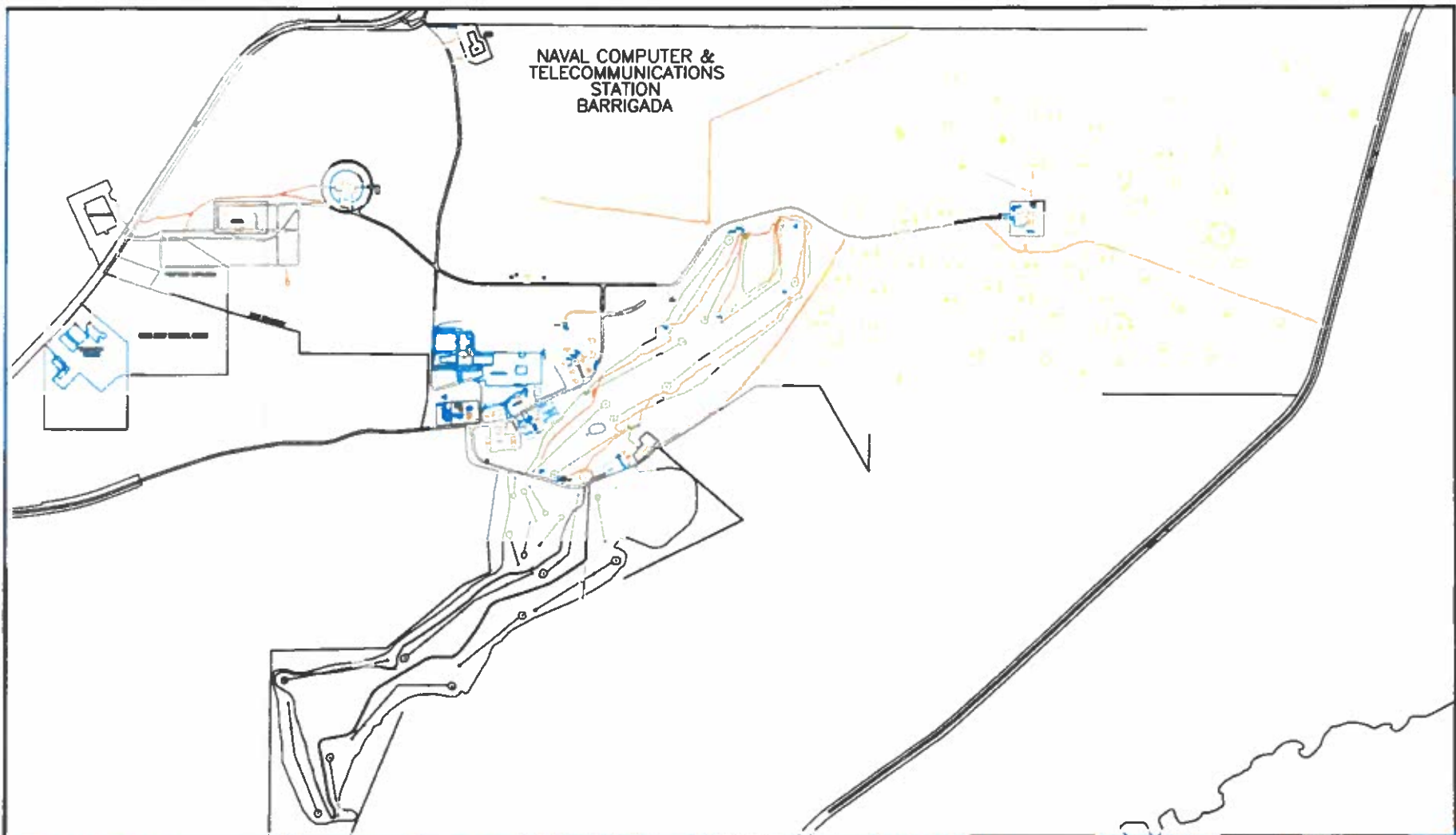
ENVIRONMENTAL COMPLIANCE OFFICE
 P.O. BOX GH, HAGATNA, GUAM 96932
 TEL. (671) 339-2034 FAX (671) 339-7170

DRAWING for GUAM HPO SECTION 106 CONSULTATION

U.S. NAVAL HOSPITAL, GUAM

SHEET CONTENTS
 A SCALE = NTS

PROJECT NO.	PREPARED BY: M. LANSANGAN
WORK REQUEST NO.	DATE: 16 OCT 01
	SHEET NO. 5 of 9



DZSP121

ENVIRONMENTAL COMPLIANCE OFFICE
 P.O. BOX CH, HAGATNA, GUAM 96932
 TEL. (671) 339-2034 FAX (671) 339-7170

DRAWING for GUAM HPO SECTION 106 CONSULTATION

RADIO BARRIGADA and SURROUNDING AREAS

SHEET CONTENTS
 A SCALE = NTS

PROJECT NO.

PREPARED BY

M. LANSANGAN

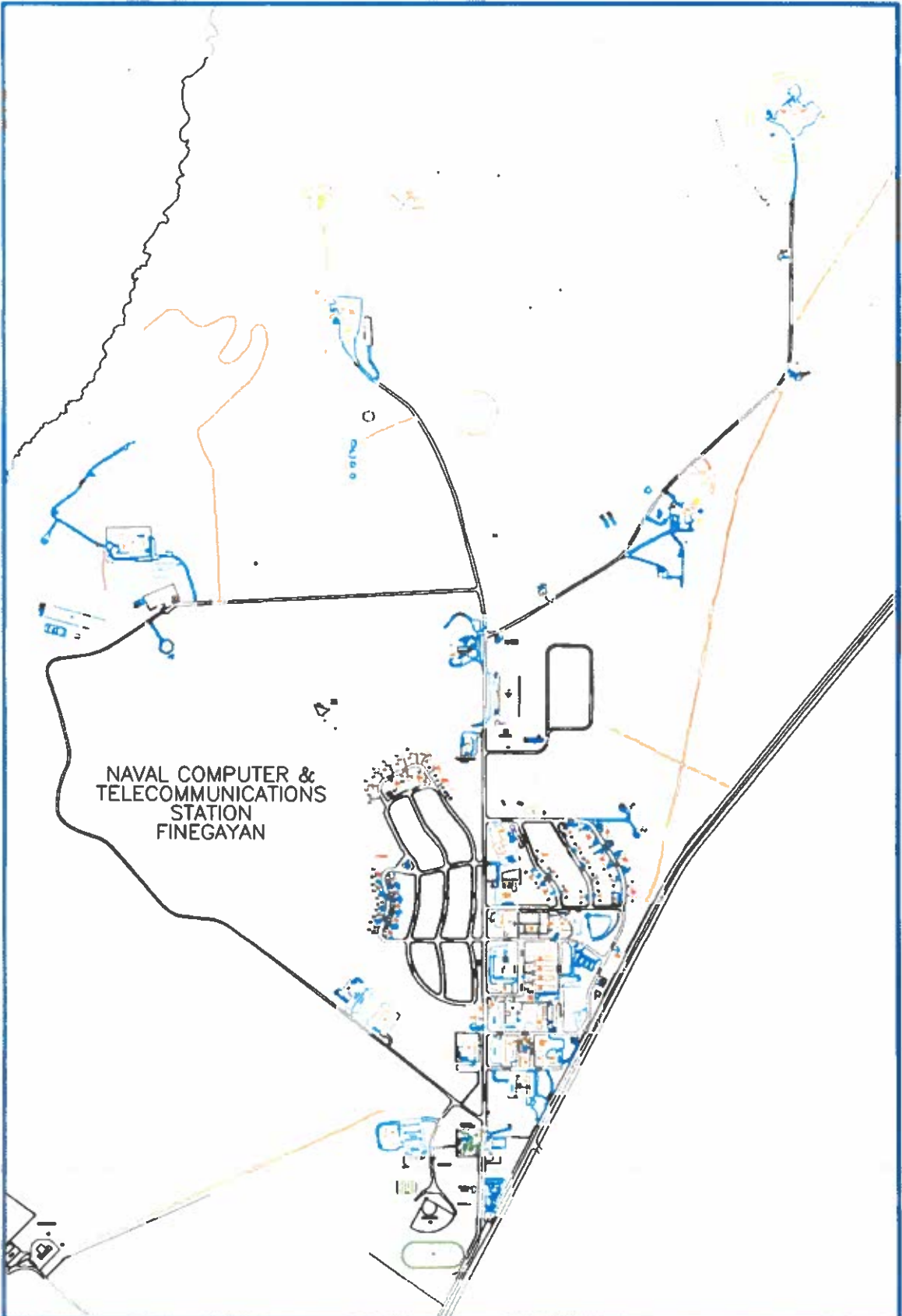
WORK REQUEST NO.

DATE

16 OCT 07

SHEET NO.

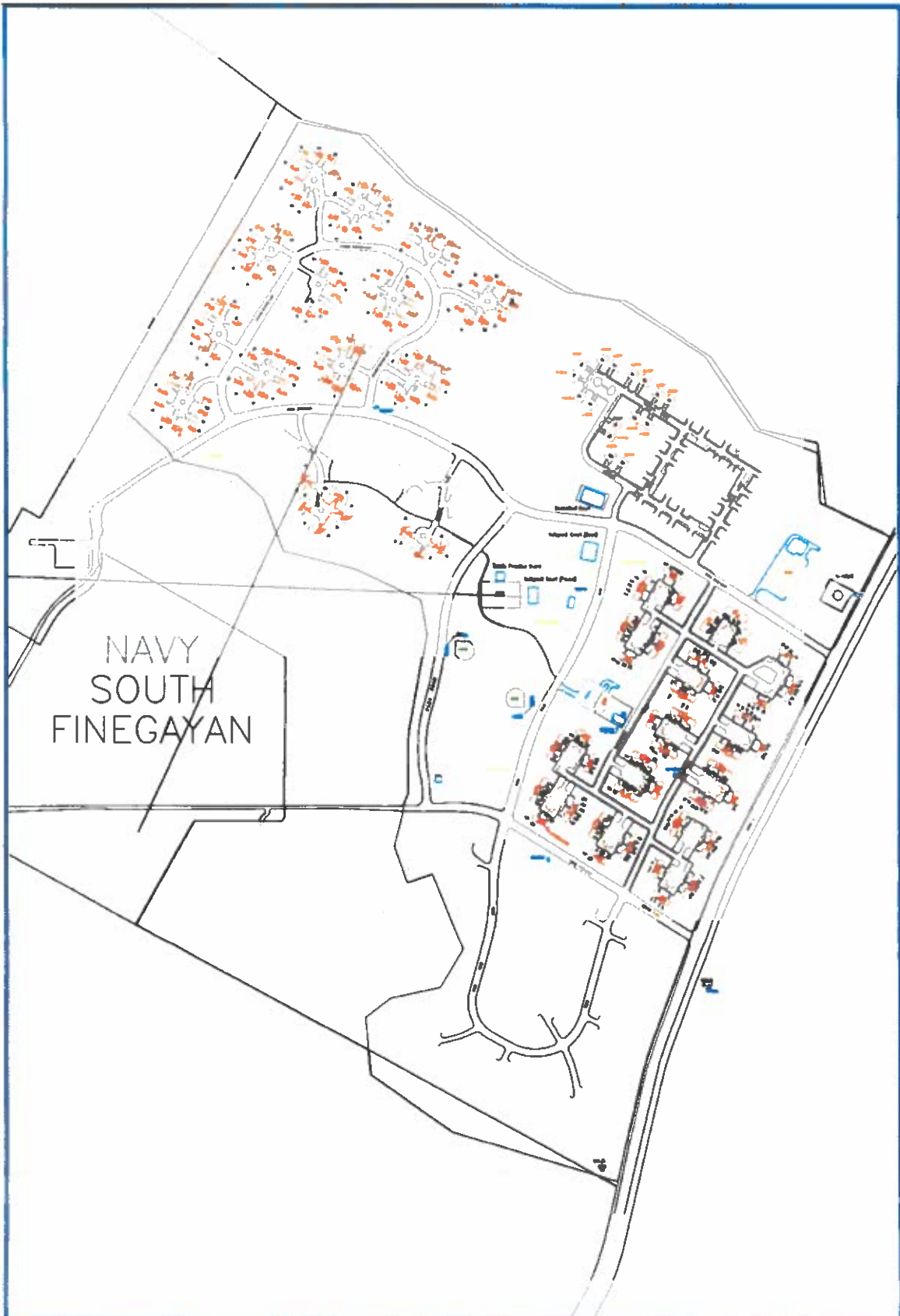
6 of 9



NAVAL COMPUTER &
TELECOMMUNICATIONS
STATION
FINEGAYAN

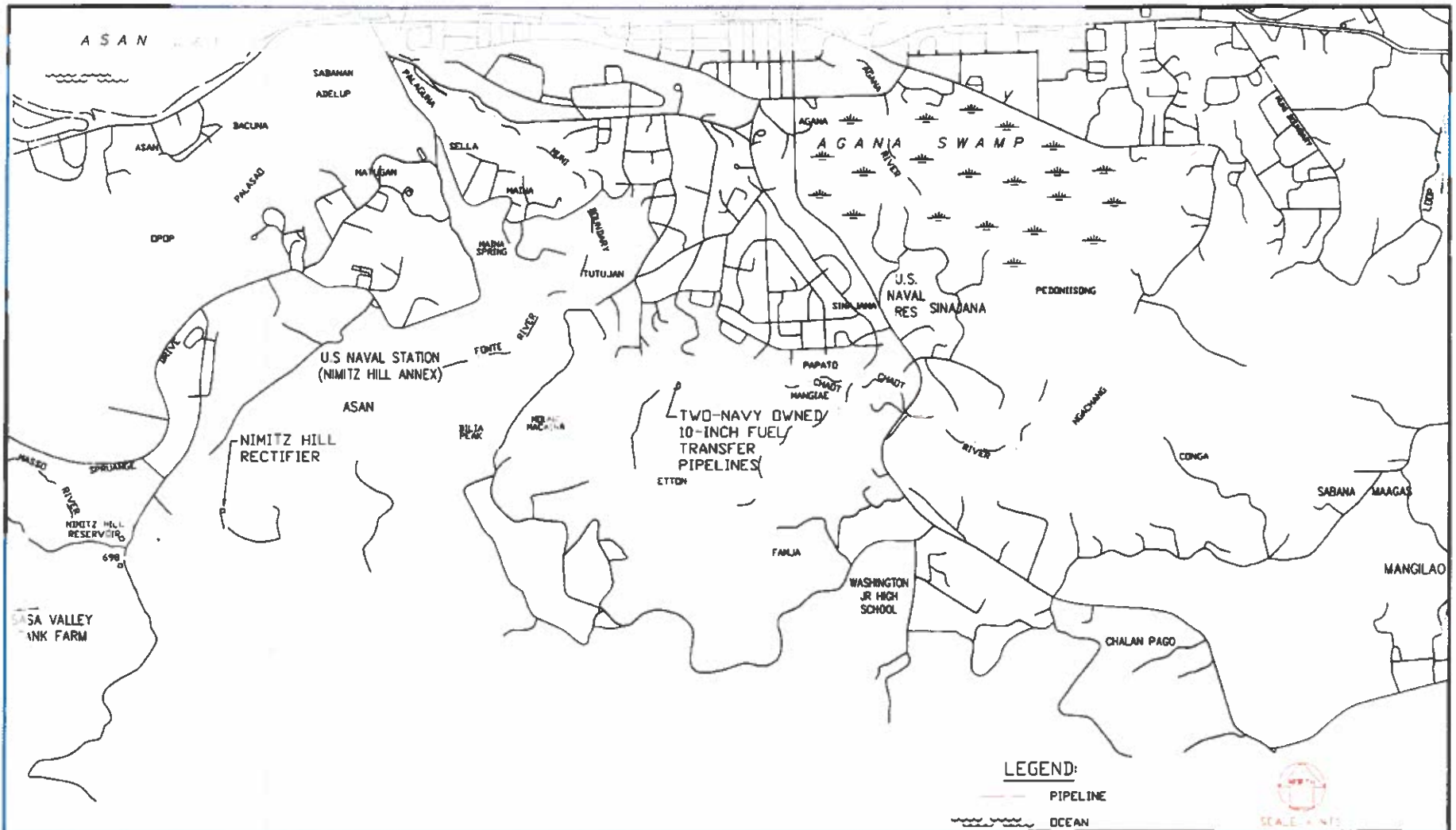
<p>DZSP121 ENVIRONMENTAL COMPLIANCE OFFICE P.O. BOX 107, HAGAÑA, GUAM 96912 TEL: 671-336-3000 FAX: 671-336-1141 WWW.DZSP121.GOV.GU</p>	<p>SHEET CONTENTS / PROJECT NOTES A SCALE = NTS</p>	<p>DRAWING FOR GUAM EPO SECTION 106 CONSULTATION NORTH FINEGAYAN and SURROUNDING AREAS</p>	<p>PREPARED BY M. LANGBANDAN DATE 16 OCT 07 SHEET NO. 7 of 8</p>
---	---	--	--

ENCLOSURE (1)



DZSPI21 MILITARY & CIVILIAN OFFICES P.O. BOX 911 HAGAÑA GUAM 96911 TEL: (671) 336-2024 FAX: (671) 336-2100 WWW.DZSPI21.GU FAX: (671) 336-2100	SHEET CONTENTS / PROJECT NOTES A SCALE = NTS	DRAWING 101 GUAM MPD SECTION 106 CONSULTATION	PREPARED BY M. LANSANGAN
		SOUTH FINEGAYAN and SURROUNDING AREAS	DATE 16 OCT 07 SHEET NO. 8 of 9

ENCLOSURE (1)



OZSP | 21

ENVIRONMENTAL COMPLIANCE OFFICE
 P.O. BOX GH, HAGATNA, GUAM 96932
 TEL (671) 339-2034 FAX (671) 339-7170

DRAWING for EUM MPO SECTION 106 CONSULTATION

NAVY POL PIPELINE (SASA VALLEY TO TIYAN)

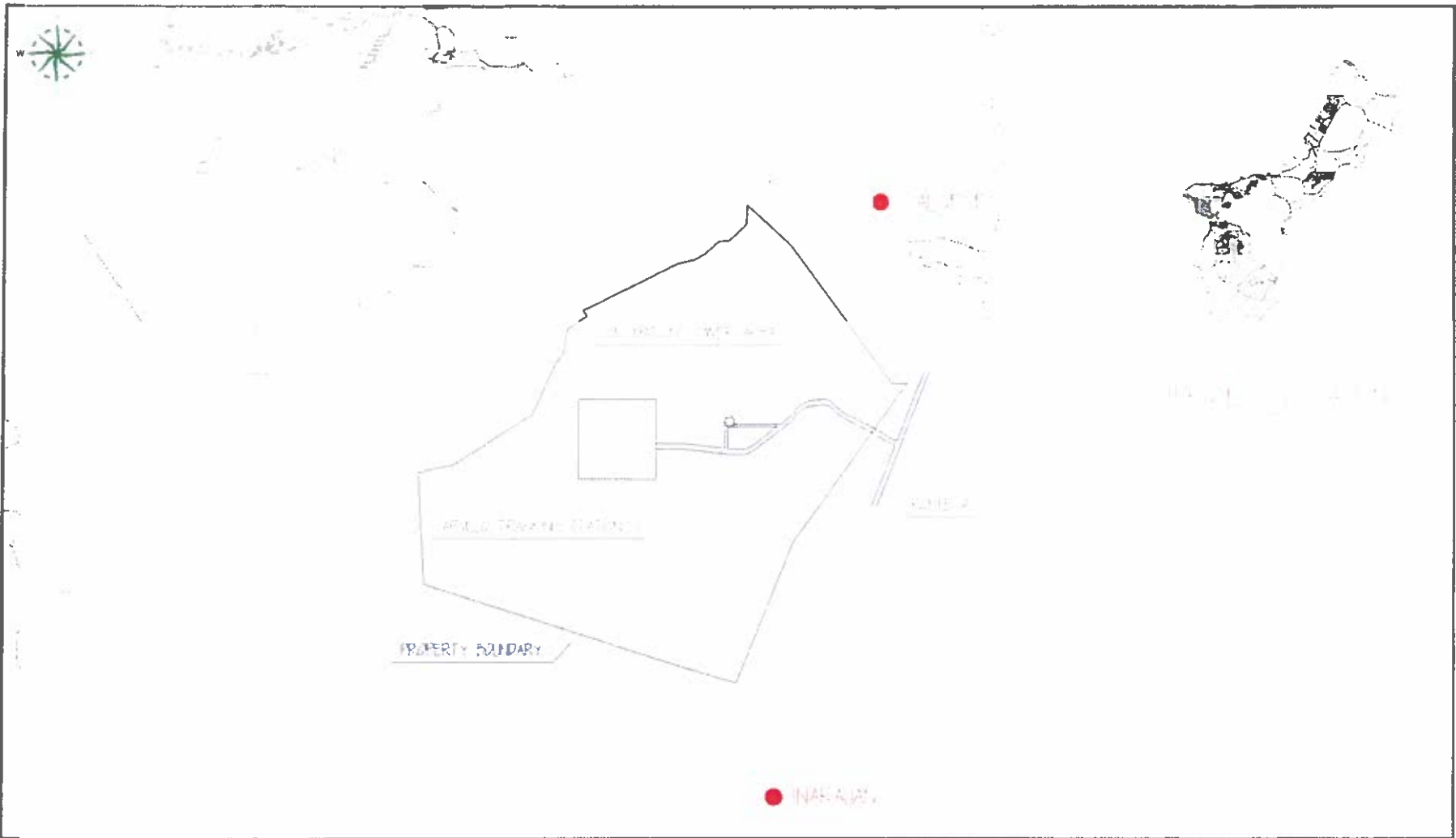
SHEET CONTENTS
 A SCALE = NTS

PROJECT NO.

PREPARED BY:
 M. LANSANGAN

WORK REQUEST NO.

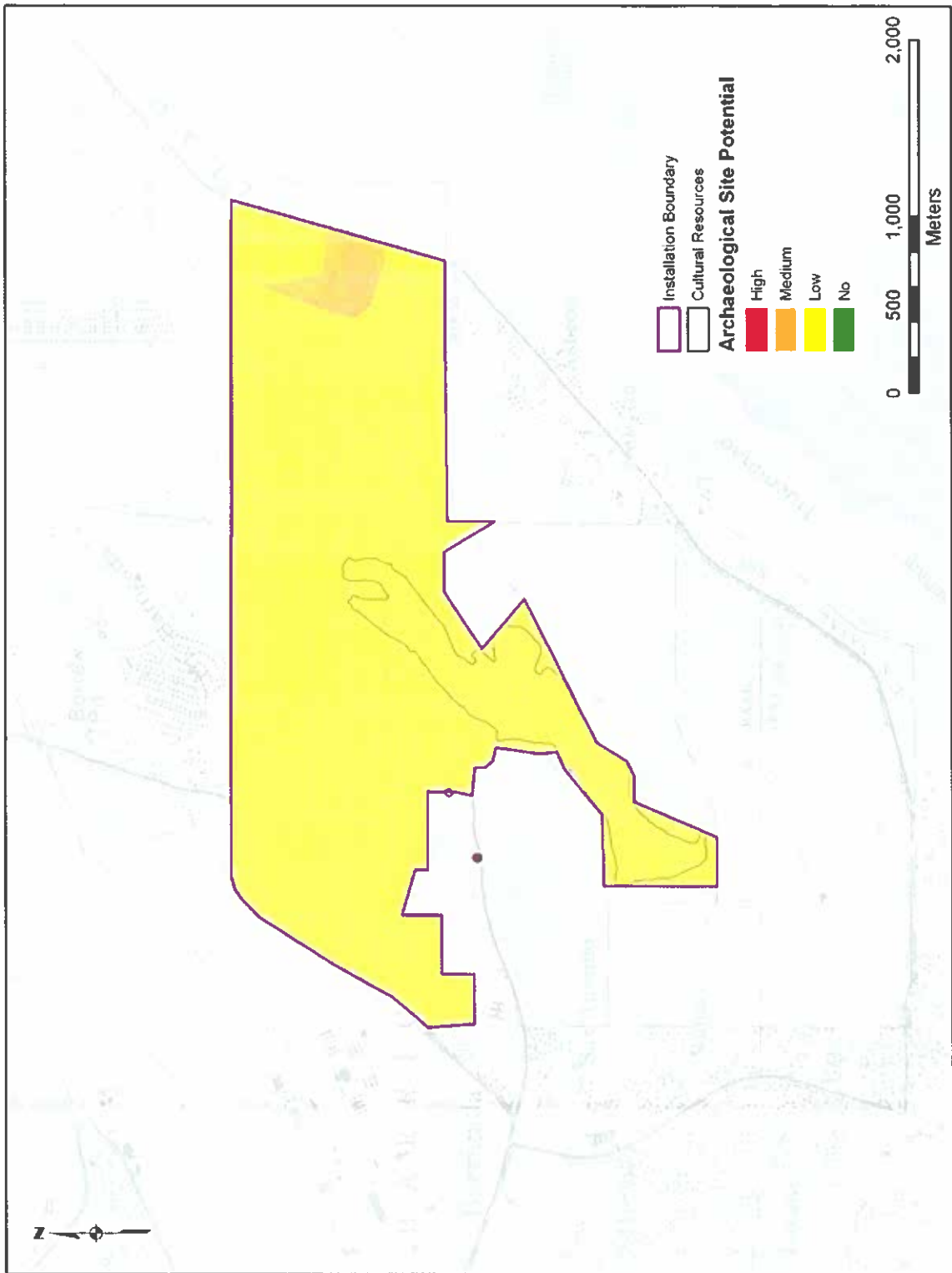
DATE: 16 OCT 07
 SHEET NO: 9 of 9



DZSP|21
 ENVIRONMENTAL COMPLIANCE OFFICE
 P.O. BOX 68 HASATIA GUAM 96941
 TEL: (671) 339-2534 FAX: (671) 339-7170

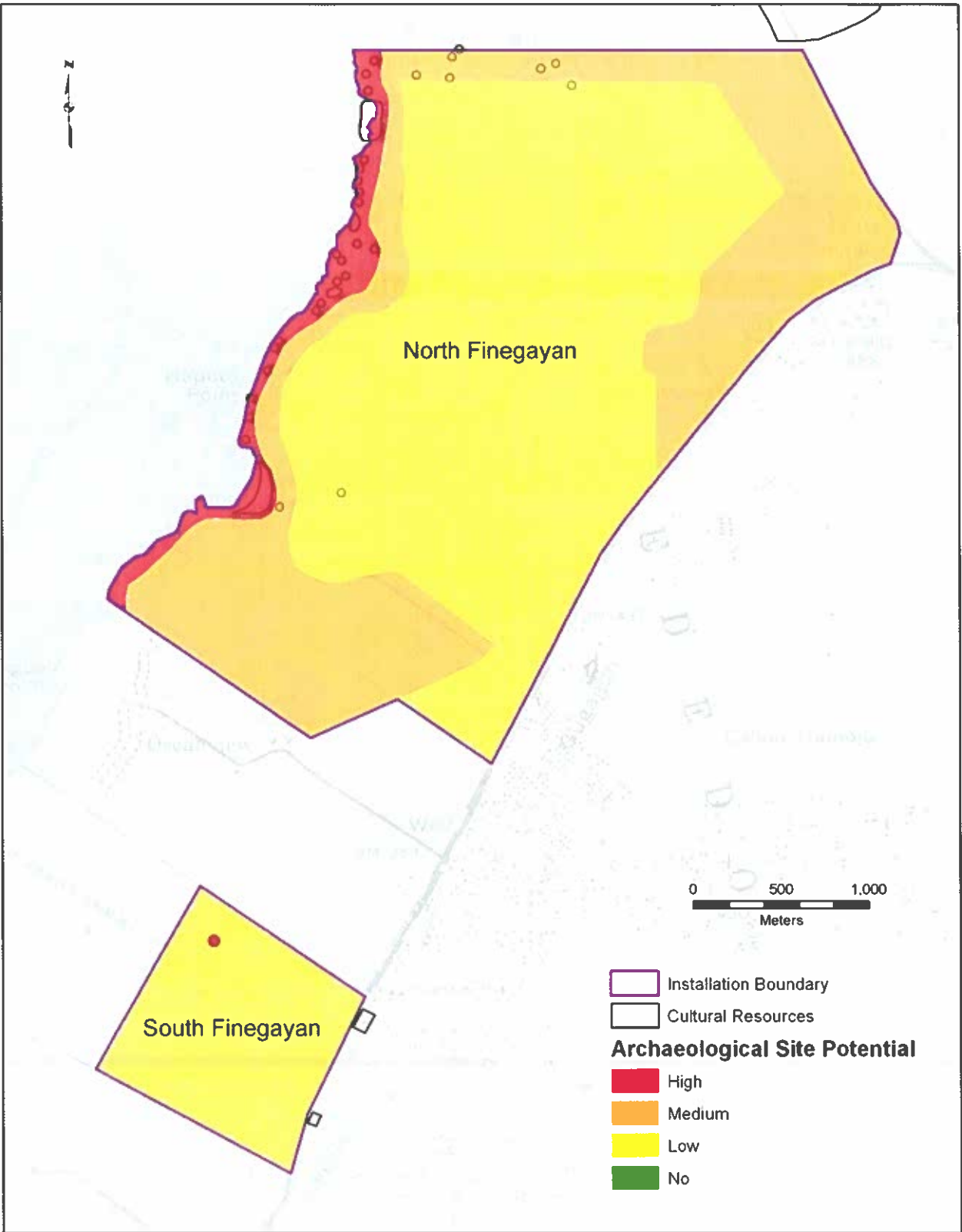
ENVIRONMENTAL COMPLIANCE OFFICE	DATE	PROJECT NO.
APPROVAL	DATE	PROJECT NO.
APPROVAL	DATE	PROJECT NO.

APPENDIX B



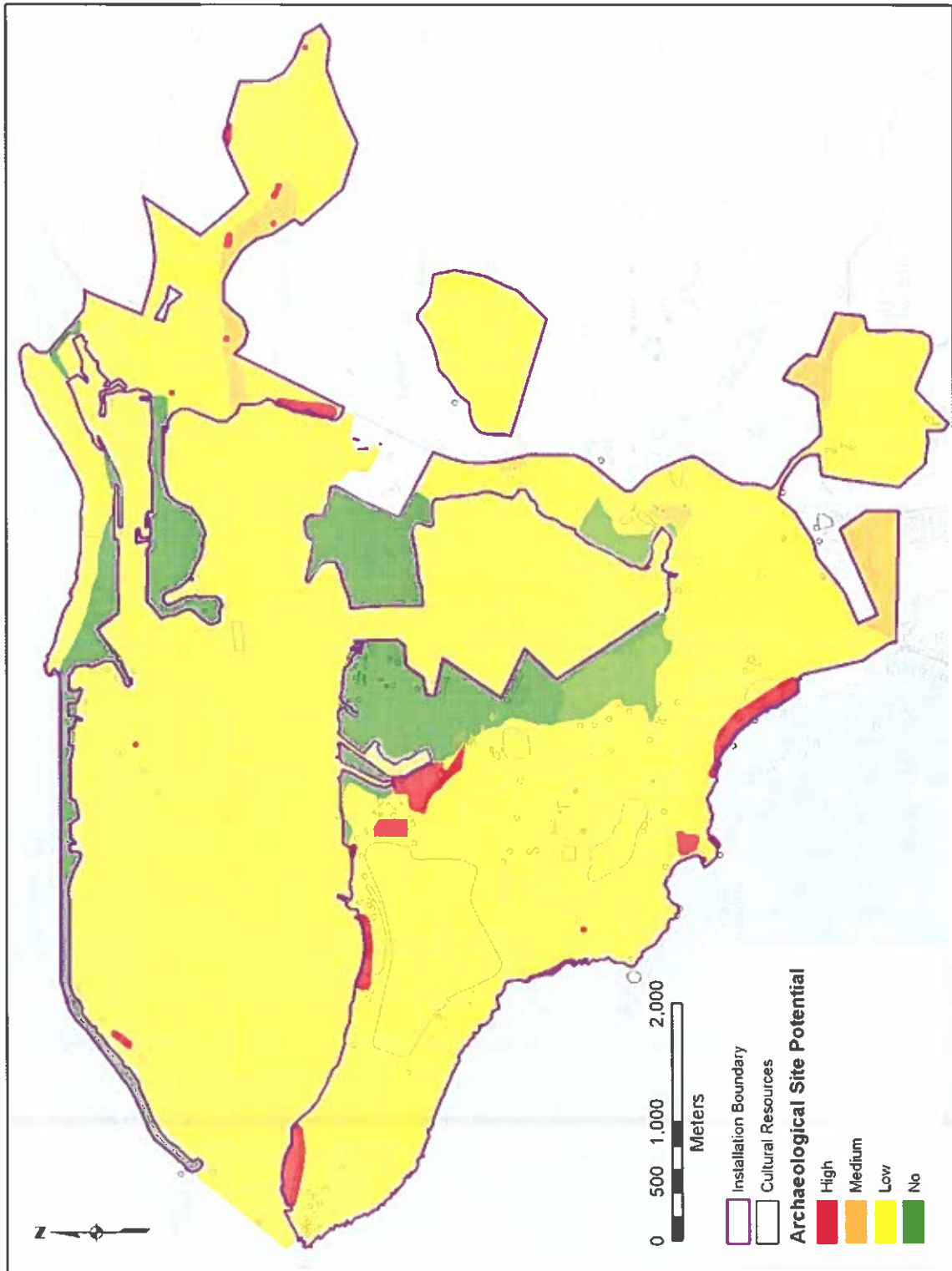
Barrigada Archaeological Probability Map

APPENDIX B



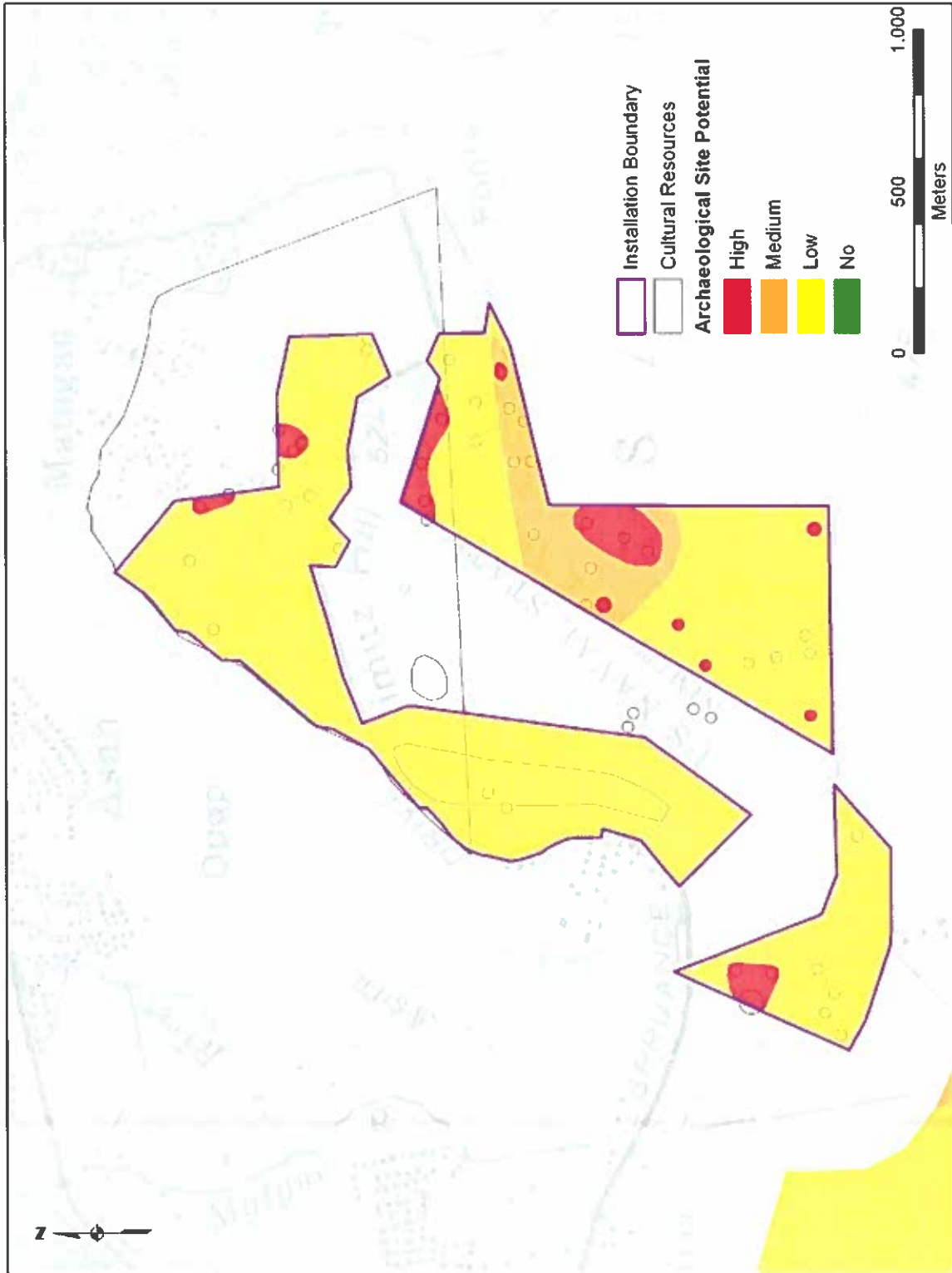
North and South Finegayan Archaeological Probability Map

APPENDIX B



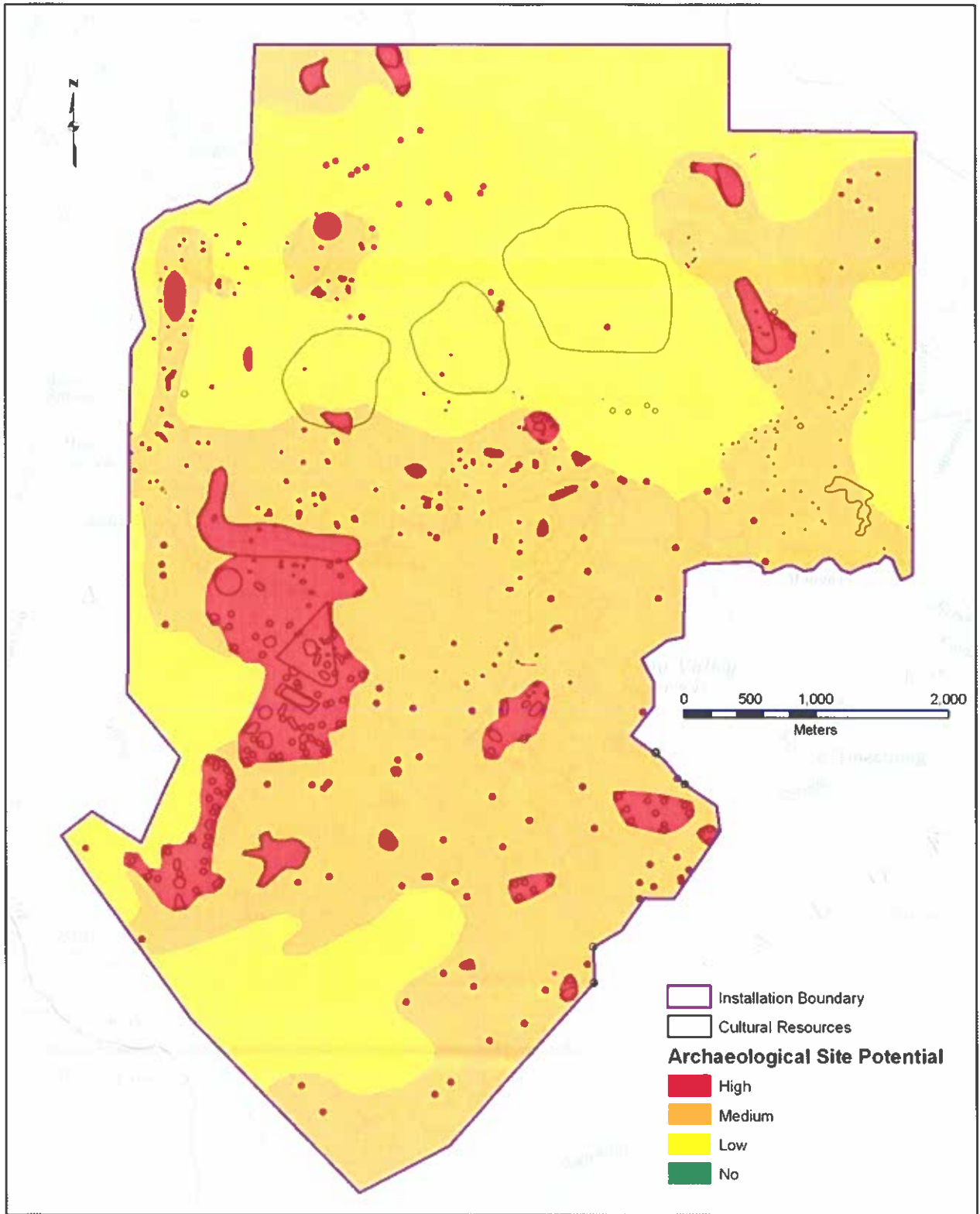
Main Base (Waterfront Annex) Archaeological Probability Map

APPENDIX B



Nimitz Hill Archaeological Probability Map

APPENDIX B



Ordnance Annex Archaeological Probability Map

UNDERTAKINGS THAT REQUIRE NO FURTHER REVIEW

I. SPECIFIED UNDERTAKINGS

A. For Historic Buildings and Structures:

1. Installation of interpretive signs or exhibit structures that are not attached to a historic property and that do not visually intrude on a historic property. Such signs or exhibits shall be constructed of materials and colors that are compatible with the historic property and its setting.
2. Replacement of non-original interior light fixtures in historic interiors.
3. Replacement of exterior lighting when in accordance with SOI's Standards for rehabilitation, restoration, or reconstruction are followed.
4. Replacement in kind of siding, trim, or hardware that match original or existing material and finish.
5. Replacement of glazing similar to existing or original material and design.
6. Replacement in-kind of steel casement windows and their glazing and hardware to match existing or original materials and designs.
7. Replacement of roofs or parts of roofs when replacement matches or is compatible with existing or original material and design; maintenance procedures that do not alter the integrity of the original material.
8. Replacement of porches and stairs if replacement matches historic or existing character, material, and design.
9. Removal of building additions and mechanical equipment determined by personnel, as described in Stipulation II.B, not to be a major contributing factor to the buildings NRHP eligibility.
10. Replacement or installation of gutters and down spouts providing the material and design match existing or are comparable to the buildings period and type.
11. Removal of existing fixtures, accessories, and cabinets that are not contributing factors to the building or structures historic significance.
12. Replacement of screens or match the existing window frame material or match specifications for buildings of similar period and type.
13. Removal of non-original elements such as conduit, pipes, wiring, junction boxes and air conditioners.

14. Painting when new paint matches existing or original color.
 15. Repairs such as filling of spalling concrete and cracks if patched to hide repairs. Excluded are patches to historic bomb damage, shrapnel, strafing or bullet marks if these are major contributing factors to the building's or structure's historic character.
 16. Interior renovation of a building unless interior building configuration is a major contributing factor of the building's historic significance.
 17. Repaving of infrastructure such as streets, parking lots, driveways, sidewalks with matching materials and configuration.
 18. Repairs in kind and maintenance of wharves, piers, berths, or dry-docks, dolphins, quays, pilings, bulkheads, decking, cleats, bitts, bollards, capstans, cranes, trains or support equipment to maintain operational capability.
 19. Maintenance or repair of swimming pools, outdoor equipment and other athletic equipment.
 20. Any replacement, rehabilitation, or restoration of a portion of a structure or building when SOI's standards for rehabilitation, restoration, or reconstruction are followed. For this stipulation to apply, it shall be reviewed by or under the oversight or supervision of a professionals meeting the qualifications in Stipulation II.B
- B. Maintenance or repair of aboveground or interior utilities, such as gas, fuel, electrical, telephone lines, provided that no disturbance occurs outside existing infrastructure or utility routes.
- C. For Landscaping and Ground Disturbing Activities:
1. Maintenance and repair of underground utilities such as sewer, water, storm, electrical, gas and fuel lines, provided that no excavation or ground disturbance occurs outside of existing utility corridors.
 2. Landscaping, grounds maintenance, ongoing maintenance of existing landscaping, or removal of dead or dying vegetation that does not result in ground disturbance.
 3. Ground disturbance activities that occur outside of medium to high probability areas indicated on most current probability maps.
 4. Ground disturbing activities that occur in fill layers as documented by previous archaeological studies in a particular area.

**STANDARD OPERATING PROCEDURES
REGARDING THE INADVERTENT DISCOVERY OF
HUMAN REMAINS ON GUAM**

PURPOSE: This SOP provides uniform guidelines in the event that human remains are inadvertently discovered or disturbed during the course of any action, undertaking, or activity (including those caused by natural occurrences such as erosion) on Navy-retained lands on Guam. Inadvertent discovery refers to the unintentional excavation or discovery of human remains.

ETHICS: Any human remains regardless of ethnicity or time of deposition shall be treated with respect and dignity.

REFERENCE: National Historic Preservation Act, 36 CFR Part 800; Archaeological Resources Protection Act; Certain aspects of the Native American Graves Protection and Repatriation Act and the Guam Department of Parks and Recreation General Guidelines for Archaeological Burials were also incorporated into this SOP.

RESPONSIBILITY: Primary responsibility for carrying out this SOP lies with the Navy's cultural resource manager under Commander, Navy Region Marianas (CNRM). These procedures should be briefed to all on-site managers and supervisors who are carrying out work that could result in inadvertent discovery of remains on Navy property or during Navy sponsored projects.

**STANDARD OPERATING PROCEDURES
REGARDING THE INADVERTENT DISCOVERY OF
HUMAN REMAINS ON GUAM**

STEP I – INITIAL DISCOVERY

If human skeletal remains (or remains thought to be human) are found during a Navy project or on Navy retained lands on Guam, the following procedures shall be followed:

1. The remains shall be protected from the elements and the area around the discovery shall be secured. CNRM security personnel and cultural resource manager should be notified immediately.
2. If human remains were uncovered during a Navy construction project, then the contracting officer associated with the specific project shall be notified per the contract clause referencing these procedures. A stop work order for the area within the immediate vicinity of the find shall be issued by the contracting officer, if appropriate. The contracting officer shall be notified of all subsequent consultations regarding the remains

STEP II PRELIMINARY IDENTIFICATION

CNRM cultural resource manager shall determine if the skeletal remains are animal or human. This shall be done through a professional trained in the identification of human remains (such as an archaeologist, physical anthropologist, forensic specialist) and such professional shall examine the remains and make a determination as to whether they are human. If the skeletal remains are identified as human, then proceed to Step III.

STEP III IDENTIFICATION - AGE OF DEPOSITION (TIME PERIOD) & ETHNICITY

If possible, the age of deposition (time period) and ethnicity of the remains shall be determined based on skeletal morphology, context, and associated artifacts by (or under the supervision of) an archaeologist meeting federal qualifications set forth in 36 CFR 61, Appendix A. This determination shall be made as soon as possible, taking into account specific circumstances regarding the discovery of the remains. The following steps shall be undertaken during the identification phase:

Modern Remains

If the skeletal remains are found to be human and are modern, then CNRM security personnel and Naval Criminal Investigative Services (NCIS) will take over the investigation.

World War II Remains

If the skeletal remains are found to be human and are from World War II (WWII), then the following procedures shall be followed:

1. If there is reason to believe that the remains are from WWII and are of the indigenous origin (Charmorro) or of any other civilian present on Guam at the time, then the Community/Public Affairs office shall be notified and involved in the consultation process.
2. If there is reason to believe that the remains are of U.S. military personnel, then the Joint POW/MIA Accounting Command (JPAC) shall be notified and will take over the case.
3. If there is reason to believe that the remains are Japanese from World War II, the Consulate General of Japan (CGJ), Agana, Guam, shall be notified and consulted with as to the disposition of the remains.
4. A courtesy call will be made to the Guam [State] Historic Preservation Office (SHPO) to inform them that human skeletal remains from WWII time period were uncovered. However, human remains from this time period are usually not considered as archaeological in nature and other agencies such as JPAC or CGJ have jurisdiction over those matters.

Depending on the preliminary determination by the agencies as to whether the remains are of recent, historic, or pre-contact deposition, the following steps shall be taken:

Remains Older than WWII (Historic and Prehistoric)

If the skeletal remains are found to be human and older than 50 years (and are not associated with WWII), then following procedures shall be followed:

1. The cultural resource manager shall notify the SHPO within three working days of the identification that the skeletal remains are human and are historic or prehistoric in nature.
2. If requested, the CNRM cultural resource manager shall arrange for a site visit by a SHPO representative.
3. The cultural resource manager shall consult with the SHPO and follow Section II and III of the Policy Guidance in the Guam Department of Parks and Recreation General Guidelines for Archaeological Burials.
4. If any other organization or agency comes forward and expresses an interest in participating in the consultation process, they must submit a written request expressing their desire to participate in the consultation process and explain how they are culturally affiliated with the human remains. Their comments will be considered in the overall decision making process.
5. If the remains are encountered during project construction, CNRM shall determine the feasibility of project alternatives that will avoid disturbance of the remains or whether disinterment is necessary. If a mass burial is indicated, preservation in place shall be the preferred alternative. The results of the consultation shall be placed on file at CNRM environmental office and JPAC shall be notified.

Undetermined Remains

If a determination as to the age of deposition of the remains or the ethnicity of the remains cannot be determined, the procedures below shall be followed:

1. The SHPO will be notified and consulted with. Based on the consultation, a decision will be made to either preserve the remains *in situ* or to remove them for further analysis in hopes that the age of deposition and ethnicity can eventually be determined so that the appropriate protocols can be followed.
2. If it is determined that the skeletal remains and any associated artifacts will be exhumed, then the remains should be documented by (or under the supervision of) a qualified archaeologist.
3. Tests involving damage to the skeletal material are highly discouraged and will not be performed by the Navy. However, should it be necessary, performance of radiocarbon dating on any associated charcoal, midden, or artifacts may be conducted at the discretion of the Navy in consultation with the SHPO in order to determine age of deposition. The results of these tests, if any, shall be presented in the report by the recording professional. This report shall be submitted to the CNRM cultural resource manager and the SHPO as a record of the study.
4. If additional tests were conducted, another attempt to determine age of deposition and determine the ethnicity of the skeletal remains will be made based on the results. If a determination can be made on the age of deposition or ethnicity, then the disposition of the human remains will be conducted according to appropriate protocols outlined previously.
5. If a professional(s) not associated with the Navy, meeting the qualifications set forth in 36 CFR 61 Appendix A, seeks to analyze the skeletal remains they shall submit a written request to the CNRM cultural resource manager. The CNRM cultural resource manager shall notify the SHPO of the request and will follow the procedures outlined in the Research Guidelines section of the Guam Department of Parks and Recreation General Guidelines for Archaeological Burials. The applicant shall be notified within 30 days of submission of the Research Design whether it has been accepted or rejected. The cost of the tests and report preparation shall be borne by the applicant. A copy of the results and findings shall be provided to the Navy and the SHPO within six months after the tests are conducted. The remains shall be curated at the laboratory of the researcher until plans for reburial have been made.
6. If the age of deposition or ethnicity of the human remains cannot be determined, then the CNRM cultural resource manager, in consultation with the SHPO, shall curate the remains and any associated artifacts in the event that further information may come to light or rebury the remains. A record of the consultation process shall be placed on file at CNRM environmental office and at the SHPO.

STEP IV DISPOSITION

CNRM shall follow Sections II and III of the Policy Guidance in the Guam Department of Parks and Recreation General Guidelines for Archaeological Burials when dealing with the disposition of human remains older than WWII. Reiterated below are procedures tailored specifically to burials found on Navy property on Guam using the Department of Parks and Recreation General Guidelines for Archaeological Burials as a general guideline.

1. If the remains are found eroding out of the soil, the Navy, in consultation with the SHPO, shall decide whether the remains can be preserved in place or whether the remains would be severely damaged by leaving them *in situ*. The results of the decision-making process shall be placed on file at the CNRM environmental office.
2. If the remains are exposed during a project, and the project can be redesigned to avoid the remains, or the remains can be left in place then the following steps shall be taken: The remains and any associated artifacts shall be recorded *in situ* by an individual meeting the qualifications set forth in 36 CFR 61.9 using standard archeological procedures set forth in 48 CFR 44720. Every effort shall be made to determine the number of individuals and the age, sex, and ethnicity of the remains. The documentation and a record of the location of the remains shall be kept on file at CNRM environmental office. A copy shall be provided to the SHPO.
3. If the project cannot be redesigned to avoid disturbing the remains the following steps shall be followed:
 - (a) The remains and any associated artifacts shall be removed by an archeologist meeting the professional qualifications set forth in 36 CFR 61.9, using standard archeological procedures set forth in 48 CFR 44720.
 - (b) A report of the excavation techniques and findings, along with a photographic record shall be submitted to CNRM within 30 days of disinterment. The documentation shall be kept on file at CNRM and a copy provided to the HPO; any associated artifacts shall be temporarily curated at the contractor's laboratory until the final disposition of the remains is determined.
4. If remains have to be moved, then through consultation with the SHPO it will be determined by CNRM that the human remains may be reburied elsewhere. COMAVMARIANAS will follow Section IV(A)(1 and 4) or Section IV(B) of the Guam Department of Parks and Recreation General Guidelines for Archaeological Burials if determined appropriate and funds are available. The documentation and a record of the location of the remains shall be kept on file at the CNRM environmental office. A copy shall be provided to the SHPO.

**PROGRAMMATIC AGREEMENT
BETWEEN THE
COMMANDER, JOINT REGION MARIANAS
AND THE GUAM STATE HISTORIC PRESERVATION OFFICER,
REGARDING DEPARTMENT OF DEFENSE UNDERTAKINGS
ON THE ISLAND OF GUAM**

WHEREAS, the Department of Defense (DoD) has established the Joint Region Marianas (JRM) through a Memorandum of Agreement between the Departments of Navy, Army, and Air Force and pursuant to Department of Defense Instruction (DoDI) 4165.73; and

WHEREAS, the installations, Andersen Air Force Base, Marine Corps Base Camp Blaz, Navy Base Guam are subject to support the CJRM in their responsibilities; and

WHEREAS, the Department of the Navy, through the Commander, Joint Region Marianas (CJRM) retains responsibility for carrying out activities related to cultural resources management within the JRM area of responsibility (Appendix A, which is subject to future updates; and

WHEREAS, this programmatic agreement (PA) supersedes and replaces the 2008 Programmatic Agreement (PA) among the Commander, Navy Region Marianas, the Advisory Council on Historic Preservation, and the Guam Historic Preservation Officer regarding Navy Undertakings on the Island of Guam; and

WHEREAS, through the Defense Base Closure and Realignment Act of 1990 (Public Law 101-510, Title XXIX), as amended through the 2005 National Defense Authorization Act, CJRM recognizes that future acquisitions of land and/or property on Guam would fall under the joint region; and

WHEREAS, for the purposes of this Programmatic Agreement (PA), the term Area of Responsibility (AOR) shall refer to DoD property specifically on the Island of Guam; and

WHEREAS, CJRM, to meet national defense mission requirements, authorizes, carries out, or causes to be carried out a variety of undertakings including but not limited to dredging of its harbors; maintenance, rehabilitation, repair, construction, and demolition of buildings, structures, and roads; installing, repairing, and updating utilities and infrastructure; and work regarding grounds and associated landscaping; and

WHEREAS, CJRM finds that a programmatic approach, in accordance with 36 CFR §800.14(1)(iv) is the appropriate approach to address the circumstances of routine and redundant operations, maintenance, repair activities; and

WHEREAS CJRM and its designee is required to have an Integrated Cultural Resources Management Plan (ICRMP) in accordance with DoDI 4715.16 (3)(b)(1) and Office of Chief of naval Operations (OPNAV) 5090.13-3.4; so

NOW, THEREFORE, CJRM and the Guam State Historic Preservation Officer SHPO agree that CJRM will carry out undertakings on the Island of Guam in accordance with this programmatic agreement with the following stipulations to satisfy its National Historic Preservation Act (NHPA) responsibilities.

STIPULATIONS

I. APPLICABILITY

- A. This PA applies to all DoD undertakings not covered by the *2020 Programmatic Agreement Between the Commander, Joint Region Marianas and the Guam State Historic Preservation Office, Regarding Military Testing and Training on and Within the Surrounding Waters of the Island of Guam* (Guam PATT) and the *2011 Programmatic Agreement Among the Department of Defense, the Advisory Council on historic Preservation, the Guam State Historic Preservation Officer, and the Commonwealth of the Northern Mariana Islands State Historic Preservation Officer Regarding the Military Relocation to the Islands of Guam and Tinian* (2011 Guam Build-up PA) while in effect, executed within CJRM's AOR, regardless of whether they are initiated, funded, or carried out by CJRM or by another DoD command or lessee of the CJRM.
- B. All future CJRM land acquisitions on the Island of Guam shall be incorporated into CJRM's AOR and subject to stipulations identified in this PA.
- C. Unless otherwise noted, this PA will utilize the definitions found within 36 CFR §800.16.

II. PROFESSIONAL STANDARDS

- A. CJRM will use appropriate contract performance requirements, and/or appropriate source selection criteria for cultural resources contractors which shall include, but not necessarily be limited to, minimum qualifications for historic preservation experience and satisfactory prior performance, as appropriate to the nature of the work and the type of procurement, developed with the participation of CJRM CR professionals meeting Stipulation II.A.1, II.A.2, or II.A.3, as appropriate.
 1. All archaeological investigations shall be carried out by or under the supervision of a person meeting the Secretary of Interior's (SOI) Professional Qualification Standards for archaeology finalized and adopted in 1983 and published in Federal Register Volume 48, Number 190, pages 44716-44740; 36 CFR §61.
 2. All built environment inventories and eligibility determinations shall be carried out by or under the supervision of a Qualified Preservation Professional meeting the SOI's Professional Qualifications Standards for History, Architectural History, or Historic Architecture finalized and adopted in 1983 in Federal Register Volume 48, Number 190, pages 44716-44740; 36 CFR §61.
 3. Traditional Cultural Place (TCP) studies and eligibility determinations will be carried out by, or under the oversight, or supervision of, a person or persons

having a graduate degree in Anthropology, History, or closely related field; documented experience or expertise involving Pacific Island cultures; and previous experience conducting TCP studies and evaluations. Studies shall be consistent with guidance in Identifying, Evaluating, and Documenting Traditional Cultural Places National Register Bulletin (2024).

III. OTHER AGREEMENTS

- A. Pursuant to 36 CFR §800.14, federal agencies are authorized to negotiate and adopt multiple program alternatives to achieve compliance. The intent of this PA is to provide for a streamlined process for meeting Section 106 obligations on individual project actions that occur within the JRM AOR, on Guam (See Appendix A). CJRM shall continue to consult on additional program alternatives intended to assist with mitigating large-scale and overarching effects to Guam's cultural resources and traditional lifeways.
- B. Nothing in this PA will alter, modify, or supersede the following Program Alternatives, or future relevant Program Comments, laws, or regulations:
 - 1. World War II (WWII) Temporary Buildings Programmatic Memorandum of Agreement among the U.S. Department of Defense, the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO) executed on 7 July 1986 with 1 May 1991 amendments.
 - 2. Management of Historic Family Housing Units Programmatic Agreement among the U.S. Navy, the Advisory Council on Historic Preservation, and the NCSHPO executed on 17 November 2000.
 - 3. Wherry and Capehart Era Family Housing Program comment issued by ACHP on 18 November 2004.
 - 4. Cold War Era (1946-1974) Unaccompanied Personnel Housing Program comment issued by the ACHP on 18 August 2006.
 - 5. WWII and Cold War Era (1939-1974) Ammunition Storage Facilities Program comment issued by the ACHP on 18 August 2006.
 - 6. Fiscal Year 2025 National Defense Authorization Act, Section 2823, Application of Certain Authorities and Standards to Historic Military Housing and Associated historic Properties of the Department of the Army (1941-1949)

IV. USE OF ARCHAEOLOGICAL SENSITIVITY MAPS

- A. Each installation ICRMP will include archaeological sensitivity maps (maps). The purpose of the maps is to identify the potential for encountering archaeological resources within the installation's AOR. Maps (Appendix B) are based on historic maps, ethno-historic data, archaeological studies, and consultations with the SHPO.
- B. Within two years of signing this PA, CJRM, or its designee, will formalize a separate and complete ICRMP for each installation on Guam. Archaeological

sensitivity maps will be updated twice yearly and are included in the reporting requirements described in Stipulation X. SHPO will be provided an opportunity to review and comment on all map updates and CJRM will consider all comments prior to finalization.

V. GEOGRAPHICAL INFORMATION SYSTEM

- A. All data related to site locations, determinations of eligibility, isolated find locations, facility locations, survey areas, and shovel test locations shall be compiled into a geographical information system (GIS) geodatabase for each installation.
- B. CJRM will provide the SHPO with all updates to the GIS information during the quarterly reporting update.
 - 1. CJRM may require a non-disclosure agreement (NDA) from the SHPO for all data that may be Controlled Unclassified Information or sensitive under other applicable laws (NHPA/ARPA).

VI. ACCESS TO CULTURAL SITES

- A. In recognition of the importance that many properties within CJRM's AOR have for the local community, CJRM has developed a Public Access Plan (PAP) for important locations. The purpose of the PAP is to allow the people of Guam access to cultural sites on CJRM installations in accordance with the PAP Access Plan and the ICRMP for that installation. The access plan will be reviewed and updated annually with the understanding that the overall intent is to provide the local community access to collect medicinal and other plants used for traditional purposes as well as to provide access to those locations that hold special significance to the local community. Access to cultural sites can be requested through the JRM Access Plan Coordinator (APC), who coordinates with installation security to process these requests.
- B. If the SHPO is approached by individuals or organizations wishing to obtain access under the PAP, the SHPO will forward these requests to the APC.

VII. Archaeological Sensitivity Definitions

Archaeological Sensitivity designations will be established in consultation with Guam SHPO.

- A. No Archaeological Sensitivity
 - 1. Areas depicted in Appendix B or the most recent finalized quarterly report map updates as having no potential for intact archaeological deposits.
- B. Low Archaeological Sensitivity
 - 1. For those not covered in VII.A, Low Archaeological Sensitivity Areas generally have no known surface or subsurface archaeological sites. Determination of

Low Archaeological Sensitivity must be documented using the following criteria, as appropriate:

- a. Archaeological surface surveys have been conducted, and review of historical map and/or historical aerial photograph review indicates substantial historical earthmoving associated with construction (i.e., not land clearing only); and/or
- b. Archaeological subsurface investigations identified no subsurface archaeological deposits.

C. Medium Archaeological Sensitivity

Medium Archaeological Sensitivity Areas have been subject to pedestrian inventory, contain no known surface sites, but subsurface investigations have not been conducted; therefore, the presence of subsurface archaeological resources is a possibility.

D. *High Archaeological Sensitivity*

High Archaeological Sensitivity Areas have either been previously surveyed and have documented surface or subsurface sites, or are areas identified from historic maps or ethnographic accounts as areas of known land use (e.g. location of old villages). This includes all areas located in ancient shoreline or beach areas prior to sea level decline from higher sea still stands.

VIII. PROJECT REVIEW REQUIREMENTS

A. *Archaeology*

1. No Archaeological Sensitivity

CJRM shall use good faith effort to provide at least 72 hours advance notice to the SHPO in an area identified as No Archaeological Sensitivity in Appendix B or the most recent finalized Archaeological Sensitivity Maps submission. Notification shall be submitted electronically by email or other electronic means. The Signatories recognize that mission, operational, or other matters of national security may preclude such prior notice. In circumstances where prior notice is not practicable, CJRM shall endeavor to provide notice as soon thereafter as possible. Any dispute arising from notice under this stipulation shall be resolved in accordance with Stipulation XIII.

2. Low Archaeological Sensitivity

CJRM shall use good faith effort to provide at least 72 hours advance notice to the SHPO in an area identified as Low Archaeological Sensitivity in Appendix B or the most recent finalized Archaeological Sensitivity Maps submission and a professional who meets the

standards identified in Stipulation II.A.1 have reached a determination of No Historic Properties Affected. Notification shall be submitted electronically by email or other electronic means.

The Signatories recognize that mission, operational, or other matters of national security may preclude such prior notice. In circumstances where prior notice is not possible, CJRM shall endeavor to provide notice as soon thereafter as practicable. Any dispute arising from notice under this stipulation shall be resolved in accordance with Stipulation XIII.

3. Medium Archaeological Sensitivity

- a. Additional evaluation is required prior to initiating any ground-disturbing activity in these areas, unless alternate treatment is established in consultation with, the following consultation steps are required:
 - i. Notification to SHPO of the planned undertaking.
 - ii. Preparation and submission of an agency approved work plan allowing SHPO 30 calendar days to review and approve the submitted plan.
 - iii. If a previously approved work plan exists for a relevant prior project (eg. same geographic location and/or same activities) that plan may be cited to fulfill the requirement.
 - iv. Where feasible, subsurface archaeological investigations shall be conducted within the Area of Potential Effect (APE prior to construction. In cases where subsurface investigations are not possible (such as below paved areas or thick overburden or fill), archaeological monitoring shall be required.
 - v. In instances where subsurface investigations are not viable, archaeological monitoring shall be required in lieu of subsurface testing.

4. High Archaeological Sensitivity

- a. Additional evaluation is required prior to initiating any ground-disturbing activity in these areas. Additional surface or subsurface site identification and/or NRHP evaluative testing may be appropriate. The following consultation steps are required:
 - i. CJRM will make every effort to avoid or minimize effects to historic properties.
 - ii. Notification to SHPO of the planned undertaking;
 - iii. If avoidance of historic properties is not feasible, data recovery consistent with standard archaeological practices shall be conducted prior to the commencement of construction activities.
 - iv. Prior to conducting any archaeological data recovery, CJRM shall submit a data recovery plan to the SHPO. The plan will focus on

recovering the maximum amount of data from the densest areas of the site and will include excavation of all features encountered until reaching redundancy. Complete excavation of the site is not required. The SHPO shall have 30 calendar days to review and comment on the plan. If the SHPO disagrees with the plan, they shall contact CJRM in writing to request further consultation. If no response is received, CJRM will assume concurrence after 31 calendar days. In the event of disagreement on the data recovery plan, CJRM shall consult with the SHPO to resolve the disagreement. If such consultation fails to reach an agreement, then CJRM, following the procedure outlined in Stipulation XIII(A), will request comments from the ACHP and prepare their final decision.

B. Built Environment Historic Properties

1. CJRM shall use good faith effort to provide at least 72 hours advance notice to the SHPO. Notification shall be submitted electronically by email or other electronic means for:
 - a. Alterations consistent with the most recent Secretary of Interior's Standards for the Treatment of Historic Properties (36 CFR §68) treatment standards for Preservation, Rehabilitation, Restoration, and Reconstruction. Adherence to these applicable guidelines is not considered an adverse effect; and
 - b. Activities listed in Appendix C
2. The Signatories recognize that mission, operational, or other matters of national security may preclude such prior notice. In circumstances where prior notice is not practicable, CJRM shall endeavor to provide notice as soon thereafter as possible. Any dispute arising from notice under this stipulation shall be resolved in accordance with Stipulation XIII.
3. Procedures outlined in 36 CFR 800.3 through 800.7 will be followed for undertakings that have the potential to affect a historic property and the treatment plan is not consistent with guidance in the Secretary of Interior Standards for the Treatment of Historic Properties (36 CFR part 68).

IX. DISCOVERIES AND EMERGENCIES

- A. All project construction contracts and associated work plans will include an inadvertent discovery clause that addresses discovery of archaeological sites/deposits and/or human remains in the course of project construction. If, during construction or other undertaking, previously unrecorded resources are encountered, CJRM will adhere to the following guidelines:
 1. Halt work in the immediate area and fully record the resources, taking reasonable measures to protect the find until consultation is completed. CJRM will notify the SHPO of the find;

2. A qualified professional shall evaluate the resource for eligibility for inclusion in NRHP. CJRM will notify the SHPO by email of the eligibility determination.
 3. If CJRM determines the find to be not eligible for inclusion in the NRHP, then the project will proceed following documentation of the discovery and completion of a SHPO site form. CRJM shall submit a report of findings to the SHPO following completion of ground disturbance.
 4. If CJRM determines the property is eligible for inclusion in the NRHP, they shall notify the SHPO of the determination by phone and email. CJRM shall begin consultation with the SHPO to determine an appropriate treatment plan.
 5. If there is a disagreement over the treatment plan and it cannot be resolved, then Stipulation XIII(A) will be followed.
 6. If, during the performance of an undertaking, human remains (HR), or indeterminate bone (IB), are identified, CJRM shall immediately halt work in the area, secure and cover the find, contact the appropriate authorities, and follow the Standard Operating Procedures (SOP) specified in Appendix D. This information shall be documented and reported to the SHPO in accordance with Stipulation X.
- B. In the event of natural disaster (such as typhoons or tidal waves), fires, sudden disruptions of utilities service, spill events or other emergency events, CJRM may take immediate actions to preserve life and property without Section 106 review. Emergency response work shall take effects to historic properties into consideration. When possible, such emergency actions will be undertaken in a manner that will allow for post-execution consultation. CJRM will notify the SHPO by telephone of the emergency and will follow up with written documentation. Consultation with the SHPO will be conducted as soon as practicable, based on the circumstances. These actions will be included in the twice-yearly report developed in accordance with Stipulation X.

X. NOTIFICATION AND REPORTING REQUIREMENTS

- A. CJRM shall submit notifications in accordance with Stipulations VIII(A)(1) and (2) and VIII(B)(1) and (2). Notifications will include:
1. Project name
 2. Location/ Area (including a map) or Area of Potential Effect (APE)
 3. A brief description of proposed action and outcome of actions taken
 4. Applicable provision(s) of Appendix C (if any)
 5. Name of reviewer
- B. A report twice yearly containing:
1. Summary of actions taken under Stipulations IV - ICRMP; V(B) – GIS updates; IX(A)(5) – Table of HR/IB Reported Discoveries; and X.B.C.1— documentation of SHPO ‘non-responses’.

2. Table of new cultural resource sites identified
 3. Archaeological sensitivity maps/Appendix B – updated no less than twice yearly
- C. The SHPO shall provide a response to any CJRM finding of effect, or determination of eligibility for NRHP listing, within thirty (30) calendar days of receipt of the finding or determination.
1. CJRM will proceed with the undertaking or recording the determination, if at the close of the thirty (30) calendar days:
 - a. SHPO has agreed with the finding or determination
 - b. The 30 days has expired and SHPO has not provided a response or requested an extension
 2. If the SHPO does not concur with the finding or determination, they shall proceed in accordance with Stipulation XIII.

XI. AUDIT

The SHPO may request an audit of activities carried out pursuant to this PA. CJRM will cooperate with all document requests, provided it will not result in delay or loss of Military Construction (MILCON) or other funding, or mission execution. The Signatories recognize that mission, operational, or other matters of national security may affect the schedule of any deliverable.

XII. MEETING

Beginning at the execution of this PA, the Signatories shall meet annually to consult on outstanding issues or concerns that may have occurred during the previous year. CJRM will make every effort to resolve concerns raised by other Signatory to this PA.

XIII. RESOLVING OBJECTIONS

- A. Should either Signatory to this PA object to any action carried out or proposed with respect to the implementation of this PA, CJRM shall consult with the objecting party. If, after such consultation, CJRM determines that the objection cannot be resolved through consultation, it shall forward all documentation relevant to the objection to the ACHP, and include a proposed response to the objection.
- B. Within 30 calendar days of receipt of all pertinent documentation, the ACHP shall exercise one of the following options:
 1. Concur with CJRM proposed response; or
 2. Provide CJRM with recommendations on the proposed response. CJRM shall

- take into account such recommendations before making a final decision on the matter and proceed accordingly; or
3. Notify CJRM that the objection will be referred to the ACHP membership for formal comment per 36 CFR §800.7(c). The resulting formal comment shall be taken into account by the Navy in accordance with 36 CFR §800.7(c). If the ACHP has not responded within the allotted time, CJRM may make a final decision on the objection and proceed accordingly.

XIV. AMENDMENT

Either Signatory to this PA may request that this PA be amended. Such requests will be made in writing and provided to the other Signatory. The requests will include the proposed amendments and the reasons for proposing them. The Parties shall consult to consider the proposed amendment. No amendment shall take effect until it has been executed by all Signatories and filed by the ACHP.

XV. TERMINATION

Either Signatory may propose to terminate this PA by providing 30 calendar days written notice to the other Signatory explaining the reasons for the proposed termination. The Signatory will consult during this period to seek agreement on amendments or other actions that would avoid termination. If the Signatory proposing the termination does not withdraw the proposal by the end of the 30 day period, or a longer period agreed to by all Signatory, then the PA will be terminated. In the event of termination, CJRM will comply with 36 CFR Part 800 with regard to all individual undertakings.

XVI. ANTI DEFICIENCY ACT

- A. The Anti-Deficiency Act, 31 USC § 1341, prohibits federal agencies from incurring an obligation of funds in advance of or in excess of available appropriations. Accordingly, the parties agree that any requirement for obligation of funds arising from the terms of this agreement shall be subject to the availability of appropriated funds for that purpose, and that this agreement shall not be interpreted to require the obligation or expenditure of funds in violation of the Anti-Deficiency Act.
- B. If compliance with the Anti-Deficiency Act alters or impairs CJRM's ability to implement the stipulations of this PA, CJRM shall consult with the Signatory in accordance with Stipulation XIII, XIV, or XV.

XVII. DURATION

- A. This PA shall become effective upon execution by either Signatory and shall remain in effect in accordance with Stipulation XIV or expiration as provided in paragraph B below.

- B. Subject to the termination clause in Stipulation XV, This PA shall expire five years from its effective date if either Signatory provide notice in writing of the intent to expire this PA to the other Signatory no later than 30 days prior five years of the effective date of this PA. If such written notice is not provided, this PA shall continue in effect on a reoccurring five-year basis subject to the provisions above.

SIGNATURE PAGE

COMMANDER, JOINT REGION MARIANAS

B.W. Mietus
Rear Admiral, U.S. Navy
Commander, Joint Region Marianas

GUAM STATE HISTORIC PRESERVATION OFFICER

Patrick Lujan
Guam State Historic Preservation Officer

Appendix A:
Joint Region Marianas Landholdings

Appendix B: Archaeological Sensitivity Maps

Appendix C:
Undertakings Requiring Advance SHPO Notification

UNDERTAKINGS EXEMPTED FROM FURTHER REVIEW

I. Historic Buildings and Structures

- A. Installation of interpretive signs or exhibit structures that are not attached to a historic property and that do not visually intrude on a historic property. Such signs or exhibits shall be constructed of materials and colors that are compatible with the historic property and its setting.
- B. Replacement of non-original interior light fixtures in historic interiors.
- C. Replacement of exterior lighting when in accordance with SOI's Standards for rehabilitation, restoration, or reconstruction.
- D. Replacement in kind of siding, trim, or hardware that match original or existing material and finish.
- E. Replacement of glazing similar to existing or original material and design.
- F. In-kind replacement of steel casement windows and their glazing and hardware to match existing or original materials and designs.
- G. Replacement of roofs or parts of roofs when replacement matches or is compatible with existing or original material and design; maintenance procedures that do not alter the integrity of the original material.
- H. Replacement of porches and stairs if replacement matches historic or existing character, material, and design.
- I. Removal of building additions and mechanical equipment determined by qualified personnel, as described in Stipulation II.B, not to be a characteristic feature to the building's NRHP eligibility.
- J. Replacement or installation of gutters and down spouts providing the material and design match existing or are comparable to the buildings period and type.
- K. Removal of existing fixtures, accessories, and cabinets that are not contributing elements to the building or structure's historic significance.
- L. Replacement of screens that match the existing window frame material or match specifications for buildings of similar period and type.
- M. Removal on non-original elements such as conduit, pipes, wiring, junction boxes, and air conditioners.
- N. Painting when new paint matches existing or original color.
- O. Repairs to spalling and cracking concrete if patched to hide repairs. Excluded

are patches to historic bomb damage, shrapnel, strafing or bullet marks if these are contributing elements to the building's or structure's historic character.

- P. Interior renovation of a building unless interior building configuration is a contributing element to the building's historic significance.
- Q. Repaving infrastructure such as streets, parking lots, driveways, and sidewalks with matching materials and configuration.
- R. Repairs in kind and maintenance of wharves, piers, berths, or dry-docks, dolphins, quays, pilings, bulkheads, decking, cleats, bits, bollards, capstans, navigational markers, cranes, trains, or support equipment to maintain operational capability.
- S. Maintenance or repair of swimming pools, outdoor equipment, and other athletic equipment.
- T. Any replacement, rehabilitation, or restoration of a portion of a structure or building when SOI's standards for rehabilitation, restoration, or reconstruction are followed. For this stipulation to apply, it shall be reviewed by or conducted under the supervision of a professional meeting the qualifications in Stipulation II.B
- U. Maintenance or repair of aboveground or interior utilities, such as gas, fuel, electrical, telephone lines, provided that no disturbance occurs outside existing infrastructure or utility routes.
- V. Installation of reversible signage on existing fences where the fence is not a contributing resource to a historic property.

II. Landscaping and Ground Disturbing Activities:

- A. Maintenance and repair of underground utilities such as sewer, water, storm, electrical, gas and fuel lines, provided that no excavation or ground disturbance occurs outside of existing utility corridors.
- B. Landscaping, grounds maintenance, ongoing maintenance of existing landscaping, or removal of dead or dying vegetation that does not result in ground disturbance.
- C. Ground disturbance activities that occur within low sensitivity areas as indicated on the most recent archaeological sensitivity map for that area.
- D. Ground disturbing activities that occur in fill layers as identified and documented in the most recent archaeological sensitivity map for that area.
- E. Buildings and Structures over 50 Years Old that have been determined Not Eligible for inclusion in the National Register of Historic Places.

1. Must have SHPO concurrence letter on the determination of eligibility.
- F. All activities that occur within or on a building or structure that do not require excavation outside No or Low Archaeological Sensitivity areas.

III. Archaeological Sites

- A. Ground disturbance within archaeological sites previously determined Not Eligible for inclusion in the NRHP.
1. Must have consulted on the determination of eligibility.
 2. Must have SHPO concurrence on the determination of eligibility.

Appendix D:

Treatment of Human Remains

SOP FOR HUMAN REMAINS

PURPOSE: This SOP provides uniform guidance for human remains that are inadvertently discovered or encountered during any activity that results in ground disturbance (including those caused by natural occurrences such as erosion) within the Commander, Joint Region Marianas (CJRM) Area of Responsibility (AOR).

ETHICS: All human remains shall be treated with respect and dignity.

REFERENCE: NHPA, 36 CFR Part 800; Archaeological Resources Protection Act; Guam Department of Parks and Recreation General Guidelines for Archaeological Burials.

RESPONSIBILITY: Primary responsibility for carrying out this SOP lies with CJRM Cultural Resources Manager (CRM) or the installation CRM per request of the CJRM. These procedures should be briefed to all on-site managers and supervisors who are carrying out work that could result in inadvertent discovery of remains on DoD property or during DoD sponsored projects.

I. INITIAL DISCOVERY

- A. If suspected human skeletal remains are encountered during execution of an undertaking, the following procedures shall be followed:
1. All ground-disturbing work within 15 meters (50 feet) of the remains shall stop.
 2. The remains shall be covered to protect them from the elements and the area around the discovery shall be secured. A temporary barrier shall be emplaced, such as high visibility cones/candle sticks with flagging tape (until high visibility fencing is emplaced per request of the CRM).
 3. CJRM and the installation CRM should be notified immediately.
 4. If human remains were uncovered during a construction project, then the contracting officer (KO) associated with the specific project shall be notified per the contract clause referencing these procedures, including the installation of protective barrier (such as high visibility fencing per request of the CRM). A pause in ground disturbance for the area within 15 meters of the find shall be issued by the KO, or a stop work order if appropriate. The KO shall be notified of all subsequent consultations regarding the find.

II. PRELIMINARY IDENTIFICATION

The installation CRM shall confirm the skeletal remains are human. If the installation CRM is unable to confirm the remains are human, they will seek the opinion of a professional trained in the identification of human remains such as an archaeologist, physical anthropologist, forensic specialist. If the skeletal remains are identified as human (or human cannot be ruled out), then proceed to Step III.

III. IDENTIFICATION - AGE OF DEPOSITION (TIME PERIOD) & ANCESTRY

- A. As soon as possible following confirmation of the identification of human remains, the age of deposition (time period) and ancestry of the remains shall be determined. The determination should be based on skeletal morphology, archeological context, and associated artifacts and should be conducted by an archaeologist who meets the federal qualifications set forth in Stipulation II.B. of this document.
- B. The following discussion addresses procedures to be taken based on time period to which the remains date.
- C. Modern Remains
 - a. If the remains are determined to be modern, CJRM security personnel and Naval Criminal Investigative Services (NCIS) will take over the investigation.
- D. World War II Remains
 - a. If the skeletal remains are found to be human and are believed to be from World War II (WWII), the following procedures apply:
 - b. If there is reason to believe that the remains are from WWII and are of the indigenous origin (CHamoru) or other civilian (non-military) present in Guam at the time, then the Guam State Historic Preservation Office (SHPO) shall be notified and involved in the consultation process.
 - c. If there is reason to believe that the remains are of U.S. military personnel, then the Defense POW/MIA Accounting Agency (DPAA) shall be notified and will assume responsibility for the case. CJRM J45 Director will also be notified.
 - d. If there is reason to believe that the remains are Japanese from World War II, the Consulate-General of Japan (CGJ) in Hagatna [Guam] and the CJRM shall be notified and consulted, in coordination with the installation CRM, as to the disposition of the remains. CJRM J45 Director will also be notified.
 - e. Guam SHPO will be notified to inform them that human skeletal remains believed to be from WWII era military personnel were identified. In Guam, jurisdiction for WWII military remains rests with DPAA or CGJ. CJRM and the installation CRM will defer to DPAA and CGJ for treatment. The installation CRM shall arrange for a site visit by a SHPO representative if such visit is requested by the SHPO.
- E. Remains Older than WWII (Historic and Precontact)
 - 1. If the skeletal remains are determined to be older than 50 years and are not associated with WWII, then following procedures shall be followed:

1. The CJRM and Installation Leadership shall be notified (per commander's critical information requirement [CCIR]) by email the same day that the remains are confirmed human (or human cannot be ruled out).
2. After leadership has been informed, the Guam SHPO shall be notified within 24 hours by email that human remains were encountered that are historic or precontact in nature and do not belong to the WWII era. A more comprehensive notification of discovery shall be submitted to SHPO as soon as feasible.
3. The CJRM CRM shall arrange for a site visit by a SHPO representative, if such visit is requested by the SHPO.
4. The CJRM shall enter into consultation with the SHPO and shall coordinate procedures for the recovery, analysis, and repatriation of the human remains..
5. If a local organization, family, or agency expresses an interest in participating in the consultation process, they must submit a written request expressing their desire to participate and identify their relationship to the remains. All comments received during consultation will be considered in making final disposition determinations.
6. If the remains are encountered during project construction, CJRM shall determine the feasibility of project alternatives that will avoid further disturbance of the remains or whether disinterment is necessary. If an intact burial is identified, preservation in place shall be the preferred alternative.

F. Remains of Undetermined Age

1. If a determination as to the age of deposition of the remains or the ancestry of the remains cannot be determined, the procedures below shall be followed:
 - a. CJRM shall initiate consultation with the SHPO. Based on the consultation, a decision will be made to either preserve the remains *in situ* or to remove them for further analysis to establish the age of deposition and ancestry of the find.
 - b. If CJRM determines that the skeletal remains and associated artifacts will be exhumed, the remains will be documented by (or under the direct supervision of) a qualified archaeologist.
 - c. Further analysis is allowed to expand our knowledge of population interactions with prior approval by SHPO. The CJRM shall submit a letter of intent to SHPO for approval prior to any further analysis, such as radiocarbon dating and DNA. The results of these tests, if any, shall be presented in a report by the recording professional as part of the final report. The final report shall follow standard review and acceptance procedures with CJRM and SHPO.
 - d. If the age of deposition or ancestry of the human remains cannot be determined, then the CJRM, in consultation with the SHPO, shall curate

the remains and associated artifacts in the event that further information may come to light or rebury the remains. A record of the consultation process shall be placed on file at the CJRM and at the SHPO.

G. Conducting Research with Human Remains

1. Any professional within the Department of Defense (DoD) or outside the DoD, meeting the qualifications set forth in 36 CFR 61 Appendix A, may seek to research human remains. The researchers shall submit a written request to the CJRM cultural resources manager for review. The CJRM cultural resources manager shall submit the research design for review by the SHPO. The research design must be approved by the CJRM and the SHPO. The applicant shall be notified within 30 days of submission of the Research Design whether it has been accepted or rejected. The cost of the tests and report preparation shall be borne by the applicant. A copy of the results and findings shall be provided to the CJRM and the SHPO within six months of completion of the tests. The remains shall be curated at the expense of the researcher until plans for reburial have been made.

IV. DISPOSITION

- A. CJRM shall coordinate with SHPO regarding the disposition of human remains older than WWII. Reiterated below are procedures tailored specifically to burials found on DoD property on Guam.
 1. If the remains are found eroding out of the soil, the CJRM, in consultation with the SHPO, shall decide whether the remains can be preserved in place or whether the remains would be severely damaged by leaving them *in situ*. The results of the decision-making process shall be placed on file at the CJRM environmental office.
 2. If the remains are exposed during a project, and the project can be redesigned to avoid the remains, or the remains can be left in place then the following steps shall be taken: The remains and any associated artifacts shall be recorded *in situ* by an individual meeting the qualifications and standard archeological procedures set forth in 48 FR 44716. Every effort shall be made to determine the number of individuals and the age, sex, and ancestry of the remains. The documentation and a record of the location of the remains shall be kept on file at CJRM environmental office. A copy shall be provided to the SHPO.
 3. If the project cannot be redesigned to avoid disturbing the remains the following steps shall be followed:
 - a. The remains and any associated artifacts shall be removed by an archaeologist meeting the professional qualifications using standard archeological procedures set forth in 48 FR 44716. A report of the excavation techniques and findings, along with a photographic record shall be submitted to the installation CRM within 30 days of disinterment. The documentation shall be kept on file at CJRM and a copy provided to

the SHPO; any associated artifacts shall be temporarily curated at the contractor's laboratory until the final disposition of the remains is determined.

- b. If remains have to be moved, CJRM will consult with the SHPO on intended disposition. The documentation and a record of the location of the remains shall be kept on file at the CJRM environmental office. A copy shall be provided to the SHPO.



DEPARTMENT OF THE NAVY
 JOINT REGION MARIANAS
 PSC 455 BOX 211
 FPO AP 96540-1000

5090
 Ser J00/ 0587
 November 14, 2025

Mr. Patrick Lujan
 State Historic Preservation Officer
 Department of Parks & Recreation
 490 Chalan Palayso
 Agana Heights, Guam 96910

SUBJECT: CONTINUED COMMITMENT TO CULTURAL RESOURCE MANAGEMENT PARTNERSHIP

Håfa Adai Mr. Lujan,


As part of Joint Region Marianas' (JRM) partnership with your office, I wanted to provide you an update on several shared interests:

- Implementation and Maintenance of the Electronic State Historic Preservation Officer (E-SHPO) Portal. After the initial development of a pilot E-SHPO portal, a local contract was awarded in September 2025 for \$140K for the full launch of the portal. The initial contract was funded by Missile Defense Agency (MDA). Annual web hosting and maintenance of the portal will cost approximately \$85K (funding source still to be determined).
- Star Cave Study. The proposal was well received by the Department of War (DoW) Legacy Program, which viewed it as a strong candidate for DoW Legacy Program Funding. We are optimistic concerning approval of \$205K this fiscal year for the study and preservation of the historic rock art images within the cave.
- Cultural Resources Workforce Development Program. Designed to develop a strong cultural resources workforce on Guam, this program remains in development with the University of Guam. Estimated at \$400K, this is another project we plan to submit to the DoW Legacy Program for consideration.
- West Bonya Latte Sites Interpretive Hiking Trail. JRM is examining potential access and funding solutions. This project will require close coordination between your office, Naval Base Guam, and the National Park Service. We are committed to exploring an approach that would both meet the desired intent while maintaining the required security within the Naval Magazine.

In addition to the above initiatives, we recently awarded a contract for \$482K to provide continued liaison support with your office for another year.

JRM remains committed to our continued partnership and shared goal of protecting the historic properties and cultural resources on the island. Should you have any questions, please contact Christopher King at christopher.a.king94.civ@us.navy.mil or (671) 339-3117.

Very Respectfully,


 B. W. MIETUS
 Rear Admiral, U.S. Navy
 Commander

Date Received:	Staff Initial:
Doc. Dates:	Incoming No.:
RC No:	Other No.:
SHPO Comments:	
1.	
2.	
3.	





Lourdes A. Leon Guerrero
Governor
Joshua F. Tenorio
Lt. Governor

Department of Parks and Recreation
Dipattamenton Plaset yan Dibuetision
Government of Guam

Director's Office, Parks and Recreation Divisions
#1 Paseo de Susana, Hagåtña, Guam 96910
P.O. Box 2950, Hagåtña, Guam 96932
(671) 475-6288; Facsimile (671) 477-0997
Guam Historic Resources Division
490 Chalan Palasyo, Agaña Heights, Guam 96910
(671) 475-6294/6355; Facsimile (671) 477-2822



Angel R. Sablan
Director
Warren Pelletier
Deputy Director

June 11, 2025

In reply refer to:
RC 2007-0782
(cr: 2024-0331)

John Salas, P.E.
Environmental Director
By Direction
Naval Facilities Engineering Systems Command, Marianas
PSC 455, BOX 195
FPO AP 96540-2937

Subject: STIPULATION VIII.A.2(B)(EMERGENCIES AND DISCOVERIES) OF THE
2008 PROGRAMMATIC AGREEMENT FOR UNDERTAKING ON THE
ISLAND OF GUAM; UNDERTAKING FOR INITIAL DEFENSE
OPERATIONAL CONCEPT (ID) DEVELOPMENT ON GUAM
(RC 2007-0782/CR 2024-033)

Hafa Adai Mr. John Salas,

Thank you for your June 04, 2025, transmittal letters reporting on adverse effects to a previously undocumented traditional CHamoru site that was removed during ground-disturbing activities on Andersen AirForce Base, Guam in support of Missile Defense Agency Project P-699 after July 2, 2024. The project was mobilized under the terms of a previously approved Archaeological Survey, Discovery and Monitoring Plan in Support of MILCON P-735 Multi-Purpose Machine Gun Range, Andersen Air Force Base, Yigo, Guam (August 9, 2021 – revisions accepted by GHRD for final work plan, cited as February 2021).

In the first of two letters from you on June 04, 2025, two documents were provided for GHRD review:

1. An addendum to the plan by SEARCH that was intended to accompany the approved P-735 work plan as modified for this project area (Rasmussen and Lauer 2021) in Enclosure 1; and,
2. The SEARCH technical report on the results of inventory shovel probing and archaeological monitoring in support of Missile Defense Agency project P-699 in Enclosure 2.

These documents were dated May 2024 and November 2024 respectively. Neither were previously provided and neither have been reviewed by our office.

In your second transmittal letter of June 04, 2025, you provided a letter from PACAF (Barbara Torres) August 29, 2024, informing of post-field discovery identified as an indeterminate bone and culturally enriched soils. In addition, you provided a plan intended to serve as mitigation investigations and NRHP evaluation of an area proposed as a site that was not determined prior to demolition during Project P-699. A timeline of the submittal of the draft report to AAFB EV manager August 2, 2024, and the transmittal of a fragment of bone identified as “indeterminate” on August 7 and transferred to Dr. Hedy Justus on August 12, 2024, is included in the letter from PACAF on August 29, 2024. The letter about the possible human skeletal remains (HSR) was received August 30, 2024, reviewed by GHRD on September 4, 2024, requesting an update following ICRMP Standard Operating Procedures, as available.

It appears that there has been some miscommunication and interruption of the flow of information as well as timely review of documents and discoveries. It appears that the project proceeded without consultation with either the CRM – NAVFAC nor SHPO, leading to the improper documentation of HSR as well as the destruction of an archaeological site that had been tentatively identified in the draft report as early as August 1, 2024.

We have reviewed the “Proposed Mitigation Plan for Damage to Archaeological Site during Missile Defense Agency project P-699” and find it acceptable as Mitigation of the adverse effects from this project on the archaeological site described on pp. 115-117 of the “Revised (sic) Final Report Archaeological Survey and Monitoring in Support of FY24 Missile Defense Agency Project P-699, AAFB, Guam.”

We will proceed to review the Final Report when we receive notification of the final determination for discovery of “indeterminate HSR” and the Report of the Proposed Mitigation Plan.

Thank you for your due diligence for the cultural resource management of the P-699 project. We look forward to seeing a report based on the investigations of the Proposed Mitigation Project and of any further inquiry into lapses in communication and protocol that have led to this adverse effect.

Should you have any questions, please contact Mr. Logan Myers, Archaeologist, at (671) 475-6340 or by email: logan.myers@dpr.guam.gov.

Sincerely,



Angel R. Sablan
Acting State Historic Preservation Officer

June 13, 2025
(ARS/JP:JP/LM/BCL/bc1)
Originator
Chrono



DEPARTMENT OF THE NAVY
 NAVAL FACILITIES ENGINEERING SYSTEMS COMMAND MARIANAS
 PSC 455, BOX 195
 FPO AP 96540-2937

IN REPLY REFER TO:
 5090
 Ser EV25/721
 4 JUN 25

Patrick Lujan
 State Historic Preservation Officer
 Department of Parks & Recreation
 490 Chalan Palayso
 Agana Heights, Guam 96910

SUBJECT: STIPULATION VII.B.1 (a) (MEDIUM PROBABILITY AREA) AND VII.B.1 (b) OF THE 2008 PROGRAMMATIC AGREEMENT FOR UNDERTAKINGS ON THE ISLAND OF GUAM; UNDERTAKING FOR INITIAL DEFENSE OPERATIONAL CONCEPT (ID) DEVELOPMENT ON GUAM (RC 2007-0782 / CR 2024-0331)

Dear Mr. Lujan,

The Naval Facilities Engineering Systems Command Marianas submits an addendum by SEARCH that was intended to accompany the approved P-735 work plan (Rasmussen and Lauer 2021) in Enclosure 1 and the SEARCH technical report on the results of the inventory shovel probing and archaeological monitoring in support of Missile Defense Agency project P-699 in Enclosure 2.

If we do not receive a response within 30 calendar days of receipt of this letter, we will consider our responsibilities under Stipulation VII.B of the 2008 PA fulfilled.

Should you have any questions regarding the enclosed reports please contact Ms. Naomi Brandenfels
naomi.c.brandenfels.civ@us.navy.mil / (671)747-0023.

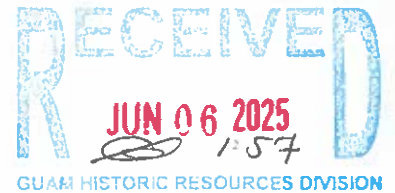
Date Received: 6/6/25	Staff Initial: JF
Doc. Dates: 6/4/25	Incoming No.:
RC No: 2007-0782	Other No.: CR
SHPO Comments:	2024-0331
1.	
2.	
3.	

Sincerely,

John F. Salas

SALAS.JOHN.FRANK.126
 4319290
 2025.06.04 11:14:21
 +10'00'

JOHN F. SALAS, P.E.
 Environmental Director
 By Direction



Enclosure 1: SEARCH Addendum to P-735 Work Plan
 Enclosure 2: Archaeological Survey and Monitoring in Support of
 FY24 Missile Defense Agency Project P-699, AAFB, Guam

ENTERED ON 6/6/25
 BY: JF



DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING SYSTEMS COMMAND MARIANAS
PSC 455, BOX 195
FPO AP 96540-2937

IN REPLY REFER TO:
5090
Ser EV25/722
4 JUN 25

Patrick Lujan
State Historic Preservation Officer
Department of Parks & Recreation
490 Chalan Palayso
Agana Heights, Guam 96910

SUBJECT: STIPULATION VIII.A.2 (b) (EMERGENCIES AND DISCOVERIES) OF THE
2008 PROGRAMMATIC AGREEMENT FOR UNDERTAKINGS ON THE ISLAND OF
GUAM; UNDERTAKING FOR INITIAL DEFENSE OPERATIONAL CONCEPT (ID)
DEVELOPMENT ON GUAM (RC 2007-0782 / CR 2024-0331)

Dear Mr. Lujan,

The Naval Facilities Engineering Systems Command Marianas submits the enclosed proposed plan to mitigate adverse effects to a previously undocumented traditional Chamoru site. The site was removed during ground disturbing activities in support of Missile Defense Agency project P-699. In accordance with Stipulation VIII.A.2(b), a letter was sent to your office on August 30, 2024 informing you of the post-field discovery of an indeterminate bone and disturbed culturally enriched soils. The enclosed plan is intended to serve as mitigation for the above mentioned site as it did not receive data recovery level investigations and National Register of Historic Properties (NRHP) evaluation.

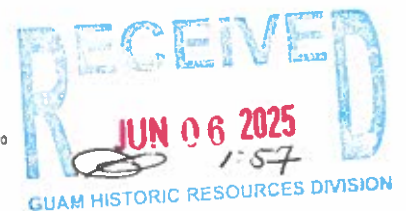
If we do not receive a response within 30 calendar days of receipt of this letter, we will consider our responsibilities under Stipulation VIII.A.2.b of the 2008 PA fulfilled and will pursue the proposed course of mitigation measures.

Should you have any questions regarding the enclosed reports please contact Ms. Naomi Brandenfels
naomi.c.brandenfels.civ@us.navy.mil / (671)747-0023.

Sincerely,

SALAS, JOHN FRANK.1264319290
2025.06.04 11:39:35 +10'00'

JOHN F. SALAS, P.E.
Environmental Director
By Direction



Enclosure 1: Proposed Plan to Mitigate Adverse Effects

**Proposed Mitigation Plan for Damage to Archaeological Site during
Missile Defense Agency project P-699**

Missile Defense Agency project P-699A final report that includes:

- Guam Historic Preservation Inventory (GHPI) Form completed and GHPI number assigned.

- Data recovery-type analysis completed for all ceramics recovery by someone with undisputed and established Guam pre-Contact ceramics expertise.

- Existing raw field data (notes, photographs, and field forms) on shovel probes reviewed and analyzed by someone with advanced degree focusing on geomorphology and archaeological site formation processes to assess stratigraphic integrity and the relationship of the ceramics collected in subsurface inventory to the site stratigraphic layers.

- A current account of the pre-Contact Context of the Upper Plateau of Northern Guam reflective of recent discoveries and data to include new information and identify remaining data gaps and existing or new research questions
 - This information can be included in the Guam Synthesis

I MINA'TRENTA NA LIHESLATURAN GUÅHAN
2010 (SECOND) Regular Session

Resolution No. 432-30 (LS)

As amended on the Floor.

Introduced by:

B. J.F. Cruz
v. c. pangelinan
Judith T. Won Pat, Ed.D.
T. C. Ada
V. Anthony Ada
F. B. Aguon, Jr.
F. F. Blas, Jr.
E. J.B. Calvo
J. V. Espaldon
Judith P. Guthertz, DPA
T. R. Muña Barnes
Adolpho B. Palacios, Sr.
R. J. Respicio
Telo Taitague
Ray Tenorio

Relative to expressing the objection of *I Mina'Trenta Na Liheslaturan Guåhan* (the 30th Guam Legislature) to the U.S. Department of Defense's (DoD's) attempt to satisfy its National Historic Preservation Act (NHPA) Section 106 Responsibilities for the military relocation and other military buildup projects according to the terms of a Draft Programmatic Agreement with the Guam State Historic Preservation Officer (SHPO) and without

further consultation with the people of Guam; and to further objecting to DoD's proposed mitigation as inadequate.

1 BE IT RESOLVED BY *I MINA'TRENTA NA LIHESLATURAN*
2 *GUÅHAN*:

3 WHEREAS, the Department of Defense (DoD) has determined that the
4 proposed Guam and Commonwealth of the Northern Mariana Islands
5 (CNMI) Military Relocation and associated buildup activities, as described in
6 the Final Environmental Impact Statement (FEIS), are subject to review under
7 Section 106 of the National Historic Preservation Act (NHPA), and its
8 implementing regulations; and

9 WHEREAS, the DoD has proposed that the Guam (State) Historic
10 Preservation Officer (SHPO), and others, enter into a Programmatic
11 Agreement (PA), the execution and implementation of which will evidence
12 that the DoD has satisfied its Section 106 responsibilities, and has afforded the
13 Signatories (including the Guam SHPO) and Consulting Parties the
14 opportunity to comment on the Military Relocation and associated buildup
15 activities, and their effects on historic properties in the Area of Potential Effect
16 (APE), and has taken into account the direct, indirect and cumulative effects
17 of the buildup to historic properties in Guam and the CNMI; and

18 WHEREAS, according to the draft PA, the DoD has determined that the
19 proposed Military Relocation and associated buildup activities will affect

1 historic properties, as defined by 36 CFR Sect 800.16(1); but that the effects on
2 historic properties *cannot* be *fully* determined *prior to* approval of the Military
3 Relocation and associated projects; and

4 **WHEREAS**, the approval of the Military Relocation and associated
5 buildup activities is expected to occur on or about September 8, 2010; and

6 **WHEREAS**, according to the Draft PA, the DoD, as part of its Section
7 106 review, has determined the Area of Potential Effect (APE) for the direct
8 and indirect effects of over two hundred (200) projects based on the FEIS, and
9 that the APE for the cumulative effects on historic properties includes the
10 entire island of Guam and Tinian; and

11 **WHEREAS**, the DoD has proposed by the Draft PA that the Guam
12 SHPO concur with the determination of the Adverse Effects to Historic
13 Properties; concur with the determination of No Historic Properties Affected;
14 and concur with the determination of No Adverse Effects, for approximately
15 two hundred sixteen (216) separate buildup projects; and

16 **WHEREAS**, in a seventh (7th) draft of the PA, DOD proposes to approve
17 the proposed Military Relocation and associated buildup activities in the
18 Record of Decision and that Section 106 consultation on the individual
19 projects be conducted subsequent to that approval; now, therefore, be it

20 **RESOLVED**, that *I Mina'Trenta Na Liheslaturan Guåhan* (the 30th Guam
21 Legislature), on behalf of the people of Guam, and specifically the *Chamorro*
22 people whose use of historic or traditional cultural properties will be affected,

1 concurs that there are historic properties that will be affected by the Military
2 Buildup projects, and that the cumulative effects to cultural resources will
3 encompass the entire island of Guam; and be it further

4 **RESOLVED**, that *I Liheslaturan Guåhan* (the Guam Legislature) objects to
5 the execution of the Programmatic Agreement as proposed, and objects to the
6 adoption of the DoD determinations of *No Historic Properties Affected* and
7 *No Adverse Effects* without further consultation with the people of Guam; and
8 be it further

9 **RESOLVED**, that *I Liheslaturan Guåhan* (the Guam Legislature) does
10 request DoD and the Advisory Council on Historic Preservation (ACHP)
11 require additional consultation with the *Chamorro* people as to the
12 determinations of adverse effects, the determination of whether historic
13 properties are affected, and the determination of the Area of Potential Effect
14 for each property listed in Appendices to the Draft PA as well as those project
15 areas not yet known but also covered by the PA; and be it further

16 **RESOLVED**, that the Military Relocation and associated buildup
17 projects *not* be approved in a record of decision or otherwise until these
18 determinations and suitable mitigation are agreed to by the people of Guam;
19 and be it further

20 **RESOLVED**, that *I Liheslaturan Guåhan* (the Guam Legislature)
21 anticipates productive results and increased protection of historical and
22 cultural properties, consistent with the intent of NHPA, by increased

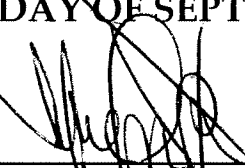
1 consultation prior to execution of this PA and prior to approval of the buildup
2 projects; and be it further

3 **RESOLVED**, that the Speaker certify, and the Legislative Secretary
4 attest to, the adoption hereof, and that copies of the same be thereafter
5 transmitted to all the members of the Advisory Council on Historic
6 Preservation; to the United States Department of Defense (DoD); to Mr.
7 Donald Schregardus, Deputy Assistant Secretary of the Navy (Environment);
8 to the Joint Guam Program Office (JGPO); to the Guam (State) Historic
9 Preservation Officer (SHPO); and to the Honorable Felix P. Camacho, *I*
10 *Maga'lahaen Guåhan*.

**DULY AND REGULARLY ADOPTED BY I MINA'TRENTA NA
LIHESLATURAN GUÅHAN ON THE 9th DAY OF SEPTEMBER, 2010.**



JUDITH T. WON PAT, Ed.D.
Speaker



TINA ROSE MUÑA BARNES
Legislative Secretary

https://www.guampdn.com/opinion/columnists/opinion-lotz-comment-on-draft-historic-preservation-programmatic-agreement/article_a8a16471-9163-4e7a-a814-ef13ece13332.html

Dave's Commentary

OPINION Lotz: Comment on draft historic preservation programmatic agreement

By Dave Lotz For Pacific Daily News

Dec 22, 2025



Lotz

Gov. Lou Leon Guerrero's press release on Dec. 9 invites the public to comment on a draft historic preservation programmatic agreement, located at <https://go.opengovguam.com/news/cdlo>, between the Guam State Historic Preservation Officer Patrick Lujan and Commander Joint Region Marianas regarding military's undertakings on Guam.

This agreement is based upon the National Historic Preservation Act of 1966 and the subsequent Advisory Council Regulations under Section 106 of the NHPA issued as 36 CFR 800.

As presented this proposed agreement is written in governmental bureaucratic language that is challenging to understand. Those required to perform this function for the federal government are expected to have attended a multi-day course in applying the historic preservation laws and regulations.

For your background, please review the outline of the regulations located at <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106>, the process required to review federal actions in regarding to federal proposals that may impact cultural resources. However, this PA supersedes this process with no acceptable justification as to why the Section 106 process is to be replaced by this proposed PA.

Of particular concern in this draft PA is virtually no mention of public involvement. 36 CFR 800 mentions the public 62 times while the PA does not mention the public at all. The public needs to be continually involved in the review process of these federal actions that should include public notices, discussions, and meetings with the decision makers. The previous annual meetings finally involved the public, but now this PA does not mention any public participation. The GSHPO is required to involve the public under the NHPA.

The GSHPO should have requested public input in the initial stage of discussion on this proposal instead of a review of what appears to be of the final draft. The review should start with a public forum for scoping to discuss the legal requirements, cultural resources, and proposed military actions.

The attorney general of Guam should also review this document to ensure compliance with Guam historic preservation law.

Additional items on the draft PA should be of concern to us. First, several documents are listed that presumes the public has a working knowledge of them. Second is the mention of future land acquisition on Guam by Joint Region Marianas. Third is the absence in the PA of the cited archaeological maps. Fourth, clarification is required of the scope relative to maintenance, construction, and/or military activities. Fifth is the mention of the Public Access Program, which should allow ease of access to cultural resources on military bases.

My conclusion is this entire draft PA, while certain sections have merit, is too complex, confusing and appears to be an attempt by JRM to seize responsibilities that correctly belong to the GSHPO and the public, thus rendering our input into preserving our cultural resources inadequate.

Both JRM and the GSHPO need to establish meaningful dialogue with the Guam community to protect our cultural resources. The current practice of listing projects on a web page where comments go into a black hole is clearly insufficient.

Send comments to patrick.lujan@dpr.gov.

Dave Lotz is a vocal advocate for protecting Guam's unique heritage, a knowledgeable and long-time hiking enthusiast and environmental advocate, and critic of inept government. He has been a resident of Guam since 1970 and retired from the Guam Department of Parks and Recreation, Andersen Air Force Base Environmental Flight, and the National Park Service.

https://www.guampdn.com/opinion/columnists/opinion-lotz-flaws-in-the-proposed-programmatic-agreement/article_40342674-89b8-4323-a32c-092d317f0ebe.html

Dave's Commentary

OPINION Lotz: Flaws in the proposed Programmatic Agreement

By Dave Lotz For Pacific Daily News

Mar 2, 2026



Lotz

There is still time to submit our comments on the proposed Programmatic Agreement, PA, between the Joint Region Marianas commander and the Guam State Historic Preservation officer regarding Department of Defense undertakings on Guam.

Comments are due no later than March 20, 2026 to patrick.lujan@dpr.guam.gov. Lujan is currently Guam's State Historic Preservation officer, SHPO.

Sen. Sabina Flores is holding a public hearing on Resolution 144-38 opposing this PA on Thursday, March 5, at 9 a.m. Please attend or submit your views in support of the resolution.

The PA is apparently intended to be based upon the National Historic Preservation Act Section 106 regulations that require reviews of proposed actions of the federal government that may impact cultural resources.

There are a few fundamental flaws in this proposed PA that merit expressing our concerns.

First, the PA omits any further involvement by the public and the Advisory Council on Historic Preservation, both of which are required to be involved. For example, Section 106 regulations mention the public 62 times and the draft PA does not mention the public once.

Second, the PA is incomplete as Appendix A, Joint Region Marianas Landholding, and Appendix B, Archaeological Sensitivity Maps, are not included.

Third, the PA has a reference to future military land acquisitions with no description of these future land takings. Early on in the military buildup, DoD stated there would be no land acquisition on Guam.

Fourth, no projects are described or their impacts on our cultural resources.

It seems clear that the PA will just provide the disguise to exclude our input into Guam's cultural resources currently held by the military so decisions can be made behind closed doors. What is being hidden from the public? What don't they want the public to know?

These are sufficient reasons to justify legal challenges to any cultural resource decisions based upon this PA. Has Guam's attorney general reviewed this PA?

Perhaps even more troubling is media statements made by SHPO Lujan that he considers the military a "partner." The public should be the "partner" to Guam's SHPO and not the military.

Guam SHPO is a regulatory agency enforcing historic preservation laws and requirements on behalf of the people of Guam. Guam SHPO should not be exhibiting any favoritism to a federal agency by designating a federal agency as a "partner."

There have been no statements from Lujan as to how comments from the public to him on this PA will be used by his office and the military.

Finally, there is no requirement for this PA. Each military action should be reviewed under the Section 106 regulations that require the public's participation.

In effect, this PA just abdicates the Guam SHPO responsibilities to the military, which is unacceptable.

Dave Lotz is a vocal advocate for protecting Guam's unique heritage, a knowledgeable and long-time hiking enthusiast and environmental advocate, and critic of inept government. He has been a resident of Guam since 1970 and retired from the Guam Department of Parks and Recreation, Andersen Air Force Base Environmental Flight, and the National Park Service.



National Trust *for*
Historic Preservation



Defending the National Historic Preservation Act and Section 106

Presented by the Government Relations and Law Divisions

NOVEMBER 19, 2025 | 12:00 – 1:00 PM ET

Today's Agenda

OVERVIEW

OBSERVATIONS AND RECOMMENDATIONS

RECENT COURT DECISIONS AND POLICY CHANGES

WHAT'S NEXT? PERMITTING REFORM AND CONGRESS

QUESTION & ANSWER

Origins



The West End, before and after urban renewal c. 1960. Otis House is circled in red.

An outcome of the urban renewal era, the National Historic Preservation Act sought to balance progress with preservation.



Senate Energy and Natural Resources Committee

Full Committee Hearing to Examine the Section 106 Consultation Process Under the National Historic Preservation Act



Mr. Andy McDonald Montana-Dakota Utilities Co.

“Our issue is not with the intent of Section 106 or the federal employees' efforts to interpret and implement it, but rather the absence of clear, predictable boundaries around what constitutes the relevant APE and what effects must be considered.”





Dr. Chris Merritt

Utah, SHPO

The Process is Working:

- Of the roughly **1,500** Section 106 reviews conducted by the Utah SHPO each year, on average only **3.2%** (34) result in an adverse effect determination.
- For 2024-2025, **98%** of all reviews take **7 days** or less.

Digital Data and Workflows in Utah

- Efficiencies created through Investment in GIS spatial database
- Fully digital workflow since 2017 - **\$350k** in savings per year.

Mr. Steven Concho Pueblo of Acoma, THPO

“When consultation begins early and is adequately resourced, it consistently produces better fieldwork, more thoughtful design, fewer conflicts, and decisions that honor tribal sovereignty and the federal trust responsibility while advancing responsible development.”



- **Hundreds of Section 106 Reviews each year across New Mexico, Colorado, Arizona, and Utah**
- **Annual federal funding of approximately \$100k**

SENATE COMMITTEE ON
**ENERGY &
NATURAL RESOURCES**



Chairman Mike Lee (R-UT)

“Section 106 has a consultation process that has become more like a maze without a map.”



Ranking Member Martin Heinrich (D-NM)

“We should always look for ways to make processes, like Section 106 consultation, more efficient and more effective.”



Sen. Catherine Cortez Masto (D-NV)

“I think there are opportunities to streamline and it makes sense.”



Sen. Jim Justice (R-WV)

“Please let’s quit denying we don’t have a problem!”

Section 106 Works!

- There are around 120,000 Section 106 consultations per year.
- Over **98%** of Section 106 consultations result in findings of No Adverse Effect.
- All available data from SHPOs shows that reviews are typically conducted in a timely manner, often faster than required by law.
- **Administrative tools already exist that can solve virtually any challenge related to Section 106...**



Market Street, Charleston, SC



Clara Barton National Historic Site, Glen Echo, MD

Program Alternatives

36 CFR § 800.14

- **Exemptions**
 - **Standard Treatment**
 - **Alternate Procedures**
 - **Programmatic Agreements**
 - **Program Comments**
-
- **https://www.achp.gov/program_alternatives**



Exemptions

36 CFR § 800.14(c)

- A federal agency may seek an exemption from Section 106 review for a specific category of undertakings. The ACHP may also propose an exemption on its own initiative. Exempted actions must have effects that are both foreseeable and likely to be minimal or non-adverse. Exempted categories must also be consistent with the purposes of the NHPA.

- *Interstate Highway System Exemption (2005)*
- *Natural Gas Pipelines Exemption (2002)*
- *Electric Vehicle Supply Equipment (EVSE) Exemption (2022)*
- *GSA Routine Operations and Maintenance Exemption (2023)*
- *Exemption for Indigenous-Knowledge-Informed Activities by Native Hawaiian Organizations (2024)*



Gerstle River Bridge, AK

Standard Treatment

- **36 CFR § 800.14(d)**
- Standard Treatments are a program alternative that allows the ACHP to establish standardized practices for dealing with certain categories of undertakings, effects, historic properties, or treatment options. Standard treatments do not replace the regular review process but can expedite reviews when included in memoranda of agreement or programmatic agreements as mitigation measures or used to support no adverse effect findings in regular reviews.
- There are no current Standard Treatments, but the Veterans Administration is currently developing one with the ACHP for National Cemeteries.



Fort Rosecrans, CA

Alternate Procedures

- **36 CFR § 800.14(a)**
- Alternate procedures are a program alternative that allows federal agencies to streamline the Section 106 process by tailoring the process to the agency's programs and decision-making process. Procedures, approved by the ACHP and adopted by the agency, substitute in whole or in part for the ACHP's Section 106 regulations under Subpart B.
- The only current Alternate Procedure applies to the Army (2001).



Programmatic Agreements

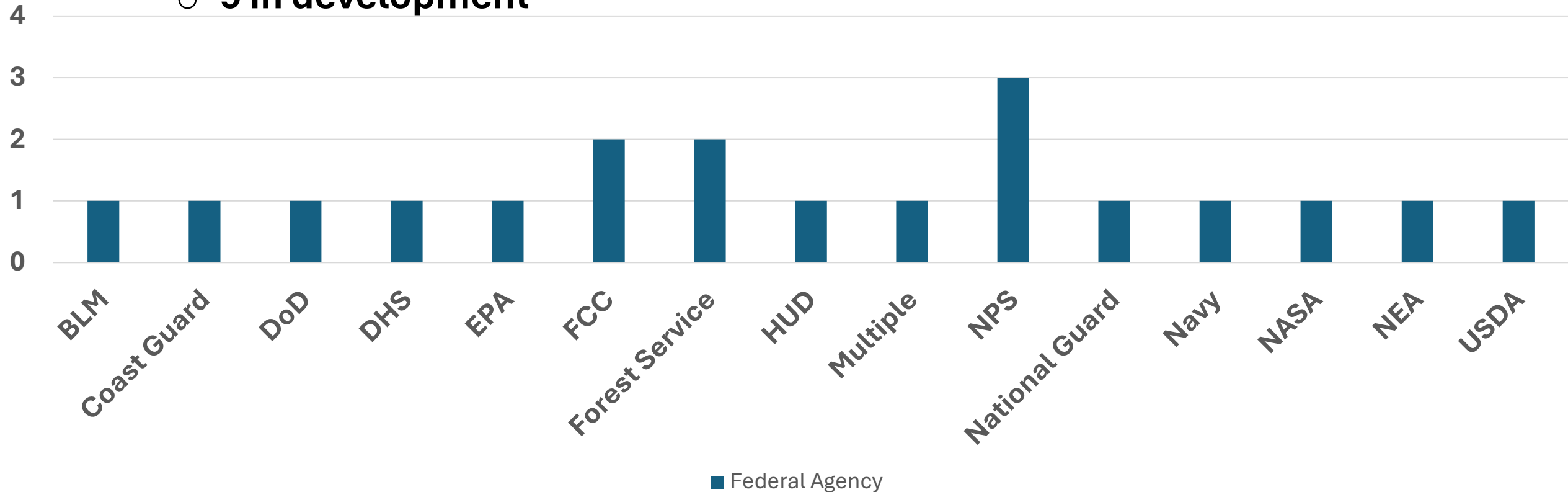
- **36 CFR § 800.14(b)**
- Programmatic agreements are the *most commonly used* program alternative. They allow federal agencies to govern the implementation of a particular agency program or the resolution of adverse effects from complex projects or multiple undertakings similar in nature through negotiation of an agreement between the agency, appropriate SHPO(s) /THPO(s), and the ACHP. In certain circumstances, the ACHP may also designate a specific agency agreement as a **Prototype Agreement** that can then serve as a template for the same type of program or undertaking in more than one program or area.



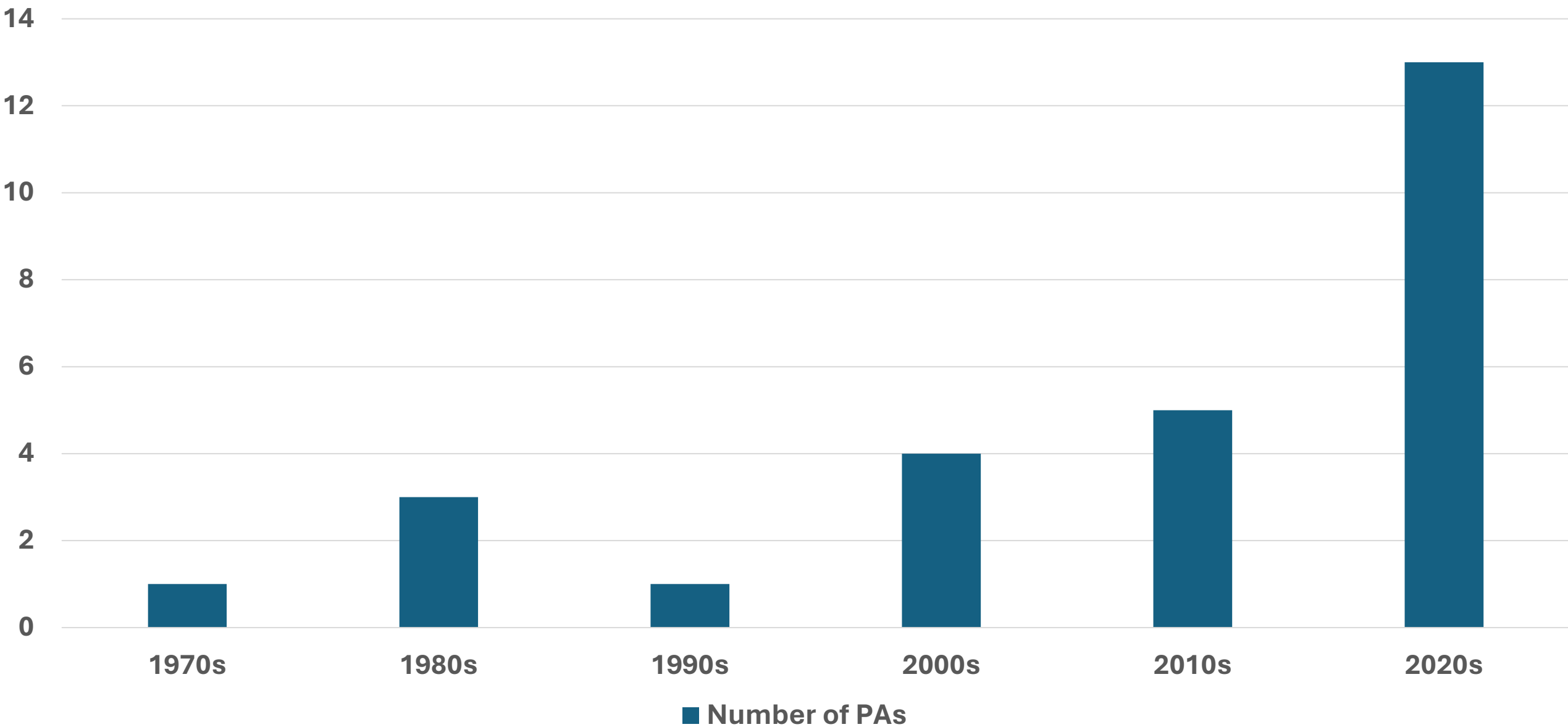
April 12, 1981: Launch of the First Shuttle Mission - NASA

Programmatic Agreements

- **State vs. Prototype vs. Nationwide**
- **Nationwide PAs**
 - **19 currently**
 - **9 in development**



Nationwide PAs By Decade (Including PAs Currently in Development)



Program Comments

- **36 CFR § 800.14(e)**
- Program Comments allows a federal agency to request the ACHP comment on a category of undertakings in lieu of commenting on a case-by-case basis. The ACHP may also propose a Program Comment on its own initiative. Program Comments historically focused on streamlining compliance for repetitive management actions on large numbers of similar historic properties and for agency actions that generate large numbers of similar undertakings.
- Program Comments today are also being used as vehicles for policy goals and to achieve cost-savings for federal agencies.



5G Cell Towers, Phoenix and New York City

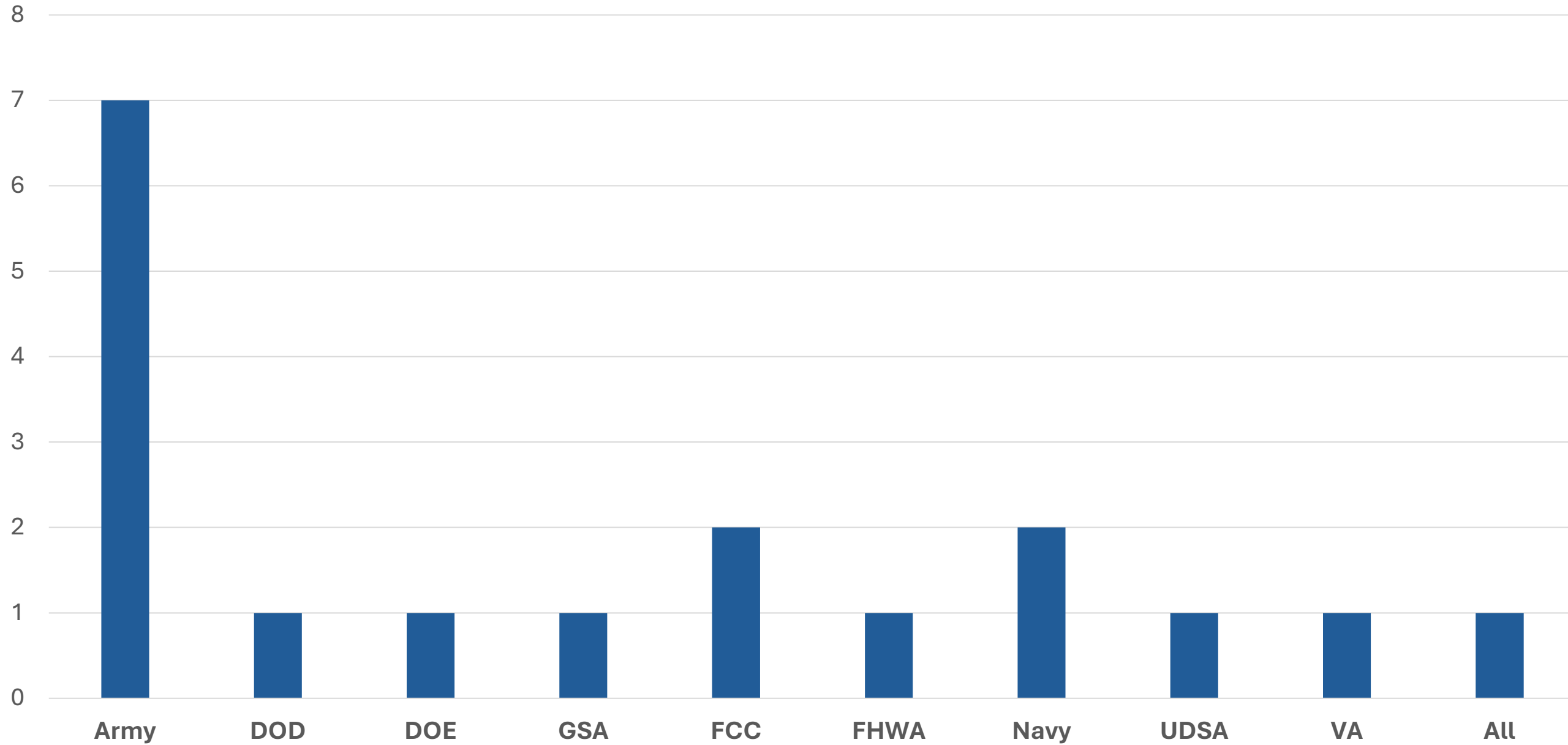
Existing Program Comments

- Army Capehart Wherry Military Housing (2002)
- Navy & Air Force Capehart-Wherry Military Housing (2004)
- Extension of Programmatic Agreements Based on DOE's Prototype (2005)
- Army WWII and Cold War Ammunition Storage Facilities (2006)
- Army Cold War Era Unaccompanied Personnel Housing (2006)
- Army Ammunition Production Facilities and Plants (2006)
- Disposal of Navy Vessels (2010)
- FHWA Projects Affecting Post-1945 Bridges (2012)
- FCC Positive Train Control (2014)
- GSA Select Repairs and Upgrades (2018)
- USDOT Effects to Rail Properties Within Rail Rights-of-Way (2018)
- VA Program Comment for Vacant and Underutilized Properties (2018)
- FCC Wireless Communication Facilities (2020)
- Army Program Comment for Inter-War Era Historic Housing (1919–1940) (2020)
- Army Program Comment for Vietnam War Era Housing (1963-1975) (2023)
- Army Program Comment for Pre-1919 Historic Army Housing (2024)
- Federal Communications Projects (2024)
- Accessible, Climate-Resilient, Connected Communities

18 Total Program Comments

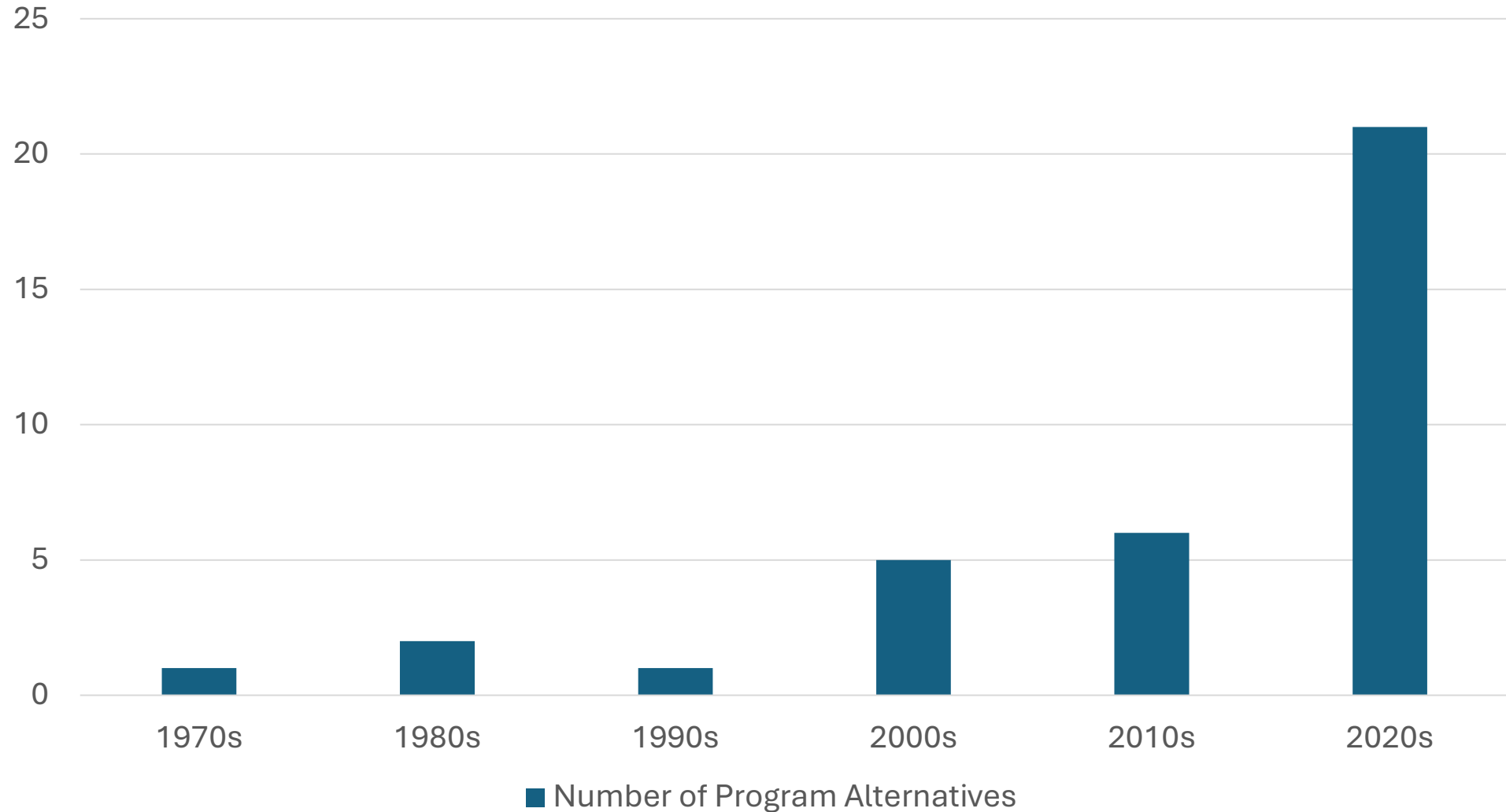
2 Currently in Development

Program Comments by Agency



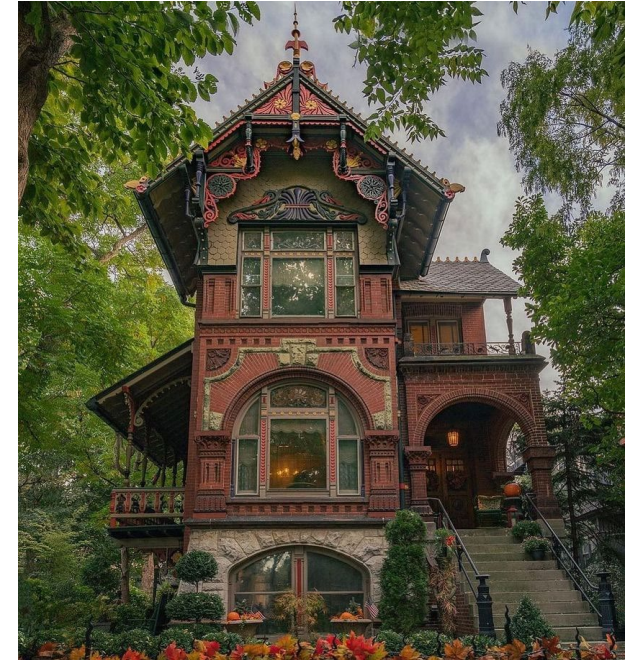
Program Alternatives by Decade (Including in Development)

1970s: 1
1980s: 2
1990s: 1
2000s: 5
2010s: 6
2020s: 21



So, What's The Problem?

- Capacity constraints for SHPOs, THPOs, and the ACHP due to limited staff and resources.
- Lack of Federal Agency staff, resources, and expertise.
- Late initiation of consultation, when agencies treat Section 106 as an end-step rather than early planning.
- Technology and data gaps, including non-digitized or inaccessible historic property records.
- Complex, multi-jurisdictional projects that cross agency or state lines without clear coordination, which leads to inconsistent implementation among federal agencies.



Hermann Weinhardt House, Chicago, IL



Evergreen Plantation, Wallace, LA

So, What's The Problem?

- Inconsistent APE and identification actions, sometimes due to federal agency policies
- Unpredictable mitigation requirements, as opposed to more easily quantifiable environmental mitigation options.
- Submittal requirements and expectations differ in every state, with some SHPOs requiring more or different information than others.
- Unrealistic applicants who deny the significance of historic resources and/or take an adversarial approach to the Section 106 process.
- Misconceptions about Section 106, including that it's an environmental review or the same as NEPA



Consumers Building, Chicago, IL



Ames Monument, Laramie, WY

NEPA vs. Section 106

NEPA

- Applies to "major federal actions"
- Broad consideration of many factors
- NEPA documents include Environmental Assessments, Environmental Impact Statements, and Records of Decision
- EIS is required for actions "significantly affecting the quality of the human environment"

SECTION 106

- Applies to all "undertakings," including non-federal undertakings with federal funding, permits, or approval, not just "major federal actions"
- Only considers impacts to cultural resources
- Assessment of cumulative effects is explicitly required
- Must be completed "prior to" the agency's final decision. NEPA review must be informed by the outcome of Section 106



Recent Changes to NEPA

Marin Audubon Society v. Federal Aviation Administration,
121 F.4th 902 (D.C. Cir. 2024)

- Court ruled that CEQ did not have the authority to create NEPA regulations and that their existing regulations were void.
- CEQ revoked its NEPA regulations on April 11, 2025.
- All federal agencies previously used CEQ's regulations for their NEPA compliance. Now every federal agency is promulgating new, agency-specific NEPA regulations.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 19, 2024

Decided November 12, 2024

No. 23-1067

MARIN AUDUBON SOCIETY, ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, U.S. DEPARTMENT OF
TRANSPORTATION AND NATIONAL PARK SERVICE, U.S.
DEPARTMENT OF THE INTERIOR,
RESPONDENTS

On Petition for Review of an Order
of the Federal Aviation Administration

Recent Changes to NEPA

Seven County Infrastructure Coalition v. Eagle County, 605 U.S. ____ (May 29, 2025)

- Requires Courts to give "substantial deference" to agency decisions regarding the scope of an EIS.
- Flaws or omissions in an EIS do not require its vacation unless the errors would have affected the agency's decision.
- Limits analysis to effects caused by the project itself, ending the consideration of cumulative effects.

Cite as: 605 U. S. ____ (2025)

1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 23–975

SEVEN COUNTY INFRASTRUCTURE COALITION,
ET AL., PETITIONERS *v.* EAGLE COUNTY,
COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 29, 2025]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Some 55 years ago, Congress passed and President Nixon signed the National Environmental Policy Act, known as NEPA. For certain infrastructure projects that are built, funded, or approved by the Federal Government, NEPA requires federal agencies to prepare an environmental impact statement, or EIS. The EIS must address the significant environmental effects of a proposed project and identify feasible alternatives that could mitigate those effects.

Permitting Reform in Congress

- ❖ **Sustained interest in permitting reform**
 - ❖ 118th Congress (and over 20 pieces of legislation)
 - ❖ President Trump's Executive Orders
 - ❖ House and Senate Committee activity
- ❖ **Areas of examination**
 - ❖ NEPA and NHPA
 - ❖ Themes raised by Members of Congress
- ❖ **Legislative activity**
 - ❖ Forecast for legislative activity
 - ❖ **TOMORROW**: House Natural Resources Committee markup:
 - ❖ SPEED Act (H.R. 4776)
 - ❖ Other legislation



Permitting Reform in Congress

**“The shutdown has given us a lot of time to review the legislation,
to work with other members”**

House Natural Resources Committee Chair Bruce Westerman (R-AR)

❖ Forecast heading into 2026

- ❖ Momentum sustained through government shutdown
- ❖ Multiple variables before final bill passage

❖ Reaffirming the public value of preservation

- ❖ History of NHPA/Section 106 and their importance
- ❖ America 250 and historic preservation
 - ❖ “250 in 250”: \$250 million for the Historic Preservation Fund for America 250
 - ❖ \$25 million for survey and digitization

❖ We need your engagement and participation!





UNITED STATES SENATE COMMITTEE HEARING CHANNELS

Hearing to examine the Section 106
consultation process under the
National Historic Preservation Act.

Coverage begins at 9:30 am.

Question & Answer

00:02:11



COMMITTEE ON ENERGY & NATURAL RESOURCES

01:46:57



Resources



Review the National Trust's Commentary and Testimony



Familiarize yourself with the ACHP's Section 106 Guidance



Use our Advocacy Toolkit and Checklists

Thank You!

Please reach out with additional questions or to continue the conversation at policy@savingplaces.org or forum@savingplaces.org



Sign up for our Advocacy Newsletter



Get Involved with our Action Center

Tribal Consultation: Toward Meaningful Collaboration with the Federal Government

Michael C. Blumm* & Lizzy Pennock**

Abstract

One of the bedrock principles of federal Indian law is a centuries-old understanding that the tribes, as “domestic dependent nations,” have a “government-to-government” relationship with the federal government, which has a trust obligation concerning the tribes, their sovereignty, and their cultural resources. Although this relationship was first judicially articulated in the nineteenth century, it was interpreted to require federal “consultation” with the tribes under a series of executive orders beginning in the 1970s and the National Historic Preservation Act (“NHPA”). However, this government-to-government consultation has been largely disappointing. The tribes have often complained that federal agencies have reduced consultation to procedural “box-checking,” with little or no evidence of substantive results. As a result, the tribes have called for “meaningful consultation” and the resulting “collaborative management” going forward.

This paper discusses the origins of the modern consultation doctrine and considers several case studies that have and have not produced substantive results. We draw some lessons from the case studies that the Biden Administration, which has professed an interest in engaging in meaningful consultation, may draw upon. If the Biden Administration does engage in meaningful consultation, tribes may gain an important management role

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. We thank our colleague, Dan Rohlff, Professor of Law, Lewis and Clark Law School, for incisive comments on a draft of this paper, and Nicholas James Crockett for expert editing.

** Attorney, WildEarth Guardians, J.D. 2021 Lewis and Clark Law School. Copyright Michael C. Blumm and Lizzy Pennock.

concerning off-reservation resources that are significant to their history and culture.

Table of Contents

INTRODUCTION	3
I. THE NIXON ANNOUNCEMENT OF A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN TRIBES AND THE FEDERAL GOVERNMENT	11
II. CONSULTATION UNDER THE EXECUTIVE ORDERS AND THE NATIONAL HISTORIC PRESERVATION ACT	13
A. Section 106 of the National Historic Preservation Act.....	13
1. Section 106 Regulations	14
2. Section 106 and Meaningful Tribal Consultation	17
B. The Clinton Executive Orders	20
1. Indian Sacred Sites	20
2. Regular and Meaningful Consultation	21
III. TRIBAL CONSULTATION CASE STUDIES	24
A. The Joint Secretarial Order on Tribal Rights and the Endangered Species Act.....	28
B. Bears Ears National Monument.....	30
1. Background	32
2. The “Collaborative Management” Proposal of the Bears Ears Intertribal Coalition	34
3. Obama’s Bears Ears Proclamation.....	35
4. Trump, Biden, and the Future of Bears Ears.....	37
C. The Chaco Canyon Oil and Gas Leases.....	39
1. Chaco Canyon’s Resource Management Plan	40
2. Consultation on the Management Plan Amendment.....	40
D. Copper Mining at Oak Flat	45
1. Oak Flat Consultation.....	46
2. The Fate of Oak Flat.....	50
CONCLUSION	52

INTRODUCTION

Tribal knowledge of the environment is vast¹ but often untapped or ignored by federal natural resource managers when making decisions that affect tribal land and natural resources of cultural significance.² Although the federal government has long had a government-to-government relationship with governments of federally recognized tribes,³ it has often

¹ See, e.g., Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1067–68 (1997) (describing the “quality of language . . . typical of Indian gatherings,” emphasizing “how we are all connected to nature,” and sending a “reminder of how much knowledge exists in Indian country.”).

² See, e.g., Letter from Mark Ingersoll, Chairman of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, to Larry Roberts, Acting Assistant Secretary of Indian Affairs (Nov. 30, 2016), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055648.pdf> [hereinafter Mark Ingersoll Letter] (“Agencies seem either reluctant or ill-suited to properly evaluate cumulative and regional environmental impacts on Indian lands, treaty rights (on and off-reservation), sacred places, and Tribal community health and environment.”); see also Wilkinson, *supra* note 1, at 1064 (“[M]any a federal official has eschewed government-to-government dealings because of a busy schedule, inadequate knowledge of complex subject matter, or indifference that can border on racism.”); Hannah Northey, *About-face: Army Corps to consult with tribes on WOTUS*, E&E NEWS (Apr. 21, 2021), <https://www.eenews.net/stories/1063730549> (explaining the Biden Administration’s plan to rescind “guidance issued in January that directed the [Army Corps] Los Angeles District not to consult with tribes regarding the proposed Rosemont Copper Mine,” a ban that “was being implemented across the nation.”).

³ Tribal governments are distinct from state and local governments. Some county governments, for example, are “quietly passing ordinances that assert a government-to-government role in managing public lands alongside federal agencies.” Michael C. Blumm & James A. Fraser, “Coordinating” with the Federal Government: *Assessing County Efforts to Control Decisionmaking on Public Lands*, 38 PUB. LAND & RES. L. REV. 1, 3 (2017). These counties rely on statutory provisions directing federal agencies to coordinate with state and local governments in public land planning, but the ordinances attempt to usurp federal authority. *Id.* at 4. The federal Supremacy Clause preempts most of these ordinances. *Id.* Similarly, the Supremacy Clause applies to state governments. See, e.g., *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (explaining that based on the U.S. Constitution’s Supremacy Clause, it “has been settled that state law that conflicts with federal law is ‘without effect’ ”) (citation omitted). A federal law is the “supreme law of the land,” U.S. CONST. art. VI, cl. 2, and tribes are generally shielded from the application of state or local laws. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983), in which the Supreme Court unanimously ruled that federally approved tribal hunting and fishing regulations preempted state regulations on-reservation. The Court stated that the tribe’s comprehensive management of on-reservation fish and wildlife resources displaced state regulation because state regulation could “effectively nullify the Tribe’s unquestioned authority to regulate the use of its resources by members and nonmembers . . . and threaten Congress’ firm commitment to the encouragement of tribal self-sufficiency and economic development.” *Id.* at 344.

failed to live up to its end of the bargain—tribal calls for meaningful consultation, or any consultation at all, have often gone unheeded.⁴

Nixon first called for a government-to-government relationship in 1970, envisioning a mutual “partnership,” wherein both federal and tribal sovereignty are respected.⁵ Since then, the federal government has consistently failed to achieve Nixon’s vision. The Chairman of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians describes federal consultation efforts as “too little, too late” in most cases.⁶ As a result, tribal leaders today are calling on the Biden Administration and Secretary of the Interior Deb Haaland to quickly remedy the dissatisfactory consultation doctrine by establishing a rigorous, collaborative consultation process that consistently includes tribes in environmental and natural resource-related decision making and respects tribal sovereignty.⁷

⁴ See, e.g., NAT’L CONG. OF AM. INDIANS, Res. #SAC-12-036, SUPPORT FOR A STRONG NATION-TO-NATION RELATIONSHIP AND EFFECTIVE, MEANINGFUL CONSULTATION 2 (Oct. 2012) (“[N]ot all of the agencies under the control of the President have yet developed the government-to-government consultation policies required of them under” President Clinton’s Exec. Order 13,175 on consultation); see also Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 904 (2012) (describing how tribal consultation is “at the heart of the procedural requirements of the NHPA” but that “in practice, tribal consultation under the NHPA has not always been carried out efficiently or to the mutual benefit of tribes and federal agencies”); U.S. DEP’T. OF THE INTERIOR ET AL., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions 2* (Jan. 2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf> [hereinafter Departments’ Consultation Report] (“With regard to infrastructure projects, historically Federal agencies have not, as a matter of policy, sought out Tribal input or consistently worked to integrate Tribal concerns into the project approval process.”). While this chapter was in press, Monte Mills and Martin Nie published an important report on tribal co-management, which assessed the history, law, and politics of tribal co-management for consideration of tribes, the federal government, and Congress, to which we will cite in these notes. See Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. L. & RES. L. REV. 49 (2021) [hereinafter *Bridges to a New Era*].

⁵ See Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT’L L. 129, 138 (1999) (describing the “government-to-government” policy between the federal government and tribes, first “encouraged by Nixon,” as a “partnership . . . within a mutually defined framework that respected tribal sovereignty and U.S. sovereignty. . .”).

⁶ Mark Ingersoll Letter, *supra* note 2, at 7 (“Whether intentional or inadvertent, government-to-government consultations between agencies and Tribes are usually a case of ‘too little, too late.’”).

⁷ See Biden-Harris Campaign, *Biden-Harris Plan for Tribal Nations*, <https://joebiden.com/tribalnations/> (last visited Apr. 17, 2021) (“Throughout [American]

Consultation is significant to tribes for several reasons. Tribes frequently have a land management approach distinct from that of other governments and entities, which non-tribal officials do not adequately understand.⁸ Policies and regulations formed without tribal consultation, or any consideration of tribal values or rights at all, can consequently force a management scheme on tribes inconsistent with their needs, historical resource management programs, and legal rights.⁹ Tribes also place considerable cultural, religious, and historical significance on places and resources that other land managers often do not recognize or protect.¹⁰ Moreover, when tribes must defend their rights and resources after being left out of federal decision making, the result is often significant expenditures of funding, time, and legal resources¹¹ that otherwise would be unnecessary.

The government-to-government relationship between tribes and the

history, th[e] promise [of equality for all] has been denied to Native Americans who have lived on this land since time immemorial.”); *see also* Jennifer Yachnin & Jeremy P. Jacobs, *Tribes expect a voice on land and waters under Haaland*, GREENWIRE (Feb. 4, 2021), <https://www.eenews.net/stories/1063724399> (last visited May 2, 2021) (“Tribal leaders and experts have identified common issues they expect [Secretary of the Interior Deb Haaland] to act on quickly . . . including an overarching need for better consultation and recognition of tribal sovereignty across Interior’s wide authority over lands and waters.”); *see also id.* (“Consultation with federal agencies is honored and at the highest level, and it’s not just a check-the-box process[.]”) (quoting Shannon Wheeler, chairman of the Nez Perce Tribe).

⁸ Wilkinson, *supra* note 1, at 1068 (explaining how some tribes thought the Endangered Species Act was “too narrow” because it focuses on single species as opposed to the tribes’ “holistic management approach,” which focuses on “whole natural systems”); *see also* Yachnin & Jacobs, *supra* note 7 (“Many tribal nations want more influence because they have long histories of being good stewards of their lands.”) (quoting Sarah Krakoff, University of Colorado Law Professor).

⁹ Wilkinson, *supra* note 1, at 1080 (“[W]hen the ramifications of treaty rights and the trust relationship had been fully explored [in consultation meetings], it became apparent that the ESA should be applied differently, and in a more limited manner, with respect to consultations under Section 7 and takings under Section 9 than is the case with any other entities or persons.”).

¹⁰ *See, e.g.*, Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects*, 25 NAT. RES. AND ENV’T 54, 56 (Summer 2010) (describing the “special expertise [of tribes] regarding impacts on places that have religious and cultural significance”); Charles Wilkinson, *At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top: The Creation of the First Native National Monument*, 50 ARIZ. ST. L. J. 317, 318 (2018) (explaining that “Bears Ears holds profound significance” for multiple tribes, and that “Native people come to Bears Ears for many reasons, including holding ceremonies, hunting, celebrating family occasions, and gathering medicines, roots, nuts, berries, and weaving materials.”).

¹¹ Mark Ingersoll Letter, *supra* note 2, at 3 (“[W]e have been forced to devote extraordinary amounts of staff time, legal resources, and scarce funding over the past decade in an effort to compel the Federal Energy Regulatory Commission (FERC) to simply do what is required of them by [the NHPA], and by FERC’s federal trust responsibility.”).

federal government arises out of the trust doctrine; government-to-government consultation is a substantial aspect of this relationship.¹² The federal government's trust responsibility toward Indian tribes emerged from early federal-tribal treaties, executive orders, statutes, the U.S. Constitution, and various Supreme Court opinions.¹³ In his 1831 *Cherokee Nation v. Georgia* decision, Chief Justice John Marshall declared that Indian tribes were "domestic dependent nations" that "look[ed] to [the federal] government for [their] protection."¹⁴ Felix Cohen's *Handbook of Federal Indian Law* considers *Cherokee Nation* to have laid the foundation for the government-to-government relationship as a trust relationship with an accompanying "federal duty to protect tribal rights to exist as self-governing entities."¹⁵ In the nineteenth and twentieth centuries, the federal government's interpretation of its trust responsibility skewed toward "a nearly absolute and unreviewable congressional plenary power,"¹⁶ but the modern trust

¹² See, e.g., U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES 4 (Aug. 20, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> [hereinafter SECRETARIAL ORDER NO. 3335] ("The Department [of the Interior] has . . . sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.")

¹³ See COHEN'S HANDBOOK ON FEDERAL INDIAN LAW § 5.04[3](a) (Nell Jessup Newton ed., 2012) [hereinafter COHEN TREATISE] ("The concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court. Today, the trust doctrine is one of the cornerstones of Indian law."). The Supreme Court cases which had a considerable role in defining the trust relationship are *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). See also *Bridges to a New Era*, *supra* note 4, at 64–83 (discussing "first principles" of Federal Indian Law).

¹⁴ *Cherokee Nation*, 30 U.S. at 17. See also COHEN TREATISE, *supra* note 13, § 5.04[3](a) (describing *Cherokee Nation v. Georgia* as the case that "provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities").

¹⁵ COHEN TREATISE, *supra* note 13, § 5.04[3](a) ("*Cherokee Nation v. Georgia* provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.")

¹⁶ *Id.* ("In the late 19th and early 20th centuries, courts relied on [early Supreme Court decisions] to justify broad exercises of power to dispose of tribal property and alter the relationships of tribes to the federal government, even without tribal consent. . . . The trust

doctrine purports to recognize tribal self-determination and sovereignty.¹⁷

The consultation requirement arises out of the trust duty as well as in other contexts, like that prescribed by the NHPA.¹⁸ If consultation in any context is to be meaningful, however, federal agencies must treat tribes as distinct from members of the public or stakeholders commenting on proposed actions.¹⁹ To adequately address tribal concerns and perspectives, federal officials must understand tribal culture, history, and legal rights.²⁰ Tribes are sovereign nations with unique expertise and sovereignty—not merely interest groups.²¹ In order to truly treat tribes as sovereigns, federal officials must understand Indian law and the unique status of tribal governments in U.S. law, including the government-to-government relationship under the federal trust obligation.²²

relationship thus formed the linchpin for the excesses of the late 19th and early 20th century invocations of a nearly absolute and unreviewable congressional plenary power.”).

¹⁷ *Id.* (discussing an order by the Secretary of the Interior “reaffirming the federal trust responsibility’s application to all Interior agencies and bureaus” and a subsequent order “promot[ing] cooperative management and partnerships with Indian tribes in managing federal lands and resources.”); *see also* SECRETARIAL ORDER NO. 3335, *supra* note 12, at 4 (“During the last few decades, the trust relationship has evolved” into today’s “Era of Tribal Self-Determination[.]”).

¹⁸ National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*; *see infra* Part II.A.

¹⁹ *See Bridges to a New Era*, *supra* note 4, at 88–105 (including recommendations for consultation reform); *see also infra* notes 47–79 and accompanying text.

²⁰ Federal agencies that lack a basic understanding about how individual tribes function cannot consult adequately. *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010) (enjoining a solar development project for the Bureau of Land Management’s (“BLM”) failure to adequately consult the Quechan Tribe, noting that the BLM grouped “tribes” together on the theory that consulting with one satisfied consulting with all, prompting the court to explain that “Indian Tribes aren’t interchangeable”); *see also* Departments’ Consultation Report, *supra* note 4, at 2–3 (“Federal staff need better training prior to working with Tribes.”).

²¹ Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) [hereinafter Biden’s Consultation Memo] (recognizing that “American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions[.]” and that “[t]he Federal Government has much to learn from Tribal Nations”).

²² Letter from Brian Cladoosby, President of the Nat’l Cong. of Am. Indians, to Ryan Zinke, Sec’y of the Dep’t of Interior, at 1 (July 14, 2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/19-NCAI.pdf> (explaining that the “federal trust responsibility to Indian tribes . . . is rooted in the land cessions that formed the United States[.]” and that this responsibility “is one of the most fundamental aspects of the federal government’s relationship to Indian tribes and all federal departments and agencies play a vital role in upholding the federal trust responsibility”). *See also* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585, 594

Meaningful consultation requires that federal government officials regard tribal governments and tribal officials neither as members of the general public, nor as adversaries nor obstacles, but instead as management partners.²³ A government-to-government relationship between sovereigns cannot exist if the federal government systematically fails to recognize tribal governments as collaborative managers of lands and resources of cultural significance. Achieving this relationship requires a commitment by the federal government to eschew a tradition of paternalism toward tribes.²⁴

Meaningful tribal consultation can prevent federal agencies from making uninformed decisions affecting culturally significant tribal lands and resources and may come in various forms.²⁵ For example, the inter-tribal coalition that successfully petitioned President Barack Obama to proclaim Bears Ears a National Monument described the desired relationship as one of ongoing “collaborative management.”²⁶ According to the coalition, collaborative management harmonizes Western science with traditional knowledge founded on native cultural values and should engage tribes from the beginning to the end of the consultation process.²⁷ Another

(2008) (providing “some foundational principles of Indian law” that must be understood to effectuate “tribal co-management,” which “differs from other types of collaborative management for federal lands[,]” including tribal sovereignty, “inherent powers of self-government[,]” and the trust relationship); Biden’s Consultation Memo, *supra* note 21, at 7491 (“The United States has made solemn promises to Tribal Nations for more than two centuries.”).

²³ Mark Ingersoll Letter, *supra* note 2, at 4 (“Agencies like the Federal Energy Regulatory Commission and the U.S. Army Corp of Engineers (“USACE”) often seem to view applicants and other government entities as allies, and Indian Tribes as adversaries.”).

²⁴ Signaling a renewed federal commitment to the government-to-government relationship and elevating tribal government status, Secretary of the Interior Deb Haaland recently “touted the Biden administration’s focus on Indigenous representation across all levels of government.” Heather Richards, *Haaland promises bold thinking on Indigenous issues*, E&E NEWS (Apr. 23, 2021) (“Every federal agency needs to be thinking boldly about our obligations to Indigenous peoples[.]”) (quoting Haaland).

²⁵ See Presidential Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. (Nov. 5, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president> [hereinafter Obama’s Consultation Memo] (“Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”).

²⁶ Wilkinson, *supra* note 10, at 326 (describing “collaborative management” as a “deeper tribal-federal relationship” than merely “co-management,” not limited to the role of “advisors” and “consultants”; instead, one which provides “true joint responsibility” where tribes are involved in the entire land management decision-making process).

²⁷ BEARS EARS TRIBAL COAL., PROPOSAL FROM THE BEARS EARS INTER-TRIBAL

successful consultation resulted in the 1997 Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.²⁸ The order's consultation called for high-level government officials and tribal representatives to engage in highly structured negotiations that made time for presentations on, and an accurate understanding of, the relevant cultural, historical, and legal issues. This process was meant to enable federal negotiators to understand tribal experiences and backgrounds.²⁹

This Article contends that the current practice of tribal consultation in land and resource management for culturally significant tribal lands is often "too little, too late."³⁰ But federal agencies can remedy this injustice by incorporating the essential elements of meaningful consultation. We analyze various consultation arrangements, some of which have achieved successful consultation, and others that have been failures, both of which provide lessons for the future.

Part I of this paper provides a brief background on the dawn of the modern era of federal Indian policy, originating with President Richard Nixon's landmark announcement on tribal self-determination in 1970. Part II describes the executive orders requiring federal agencies to engage in meaningful consultation under the government-to-government relationship, as well as the statutorily prescribed consultation under the NHPA.

COALITION TO PRESIDENT BARACK OBAMA 28 (Oct. 15, 2015), <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> [hereinafter Bears Ears Proposal] (presenting the "formulation" of "Collaborative Management" "as an effective, workable way to bring the Traditional Knowledge, scientific expertise, management experience, and commitment of the Tribes to the Bears Ears National Monument in concert with Federal agencies."). See also Wilkinson, *supra* note 10, at 332 ("Traditional knowledge is derived from the sturdy foundation of data derived from keen observation carried out and passed down over hundreds, even thousands, of years[,] as well as "traditional stories about events, people and the land.").

²⁸ U.S. DEPT'S OF COMMERCE & INTERIOR, SECRETARIAL ORDER NO. 3206, JOINT SECRETARIAL ORDER ON AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT, (June 5, 1997), https://www.fws.gov/leavenworthfisheriescomplex/secretarial_order.pdf [hereinafter Joint Secretarial Order].

²⁹ Wilkinson, *supra* note 1, at 1077–79 ("[C]ritically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical and legal background[,] and the meetings "were designed to allow the tribal side to explain some of the many unique and varied circumstances that apply when federal laws are sought to be extended into Indian country.").

³⁰ Mark Ingersoll Letter, *supra* note 2, at 7 ("[G]overnment-to-government consultations between agencies and Tribes are usually a case of 'too little, too late.'").

Part III analyzes several examples of tribal consultation, highlighting processes that have led to meaningful consultation and those that failed to do so and discussing how the lessons learned can inform the meaning of consultation going forward. We suggest three essential elements for meaningful consultation: (1) early and consistent tribal engagement; (2) face-to-face interactions; and (3) a deep understanding by federal officials of tribal cultures and land management practices.³¹ These elements will lead to meaningful consultation by assuring robust tribal participation in land and resource management, which makes it more likely that tribes will substantively influence management decisions. We conclude that meaningful consultation requires face-to-face negotiations from the beginning to the end of decision-making processes, thus incorporating tribal perspectives, knowledge, and rights into these interactions.³² Through meaningful consultation, the federal government can begin to fulfill its trust obligation to honor the government-to-government relations with tribes.³³ Decision making that incorporates tribal perspectives and knowledge of land, as well as resource management for culturally significant lands, will result in better federal land management.

³¹ In 2021, Bryan Newland, the acting assistant secretary of Indian affairs for the Department of the Interior, highlighted his takeaways from meetings with tribal leaders, who “mentioned the need to begin consultation long before decisions are made or documents are generated, and in doing so, take into account tribal ceremonial times to make sure that there’s adequate time for tribes to respond[.]” Newland added that leaders spoke of “the need to ensure that there’s a consistent application of the consultation requirement among agency field offices.” See Michael Doyle, *Biden’s Indian Affairs nominee listens hard*, E&E NEWS (Apr. 26, 2021) (quoting Newland).

³² Departments’ Consultation Report, *supra* note 4, at 2–3 (“Even where such rights and responsibilities are explicit in law, regulation, or policy, Tribes asserted that Federal agencies often fail to fully implement them. Along these lines, Tribes further remarked that even the best-written agency Tribal consultation policies are often poorly implemented.”).

³³ See Michael Doyle, *Problems, opportunities aplenty await Haaland at Interior*, E&E NEWS (Feb. 22, 2021) (“Honoring our nation-to-nation relationship with Tribes and upholding the trust and treaty responsibilities to them are paramount to fulfilling [the Department of the] Interior’s mission[.]”) (quoting Ann Marie Bledsoe Downes, “Interior’s designated tribal governance officer and deputy solicitor for American Indian affairs”); see COHEN TREATISE, *supra* note 13, at §§ 5.04[3], 5.05 (outlining the federal trust obligation); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1505–06 (1994) (“[T]he trust doctrine is an important legal tool to protect native rights against adverse agency action. . . . The trust doctrine transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their ways of life.”).

I. THE NIXON ANNOUNCEMENT OF A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN TRIBES AND THE FEDERAL GOVERNMENT

In 1970, after two centuries of turbulent tribal policy,³⁴ President Nixon announced the federal government's commitment to encouraging tribal self-determination and to fostering a government-to-government relationship with tribes.³⁵ The announcement was a landmark policy shift, officially ending the termination era³⁶ and declaring a "new direction of Indian policy aimed at Indian self-determination."³⁷

The announcement moved the federal government away from both

³⁴ Since 1778, federal Indian policy has moved through many phases. *See generally* COHEN TREATISE, *supra* note 13. The "treaty era" started in 1778 and was marked by treaties made between Congress and Native Americans primarily for land cession. Congress has often "renege[d] on the promises" made in these treaties after securing land, or later unilaterally altered treaties to the detriment of tribal signatories. The "removal era" followed, in which the federal government sought to displace Native Americans from Indian country and move them west of the Mississippi River, including the infamous Trail of Tears. Removal preceded the "reservation era," in which tribes were consigned to government-selected land regulations, often with other tribes with which they had no prior relationship. The reservation era was followed by the "allotment and assimilation era," which sought to control and alter the customs and practices of Native Americans so that they might more closely resemble those of white Americans. The "reorganization era" followed under the New Deal, marking the first time that the federal policies toward Native Americans sought to help tribes govern themselves and returned some land taken in the allotment era. Unfortunately, the tide shifted again in 1953 with the beginning of the "termination era," which reversed policies geared toward Indian self-government, and in which the federal government sought to terminate its trust relationship with tribes by terminating the special trustee relationship tribes held with the United States. Around 1970, the "self-determination era" began (the Cohen treatise, cited above places the beginning of the era at 1961), which continues today. This now half-century-old era is notable for its push to protect Native American civil rights and "forc[ing] the United States to reckon with its history of mistreatment toward Native Americans." Howard Univ. Sch. of L., *Indigenous Peoples' Civil Rights*, <https://library.law.howard.edu/civilrightshistory/indigenous/selfdetermination> (last visited Apr. 17, 2021).

³⁵ Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970) [hereinafter Nixon Announcement].

³⁶ The termination era saw a "harsh attack on tribal sovereignty and cultures," where the federal government's goal was "pro-assimilation and anti-special rights for Indians." The government "abrogated express treaty rights" and "unilaterally ended the government-to-government relationships" that the United States had with over one hundred tribes. Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1510 (2016).

³⁷ Nixon's announcement condemned forced termination because it terminated the trustee relationship between the Indian people and the federal government, resulting in the tribes' loss of "any special standing they had under federal law" and dismantl[ing] the

termination and paternalism,³⁸ creating a policy in which the federal government instead put Indian people at the helm of decision making related to them.³⁹ Nixon suggested that achieving the “new and balanced” federal-tribal government-to-government relationship meant that both governments must “play complementary roles” when it came to “Indian problems.”⁴⁰ The self-determination policy ushered in a new era of relations between the federal government and tribal governments concerning decision making affecting tribal people and resources.

Nixon’s announcement seemingly quashed the notion that the federal government might not have a responsibility to consult with tribes as sovereigns; for it made it clear that the only question for the federal government to consider was *how* to carry out its responsibility and how to make Indian self-determination an enduring national policy.⁴¹ If the federal government does not consult meaningfully with tribes in environmental decision making regarding culturally significant tribal lands and resources, the vision for a balanced relationship in which the federal and tribal governments have complementary roles cannot exist.

However, as this paper shows, the federal government has consistently failed to provide this complementary role for tribal governments in environmental decision making. Only in some instances, tribal and federal governments have achieved the goal of co-management. These examples, discussed in Section III, can help build a foundation to support a long-lasting and meaningful government-to-government relationship.

tribes by fractionating tribal property and divvying it to individual tribal members in an attempt to assimilate them into society at large. Nixon Announcement, *supra* note 35, at 1; *see also* Goldberg, *supra* note 36, at 1508–10 (explaining that Nixon’s announcement was a “landmark” statement and that it “substantially amplif[ied]” previous efforts to shift federal Indian policy in favor of tribal interests).

³⁸ Nixon Announcement, *supra* note 35, at 2 (explaining that federal termination and federal paternalism are “policy extremes,” which are both wrong and must be rejected if the federal government was to best serve the interests of tribal people).

³⁹ *Id.* at 1 (“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).

⁴⁰ *Id.* at 2.

⁴¹ *Id.* (“[M]ost importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be furthered.”).

II. CONSULTATION UNDER THE EXECUTIVE ORDERS AND THE NATIONAL HISTORIC PRESERVATION ACT

Several presidents after Nixon have reaffirmed the federal policy of fostering a government-to-government relationship with tribes.⁴² Together, Congress and the Executive Branch have developed the federal policy of Indian self-determination through several executive orders and section 106 of the NHPA. Section 106 and its implementing regulations allow tribes to sue federal agencies for failure to adequately consult the tribes, which the regulations require.⁴³ The executive orders require consultation in a broader context, applying to all “regulatory policies that have tribal implications.”⁴⁴ Unlike the NHPA consultation, executive order consultation is unenforceable in court because its scope is limited to “internal management of the executive branch.”⁴⁵

A. Section 106 of the National Historic Preservation Act

Section 106 of the NHPA and its implementing regulations, forms the principal statutory requirement for tribal consultation and outlines

⁴² President George W. Bush harkened back to Nixon’s “national policy of self-determination for Indian tribes[,]” committing to sustaining the government-to-government relationship and respecting tribal sovereignty and self-determination. Memorandum on Government-to-Government Relationships with Tribal Governments (Sept. 23, 2004), <https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>. President Obama endorsed President Clinton’s Indian policy, recognizing that consultation is “critical” for a “productive” government-to-government relationship, and that “failure to include the voices of tribal officials in formulating policy” has led to “undesirable” and “tragic” results. Obama’s Consultation Memo, *supra* note 25. Obama also signed Exec. Order 13,604 in March 2012, requiring consultation for infrastructure-related decision making (for transmission lines and pipelines, for example). Exec. Order No. 13,604, 77 Fed. Reg. 18,885 (Mar. 22, 2012) [hereinafter Exec. Order 13,604]. Exec. Order 13,604 directed “federal permitting and review processes” to “rely upon early and active consultation” with tribal governments, although merely for the purposes of “avoid[ing] conflicts” and alleviating “concerns.” *Id.* The Obama Executive Order declared that tribal governments “may” “have key decision-making responsibilities” for a particular project. *Id.*

⁴³ *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation. v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010) (explaining that “[t]he Court’s review of agency action under [the NHPA] is governed by the Administrative Procedure [A]ct[,]” (“APA”), and a failure to engage in adequate consultation violates § 706(2)(D) of the APA because it is an “agency action” “without observance of procedure required by law”).

⁴⁴ *See, e.g.,* Exec. Order No. 13,175, 3 C.F.R. 304 (2000) [hereinafter Exec. Order 13,175].

⁴⁵ *Id.* § 10 (“This order is intended only to improve the internal management of the executive branch. . .”).

mechanisms for consultation that help the federal government determine the potential effects of a given “undertaking” (defined below). This provision of the NHPA requires federal officials with jurisdiction over a federal “undertaking” to account for the undertaking’s effects on “any district, site, building, structure or object” listed in the National Register of Historic Places before spending federal money or approving a project affecting a registered property.⁴⁶

1. Section 106 Regulations

The NHPA’s regulations provide details concerning the requirements of section 106 and under what circumstances it applies.⁴⁷ First, there must be a federal “undertaking,” defined as a “project, activity, or program” funded in part or in whole by a federal agency, including those carried out “on behalf” of an agency, with federal financial assistance, or requiring a federal permit, license, or approval.⁴⁸ Undertakings include new and ongoing projects, activities, and programs. The regulations limit the federal government’s consultation obligations based on both the “scale of the undertaking” and the “scope of federal involvement.”⁴⁹ Because the regulations task the agency official with determining the “appropriate” level of consultation based on the scale and the scope of federal involvement, the

⁴⁶ 16 U.S.C. § 470f (“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking” on National Register listings and “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.”). See also Nat’l Park Serv., *What is the National Register of Historic Places?*, <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm#:~:text=The%20National%20Register%20of%20Historic%20Places%20is%20the,of%20the%20Nation%27s%20historic%20places%20worthy%20of%20preservatio> Then (last visited Apr. 18, 2021) (“The National Register of Historic Places is the official list of the Nation’s historic places worthy of preservation.”); *Bridges to a New Era*, *supra* note 4, at 113–33 (including recommendations for reforming to coordinate the NHPA implementation with federal land planning).

⁴⁷ 36 C.F.R. § 800.1(a) (2021) (“Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties . . . [and the] procedures in this part define how Federal agencies meet these statutory responsibilities.”).

⁴⁸ *Id.* § 800.16(y).

⁴⁹ *Id.* § 800.2(a)(4) (“The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement[.]”).

thoroughness of consultation varies.⁵⁰ Importantly, the Act’s scope is not limited to federal property, as explained below.⁵¹

Section 106 consultation is triggered when the agency with jurisdiction over the federal undertaking confirms that the undertaking has the potential to affect historic properties.⁵² Because section 106 applies only to historic properties, that is, properties listed on or eligible for the National Register, the federal government may still adversely affect culturally significant tribal properties without consulting tribes if those properties are not deemed eligible or are not already listed.

The regulations require consultation to begin “at the early stages of project planning” to identify historic properties the undertaking may affect and to assess alternatives to “avoid, minimize or mitigate any adverse effects” of the undertaking on historic properties.⁵³ Federal agencies must give the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment on the undertaking and “involve the consulting parties . . . in findings and determinations made during the section 106 process.”⁵⁴ If the undertaking has the potential to affect a historic property that is religiously or culturally significant to any federally recognized tribe,⁵⁵ that tribe is a “consulting party” that must be involved in the

⁵⁰ *Id.*

⁵¹ U.S. DEPT. OF INTERIOR, *National Historic Preservation Act, Section 106: A quick guide for preserving Native American cultural resources* (2012), <https://www.nps.gov/history/tribes/Documents/106.pdf> [hereinafter 106 Guide].

⁵² Advisory Council on Historic Pres., *An Introduction to Section 106*, <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> (last visited Apr. 14, 2021). (“If a federal or federally-assisted project has the potential to affect historic properties, a Section 106 review will take place.”). *See also* 106 Guide, *supra* note 51 (defining “historic properties” as “any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of History Places[,]” including “any artifacts, records, and remains . . . that are related to and located within the historic properties and any properties of traditional religious and cultural importance to Tribes”).

⁵³ 36 C.F.R. § 800.1(a).

⁵⁴ *Id.* *See also id.* § 800.2(b) (“The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.”).

⁵⁵ As of May 2021, there were 574 federally recognized tribes. U.S. Dept. of Interior, Indian Affairs, *Frequently Asked Questions*, <https://www.bia.gov/frequently-asked-questions> (last visited May 1, 2021). Although the regulations recognize both Indian tribes and Native Hawaiian organizations, *see, e.g.*, 36 C.F.R. § 800.2(c)(2)(ii) (describing the requirements for “[c]onsultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.”), the scope of this Article is limited to Indian tribes.

process.⁵⁶

The regulations extend consultation rights to any Indian tribe that “attaches religious and cultural significance to historic properties” the undertaking may affect, regardless of whether the property is situated on tribal land.⁵⁷ To satisfy its tribal consultation obligation, the agency must provide a tribe with a “reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking’s effect of such properties, and participate in the resolution of adverse effects.”⁵⁸ The regulations recognize the “unique legal relationship” between the federal government and Indian tribes, and encourage a section 106 consultation process that is both “respectful of tribal sovereignty” and recognizes “the government-to-government relationship.”⁵⁹

However, several procedural and administrative elements have hampered implementation of section 106. The law’s scope is limited since consultation is relative to the “scale of the undertaking” and the federal government’s involvement.⁶⁰ If an undertaking is small and the federal government has only a distant role in its implementation, the tribes involved may not be consulted as thoroughly as they would for a more substantial undertaking. Therefore, the federal government can be involved with projects, activities, or programs that have the potential to adversely affect culturally significant tribal properties while avoiding rigorous consultation if federal involvement is limited. Further, section 106 applies only to properties and sites listed on or eligible for the National Register of Historic Places,⁶¹ so not all sites with cultural value to tribes may be

⁵⁶ 36 C.F.R. § 800.2(c)(2)(ii). Other parties with “consultative roles in the 106 process” are: (1) the state historic preservation officer, representing the interests of a state and its citizens; (2) Indian tribes and Native Hawaiian organizations; (3) representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur; (4) applicants for federal assistance, permits, licenses, or approval; and (5) a catch-all group including “individuals and organizations with a demonstrated interest in the undertaking.” *Id.* § 800.2(c)(1)–(5).

⁵⁷ *Id.* § 800.2(c)(2)(ii).

⁵⁸ *Id.* § 800.2(c)(2)(ii)(A).

⁵⁹ *Id.* § 800.2(c)(2)(i)(B)–(C).

⁶⁰ *Id.* § 800.2(a)(4).

⁶¹ See Nat’l Endowment for the Humanities, *Frequently Asked Questions about Section 106 of the National Historic Preservation Act*, <https://www.neh.gov/grants/manage/frequently-asked-questions-about-section-106-the-national-historic-preservation-act> (last visited Aug. 4, 2021) (“Section 106 of the National Historic Preservation Act . . . and

subject to the consultation requirements of section 106.

2. Section 106 and Meaningful Tribal Consultation

Although section 106 expressly requires tribal consultation, the federal government's efforts often fall short of ensuring meaningful tribal engagement.⁶² Agencies frequently perform rote and less-than-rigorous consultation—that is, so-called “box-checking.”⁶³

Instead of engaging in meaningful back-and-forth consultation, federal agencies sometimes document “every contact or communication with a tribe, no matter how inconsequential,” as proof that consultation took place.⁶⁴ Contact can include one-way communications like mailing a notice of agency intent to prepare an environmental impact statement to a tribe, or a tribal member simply speaking at a public meeting.⁶⁵ Federal agencies have sometimes treated tribes as interchangeable, counting communications with one as communications with all.⁶⁶

In some instances, archaeological surveys conducted by private entities have failed to recognize tribally significant resources.⁶⁷ A complication is that tribes sometimes intentionally withhold information from the federal government for the purposes of National Register listing because they do not want to make cultural resources publicly accessible.⁶⁸ For the

its implementing regulations . . . is a law that requires federal agencies to consider the effects of federally funded projects on historic properties (i.e., listed or eligible for listing, in National Register of Historic Places[.]”).

⁶² For example, in the *Quechan Tribe* case discussed *infra* notes 66–77 and accompanying text, the court ruled against the BLM for its failure to adequately consult with the tribe, describing the BLM's “consultation” as “an empty formality.” *Quechan Tribe of the Fort Yuma Indian Reservation. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010).

⁶³ See Yachnin & Jacobs, *supra* note 7 (discussing President Biden's executive order promising “regular, meaningful, and robust consultation” with tribes and quoting Shannon Wheeler, Chair of the Nez Perce Tribe, to the effect that consultation is a treaty obligation that must be honored at the highest level, and “not just a check-in-the-box process”).

⁶⁴ Mark Ingersoll Letter, *supra* note 2, at 7.

⁶⁵ *Id.*

⁶⁶ *Quechan Tribe*, 755 F. Supp.2d at 1112 (noting that the BLM's documented “consultation” efforts for the project at issue referred to consultation with “tribes,” treating them “interchangeab[ly]”).

⁶⁷ Mark Ingersoll Letter, *supra* note 2, at 18 (“[M]any archaeologists and other professionals employed by [project] applicants may not be able to identify Tribal resources for lack of training or familiarity with the sites and resources.”).

⁶⁸ *Id.* (“Tribes may have intentionally withheld information because of concerns about data disclosure, either inadvertently, or willfully by tribunals or applicants.”).

NHPA to apply, tribes must disclose information to government officials and project applicants in order to demonstrate that a historic property is listed, or is eligible for listing, on the National Register, in the hope that doing so will lead to protection.⁶⁹ If a tribe instead wishes to withhold information detailing the location or the attributes of culturally or religiously significant resources, that resource risks being destroyed during the course of project development. In some cases, even when tribes have willingly disclosed information, the federal government has failed to consider tribal concerns before granting project approval.

Although the actions discussed above might seem like consultation, they are not *meaningful*. Federal agencies are unlikely to actually grasp tribal knowledge and perspectives and apply them in decision making by simply mailing notices and attending public meetings. Because individual tribes are unique, none can be overlooked, and the appropriate authorities within each tribe must be consulted for any consultation to be truly meaningful.

An example of failed consultation was the 2010 case of *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, in which the Quechan tribe alleged that the Bureau of Land Management (“BLM”) approved a solar energy project without engaging in the tribal consultation required by the NHPA.⁷⁰ During the BLM’s decision-making process, the tribe maintained that the project would destroy hundreds of ancient cultural sites.⁷¹ The tribe learned informally that the BLM was developing a programmatic agreement, which the BLM would approve by a specific date, and sent a letter to the agency expressing its concerns that the decision-making process did not allow adequate time for

⁶⁹ See 36 C.F.R. § 800.4(a)(4) (discussing the identification of historic properties in consultation with tribal representatives, which requires “[g]ather[ing] information from any Indian tribe or Native Hawaiian organization . . . to assist in identifying properties [which] . . . may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites”).

⁷⁰ *Quechan Tribe*, 755 F. Supp.2d at 1107.

⁷¹ *Id.* (“The area where the project would be located has a history of extensive use by Native American groups” and it was uncontested that “459 cultural resources” were identified in the project area, including burial sites. . . .).

consultation.⁷² The BLM approved the project over the tribe's objections.⁷³

A federal district court granted the tribe a preliminary injunction, holding that the BLM failed to "initiate government-to-government contact" with the tribe and "glide[d] over requirements imposed" by the NHPA and its implementing regulations.⁷⁴ The court decided that the BLM violated the NHPA because the agency's communications were "cursory and inadequate."⁷⁵ It also determined that the BLM contacted the tribe "late in the planning process," leaving inadequate time for an alternatives analysis that could avoid culturally significant sites.⁷⁶ The court consequently enjoined the BLM from beginning the first phase of the project until adequate NHPA consultation occurred.⁷⁷ This result demonstrates how tribes can enforce section 106 against federal agencies if tribes believe consultation has been inadequate.⁷⁸

Even when tribal consultation complies with section 106 regulations, it does not automatically satisfy the government-to-government consultation obligation. Section 106 requires that consultation recognize the government-to-government relationship and requires the responsible agency official to consult with tribal government representatives "in a manner sensitive to the concerns and needs" of the tribe.⁷⁹ Government-to-government consultation, as required by section 106, however, does not alone "protect tribal rights to exist as self-governing entities," as required for

⁷² *Id.* at 1110–11 (explaining the defendants' argument that they satisfied their section 106 duties through the execution of a programmatic agreement under 36 C.F.R. § 800.14(b)(1)(ii)). The section 106 regulations explain that the ACHP and the federal agency official "may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b)(1). Under § 800(b)(1)(ii), used by the BLM in this case, a programmatic agreement "may be used . . . [w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking."

⁷³ Quechan Tribe, 755 F. Supp.2d at 1118 (describing the Tribe's first contact with the BLM for this project in February 2008, which "put BLM on notice [of] historical and cultural sites within the project area . . . considered important to the Tribe," but that "the documentary evidence [did not] show that BLM ever met with the Tribe's government until October 16, 2010, well after the project was approved").

⁷⁴ *Id.* at 1119.

⁷⁵ *Id.* at 1111.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1120–22.

⁷⁸ See also *infra* Part II(A), discussing additional NHPA section 106 litigation.

⁷⁹ 36 C.F.R. § 800.2(c)(2)(ii)(C).

general consultation outside of the NHPA.⁸⁰ Mere contact between federal and tribal government officials, even if conducted in a sensitive manner, does not necessarily protect tribal self-governance. Whether compliance with section 106 fully satisfies the government-to-government consultation obligation depends on the level of tribal participation in the resolution of adverse effects.⁸¹

B. The Clinton Executive Orders

Throughout his tenure, President Bill Clinton used executive orders (“E.O.”) to strengthen the federal government’s commitment to a government-to-government relationship with tribes. Clinton promulgated E.O. 12875 in 1993, focusing on unfunded federal mandates that strained tribal budgets.⁸² E.O. 13007 in 1996 promised protection of Indian sacred sites.⁸³ E.O. 13175 in 2000 (superseding E.O. 13084 from 1998) focused explicitly on federal consultation with tribal governments.⁸⁴ These executive orders strengthened the federal government’s commitment to meaningful consultation as a means of implementing the federal policy of a government-to-government relationship with tribes.

1. Indian Sacred Sites

E.O. 13007 directed federal agencies with land management authority to: (1) “accommodate access to and ceremonial use of Indian sacred

⁸⁰ See COHEN TREATISE, *supra* note 13, § 5.04(3)[a] (discussing the federal trust responsibility).

⁸¹ See 36 C.F.R. § 800.2(c)(2)(ii)(A) (“The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”).

⁸² Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (Oct. 26, 1993) [hereinafter Exec. Order 12,875] (“[T]he cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments.”).

⁸³ Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 29, 1996) [hereinafter Exec. Order 13,007] (focusing on “protect[ing] and preserv[ing] Indian religious practices”).

⁸⁴ Exec. Order 13,175, *supra* note 44 (purporting to “establish regular and meaningful consultation and collaboration with tribal officials . . . [and] to strengthen the United States government-to-government relationships with Indian tribes”). Exec. Order 13,175 superseded and revoked Exec. Order 13,084. *Id.* § 9(c) (“Executive Order 13084 . . . (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.”). See also Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

sites”; and (2) avoid causing “adverse” effects to the “physical integrity” of sacred sites.⁸⁵ The E.O. defined a “sacred site” as “any specific, discrete, narrowly delineated location on Federal land” identified to the appropriate federal agency either by a tribe or a qualified individual tribal member.⁸⁶ This definition invites concerns similar to those of National Register listings, because, in order to qualify for protection, tribes must disclose to federal agencies—and consequently to the public—sensitive information about the locations and attributes of sacred sites.⁸⁷

E.O. 13007’s definition of “consultation” is vague, requiring only that federal land management agencies prepare a report within one year of the effective date of the E.O., detailing how the agency plans to implement its directives.⁸⁸ Nor does the E.O. provide consultation standards. Instead, it merely asks agencies to report on “procedures implemented or proposed to facilitate consultation” with tribes whose sacred sites might be affected.⁸⁹ Thus, the E.O. gave federal agencies considerable discretion in determining how to protect and accommodate access to cultural sites and how to design a framework to govern consultation when federal land management decisions put sacred sites at risk.

2. *Regular and Meaningful Consultation*

The other Clinton administration executive orders aimed to “establish regular and meaningful consultation and collaboration” with tribal governments.⁹⁰ E.O. 12875 in 1993 declared a policy of protecting the American people from the consequences of “unfunded federal mandates” on state, local, and tribal governments.⁹¹ But because the “regular and meaningful

⁸⁵ Exec. Order 13,007, *supra* note 83, § 1(a).

⁸⁶ An Indian tribal member who identifies a sacred site must be “determined to be an appropriately authoritative representative of an Indian religion.” *Id.* § 1(b)(iii).

⁸⁷ See, e.g., Native Am. Rts. Fund, *Protecting Bears Ears National Monument*, <https://www.narf.org/cases/bears-ears/> (last visited Apr. 15, 2021) [hereinafter NARF, *Protecting Bears Ears*].

⁸⁸ Exec. Order 13,007, *supra* note 83, § 2(b). Agency reports must include “any changes necessary to accommodate” tribal access and use of sacred sites and “any changes necessary to avoid adversely affecting the physical integrity of the sites.” *Id.* § 2(b)(i)–(ii).

⁸⁹ *Id.* § 2(b)(iii).

⁹⁰ See Exec. Order 12,875, *supra* note 82; Exec. Order 13175, *supra* note 44.

⁹¹ Exec. Order 12,875, *supra* note 82 (“[T]he cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. . . . These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.”).

consultation” directed by E.O. 12875 included consultation with state, local, and tribal governments, it placed each of them on the same level, even though the federal government’s responsibility towards tribes is clearly distinct.⁹²

In contrast to E.O. 12875, E.O. 13175 in 2000 recognized as “fundamental” the “unique legal relationship” between the federal government and tribal governments, under which the federal government has, over time, “establish[ed] and define[d] a trust relationship with Indian tribes.”⁹³ E.O. 13175 promoted tribal “self-government,” “sovereignty[,] and self-determination”⁹⁴ by requiring federal agencies, through “regular and meaningful consultation” in a government-to-government framework,⁹⁵ to carry out the “complementary roles” that Nixon’s announcement envisioned 30 years earlier.

E.O. 13175 directed federal agencies⁹⁶ to establish an “accountable process” to ensure tribal officials have an opportunity to contribute “meaningful and timely” input when agencies develop regulatory policies that have tribal implications, and to consult tribal officials early in the development process.⁹⁷ For example, to fulfill its E.O. 13175 obligations, the 2013 “accountable process” of the U.S. Army Corps of Engineers promised an “[o]pen, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect, and shared responsibility,” working toward a “mutual consensus and begin[ning] at the earliest planning stages, before decisions are made and actions are taken; [with]. . . active and respectful dialogue”⁹⁸ The E.O. also directed

⁹² See, e.g., 36 C.F.R. § 800.2(c)(2)(ii)(B) (“The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation should be conducted in a sensitive manner respectful of tribal sovereignty.”).

⁹³ Exec. Order 13,175, *supra* note 44, § 2(a).

⁹⁴ *Id.* at § 2(c).

⁹⁵ *Id.*

⁹⁶ *Id.* § 1(c) (defining “agency” as “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(5)”).

⁹⁷ *Id.* § 5(a).

⁹⁸ U.S. ARMY CORPS OF ENG’RS, TRIBAL CONSULTATION POLICY 2 (2013) https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf (“E.O. 13175 requires all federal agencies to formulate an accountable process. . . . This document affirms the [USACE] commitment to engage in consultation with federally recognized tribes.”). In contrast, the Trump Administration USACE Consultation Policy banned the

agencies to provide a “tribal summary impact statement,” describing the extent of the consultation, summarizing tribal concerns, and explaining the extent to which the agency resolved those concerns.⁹⁹ Section 5(d) of the E.O. instructed that agencies “should explore, and, where appropriate, use consensual mechanisms for developing regulations” on issues affecting tribal self-government, trust resources, and treaty rights.¹⁰⁰

In 2012, President Obama strengthened the federal government’s commitment to tribal consultation with the promulgation of E.O. 13604, focused on infrastructure and requiring federal permitting and review processes for projects to rely “upon early and active consultation with . . . tribal governments[.]”¹⁰¹ In contrast, the earlier E.O. 13175 used weaker language, directing that agencies “*should* . . . use consensual mechanisms [with tribes] for developing regulations” with tribal impacts.¹⁰²

These E.O.s incorporated some elements that are essential to meaningful consultation. E.O. 13175 recognized the value of “early” consultation and back-and-forth communication in which tribal officials provide concerns that the agencies must consider before issuing a policy or regulation.¹⁰³ Section 5(d) of E.O. 13175 resembles what some tribes have described when calling for meaningful consultation—using “consensual mechanisms” that could lead to federal-tribal consensus, rather than one-way communication by an agency.¹⁰⁴ The Bears Ears coalition, for example, proposed “joint decision-making” under a process developed by both

Corps from consulting with tribes at all for the proposed Rosemont Copper Mine in Arizona. Northey, *supra* note 2 (describing the Trump policy).

⁹⁹ Exec. Order 13,175, *supra* note 44, § 5(b)(2)(A)–(B).

¹⁰⁰ *Id.* § 5(d).

¹⁰¹ Exec. Order 13,604, *supra* note 42, § 1(a). (emphasis added).

¹⁰² Exec. Order 13,175, *supra* note 44, § 5(d). (emphasis added).

¹⁰³ See *supra* notes 44 and 82 and accompanying text.

¹⁰⁴ Exec. Order 13,175 does not define “consensual mechanisms,” but provides “negotiated rulemaking” as an example. Exec. Order 13,175, *supra* note 44, § 5(d). Negotiated rulemaking is “a process which brings together representatives of various interest groups and a federal agency to negotiate the text of a proposed rule,” with a goal of “reach[ing] consensus.” U.S. EPA, *Negotiated Rulemaking Fact Sheet*, <https://archive.epa.gov/publicinvolvement/web/pdf/factsheetregneg.pdf> (last visited Apr. 26, 2021). See also Mark Ingersoll Letter, *supra* note 2, at 7–8 (“[M]eaningful consultation should always be undertaken with the goal of reaching consensus. Without this goal, there is no actual consultation. . . . [T]he federal government and Tribes should be sitting down with one another, engaging in meaningful back-and-forth, and reaching agreement to facilitate project development.”).

tribal and federal agency representatives.¹⁰⁵ Similarly, although the E.O. does not define “consensual mechanisms,” it suggests “negotiated rule-making” on the text of a proposed rule, with a goal of reaching consensus among federal officials and representatives of various interest groups.¹⁰⁶

As noted, one drawback to these E.O.s is the sometimes-vague nature of the instructions they provide, which opens the door for consultation that is less than meaningful. The Clinton administration’s E.O.s do not define “meaningful consultation.” Although consulting tribes early in the process is essential to allowing agencies to incorporate tribal perspectives meaningfully, E.O. 13175 left the details of how to engage in meaningful and timely consultation to the federal agency. Moreover, the E.O. does not require an agency to act on tribal concerns, but merely to summarize those concerns and the agency’s response to them.¹⁰⁷ An agency could conceivably satisfy its E.O. 13175 obligation through email exchanges alone. Consultation under E.O. 13604 is more stringent than that of E.O. 13175 but still leaves substantial discretion to federal agencies. Achieving E.O.-based consultation does not necessarily equate to achieving meaningful consultation. Nor does it automatically satisfy government-to-government consultation as required under the trust doctrine. The agency discretion granted by the E.O.s for fashioning consultation does not “protect tribal rights to exist as self-governing entities” because it does not give tribes any decision-making power, but instead relegates them to participating in whatever process the agency decides on.¹⁰⁸

III. TRIBAL CONSULTATION CASE STUDIES

This section analyzes the consultation processes via several case studies: (1) the Secretarial Order on the ESA; (2) the proclamation (and diminishment) of Bears Ears National Monument in Utah; (3) oil and gas lease sales in Chaco Canyon, New Mexico; and (4) the Oak Flat, Arizona land exchange and mining project. These case studies are not

¹⁰⁵ Bears Ears Proposal, *supra* note 27, at 30; *see also id.* at 22 (proposing that the agencies and tribes “shall, from the beginning to the conclusion of all plans and projects, collaborate jointly on all procedures, decisions, and other activities[.]”).

¹⁰⁶ Exec. Order 13,175 *supra* note 44, § 5(d).

¹⁰⁷ *See id.* § 5(b)(2)(B).

¹⁰⁸ *See* COHEN TREATISE, *supra* note 13, § 5.04[3](a); *see also Bridges to a New Era*, *supra* note 4, at 169–74 (recommending a new executive order on tribal co-management).

exhaustive,¹⁰⁹ but are representative of several aspects of the tribal consultation process. Each discusses whether federal agencies engaged in any consultation and, if so, whether it was meaningful or amounted to so-called box-checking. Procedural aspects of successful consultation include, for example, the rank of the federal official that engages in consultation, and whether an agency consults tribes directly or groups them in with the public or non-tribal stakeholders. Substantive aspects include tribal identification of places and resources of cultural significance and co-management frameworks between tribal governments and state or federal

¹⁰⁹ Other consultation case studies we considered included the Jordan Cove liquid natural gas (“LNG”) project and the memorandum of agreement to remove four dams on the Klamath River. The Jordan Cove project proposed to put a LNG terminal in Coos Bay on the southern Oregon coast, in an area including “archaeological resources, human burials, and sacred places.” Mark Ingersoll Letter, *supra* note 2, at 3–4. The Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians spent over a decade attempting to compel FERC to meaningfully consult under the NHPA. *Id.* at 5–6. Instead, consultation efforts cataloged by FERC were limited to a notice of intent to the general public, a series of written communications between FERC and the tribes, and tribal member attendance at public meetings. *Id.* FERC proceeded to issue a final EIS in 2015, despite the tribes’ request for a government-to-government consultation meeting. *Id.* at 6. In early 2020, Oregon denied several permits for the project, citing “significant adverse effects” under the Coastal Zone Management Act, and NOAA upheld the state’s Coastal Zone Management Act findings in early 2021. See Ted Sickinger, *Feds uphold state denial on Jordan Cove LNG’s coastal zone permit, another roadblock for the controversial project*, THE OREGONIAN: OREGON LIVE (Feb. 9, 2021), <https://www.oregonlive.com/environment/2021/02/feds-uphold-state-denial-on-jordan-cove-lngs-coastal-zone-permit-another-roadblock-for-the-controversial-project.html>. Since tribal consultation was not as prominent an issue as the state’s rejection of the project, we elected not to include this case study.

Consultation was also implicated in the Klamath dam removal process. The major parties involved in dam removal are PacifiCorp (the previous owner of the dams), the Karuk Tribe, Yurok Tribe, States of Oregon and California, and Klamath River Renewal Corporation (“KRRRC”). *Memorandum of Agreement*, at 1 (Nov. 2020), <http://www.klamathrenewal.org/wp-content/uploads/2020/11/Klamath-MOA.pdf> (implementing the Klamath Hydroelectric Settlement Agreement for Dam Removal). The parties filed applications with FERC to transfer the dam licenses to the KRRRC, which would undertake the removal of four dams. *Id.* at 1–2. In July 2020, FERC responded to the transfer request by requiring PacifiCorp to remain a co-licensee “to aid in covering any major liability.” See Jamie Parfitt, *Fight over Klamath River Dam Removal Project Goes to Federal Regulators*, KDRV NEWS (Feb. 16, 2021), <https://www.kdrv.com/content/news/Fight-over-Klamath-River-dam-removal-project-goes-to-federal-regulators-573806011.html>. In response to FERC, the governors of California and Oregon signed onto the dam removal project as “guarantors,” so that PacifiCorp may fully step away. *Id.* Since FERC is currently reviewing the counter proposal, *id.*, we elected not to include this case study. If FERC approves the revised proposal, KRRRC plans to begin dam removal in 2023, which will mark the beginning of the “largest dam-removal and salmon-restoration proposal in history.” Konrad Fisher, *The Klamath River’s Advocates Succeed on Their Second Try with New Agreement for Largest-ever Dam Removal*, WATERKEEPER ALL., <https://waterkeeper.org/magazines/volume-13-issue-1/klamath-river-dam-removal/> (last visited Apr. 27, 2021).

governments—like the framework arising out of the Belloni decision, discussed below.

An early example of meaningful consultation that preceded the E.O.s grew out of Judge Robert Belloni's historic decision in *Sohappy v. Smith*, later consolidated into *U.S. v. Oregon*.¹¹⁰ After ruling that Columbia River treaty tribes were entitled to a “fair share” of salmon harvest allocation because of treaty language expressly assuring them of “a right of taking fish in common with” white settlers, Judge Belloni called for meaningful tribal participation in fishery management.¹¹¹ Despite the *Sohappy* decision, Oregon continued to discriminate against tribal fishers as late as 1975, so Judge Belloni ordered the tribes and states to cooperate on developing a comprehensive fish management plan.¹¹² Belloni's order thus laid the groundwork for decades of meaningful negotiations, which have resulted in a series of management plans governing salmon harvests under a co-management framework.¹¹³ The management plans, requiring concurrence of both the states and the tribes, are a significant substantive result of the negotiations ordered by Judge Belloni and may serve as a general

¹¹⁰ The federal government began to take action on behalf of the tribes to protect treaty fishing rights in the late 1960s, including representing individual treaty fishermen in state criminal prosecutions. See Michael C. Blumm & Cari Baermann, *The Belloni Decision and Its Legacy: United States v. Oregon and its Far-Reaching Effects After a Half-Century*, 50 ENV'T. L. 347, 365 (2020). Tribal activists, including Sohappy, sued Oregon state officials in 1968, “challenging the state's restrictions on treaty fishing and seeking to stop the state's arrests of treaty fishermen.” *Id.* at 364. In the same year, the United States initiated the *U.S. v. Oregon* suit to similarly protect tribal treaty rights for salmon harvest, and due to “the overlap of treaty rights issues, Judge Belloni consolidated the two cases” in 1969. *Id.* at 366–67.

¹¹¹ *Sohappy v. Smith*, 302 F. Supp. 899, 911–12 (D. Or. 1969) (“The treaty Indians, having an absolute right to [Oregon's salmon] fishery, are entitled to a fair share of the fish produced by the Columbia River system. . . . [The] effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago.”). See also Blumm & Baermann, *supra* note 110, at 352 (“To achieve [fair share allocation], Belloni established a number of innovative procedural requirements, like ‘meaningful’ tribal participation in managing the fishery. . . .”); *Id.* at 366 (describing the Columbia River treaty tribes as including the tribes of the Yakama, Umatilla, and Warm Springs reservations and the Nez Perce Tribe).

¹¹² See Blumm & Baermann, *supra* note 110, at 374.

¹¹³ See *id.* at 373–74. By 1977, “tribes and states finally adopted a five-year co-management plan.” *Id.* at 374. See *A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam* (1977) (entered into pursuant to *Sohappy*, 302 F. Supp. at 912). See also Blumm & Baermann, *supra* note 110 (describing the ten-year Columbia River Fish Management Plan of 1988, followed by a series of short-term agreements governing management of salmon harvests, and a new ten-year plan in 2008, developed “after years of negotiations”).

model for co-management in other contexts.¹¹⁴

Judge Belloni anticipated the call for meaningful participation by the political branches in the NHPA regulations and the E.O.s decades later, and his decision illustrated the role that court oversight can provide in ensuring meaningful tribal participation when culturally significant resources are at stake.¹¹⁵ The long-term success of state-tribal collaboration with federal court oversight in managing salmon harvests, which can fluctuate widely from year to year, was confirmed in 2018 when one of Judge Belloni's successors attempted to dismiss the half-century-old case, and every party to the case—five tribes, three states, and the federal government—objected,¹¹⁶ a testament to the meaningful consultation the judge initiated.¹¹⁷ The case is now in its fifty-second year of proceedings, perhaps the longest ongoing case in the country.

Both the example set by Judge Belloni and the case studies below reveal that there is no one definition of “meaningful consultation.” An analysis of several agency consultation efforts shows that meaningful consultation must include, at a minimum, face-to-face discussions and early and consistent engagement with tribes by federal agencies. The case studies also show that meaningful consultation arises when federal agencies—or the federal judiciary—adequately understand tribal cultures and their land and natural resources management practices.

Below we review examples of meaningful consultation as well as consultation that did not meet this standard.

¹¹⁴ See Blumm & Baermann, *supra* note 110, at 385 (describing the “co-management plans that the Belloni decision prompted” as “tangible results of the 1969 decision a half-century later,” which “were the first judicial call for the states and the tribes to use their sovereign authorities to create co-management principles to govern an extremely valuable but increasingly scarce natural resource that they shared.”). Note, however, that this apparent tribal veto in the co-management framework came as a result of a federal court’s interpretation of management necessary to satisfy express treaty rights by states and tribes, not the federal government.

¹¹⁵ See *id.* at 377 (“Through several generations of plans, the parties have negotiated agreements establishing collaborative fishery management that reflected a spirit of cooperation between the tribes and states that did not exist prior to the *Sohappy* decision.”).

¹¹⁶ See *id.* at 378–79 (explaining that Oregon District Judge Michael Mosman, one of Judge Belloni’s successors, “unexpectedly dismissed the case [in 2018],” and “[t]he states of Idaho, Washington, and Oregon, all five of the tribes now party to the case, as well as the United States Department of Justice quickly filed motions seeking clarification of the dismissal and requesting reconsideration.”).

¹¹⁷ See *id.* at 380–83 (discussing the legacy of Judge Belloni’s decision).

A. The Joint Secretarial Order on Tribal Rights and the Endangered Species Act

The process that led to the Joint Secretarial Order on Tribal Rights and the Endangered Species Act (“ESA”) in 1997 is a prominent example of meaningful consultation.¹¹⁸ Like the collaboration that Judge Belloni ordered in *Sohappy*, this consultation happened before the Clinton administration’s E.O.s requiring “regular and meaningful consultation” in 1998 and 2000, and it demonstrates several essential elements of meaningful consultation in action.¹¹⁹ The Order attempted to harmonize federal law with “[t]ribal rights to manage their resources in accordance with their own beliefs and values.”¹²⁰

Tribes came together in the mid-1990s to discuss how to protect tribal interests in light of the ESA because its enforcement often disregarded “tribal sovereignty and resource management practices.”¹²¹ A group of tribal resource managers and lawyers organized efforts on a national scale to develop a tribal consensus on the ESA implementation in Indian country, beginning at a workshop in February 1996.¹²²

The tribal consensus that emerged reflected a desire “to avoid ESA conflicts through good, cooperative tribal land management.”¹²³ Once participants settled on sending this central message to the federal government, they began drafting a proposal calling for a joint secretarial order to apply nationwide that would establish working relationships between tribal

¹¹⁸ The background information describing the consultation process relies on Wilkinson, *supra* note 1, which he wrote based on his personal experience as one of the tribal representatives.

¹¹⁹ See Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 405 (1998) (“Notably, a tribal initiative provided the impetus for the Order — unlike most federal Indian policies, the Order was not generated by centralized federal decision making and handed down to the tribes.”).

¹²⁰ Wilkinson, *supra* note 1, at 1072.

¹²¹ *Id.* at 1065 (explaining that “tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting[.]”). See also *id.* at 1070 (“Many people at the [tribal ESA] workshop expressed outrage at any attempt to regulate Indians under the ESA because it implies that tribes lack the capability to manage their resources in a way that protects animal species.”).

¹²² *Id.* at 1066.

¹²³ *Id.* at 1074.

governments and the federal agencies for the ESA implementation.¹²⁴ The tribes soon presented their proposal to the Department of the Interior, which began the consultation process.

Consultation on the Secretarial Order demonstrated how to effectively implement several essential elements of achieving meaningful consultation, especially highlighting several important procedural aspects of consultation. First, then-Secretary of the Interior Bruce Babbitt had a Special Counsel who briefed him on the issues and the nature of the tribal position.¹²⁵ Second, Babbitt met face-to-face with the tribal leaders who presented the national tribal consensus, instituting a year and a half of negotiations.¹²⁶ Babbitt's efforts to comprehend the tribal position paper meant that he began the process with an understanding of the importance of this issue to the tribes. As a result, he appointed an appropriate negotiating team that included high-level federal representatives.¹²⁷

Unlike the consultation that would emerge later under the Clinton administration's E.O.s, which gave federal agencies enormous discretion in creating the consultation process, the "structure and protocols of the negotiating sessions were carefully negotiated between [tribal and federal] representatives."¹²⁸ The negotiating sessions devoted substantial time to developing a deep understanding of "the cultural, historical, and legal background" of the relationship between the ESA and Indian wildlife management.¹²⁹ These two elements—early and consistent tribal engagement and a deep understanding by federal officials of tribal cultures and land management practices—are essential because tribal members are the appropriate source for instructing agencies on how best to interact with them, and because agency officials may not effectively apply that information

¹²⁴ *Id.* at 1075 ("The basic policy decision [for the draft position paper calling for the order] was that such an administrative system, if effective, might result in deference to tribal sovereignty and good working relationships with the federal agencies. . . .").

¹²⁵ *Id.* at 1076 ("Babbitt had been briefed on the issues and the nature of the tribal position by advisors, including Professor David Getches . . . who . . . was serving as Special Counsel to Babbitt.").

¹²⁶ The tribal leaders were Billy Frank, Jr., John Echohawk, Richard Trudell, Ted Strong, and Jaime Pinkham. *Id.* at 1075.

¹²⁷ *Id.* at 1076.

¹²⁸ *Id.* at 1077.

¹²⁹ *Id.* at 1078 ("[C]ritically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical, and legal background.").

without understanding the context from which it arises.¹³⁰

The final Secretarial Order that emerged from these consultations was, according to Professor Charles Wilkinson, “a sensible harmonizing of Indian law and the ESA”¹³¹ and can serve as a positive example of a government-to-government relationship in which both sides are respected as sovereigns. The Secretarial Order called for “extensive cooperation between tribes and federal administrators”¹³² and required the agencies to provide scientific, technical, and informative assistance for tribal development of conservation and management plans for ecosystems on which ESA-listed or listing-eligible species depend.¹³³ A federally assisted tribal management plan development enables tribal participation in resource management. This result was achievable because federal agency officials took the time to understand tribes’ positions and designed a consultation framework *with* tribal members. This consultation went well beyond what President Clinton’s E.O.s would later prescribe and shows that, if consultation is to achieve meaningful federal-tribal collaboration, it must go beyond the minimum legal requirements.

B. Bears Ears National Monument

Native Americans have called the Bears Ears region in southeastern Utah home for many thousands of years. The area is dominated by a pair of culturally significant buttes (resembling the ears of a bear), surrounded by largely undeveloped federal public lands.¹³⁴ Bears Ears is, according to

¹³⁰ *Id.* at 1079 (“The importance of this aspect of the process cannot be overstated. The detailed education about tribal issues allowed federal negotiators, most of whom had previously spent little time on Indian matters, to understand the true distinctiveness of Indian policy . . . [and] [w]ith that foundation, the federal negotiators were able to see the tribal positions with new eyes.”).

¹³¹ *Id.* at 1081.

¹³² *Id.* at 1082.

¹³³ Joint Secretarial Order, *supra* note 28, at Principle 3(A).

¹³⁴ Elouise Wilson, Mary R. Benally, Ahjani Yepa, & Cynthia Wilson, *Women of Bears Ears are Asking You to Help Save It*, N.Y. TIMES (April 25, 2021) (“We are among the Women of Bears Ears – Indigenous women who support our families and communities in the protections of ancestral lands. . . . From these Southwestern lands, twin buttes rise; they are known as Bears Ears.”); *see also* Bears Ears Inter-Tribal Coal. *Native American Connections*, <https://bearssearscoalition.org/ancestral-and-modern-day-land-users/> (last visited Apr. 26, 2021) (“Several southwestern tribes trace their ancestry to the ancient peoples who populated the [Bears Ears] region since time immemorial. . . .”); Bears Ears Educ. Ctr., *Bears Ears Buttes*, <https://bearssearsmonument.org/bears-ears-buttes/> (last visited Apr.

the Native American Rights Fund, “one of the densest and most significant cultural landscapes in the United States.”¹³⁵ However, looting, vandalism, and development for resource extraction have long threatened the integrity of the area.¹³⁶ Legal efforts to protect Bears Ears span the past decade.¹³⁷ In 2010, several tribes with deep ties to the area formed the Bears Ears Intertribal Coalition.¹³⁸ Despite repeated requests, these tribes were excluded from land management planning by members of the state’s congressional delegation and local governments.¹³⁹ In response, the coalition sent a proposal to President Obama in 2015, requesting that he proclaim Bears Ears a national monument and establish a framework for collaborative federal-tribal management of the monument.¹⁴⁰ President Obama

26, 2021) (“The namesake and heart of the landscape, these twin buttes stand over 8,700 feet in elevation. They are sacred places to many Indigenous Tribes and Pueblos who share spiritual connections to the area.”).

¹³⁵ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) (establishing the Bears Ears National Monument) [hereinafter Obama Proclamation]. (“For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops,” and today there remains “[a]bundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts. . . .”).

¹³⁶ Dean B. Suagee, *Tribes Call for Collaborative Management of Bears Ears National Monument*, THE HILL (June 10, 2016), <https://thehill.com/blogs/congress-blog/judicial/283078-tribes-call-for-collaborative-management-of-bears-ears-national> (“As the tribes see it, there is a need to protect this landscape from ongoing grave-robbing and looting which rob us of our heritage. There is also concern about the impacts of extractive resource development such as oil and gas drilling and uranium mining, and the roads that go along with such development.”).

¹³⁷ Bears Ears Proposal, *supra* note 27, at 14–15 (“Bears Ears [was] of grave concern to us but for many years we did not address it comprehensively. . . . In February 2010, former Senator Bob Bennett . . . helped lead an effort [with Tribal elders] . . . to develop a shared legislative proposal[,]” and at the same time, the Navajo Nation started the process of “requesting a presidential proclamation under the Antiquities Act.”).

¹³⁸ Wilkinson, *supra* note 10, at 323–25 (discussing the origin of the coalition, beginning with a group of Diné people who “came together to address the continuing sense of loss and pain over having been removed from Bears Ears,” and whose efforts led to the formation of an “intertribal organization of five tribes with especially strong ties to the Bears Ears Region” who would guide the proposal-writing efforts).

¹³⁹ *Id.* at 327 (“United States Senators and Representatives were hard at work on their own plan for how they thought the land should be handled . . . [which] tilted sharply toward industrial development and away from land protection and creation of a tribal-federal collaborative management.”). *See also* NARF, *Protecting Bears Ears*, *supra* note 87 (explaining that, after a series of fruitless meetings, tribal representatives were disinvited from the final meeting, after which the county commissioners adopted a final land management proposal “without input from the Tribes.”).

¹⁴⁰ Bears Ears Proposal, *supra* note 27, at 1 (“This is a Tribal proposal for a Presidential proclamation under the Antiquities Act of 1906 to protect . . . an area of 1.9 million acres of ancestral land . . . [, and] [w]e propose that the most appropriate and effective management regime is Collaborative Management by the Tribes and Federal agencies.”).

responded by establishing the monument and a tribal advisory commission in December 2016.¹⁴¹ Efforts to lobby the Biden Administration to reinstate the monument boundaries that President Trump severely diminished were ongoing as this paper went to press.¹⁴²

1. Background

In 2011, then-Navajo Nation President Ben Shelley met with then-Secretary of the Interior Ken Salazar to request national monument protection for Bears Ears.¹⁴³ In 2013, the Navajo Nation began to work with the newly formed nonprofit organization, Utah Diné Bikéyah (“UDB”), to represent tribal interests in the debate over management of Utah public lands, including Bears Ears.¹⁴⁴ UDB engaged the local community through town hall meetings, hosted numerous tribal gatherings focused on land protection strategies, and developed a sophisticated map of Bears Ears—highlighting the cultural significance of specific lands.¹⁴⁵

Meanwhile, the San Juan County commissioners and members of Utah’s congressional delegation worked on land management plans, although they failed to meaningfully engage the tribes, despite tribal efforts to participate.¹⁴⁶ The Navajo Nation and UDB submitted their proposal to the county. The commissioners engaged in a series of meetings with UDB in early 2015, but they achieved little progress. By August 2015, the county urged the state legislature to pass a bill that would open culturally

¹⁴¹ Obama Proclamation, *supra* note 135.

¹⁴² Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017) (modifying the Bears Ears National Monument) [hereinafter Trump Proclamation]. On the restoration efforts, see Nicole Chavez, *Navajo Nation calls on restoration of Bears Ears National Monument during Deb Haaland visit to Utah*, CNN (Apr. 8, 2021), <https://www.cnn.com/2021/04/08/us/bear-ears-deb-haaland-visit/index.html> (discussing the coalition’s current lobbying efforts to restore the monument boundaries and “have a voice in how their ancestral homelands are managed”).

¹⁴³ Bears Ears Proposal, *supra* note 27, at 15.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (“[UDB] has interviewed and surveyed thousands of people; held eight Town Hall meetings; obtained over 15,000 statements of support; held five annual gatherings of Tribes at Bears Ears to discuss land protection strategies; interviewed dozens of elders and medicine men; developed sophisticated GIS data and many maps displaying that data; and obtained 24 resolutions of support from many Navajo chapter houses and Tribes.”). See also NARF, *Protecting Bears Ears*, *supra* note 87; Bears Ears Inter-Tribal Coal., *Interactive Map*, <https://bearscoalition.org/interactive-map/> (last visited Apr. 18, 2021) (providing an interactive map including photos of “remarkable places” and the associated information, as well as the proposed 1.9 million-acre national monument).

¹⁴⁶ Bears Ears Proposal, *supra* note 27, at 15.

significant areas for resource extraction.¹⁴⁷ At the same time, Utah Congressmen Rob Bishop (R-Utah) and Jason Chaffetz (R-Utah) were pushing the Public Land Initiative (“PLI”) in Congress.¹⁴⁸ UDB and the Navajo Nation shared an early version of their proposal with federal officials involved in the PLI process and visited Washington D.C. to meet with congressmen who supported the PLI, but the tribes never received a single substantive response to their proposal.¹⁴⁹ In 2016, Congressman Bishop released the PLI, which would protect 1.39 million acres of Bears Ears without any tribal management.¹⁵⁰ Realizing there was little hope for a version of the PLI that would protect tribal interests, the tribes began working on a separate proposal to protect Bears Ears using a presidential proclamation under the Antiquities Act,¹⁵¹ maintaining the campaign that the Navajo Nation began in 2011.¹⁵² The Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni tribal governments united in July 2015 to form the Bears Ears Intertribal Coalition, which would draft the Bears Ears proclamation proposal.¹⁵³

¹⁴⁷ NARF, *Protecting Bears Ears*, *supra* note 87 (explaining that one month after a series of meetings with UDB, Navajo Nation, and Ute Mountain Ute Tribe, the San Juan County Commissioners “urged the Utah State Legislature to pass HB 3931,” which undermined the Bears Ears proposal by “designat[ing] large areas of Bears Ears as “Energy Zones” to use for fast-tracked [] grazing, energy, and mineral development.” Later meetings between the county and the tribes “did not produce any results.”).

¹⁴⁸ Bears Ears Proposal, *supra* note 27, at 15.

¹⁴⁹ *Id.* at 16.

¹⁵⁰ NARF, *Protecting Bears Ears*, *supra* note 87.

¹⁵¹ Antiquities Act, 54 U.S.C. § 320301 (2018).

¹⁵² Anna Brady, *Through Bears Ears, Tribes Lead the Way for True Collaboration over Utah’s Public Lands*, UNIV. OF UTAH S.J. QUINNEY COLL. OF L. (Nov. 9, 2015), <https://law.utah.edu/through-bears-ears-tribes-lead-the-way-for-true-collaboration-over-utahs-public-lands/> (“The Bears Ears Nat’l Monument proposal and indeed the Bears Ears Inter-Tribal Coalition itself, developed as a grassroots response to the Utah Public Lands Initiative—a multi-year, statewide stakeholder engagement process sponsored by Utah Representatives Rob Bishop and Jason Chaffetz with the elusive goal of reaching consensus regarding designation and management of public lands in Utah.”).

¹⁵³ Suagee, *supra* note 136 (“Five federally recognized Indian tribes[,]” the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni, “have formed a coalition to seek presidential designation of a National Monument to protect the home of their ancestors.”). *See also* Wilkinson, *supra* note 10, at 325 (discussing the formation of the inter-tribal organization in which the board was composed of one member from each tribe, with a goal to write the proclamation proposal to present to Obama).

2. *The “Collaborative Management” Proposal of the Bears Ears Intertribal Coalition*

In October 2015, the coalition submitted a comprehensive land management proposal to President Obama, requesting that he proclaim 1.9 million acres of land surrounding Bears Ears as a national monument under the Antiquities Act.¹⁵⁴ The proposal called for collaborative management of the lands within the proclamation boundaries.¹⁵⁵ The tribes’ proposed version of collaborative management would combine native traditional knowledge and culture with existing federal public land practices¹⁵⁶ and include more than just consultation with federal agencies—it would require long-term, active engagement by the tribes in managing the conservation of Bears Ears.¹⁵⁷

Under the collaborative management proposal, an administrative commission with eight members would oversee management of the monument.¹⁵⁸ The commission would have one person from each tribe in the coalition and one person from each of the three federal agencies with public lands in the proposed monument boundaries: the BLM, the U.S. Forest Service, and the National Park Service.¹⁵⁹ Through joint decision making, the commission would oversee the development of the governing management plan and formulate policy.¹⁶⁰

The Bears Ears coalition envisioned a framework that would fuse Western land management with tribal knowledge.¹⁶¹ Its proposal would integrate traditional knowledge with existing federal land management practices as a centerpiece of collaborative management, and a proposed institute would ensure the incorporation of traditional knowledge into

¹⁵⁴ Utah Diné Bikéyah, *What is the Bears Ears Proposal*, <https://utahdinebikayah.org/overview/> (last visited Apr. 13, 2021).

¹⁵⁵ Wilkinson, *supra* note 10, at 331.

¹⁵⁶ *Id.* at 319.

¹⁵⁷ *See, e.g.*, Bears Ears Proposal, *supra* note 27, at 22 (“The Agencies and the Tribes shall, from the beginning to the conclusion of *all plans and projects*, collaborate jointly on all procedures, decisions, and other activities. . . .”) (emphasis added).

¹⁵⁸ *Id.* at 29.

¹⁵⁹ Brady, *supra* note 152.

¹⁶⁰ Bears Ears Proposal, *supra* note 27, at 29–30 (“Th[e] Commission would be the policy making and planning body for the monument and would have supervisory authority over the Monument Manager.”).

¹⁶¹ *Id.* at 31.

Western science.¹⁶² A monument manager would report to the commission and oversee operational staff experienced in both traditional Native American values and knowledge as well as Western science and public land management.¹⁶³

Collaborative management, as proposed, would replace the consultation required of federal agencies in similar contexts, such as under Clinton's E.O.s. While E.O.-based consultation often "becomes merely a box to be checked that allow[s] federal agencies to proceed on the projects which they prefer," the coalition's proposed framework would ensure long-term co-decision making through establishing the commission and monument manager.¹⁶⁴ In short, the intertribal coalition sought a deep fusion of Western and tribal practices to ensure management of the monument.

3. *Obama's Bears Ears Proclamation*

In December 2016, during the last weeks of his second term, President Obama proclaimed Bears Ears a National Monument.¹⁶⁵ The monument's boundaries fell short of what the tribes had proposed, preserving only 1.35 million acres.¹⁶⁶ However, Obama did create the Bears Ears Commission "to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historic knowledge."¹⁶⁷ The commission would have an elected representative from each of the five tribes, but no federal officials.¹⁶⁸ It would continuously partner with the federal agencies for general decision making, and the agencies would "carefully and fully consider integrating" the commission's knowledge and expertise.¹⁶⁹ The resulting management plan would codify a

¹⁶² *Id.* at 31–33 (discussing, for example, combining tribal oral history with archaeological findings and creating map art, fusing "culture, art, the natural world, and geography."). See also *infra* text accompanying notes 269–76 (discussing how to achieve meaningful consultation through educating agencies on Indigenous and local knowledge).

¹⁶³ Bears Ears Proposal, *supra* note 27, at 29.

¹⁶⁴ Wilkinson, *supra* note 10, at 326.

¹⁶⁵ Obama Proclamation, *supra* note 135.

¹⁶⁶ *Id.* at 1143.

¹⁶⁷ *Id.* at 1144.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

framework for ongoing meaningful engagement between the commission and the federal agencies.¹⁷⁰

The Obama proclamation set a high bar for what is possible for a government-to-government relationship, reflecting respect for tribal culture and Bears Ears' importance to the tribes.¹⁷¹ Like the Secretarial Order, the proclamation demonstrated that substantive results could ensue from the federal government developing a deep understanding of tribal culture and values. This cooperative process could create a meaningful role for tribal governments to contribute to the management of public lands, especially of resources that are culturally significant to the tribes.

Although the proclamation did not adopt every aspect of the coalition's proposal, the collaboration it outlined went well beyond what President Clinton's Executive Orders required. E.O. 13175 called for "regular and meaningful consultation," but gave federal agencies considerable discretion in fashioning that process.¹⁷² The Bear Ears management proposal would enable tribes to instruct federal agencies in how to engage them meaningfully. E.O. 13175 required only tribal summary impact statements detailing tribal concerns and describing the extent to which an agency addressed them.¹⁷³ The Obama proclamation, on the other hand, required agencies to provide a "written explanation of their reasoning" if they "decide[d] not to incorporate specific recommendations" submitted by the commission.¹⁷⁴ Thus, agencies could no longer merely list tribal concerns without actually addressing them before moving forward with a project.

Using tribal involvement to design a consultation framework is redolent of what the Nixon announcement called for in 1970 when it

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1140 ("The area's cultural importance to Native American tribes continues to this day. As they have for generations, these tribes and their members come here for ceremonies and to visit sacred sites. . . . Traditions of hunting, fishing, gathering, and wood cutting are still practiced by tribal members. . . . The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation . . . is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come."). *See also* Wilkinson, *supra* note 10, at 329 ("The Proclamation, which spans about ten pages single-spaced and is well worth reading from beginning to end, glows with respect for tribal culture, tribal experience, tribal expertise, and tribal knowledge. . . .").

¹⁷² Exec. Order 13,175, *supra* note 44 (requiring agencies to establish an "accountable process" that would provide tribal officials an opportunity to contribute "meaningful and timely" input).

¹⁷³ *Id.* § 5(b)(2)(B).

¹⁷⁴ Obama Proclamation, *supra* note 135, at 1144.

recognized that federal programs and funding would be more effective “if the people who are most affected by these programs are responsible for operating them.”¹⁷⁵ By applying tribal knowledge of the culturally significant tribal lands and natural resources within Bears Ears, the federal government could further its responsibility to tribes and achieve a balanced relationship between the two governments.¹⁷⁶ The Bears Ears management scheme envisioned a genuine government-to-government relationship between sovereigns.

4. *Trump, Biden, and the Future of Bears Ears*

Within a year of Obama’s proclamation, the Trump administration used the Antiquities Act to reduce Bears Ears’ boundaries by more than eighty-five percent, splitting the remaining fifteen percent into two segments.¹⁷⁷ In early 2020, the Trump administration’s Department of the Interior promulgated a management plan that would allow drilling, mining, and grazing on lands that the Administration had removed from protection.¹⁷⁸ Several groups representing the interests of the five tribes in the coalition filed lawsuits challenging this action.¹⁷⁹ But President Biden’s January 21, 2021 E.O. 13990,¹⁸⁰ which directed the Secretary of the

¹⁷⁵ Nixon Announcement, *supra* note 35. Using tribal involvement to instruct federal agencies in the most effective ways to engage them in decision making is also reminiscent of Nixon’s 1970 announcement. *Id.*

¹⁷⁶ *Id.* at 2.

¹⁷⁷ Trump Proclamation, *supra* note 142. See Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining ‘the Public’ in Public Land Law*, 48 ENV’T. L. 311, 322–29 (2018) (discussing the Bears Ears proclamation and the Trump diminishment); see also *Hopi Tribe v. Trump*, No. 1:17-cv-02590-TSC U.S. Dist. LEXIS 106244, at *14 (D.D.C. Mar. 20, 2019) (“Shortly [after Trump decreased the Bears Ears National Monument] . . . , Plaintiffs sued, alleging that President Trump’s Proclamation was not authorized by the [Antiquities] Act, and violates the United States Constitution.”). See also NARF, *Protecting Bears Ears*, *supra* note 87 (“President Trump’s action . . . to revoke and replace the Bears Ears National Monument attacks the five sovereign nations with deep ties to the Bears Ears region and violates the separation of powers enshrined in our Constitution” and it is “not legal to do so. Only Congress may alter a monument.”).

¹⁷⁸ See Michael Doyle & Jennifer Yachnin, *Biden’s legal team has done its Bears Ears homework*, E&E NEWS (Feb. 5, 2021), <https://www.eenews.net/stories/1063724513>.

¹⁷⁹ *Hopi Tribe*, 2019 U.S. Dist. LEXIS 106244 at *11 (Three cases were filed against the Trump diminishment, including *Hopi Tribe v. Trump*, No. 17-cv-2590 (TSC), *Utah Diné Bikéyah v. Trump*, No. 17-cv-2605 (TSC), and *Natural Resources Defense Council v. Trump*, No. 17-cv-2606 (TSC), which were consolidated before the federal district court in D.C.).

¹⁸⁰ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (Biden Exec. Order

Interior to conduct a sixty-day review of the Trump administration's proclamation, stayed the litigation. The Biden review required consultation with the Attorney General, several other agency secretaries, and tribal governments to determine whether the Biden administration could restore the boundaries established by the Obama administration.¹⁸¹

In April 2021, the coalition reported that it had engaged in consultations with the Departments of the Interior and Agriculture,¹⁸² including a face-to-face meeting with Secretary of the Interior Deborah Haaland, the first Native American cabinet secretary.¹⁸³ Results of the consultations presumably will flow from the reestablishment of the Bears Ears Commission and the co-management framework, either as proposed by the coalition or as proclaimed by President Obama.

The coalition urged Secretary Haaland to recommend that Biden reestablish the monument at the originally proposed 1.9 million acres and, in the interest of expediency, advocated for executive branch action (rather than legislative).¹⁸⁴ Executive action restoring or enlarging the monument as proclaimed by Obama, however, may invite litigation from the monument's opponents, who maintain that the Obama-era monument was too large, and who may be encouraged by a recent statement from Chief Justice John Roberts questioning the scope of presidential authority under the Antiquities Act.¹⁸⁵ Nonetheless, Secretary Haaland has signaled that the

13,990, Protecting Public Health and Environment and Restoring Science to Tackle the Climate Crisis), § 3(a) [hereinafter Exec. Order 13,990].

¹⁸¹ *Id.* (directing the Secretary of the Interior to "conduct a review of the monument boundaries and conditions that were established by [Trump's proclamation]," in consultation with the Attorney General, the Secretaries of Agriculture and Commerce, the Chair of the Council on Environmental Quality, and Tribal governments).

¹⁸² Bears Ears Inter-Tribal Coal., *Our Request Stands: Prompt Action is Needed to Restore Protections for Bears Ears*, (Mar. 17, 2021), <https://bearscoalition.org/protections-need-to-be-quickly-restored-to-protect-bears-ears/>.

¹⁸³ See Jennifer Yachnin, *Haaland's Utah Trip beset by Bears Ears lobbying*, E&E NEWS (Apr. 8, 2021); see also *Secretary Deb Haaland*, U.S. DEP'T. OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited Apr. 13, 2021).

¹⁸⁴ See Yachnin, *supra* note 183. See also Jennifer Yachnin, *Tribal leaders: Bears Ears Can't Wait for Legislative Fix*, E&E NEWS (Apr. 21, 2021) [hereinafter Yachnin, *Legislative Fix*].

¹⁸⁵ Utah's governor "warned . . . that his state could file its own legal challenge if Biden opts to restore the monument ahead of congressional action." Yachnin, *Legislative Fix*, *supra* note 184. Governor Cox argued that "the Antiquities Act provides a limit on the size" of protected sites, and Chief Justice Roberts "recently appeared to invite new challenges to the law," in a statement "question[ing] whether presidents ignored language in the Antiquities Act" that monuments should be as small as possible to protect the relevant

Executive Branch will move forward with Biden’s directive to determine whether it can restore the boundaries.¹⁸⁶

A. *The Chaco Canyon Oil and Gas Leases*

Chaco Canyon, much of which is part of Chaco Culture National Historical Park, and the surrounding land in the San Juan Basin in northwestern New Mexico, supported a sprawling mecca of Native American life for hundreds of years. The sites remain important to the Navajo Nation and more than twenty Pueblo tribes.¹⁸⁷ Culturally significant tribal sites in the basin are at risk from private companies seeking to drill for oil and gas. Tribes in the area allege that federal land managers with authority over oil and gas drilling have consistently failed to adequately consult them concerning management of Chaco Culture National Historical Park and the surrounding area.¹⁸⁸

objects. *Id.* See also Jennifer Yachnin, *Chief Justice Roberts invites Antiquities Act challenges*, E&E NEWS (Mar. 24, 2021) (“Chief Justice John Roberts this week openly urged opponents of sprawling national monuments to continue their legal fight, suggesting the Supreme Court may be eager to take a fresh look at precedent.”).

¹⁸⁶ See Exec. Order 13,990, *supra* note 180.

¹⁸⁷ See Jonathon Thompson, *Drilling Chaco: What’s Actually at Stake*, HIGH COUNTRY NEWS (Apr. 13, 2015) <https://www.hcn.org/articles/drilling-chaco-whats-really-at-stake> (describing Chaco Canyon as “the center of a larger society that extended hundreds of miles beyond the canyon’s walls” to many historical sites “concentrated in the central San Juan Basin”). See also Arlyssa Becenti, *Feds proceed with Chaco drilling plan while tribes distracted by pandemic*, NAVAJO TIMES (June 4, 2020) <https://navajotimes.com/coronavirus-updates/feds-proceed-with-chaco-drilling-plan-while-tribes-distracted-by-pandemic/> (“The Navajo Nation is not the only tribe that has historical ties to Chaco Canyon . . . Pueblo tribes consider Chaco Canyon as their ancestral home. . . .”).

¹⁸⁸ Thompson, *supra* note 187 (listing formally protected sites as Aztec and Salmon Ruins, and Chimney Rock, and describing the rest as a “prime target for oil and gas drillers”). Several structures, including Chaco Canyon and Pueblo Bonito, are protected from oil and gas drilling as part of the Chaco Culture National Historic Park; the surrounding areas are not. Oil and gas drilling adjacent to protected areas has negative effects regardless—drilling creates light and noise pollution. See *id.* (“Chaco Canyon, Pueblo Bonito and its sibling structures are all part of the Chaco Culture National Historic Park, and thus protected from oil and gas and other development (though drilling-related light and noise pollution are a legitimate and significant concern).”). See also Joey Keefe, *Groups Blast Trump Administration Plans for More Drilling at Chaco Canyon*, N.M. WILD (Sept. 26, 2020), <https://www.nmwild.org/2020/09/26/groups-blast-trump-administration-plans-for-more-drilling-at-chaco-canyon/> (quoting executive director of New Mexico Wild, who described the BLM’s “consultation” process during the pandemic as “shameful” and “compounding a tragic history of disrespect and broken trust”).

1. Chaco Canyon's Resource Management Plan

A resource management plan (“RMP”) published by the BLM in 2003 authorized nearly 10,000 oil and gas wells in the San Juan Basin, of which about 4,000 have already been drilled.¹⁸⁹ The RMP, encompassing 4.2 million acres of land, including over 675,000 acres of Navajo Nation trust surface land and 210,000 acres of allotments held by individuals of the Navajo Nation,¹⁹⁰ governs land and resource management in the basin, including decision-making processes for oil and gas development.¹⁹¹ The BLM began the process of amending the 2003 RMP in 2014, and in 2016 the BLM and the Bureau of Indian Affairs¹⁹² announced a joint effort to analyze land management in the area for both public and tribal lands.¹⁹³

2. Consultation on the Management Plan Amendment

The BLM began the process of section 106 consultation under the NHPA because Chaco Canyon is a qualifying property under the National Register of Historic Places.¹⁹⁴ But when BLM began to amend the RMP

¹⁸⁹ See Thompson, *supra* note 187.

¹⁹⁰ See Becenti, *supra* note 187.

¹⁹¹ See *id.* (“The Draft RMPA/EIS provides a unified document that resource managers can use for land use management purposes. This planning effort will update management decisions such as oil and gas development, lands and realty, lands with wilderness characteristics, and vegetation.”).

¹⁹² U.S. Dept. of Interior, *Interior Department Announces Broader Plan to Review Management of Lands in Northwestern New Mexico* (Oct. 20, 2016), <https://www.doi.gov/pressreleases/interior-department-announces-broader-plan-review-management-lands-northwestern-new> [hereinafter DOI Press Release 2016] (explaining the Bureau of Indian Affairs’ (“BIA”) involvement, focused on “issues and concerns related to including BIA-managed mineral leasing and associated activities in the Environmental Impact Statement . . . which is being prepared as part of the [RMPA]”).

¹⁹³ *Id.* (“For the first time, the [BLM] and the [BIA] . . . will jointly conduct an expanded analysis of management in the area that covers both public and tribal lands. . . . BIA’s decision to join the BLM’s planning effort as a co-lead reflects the complex land tenure around the park. . . . The joint effort . . . reflects the Department of Interior’s emphasis on working with Native American leaders to provide expanded opportunities for integrating traditional knowledge and expertise in the management of public lands that have a special historical, cultural, or geographic connection with indigenous communities.”).

¹⁹⁴ See *Diné Citizens Against Ruining Our Env’t v. Jewell*, 312 F. Supp. 3d 1031, 1051 (D.N.M. 2018) (explaining that “[a] historic property includes those in the ‘National Register of Historic Places maintained by the Secretary of Interior.’ Chaco Park fits that definition.”) (internal citation omitted).

in 2014, the agency failed to consider tribal lands,¹⁹⁵ even though the RMP governs almost 1 million acres of trust lands and tribal member-owned allotments.¹⁹⁶ In 2016, the BLM announced that, together with the Bureau of Indian Affairs, it would expand the RMP effort that was underway to address concerns related to resource development adjacent to Chaco Park.¹⁹⁷ The BLM began the 2016 RMP amendment consultation process by seeking public comments.¹⁹⁸ Between October 2016 and February 2017, the consultation consisted of meetings with interested stakeholders and public scoping meetings.¹⁹⁹

Meanwhile, the BLM continued to auction lease sales under the 2003 RMP, which was developed without adequate tribal consultation.²⁰⁰ Specifically, the BLM proposed to sell oil and gas leases for 4,500 acres of land for in March 2018.²⁰¹ The Greater Chaco Coalition—an ad hoc group formed by tribal, environmental, and local community groups—protested the lease auctions sale, claiming that tribal consultation was inadequate.²⁰² These protests caused the agency to cancel the sale, and the BLM acknowledged a failure to adequately survey the area for cultural resources.²⁰³

¹⁹⁵ DOI Press Release 2016, *supra* note 192 (announcing in 2016 an “effort to include tribal lands in the area” in the RMP development process, even though “BLM initiated a process to update its [RMP] . . . in 2014”).

¹⁹⁶ *See* Becenti, *supra* note 187.

¹⁹⁷ DOI Press Release 2016, *supra* note 192.

¹⁹⁸ *Id.*

¹⁹⁹ *See* Rebecca Sobel, *Greater Chaco Coalition Responds to BLM’s Broken Promises*, WILDEARTH GUARDIANS (Mar. 2, 2020), <https://wildearthguardians.org/press-releases/greater-chaco-coalition-responds-to-blms-broken-promises/>.

²⁰⁰ *See* *Greater Chaco Spared from Fracking Auction: Community Responds to Cancellation of Chaco Canyon Oil and Gas Lease Sale*, FRACK OFF CHACO (Mar. 2, 2018) <https://www.frackoffchaco.org/blog/chacospared> [hereinafter *Greater Chaco Spared*]. (“The [BLM] had planned to move forward with the leases based on an outdated [RMP] that was written before new fracking methods were feasible in the region, and without meaningful Tribal consultation or consent from Navajo Nation and Pueblos who consider Chaco sacred.”).

²⁰¹ *Id.*

²⁰² *See id.* (“Thousands of people have rallied in opposition to the lease sale, and 459 administrative protests were filed in opposition of the March auction, by far the most protests the state has ever received for an oil and gas lease sale. . . . The Navajo Nation and All Pueblo Council of Governors, National Congress of American Indians, 15 Navajo Chapter Houses, the New Mexico Legislature, and over 400,000 public citizens have requested a moratorium on drilling until health, cultural and environmental impacts can be analyzed.”).

²⁰³ *See* Sobel, *supra* note 199. *See also* *Greater Chaco Spared*, *supra* note 200 (explaining that the department canceled the leases in part because the sales were approved

Even after announcing an expanded analysis in 2016 that was to include tribal lands, and in which the Department of the Interior touted its “commitment to ensuring that the region’s rich cultural and archaeological resources are protected,”²⁰⁴ the BLM consistently failed to directly engage tribes.²⁰⁵ After committing, in 2016, to working with Native American leaders and integrating traditional knowledge in the management of culturally significant tribal lands, and after admitting its failure in 2018 to consult with tribes when canceling the lease sale, the BLM released the draft RMP amendment in February 2019.²⁰⁶ The amendment’s “preferred alternative” approved over 3,050 new wells in the planning area—just thirty-three wells short of that proposed under the plan’s maximum development alternative.²⁰⁷

Tribes alleged that the BLM’s consultation for the RMP amendment draft again failed to directly engage with them. Public review began in February 2020, just days before New Mexico’s COVID-19 “stay-at-home” orders went into effect.²⁰⁸ Those orders meant that public meetings held in May 2020 would be virtual.²⁰⁹ The Navajo Nation and the Pueblos repeatedly requested that the BLM prolong the public process for the RMP amendment until there could be in-person, face-to-face consultation instead of virtual meetings.²¹⁰ In response, the BLM added “four additional ‘virtual’ open houses” in August 2020, during which no public comments

“without meaningful Tribal consultation or consent from Navajo Nation and Pueblos,” and that “[the bureau] announced the lease sale would be canceled until the agency can further consult with Tribes and local leaders”).

²⁰⁴ DOI Press Release 2016, *supra* note 192.

²⁰⁵ *See* Sobel, *supra* note 199.

²⁰⁶ *See id.*

²⁰⁷ *See id.* (noting that the BLM’s plan remained “squarely focused on facilitating more industrialized fracking and resource degradation”).

²⁰⁸ *See Greater Chaco Coalition Demands BLM Respect Tribes and Communities, Echoes Request to Postpone Drilling Plan*, FRACK OFF CHACO (Sept. 17, 2020), <https://www.frackoffchaco.org/blog/press-release-9-17-2020> [hereinafter Coalition Demands BLM Respect].

²⁰⁹ *See* Becenti, *supra* note 187 (noting that the regional bureau office “held five virtual public meetings May 14 to 18” that “weren’t ideal for tribal members who would be directly impacted by the proposed plan, either because many are without internet/broadband connection” or “were busy with community obligations” regarding COVID-19).

²¹⁰ *Letter from Daniel Tso, Chairman of the Navajo Nation Health, Educ. and Hum. Servs. Comm. to Tim Spisak, Dir. Of Bureau of Land Mgmt. N.M. State Off.* (Aug. 13, 2020), https://drive.google.com/file/d/1u_Zdp7ssxaDbfF0fcS6TmBw-AQoTIIkx/view.

became part of the official record.²¹¹

The Navajo tribe filed suit alleging that the BLM had failed to consult with tribes about the effects of issuing oil and gas leases near Chaco Culture National Historical Park and that the agency failed to analyze the indirect effects the wells would have on the park.²¹² The district court ruled that the BLM did not violate the NHPA, finding its analysis adequate for historic sites potentially affected by oil and gas drilling, since the park itself was not slated for leasing.²¹³ Employing what might be classified as “soft glance” review,²¹⁴ the court explained that it was “not tasked with determining if [the BLM] correctly decided whether an oil well . . . altered a historic site” under the NHPA, but merely whether the BLM “followed the proper procedures.”²¹⁵ Documentation supporting the “agency’s findings need not be a topic treatise or even an essay,” the court reasoned, but must provide only “some explanation.”²¹⁶ Consequently, the court held that the BLM did not violate the NHPA, a determination that the Tenth Circuit upheld in 2019.²¹⁷

Most tribes view the district court’s deference to the BLM’s consultation as an example of judicial box checking, illustrating a court’s willingness to rubber-stamp the BLM’s section 106 procedures. Tribes maintain that in both Chaco consultation processes, the BLM failed to engage in meaningful consultation with the Navajo Nation and the Pueblos. By

²¹¹ *Id.* (Daniel E. Tso, the Chairman of the Health, Education and Human Services Committee of the Navajo Nation, sent a letter on August 13, 2020, to the Bureau’s state office regarding a request to “immediately, and indefinitely, suspend” the RMPA process. He explained that “the Navajo Nation is still in the midst of an extreme human health emergency,” and the tribe could not be expected to engage in “meaningful consultation” because it could not be in person, and tribal members lacked internet access. He also requested translating into the Navajo language.) *See also* Coalition Demands BLM Respect, *supra* note 208 (“Adding insult to injury, [the agencies] hosted four additional ‘virtual open houses’ August 26–29[.]” during which “the agencies refused to make comments part of the official record, and chose not to broadcast or post these proceedings publicly despite receiving formal comments of protest from Navajo Nation and Pueblo community members and Tribal leadership.”).

²¹² *Diné Citizens Against Ruining Our Env’t*, 312 F. Supp. 3d at 1081.

²¹³ *Id.* at 1099.

²¹⁴ *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1407 (2010) (explaining that a court using the “soft glance” standard for review gives agency decisions “considerable deference”).

²¹⁵ *Diné Citizens Against Ruining Our Env’t*, 312 F. Supp. at 1100.

²¹⁶ *Id.* at 1101.

²¹⁷ *Id.* at 1109, *aff’d*, *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 850 (10th Cir. 2019).

failing to provide even cursory consultation, the BLM did not engage the tribes early in the decision-making process, as directed by the Clinton administration's E.O. 13175.²¹⁸ When the BLM canceled the lease sale in 2018, it conceded that it had erroneously approved the sale despite tribal concerns about the proximity of the sales to Chaco Canyon and uncertainty concerning their effect on tribal cultural resources.²¹⁹ As of 2020, the BLM had conducted no new cultural resource studies.²²⁰

Tribes maintain that the BLM failed to provide meaningful consultation by refusing face-to-face interactions. The tribes lacked the funding and human resources to adequately participate in the RMP amendment because they were fighting the disproportionate effects of COVID-19 in their communities.²²¹ An agency cannot “ensure meaningful and timely input by tribal officials”, as required by the Clinton 2000 executive order.²²² if the tribes lack the capacity to review the documents. While tribes responded to a health emergency, the BLM moved to quickly approve the amendment, authorizing nearly 3,000 new gas and oil wells.²²³

Tribes view the federal government's process during the oil and gas leases in Chaco Canyon not only as a failure to consult but as a display of disrespect, prioritizing the approval of oil wells over the health and

²¹⁸ See Exec. Order 13,175, *supra* note 44 and accompanying text.

²¹⁹ See John R. Moses, *Zinke places Chaco Canyon Drilling leases on hold, pending cultural review*, FARMINGTON DAILY TIMES (Mar. 2, 2018), <https://www.daily-times.com/story/news/local/navajo-nation/2018/03/02/chaco-drilling-leases-hold-pending-zinke-cultural-review/389984002/> (quoting then-Secretary of the Interior, Ryan Zinke).

²²⁰ See Katie Pellicore, *Take Action to Defend Chaco from Oil and Gas Development*, SAN JUAN CITIZENS ALL. (Aug. 26, 2020), <https://www.sanjuancitizens.org/oil-and-gas/take-action-to-defend-chaco-from-oil-and-gas-development> (“Consultation with consulting parties and cooperating agencies (including tribes) remains incomplete under the [NHPA] and National Environmental Policy Act. Ethnographic studies and cultural resources analyses have not been conducted and documentation of consultation requirements stops in 2017 in the RMPA EIS in Chapter 4 in the Consultation and Coordination section.”).

²²¹ Becenti, *supra* note 187 (explaining that several tribes, like the Navajo, with “historical and cultural ties to Chaco Canyon” were struggling to deal with the pandemic, which disproportionately affected the tribes).

²²² Exec. Order 13,175, *supra* note 44, § 5(a).

²²³ Becenti, *supra* note 187 (“BLM and other agencies decided to move forward with the public comment period and virtual meetings” although Vallo said the tribes “had requested to pause any public comment period because the tribe hadn’t reviewed thoroughly the draft RMPA” and didn’t have a chance to “regroup with other tribes and agencies to discuss” a covid-era process.).

interests of tribal members at disproportionate risk during a global pandemic.²²⁴ In March 2021, the Biden administration placed an indefinite moratorium on new oil and gas lease auctions,²²⁵ meaning that the 3,000 oil wells proposed under the latest RMP alternative²²⁶ cannot be sold—at least for now.

B. Copper Mining at Oak Flat

Chí'Chil Bildagoteel, or Oak Flat, Arizona, has been a culturally significant and sacred site to Western Apache tribes for thousands of years.²²⁷ But Congress approved a land exchange in a 2014 appropriation rider that would enable the Australian-owned company, Resolution Copper Mining, to establish a copper mine on a 2,422-acre parcel that included Oak Flat.²²⁸ In return, the company agreed to convey to the United States 5,344 acres

²²⁴ See, e.g., Liz Mineo, *For Native Americans COVID-19 'Is the Worst of Both Worlds at the Same Time'*, HARVARD GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> (“As of April 30[, 2020], the Navajo Nation had the third-highest per capita rate of COVID-19 in the country, after New Jersey and New York. Worsening the situation, Native Americans appear to have a higher risk of serious complications. . . .”).

²²⁵ Donald McGahn II, Jeffery Schlegel, David Stringer, & Charles Wehland, *Biden Administration Announces Moratorium on New Federal Oil and Gas Leases*, JONES DAY (Mar. 24, 2021), <https://www.mondaq.com/unitedstates/oil-gas-electricity/1050810/biden-administration-announces-moratorium-on-new-federal-oil-and-gas-leases> (“The moratorium represents a step further than Secretarial Order No. 3395 issued by the acting [Interior] secretary . . . on January 20, 2021, which implemented a 60-day suspension of new oil and gas leasing and drilling permits for federal land and water. The moratorium will extend the duration of the temporary suspension . . . by an unknown amount of time.”).

²²⁶ In January 2021, the BLM listed the Chaco RMP amendment as “in progress,” after the extended public comment period ended on September 25, 2020. Bureau of Land Mgmt., *Farmington Mancos-Gallup RMP Amendment*, BLM NAT'L NEPA REGISTER, <https://eplanning.blm.gov/eplanning-ui/project/68107/510> (last visited Apr. 27, 2021).

²²⁷ *Congress Can Protect Sacred Oak Flat in Arizona from Mining Project*, SAN CARLOS APACHE TRIBE (Apr. 13, 2021) [hereinafter San Carlos Apache Tribe April Press Release] <http://www.chairmanterryrambler.org/congress-can-protect-oak-flat/>.

²²⁸ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 § 3003(c)(1), 128 Stat. 3733 (2014) [hereinafter FY2015 NDAA] (“Subject to the provisions of this section, if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, the Secretary is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land.”); *id.* § (b)(2) (defining the federal land at issue as “the approximately 2,422 acres of land located in Pinal County, Arizona”). The rider was sponsored by the late Senator John McCain (R-AZ).

of “equal value” land.²²⁹ The rider required that the land exchange not take place until the Forest Service issued a final Environmental Impact Statement (“EIS”) on the mine plan under the National Environmental Policy Act.²³⁰ The mining of Oak Flat would create a 1.8-mile-wide crater at least 800 feet deep.²³¹

1. Oak Flat Consultation

The land exchange rider directed the Secretary of Agriculture to “engage in government-to-government consultation” with the affected Indian tribes regarding “issues of concern.”²³² It appeared that section 106 consultation would be necessary as well because Oak Flat was listed on the National Register in 2016 as a “historic property of religious and cultural significance to multiple Apache tribes.”²³³ Nonetheless, the appropriation rider directed the Secretary of Agriculture to exchange the land and facilitate the project.²³⁴ After the Secretary delegated the exchange and project to the Forest Service because Oak Flat was located on national forest land,²³⁵ the Service assumed responsibility for both the transfer of land and

²²⁹ Letter from Rick Gonzalez, Vice Chairman of the Advisory Council on Historic Preservation, to Tom Vilsack, Secretary of Agriculture (Mar. 29, 2021), VilsackResolutionCopperLTR20210329.pdf (achp.gov) [hereinafter ACHP Comment]. See also San Carlos Apache Tribe April Press Release, *supra* note 227 (describing the land exchange as a “travesty that occurred in 2014 when a last-minute, nongermane provision was inserted, without debate, into the annual [NDAA]”).

²³⁰ FY2015 NDAA, *supra* note 228, § 3003(c)(10) (“Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.”).

²³¹ ACHP Comment, *supra* note 229, at 1–2 (explaining that removing the copper ore from underneath Oak Flat “would result in a crater between 800 and 1,115 feet deep and roughly 1.8 miles across” and that removing Oak Flat from federal ownership would “eliminat[e] the mining restrictions . . . in place.”).

²³² FY2015 NDAA, *supra* note 228, § 3003(c)(3)(A).

²³³ *National Register Database and Research*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/database-research.htm#table> (showing Chí’Chil Bildagoteel Historic District, listed March 4, 2016) (last visited Apr. 18, 2021). See also ACHP Comment, *supra* note 229, at 2 (“Early on in the consultation process, the [Tonto National Forest] determined that the undertaking would result in adverse effects to numerous identified historic properties, including the National Register of Historic Places-listed Chí’chil Bildagoteel Historic District, known also as Oak Flat.”).

²³⁴ FY2015 NDAA, *supra* note 228, § 3003(b)(8) (defining “Secretary” as the “Secretary of Agriculture”); *id.* § 3003(c)(1) (authorizing Secretary to exchange the land).

²³⁵ ACHP Comment, *supra* note 229, at 1.

section 106 consultation.²³⁶

Section 106 consultation was unique for the Oak Flat exchange because the legislated nature of the land exchange constricted the consultation process.²³⁷ Since Congress required the Forest Service to exchange the 2,422-acre parcel with Resolution Copper Mining, the agency's reasonable alternatives to minimizing the project's adverse effects on historic properties were quite limited.²³⁸ The Forest Service could not, for example, choose a no-action alternative (normally required by the National Environmental Policy Act), nor could it alter the number of acres or location of land to exchange.²³⁹ Still, the rider required that the Secretary of Agriculture seek "mutually acceptable measures" in order to address the concerns of affected Indian tribes and to minimize the undertaking's adverse effects on the tribes.²⁴⁰

The Forest Service initiated consultation with tribes in 2015, a year after the legislation passed; however, consultations were not consistently characterized as section 106 consultations until 2017, when the agency began consulting with Arizona's State Historic Preservation Officer.²⁴¹ The

²³⁶ *ACHP Issues Comments to USDA on Resolution Copper Project and Southeast Arizona Land Exchange*, ADVISORY COUNCIL ON HISTORIC PRES. (Mar. 29, 2021), <https://www.achp.gov/news/achp-issues-comments-usda-resolution-copper-project-and-southeast-arizona-land-exchange>. See also 3 TONTO NAT'L FOREST, USDA FOREST SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: RESOLUTION COPPER PROJECT AND LAND EXCHANGE 820 (2021) <https://www.resolutionmineeis.us/documents/final-eis> [hereinafter OAK FLAT FEIS] ("The Secretary of Agriculture authorized the Forest Supervisor, Tonto National Forest, to consult with Resolution Copper to seek mutually acceptable measures to address the concerns of the affected tribes and minimize the adverse effects from mining related activities on the conveyed lands.").

²³⁷ ACHP Comment, *supra* note 229, at 3.

²³⁸ *Id.* See also FY2015 NDAA, *supra* note 228, § 3003(b)(2) (describing the federal parcel as "2,422 acres of land. . ."). NEPA requires federal agencies to assess the environmental effects of their proposed actions before making decisions. See, e.g., *What is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Aug. 4, 2021). The assessment includes analyzing a range of reasonable alternatives, which "must be rigorously explored and objectively evaluated." *NEPA's Forty Most Asked Questions*, U.S. FISH AND WILDLIFE SERV., https://www.fws.gov/r9esnepa/NEPA_Handbook/40_Asked_Questions.pdf (last visited Aug. 4, 2021).

²³⁹ FY2015 NDAA, *supra* note 228, § 3003(b)(2) (defining the federal land at issue as a 2,422-acre parcel "depicted on the map entitled 'Southeast Arizona Land Exchange and Conservation Act of 2011—Federal Parcel—Oak Flat'").

²⁴⁰ *Id.* § 3003(c)(3)(B)(i)–(ii).

²⁴¹ ACHP Comment, *supra* note 229, at 3. See also 36 C.F.R. § 800.2(c)(1)(i) ("The [State Historic Preservation Officer ("SHPO")] reflects the interests of the State and its citizens in the preservation of their cultural heritage[,] . . . [and] the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities. . .").

Service determined in 2017 that the undertaking had a “very high potential to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource-gathering localities, [and] burial locations.”²⁴² This acknowledgement prompted the ACHP’s involvement in the consultation between several tribes and other consulting parties.²⁴³ After the Forest Service identified historic properties, with the assistance of tribal monitors and tribal field visits,²⁴⁴ the agency drafted a programmatic agreement, including mitigation measures, plans for recovering data from those historic properties that would be destroyed, including at Oak Flat, and a system to continue identifying culturally significant historic properties as the undertaking proceeded.²⁴⁵

Several tribes described the consultation as inadequate and, after reviewing the section 106 process, the ACHP agreed.²⁴⁶ The ACHP concluded that even though the Forest Service initiated consultation early with tribes, its consultation efforts lacked transparency and were inconsistent.²⁴⁷ The agency’s communications concerning the purposes of its

²⁴² OAK FLAT FEIS, *supra* note 236, at 820.

²⁴³ ACHP Comment, *supra* note 229, at 3–4 (“Consultation has included the SHPO; the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Mescalero Apache Tribe, the Pueblo of Zuni, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Yavapai-Prescott Indian Tribe, the Ak-Chin Indian Community, the Fort Sill Apache Tribe, the Pascua Yaqui Tribe, and the Tohono O’odham Nation; and other consulting parties, including Archaeology Southwest, Arizona Mining Reform Coalition, Boyce Thompson Arboretum, Inter Tribal Association of Arizona and others. . . .”).

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.* at 4 (“These measures included treatment plans for data recovery efforts for the numerous historic properties that would be physically destroyed or damaged as part of the undertaking, including a specific plan for the Oak Flat Parcel.”). The programmatic agreement also included mitigation measures “[b]ecause of the size and complexity of the undertaking and the scale of the adverse effects” and various off-site measures to mitigate for the destruction of culturally significant tribal lands. *Id.* (“[O]ff-site measures” included “mitigation funds that would support tribal initiatives, including cultural resources, education and youth programs; archaeological database funding; and development funds for historic properties in the local community.”).

²⁴⁶ *Id.* at 5–6. The ACHP reviewed Tonto National Forest’s section 106 consultation in 2020 at the request of Terry Rambler, the Chairman of the San Carlos Apache Tribe. *Id.* at 4. See 36 C.F.R. § 800.2(b) (explaining the ACHP’s role in section 106—the ACHP “issues regulations to implement section 106, provides guidance and advice on the application” of the section 106 procedures, and “generally oversees the operation of the section 106 process.”).

²⁴⁷ ACHP Comment, *supra* note 229, at 5. The ACHP determined that the Service “struggled to manage its consultation efforts,” and that the Service’s “records show the

consultation meetings, and who should attend them, were “irregular and erratic,” and the section 106 process was often entangled with public outreach and other environmental review processes.²⁴⁸ The ACHP also determined that the proposed mitigation measures were “wholly inadequate” to alleviate the destruction that the undertaking would cause on the culturally significant properties.²⁴⁹ In December 2020, the ACHP recommended that the Forest Service proceed with section 106 consultation, suggesting that it still needed to summarize its responses to comments received on the programmatic agreement and explain to the consulting parties how it would respond to them.²⁵⁰

To tribes, the Oak Flat consultation is another example of agency box-checking. The agency checked the “early” box as required by E.O. 13175 and section 106.²⁵¹ But it failed to engage with tribes consistently or transparently. The Forest Service hired tribal monitors to identify tribal properties, thus checking the section 106 box requiring the agency to consult with tribes such that tribes can “advise on the identification and evaluation of historic properties.”²⁵² But other than involving tribes in site identification, the Forest Service did little to give tribes an opportunity to meaningfully participate in the resolution of adverse effects, as required under section 106.²⁵³ After monitors identified more than 500 additional

undertaking was not fully defined for Indian tribes at the outset of the Section 106 review process and that the agency’s early outreach efforts to tribes often lacked transparency and consistency.” *Id.* The Service also “inconsistent[ly] manage[d] the pace of consultation,” *id.*, the Service’s “communication on the purpose of, and audience for, consultation meetings was often irregular and erratic,” and “[t]here was a general lack of clarity delineating the section 106 consultation from the NEPA review process and public outreach.” *Id.* at 6.

²⁴⁸ *Id.* (“There was a general lack of clarity delineating the Section 106 consultation from the NEPA review process and public outreach.”).

²⁴⁹ *Id.* at 5 (“While the ACHP routinely advises agencies to seek creative ways to mitigate adverse effects where possible, it finds the mitigation measures within the [programmatic agreement] to be wholly inadequate in light of the magnitude of adverse effects to this and other historic properties of such significance to numerous Indian tribes.”).

²⁵⁰ *Id.* at 4.

²⁵¹ Exec. Order 13,175, *supra* note 44, (requiring consultation “early in the process of developing the proposed regulation”); 36 C.F.R. § 800.1(c) (stating that the “agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning”).

²⁵² 36 C.F.R. § 800.2(c)(2)(ii)(A). *See also* Mark Ingersoll Letter, *supra* note 2, at 11, 18 (explaining that tribal surveyors are superior to private because conflicts of interest sometimes arise when agencies contract out survey work to private archaeologists, who can be project beneficiaries, or who “may not be able to identify Tribal resources for lack of training or familiarity with sites and resources.”).

²⁵³ § 800.2(c)(2)(ii)(A).

sites eligible for listing or in need of further evaluation,²⁵⁴ the agency made no changes to its consultation schedule to enable evaluation of these sites. Although a substantive aspect of consultation occurred with the tribal identification of culturally significant properties, consultation ultimately fell short of producing substantive results because the agency ignored the new information.

When the ACHP concluded its review in December 2020, it recommended that section 106 consultation continue because the “historic significance of Oak Flat cannot be overstated and neither can the enormity” of the undertaking’s adverse effects on this property.²⁵⁵ Two weeks after receiving the ACHP’s recommendation to continue section 106 consultations,²⁵⁶ the Forest Service issued a 2,708-page final EIS (“FEIS”)—despite failing to address hundreds of outstanding site reviews—which started the sixty-day land exchange timeline mandated by Congress.²⁵⁷ The ACHP consequently terminated consultation under section 106, citing “failure to resolve adverse effects.”²⁵⁸ Despite the lack of meaningful consultation, the FEIS concluded that “[a]dverse impacts on historic properties would be avoided, minimized, or mitigated through the section 106” consultation—the same consultation process that the Forest Service limited to sixty days.²⁵⁹

2. *The Fate of Oak Flat*

In March 2021, in response to President Biden’s memorandum on tribal consultation,²⁶⁰ the Secretary of Agriculture directed the Forest

²⁵⁴ ACHP Comment, *supra* note 229, at 3.

²⁵⁵ *Id.* at 5.

²⁵⁶ *See id.* (“On December 15, 2020, the ACHP provided its observations and recommendations to the [service] on how to continue moving the Section 106 consultation process forward.”).

²⁵⁷ OAK FLAT FEIS, *supra* note 236, at 820.

²⁵⁸ *See* 36 C.F.R. § 800.7(a)(4); ACHP Comment, *supra* note 229, at 4.

²⁵⁹ OAK FLAT FEIS, *supra* note 236, at 824. *See also* Annette McGivney, *Biden Administration Pauses Transfer of Holy Native American Land to Mining Firm*, GUARDIAN (Mar. 2, 2021), <https://www.theguardian.com/environment/2021/mar/02/arizona-oak-flat-biden-administration-pauses-transfer-native-american-site-mining-resolution-copper> (“Parts of the handover had been rushed to completion in the waning days of the Trump administration, in an effort to give Resolution Copper control over Arizona’s Oak Flat region before or soon after Trump left office.”).

²⁶⁰ *See* Biden’s Consultation Memo, *supra* note 21 (“This memorandum reaffirms the policy announced in” Clinton’s Exec. Order 13,175; “[t]ribal consultation under this order

Service to withdraw its FEIS pending further consultation, thereby pausing the sixty-day clock.²⁶¹ The agency stated that “additional time is necessary to understand concerns raised by the Tribes . . . and the project’s impacts to these important resources,” which could take “several months.”²⁶² Thus, the renewed consultation may elevate the substantive aspect of consultation—tribal identification of places—into a result if any of the 500 potential listing sites require section 106 consultation, and the Forest Service enables tribal participation in the resolution of adverse effects on these properties. The Secretary of Agriculture is to issue another EIS to un-pause the tolled sixty-day clock,²⁶³ but must first “take into account” the ACHP’s recommendation for legislative action to stop the land exchange.²⁶⁴ The Secretary must provide a “rationale for the decision and evidence” that it considered the Council’s comments if it issues another FEIS and moves forward with the undertaking.²⁶⁵ The Secretary can, of course, comply with section 106 and still proceed with the exchange. However, even if the Secretary agrees with the ACHP and tries to work with Congress to amend or repeal the rider, it does not mean that Congress will act.

Aside from the ACHP, momentum is building for congressional

strengthens the Nation-to-Nation relationship between the United States and Tribal Nations,” and “after consultation by the agency with Tribal Nations and Tribal officials,” agencies must submit implementation plans for the policy directives in Exec. Order 13,175.).

²⁶¹ *Resolution Copper and Land Exchange Environmental Impact Statement, Project Update*, USDA (as of Mar. 1, 2021), <https://www.resolutionmineeis.us/> (discussing the rescinded FEIS and explaining that “[t]he recent Presidential Memorandum on tribal consultation and strengthening nation to nation relationships counsels in favor of ensuring the Forest Service has complied with the environmental, cultural, and archaeological analyses required.”). See also San Carlos Apache Tribe April Press Release, *supra* note 227 (noting that the Forest Service withdrew the FEIS, halting the land swap, and that Forest Service officials credited the move in part to Biden’s memorandum regarding tribal consultation and strengthening nation-to-nation relationships).

²⁶² McGivney, *supra* note 259.

²⁶³ The NDAA rider legislating the exchange and project dictates that a final EIS must be published for the 60-day clock to begin. Thus, since the FEIS was revoked, the agency must issue another final EIS to restart the clock. FY2015 NDAA, *supra* note 228, § 3003(c)(10) (“Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.”).

²⁶⁴ 36 C.F.R. § 800.7(c)(4). The ACHP concluded that congressional action “would provide the most complete and appropriate protection of Oak Flat” and other properties. See ACHP Comment, *supra* note 229, at 6 (“USDA should work with the Administration and Congress to take immediate steps to amend or repeal the legislation directing the transfer or otherwise prevent it from happening as proposed.”).

²⁶⁵ 36 C.F.R. § 800.7(c)(4).

action via the Save Oak Flat Act, which would repeal the National Defense Authorization Act rider that legislated the exchange and mining project.²⁶⁶ House Representative Raúl Grijalva (D-Ariz.) introduced a bill to do just that in March 2021, as he did in 2015, 2017, and 2019, although the House has never voted on any of these bills.²⁶⁷ The House Subcommittee for Indigenous Peoples of the United States held a hearing on April 13, 2021 to consider the proposed legislation.²⁶⁸

CONCLUSION

Federal agencies can technically meet the consultation requirements under the NHPA and government-to-government consultation prescribed in executive orders without actually consulting meaningfully with tribes. This does not mean that the federal government does not have an obligation to go above these bare minimum legal requirements. To fulfill its trust obligation to engage in a government-to-government relationship with tribes²⁶⁹ and “protect tribal rights to exist as self-governing entities,” the federal government must engage in meaningful consultation.²⁷⁰ Incorporating the essential elements of meaningful consultation is necessary for a government-to-government relationship between sovereigns. A partnership in which the federal government treats tribes as respected sovereigns

²⁶⁶ Save Oak Flat Act, H.R. 1884, 117th Cong. (2021). *See also* Madeleine Carey, *Ask Congress to Support the Save Oak Flat Act*, WILDEARTH GUARDIANS (Apr. 24, 2021), <https://wildearthguardians.org/brave-new-wild/opinion/ask-congress-to-support-the-save-oak-flat-act/> (encouraging the public to write their members of Congress in support of the Act).

²⁶⁷ Sahar Akbarzai, *Arizona Democrat Reintroduces Bill to Protect Sacred Apache Site from Planned Copper Mine*, CNN (Mar. 18, 2021), <https://www.cnn.com/2021/03/18/politics/oak-flat-copper-mine-legislation/index.html>.

²⁶⁸ *Legislative Hearing on Save Oak Flat Act*, NAT. RES. COMM. (Apr. 13, 2021), <https://naturalresources.house.gov/hearings/legislative-hearing-on-save-oak-flat-act/>; *See also* Save Oak Flat Act, H.R. 1884, 117th Cong. (2021).

²⁶⁹ *See* Mark Ingersoll Letter, *supra* note 2, at 3 (discussing FERC’s failure to adhere to its federal trust responsibility).

²⁷⁰ *See* COHEN TREATISE, *supra* note 13. *See also* Wood, *supra* note 33, at 1472, 1500 (“This relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.”) (quoting *Worcester v. Georgia*, 31 U.S. 515, 555 (1832)); Yachnin & Jacobs, *supra* note 7 (“We want [] consultations to be meaningful to put treaty rights and inherent rights where they should be, [to see] [t]hat federal agencies take that trust responsibility seriously.”) (quoting a letter from Shannon Wheeler, Chairman of the Nez Perce Tribe).

cannot exist if federal agencies leave tribes out of the decision-making processes that affect their culturally significant lands and natural resources. When the federal government merely engages in “box-checking” consultation and proceeds to damage culturally significant tribal lands and resources, it is acting in a manner inconsistent with its trust obligation.

The case studies discussed in this Article expose the lengths to which tribes must go to ensure that the federal government adequately considers their interests. Even though some tribes succeeded in getting their voices heard, the legal, administrative, financial, and personnel resources required to do so are often beyond the means of most tribes. In the Bears Ears and Secretarial Order case studies discussed above, in which meaningful consultation was eventually achieved, the tribes shouldered the burden of making the federal agencies—which have a trust responsibility to protect tribal interests—understand the value and importance of their lands, cultures, and traditions. The Obama Administration’s Bears Ears proclamation rested on the proposition that the intertribal coalition and UDB prepared over many years, which described the cultural significance of Bears Ears.²⁷¹ Tribal negotiators for the Secretarial Order also dedicated substantial amounts of time to educating federal negotiators about tribal experiences and issues.²⁷² To require tribes to regularly perform this labor just to get a seat at the table is not sustainable for every consultation process.²⁷³

Even if the federal government did not have consultation obligations, the government’s best interests are served by meaningfully consulting with tribes in land and natural resource management decision making that affects properties with cultural importance to the tribes. At a minimum, federal agencies can avoid litigation and project delays that occur when tribes assert their rights, which were ignored as in the Oak Flat and Chaco

²⁷¹ See Wilkinson, *supra* note 10, at 325 (describing the development for the monument proposal, beginning in July 2015, which included five “all-day” meetings and numerous proposal drafts to ensure “that the Indian voice and Native culture [were] fully integrated into the document.”). See also *id.* at 323–24 (describing tribal efforts beginning in 2010 to develop the Bears Ears cultural map, including a “substantial research campaign” to “determine what the boundaries of a national monument” would eventually be); Yachnin, *Legislative Fix*, *supra* note 184 (“Years of grassroots work and inter-tribal collaboration went into our original proposal to President Obama. . .”).

²⁷² See Wilkinson, *supra* note 1, at 1078–79.

²⁷³ See *id.* (explaining that the “wealth of information” coming from the “detailed education about tribal issues” arising out of consultation “came at a cost” because it was “enormously burdensome” and required “substantial amounts of time”).

Canyon case studies.²⁷⁴ Federal agencies have much to gain from understanding and incorporating unique tribal knowledge and expertise in land management, and thus so does the public. One way to help federal land managers gain this understanding would be to establish institutes to promote the use of “scientific knowledge, Indigenous knowledge, and local knowledge” in management decision making, as suggested in the Bears Ears proposal.²⁷⁵ These institutes could provide access to tribal knowledge needed to ensure meaningful tribal participation in federal decision making. In the words of Russell Attebery, Chairman of the Karuk Tribe, “nobody knows Indian country like the people who live there.”²⁷⁶

²⁷⁴ See *id.* at 1075 (describing the proposed working relationship between tribal governments and federal agencies, and that this could “obviate or greatly diminish the need for legislation or litigation”).

²⁷⁵ See Bears Ears Proposal, *supra* note 27, at 31 (suggesting an institute which would focus on “Traditional Knowledge” combined with “western science”). See also Betsy Baker, *Smart as SILK: An Innovative Advisory Body for Implementing the Knowledge-based Requirements of the Central Arctic Ocean Fisheries Agreement*, WILSON CTR.: POLAR INST. (Apr. 2021) <https://www.wilsoncenter.org/publication/polar-perspectives-no-4-smart-silk-innovative-advisory-body-implementing-knowledge> (proposing the “SILK committee,” “a design and working title” for the “type of body that will assist” signatories in carrying out their obligation to “take into account Indigenous knowledge and local knowledge as well as the best available scientific information when making implementing decisions” under the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018)).

²⁷⁶ See Oregon Humanities, *A Conversation on the History and Future of Settlement and Water Use in the Klamath Basin*, YOUTUBE (Mar. 15, 2021), <https://www.youtube.com/watch?v=rzmo2qYSgG0> (Russel Attebery at 15:54, discussing meaningful consultation).

UNIVERSITY of PENNSYLVANIA
JOURNAL of LAW & PUBLIC AFFAIRS

Vol. 6

March 2021

No. 3

**THE FUNDAMENTAL INADEQUACY OF TRIBE-AGENCY
CONSULTATION ON MAJOR FEDERAL
INFRASTRUCTURE PROJECTS**

*Alana K. Bevan**

INTRODUCTION.....	562
I. CONSULTATION: THE STATUS QUO FOR TRIBE-AGENCY ENGAGEMENT ON MAJOR INFRASTRUCTURE PROJECTS.....	565
A. <i>The National Historic Preservation Act</i>	565
B. <i>National Environmental Policy Act</i>	569
C. <i>Executive Directives</i>	570
1. Executive order 13,175	571
2. Presidential memoranda on tribal consultation.....	571
3. Increased presidential commitment to consultation.....	572
D. <i>International Standards: United Nations Declaration on the Rights of Indigenous People</i>	572
II. CONSULTATION’S FAILURE.....	573
A. <i>Administrative Procedure and Self-Regulation</i>	575
B. <i>Judicial Review</i>	579
1. Arbitrary and capricious review under the APA	580
2. NHPA	582
3. NEPA.....	584
C. <i>Legislative Oversight</i>	585
1. Oversight through the Government Accountability Office	586

* Editor-in-Chief, Volume 6, *University of Pennsylvania Journal of Law & Public Affairs*; University of Pennsylvania Law School, J.D. Candidate, 2021; The Johns Hopkins University, Ph.D., 2009; University of Alberta, B.A. (Hon), 2003. My deepest thanks to Professor Bridget Fahey for supervising this Comment and for her thoughtful mentorship. Thanks also to the staff of the *University of Pennsylvania Journal of Law & Public Affairs* for their careful editing and review. All errors and omissions are my own.

2. Oversight through congressional hearings.....	586
3. Continued use of the consultation device	589
III. RADICAL NONCOMPLIANCE DICTATES THE NEED FOR NEW ENGAGEMENT DEVICES.....	590
A. <i>Negotiated Rulemaking</i>	592
B. <i>Adversarial Administrative Adjudication</i>	593
C. <i>Negotiation and Compact</i>	596
D. <i>Consent</i>	597
CONCLUSION.....	600

INTRODUCTION

On the windy banks of the Missouri River near Cannon Ball, North Dakota lies the site of Inŷanŷ Wakháŷagapi Othí, translated to English as Sacred Stone Camp.¹ For 328 days, citizens of the Standing Rock Lakota and Dakota Sioux Nations and their allies occupied Sacred Stone and three satellite camps, protesting construction of the Dakota Access oil pipeline.² As pipeline construction neared the camp site, construction company security and law enforcement clashed with protestors.³ The Standing Rock Sioux Tribe also challenged the pipeline in federal court, filing its request for declaratory and injunctive relief in the District Court for the District of Columbia in July 2016.⁴ More than four years after state authorities forcibly terminated the protest at Sacred Stone, the Tribe’s legal challenge continues.⁵

¹ SACRED STONE CAMP - IDYAD WAKHÁDAGAPI OTHÍ, <http://www.sacredstonecamp.org> [<https://perma.cc/CB3W-VTXN>] (last visited Jan. 10, 2021).

² *Id.*; Amy Sisk, *Timeline: The Long Road to #NoDAPL*, INSIDE ENERGY (Jan. 23, 2017), <http://insideenergy.org/2017/01/23/timeline-the-long-road-to-nodapl/> [<https://perma.cc/S2K9-M8CB>].

³ Alan Taylor, *Tempers Flare During Protest Against the Dakota Access Pipeline*, THE ATLANTIC (Sept. 6, 2016), <https://www.theatlantic.com/photo/2016/09/tempers-flare-during-protest-against-the-dakota-access-pipeline/498809/> [<https://perma.cc/W48X-FXBS>]; Sue Skalicky & Monica Davey, *Tension Between Police and Standing Rock Protesters Reaches Boiling Point*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/dakota-access-pipeline-protest.html> [<https://perma.cc/DB59-46XY>].

⁴ Complaint for Declaratory and Injunctive Relief, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77 (D.D.C. 2017) (No. 16-cv-1534). Note that additional cases filed by the Yankton Sioux and Oglala Sioux Tribes have been consolidated with this matter (16-1796 and 17-267).

⁵ Morgan Conley, *Tribes Press for Shutdown of Dakota Access Pipeline*, LAW360 (Jan. 8, 2021), <https://www.law360.com/articles/1343135/tribes-press-for-shutdown-of-dakota-access-pipeline> [<https://perma.cc/JE8J-XWXY>]; Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/standing-rock-protest-dakota-access-pipeline.html> [<https://perma.cc/YT5X-KV59>].

Although the Dakota Access pipeline is privately owned, the Tribe filed its request for legal relief against the U.S. Army Corps of Engineers.⁶ First, the Tribe challenged the processes through which the Corps issued authorizations to build the Dakota Access pipeline underneath bodies of water upstream from the Standing Rock reservation and to discharge into waters on tribal ancestral lands.⁷ More broadly, the Tribe also challenged the processes governing the Corps' nationwide permit for the construction of oil pipelines that impact water sources.⁸ These processes, the Tribe alleged, violated the federal statutory and regulatory requirement that federal agencies adequately consult recognized Indian tribes prior to authorizing infrastructure actions with potential impacts on culturally or religiously significant sites.⁹

Although the Standing Rock Tribe's complaint contains other claims, the alleged failure of the Corps to adequately and meaningfully consult the Tribe prior to authorizing construction on the Dakota Access pipeline is central to the parties' dispute.¹⁰ The Tribe contends that any consultation by the Corps as to the planned construction's impact on sites of historic and cultural significance was cursory, belated, and incomplete, thus failing to meet the standard for consultation as established by federal law.¹¹ The Corps, in contrast, alleges that it engaged in a "robust consultation process" during its review and subsequent approval of Dakota Access pipeline construction plans, providing the Tribe with reasonable opportunities to advise the Corps on historic properties and making routine efforts to engage on matters of cultural sensitivity.¹² What the Corps describes as reasonable consultation constitutes—from the Tribe's perspective—an "attempt to circumvent the [consultation] process" and mere rubber stamping of Dakota Access's development plans.¹³

⁶ As of the time of editing, the case remains open. Note that the private owner of the pipeline project, Dakota Access LLC (a subsidiary of Energy Transfer Partners), entered the case as an unopposed intervenor—and then a cross-claimant—on August 5, 2016. Unopposed Motion to Intervene in Support of Defendant by Dakota Access LLC, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

⁷ Complaint for Declaratory and Injunctive Relief at 2, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

⁸ *Id.*

⁹ *Id.* at 31–40.

¹⁰ Leigh Paterson, *Tribal Consultation at Heart of Pipeline Fight*, INSIDE ENERGY (Sept. 23, 2016), <http://insideenergy.org/2016/09/23/tribal-consultation-at-heart-of-pipeline-fight/> [<https://perma.cc/Y5KX-QALY>].

¹¹ Complaint for Declaratory and Injunctive Relief at 31–40, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

¹² United States Army Corps of Engineers' Opposition to Plaintiff's Motion for Preliminary Injunction at 28, 34–35, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

¹³ Complaint for Declaratory and Injunctive Relief at 25, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

The Standing Rock Sioux protest and legal challenge to the Dakota Access pipeline is not unique. Instead, it is part of an ongoing continent-wide story and history of agency failure to adequately and meaningfully consult tribes on major infrastructure projects. Tribal opposition to oil and gas pipelines is on the rise, as are protests and legal challenges to infrastructure projects generally, including renewable energy installations.¹⁴ The primary legal argument underpinning these challenges is that, in failing to adequately consult tribes impacted by project plans, federal agencies violate federal law.¹⁵ The high visibility and violence of the Standing Rock protests, and the intensity of the legal battle between the Standing Rock Tribe and Dakota Access, appear to have caught the attention of both the executive and legislative branches.¹⁶ Despite governmental awareness of the need for improved, meaningful consultation, Congress and federal agencies persist in using and abusing consultation in statutes, regulations, and guidance, leaning on an unworkable device to discharge their obligation to engage with impacted tribes.¹⁷ But the physical and legal clashes of Standing Rock will recur so long as consultation—a deeply flawed tool—is the default device for tribe-agency engagement on major infrastructure projects.¹⁸

¹⁴ See Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 599–601, 603 (2018) (summarizing recent examples of tribal action against pipeline construction or right of way permit renewals, as well as against renewable energy farm construction).

¹⁵ *Id.* at 601–03.

¹⁶ In September 2016, for example, the U.S. Departments of the Interior, the Army, and Justice invited 567 federally recognized tribal governments to participate in listening sessions and formal tribal consultations on agency processes for infrastructure-related decision-making. Press Release, U.S. Department of the Interior, The Departments of the Army, the Interior and Justice Invite Tribal Leaders to Participate in Formal Government-to-Government Consultations on Infrastructure Decision-Making (Sept. 23, 2016), <https://www.doi.gov/pressreleases/departments-army-interior-and-justice-invite-tribal-leaders-participate-formal> [<https://perma.cc/H77R-3GQB>]. Standing Rock also prompted twenty-six members of Congress to request that the U.S. Government Accountability Office prepare a report investigating all related federal agencies' policies for tribal consultation during infrastructure permitting and construction processes. See, e.g., Letter from Raul Ruiz, Ranking Member, House Subcomm. on Indian, Insular & Alaska Native Affs., & Raúl M. Grijalva, Ranking Member, House Comm. on Nat. Res., to Gene Dodaro, Comptroller Gen. of the U.S. (Sept. 8, 2016), <https://ruiz.house.gov/media-center/press-releases/ruiz-grijalva-call-greater-oversight-protect-health-and-environmental> [<https://perma.cc/ZKW4-ZVCU>]. The report was publicly released in March 2019. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR INFRASTRUCTURE PROJECTS (2019), <https://www.gao.gov/assets/700/697694.pdf> [<https://perma.cc/R3GU-QPTM>].

¹⁷ See *infra* Section II.C.3.

¹⁸ See, e.g., Nick Martin, *The Next Standing Rock Is Everywhere*, NEW REPUBLIC (Oct. 7, 2019), <https://newrepublic.com/article/155209/next-standing-rock-everywhere> [<https://perma.cc/ZKW4-ZVCU>] (“There will not be another Standing Rock. There will be dozens, maybe even hundreds, by the time the fight to avoid the encroaching crisis is finished, if it ever is.”).

This Article argues that consultation, as a legal mechanism to guarantee effective, sovereign-to-sovereign engagement and agreement on major infrastructure projects, has not and will not work. Discussion of how to improve and standardize consultation practice validates continued congressional use of consultation as an engagement device and crowds out discussion of potential (more effective and accountable) alternatives. Part I identifies the statutory, regulatory, and executive authorities requiring consultation between federal agencies overseeing major infrastructure projects and the tribes impacted by construction. Part II traces the failures of administrative procedure, judicial review, and legislative oversight to guarantee meaningful consultation, and demonstrates that consultation is an inherently flawed engagement device given its fundamental inability to be checked by legal and administrative oversight. Part III advocates for congressional and administrative reform by suggesting a spectrum of possible alternative engagement devices, including negotiated rulemaking, adversarial administrative adjudication, negotiated compact, and formal consent, each of which could provide for heightened accountability and make for better policy.

I. CONSULTATION: THE STATUS QUO FOR TRIBE-AGENCY ENGAGEMENT ON MAJOR INFRASTRUCTURE PROJECTS

A network of federal statutes, regulations, executive directives, and international guidance require or encourage federal agencies to consult with tribes prior to authorizing, funding, and permitting major infrastructure construction projects.¹⁹ The key components of federal law mandating tribal consultation for infrastructure projects are the 1966 National Historic Preservation Act (NHPA) and the 1969 National Environmental Policy Act (NEPA).

A. The National Historic Preservation Act

The NHPA uses federal measures “to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations” and to assist federally recognized tribes “to expand and accelerate their historic preservation programs and activities.”²⁰ Recognizing

¹⁹ See generally Matthew J. Rowe, Judson Byrd Finley & Elizabeth Baldwin, *Accountability or Merely “Good Words”? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV’T L. & POL’Y 1 (2018) (providing an overview of the tribe-agency consultation requirement).

²⁰ 54 U.S.C. §§ 300101(1), (6). The NHPA was enacted in 1966, but language considering the impact of development on culturally and historically significant tribal lands was not

an implicit tension between historic and cultural preservation and modern development and infrastructure, Section 106 of the NHPA requires federal agencies with jurisdiction over a proposed “undertaking” to consider “the effect of the undertaking on any historic property.”²¹ An “undertaking” is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,” including projects carried out with Federal funds or requiring a Federal permit or license.²² Historic property includes not only “any prehistoric or historic district, site, building, structure, or object” but also “artifacts, records, and material remains relating to a district, site, building, structure, or object.”²³ Section 106 review requires that, in evaluating the effect of an undertaking on a historic property, federal agencies consider “property of traditional religious and cultural importance to an Indian tribe,” requiring consultation with Tribes so impacted.²⁴

The NHPA established the Advisory Council on Historic Preservation (ACHP), an independent agency that engages in the consultative process and also promulgates the regulations required to implement Section 106 review.²⁵ Section 106 regulations provide guidance and procedures by which federal agencies fulfil their statutory obligations to consult; the regulations state that “[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”²⁶ The Section 106 process requires federal agencies to “make a reasonable and good faith effort” to identify parties potentially impacted by a proposed project and, in the tribal context, to consult with the identified tribal historic

included until 1992 amendments to the Act. *See* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600 (codified as amended in scattered sections of 16, 25, and 43 U.S.C.) (enacting new law on tribal historic preservation programs). *See generally* S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895 (2012) (providing a complete overview on consultation under the NHPA).

²¹ 54 U.S.C. § 306108.

²² *Id.* § 300320; *see also* *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 734 (D.C. Cir. 2019) (“We have construed the statute to mean that, for an action to be a federal undertaking, ‘only a “Federal permit, license or approval” is required,’ not necessarily federal funding.”).

²³ 54 U.S.C. § 300308.

²⁴ *Id.* § 302706.

²⁵ *Id.* § 304108(a); *see About the ACHP*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/about> [<https://perma.cc/84A5-J9ZA>] (last visited Jan. 10, 2021) (“The Advisory Council on Historic Preservation promotes the preservation, enhancement, and sustainable use of our nation’s diverse historic resources, and advises the President and the Congress on national historic preservation policy.”).

²⁶ 36 C.F.R. § 800.1(a) (2019).

preservation officer (THPO) for each impacted tribe.²⁷ Consultation “should commence early in the planning process,” and, in a two-step process, provide the tribe with “a reasonable opportunity” to advise the agency on identification and evaluation of significant historic and cultural properties as well as to share its concerns about the undertaking’s potential impact on those properties.²⁸ This consultation is required not only for tribally-owned lands but also on other lands to which tribes attach historic or cultural significance.²⁹ Section 106 regulations emphasize that, in recognition of the “unique legal relationship” between the federal government and tribal governments, consultation “should be conducted in a sensitive manner respectful of tribal sovereignty.”³⁰ The consultative process about a planned undertaking is to recognize this “government-to-government” relationship.³¹ Section 106 consultation should occur concurrently with NEPA consultation and analysis, as environmental analyses and impact statements must consider impact on cultural resources.³²

Once the agency concludes its consultation process and identifies a plan to proceed with the undertaking, it signs a programmatic agreement that resolves any adverse effect on property of historic, religious, or cultural significance.³³ “Compliance with the procedures established by an approved programmatic agreement satisfies the agency’s [S]ection 106 responsibilities for all individual undertakings of the program covered by the agreement”³⁴ Signing of the programmatic agreement “clos[es] the record for purposes of NHPA § 106.”³⁵

Complicating this regulatory landscape in the infrastructure context are inconsistencies in U.S. Army Corps of Engineers (“Corps”) Section 106 procedures. The Corps Civil Works Division is responsible for water resource development and management; private pipeline projects must get permission from Civil Works for a pipeline to cross federal land or to impact Corps

²⁷ *Id.* §§ 800.1–800.2. When an impacted tribe has no THPO, the tribal government may designate a representative to consult with the federal agency. ADVISORY COUNCIL ON HIST. PRES., CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK 7 (2012), <https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf> [<https://perma.cc/X5NC-BHC8>] (“The tribe retains the same consultation rights regarding agency findings and determinations, and to execute a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), as it would if it had a THPO.”).

²⁸ 36 C.F.R. § 800.2(c)(3)(i) (2019).

²⁹ *Id.* § 800.2(c)(3)(ii).

³⁰ *Id.*

³¹ *Id.* § 800.2(c)(3)(iii).

³² *Id.* § 800.8(a)(1); *see infra* Section I.B.

³³ 36 C.F.R. §§ 800.13–800.14 (2019).

³⁴ *Id.* § 800.14(b)(2)(iii).

³⁵ *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008).

projects.³⁶ The Corps Regulatory Program, a subdivision of Civil Works, is the division that actually reviews permit applications and issues permits for any construction or other infrastructure project impacting U.S. navigable waters.³⁷ Although Civil Works generally follows ACHP regulations governing procedures for engaging in NHPA Section 106 review, the Regulatory Program does not.³⁸ Instead, the Regulatory Program follows its own procedures for implementing Section 106.³⁹ Agencies may use their own alternative Section 106 regulations but ACHP must approve those alternatives and the alternatives must employ standards consistent with the ACHP regulations; the Corps' Regulatory Program's alternate regulations have never been approved.⁴⁰ A 2019 U.S. Government Accountability Office Report on tribal consultation during the infrastructure development process highlighted this regulatory bifurcation as a violation of the NHPA that should be resolved through congressional action.⁴¹

The ACHP also produces guidance on improving the consultation relationship between agencies and tribes. The latest report, issued in September 2015, identified staffing and resource scarcity, diversity, and the role of permit applicants—who often apply for permits at a time when they already bear substantial sunk costs in planning and historic preservation

³⁶ *Civil Works*, U.S. ARMY CORPS OF ENGR'S, <https://www.usace.army.mil/Missions/Civil-Works/> [<https://perma.cc/C7RC-BEGZ>] (last visited Jan. 10, 2021); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51 n.86.

³⁷ *Civil Works: Regulatory Program Links*, U.S. ARMY CORPS OF ENGR'S, <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/> [<https://perma.cc/K2DD-D94Q>] (last visited Jan. 10, 2021); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51 n.86.

³⁸ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51.

³⁹ The Regulatory Program's Section 106 procedures come from a 1990 Corps regulation, a 2005 Corps guidance document, and a 2007 Corps memorandum. 33 C.F.R. pt. 325, app. C (2019); Memorandum from Michael B. White, Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng'rs, on Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 (April 25, 2005) (on file with the U.S. Army); Memorandum from Lawrence A. Lang, Acting Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng'rs, on Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005 (Jan. 31, 2007) (on file with the U.S. Army).

⁴⁰ 36 C.F.R. § 800.14 (2019); 54 U.S.C. § 306102(b)(5)(A); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 52–54 (describing alternative USACE regulations and the ACHP approval process and noting that the ACHP has never approved USACE alternative regulations).

⁴¹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 55 (“The long-standing nature of the differences between the Corps procedures and the ACHP regulations, as well as the agencies’ inability to resolve these differences over almost two decades despite numerous attempts to do so, suggests that legislative action may be needed to resolve this issue.”).

analysis—as challenges to the consultative process.⁴² Suggested solutions included regular scheduled meetings, consultation agreements, documented consultation standards, better training for agency staff on tribal needs, and better use of tribal expertise during planning processes.⁴³

B. National Environmental Policy Act

The second statutory prong governing tribe-agency consultation on major infrastructure is the NEPA, which requires preparation of an environmental assessment or environmental impact statement for proposed projects. Congress enacted the NEPA to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”⁴⁴ As such, NEPA requires that all “major Federal actions significantly affecting the quality of the human environment” trigger an environmental review.⁴⁵ As with the NHPA, the NEPA established a body to create and oversee implementing regulations.⁴⁶ Regulations promulgated by the Council on Environmental Quality (CEQ), housed within the Executive Office of the President, define “major Federal action” broadly, including any activity or project “entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies.”⁴⁷ CEQ regulations require initiation of NEPA environmental assessment requirements early in the planning process.⁴⁸ The NEPA environmental review process constitutes preparation of either an Environmental Assessment or an Environmental Impact Statement, depending on the project’s degree of likely environmental impact.⁴⁹ CEQ regulations require that federal agencies undertaking major

⁴² ADVISORY COUNCIL ON HIST. PRES., RECOMMENDATIONS FOR IMPROVING TRIBAL-FEDERAL CONSULTATION 1–2 (2015), <https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf> [perma.cc/4N92-P2JH].

⁴³ *Id.* at 3–4.

⁴⁴ 42 U.S.C. § 4321.

⁴⁵ *Id.* § 4332(C).

⁴⁶ *Id.* § 4342.

⁴⁷ 40 C.F.R. § 1508.18 (2019).

⁴⁸ *Id.* § 1500.1(b).

⁴⁹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,321 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.3(a)). The Environmental Assessment (EA) is a relatively brief review of the project’s environmental impact with either a Finding of No Significant Impact (FONSI) or a finding of likely significant impact, which then triggers the more in-depth review required by an Environmental Impact Statement (EIS). An EIS has significantly more elaborate requirements, starting with publication of a Notice of Intent in the Federal Register, a scoping process identifying interested stakeholders, a full analysis of the environmental effects of a proposed plan and of alternative plans (including no action), publication of the draft EIS, a public comment period, publication of the final EIS with responses to substantive comments

actions requiring NEPA review assess the impact of those actions on cultural resources.⁵⁰ This assessment requires agencies to consult “early with appropriate State, Tribal, and local governments . . . when their involvement is reasonably foreseeable.”⁵¹ This regulatory requirement to consult impacted tribes as part of the environmental assessment process does not define what constitutes adequate consultation.⁵²

The Federal Permitting Improvement Steering Council (FPISC) also impacts implementation of NEPA. Created in 2015 to make the permitting processes for large infrastructure projects more centralized and efficient, FPISC is made up of 16 federal agencies, departments, councils, and commissions involved in these large federal projects.⁵³ FPISC identifies and advises member agencies and departments on best practices for permitting and environmental review, including for improving stakeholder engagement.⁵⁴ In its latest report on recommended best practices, FPISC issued several recommendations related to tribal consultation. FPISC recommended that lead agencies engaging in NEPA review collaborate with tribes to develop standards for identifying resources potentially impacted by proposed infrastructure projects and, when project ideas are identified, to consult with tribes before rather than after initiating review processes.⁵⁵

C. Executive Directives

Although not legally binding, multiple executive directives issued over the last 20 years emphasize presidential concern for the importance of tribal voices during infrastructure planning processes.

received, and issuance of the Record of Decision, stating the agency’s final conclusion on environmental impact. *Id.* at 43,323–26, 43,328, 43,333.

⁵⁰ 40 C.F.R. § 1508.8 (2019).

⁵¹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,360.

⁵² *Id.* at 43,367.

⁵³ Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (codified as amended in scattered sections of 12, 16, 22, 23, 26, 40, 42, and 49 U.S.C.). Current members of FPISC are the Advisory Council on Historic Preservation, Council on Environmental Quality, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission, and Office of Management and Budget.

⁵⁴ 42 U.S.C. § 4370m-1(c)(2)(B).

⁵⁵ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2019, at 3–4 (2019), <https://www.permits.performance.gov/sites/permits.dot.gov/files/2019-10/fast-41fy2019-best-practices-report.pdf> [<https://perma.cc/N63Q-HPZ9>].

1. Executive order 13,175

On November 6, 2000, President Bill Clinton issued Executive Order 13,175, directing federal agencies to consult with recognized tribes on federally funded or directed activities with the potential to impact tribes.⁵⁶ The order recognized that the federal government has a unique trust relationship with tribal governments and, as such, ordered federal agencies making policy or engaging in other administrative action with tribal implications to engage in accountable, meaningful, and timely consultation with tribal officials.⁵⁷ Agencies were directed to create and document consultation processes in conformity with the order.⁵⁸ Finally, the order noted its issuance in conjunction with Executive Order 13,132, establishing parallel requirements for federal agencies to consult with states and localities when engaging in policymaking with federalism implications.⁵⁹

2. Presidential memoranda on tribal consultation

In September 2004, President George W. Bush issued a memorandum affirming his administration's support for Executive Order 13,175 and requesting that agency heads ensure compliance with the order's directions.⁶⁰ President Barack Obama issued a subsequent memorandum to heads of executive departments and agencies in November 2009, requiring each body to develop a plan of action for "regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications," in compliance with the Clinton order.⁶¹ Although President Obama noted in his memorandum that "[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results," he indicated that "meaningful dialogue" and specifically consultation, "is a critical ingredient of a sound and productive Federal-tribal relationship."⁶²

⁵⁶ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

⁵⁷ *Id.* at 67,249–50. Note that independent agencies such as the Federal Communications Commission and Federal Energy Regulatory Commission are "encouraged" to comply with EO 13,175 though they are not subject to it. *Id.* at 67,251.

⁵⁸ *Id.* at 67,250.

⁵⁹ *Id.* at 67,251; *see* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999) ("Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.").

⁶⁰ Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004).

⁶¹ Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

⁶² *Id.*

3. Increased presidential commitment to consultation

President Obama increased Executive Branch investment in consultation when he issued Executive Order 13,647, establishing the White House Council on Native American Affairs.⁶³ Vowing “[g]reater engagement and meaningful consultation with tribes,” President Obama directed the new Council to coordinate consultation across agencies and departments.⁶⁴

The Obama Administration subsequently issued annual reports from the Executive Office of the President providing updates on executive-tribal coordination. The 2016 report emphasized agency progress in formalizing and improving the consultation process, highlighting efforts from the Environmental Protection Agency (EPA), the Department of the Treasury, the Federal Emergency Management Agency (FEMA), the Department of Energy, and the Social Security Administration.⁶⁵ The 2017 report included reports on similar policy improvements by the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), the Department of the Interior, and the Department of Education.⁶⁶

D. International Standards: United Nations Declaration on the Rights of Indigenous People

Finally, the United Nations Declaration on the Rights of Indigenous People provides member nations with nonbinding guidance on recognizing and affirming indigenous political, economic, cultural, and property rights.⁶⁷ The Declaration advises member states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may

⁶³ Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013).

⁶⁴ *Id.*

⁶⁵ EXEC. OFF. OF THE PRESIDENT, 2015 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: BUILDING PROSPEROUS AND RESILIENT TRIBAL NATIONS 16, 26, 46, 52 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/2015%20Tribal%20Nations%20Conference%20Report.pdf> [<https://perma.cc/4B47-PYBV>].

⁶⁶ EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 9–11, 16 (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [<https://perma.cc/E4DE-44HF>]. This report also highlighted the inter-agency review of consultation on infrastructure projects initiated by the Departments of the Interior, Justice, and the Army in 2016. *Id.* at 14.

⁶⁷ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

affect them.”⁶⁸ The Declaration also advises member states to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁶⁹

The United States voted against the United Nations Declaration in 2007 but changed its position to support the Declaration in January 2011.⁷⁰ The State Department’s 2011 announcement recognized the “moral and political force” of the Declaration, but also interpreted the Declaration’s advice as aligning squarely with preexisting federal statutory and regulatory consultation requirements.⁷¹ Referencing Executive Order 13,175 and President Obama’s 2009 memorandum as evidence of the federal tradition of consultation, the State Department recognized “the significance of the Declaration’s provisions on free, prior and informed consent” but noted that the federal government understood those provisions “to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”⁷² Recognition and endorsement of the United Nations Declaration effected no change on federal law or policy.⁷³

II. CONSULTATION’S FAILURE

Despite guidance from diverse legal authorities—including statutes, regulations, guidance, executive directives, and international declaration—conflict among federal agencies and departments, private infrastructure developers, and tribal governments and communities persists. If the degree of visibility and intensity of litigation over the Dakota Access pipeline are

⁶⁸ *Id.* art. 19. For a full analysis of the free, prior, and informed consent model, see generally Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429 (2017).

⁶⁹ G.A. Res. 61/295, *supra* note 67, art. 32.

⁷⁰ U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/Q2AH-DCC8>]; see also Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010) (indicating President Barack Obama’s support for the United Nations Declaration).

⁷¹ ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 70.

⁷² *Id.*

⁷³ *Id.*

any marker, tribe-developer-agency conflict is, in fact, on the rise. Is there any hope for tribal consultation as a legal mechanism for ensuring meaningful intergovernmental respect and consensus?

Failing to confront the fundamental, inherent internal contradictions in consultation requirements, several scholars of administrative and tribal law insist consultation can work. The general consensus among these scholars is that the “regular and meaningful consultation” promised in Executive Order 13,175 and reaffirmed in subsequent presidential memoranda has not—or has rarely—come to pass,⁷⁴ but that adherence to best practices or to an articulated uniform standard would transform current consultation practices into the meaningful consultation theoretically intended by past presidents and policymakers.⁷⁵ Existing protections and obligations to honor tribal

⁷⁴ Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 900 (2014); see also Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 344 (2018) (“Congress should affirm tribes’ status as key stakeholders in environmental, homeland security, public safety, energy, education, health, and other national concerns and enact requirements for meaningful consultation with tribes.”); Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENV’T L. REV. 1, 50 (2012) (“Consultation policies should be established within every federal agency as well as at the state-level. While the policies need to have some flexibility to account for the individual differences between tribes, sound principles should be followed”); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 474–75 (2013) (“The federal government’s trust responsibility includes an important procedural component: the duty to consult with Indian tribes. This consultation duty has the potential to breathe new life into the substantive components of the trust responsibility.”); Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RES. L. REV. 205, 243 (2017) (“[C]onflicts demonstrate the importance of establishing common understandings of meaningful consultation, as well as the need to carefully explore and apply the lessons of circumstances, like the Badger-Two Medicine, where despite initial upsets meaningful consultation organically occurred.”); Dwight Newman et. al., *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. INT’L L.J. 449, 454 (2014) (“Taking the general need for Indigenous consultation—and potentially participation—in Arctic energy development, this Article discusses the appropriate forms for that consultation and participation, taking into account the special context of the Arctic.”); Christy McCann, *Dammed if You Do, Damned if You Don’t: FERC’s Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 454 (2006) (“While consultation may not be the solution to getting all tribal issues resolved favorably, it does offer an opportunity for progress. This opportunity justifies the investment of the time and resources necessary to make that consultation meaningful.”).

⁷⁵ See Eitner, *supra* note 74, at 900 (“A statute providing a government-wide standard for meaningful consultation and a mechanism by which agencies must justify decisions that run contrary to the views expressed by tribes would provide just such a guarantee. By doing so, the federal government would honor its general trust responsibility to Indian tribes and ensure that it will not revert to its past pattern of broken promises.”)

sovereignty offered by NHPA and NEPA, they suggest, are adequate “when agencies undertake these obligations in good faith.”⁷⁶ Better mechanisms to hold agencies to good faith efforts to consult would address these flaws.⁷⁷

Even scholars highly critical of consultation suggest that forcing consultation in practice to cohere with the spirit of statutory and regulatory consultation requirements could be a plausible solution to current failures to meaningfully engage tribes impacted by infrastructure development. Derek Haskew recognizes the inadequacy of consultation with tribes yet seems resigned to its use as a legal mechanism, writing that “the recent popularity of consultation requirements suggests they may be here for some time.”⁷⁸ Haskew suggests that, given the ubiquity of statutory and regulatory consultation requirements, one “course of progress . . . would be to begin the process of raising consultations to their optimal expression as a legal device.”⁷⁹

Consultation is a fundamentally flawed engagement device. These calls to action for meaningful consultation through improved standards simply fail to grapple with the fact that, not only has consultation failed historically, it is a conceptually inadequate device. Consultation is inadequate because its chief benefit—its inherent flexibility that allows stakeholders to engage on terms that are individually and situationally significant—is also its weakness, in that its broad and discretionary model is ripe for agency inaction and abuse. This negative quality cannot be excised from the consultation model so as to make it a viable engagement device. I suggest here that triplicate failures of inadequate administrative procedure, judicial review, and legislative oversight make consultation inherently inadequate to serve its stated purpose of government-to-government engagement on large infrastructure projects. Scholars suggesting otherwise are not only incorrect; they implicitly support federal reliance on consultation and thus fail to hold political and executive actors accountable for their continued use of a device of engagement so flawed and obviously dismissive of tribal sovereignty.

A. Administrative Procedure and Self-Regulation

First, consultation fails because it is inherently subject to administrative failure. Consultation policies take the form of advisory action with no legally binding effect; unmanageable and vague guidance interprets equally unmanageable and vague statutory mandates. As such, consultation relies primarily on agencies to provide their own internal oversight and create their own legitimacy. Because consultation necessarily rests on values of

⁷⁶ Rowe, Finley & Baldwin, *supra* note 19, at 46.

⁷⁷ *Id.* at 47.

⁷⁸ Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 74 (2000).

⁷⁹ *Id.*

agency discretion, reasonable action, and good faith, it also lacks an administrative backstop to protect stakeholder interests.

Administrative procedure makes consultation ineffective because agencies' consultation policies are informal guidance rather than binding rulemaking or adjudication. The statutory mandates in NHPA and NEPA require federal agencies to make reasonable, good faith efforts to consult with tribes, but provide no benchmark for measuring adequacy of consultation, and do not require that consultation procedures be formalized through notice-and-comment rulemaking.⁸⁰ Requirements for consultation to be meaningful and respectful of tribal sovereignty and the government-to-government interaction come instead from executive orders and memoranda that lack legal binding force.⁸¹ Consultation must occur in some form to comply with law, but any requirements for timing and quality of consultation, and for consideration of tribal views, are merely advisory and not legally required.⁸²

As nonbinding guidance documents, agency policies on tribal consultation explicitly disclaim the creation of any legal rights. The Army Corps of Engineers' Regulatory Program Tribal Consultation Policy contains the disclaimer that it "is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law."⁸³ Other agencies playing a role in regulating and permitting infrastructure development, including the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, and the Environmental Protection Agency, adhere to tribal consultation policies containing a

⁸⁰ 54 U.S.C. § 302706; Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,360 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.2).

⁸¹ See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (describing consultation requirements without discussing legal consequences from the failure to comply); see also Memorandum on Government-to-Government Relationship With Tribal Governments, *supra* note 60 ("[T]he head of each executive department and agency . . . shall continue to ensure to the greatest extent practicable and as permitted by United States law that the agency's working relationship with federally recognized tribal governments respects the rights of self-government and self-determination . . ."); Memorandum on Tribal Relations, *supra* note 61 (directing agency heads to submit plans of action and progress reports to the Director of the Office of Management and Budget "to the extent permitted by law and consistent with [agencies'] statutory and regulatory authorities.").

⁸² See McCann, *supra* note 74, at 438 ("Agencies do not have to actually implement tribes' recommendations; they are just required to listen to what tribes have to say. Agencies have the discretion to ignore, as long as they can show a meaningful consultation occurred.")

⁸³ Memorandum from Thomas P. Bostick, Lieutenant General, U.S. Army Corps of Engineers on Tribal Consultation Policy 6 (2012) (on file with the U.S. Army). The Corps Policy also refers to broader Department of Defense consultation policies which offer the same disclaimer.

functionally identical disclaimer, marking those policies as not legally binding guidance documents.⁸⁴

Given the nonbinding nature of consultation policies and agreements, enforcement of meaningful and substantive consultation—at least in the administrative context—falls to the consulting agency. Consultation cannot work because agencies have no incentive to self-regulate or to limit their own discretion to consult only perfunctorily. Characterization of tribal consultation as a “box-checking exercise” is rooted in reality.⁸⁵ Any hope of successful consultation rests upon agency “sincerity”; “[d]oes the agency or project proponent truly want to know what Indians think about a particular project or issue? Or are they simply checking the box ‘Have you consulted?’.”⁸⁶ There is no reliable agency self-regulation mechanism to guarantee sincerity and good faith.

The absence of administrative checks on consultation failures may be part of a broader trend of agency practice that departs from “the series of assumptions” codified in the Administrative Procedure Act.⁸⁷ Daniel Farber and Anne Joseph O’Connell contrast these traditional administrative law assumptions with the current status of the federal administrative state:

[Traditional] assumptions call for statutory directives to be implemented by an agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation is presumed to be through statutorily

⁸⁴ U.S. DEP’T OF ENERGY, DOE O 144.1, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 6 (2009), <https://www.energy.gov/sites/prod/files/DOE%20O%20144.1.pdf> [<https://perma.cc/2RUH-RG5S>]; U.S. DEP’T OF HOMELAND SEC., TRIBAL CONSULTATION POLICY § V(B) (2011) https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf [<https://perma.cc/C6Q3-VNHL>]; Tribal Government-to-Government Consultation Policy, 81 Fed. Reg. 40,893, 40,897 (Jun. 23, 2016); U.S. DEP’T OF THE INTERIOR, POLICY ON CONSULTATION WITH INDIAN TRIBES 14 (2011), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf> [<https://perma.cc/ZAN9-CSY4>]; U.S. ENV’T PROTECTION AGENCY, POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES: GUIDANCE FOR DISCUSSING TRIBAL TREATY RIGHTS 1 (2016), https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf [<https://perma.cc/5GWP-5QLT>]. Interestingly, the Department of the Interior undertook a nonbinding quasi-notice-and-comment process in developing its policy, soliciting and allegedly considering comments from over twenty tribal governments prior to issuing its 2011 policy as a response to the 2009 memorandum from President Obama. For a list of comments by section, see *Tribal and Public Comments*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/tribes/Tribal-and-Public-Comments> [<https://perma.cc/Y6HS-5WP9>] (last visited Feb. 3, 2021).

⁸⁵ Rowe, Finley & Baldwin, *supra* note 19, at 17.

⁸⁶ DARBY C. STAPP & MICHAEL S. BURNEY, TRIBAL CULTURAL RESOURCE MANAGEMENT: THE FULL CIRCLE TO STEWARDSHIP 119 (2002).

⁸⁷ Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1154 (2014).

mandated procedures and criteria, where the final result can then be reviewed by the courts to see if the reasons given by the agency at the time of action match the delegated directions. Yet, there are often statutory and executive directives to be implemented by multiple agencies, frequently missing confirmed leaders, where practical decision-making authority may rest outside of those agencies. The process of implementation also follows mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts.⁸⁸

Farber and O’Connell later list the costs that this shift inflicts on administrative law. Although written from a general administrative law perspective, this list could easily be read as an enumeration of the negative consequences of cursory and meaningless consultation: “loss of transparency for the regulated parties and the public; greater difficulty of congressional oversight . . . ; decreasing influence of the agency’s unique expertise and knowledge of the record; and blurring or undermining delegation as the agency’s statutory mandate is diluted by other policy and political goals.”⁸⁹ Agencies’ failure to adequately engage tribes as governments impacted by major infrastructure projects may be part of a broader trend of agency action largely beyond the reach of the APA, leaving impacted parties without substantial recourse when agencies fail to adequately self-regulate.

Emily Hammond and David Markell identify three metrics for assessing the legitimacy of agency procedure (largely) absent judicial review.⁹⁰ In other words, in the substantial discretionary space of agency action unlikely to face judicial review, how can we evaluate whether an agency is adequately self-regulating? Hammond and Markell’s three metrics are [1] how the procedure is used; [2] agency responsiveness to concerns and reason-giving for decisions; and [3] substantive outcomes of the procedure.⁹¹ Application of all three metrics suggest legitimacy problems with consultation. Metric [1] involves consideration of the frequency with which citizens use the procedure and the substantive nature of that use; although tribal interest in engagement with agencies on the impact of infrastructure projects is high—and rising—that interest persists in spite of barriers to engagement that agencies are in the best position to mitigate, and the frequency of quality consultation is far lower than it could and should be.⁹² Metric [2] evaluates agency responsiveness to expressed concerns and the

⁸⁸ *Id.* at 1154–55.

⁸⁹ *Id.* at 1175.

⁹⁰ Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV’T L. REV. 313, 327–330 (2013).

⁹¹ *Id.* at 328.

⁹² *Id.* at 328–29; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 16, at 20–27.

degree of reason-giving for its decisions; tribes routinely point to poor agency communication, agency failure to consider tribal perspectives, and lack of agency accountability as significant barriers to the consultation process.⁹³ Metric [3] evaluates the degree to which the process meets substantive statutory goals and whether results are distributive and non-arbitrary; in this aspect, consultation presents its most extreme failures, given that results depend on agency attitude and willingness to consult early in the process and that agencies face increasing numbers of challenges for failure to consult.⁹⁴

Agency attempts to improve accountability to tribes during the infrastructure project consultation process, including attempts at collective oversight, have yet to pay dividends. The purpose of creating FPISC was to coordinate interagency permitting and environmental review for large infrastructure projects, and in December 2017 the FPISC Best Practices Report for fiscal year 2018 recommended creating a central database and notification system of areas of tribal interest and tribal consultation contacts.⁹⁵ Despite President Donald Trump's 2017 Executive Order directing agencies to implement FPISC's annual best practices, there has been no decision or movement made on creating this central database.⁹⁶

B. Judicial Review

Second, consultation fails because there is no meaningful judicial review acting as a check on agencies failing to engage tribes in a meaningful capacity.

⁹³ Hammond & Markell, *supra* note 90, at 329; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 22–23.

⁹⁴ Hammond & Markell, *supra* note 90, at 329–30; STAPP & BURNEY, *supra* note 86, at 119–20; Eid, *supra* note 14, at 600; *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2 (“According to the National Congress of American Indians, federal approval of certain infrastructure projects historically had negative effects on tribal communities, and tribes’ knowledge and expertise can help ensure that infrastructure projects are completed in a timely manner to avoid negative impacts on tribal resources and reduce the risk of subsequent disagreement or litigation.”).

⁹⁵ 42 U.S.C. § 4370m-1(c)(2)(B); FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018, at 4 (2017), <https://cms8.permits.performance.gov/sites/permits.dot.gov/files/2019-10/fast-41fy-2018best-practices-report.pdf> [<https://perma.cc/SH54-2UFC>]; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 35.

⁹⁶ Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464–65 (Aug. 24, 2017). FPISC's inaction persists despite agencies' alleged support for such a central information and notification system and suggestions that individual agency systems could be scaled up to create a central system for all agencies participating in the large infrastructure permitting and planning process. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 35–37.

1. Arbitrary and capricious review under the APA

Judicial review is rarely adequate to the task of enforcing the tribal right to meaningful engagement. Before seeking judicial review, tribes—like any party hoping to challenge agency action—generally need to exhaust any available administrative remedies.⁹⁷ When a tribe wishes to bring a failure-to-consult claim under NHPA or NEPA, the exact requirements for exhaustion are not clear, but relevant case law suggests tribes must explicitly attempt to initiate consultation.⁹⁸ Agency publication of notices of project approval or environmental assessments under NHPA or NEPA are adequate notice to interested tribes for purposes of the exhaustion requirement.⁹⁹

97

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section ... unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704; *see also* 2 CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES § 6:24 (2003), Westlaw (database updated Aug. 2020) (“When review is sought under the general review provisions of the Administrative Procedure Act, the ‘agency action’ must be ‘final agency action.’”). NHPA and NEPA do not statutorily require that administrative remedies be exhausted, and thus courts have discretion to hear claims on the merits without exhaustion of such remedies, but often do not. *See, e.g.,* Winnemem Wintu Tribe v. U.S. Dep’t of the Interior, 725 F. Supp. 2d 1119, 1139 (E.D. Cal. 2010) (“[T]o bring a claim under the APA for a violation of the NEPA, plaintiffs must show that they have exhausted available administrative remedies prior to bringing an action in federal court.”). *But see* Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs, 194 F. Supp. 2d 977, 992 (D.S.D. 2002) (“The NHPA does not *require* the Tribe to exhaust its administrative remedies prior to seeking judicial review Thus, it is within the Court’s discretion whether this action should be dismissed for failure to exhaust administrative remedies.” (citations omitted)).

⁹⁸ *See* Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs, No. CV 14-1667 PSG, 2015 WL 12659937, at *19 (C.D. Cal. June 30, 2015) (“[P]laintiffs were required to exhaust their administrative remedies by bringing the Santa Ynez Band’s interest in the Project before the Corps prior to filing this lawsuit under the APA.”).

⁹⁹ *Id.*; *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384–85 (1947) (“Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.”); Hendrick Med. Ctr. v. Azar, 950 F.3d 323, 327 (5th Cir. 2020) (“Hendrick received notice via the Federal Register but failed to request correction of its wage data by the published deadline in accordance with the established process under the statute. Thus, the Board’s determination that it did not have jurisdiction over Hendrick’s appeal for failure to exhaust administrative remedies was correct.”); Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364–65 (9th Cir. 1990) (“Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.” (citations omitted)).

Even if tribes prove exhaustion of administrative remedies through appeal to consulting agencies, judicial review has limited effect. Most legal challenges for failure to consult fall under the Administrative Procedures Act.¹⁰⁰ NEPA provides no private right of action, and therefore claims for failure to consult during the NEPA environmental review process must be brought under the APA.¹⁰¹ Courts are split on whether NHPA provides a private right of action; in more recent cases, the Ninth and D.C. Circuits have held that NHPA provides no private right of action and that claims for failure to consult during the Section 106 review process must be brought under the APA.¹⁰² Though beyond the scope of this Comment, tribal claims for failure to consult during large infrastructure project planning and permitting have also been brought under both the Religious Freedom Restoration Act and a 2017 Federal Communications Commission order.¹⁰³

Under the APA, a reviewing court considering tribal claims of inadequate consultation under NEPA and—in most circuits—NHPA will limit review to whether agency consultation was arbitrary and capricious.¹⁰⁴ This

¹⁰⁰ See Rowe, Finley & Baldwin, *supra* note 19, at 42–3 (describing habitual practice of tribal challenges to agency decisions under the APA).

¹⁰¹ Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990).

¹⁰² See Shanks v. Dressel, 540 F.3d 1082, 1092 (9th Cir. 2008) (“Section 106 of the NHPA does not create a private right of action against the federal government.”); Karst Env't. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (“NHPA, like NEPA, contains no private right of action, [so] we agree with the Ninth Circuit that NHPA actions must also be brought pursuant to the APA.”); Sisseton-Wahpeton Oyate v. U.S. Dep't of State, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009) (“I find that no private right of action was created by the NHPA, and therefore, this court can consider a violation of NHPA, like NEPA, only within the confines of the APA.”). *But see* Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991) (“This Court, along with other courts of appeals, has recognized that federal question jurisdiction and a private right of action generally exists in actions arising under the Preservation Act.”); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989) (“Bywater correctly observes that the NHPA expressly permits private suits outside the APA review process”); Brewery Dist. Soc'y v. Fed. Highway Admin., 996 F. Supp. 750, 756 (S.D. Ohio 1998) (“Plaintiffs have a private right of action in this case against Defendant FHA under the NHPA to ensure compliance with the provisions of that statute.”).

¹⁰³ See Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1048 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008) (upholding Navajo, Hopi, Havasupai, and Hualapai Nation claim under the Religious Freedom Restoration Act); Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1107, 1110, 1118 (D.C. Cir. 2019) (considering though failing to reach Oceti Sakowin claim that FCC failed to consult as required by its own guidance document).

¹⁰⁴ See 5 U.S.C. § 706 (stating that a reviewing court should “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

standard of review is highly deferential to agencies in interpretation of both authorizing statutes and the agency's own regulations.¹⁰⁵

2. NHPA

NHPA's Section 16 review process requires federal agencies to "consult with any Indian tribe . . . that attaches religious and cultural significance to property" potentially impacted by an undertaking under the meaning of the statute.¹⁰⁶ Agencies must make a "reasonable and good faith effort" to identify potentially impacted tribes, and so long as some demonstrable effort was made, courts have determined that the agency is not at fault for failing to identify a tribe and to consult with tribe leaders.¹⁰⁷ Consultation requires that a potentially impacted tribe have "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."¹⁰⁸ If the agency attempts to initiate consultation through direct contact—even through a form letter—and the tribe declines to respond, the agency has discharged its statutory and regulatory obligation to consult.¹⁰⁹

¹⁰⁵ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984) ("Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'").

¹⁰⁶ 54 U.S.C. §§ 302706, 300308.

¹⁰⁷ See, e.g., *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. CV 14-1667 PSG, 2015 WL 12659937, at *20 (C.D. Cal. June 30, 2015) ("[R]egardless of Plaintiffs' failure to properly raise this issue before the Corps during the administrative process, the Corps satisfied its obligations under NHPA because it made a 'reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects' and did not identify the Santa Ynez Band; therefore, the applicable regulation did not require consultation with the Santa Ynez Band." (citation omitted)).

¹⁰⁸ 36 C.F.R. § 800.2(c)(3)(i) (2019).

¹⁰⁹ See, e.g., *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728, 749 (D.C. Cir. 2019) ("[I]f a Tribe refuses to respond when the Commission requests its views on an application, the Commission has discharged its obligation of direct Commission-to-Tribe consultation."); *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1292 (D.N.M. 2008) ("BLM sent letters to 51 different tribal governments and 29 other tribal officials to inform them of the project and to seek their input on concerns and issues BLM should consider during the planning process BLM sent copies of the draft RMP and EIS as well as the proposed RMP and Final EIS to all tribal entities that requested copies.").

Though it should be noted that mere contact between agency and tribe is not sufficient for Section 106 consultation, reviewing courts generally require only that consultation constitute some form of individualized discussion between the tribe and the agency.¹¹⁰ This discussion may take many forms, including listening sessions, conference calls, or remote or in-person meetings.¹¹¹ Consultation may be generalized and need not involve discussion of every installation or site.¹¹² Likewise, consultation need not involve every chapter of large tribes.¹¹³ Despite the regulatory directive to begin consulting early in the Section 106 process, delayed consultation just prior to project approval has not been found to be arbitrary and capricious.¹¹⁴ In *Walsh*

¹¹⁰ See, e.g., *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1118–19 (S.D. Cal. 2010) (“BLM's invitation to ‘consult,’ then, amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings. Because of the lack of information, it was impossible for the Tribe to have been consulted meaningful as required in applicable regulations.”). But see, e.g., *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 746 (“[I]nitial contact will lead to voluntary direct discussions through which applicants and tribes . . . will resolve questions involving the presence of relevant historic properties and effects on such properties . . .” (citation omitted)).

¹¹¹ *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 750–51.

¹¹² See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) (“The Tribe . . . did not have an absolute right to participate in cultural surveying at every permitted undertaking, as it seems to argue. The Advisory Council regulations direct the agency to ‘take into account past planning, research, and studies’ in making these types of determinations, and that is just what the Corps did here. It gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it.” (citation omitted)).

¹¹³ See, e.g., *San Juan Citizens All.*, 586 F. Supp. 2d at 1293 (“Simply because BLM chose to consult with individual Navajo Chapters in other cases does not demonstrate that it was legally obligated to consult all Chapters in all situations.”).

¹¹⁴ See, e.g., *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 933 (S.D. Cal. 2013) (“[N]o request for meetings by the Tribe was made or initiated until December 2011. Once the first meeting was held on January 31, 2012, subsequent monthly meetings were held [over the three months until permit approval Therefore, the Court concludes that the BLM did not fail to adequately conduct Section 106 consultations.”). Note that any delay in tribal communication of concerns until after approval of a federal undertaking has not prompted a finding of inadequate consultation:

[W]e think it would undermine the policies behind the laches doctrine, as well as the justifications for requiring an agency to conduct additional NHPA review when previously undiscovered cultural resources are identified, to treat the asserted violation of this “ongoing” duty in this case as distinct from the claim that the original section 106 process was defective for the purposes of determining inexcusable delay. Had the Tribe participated in the process, the Coalition could not now claim that the information that it subsequently brought to the Forest Service's attention was “new.” Indeed, a contrary result would give parties that an agency seeks to consult under NHPA incentives *not* to participate in the process: even if the agency would, after appropriate consideration of the

v. *U.S. Army Corps of Engineers*, the court found that the Bureau of Land Management satisfied its Section 106 consultation requirement even though it issued the development permit before concluding its meetings with Plaintiffs.¹¹⁵

Failure of agencies to consult beyond an initial discussion has not been considered arbitrary and capricious by reviewing courts. Should the parties disagree on the potential adverse impact an undertaking will have on a property of historic, religious, or cultural significance, the agency is nonetheless free to follow its own conclusions and proceed with project approval and construction.¹¹⁶ NHPA “only requires that an agency take procedural steps to identify cultural resources; it does not impose a substantive mandate on the agency to protect the resources.”¹¹⁷ After the programmatic agreement is signed for a given project, the drafting agency has discharged its Section 106 obligations, even to a tribe that does not sign the agreement.¹¹⁸

3. NEPA

NEPA environmental review requires consideration of environmental impact on cultural resources which, at least in part, must involve consultation with potentially adversely impacted tribes.¹¹⁹ Consultation in the process of environmental assessment must involve a “full and fair discussion” of the potential effects of the project on impacted resources.¹²⁰ This is part of the broader requirement that, to comply with NEPA, federal agencies take a “hard look” at the environmental impacts of any planned action.¹²¹ This “hard

information, go forward with the project, an entity such as the Tribe could hold back some evidence of the existence of cultural resources until after the project had been approved, and then receive a second bite at the apple

Apache Survival Coal. v. United States, 21 F.3d 895, 912 (9th Cir. 1994).

¹¹⁵ 757 F. Supp. 781, 786–89 (W.D. Tex. 1990).

¹¹⁶ See, e.g., *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 746 (“[I]f an applicant and an Indian tribe . . . disagree regarding whether an undertaking will have an adverse effect on a historic property of religious and cultural significance, or if the tribe . . . does not respond to the applicant’s inquiries, the Commission steps in to consult and ultimately ‘make a decision regarding the proposed undertaking.’” (citation omitted)).

¹¹⁷ *San Juan Citizens All.*, 586 F. Supp. 2d at 1294.

¹¹⁸ See generally *Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-cv-0268-LRH-WGC, 2016 WL 4497756 (D. Nev. Aug. 26, 2016).

¹¹⁹ 36 C.F.R. § 800.8 (2019).

¹²⁰ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,363, 43,366 (July 16, 2020) (to be codified at 40 C.F.R. §§ 1502.1, 1502.16).

¹²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted).

look” does not impose a duty to reach particular results or to follow outside—including tribal—recommendations.¹²²

Courts reviewing tribe-agency consultation on the environmental impacts on cultural resources require consideration of all identified resources but no particular quality of consultation or level of deference to tribal concerns.¹²³ Consultation may be generalized and need not involve discussion of every installation or site.¹²⁴ An agency’s environmental assessment may consider impacts on specific historic sites identified by tribes but not on surrounding areas. This is exemplified in *South Fork Band Council v. U.S. Department of the Interior*, where the Bureau of Land Management claimed its environmental impact statement satisfied Plaintiffs’ concerns in arranging for access to specific sacred sites but not to the entire mountain on which those sites were located, despite reference to the entire mountain’s significance in consultation records.¹²⁵ As with tribe-agency engagement under NHPA, timely consultation may involve agency contact as little as one month before publishing its environmental assessment or environmental impact statement.¹²⁶

C. Legislative Oversight

Third, consultation fails because Congress defers to agencies in creating their own nonbinding policies and Congressional oversight neglects to protect tribal interests. Congress has oversight mechanisms at its disposal for conducting inquiry into agency action and policy, but so long as authorizing statutes direct agencies to engage in consultation—fundamentally a discretionary, nonbinding form of tribe-agency engagement—there is no incentive for agency change.

¹²² *Id.*; see also *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1158 (9th Cir. 2017) (“The Department does not believe this proposed action would preclude the Tribes or any entitlement holder from using their Colorado River entitlement. The interim surplus criteria will not alter the quantity or priority of Tribal entitlements.”).

¹²³ See, e.g., *Indigenous Env’t Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 590 (D. Mont. 2018) (holding that the Department of State’s environmental impact statement needed to include a survey of potential cultural resources impacted, but not requiring any additional action or specifying the means of tribal consultation).

¹²⁴ See, e.g., *Diné Citizens Against Ruining Our Env’t v. Jewell*, 312 F. Supp. 3d 1031, 1107–08 (D.N.M. 2018) (“A SHPO consultation is thus not mandatory for every well, but only for wells that the BLM Field Manager is considering expanding the APE. Accordingly, the BLM’s failure to consult the SHPO for every well does not, by itself, demonstrate that the BLM acted contrary to law or arbitrarily and capriciously.”).

¹²⁵ 588 F.3d 718, 724 (9th Cir. 2009).

¹²⁶ See, e.g., *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592, 608–09 (9th Cir. 2010) (finding that the BLM met its NEPA consultation requirement despite waiting a full year after the developer applied for an amendment to mining plans to contact the tribe).

1. Oversight through the Government Accountability Office

After tensions between the Standing Rock Sioux Tribe, Dakota Access, and authorizing federal agencies spilled over into physical confrontation and extensive litigation in the federal courts, 26 members of Congress asked the GAO to produce a report on federal agencies' procedures for consulting with tribes about major infrastructure projects.¹²⁷ An "arm of Congress . . . totally independent of the executive," GAO acts as a mechanism for congressional oversight.¹²⁸ GAO is charged by statute with "evaluat[ing] the results of a program or activity the Government carries out under existing law" when asked to do so by a congressional committee.¹²⁹ In this case, twenty-two members of the House of Representatives, and leaders of the House Subcommittee for Indigenous Peoples of the United States, House Committee on Natural Resources, Senate Committee on Indian Affairs, and Senate Committee on the Budget commissioned the GAO in September 2016 to inquire into the consultation policies of twenty-one agencies.¹³⁰ Following their investigation, the GAO identified a series of barriers to consultation identified by agency officials and tribal governments, and subsequently made twenty recommendations to seventeen agencies, two recommendations to the FPISC, and one request for congressional consideration.¹³¹ Agencies that responded to GAO recommendations generally agreed with the Office's suggestions and expressed commitment to revisiting consultation policies.¹³² The GAO Report serves as a useful tool for identifying problems with tribe-agency consultation but lacks teeth as an enforcement mechanism. Unfortunately, GAO findings are not binding upon agencies or upon Congress, and their opinions are only persuasive authority in federal courts.¹³³

2. Oversight through congressional hearings

Congress also exercises oversight over tribe-agency consultation in holding committee hearings. Since 2016, Congress has held countless hearings referencing both the Standing Rock conflict and the need for effective tribe-agency consultation in general.

First, the House Subcommittee on Energy held a hearing on Standing Rock to provide an information-sharing platform for both Standing Rock

¹²⁷ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2, 67–68.

¹²⁸ 7 CHARLES H. KOCH, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 7909 (1999), Westlaw (database updated July 2020).

¹²⁹ 31 U.S.C. § 717.

¹³⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2, 67–68.

¹³¹ *Id.* at 57–59.

¹³² *Id.* at 60–65.

¹³³ KOCH, *supra* note 128, § 7909.

Sioux Tribe council and Energy Transfer Partners to share their thoughts on the breakdown in consultation.¹³⁴ More recently, the House Subcommittee on Indigenous Peoples held a hearing on the role of tribal consultation under NHPA and other federal laws for protection of tribal resources impacted by construction of the border wall between the United States and Mexico; committee members heard testimony from a representative of the Department of the Interior, a construction consultant, a representative from the Tohono O'odham Nation in Arizona, and two scholars with expertise on tribal resources and the consultation process.¹³⁵

Second, in the wake of this increased publicity on agency consultation failures, agencies have also been called before congressional committees to give testimony on consultation policies. In February 2017 Alex Amparo, then Assistant Administrator for the Department of Homeland Security, appeared before the Senate Committee on Indian Affairs to provide testimony on consultation policy improvements adopted by FEMA, the Federal Emergency Management Agency.¹³⁶

Third, consultation is regularly raised in the course of appropriations hearings. For fiscal years 2018, 2019, and 2020, House appropriations hearings for Energy, Water Development, Agriculture, Rural Development, the FDA, Interior, and Environment all involved discussion of tribe-agency consultation.¹³⁷

¹³⁴ *Modernizing Energy and Electricity Delivery Systems: Challenges and Opportunities to Promote Infrastructure Improvement and Expansion: Hearing Before the Subcomm. on Energy of the H. Comm. on Energy & Com.*, 115th Cong. 142–46, 167–72 (2017) (statements of Chad Harrison, Councilman At-Large, Standing Rock Sioux Tribe, and Joey Mahmoud, Executive Vice President and Project Executive, Dakota Access Pipeline, Energy Transfer Partners).

¹³⁵ *Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. (2020) (statements of Scott Cameron, Principal Deputy Assistant Secretary for Policy, Management, & Budget, U.S. Dep't of the Interior, Steve Hodapp, Independent Contractor & Environmental Specialist, Ned Norris, Jr., Chairman, the Tohono O'odham Nation, Sarah Krakoff, Moses Lasky Professor of Law, University of Colorado Law School, and Shannon Keller O'Loughlin, Executive Director, Association on American Indian Affairs).

¹³⁶ *Emergency Management in Indian Country: Improving FEMA's Federal Tribal Relationship with Indian Tribes: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 5–11 (2017) (statement of Alex Amparo, Assistant Administrator for Recovery, Office of Response and Recovery, Federal Emergency Management Agency, U.S. Department of Homeland Security).

¹³⁷ *Energy and Water Development Appropriations for 2018, Part 1B: Hearing Before the Subcomm. on Energy, Water Dev. and Related Agencies Appropriation of the H. Comm. on Appropriations*, 115th Cong. 251 (2017); *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 2018, Part 1C: Hearing Before the Subcomm. on Agriculture, Rural Development, FDA and Related Agencies Appropriations of the H. Comm. on Appropriations*, 115th Cong. 223 (2017); *Interior, Environment, and*

Consideration of the tribe-agency consultation relationship in committee hearings is—at least facially—encouraging. Committee hearings may play an “information-forcing agency oversight” role in shining a light on inadequate agency procedure.¹³⁸ The problem with expecting this information-forcing to result in change is that, in the face of vague statutes and the understanding that consultation policy is nonbinding, hearing oversight lacks the force to change agency priorities. As Christopher Walker writes in his article on legislative impact on the administrative state,

Congress often uses hearings, information requests, investigations, audits, and so forth to compete with the other branches of government in the public sphere. But if Congress does not also use these oversight tools to regularly pass laws, I fear the legitimacy of the toolbox is called into question. Without the threat of legislative action, moreover, the efficacy of this toolbox in influencing agency action is severely diminished. These fears are heightened when members of Congress, or congressional committees, use these oversight tools to extract policy outcomes from federal agencies that are contrary to the wishes of the collective Congress.¹³⁹

Providing a platform for sharing insights and experiences about tribe-agency consultation is inadequate to the task of making consultation work.

Related Agencies Appropriations for 2018, Part 3A: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations, 115th Cong. 11, 36 (2017); *Interior, Environment, and Related Agencies Appropriations for 2019, Part 7: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations*, 115th Cong. 34, 158–59, 171, 198, 207, 281, 292, 317, 375, 424 (2018); *Interior, Environment, and Related Agencies Appropriations for 2020, Part 7: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations*, 116th Cong. 124–25 (2019); *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 2020, Part 1C: Hearing Before the Subcomm. on Agriculture, Rural Development, FDA and Related Agencies Appropriations of the H. Comm. on Appropriations*, 116th Cong. 192 (2019); *Energy and Water Development Appropriations for 2020, Part 1B: Hearing Before the Subcomm. on Energy, Water Development, and Related Agencies Appropriation of the H. Comm. on Appropriations*, 116th Cong. 71, 280 (2019).

¹³⁸ See Catherine M. Sharkey, *State Farm “With Teeth”*: Heightened Judicial Review in the Absence of Executive Oversight, 89 NYU L. REV. 1589, 1657–59 (2014) (describing the information forcing role of congressional hearings, inspector general audits, and GAO investigations in the SEC context).

¹³⁹ Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1120 (2018).

3. Continued use of the consultation device

Despite Congress' inadequacy to police tribe-agency consultation and widespread dissatisfaction with consultation as an engagement device, Congress continues to draft statutes with consultation requirements. During the four years from April 2016 through March 2020, Congress enacted twenty-eight public laws creating new tribal consultation requirements.¹⁴⁰

¹⁴⁰ The twenty-eight public laws enacted between April 2016 and March 2020 are as follows:

1. Integrated Public Alert and Warning System Modernization Act of 2015, Pub. L. No. 114-143, § 526, 130 Stat. 327 (codified as amended at 6 U.S.C. § 3210).
2. Native American Children's Safety Act, Pub. L. No. 114-165, § 2, 130 Stat. 415 (2016) (codified as amended at 25 U.S.C. §§ 3201, 3207).
3. Native American Tourism and Improving Visitor Experience Act, Pub. L. No. 114-221, § 4, 133 Stat. 847 (2016) (codified as amended at 25 U.S.C. § 4353).
4. 21st Century Cures Act, Pub. L. No. 114-255, § 6002, 133 Stat. 1033 (2016) (codified as amended at 42 U.S.C. § 290aa).
5. Federal Property Management Reform Act of 2016, Pub. L. No. 114-318, § 623, 130 Stat. 1608 (codified at 40 U.S.C. § 623).
6. Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, §§ 1120, 3225, 4004, 130 Stat. 1628 (2016) (codified as amended in scattered sections of 16, 25, and 33 U.S.C.).
7. Weather Research and Forecasting Innovation Act of 2017, Pub. L. No. 115-25, §§ 201, 412, 131 Stat. 91 (codified as amended at 15 U.S.C. §§ 313, 8548).
8. Indian Employment, Training and Related Services Consolidation Act of 2017, Pub. L. No. 115-93, §§ 7, 15, 131 Stat. 2026 (codified as amended at 25 U.S.C. § 3406).
9. Law Enforcement Mental Health and Wellness Act of 2017, Pub. L. No. 115-113, §§ 2, 4, 131 Stat. 2276 (codified as amended at 34 U.S.C. §§ 10101, 10381, 50101).
10. John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018; VA MISSION Act of 2018, Pub. L. No. 115-182, § 209, 132 Stat. 1393 (codified as amended at 38 U.S.C. § 8122).
11. Strengthening Career and Technical Education for the 21st Century Act, Pub. L. No. 115-224, §§ 112, 122, 133, 219, 132 Stat. 1563 (2018) (codified as amended at 20 U.S.C. §§ 2323, 2342, 2354, 2399).
12. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, §§ 1129, 1214, 132 Stat. 3765 (codified as amended at 33 U.S.C. §§ 7020, 2232).
13. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-271, § 7031, 132 Stat. 3894 (2018) (codified as amended at 42 U.S.C. § 290ee-5).
14. Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, § 2202, 132 Stat. 4168 (2018) (codified at 6 U.S.C. § 652).
15. Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115-325, §§ 101-03, 132 Stat. 4445 (codified as amended at 25 U.S.C. §§ 3502-04).
16. Endangered Salmon Predation Prevention Act, Pub. L. No. 115-329, § 3, 132 Stat. 4475 (2018) (codified as amended at 16 U.S.C. § 1389).
17. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4003, 132 Stat. 4624 (codified as amended at 7 U.S.C. §§ 2012-13).

Though infrastructure-impacting legislation is somewhat disproportionately represented, consultation requirements were also codified in legislation related to health care, criminal justice, agriculture, and education. Codification of consultation as a means of engagement between federal agencies and tribes explicitly sanctions current policies and implicitly denies that consultation as a device is at the root of conflict between agencies and tribes in and out of court. Congressional action creating consultation obligations undermines any positive effects flowing from congressional oversight through GAO investigations and congressional hearings. In fact, continued use of consultation in federal statutes actively privileges a model of tribe-agency engagement that cannot work and that directly contravenes the spirit of executive orders and memoranda requiring respect for sovereignty of tribes potentially impacted by large infrastructure projects.

III. RADICAL NONCOMPLIANCE DICTATES THE NEED FOR NEW ENGAGEMENT DEVICES

In the face of consultation's inadequacy, Congress must employ different engagement devices to facilitate tribe-agency engagement in a manner respectful of tribal sovereignty. The frequency with which Congress uses consultation requirements suggests that the device has been successful, but the historical record tells a different story. Below, I suggest possible paths forward by exploring alternative engagement mechanisms with the potential

-
18. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 201, 132 Stat. 5123 (codified as amended at 34 U.S.C. § 11114).
 19. Ashanti Alert Act of 2018, Pub. L. No. 115-401, §§ 203–04, 132 Stat. 5336 (codified at 34 U.S.C. § 21903–04).
 20. Johnson-O'Malley Supplemental Indian Education Program Modernization Act, Pub. L. No. 115-404, § 7, 132 Stat. 5349 (2018) (codified as amended at 25 U.S.C. § 5348).
 21. Museum and Library Services Act of 2018, Pub. L. No. 115-410, § 210, 132 Stat. 5412 (codified as amended at 20 U.S.C. § 9108).
 22. Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435, § 312, 132 Stat. 5529 (codified at 5 U.S.C. § 312).
 23. John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1111, 133 Stat. 580 (2019) (codified at 54 U.S.C. § 320301).
 24. Pandemic and All-Hazards Preparedness and Advancing Information Act of 2019, Pub. L. No. 116-22, § 210, 133 Stat. 905 (codified as amended at 42 U.S.C. § 234).
 25. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 2802, 133 Stat. 1198 (codified as amended at 10 U.S.C. § 2802).
 26. Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act, Pub. L. No. 116-99, §§ 2–3, 133 Stat. 3254 (2019).
 27. Grant Reporting Efficiency and Agreements Transparency Act of 2019, Pub. L. No. 116-103, § 6402–03, 133 Stat. 3266 (codified at 31 U.S.C. §§ 6402–03).
 28. Coronavirus Aid, Relief, and Economic Security Act, 2020, Pub. L. No. 116-136, § 601, 134 Stat. 281 (codified at 42 U.S.C. § 801).

to succeed where consultation has failed. First, a better engagement device should require agencies to make binding policy with attendant administrative protections to impacted tribes. Second, a better device should promote more rigorous judicial review while decreasing litigation.¹⁴¹ Third, it should permit greater congressional scrutiny.¹⁴²

Existing federal Indian law provides a spectrum of alternative engagement devices that better satisfy the above criteria: [1] negotiated rulemaking; [2] formal adjudication; [3] negotiation and compact; and [4] consent. Each of these is preferable to the current system of “box-checking” consultation in providing more robust oversight and protection for tribes. No single alternative device is appropriate in the universal way Congress insists consultation can work; each alternative operates well in some circumstances but not in others. There are also likely many more alternatives available. In creating law, Congress must intentionally evaluate the needs of engagement in

¹⁴¹ Legally binding policies with clear imposition of rights owed regulated parties and duties owed by agencies would allow reviewing courts to consider APA procedural requirements (thus tying the requirement of more rigorous judicial review to the requirement of additional administrative procedure). More explicit statutes directing agencies to engage in rulemaking or adjudication would also ground more engaged arbitrary and capricious review, if for no other reason than that the court would have a detailed record of agency action to consider. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1339–40, 1343–44 (2001).

Alternatively, reframing the tribe-agency engagement process as an adjudication—or as having sufficient adjudicatory qualities—would allow reviewing courts to consider due process requirements. *Compare* *Londoner v. Denver*, 210 U.S. 373 (1908) (holding that due process protections are only applicable to government agency activities that are adjudicative in nature) *with* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that due process protections are applicable to administrative activities where a small number of people is exceptionally impacted, while rule-making activities impacting many people do not trigger due process protections). *See also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 886 (2007) (“[T]he procedural due process protections we associate with adjudicatory hearings do not apply to agency rulemakings any more than they apply to actions of legislators; that has been the understood import of *Bi-Metallic Investment Co. v. State Board of Equalization* for nearly a century.”).

A superior engagement device would also spur less litigation initiated by tribes, not because of any limitation in access to courts, but because of increased satisfaction in the tribe-agency engagement process. The more equitable the balance of power between tribe and agency, the less likely it is that tribes will need to seek recourse in the federal courts.

¹⁴² Nonbinding policymaking more easily evades congressional review; for example, guidance documents and other forms of nonbinding rules are routinely subject to less congressional oversight than are binding rules. Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 508 (2012); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 381 (2009). If Congress passed laws requiring agencies to engage in binding rulemaking or adjudication, it would be more feasible for traditional methods of congressional oversight to evaluate the adequacy of agency fulfillment of their statutory duties. For example, the Congressional Review Act allows Congress to issue a joint resolution of disapproval for binding rules it wishes to overturn. 5 U.S.C. § 801.

each statute and evaluate which device will best maximize benefits and decrease harms.

A. Negotiated Rulemaking

Negotiated rulemaking incorporates a consultation model but requires by statute that agencies develop binding consultation rules through negotiation with tribal representatives. Executive Order 13,175 specifically named negotiated rulemaking as one possible device for promulgating binding consultation policies.¹⁴³ Agencies adopted negotiated rulemaking in the 1980s as an alternative to the fundamentally adversarial formal rulemaking process.¹⁴⁴ Congress passed the Negotiated Rulemaking Act in 1990, providing a framework for negotiated rulemaking that would still conform with APA Section 553.¹⁴⁵ In negotiated rulemaking, the promulgating agency creates a committee of representatives from impacted organizations and agencies; in this case, representatives from tribal governments would be important committee members.¹⁴⁶ The committee meets, with discussion on the record, to negotiate a proposed rule; consensus on the proposal means that proposed rule then goes on to be subject to the APA's notice-and-comment rulemaking procedures.¹⁴⁷ Theoretically, this would permit tribes to specify the consultation practices that would be most meaningful to them. "If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus."¹⁴⁸ The agency then may use the report in writing the proposed rule itself.¹⁴⁹ In most cases, agencies engaging in negotiated rulemaking do so by choice and out of statutory obligation.¹⁵⁰

¹⁴³ Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 9, 2000).

¹⁴⁴ Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1263–64 (1997).

¹⁴⁵ 5 U.S.C. §§ 561–70.

¹⁴⁶ Coglianese, *supra* note 144, at 1256–57.

¹⁴⁷ *Id.* at 1257; 5 U.S.C. § 553(c).

¹⁴⁸ 5 U.S.C. § 566.

¹⁴⁹ 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 4:36 (3d ed. 2010), Westlaw (database updated Feb. 2020).

¹⁵⁰ David Thaw, *Enlightened Regulatory Capture*, 29 WASH. L. REV. 329, 341 (2014). Here, Congress would need to require negotiated rulemaking. The Department of the Interior has a consultation policy that leaves the decision as to whether to employ consultation, negotiated rulemaking, or "other collaborative approach" to agency officials. That there is little evidence that DOI employs negotiated rulemaking in formulating policy with tribes is perhaps not surprising given this discretion. U.S. DEP'T OF THE INTERIOR, POLICY ON CONSULTATION WITH INDIAN TRIBES, *supra* note 84, at 10, 12.

Negotiated rulemaking with tribal committee members is already in place in some agencies. Congress currently requires that the Department of Housing and Urban Development (HUD), the Department of Transportation, the Department of the Interior, the Department of Health and Human Services, and the Department of Education engage in negotiated rulemaking procedures for specific regulations under a series of Native American Self-Determination Acts impacting funding allocation and distribution.¹⁵¹

Scholars' evaluations of negotiated rulemaking suggest it may be a viable alternative to nonbinding consultation policy. While several commentators are of the opinion that negotiated rulemaking is largely unsuccessful,¹⁵² some of these concerns are rooted in the theory that negotiated rulemaking prioritizes private interests of the parties involved over public needs.¹⁵³ But if tribes are both the participating parties and the impacted parties, this criticism suggests that negotiated rulemaking may be particularly well-suited for tribe-agency consultation. In fact, David Thaw cites implementation of the No Child Left Behind Act for schools funded by the Bureau of Indian Affairs as one of three noted successes of negotiated rulemaking, though there is no evidence of "success" beyond the fact that the process did yield regulations.¹⁵⁴

With negotiated rulemaking's success defined as any process resulting in a rule, it is best suited to tribe-agency engagement over projects with relatively low impact on the general public. In the absence of consensus, the backstop procedure is the typical notice-and-comment rulemaking process, meaning that tribal priorities and concerns may not be considered if overwhelmed by a large volume of public comments. It should be noted, however, that even notice-and-comment rulemaking without consensus would offer administrative procedural protections that exceed those offered by a consultation model.

B. Adversarial Administrative Adjudication

Unlike the implementation of negotiated rulemaking, a second alternative engagement device would completely eliminate consultation in favor of an administrative adjudication between the agency and the potentially impacted tribe. The process by which an agency seeking to approve a large infrastructure project approaches a tribe potentially impacted

¹⁵¹ 25 U.S.C. §§ 4116, 5328, 5367, 5397; 23 U.S.C. § 207.

¹⁵² See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1334–35 (1997) (suggesting that negotiated rulemaking produces neither better rules nor less post hoc litigation).

¹⁵³ William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1386 (1997).

¹⁵⁴ Thaw, *supra* note 150, at 345–47.

under NHPA and NEPA is an assessment of tribal and agency rights and duties, suggesting it may be considered an inherently adversarial and adjudicatory process.¹⁵⁵ In adjudication, administrative decision-making involves the application of preexisting standards to individualized facts, leading to the resolution of an individualized controversy or complaint.¹⁵⁶ Significantly, adjudications can still involve declarations of policy, while rulemaking may also have a quasi-adjudicative or “quasi-judicial” component; there is no bright line rule between the two categories as the APA might suggest.¹⁵⁷ Licensing and permitting are two common administrative proceedings that have a somewhat hybrid nature but are nevertheless considered adjudications for APA purposes.¹⁵⁸ The rulemaking-adjudication distinction is still significant, as different APA procedural protections accompany adjudications and rulemakings, with further differentiation based on whether the proceedings are formal or informal as defined by the APA.¹⁵⁹

Whether an adjudication is formal or informal will impact several factors, including whether the adjudication must be on the record, the impartiality required of the factfinder, the required statement of findings and conclusions, the evidence considered, and whether there is a requirement of right to cross-examination.¹⁶⁰ Equally significant is the requirement that, in adjudications or other “quasi-judicial” proceedings, agencies must accord due process protections to the complaining party.¹⁶¹ “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”¹⁶² Due process protections are not fixed in nature but are a function of the private and government interests at stake and the “risk of erroneous deprivation” of the private interest in a given dispute.¹⁶³

It would not be unreasonable to classify tribe-agency engagement over a proposed large infrastructure project as an adversarial administrative adjudication. An agency decisionmaker would apply NHPA and NEPA statutory and regulatory guidelines to the particular concerns of potentially impacted tribes in light of a particular proposed infrastructure project. The

¹⁵⁵ KOCH, *supra* note 128, at § 7305.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 5 U.S.C. § 551.

¹⁵⁹ See 5 U.S.C. § 553 (codifying procedural requirements for rulemaking, including requirement that the rulemaking be “on the record after opportunity for an agency hearing”); 5 U.S.C. § 554, 556–57 (codifying procedural requirements for adjudications, including requirements for formal adjudications “on the record after opportunity for an agency hearing”).

¹⁶⁰ *Id.* §§ 554–57.

¹⁶¹ Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978); United States v. Fla. E. Coast Ry. Co. 410 U.S. 224, 244–45 (1973).

¹⁶² Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

¹⁶³ *Id.*

decisionmaker would evaluate and determine prospective tribal rights and agency duties that must be guaranteed for the project to go forward. Derek Haskew makes a persuasive argument for classifying the tribe-agency engagement process as an administrative adjudication.¹⁶⁴ Haskew points out that both consultations and adjudications involve specific parties with adverse interests and can substantially impact use of tribal assets.¹⁶⁵ That tribes and federal agencies meet to consult as historic adversaries is undeniable.¹⁶⁶

Would additional APA and constitutional procedural protections offered by formal (or informal) adjudication make for a superior process? In a formal adjudication, the APA would provide tribes with a hearing on the record, including the timely notice of that hearing, the opportunity to submit facts and arguments and to call witnesses, relative guarantees of the impartiality of the presiding official, and the ability to rebut agency evidence and to conduct cross-examination as needed. Even if Congress determined via statute that these adjudications would be informal, judge-made determinations on the requirements of due process—given tribal property interests and the high deprivation risks of approving infrastructure projects without engagement with impacted tribes—may provide just as much process, including an in-person hearing.¹⁶⁷

Adjudication would be best suited to tribe-agency engagement between relatively few parties. When several tribes' interests are at stake, the fundamentally bi-polar administrative process would struggle to account for the priorities of all sovereigns. But when a small number of tribes must engage with federal agencies on a major project, adjudication provides clear benefits. The opportunity to engage in a procedurally complex adversarial proceeding against the agency, for proper determination of the steps that would be required to protect tribal interests before and during infrastructure development, would clearly provide better procedural protections. The role of Congress in statutorily recognizing tribal interests and in creating specific requirements for implementing agencies would likewise make true congressional oversight more feasible. And an adjudicative process would provide both more meaningful judicial review of the adjudicative decision and less litigation in the form of appeals to the federal courts (or at least less litigation than the current system engenders, given the lack of a forum for presentation of evidence and challenge of agency witnesses).

¹⁶⁴ Haskew, *supra* note 78, at 69–70, 73–74.

¹⁶⁵ *Id.* at 69.

¹⁶⁶ Tanana & Ruple, *supra* note 74, at 47.

¹⁶⁷ 5 U.S.C. §§ 554, 556–57.

C. Negotiation and Compact

The negotiation and compact model required by the Indian Gaming Regulatory Act (IGRA) provides a third alternative engagement device. IGRA requires that Class III gaming on tribal lands within a state must be “conducted in conformance with a Tribal-state compact entered into by the Indian Tribe and the State.”¹⁶⁸ If a tribe wishing to open a gaming facility on its lands requests that the state enter into a negotiation and compact process, the state must do so, and negotiate in good faith.¹⁶⁹ A tribal-state compact takes effect once approved by the Secretary of the Department of the Interior.¹⁷⁰ If the state fails to negotiate in good faith, the tribe may file suit against the state in federal court and ask the court to make a finding as to the state’s good faith effort.¹⁷¹ A finding of bad faith forces the parties to create a proposal within 60 days or, failing that, to submit to mediation to attempt to reconcile and create a compact.¹⁷² If the state refuses to waive sovereign immunity and consent to the suit, the tribe may alone submit a gaming proposal to the Secretary, giving the state sixty days to accept or to submit its own counter-proposal.¹⁷³ If the state does advance its own proposal, the Secretary sends the parties to mediation to reconcile the two proposals.¹⁷⁴ The Secretary then either accepts the mediator’s consolidated proposal or advances an alternate proposal within another sixty day period.¹⁷⁵

Compacts place a great deal of discretion in the hands of the Secretary of the Interior, making the negotiation and compact process an effective alternative device for Congress in situations where the Secretary can be a good arbiter of competing interests. In circumstances where there is, for example, a conflict of interest, federal courts act as the backstop for resolving tribe-agency disputes, and a judicial finding of bad faith triggers a mediation process that parallels the mediation following from a good faith negotiation that fails to reach consensus.¹⁷⁶ Use of negotiated compacts as an engagement device

¹⁶⁸ 25 U.S.C. § 2710(d)(1). Class III gaming includes slot machines, table casino games, and lotteries. *Id.* § 2703(8).

¹⁶⁹ *Id.* § 2710(d)(3)(A).

¹⁷⁰ *Id.* § 2710(d)(3)(B).

¹⁷¹ *Id.* § 2710(d)(7).

¹⁷² *Id.* § 2710(d)(7)(B)(iii-iv). Note that failure to reach a compact does not imply necessary bad faith by the state, though courts have often found that there cannot be bad faith when the parties did enter into a compact. *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007); *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Rsrv. v. California*, 813 F.3d 1155, 1172 (9th Cir. 2015).

¹⁷³ 25 C.F.R. §§ 291.1(b), 291.3, 291.7 (2019).

¹⁷⁴ *Id.* §§ 291.9, 291.10.

¹⁷⁵ *Id.* § 291.11.

¹⁷⁶ *Id.*

would be inappropriate in circumstances where, in the past, tribes have been dissatisfied with the Secretary's balancing of tribe and agency interests.¹⁷⁷

IGRA's mechanism was specifically implemented with an eye to respecting "the basic principle that the states and tribes negotiate as sovereigns."¹⁷⁸ The Senate Committee Report accompanying the original Senate bill stated that "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises"¹⁷⁹ Compacts offer further benefits: a statute providing for negotiation and compact must necessarily also provide relatively robust procedures as to initiation of negotiation and for solutions in the event that negotiations break down, and mediation is a helpful backstop to protect tribal interests. When the Secretary of the Interior can and does balance federal and tribal interests, the negotiation and compact model may be the best device for considering competing concerns from multiple sovereigns.

D. Consent

A final alternative engagement device is the requirement of tribal consent.

Substantial secondary literature exists urging Congress to adopt the "free, prior, and informed consent" model incorporated in the United Nations Declaration on the Rights of Indigenous Peoples.¹⁸⁰ The UN Declaration emphasis on good faith engagement and on securing consent prior to taking state action that may impact tribes is more in line with the spirit of Executive

¹⁷⁷ See Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 216 (2010) (arguing that the negotiation and compact model "has forced an uneasy and often litigious relationship between states and tribes with mixed results, skewed incentives, and often unfavorable consequences"); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) ("Given that class III gaming can be 'a source of substantial revenue for the Indian tribes and a significant rival for traditional private sector gaming facilities,' its regulation 'has been the most controversial part of IGRA and the subject of considerable litigation between various Indian tribes and the states.'").

¹⁷⁸ *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 481 (W.D. Wis. 1991).

¹⁷⁹ S. REP. NO. 100-446, at 13 (1988).

¹⁸⁰ For examples of literature urging adoption of the UN model, see Fredericks, *supra* note 68; Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior, and Informed Consent*, 32 J. ENERGY & NAT. RES. L. 297 (2014); Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D.L. REV. 37 (2015); Tarah Bailey, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, 29 COLO. NAT. RES. ENERGY & ENV'T L. REV. 195 (2018).

Order 13,175 and its emphasis on sovereign-to-sovereign interaction. Complicating any recommendation that Congress adopt the UN's standard, however, is that it is not binding on the United States, and much more significantly, that when the United States finally voted in favor of the declaration three years after it was passed by the UN General Assembly, it was with the clear caveat that the executive branch saw no conflict between the declaration and current federal agency consultation policies.¹⁸¹ It is infeasible to recommend that Congress adopt a standard of international customary law with an eye to effecting change in the processes and safeguards in the tribe-agency engagement process when the executive branch has already decided the standard effects no change at all.

Notwithstanding these concerns, consent is a viable alternative engagement device already grounded in federal Indian law. Both the Indian Right-of-Way Act and the Native American Graves Protection and Repatriation Act (NAGPRA) contain consent provisions.¹⁸²

Under the Indian Right-of-Way Act, there is no grant of a right-of-way across land held in trust for a tribe, owned by a tribe, or owned by an individual tribe member “without the consent of the proper tribal officials [or] of the individual Indian owners.”¹⁸³ Consent must be given in written form and may include restrictions or conditions.¹⁸⁴ Although the Secretary of the Interior formally grants the right-of-way, the grant is improper without consent.¹⁸⁵ The grant does not change or transfer ownership of the land, leaving the tribal property interest intact.¹⁸⁶ This requirement is also applied in multiple infrastructure contexts, including construction of railway and telephone lines,¹⁸⁷ power and communication facilities,¹⁸⁸ and pipelines.¹⁸⁹

¹⁸¹ ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 70.

¹⁸² 25 U.S.C. §§ 324, 3001–02.

¹⁸³ *Id.* § 324.

¹⁸⁴ See 25 C.F.R. § 169.107 (2019) (providing that applicant for right-of-way across tribal land must secure tribal authorization and written agreement with tribe to grant a right-of-way, noting that “[t]he consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant.”).

¹⁸⁵ 25 U.S.C. § 324.

¹⁸⁶ *Id.*; see, e.g., *Murphy v. State*, 124 P.3d 1198, 1203 (Okla. Crim. App. 2005) (“The Act thus creates an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees, who took their allotment subject to the right-of-way.”).

¹⁸⁷ 25 U.S.C. §§ 312, 319.

¹⁸⁸ 43 U.S.C. § 961; *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1096 (S.D. Cal. 2008) (“[T]he Court finds this section mandates Quechan must hold equitable title to the lands adjoining the right-of-way.”).

¹⁸⁹ 25 U.S.C. § 321; *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1057 (9th Cir. 1988) (“Pursuant to the authority granted by the 1948 Act . . . the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines . . .”).

In the pipeline context, recent litigation centers large on oil and gas companies' reliance on expired easements and failure to get tribal owners' consent to renew the right-of-way.¹⁹⁰

Under NAGPRA, "intentional removal from or excavation of Native American [remains and] cultural items" from tribal lands is only permitted after obtaining consent from the appropriate tribe.¹⁹¹ Proof of consent must be given to the federal agency official who issues the required permit for excavation.¹⁹² When Native American remains or cultural items are on federal land, NAGPRA requires consultation with the appropriate tribe but **not** the tribe's consent.¹⁹³ On both tribal and federal lands, accidental discovery of remains or cultural items is subject to a reporting requirement.¹⁹⁴ In requiring tribal consent for excavation, the federal government treats tribal governments as guardians of both their people's burial grounds and of the cultural items they may contain.¹⁹⁵ The Senate Committee Report accompanying NAGPRA noted that "[t]he Committee does not intend this section to operate as a bar to development of Federal or tribal lands on which human remains or objects are found . . . [nor] to significantly interrupt or impair development activities on Federal or tribal lands."¹⁹⁶ Notwithstanding this promise, courts have provided remedies against agencies that failed to protect remains and cultural items inadvertently discovered on infrastructure construction sites, suggesting that prospective injunctive relief may be available to tribes contesting intentional excavation without tribal consent.¹⁹⁷ A private right of action exists under NAGPRA.¹⁹⁸ Even if that were not the

¹⁹⁰ See, e.g., *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 968 (10th Cir. 2019) ("The undisputed facts—expiration of the easement, specifically—show that Enable lacks a legal right to keep the pipeline in the ground. The consent forms would not allow a reasonable jury to find otherwise."); *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1107 (10th Cir. 2017) ("In January 2015, the BIA notified PNM that it could not approve the renewal application without that consent."); *W. Ref. S.W., Inc. v. U.S. Dep't of the Interior*, 450 F. Supp. 3d 1214, 1230 (D.N.M. 2020) ("[T]he Court cannot say that the IBIA's decision to require remainderman consent is based on an impermissible construction of the 1948 Right-of-Way Act or an unreasonable decision to look to the common law.").

¹⁹¹ 25 U.S.C. § 3002.

¹⁹² 43 C.F.R. § 10.3(b)(4) (2019).

¹⁹³ 25 U.S.C. § 3002.

¹⁹⁴ *Id.*

¹⁹⁵ Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2384 (2019).

¹⁹⁶ S. REP. NO. 101-473, at 7 (1990).

¹⁹⁷ See, e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 209 F. Supp. 2d 1008, 1027 (D.S.D. 2002) (granting preliminary injunction requiring Army Corps of Engineers to cease construction of a recreation area following Plaintiff's showing that the agency was aware of inadvertent discovery of indigenous remains).

¹⁹⁸ 25 U.S.C. § 3013; *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003).

case, grievances against a federal agency may be brought in federal court under the APA.¹⁹⁹

Though these statutes and accompanying regulations are short on detail as to the procedures for obtaining tribal consent and consequences for violation of duties to obtain the same, consent could be a viable engagement device in the context of large infrastructure project planning and permitting. Procedure both from authorizing statutes and from the APA would provide better protection for tribes. A clear requirement of written consent would lay a path for judicial and congressional enforcement (and ideally for less litigation given agencies' knowledge of the statutory requirement for clear tribal consent). Consent would be used only when infrastructure projects have the potential to impact tribal lands; the issue of indirect impacts on tribal lands based on adjacent or upstream construction, for example, is not covered under NAGPRA.²⁰⁰

CONCLUSION

Consultation between tribes and federal agencies on large infrastructure projects has failed and will continue to fail. The statutory and regulatory protections offered under NHPA and NEPA are inadequate, providing for neither meaningful administrative and judicial review nor effective congressional oversight. Litigation brought by tribes alleging failure to consult, while seldom rewarding Plaintiffs due to the deferential arbitrary and capricious standard and the nonbinding nature of consultation policy, is frequent and will likely become more so without a shift in engagement strategy. The spirit of Executive Order 13,175 and subsequent executive memoranda suggests that, at some level, there is a desire from the federal government to engage tribes as fellow sovereigns and to recognize tribal rights and the impact, potential or realized, that major infrastructure projects have on tribal interests.

Agencies will not adequately engage sovereign tribes impacted by major infrastructure projects so long as Congress continues to lean on consultation, a fundamentally inadequate engagement device. Scholars persisting in advocating for improvements to consultation policies only legitimize this flawed approach to tribe-agency engagement. At best, consultation doesn't work, and at worst, it creates administrative cover for bad actions by agencies and private parties. Four other engagement devices—

¹⁹⁹ See *Bonnichsen v. United States*, 367 F.3d 864, 874–75 (9th Cir. 2004) (finding that review of Interior Secretary's action under NAGPRA is "governed by the APA, which instructs courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'").

²⁰⁰ With NAGPRA, intentional excavation of tribal remains or cultural artifacts on federal land puts tribes back in the problematic role of consultant with no tangible rights.

negotiated rulemaking, adversarial adjudication, negotiated compact with mediation, and consent—already exist in federal Indian law and provide potential alternatives to consultation. Congress must be intentional in evaluating and codifying these alternatives where they best mitigate harms and maximize benefits to engaging parties. To honor the policies behind executive directives to engage tribes as fellow sovereigns, Congress must adopt and codify engagement mechanisms that provide better oversight and legal protections for tribes.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I. OVERVIEW

Resolution No. 144-38 (COR) was introduced on February 13, 2026, by Senator Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague, and subsequently referred by the Committee on Rules to Senator Sabina Flores Perez, Prime Author, on February 17, 2026. The Author convened a public hearing on March 5, 2026 at 9:06 a.m. in the Guam Congress Building, Public Hearing Room. The public hearing recessed at 10:55 a.m. on March 5, 2026, and it was reconvened on March 11, 2026 at 2:06 p.m. in the Guam Congress Building, Public Hearing Room. The public hearing was adjourned on March 11, 2026 at 4:45 p.m.

Public Notice Requirement:

In Compliance with Open Government Law, the five (5)-day public notice of this hearing was published on February 25, 2026, and the forty-eight (48) hour notice was published on March 3, 2025 on KUAM-TV and on the Guam Public Notice Website. Notices were also sent to all Senators, stakeholders, and all main media broadcasting outlets via email on the same dates.

Senators Present:

Senator Sabina Flores Perez	<i>Prime Author</i>
Senator Chris Barnett	<i>Co-sponsor</i>
Senator Therese M. Terlaje	<i>Co-sponsor</i>
Senator Telo T. Taitague	<i>Co-sponsor</i>

Oral Testimony:

Patrick Lujan	<i>State Historic Preservation Officer (SHPO)</i>
Dr. Robert Underwood	<i>Former Guam Delegate, 107th U.S. Congress</i>
Hope A. Cristobal	<i>Former Senator, 23rd Guam Legislature</i>
Monaeka Flores	<i>Prutehi Guåhan</i>
Baltazar B. Aguon	<i>Community member</i>
Jarren Saralu	<i>Community member</i>
Veronica Cruz	<i>Community member</i>
Maria Hernandez	<i>Micronesian Climate Change Alliance</i>
Jesse Chargualaf	<i>Independent Guåhan</i>
Kallen Perez	<i>Community member</i>
Ian Catling	<i>Community member</i>
David Lotz	<i>Community member</i>
Kyle Riordan	<i>Community member</i>



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Written Testimony Submitted:

Patrick Lujan	<i>State Historic Preservation Officer (SHPO)</i>
Dr. Laura M. Torres Souder	<i>Chairperson, Kumisión I Fino' CHamoru</i>
Dr. Robert Underwood	<i>Former Guam Delegate, 107th U.S. Congress</i>
Jarren Saralu	<i>Community member</i>
David Lotz	<i>Community member</i>
Baltazar Bordallo Aguon	<i>Community member</i>
Veronica Cruz	<i>Community member</i>
Cassie Bordallo	<i>Community member</i>
Molly Ann Aguon-Diaz	<i>Community member</i>
Victoria Manley	<i>Community member</i>
Kisha Borja-Quichocho-Calvo	<i>Community member</i>
Ian Catling	<i>Community member</i>
Kyle Riordan	<i>Community member</i>

Supplemental Documents:

2008 Programmatic Agreement
2025 Draft Programmatic Agreement
2025 November 14 Letter from Rear Admiral Brett Mietus to SHPO Patrick Lujan
2025 June 11 Letter from Acting SHPO Angel Sablan to John Salas. Naval Facilities Engineering Systems Command Marianas
2025 June 4 Letter from John Salas to SHPO Patrick Lujan, Stipulation VII.B.1
2025 June 4 Letter from John Salas to SHPO Patrick Lujan, Stipulation VIII.A.2
Guam Legislature Resolution No. 432-30 (LS)
2025 December 22 Dave Lotz Opinion Column, "Comment on draft historic preservation programmatic agreement," Guam PDN
2026 March 2, Dave Lotz Opinion Column, "Flaws in the proposed Programmatic Agreement," Guam PDN
National Trust for Historic Preservation, "Defending the National Historic Preservation Act and Section 106," November 19, 2025
Blumm, Michael C. and Pennock, Lizzy, "Tribal Consultation: Toward Meaningful Collaboration with the Federal Government," Colorado Environmental Law Journal, Vol. 33.1
Bevan, Alana K, "The Fundamental Inadequacy of Tribe-Agency Consultation of Major Federal Infrastructure Projects," University of Pennsylvania Journal of Law and Public Affairs, March 2021, Vol. 6. No. 3

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

II. SUMMARY OF TESTIMONY & DISCUSSION

The Public Hearing was Called-to-Order at 9:06 a.m.

Senator Sabina Flores Perez, *Author*: Good morning. *Buenas yan Håfa Adai.*

This public hearing is called to order. The time is now 9:06 a.m., Thursday, March 5, 2026. In compliance with open government law, notice of today's hearings were noticed on KUAM, provided via email to stakeholders, senators, and local media, and posted on the Government of Guam public notice website on Wednesday, February 25th for the five-day notice and Tuesday, March 3rd for the 48-hour notice, thus meeting its requirements.

I'd like to acknowledge my colleague, Senator Barnett, for joining me here today. *Si Yu'os ma'åse'.*

The purpose of this public hearing is to receive testimony on agenda item:

- Resolution No. 144-38 (COR) – sponsored by Senators Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, and Telo T. Taitague, relative to calling for the withdrawal of the draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

The rules of conduct for today's hearing are as follows:

- The order of those wishing to testify will begin with the government agencies followed by those confirmed in advance and then by a sign-in sheet. I ask that all written testimonies be submitted in advance to my staff to facilitate copying and dissemination to all those who are present here today.
- When you're called to testify, please ensure the microphone is on and restate your name and organization, if applicable, for record-keeping purposes.
- Senators will be given an opportunity at the end of the panel to ask questions.
- Questions and testimony shall be confined to the substance or nature of the agenda. Personal inference as to character or motive of any senator or anyone testifying is not permitted.

And now to begin our agenda.

Resolution No. 144-38 (COR), sponsored by Senators Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, and Telo T. Taitague, relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

For the record, invitation letters were sent to the following to provide testimony:

710 Marine Corps Drive Bell Tower Building Suite 303A, *Hagåtña*, Guam 96910
671.989.2968•office.senatorperez@guamlegislature.gov•

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Patrick Lujan, our State Historic Preservation Officer;
- Executive Director Reid, Advisory Council on Historic Preservation;
- Brett Mietus, Commander of Joint Region Marianas, who is a signatory for the proposed 2025 Programmatic Agreement. The past commander was also the signatory of the 2008 Programmatic Agreement.
- President Melvin Won Pat-Borja of the Department of CHamoru Affairs;
- Chairperson Laura T. Souder, Chair of Kumisión I Fino' CHamoru; and
- Chief Program Officer Joseph Quinata of the Guam Preservation Trust.

As of today, we received written testimony from Kumisión I Fino' CHamoru. An email response from ACHP Director, Jaime Loichinger, stated: "Thank you for this invitation. While the ACHP is unable to attend in person, we continue to advise the Department of Defense on its Section 106 compliance strategy."

We did receive a letter or an email from SHPO stating he is off-island, and he'll be willing to send testimony. As well, we did receive word that we would receive testimony from the Department of CHamoru Affairs and Guam Preservation Trust.

For a brief opening statement: As we observe Mes CHamoru, it is important that we ground this resolution in who we are and how we understand our history. Mes CHamoru was designated in March in connection with what was once called Discovery Day to mark March 6, 1521.

Over time, our leaders recognized the contradiction of commemorating, quote, "Discovery," when our ancestors lived on the island and stewarded these islands for thousands of years. Discovery Day became Guam History and CHamoru Heritage Day. Words matter. What we commemorate reflects how we understand ourselves.

As Chairperson of the Kumisión, Dr. Laura T. Souder reminds us, we often portray CHamoru culture as something that existed in the past. We build huts, we hold slingstone competitions, we prepare traditional foods, we perform chants and dances. Yet these practices reflect technical knowledge, engineering skill, mathematical precision, ecological expertise, and sophisticated systems of governance and sustainability.

Our ancestors were not passive onlookers to history.

They exercised agency. They asserted cultural sovereignty. They navigated colonial policies, natural disasters, hostilities, and social change with resilience and wisdom.

Resolution No. 144-38 is about agency.

It is about whether we assert our right to meaningful consultation and full legal protection of our cultural resources under federal law. For the public, the National Historic Preservation Act establishes a process known as Section 106. This federal law requires agencies to consider the effects of their undertakings before approving or funding projects that may affect historic properties.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

An undertaking includes construction, land clearing, demolition, infrastructure development, or other actions that may disturb archaeological sites, burial grounds, historic buildings, and cultural landscapes. Under Section 106 and its implementing regulations, 36 Code of Federal Regulations Part 800, federal agencies are legally required to follow a structured review process.

First, they must identify historic properties within the area of potential effects. This includes archaeological sites, burial areas, places of traditional cultural significance, and historical landscapes.

Second, they must consult with consulting and interested parties, including the State Historic Preservation Officer, indigenous communities, and other stakeholders with an interest in the affected properties.

Third, they must determine whether the undertaking will cause adverse effects.

And fourth, if adverse effects are identified, they must explore alternatives to avoid, minimize, or mitigate the harm before proceeding.

This process requires documentation, transparency, consultation, and meaningful opportunities for public involvement before decisions are finalized. A programmatic agreement is a mechanism allowed under federal regulations when agencies anticipate multiple or complex undertakings. It establishes procedures for how Section 106 compliance will occur across projects. However, it must not weaken identification requirements, reduce consultation opportunities, narrow dispute resolution processes, or eliminate meaningful public participation.

The 2008 Programmatic Agreement has governed Navy undertakings on Guåhan for more than 17 years, and it's a 50-year agreement. And these streamlined procedures allow data recovery, also known as salvage archaeology, or to put it bluntly, destruction of cultural sites, if high-probability areas cannot be avoided.

During the past 17 years, significant military expansion has occurred, yet there has not been a comprehensive public accounting of how historic properties were identified, how burial sites were treated, how adverse effects were determined, or how consultation obligations were fulfilled. Yet, this 2008 Programmatic Agreement was used to finalize the Record of Decision for the Missile Defense Agency with little to no input from consulting parties, interested parties, or the public at large.

Regarding historic preservation, the 2008 Programmatic Agreement contains loopholes, such as blanket approvals for work plans, salvage archaeology plans, for different projects within the same area, as well as default approvals if 30 days have lapsed without a response from SHPO. Furthermore, the 2008 Programmatic Agreement omits quarterly reporting requirements for medium and high culturally/archaeologically sensitive sites.

Documents obtained through FOIA highlighted the impacts of these loopholes and deficiencies in the 2008 Programmatic Agreement. In a letter dated June 11, 2025, from Director Angel Sablan to John Salas of the Naval Facilities Engineering Systems Command Marianas, it states, quote: "It appears that there has been some miscommunication and interruption of flow of information as well as timely review of documents and discoveries. It appears the project proceeded without consultation with either the Cultural Resource Manager, NAVFAC, nor SHPO, leading to improper documentation of the HSR as well as the destruction of an

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

archaeological site that had been tentatively identified in a draft report as early as August 1st, 2024.” This is but one occurrence in the 17-plus years of the existence of the 2008 Programmatic Agreement.

The draft 2025 Programmatic Agreement, which will supersede this 2008 Programmatic Agreement, does not correct the default approval of data recovery, salvage archaeology plans, or work plans of these highly culturally sensitive sites, after 30 days have lapsed. Nor does it correct the omission of quarterly reporting for medium and high archaeologically sensitive sites.

In fact, the draft 2025 Programmatic Agreement puts our cultural sites at even greater risk of harm and destruction, by proposing to expand coverage to current and future Department of Defense lands outside its existing footprint under a consolidated framework. It introduces categorical procedures that may allow certain activities to proceed without full project-specific review. It does all this with no mention of public participation throughout the process, even though public involvement is critical to compliance with Section 106. Furthermore, this proposed Programmatic Agreement is inconsistent, if not misleading, when it states, “Whereas the Commander Joint Region Marianas finds that a programmatic agreement approach in accordance with 36 CFR Section 800.14 is the appropriate approach to address circumstances of routine and redundant operations, maintenance, repair activities.”

Furthermore, this draft 2025 Programmatic Agreement abdicates SHPO’s responsibility with a potential unilateral execution by only one signatory, the Department of Defense or SHPO, not all parties, which at least the 2008 Programmatic Agreement requires.

From my understanding, the drafting process for the 2025 Programmatic Agreement did not include consulting or interested parties who SHPO has a responsibility to invite pursuant to 36 CFR Part 800. Without this participation, the answer to the questions of whether this expanded framework strengthens cultural protection or streamlines processes in ways that reduce transparency and oversight points to the latter, that result in repeated failures of the past.

During Mes CHamoru, we celebrate identity. Resolution No. 144-38 ensures that celebration is matched with vigilance. This measure calls for withdrawal of both the draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement, and for full implementation of the Section 106 process to ensure transparency is restored.

I look forward to receiving testimony on this important measure. First, before I call on those to testify, I’d like to recognize my colleague, Senator Therese M. Terlaje. Thank you.

For those that want to testify, please come forward to the table and I’ll call you in the order that is listed. We have Jarren Saralu, Dr. Robert Underwood, Veronica Cruz. We also have Monaeka Flores, Baltazar Aguon, Eva Cruz, Jesse Chargualaf, Jordan Panuelo, Kallen Perez, Maria Hernandez. So, maybe we’ll just have another set come through. If you don’t mind, I would like to recognize Dr. Underwood, who’s the senior member in this group and a long-time advocate.

Dr. Robert Underwood, Delegate of the 107th Congress and Chairman of the Pacific Center for Island Security (PCIS): *Si Yu'os ma'åse'* Senator.

Increasingly in every one of these hearings, I am the senior person, and so I appreciate that recognition, and also the opportunity to speak to you on this very important resolution.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Buenas yan Håfa Adai, todos hamyo, mandistinggeyon na Senadot [Hello, everyone, all distinguished Senators], Senator Terlaje and Senator Barnett, as well as yourself.

I want to, first of all, thank you for having the foresight and courage to introduce this resolution along with your current co-sponsors, Senator Terlaje, Barnett, and Taitague.

I want to thank you for the opportunity to testify on this vital statement of purpose and renewal of commitment to preserve and protect the resources of our island of Guåhan. In examining this statement and in examining this resolution, I take the time to remind everyone in the Legislature that you take many oaths of office, oaths of allegiance. You take the oath of office, which is required by law under the laws of the United States to adhere to the Constitution and the laws which apply to Guam.

You also take the *Ini'fresi*, which is a voluntary statement to protect the CHamoru people and their resources, both human form, as in cultural remnants and ongoing cultural practices, and natural, as in the physical environment which we are directly connected to, both in our land and ocean resources. In some ways, the Programmatic Agreement, relabeled the “problematic agreement” by some of our friends here, which is under consideration, purports to carry out this purpose by mentioning CHamoru cultural and historical resources, mostly archaeological.

Like any agreement, a renewed agreement, which this one proposes, depends upon the history and the implementation of the previous one. I don't think we have the full story of the implementation of the previous agreement, since there's little public discussion and transparency about all of the construction and destruction which has already occurred and which is patently obvious to anyone who drives around the island.

It is interesting to note that in the name of construction, we engage first in destruction and disruption.

In this case, the U.S. government will be again seeking to process the destruction of historically significant sites through what appears or purports to be a balanced approach. In reality, it seeks to implement a process which is less rigorous than existing federal law. As the resolution points out, the island, and more importantly, our past, would be better served by applying the National Historic Preservation Act, Section 106, which is not included in the current proposed Programmatic Agreement.

As is true in all forms of institutional behavior, trust and mutuality is required for the successful implementation of programs and policies. There really is not much trust, because there's not much transparency from the 2008 agreement and the results of the implementation of that document. When there's little trust, there must be processes of verification and increased mutuality. In point of fact, there's a reduction in mutuality in the proposed agreement. And I add this very significant part as well.

And then, excuse me, I'm still trying to recover from, I'm okay. I'm not going to collapse. That would be the big drama of the morning.

In addition to this, the draft agreement doesn't mention any provisions to address environmental impacts associated with construction or operations, including the effects of runoffs in order to protect the aquifer. The Government of Guam has no delegated authority under the Clean Water Act, and Department of Public Works permits are not necessary for federal construction projects.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

This new agreement only covers cultural resources. Where is the stated effort to protect our environment?

I know that many will say the federal government is already obligated to adhere to environmental standards. I hasten to point out that those standards are being significantly weakened under the current Trump administration. The need to increase transparency and mutuality based on environmental disruption and degradation is also there. And I urge the Legislature to raise those concerns as well.

The two most ominous words in this rapid militarization of our island is “destruction” and “mitigation.” I love that word, mitigation. There will be resources destroyed, and there will be environmental assets disrupted. And as always, there will be proposed mitigation projects outlined.

The end result will be a new series of what we could refer to as DMZs on the island, Destruction and Mitigation Zones, and the island will be populated with them.

I sincerely hope that in anticipation of that need to so-called mitigate, we can get beyond such efforts and empower our own local agencies so that there is more mutuality and transparency. *Si Yu'os ma'åse'*. Thank you for your attention.

Senator Perez: *Si Yu'os ma'åse'*, Dr. Underwood. Now I'd like to recognize Jarren Saralu.

Jarren Saralu, community member: *Buenas Senadora yan senadot-siha.* [Hello Senators].

Si Yu'os ma'åse' put todü mina put miyu para gi isla-ta. Guåhu si Jarren Saralu. Sengsong Yigu yu'. Målagu yu' gi sangåni hamyo para hæfa manggaige ham. Este na programmatic agreement ti maulek para i taotao-ta, i famagu'on-ta yan i famaguon-ñiha. Hu suppopotta i yomuti pat este na PA. Bei sangåni irasion-hu siha gi fino English, as si ki todü na taotao guine siña-na komprende.

[Thank you for everything for our island. I am Jarren Saralu. From the Village of Yigo. I want to speak to you for us here. This programmatic agreement is not good for our people, our children and their children. I support throwing away this PA. I will speak in English, everyone here can understand.]

Allow me to explain what this PA is all about. I have a copy with me, but it excludes, first, I would like to recognize that it excludes all the maps.

Senator Perez: Can you speak into the microphone or bring it closer to you? Thank you.

Jarren Saralu: Firstly, I would like to state that the Appendix B and C maps are missing from this draft. That's already a red flag in and of itself. But I promise to be as unbiased as I can, while also keeping it fast and brief.

The Programmatic Agreement essentially is a stated legally binding agreement between the Guam State Historic Preservation Office and the Joint Region Marianas, specifically mentioning the Commander of the JRM and the SHPO (preservation officer). This PA is a mutual contract of agreement between the JRM and the SHPO in regards to the Department of Defense's undertakings on the island of Guam.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

An undertaking, defined in this instance as, quote, “a project, activity, or program, funded in whole or in part, under the direct or indirect jurisdiction of a federal agency,” unquote, as per the National Historic Preservation Act of 1966.

The PA essentially states the actions and the steps that the JRM will have to follow while maintaining current acquisitions as well as future acquisitions of land here on our island.

These said steps and actions are meant to ensure full preservation of the island’s historic resources, landmarks, and archaeological findings should they be discovered, if not already have been discovered, within what the PA calls the CJRM’s area of responsibility. The AOR is referred to in the PA as the Department of Defense property on the island of Guam.

It is also mentioning about allowing access to cultural sites through a development made by the CJRM called the Public Access Plan (PAP) with the purpose of “Providing the local community access to collect medicinal and other plants used for traditional purposes and providing access to spaces that hold special significance to the local community.” Many of these seem promising at a first glance; however, there are some very concerning prospects that nobody seems to talk about. In that regard, I also ask for the advice and review of the PA by Guam State Archaeologist for the SHPO, John Mark Joseph.

Stipulation II.A.3 states the following, “Traditional cultural place studies, TCP, and eligibility determinations will be carried out by, or under the oversight or supervision of, a person or persons having a graduate degree in anthropology, history, or closely related field, documented experience or expertise in following Pacific Island cultures, and previous experience conducting TCP studies and evaluations.” While this is true, it is highly recommended that said person or persons should also meet the Secretary of the Interior’s qualification standards for anthropology.

Stipulation V.B states, “CJRM will provide SHPO with all updates to the GIS (Geological Information System) during the quarterly reporting update.” In previous times, the GIS updates that were given were wrong in the past. For example, there was an instance in which the CJRM had excluded a site that was on their maps from the GIS. The exclusion was on a site that is on Ordnance Annex, or formerly known as Naval Magazine. Just to note, Naval Magazine is also the original location of the latte stones that were relocated to what is now Latte Stone, or Senator Angel Santos Park, in Hagåtña. For that reason, it should also be mentioned that any and all updates given to the SHPO from the CJRM are to be double-checked to ensure complete accuracy.

Continuing with Stipulation VIII.A.1, “The CJRM shall use good faith effort to provide at least 72 hours advance notice to the SHPO in an area identified as no archaeological sensitivity in Appendix B” from which the draft is missing the maps... “or the most finalized archaeological sensitivity map submission.” Followed with, “In circumstances where prior notice is not practicable, the CJRM shall endeavor to provide notice as soon thereafter as possible.” Firstly, a 72-hour advance notice is almost insulting, as all necessary measures should be followed, as there is no absolute way to tell whether an area with no archaeological sensitivity is true before groundbreaking can even be made, even if an area is said to not be historically significant.

Secondly, to quote the last sentence, there should at least be an example of an event or events that could possibly take place in which the CJRM would be unable to give prior notice to the SHPO.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Jumping forward to the PA Standard Operating Procedure, SOP, for Human Remains, Stipulation I talks about the initial discovery and the procedures that should be followed when coming across remains. It does not mention, however, about giving any notice to the SHPO, only mentioning that the CJRM and the CRM, Cultural Resources Manager, are to be notified immediately. The fact of the matter is that the SHPO must be informed of any and all discoveries, as all discoveries are archaeological in nature and need to be reported as such, especially prehistoric and World War II remains, and a full report must be provided, no exceptions.

We cannot expect full historic preservation when we have these blatant loopholes and pathways in which the CRM can bypass the SHPO. There are facts that must be taken into account before we can move forward. Otherwise, we are no better than dogs who roll belly up when the alpha comes around. The SHPO has failed in his duty and responsibility by letting this PA go to the desk of the Governor.

To quote the National Historic Preservation Act of 1966, the duties of the State Historic Preservation Officer: “It shall be the responsibility of the State Historic Preservation Officer to cooperate with the Secretary of the Interior, the Council, which is the Advisory Council on Historic Preservation, other federal and state agencies and local governments, and private organizations and individuals to ensure that historic property is taken into consideration at all levels of planning and management.”

It also quotes: “the responsibility of the State Historic Preservation Officer is to consult with appropriate federal agencies in accordance with this division on federal undertakings that may affect historic properties and the content and sufficiency of any plans developed to protect, manage, reduce, or mitigate harm to that property. Now that the opportunity to rewind this horrific mistake has been presented, this is no longer a debate.

The withdrawal of the draft 2025 PA and the 2008 PA must go forward without any delay, or we shall risk more of our land being taken away from us and the continued destruction of our history. *Si Yu'os ma'åse' ta'lu yan Biba Mes CHamoru* [Thank you again, and praise CHamoru month].

Senator Perez: *Un dangkulu na' si Yu'os ma'åse*, Jarren, for your testimony and in highlighting the stipulations and terms and loopholes included in those. We'll have questions for you later, for all of you. I believe that we have Monaeka Flores, who signed up in advance. You're recognized.

Monaeka Flores, Executive Director of Prutehi Guåhan: *Håfa Adai*, good morning, Senator Perez, Senator Terlaje, and Senator Barnett. Thank you so much for the introduction of this resolution. I stand in support of it. My name is Monaeka Flores. I'm the Executive Director of Prutehi Guåhan, and we just protested against this Programmatic Agreement in front of the SHPO's office just two weeks ago.

It was our first time to protest against our own SHPO and the response was really interesting. This was not our first time to engage with SHPO, and actually, we've sent SHPO, since January 21st, four emails now requesting for the missing appendices and the incomplete appendix, as well. He has stated that it's really up to JRM to release this information to the public and release it in a form that they find accessible to the public. And without this full information, how are we

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

expected to provide a thorough comment, if we're not allowed a thorough review? So, right away, it's in violation of our right to free, prior, and informed consent.

We already know that the Department of Defense, the Pentagon, has a long history of environmental degradation, not just here, but throughout Asia and the Pacific and throughout the United States. They also have a longstanding record of desecration of sacred sites and ancestral burials, and even worse, they have a long history of underreporting.

We often don't find out about these incidents until after they've happened, and we often don't find out about how their proposed mitigation has failed us until it is too late. And it is extremely disappointing that SHPO is not doing more to advocate for the people. This SHPO has never, for instance, provided any recommendations to this body to increase the protections through the law.

I know that the Legislature has consulted with previous State Historic Preservation Officers and Guam Historic Preservation Officers who've been able to make several recommendations to make the laws more protective, and this SHPO has not done so. This SHPO has also testified here in front of this body and put on public record that public engagement often slows the process down, which is absolutely atrocious.

He should ensure that community participation takes place in every step of the way, and this is not just our first time trying to reach out to this SHPO and getting these similar responses. We've also gotten it for irresponsible development of a private property, that he is unable to give some of the archaeological reports, for instance, because they are protected as the people who own the property, residents or businesses that are customers or clients of SHPO, and some of those reports are sensitive.

Unfortunately, he treats this massive institution, this gargantuan monster that is the Department of Defense, that has a long history of a lack of transparency and a history of underreporting, as a regular customer here. They occupy 30 percent of the island. This is an unprecedented military buildup. They are not just a resident or a private business.

On top of that, looking at this Programmatic Agreement in its state, the SHPO has said that this Programmatic Agreement is not a big deal. We have had other programmatic agreements and it's to streamline the process. My question is, streamline it for who? Who does that benefit? That does not benefit the people of Guam to streamline the process. And we really appreciate Senator Perez's toolkit, which very succinctly breaks down how the Programmatic Agreement skews Section 106 law.

And at this point, there is a lot of academic research that analyzes how programmatic agreements around the United States skew protections under 106. Programmatic agreements can be in partnership with any local agency. It could be with the Department of Transportation. It could be with a railroad agency. In this case, it happens to be our State Historic Preservation Officer. We're seeing how he's complicit in minimizing the protections of the law for us.

And so, just to highlight some of the ways that there are differences: Section 106 offers a case-by-case project review, and this draft PA offers only blanket coverage for most of the undertakings.

Section 106 ensures public input required at key stages, and there is absolutely no defined public involvement in the Programmatic Agreement.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Section 106 asks that alternatives be considered, and in this case, they're only focusing on mitigation, not avoidance.

Section 106 requires stronger public accountability, and in this case, the designated authority is only between the State Historic Preservation Office and the Department of Defense. These are huge problems with this Programmatic Agreement.

And also, not to mention that it's been extended. The last Programmatic Agreement that it's built from was only with the Department of the Navy. Now, this includes all undertakings of the Department of Defense. And it can be applied to so many things. We've seen how that's happened with new projects like the Missile Defense System. So we're here to rise in support of this measure, of this resolution. And it is truly disappointing.

SHPO works for the people of Guam; SHPO does not work for the military. But from where we're sitting, that's not very clear. And SHPO should really be advocating to make sure that we're involved in every step of the way. For instance, should they discover human remains, they decide to choose who the people are who can study those remains. They choose the archaeologists. They choose the scientists. Then they get to determine the period of those remains before they even report to SHPO. So, there's a lot that is kept from our community while it even happens.

And SHPO himself has also coordinated several private burial ceremonies on the base without notifying the public or even inviting members of the Legislature to attend. We've protested some of them. And we've also performed some of our own ceremonies. Because our community does care about our burials. We care about our environment.

The fact that SHPO continues to forget us, it's not only hurtful, it's extremely harmful. We've also lost Malia. We've lost somebody on the inside who was an advocate, who was a guardian. It's really made us all the more vulnerable, truly.

Even in my own personal experience with the State Historic Preservation Office, I want to report that I've had my own debates with him in terms of accessing a burial ceremony in Andersen Air Force Base that's near a property that was taken from our family via eminent domain. When I told my family that SHPO was holding this ceremony and that I was arguing with him to allow us access to attend, one of our relatives said, "We're forgotten, we're just a second thought. The descendants, the original landowners, are just a second thought to him. And we're not going to be abused for optics. We're not going to show up so that he can report that he engages with landowners."

That's exactly what happened. That's exactly what was reported in the news, that he reached out to landowners. And some of my other relatives said, 'of course we want to be there. Of course we would want to be there for the burial ceremony to honor those ancestors that are returning to' - in that case, it was near Sirena Beach.

In addition to supporting this resolution and demanding the removal of what we call a problematic agreement, and what many people have called a problematic agreement over the years, we also want to look at how SHPO is assigned these positions. Who gets to assign SHPO this job? How is SHPO qualified?

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

We have had very qualified, experienced SHPOs before that have been replaced and quite suddenly temporarily reassigned, especially even during controversial private construction projects, depending on the administration.

And some of us have even called out that there's a potential conflict of interest with this SHPO because of his prior service in the military and his time in service during his tenure as the State Historic Preservation Officer. He was, for instance, activated; he was called to active duty multiple times during his tenure as the State Historic Preservation Officer.

And finally, just to go back, I don't actually have any studies today, but I would like to provide them to you, Senator, and to the Committee. Some of the extensive academic research, some of the incidents in various states really highlights how programmatic agreements skew the law to benefit. Some of the things that they've found are conflicts of interest. What are the conflicts of interest that come out when programmatic agreements are used instead of full coverage of Section 106? And a lot of it has to do with funding. A lot of it has to do with who the investors are in some of those projects.

We have to ask some of those questions here. What are the conflicts of interest with this SHPO, for instance, and this Programmatic Agreement? So, with that, we intend to hold a second comment workshop. We thank you also for your work in demanding an extension. We've been inundated with comment period after comment period after comment period on all of these massive military projects.

As I mentioned earlier, we have records of communication with this particular SHPO asking for archaeological reports that were not granted, asking for access to the Programmatic Agreement workshops, which we did not get responses about. We see this also as a pattern of behavior that we hope can be addressed. *Si Yu'os ma'åse*, and thank you all so much.

Senator Perez: *Si Yu'os ma'åse*, Monaeka, for all your advocacy and your testimony today. I would like to recognize Baltazar Aguon. He did sign up in advance, so thank you. And sorry, *Sáina* Hope Cristobal, I know you came in later. Did you want to provide testimony as well? Sorry, excuse me, Baltazar, if we can allow the *Sáina* to present. Thank you. *Dispensa'* to all of you.

[Sáina Hope Cristobal approaches the table]

Sáina Hope Cristobal, Senator of the 23rd Guam Legislature: *Dispensa' sa atrasao yo'. Taya yoku written testimony. Lao matto yo' para bae na kombiene este i testimoni-un i muma'lo.* [Sorry, because I'm late. I don't have my own written testimony. But I have come to ___ (kombiene = right?) this testimony ____.]

I agree that it should be, as you have stated in the resolution, that to withdraw the draft 2025 Programmatic Agreement. So that, in general, is my position. I just came to the island, so I'm not really briefed on all the specifics. But I know that your work, Senator Sabina and Senator Therese Terlaje and Senator Chris Barnett, that your work is for the people. And I'm always in favor of your work. That's my position.

Senator Perez: *Si Yu'os ma'åse*, *Sáina* Hope, for your presence today. It really means a lot. Thank you. I would like to now recognize Baltazar Aguon.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Baltazar Bordallo Aguon, community member: *Håfa Adai*, Senator Perez, Senator Terlaje, and Senator Barnett. My name is Baltazar Bordallo Aguon. I am the son of Edward L.G. Aguon and Katherine Bordallo Aguon. I stand in full support of Resolution No. 144-38 to withdraw the draft 2025 Problematic Agreement.

This agreement is effectively a pre-authorization for the erasure of our history. It prioritizes MILCON construction timelines over the ethical care of our ancestors, *i manmo'ña* [the ancestors]. I commend you, Senator Perez, for drafting this resolution, and I thank you deeply, Senators, for your staunch support. This draft PA is especially disturbing to me on four points:

The first one is a central flaw: the Commander is judge. Under Stipulation XIII, the JRM Commander is the final authority on all disputes. Even if the Advisory Council on Historic Preservation provides expert recommendations, the Commander can simply document his rationale and proceed anyway. We are being asked to trust a process where the person building the project is also the person deciding if the project's impact is acceptable.

The second point is the collaboration of the SHPO in a hollow agreement. The State Historic Preservation Officer is mandated to be our primary check and balance. Instead, the SHPO has collaborated in the creation of a legally hollow agreement that hands all real oversight to the military commander. By being a party to the creation of this draft, the SHPO has essentially abdicated his duty to the people of Guam.

This draft allows a military cultural manager to be the gatekeeper who decides if our ancestors are significant enough to warrant protection, while allowing private contractors to hold our ancestral remains and artifacts in their laboratories.

The third point is emergency erasure, Stipulations XIII and IX.B. This agreement grants emergency powers that allow for major impacts to be declared and acted upon within 72 hours of a disaster. These powers are dangerously broad, allowing the Commander to declare an emergency based on vague operational needs, project delays, and manpower issues. Imagine our community in the wake of a devastating typhoon.

While our families are struggling for water, power, and survival, this PA gives the military a 72-hour window period to clear protected sites while no one is looking, without any community oversight. It is predatory streamlining at our most vulnerable moment.

And finally, the fourth point is a failure of informed consent. You cannot have informed consent when the data is hidden behind broken links. Searches on the SHPO and JRM websites for the draft PA 2025 consistently yield 404 "page not found" errors for critical documents.

While the Governor's website links to the agreement, Appendix A, JRM land-holdings, and Appendix B, archaeological sensitivity maps, are either missing or irrelevant. It is impossible for the public to know what they are actually agreeing to.

And in conclusion, Stipulations IX and XI of this draft suggest that preservation compliance can be bypassed or simply rushed to meet MILCON construction timelines. This proves that this draft PA is about a deadline, not about protection.

I'm not here to ask for a better programmatic agreement.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I am here to support strongly what this resolution ultimately seeks: a return to the full Section 106 process as intended by the National Historic Preservation Act.

We need a single point of truth, a transparent system where the public can actually see the data. We need a process that respects our perpetual connection to our land, not a streamlined agreement designed to manage us out of the way. *Si Yu'os* and *Saina ma'åse*. Thank you for having me here today.

Senator Perez: *Un dångkulu na' Si Yu'os ma'åse* for highlighting those really key points. Thank you so much. So at this time, Veronica, you are recognized.

Veronica Cruz, community member: *Buenas yan Håfa Adai*, Senator Perez, Senator Terlaje, and Senator Barnett. *Si Yu'os ma'åse* for sponsoring this resolution and holding this public hearing. *Guåhu si Veronica Cruz* [I am Veronica Cruz].

I am an artist, a student at the University of Guam, and a mentor in a program called Famagu'on Farmers, a program that encourages and teaches our youth the importance of sustainable agriculture, community, and most significantly, the connection and relationship with our land.

I am testifying today in opposition of the proposed 2025 draft of the Programmatic Agreement and in support of Resolution No. 144-38, which calls for the complete withdrawal of the draft.

Being that the draft is less than 20 pages in length, it lends itself to being both generic and short-sighted. When proposed military projects are likely to cause lasting consequences, we should expect a document that exemplifies transparency, accountability, and cultural competence. Instead, the 2025 draft ignores the standards outlined in the United Nations Declaration on the Rights of Indigenous Peoples, as well as the review procedures in Section 106 of the National Historic Preservation Act of 1966.

Additionally, the impacts of the 2008 PA have yet to be measured or disclosed. This is alarming because it does not allow for the understanding of the entire scope of how the United States military has affected our island within the past two decades. Without full disclosure, the CHamoru people become disempowered and subject to plans that may cause adverse and irreversible effects to our island.

For this reason, it is within the rights of the indigenous CHamoru people to demand transparency and inclusion from the Commander of Joint Region Marianas and the Guam State Historic Preservation Officer when drafting a new PA. To reemphasize what has already been said, in UNDRIP, Articles 12, 18, 19, and 32 uphold the right of indigenous peoples to protect and have access to cultural sites, participate in decision-making, and give informed consent before any project that is connected to the development, utilization, or exploitation of mineral, water, or other resources.

In Section 106 of NHPA, federal agencies are required to follow a thorough review process if a federal or federally assisted project has the potential to affect historic properties. This process involves a public notification as well as involvement and consultation from a multitude of agencies and community members. It does not limit the consultation to only two parties, but rather it includes the general public and certified local government agencies to weigh in.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

It is through this process that indigenous people can continue to protect and maintain significant cultural and historic properties. Whether intentionally or not, the 2025 draft fails to meaningfully include any of these rights. It provides the bare minimum when it comes to indigenous engagement, does not provide full disclosure of specific military undertakings, and most importantly, it does not allow for the ability to consent.

It is not difficult to see the rapid militarization of our island.

Just in my lifetime, the colonization of Guåhan has brought about the slow death of our coconut trees, more contamination of our soil, water, and air, and the unhinged normalization of war.

I believe that the preservation of our land is inherent and necessary to the continuation of our culture, efforts towards self-determination, and connection to each other and our identity. I am deeply concerned the 2025 PA draft could negatively impact ancestral burial grounds, natural resources, and our quality of life.

It is the spiritual and physical ecosystem that is irreplaceable and belongs to future generations who have the right to inherit it in pristine condition. Our children, their children, and so on, deserve to live and grow in an environment that keeps them connected to their culture and history as well as healthy and thriving. It is vital that we consider our island's limited resources, cultural identity, and natural environment when facing any large U.S. military project.

Let Camp Blaz be an unfortunate example that the United States military can violate and destroy our home, then simply shift gears and change their minds because our home, our resources, are no longer necessary in their war agenda, which we should never be a part of. Now, we are left with the environmental and psychological damage, a stark reminder of our colonial status.

In land, in bodies, in cultural assimilation, if it is a debt CHamorus believe needs to be paid to the United States, then we have already paid it tenfold. We cannot afford it any longer. I would like to extend my support and gratitude to Senator Perez, Senator Terlaje, Senator Barnett, and Senator Taitague for sponsoring Resolution No. 144-38.

And if redrafted, I firmly urge CJRM and SHPO to revise the Programmatic Agreement to act accordingly with UNDRIP standards and Section 106 of NHPA, as well as establish procedures for meaningful indigenous leadership in cultural protection and growth.

Our deep and rich history reveals that CHamorus are tied to this land and water. It is what has sustained our island community for thousands of years through war and celebration. Therefore, it is our responsibility, from students to politicians, to carry our island into the future with conscious discernment, integrity, and deep care. For many CHamoru people, Guåhan is our only home. Our consent must always be a priority. *Si Yu'os ma'åse* for your time.

Senator Perez: *Dångkulu na' si Yu'os ma'åse'*, Veronica. So much truth in that. Next we have on our list, Maria Hernandez, you're recognized.

And if anybody else would like to come and speak... if we could just have more chairs at the table for those that have signed up to give testimony. So Maria, yes.

Maria Hernandez, Executive Director of Micronesia Climate Change Alliance (MCCA) and member of Hita Litekyan: *Buenas yan Håfa Adai. Si Yu'os ma'åse'* for this very important

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

resolution. Thank you, Senator Sabina, Senator Therese, and Senator Chris, just for your continued work.

You're all very strong voices for the people, and just so grateful for the three of you and for Senator Taitague for this resolution.

I na'ån-hu si Maria Hernandez [My name is Maria Hernandez].

I speak today not just as an individual and CHamoru mother, but as a CHamoru descendant of lands impacted by the 2011 Programmatic Agreement.

And speaking on behalf of our families' coalition, Hita Litekyan, about the ways the PA has had a significant and contentious impact on our ancestral land, a place where our families lived, fished, farmed, prayed, and are buried. Our fight against the firing range and for the protection of Litekyan quickly became a fight to protect so many other ancestral lands and sacred waters impacted by the buildup, as we learned about more harmful and environmental impacts from military training activities.

More than 900 football fields of our land in Guåhan have been cleared, destroyed, disturbed by military buildup projects, projects that our community has very resoundingly opposed. Our families are now going on more than 12 years of advocacy fighting against the Range Complex over Litekyan and at Taila'lo, and 60 years of advocacy fighting for ancestral land return.

Over the years, we have found that decision-making around Ritidian's use for military purposes has largely been steered by federal and DoD priorities, with preservation and cultural protection concerns often viewed through the lens of mitigation rather than avoidance.

When our community was urging preservation-in-place for our ancestors' bones and remnants of CHamoru settlements, one of the most controversial outcomes of the 2011 PA process has been the approval and development of the U.S. Marine Base at Mok'fok and Live Fire Training Range Complex at Northwest Field, Taila'lo, adjacent to Ritidian.

Under the PA, avoidance of cultural sites is supposed to be a priority, but my family has watched, and the community has watched, as the military proceeded with clearing areas for the range complex, marine base, and other facilities despite known cultural and historical resources and parts of our heritage in the area.

An estimated 70-plus ancestral and historic sites eligible for the National Register of Historic Places, including CHamoru villages, burial places, and cultural landscapes within the Ritidian and Taila'lo area were threatened, bull-dozed, or subject to restricted access under training safety zones tied to the military footprint. From an indigenous lens, a programmatic agreement should not be a compliance mechanism under Section 106 of the National Historic Preservation Act.

It is a moral question: will the United States continue a legacy of dispossession, or will it uphold its trust and responsibility to indigenous people?

The 2025 draft Programmatic Agreement is not a guarantee of protection, it's a delegation of power. Instead of conducting open, site-specific section 106 reviews with full community participation for every DoD project that may affect cultural resources, this agreement funnels decision making into DoD's internal procedures.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

That means our community, our cultural practitioners, and our elders will have fewer real opportunities to weigh in before destruction or disturbance occurs, a framework that shifts authority away from transparent processes under the very purpose of historic preservation consultation. The PA omits any further involvement by the public and the Advisory Council on Historic Preservation, both of which are required to be involved. For example, Section 106 regulations mention the public 62 times and requires public input at key stages. The draft PA has no defined public involvement.

The PA has a reference to future military land acquisitions with no description of these future land takings. Early on in the military buildup, DoD stated that there would be no land acquisition on Guam. There are no projects described in the PA, no impacts or potential impacts listed on our cultural resources, while Section 106 requires case-by-case review. True consultation must mean free, prior, and informed consent, not procedural box checking.

Too often, consultation has meant informing us of decisions already made.

And a programmatic agreement that allows for phased identification, data recovery in lieu of preservation, or inadvertent discovery protocols, without meaningful indigenous oversight, continues a colonial framework. It prioritizes expediency over relationship and militarization over memory.

So we urge decision-makers to consider calling for the rejection of the draft 2025 PA. We demand a full public record on the 2008 PA before any replacement is approved.

We ask for public access to sensitivity maps, archaeological reports, and monitoring data. We ask that Chamoru people be centered in any decisions around the PA. And it's important to acknowledge that the best option is for our leaders to support a no-action alternative, which is something activists and the community have called for years, to halt the expansion of military infrastructure into sacred CHamoru lands.

Protection in perpetuity, not mitigation, is the only action consistent with justice. We're not opposed to safety. We're opposed to sacrifice zones. And for too long, Guåhan has been treated as expendable.

This is not just about compliance, it's about whether our children will inherit ceremony grounds or contaminated soil, whether our ancestors will rest undisturbed or beneath the sounds of gunfire. We ask that you stand on the side of protection and indigenous sovereignty.

Si Yu'os ma'åse', Senators, for all your hard work.

Senator Perez: *Un dångkulu' na si Yu'os ma'åse'*, Maria, for your testimony and for your family's intergenerational advocacy. My heart goes out to you.

Now I'd like to recognize Jesse Chargualaf for his testimony.

Jesse Chargualaf, member of Independent Guåhan: *Buenas*, Senators. My name is Jesse Chargualaf. I'm representing Independent Guåhan today. This 2025 Programmatic Agreement is like an update and replacement for the 2008 PA. A programmatic agreement is like a blanket approval for a group of similar or related projects.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Rather than using individual approval processes like Section 106, which are naturally more thorough, they use PAs, which would naturally, for them, be written as vague as possible to incorporate and expedite projects that would have ordinarily been under more scrutiny. The 2008 PA has been in effect for 17 years. It is what has governed this buildup, I think. We've stood out there with signs a thousand times to try and stop or, I'm going to say, stall the buildup. But it feels like the 2008 PA beat us every time.

You guys are finding that the 2025 PA is worse.

About seven years ago, when she was first elected, the Governor entertained about 25 organizations who pleaded– I felt like I was begging and had no shame for it. We pleaded with her to help us stop the buildup, to stop this desecration to our lives. And she had nothing for us. She responded with, “what am I supposed to say? What am I supposed to do? What am I supposed to tell them?” But everybody in that room knew what to tell them. Everybody in this room knows exactly what to tell them. And I thank you three for saying it every day. And the correct response to military permits that seek to build on those sacred stones and to lay bones, *Maga'håga*, tell them and we'll stand beside you. Tell them, “[expletive] you, I won't do what you tell me.” *Si Yu'os ma'åse'.*

Senator Perez: *Si Yu'os ma'åse'*, Jesse. At this time, I'd like to recognize Ian Catling for his testimony.

Ian Catling, community member: Thank you, I got the memo late, so.

Senator Perez: If you can press the button so the microphone's on and state your name for record-keeping purposes.

Ian Catling: Thank you very much, Senator. My name is Ian Catling. And I got the memo late. I'm just getting adjusted to what's going on right now. All I can do is provide some previous work experience on this matter with this programmatic agreement. We need to know what this is being compared to, what's going on with our historic preservation. And so it's typically the NAGPRA standards [Native American Graves Protection and Repatriation Act]. The NAGPRA standards are the gold standard for attending to culturally sensitive areas, right?

And so what the military doesn't want us to know about is that we can enforce these NAGPRA standards. Even though we are not federally registered as a nationally registered tribe, we can still enforce these standards because it's understood that we are, in fact, indigenous, we are the people of this island. There are efforts from the military standpoint, on the inside, with the personnel, because they understand what the situation is and who the people are that they are dealing with.

They try as much as possible to follow those NAGPRA standards. But we need to make it evidently clear that that's what we want in this situation, right?

This programmatic agreement is a leveraging tool that we can use as a people. I don't want us to take a defensive stance at this when we can take an offensive stance, right? This is leveraging, right? So there are certain issues for the professional standards on page two. There's no allotment for cultural monitors.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

When you are boots on the ground, there are two kinds of archeologists that are going around the world right now, those that have a moral code and those that do not. We need to establish our own cultural monitors to monitor what is going on with our cultural sites, independent of the archeological team that's there that can report to SHPO's office or whatever agency you would like them to report to. Those cultural monitors need to be present.

There are many instances... Now, I cannot back this up with data, so I'll just say that there are instances in which certain teams, archeological teams, that go out there choose to not define things the way they should be defined, right? We have no basis for being able to check-and-balance what is being written. We could only hope in good faith. We need to stop hoping in good faith that we are getting the proper information and have eyes on the ground.

We need to put an amendment or a caveat into here that affords us cultural monitors, as established through the NAGPRA standards, which nobody wants us to understand that that is available to us. It's available to us, right?

Use of archeological sensitivity maps, questionable. The issue that SHPO's office had in the past is that the whole island is culturally sensitive. You cannot just say, 'okay, this small piece of area, nothing ever happened, but something happened around the area.' The whole island is culturally sensitive.

There should not be designations of sensitivity maps. It was an ongoing battle in that office because they would always try to proffer sensitivity maps and we're like, no. No, the whole island is sensitive. You need to establish in this programmatic agreement: 'hey, the whole island's sensitive. No need for sensitivity maps.'

They're doing this to expedite the processes for their mission. The only thing that we can do as a people, whether we're public officials or not, is slow the process down. That is our power, and they are trying to make sure that we don't understand our power of slowing the process down, because that makes things financially, not capable.

They're not able to afford the cost of a project being held up for long periods of time. It's draining them, right? They don't want us to understand. Well, we need to understand that. That's part of our power. We can slow this down.

Then there is access to cultural sites. I'm a military brat- travel around the world in military bases. They do not treat the locals the way that they treat us.

We have the highest enlistment rate per capita than any other place in the United States, and yet we are treated as though we are third-class citizens. No rights to our cultural land. That needs to be established as its own, separate programmatic agreement with the people. You go to Japan, you go to Korea, you go to Germany, the people, the locals, have access to what is theirs. We all know the history of our land. We all know the history of the land grab. That's why we have our own ancestral lands and land trust organizations to offset that.

We all know what's up, they know what's up. So why is it that my family could only visit Sumay every once in a while when the base commander allows it? Depending on the base commander right? No, no, no, no, no, no, no. We need to have a longstanding agreement saying that 'we as a people have rights to our land, not at the discretion of who's in charge at that moment, that they can rotate in and out at their will.' Longstanding continuity of service.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

All right, more on cultural monitors... That's as far as I got, so I'll stop there. Thank you very much for your time.

Senator Perez: *Si Yu'os ma'åse'*, Ian. At this time I'd like to recognize Eva Aguon.

Eva Cruz, community member: Testing. Can you hear me ok?

Senator Perez: Eva Aguon-Cruz, my apologies.

Eva Cruz: Eva Aguon-Cruz. Thank you. *Buenas* and *Håfa Adai* senators, thank you for holding this public hearing. Thank you for introducing the resolution.

I'm here today to support the resolution, and just as a reminder of a few things: my testimony will be short. But again, having experience of people who have been in that position, who were actually in the business of protection and preservation versus desecration, I just want to call to mind the actual definitions of preservation and desecration because, in this sense, the way this programmatic agreement is drafted, and the language that it uses, and all of the rights that it discards, and everything that it no longer affords us as the public and as the caretakers, we do not support it and it does not need for our consent.

Desecration, in its definition, both from Webster, from Cambridge, is to violate the sanctity of something, which is what happens in the process of development, and most especially, in military development. It's to treat disrespectfully or irrelevantly. It's also the action of showing no respect towards something that is very holy or very much respected. We all know that this is the process that happens, and the programmatic agreement is meant to protect us from the desecration.

Preservation, on the other hand, is the activity or process of keeping something valued alive, intact, and free from damage or decay, and that is the responsibility of our State Historic Preservation Office and the State Historic Preservation Officer.

And, due to our political status, we already aren't afforded the luxury of saying no, especially in matters concerning the jurisdiction of the federal government, of the Department of Defense. And mechanisms like the programmatic agreement are meant to ensure that our people, with what little form of self-government we have, still maintain our inherent rights and responsibilities to our cultural resources and our ancestral remains.

With that, I'd just like to, again, applaud the senators for signing and submitting this resolution that we support. As descendants, we care. We must be consulted. We do not consent to this programmatic agreement, this problematic agreement. The programmatic agreement should call for accountability and inclusion of our voices and our people. Thank you. *Si Yu'os ma'åse'*.

Senator Perez: Thank you, *Si Yu'os ma'åse'*, Eva, for your testimony. I just want to call anybody else who would like to provide testimony at this time. If not, I want to open the floor to questions from my colleagues. Kallen Perez, you're recognized.

Kallen Perez, community member: Good morning. My name is Kallen Perez. I'm a graduate of UOG. I'm a mom of three. And I've sat in this room with many of these people that are here that, we know, requested from the Department of Defense over the past 12 years to have care and to just be mindful as they are developing our island.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I want to be really clear that I'm grateful for the three of you that are here to provide this resolution in opposition to this PA that many of my friends, around me today, have very eloquently described as being problematic for many reasons, right?

Mr. Aguon described it as the SHPO abdicating his duty to protect our island. But I have to say I'm really disappointed that there's not more colleagues here from our elected leaders that are standing up against this problematic, programmatic agreement. I am so grateful that the three of you have been very steadfast in your defense of our island's resources, but it's frustrating that not more of our elected leaders are standing up to the feds when it comes to giving away these places that are important to us.

And I was grateful that Ian mentioned that there are no sensitivity maps needed for Guam because everywhere is culturally sensitive and should be handled that way. I appreciated him giving us steps that we can take to slow the process, which I absolutely do believe is our goal here, to slow the process of desecration and not make it easier for them.

I just want to, again, say thank you for being here today and listening to all the testimony. And to everyone that testified, I echo all of their sentiments and am grateful for all of the institutional knowledge here that people have brought to the table. Thank you.

Senator Perez: Thank you so much, Kallen.

Before I open up questions from my colleagues, for the record, we did receive testimony from the Kumisión i Fino' CHamoru, and their statement is that "it is imperative, so the Commission supports Resolution 144-38. It is imperative that accountability for current and past actions under the draft 2025 Programmatic Agreement and 2008 programmatic agreement be upheld.

Further, it is incumbent upon the federal government to engage community organizations, such as Kumisión i Fino' CHamoru yan i Fainaigue i Historia yan i Lina 'la' i Taotao Tåno' [Commission on CHamoru Language and the Teaching of the History and Culture of the Indigenous People of Guam] in providing essential feedback on planned actions relative to land-use and to protect the vulnerable resources of our land and ancestral legacy. It is for these reasons, we wholeheartedly agree with the findings of Resolution 144-38 and support legislative action to achieve its end."

We received testimony from Dave Lotz, who's in support of Resolution 144-38.

He states, "first, the PA omits any further involvement by the public and the Advisory Council, both of which are required to be involved. For example, Section 106 regulations mention the public 62 times and the draft PA does not mention the public once.

Second, the PA is incomplete as Appendix A, Appendix B are not included.

Third, the PA has reference to future military land acquisitions with no description of these future land takings.

And fourth, no projects are described on their impacts or cultural resources.

This draft PA is just designed to abdicate the Guam State Historic Preservation Officer's responsibilities to the military, which is unacceptable.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

And beyond passage of this resolution, I recommend that legislation be enacted to ensure that Guåhan policies of historic preservation reflect community values and concerns, to include the following: first, policy making and oversight responsibilities for the Historic Resources Division should be assigned to the Guam Review Board of Historic Preservation.

Second, public review procedures should be established by law for all Section 106 undertakings.

Third, the webpage for the Historic Resources Division shall post all Section 106 documents.

And fourth, the Guam SHPO shall publish a yearly public report of all federal and Guam undertakings reviewed. Respectively submitted," Dave Lotz.

We also did receive testimony from Cassie Bordallo, also in support of the withdrawal of the draft 2025 programmatic and 2008 programmatic agreements.

At this time, I'd like to recognize my colleagues for any questions.

If those that testified can come before the panel again, and we can pose any questions or comments to you. So Jarren, Monaeka, Eva, Ian, Kallen, if you can sit at the table. So, I'd like to open the floor to my colleagues. First of all, Senator Barnett.

Senator Chris Barnett: *Si Yu'os ma'åse'*, Madam Chair, and *Manana Si Yu'os ma'åse'*, again, to the people of Guam. Thank you for those watching on our YouTube stream, Docomo, and GTA.

I first want to start just by commending Senator Sabina Perez, as well as Senator Telo Taitague for being instrumental in communicating the very great need for, at first, an extension of this programmatic agreement. And more importantly, with this resolution, the withdrawal of the draft 2025 Programmatic Agreement and the 2008 Programmatic Agreements.

I love this Problematic Agreement meme, if you will, because it is a problematic agreement, simply, because I think the people of Guam just don't agree with, first of all, what's happened in the 2008 agreement. And second of all, what is potentially gonna happen with this 2025 Programmatic Agreement.

I know Senator Perez, Senator Terlaje, they were a big part of why I decided to run for public office, because we had seen all too many hearings, all too many sessions where issues, like the issues that are contained in this resolution, were being debated and discussed, whether it was here in the public hearing room or across the hall in our session hall. And it was very clear to me that there weren't enough hands being raised in support of the people of Guam.

I found inspiration to run for public office and serve our island, thanks to these two ladies and others. And so I hope that you also find inspiration, because a lot of you come to these public hearings, you might as well, *pot fabot, fa'lågu pa Senadot yan Senadora* [please run for Senator], because we really do need your help.

You guys are an inspiration to me. You continue to show up. Monaeka, your courage at Adelup was to be commended. And I absolutely disagree with the way they have handled your presence there. I think that's also part of the problem.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

When we had a SHPO who had a backbone, they called her an obstructionist, and she was replaced in a very political way. And under this new SHPO, we see very little historic preservation. And that, again, is to me, my understanding, should be the gist and the center of his responsibilities. I agree with all the testimony this morning that says the streamlining of this process does not benefit the people of Guam, does not benefit the island of Guam. It benefits the Department of War.

If we have all of these mechanisms in place, like Mr. Ian had testified, and we have all of these safeguards in place, but we don't have a SHPO or a Governor or a Lieutenant Governor, or eight senators, for that matter, who agree that this is important, who agree that we need to go back to the drawing board and redo this agreement so that we actually have something that we can agree on.

I think just going back to, 'please, run for public office,' because we need your help in here. I mean, you could see there's just four senators of the 15 signed onto this very important resolution. And I don't understand, when I listen to your testimony, absolutely, Mr. Saralu, everybody who testified, you're very articulate, you're very passionate in laying out all the points, and I really don't think you can argue these points.

For the 11 senators who didn't sign on to co-sponsor this, I implore them to watch the hearing and listen to the arguments that are put forth because, for me, they're very indisputable. And I thank you for that.

Delegate Underwood had talked about the number of oaths we take to serve as a senator, and I find it a little ironic that the first oath we take is an oath to defend a constitution that doesn't even fully apply to our people or our island.

So, the oath that I hold most dear to my heart is the Ini'fresi.

Every session, we say that Ini'fresi, and when I look around at the way a lot of our colleagues vote, I don't think they understand what we're saying when we pledge to defend our air, our land, our water. I don't think they understand, because the proof is in the pudding. So, again, I don't really have any questions, Madam Chair. I mean, we're up here getting whiplash, going like this, agreeing with you.

I don't feel like these are points that are gonna be argued, but a lot of the information that you guys shared with us, a lot of the testimony, I am definitely going to take with me across the hall when we debate and discuss this resolution on the floor.

Outside of, again, asking you all to pick up your packets and run for Senator, I mean, with everybody who is... thank you, Madam Chair, for this. There's gonna be a lot of vacancies in the Legislature next year, so I can't impress upon you enough the opportunity we have to completely transform the direction our island is heading in. But we can only do that if we get like-minded people to serve our island. And, it takes eight to pass, 10 to override.

Like I said, a lot of you guys, when you come and you provide this testimony, I hear a recurring theme. Some of you say, we're tired of coming here to provide this testimony, right? So, come here in a more permanent way. That's my ask of you. And I know, Naek, I've asked you a few times, and you kind of just shrug it off, but this is where a lot of the decisions are being made.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

And we need more consensus in here. Obviously, we also need the consensus of the Governor, the Lieutenant Governor.

We need a Governor, a Lieutenant Governor, who will install a SHPO who is gonna really move and defend the island and her people, and not support these processes that circumvent all of the protections that we have, and even some that we don't yet have. So, thank you again, Madam Chair, for the opportunity to speak in support of this resolution. I absolutely agree.

We scrap the draft, scrap the 2008, and come together and get a seat at the table so that we could come up with an agreement in which the CHamoru people and the Island of Guam truly assert the importance of our culture and our land. *Si Yu'os ma'åse'*, Madam Chair, and, again, thank you to everybody who testified. Guam Election Commission's open eight to five. You can go and pick up your packets there. *Si Yu'os ma'åse'*.

Senator Perez: *Si Yu'os ma'åse'*, Senator Barnett, for your comments. At this time, I'd like to recognize Senator Terlaje.

Senator Therese M. Terlaje: *Si Yu'os ma'åse'*, Madam Chair, and I want to start off by thanking you for this resolution, which I believe is so well-written, so perfectly stating what is really at issue here. It doesn't overstate it. It's easy to comprehend when we are talking about something that is like federal law, so sometimes hard to understand or vague in its application here, but this resolution makes it extremely clear.

I think I'd like to start off with the point where you say, "no publicly accessible report has been issued documenting the outcomes of the 2008 programmatic agreement, including the number of projects conducted, sites disturbed or preserved, ancestral remains encountered, or disputes resolved."

So we have nothing on the last agreement, this one, he says it's an extension of that one and we're going to go forward with what the SHPO believes is a better way to go forward. But from what you've outlined, again, in this resolution- it's so very clear, it's not what we could have gotten. I believe, in negotiations, and it made me wonder when I read it. This is another one of those instances where I wonder who is negotiating for Guam. Who is in these rooms agreeing with the military in these huge matters?

And I feel, in some ways, that we go backwards instead of forward, instead of learning from what has happened in the past and how the public has been able to help us, in the past, to shape these agreements. We exclude the public, we exclude everybody, and we move forward, in what I believe, is a narrow type of way. Really, this is what we've seen recently, unfortunately. So we did have an agreement, very controversial in about 2011, when the entire community was invited to be involved.

We had different organizations, we had agencies involved, and even became signatories on that agreement. We had projects outlined in there as part of the mitigation for cumulative impacts, which are not mentioned here, which included things like the repository, a museum that they were supposed to help us build. That has not come to fruition at all.

There are also things, it was supposed to be annual meetings where the public would be informed of the progress as we went along. Those things, again, some of the good things that we learned

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

are not included here, and some of the things we learned when it comes to who's making the decision as to whether this can be avoided or not is not resolved here at all.

We continue to acquiesce that it will be the military's decision to decide whether this is to be avoided or, in their terms, it's going to be removed. So they remove everything. That's their mitigation, as opposed to avoiding something.

And that is the exact situation we came in with burials, with villages that they denied were villages, that later on, after they found so many pieces, pieces, pieces, they would finally come close to admitting that that was actually a village like we were telling them in the first place.

All of that, I mean, it is hard to come back again. All of you, I really want to thank you for really being on the ball, understanding this agreement perfectly, understanding our experiences, perfectly understanding what we are entitled to as a people of Guam.

I really appreciate that and that you're able to articulate it better than I can, that's for sure. I'm very grateful.

This is one of those things where it's us making the agreement. It's Guam entering into an agreement that sells us a little short. And there's no reason to do that. We need all of your help to impress upon those who we are dealing with that we are in agreement, that, 'no, that's not how we're going to treat our burials and that's not how we're going to treat our ancient villages, and that if we can preserve them, we should preserve them. And that should be our decision.'

Whether you move a road or you don't move a road, 'how convenient is that?' should not really be the sole determination.

This agreement, just again, partly from the work of Senator Perez, partly from my own readings-it does what you say. You have pointed out exactly what it does. It removes the public from this process. It determines that the commander of JRM is the one who will make most of these decisions, these determinations. It removes the cultural monitoring.

It even removes the SHPO from being there until the end, until all the reports are done, and we've seen some of these reports not be done promptly. This is the thing: we're going along in this process, and the people of Guam are not being informed right away.

There was a time when it was a little better, but right now it's really hard to know what is happening, what burials are being found, what burials are being reburied, what burials are being built over, what burials are not being required to even have monuments anymore.

At the very minimum, all of that seems to have changed in the last few years, and so that's why I feel we're going backwards instead of learning from what we have done well in the past, and learning from that, and insisting on that going forward.

There was a time when all of these PAs, we tried to get a whole group of people in, to inform us, even including the Attorney General at the time. All of us, my office, the Attorney General's office, agencies, we wanted everybody's input, experts on this NHPA process, Section 106, all of them, to help us to negotiate the best outcome possible.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

And strangely, right before that agreement was finalized, everyone was excluded. Again, they go into a room with one or two people and that's it. They're able to negotiate for Guam, kind of, and we end up with an agreement like this.

In one of your testimony, Mr. Saralu, you said that this agreement has gone to the Governor's desk, but the Governor's signature does not even look like a requirement on this; and according to the SHPO's interviews with the media, he doesn't intend that either. Maybe that's just a courtesy that it went there, and that this is just going to be between him and JRM, Joint Region Marianas.

I want to point out what he says. We've pointed out, your testimony today has pointed out what we lose, or what we should have been entitled to, or could have insisted on, and he's pointing out this is a good agreement now, better, because a range of commitments JRM has made as part of the new agreement, 'an electronic portal for SHPO to track projects and go paperless, funding for higher education in archaeology and anthropology at UOG and across the region.' I don't see the details of those things in here.

'An interpretive trail at the West Bo'ña Latte site on Naval Magazine.' Again, these are Latte sites; and we are praising that they are going to create a trail for us to see the Latte on these sites. As you said, Mr. Ian, what is that? We're supposed to have access to these places. That's part of a previous agreement not being enforced very well either. That we can't see the success or failures of those things is really critical to making a good agreement going forward.

There's been so much criticism on these access agreements that are really very hard to use and are not seemingly welcoming for the people to really go and be at these ancestral sites, appreciate them in their natural place. So many proposals are 'bring them outside of the base, put them outside the fence, and that's where the people can go and see their Latte and their artifacts.' I don't agree with that at all. One of the other concessions that the SHPO said he had was a comprehensive study of the Star Cave at Ritidian.

But again, as you've outlined, what we give up again, and again, thank you for pointing out that this is all part of a big picture. It's part of an agreement that we're already under, the 2020 Programmatic Agreement for Military Testing and Training in the Surrounding Waters of Guam and the CNMI. This is the largest testing and training range in the world that we have been subject to. That agreement, again, was one of those negotiated by one single person and did not give us any additional benefits from the one previous to that.

This is the one that allows sonar and tells us how much sonar, tells the federal agencies how much sonar killing will be allowed, how much impacts on mammals would be allowed, how much detonation is allowed. Those are the programmatic agreements that set us up for that and pretty much exclude us from having any additional impact to avoid those.

This agreement also comes on top of, as I mentioned earlier, the 2011 Guam Buildup Programmatic Agreement, where we still are finding that we are not satisfied with their compliance with that agreement, with the museum that was supposed to be built. They built us a repository and then left it for us to fund, manage, take care of all of the artifacts that were removed from the northern part of Guam, and more. Then these regular meetings, they've pretty much excluded all of us, even the Senators now, public, Senators, anyone interested, not invited, not allowed.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

This agreement also stipulates that it will cover all future Joint Region Mariana land acquisitions on the island of Guam. And all projects not included in one of those two other agreements will be covered under this agreement. So, again, we don't know what those projects are. Normally, we know which projects they are, they're going to build a firing range, this is going to manage that firing range, but this is for every, every project.

Every project coming forward, land acquisitions, they seem to be addressing in here as well, so land we don't even know about. Land acquisitions that could not be covered in these attachments that are ghost attachments at this point, not in here. How could we know the impacts? You're so right. How can we comment on the impacts of those projects when we don't know the projects? We don't know the land that they're going to be put on. We don't know the cultural sites that are in those locations.

I mean, it's just illogical.

Again, I am so grateful for your advocacy, your presence here, for Hope Cristobal, Robert Underwood, all that generation who started this for us. When these federal laws started to come into play, and have really saved a place for us that we should not lose. We must continue to be here, be there, be present, and remind everyone that this is what's at stake.

It was really unfortunate, at Camp Blaz, we saw how that progressed. And my recollection is Dave Lotz kept saying, 'these are villages according to these maps, according to these documents.' And they kept saying, 'these are not villages. This is an earthen oven. This is scattering of pottery. Those lattes, those are kind of random, arbitrarily placed. And the villages are down near the coast. There's nothing up here on the top of the land.'

And then they just kept finding more and more and more. At that time, we were advocating that cultural landscapes should be considered. There's no mention of that in here. No additional recognition of what we learned. That if you treat these things like small deposits of pottery, as opposed to, this is where they went at certain seasons. This is where they lived and fed their families in certain seasons. And all of that was part of Guam.

We advocated so hard at that time to preserve these in place for future generations to learn when archaeology techniques change. When we do like other countries and we don't have to dig them up and remove one by one and we can study these better as a whole picture, or preserve them in place, if we can do that, so that the future people of Guam, they will know exactly what our ancestors saw from on the top of the cliff, looking down, looking sideways.

All of that is important to our knowledge of how they lived, how they persevered for 4,000 years, how they survived the Spanish War, how they survived occupation. All of it is important to CHamoru identity, important to going forward.

Again, I can't thank you enough for all of your work and all of this excellent testimony that we have before us. Thank you for your work, Madam Chair, Senator Perez. It really is excellent. It really, in detail, studied the National Historic Preservation Act, the federal law, and what we should be entitled to here on Guam. *Si Yu'os ma'åse'*. Thank you, all.

Senator Perez: *Si Yu'os ma'åse'*, Senator Terlaje, for all your work throughout the decades in historic preservation and advocating for preservation-in-place. That was not even in existence, this idea of preservation-in-place. It's always been salvaged archaeology, which is to document

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

and destroy. One of the stipulations, which are the terms of the programmatic agreements of, I believe, the 2011 Programmatic Agreement was that the military was supposed to put together a synthesis report. It's a compilation of all these documented destruction of our historic properties. They have not provided that information. We don't know the cumulative impact. And here before us is a document that is going to, I would say, expedite even further the destruction of our historic sites without any public oversight, if any is provided.

I do appreciate everybody's testimony. This programmatic agreement is not for beginners, I must say. It's very inaccessible because of the jargon. They talk about terms, it's stipulation. So I do applaud all of you. You guys came in, doing your homework, and really pointing out different aspects of why this draft programmatic agreement is simply wrong. It's wrong in regards to upholding the National Historic Preservation Act. It's wrong in protecting our invaluable sites where we have, CHamorus, have lived for over 3,500 years or longer. There's so much at stake here.

If I can point out one, another flaw in this draft is it states that the applicability, although it states applicability does not apply to the 2011 Programmatic Agreement regarding the military relocation from Okinawa, or does not include 2020 Programmatic Agreement with the Mariana Islands Testing and Training, what happens when those programmatic agreements expire? Does this programmatic agreement now cover that? That is not clear to me with what is written in here. This could be the master programmatic agreement for all military undertakings, potentially, because it's not stated specifically. We know when it's not stated specifically, it's not going to be followed or our pleas are going to be ignored if it's outside of these stipulations.

That's why this programmatic agreement needs to be withdrawn, as well as the 2008 one, because of the loopholes, the gaping loopholes. We don't have a full accounting. We know that there's some impacts, but we don't have this full accounting of what it's done to our resources that are invaluable and irreplaceable.

We did get a letter late close-of-business day yesterday from the director of the Department of Parks and Rec asking to reschedule this hearing so the SHPO, when he returns, can answer questions. And so we agreed. We are going to continue this Public Hearing on March 11 at 2:00 p.m. This would also allow my colleagues to participate. We do need their support and we do encourage more testimony to be provided.

Again, thank you for mentioning the toolkit; that's been circulating as well as the petition. So again, if you would like to submit testimony, definitely you can send written testimony to me. I definitely want to encourage everyone to come to the Public Hearing that is on March 11th, at 2:00 p.m.

If you want to send written testimony, address it to:

Senator Sabina Flores Perez
710 Marine Corps Drive, Suite 303A,
Hagåtña, Guam, 96910.

It can be dropped off at the mailboxes here at the Guam Congress Building or emailed to office.senatorperez@guamlegislature.gov. At this time, it is 10:55 a.m. We are going to recess until March 11, 2:00 p.m. Thank you.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Continuation of the Public Hearing March 11, 2026

Senator Sabina Flores Perez: Buenas yan Håfa Adai. We will now reconvene the continued public hearing for Resolution No. 144-38 (COR), relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing the Department of Defense undertakings on Guåhan and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations. The time is now 2:05 p.m., March 11, 2026.

Prior to today's continuation of this public hearing, we received both oral and written testimony from members of the community, cultural practitioners, scholars, and concerned residents who shared their perspectives on this important matter. Before we proceed further, I would like to recognize my colleagues who have joined me here today, Senator Telo Taitague and Senator Chris Barnett. Si Yu'os Ma'åse.

I would like to further extend my sincere appreciation to everyone who took the time to submit testimony on this resolution, as well as any comments to the State Historic Preservation Officer. Regarding this resolution, we received oral and/or written testimony from Kumisión I Fino' CHamoru, Dr. Robert Underwood, Jarren Saralu, Baltazar Aguon, David Lotz, Monaeka Flores, Veronica Cruz, Dr. Hope Cristobal, Maria Hernandez, Eva Cruz, Jesse Chargualaf, Keisha Borja Quichocho-Calvo, Cassie Bordallo, Molly Aguon-Diaz, Kallen Perez, and Ian Catling.

Si Yu'os Ma'åse to each of you for sharing your perspectives and helping inform this discussion. Today's continued hearing is being held at the request of the Director of the Department of Parks and Recreation, Angel Sablan. At the time of the previous hearing, the State Historic Preservation Officer was off-island, and we are reconvening this hearing to accommodate that request to ensure that State Historic Preservation Officer has the opportunity to provide testimony and respond to questions from my colleagues.

As a reminder to the public, this resolution focuses on the Draft 2025 Programmatic Agreement, which is tied to the 2008 Programmatic Agreement. This 2025 Programmatic Agreement would establish procedures for how the Department of Defense carries out undertakings that may affect historic properties and cultural resources on Guåhan.

Programmatic Agreements are intended to guide compliance with Section 106 of the National Historic Preservation Act, which requires federal agencies to identify historic properties, consult with stakeholders, assess potential adverse effects, and explore alternatives to avoid or minimize harm before projects proceed. This measure calls for the withdrawal of both the 2025 and 2008 Programmatic Agreements with the full implementation of Section 106 to provide transparency in the protection of CHamoru cultural resources.

And several written testimonies submitted to the committee or to the author highlight concerns about transparency, accountability, and meaningful consultation. For example, Kumisión I Fino' CHamoru expressed support for Resolution No. 144-38 and emphasized the importance of accountability for both current and past actions under existing and proposed agreements, as well as the need for community organizations and cultural institutions to be meaningfully engaged when decisions affecting land use and cultural resources are being considered.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I'd like to also recognize my colleague, Senator Terlaje. Thank you for being here. So other members of the public noted that without full accounting of the implementation of the 2008 Programmatic Agreement, it is difficult for the community to evaluate whether the proposed 2025 agreement strengthens or weakens protections for cultural and historic resources.

Several testimonies also emphasized the importance of meaningful consultation and public participation under the Section 106 process of the National Historic Preservation Act, noting that the review process is intended to involve the public, cultural practitioners, and local institutions on projects that may affect historic properties, archaeological sites, or ancestral remains. It is also important to recognize that protecting cultural and historical sites reflects the priorities of the people of Guåhan.

The Draft Guåhan 2050 Sustainability Plan developed by the Bureau of Statistics and Plans found that residents overwhelmingly believe protecting cultural and historic sites should be the priority for both the government and the community. According to the plan, 78% of residents identified the protection of historical and cultural sites as very important. The plan further emphasizes that the preservation of CHamoru culture and the stewardship of cultural sites and ancestral lands are essential to maintaining the island's character.

The loss of cultural and historical values is viewed by many residents as an existential threat to our community. These findings reinforce what we have heard from the community members during this hearing. Cultural sites, ancestral lands, and historic places are not just artifacts of the past. They are part of the living identity of our island and the inheritance of future generations. We appreciate the continued engagement from our community and look forward to receiving testimony today.

So, at this time, I'd like to call all those who have come to testify at the table. Right now we have Patrick Lujan, the Guam State Historic Preservation Officer; Baltazar Aguon; Jarren Saralu; and Dave Lotz, and all of have signed up to testify. So we'll begin with testimonies and then later we'll save the questions after all has provided testimony. So we're gonna start with the government agency, with Patrick Lujan, State Historic Preservation Officer.

So, just as a reminder in regards to the conduct of the rules of this hearing: that basically we don't allow inferences of the speaker, and questions should be really limited to the testimony regarding the resolution. So that's the rules of conduct. So at this time, I would like to recognize Patrick Lujan.

Patrick Lujan, Guam State Historic Preservation Officer: Thank you. Thanks for having me. Håfa Adai. For the record, my name is Patrick Quenga Lujan and I serve as the Guam State Historic Preservation Officer. I want to begin with an apology for my absence at last week's hearing. However, I believe you will understand why. Just last night, I had the honor of bringing four of our ancestors home from the American Museum of Natural History in New York City.

Alongside our CHamoru diaspora, led by Fran Lujan, Heidi Chargualaf, Tina Delisle, Manny Crisostomo, Judge Johnny Gogo, Jesi Bennett, and others, we held a beautiful send-off ceremony

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

with the Native American Lenape Nation. After more than a century in a museum and far longer away from their soil, our ancestors are finally back. They will eventually rest at the Naftan Manaiña'ta once it is complete. I'm also deeply humbled that the children of the late Angel Santos entrusted me to wear this adze today, which belonged to their father.

I wore it in New York and I wear it today, hoping to honor the legacy of a man who fought so fiercely for our people, and it will go back to the family after this hearing. Regarding this Problematic Agreement, I want to express my sincere appreciation to everyone who has submitted comments so far. I assure you that every single voice is being heard, assessed, and addressed.

Since we opened the public comment window in December, we have granted two extensions totaling 105 days to ensure everyone has the opportunity to review and comment, March 20th being the deadline. This is transparency. However, I must be honest. Our dialogue thus far has been confined to formal letters, FOIA requests, newspaper banter, and this public hearing. I believe that mature professional dialogue could have cleared up much of the misinformation currently fueling public tension.

I have been criticized by some who say my military background makes me unfit for this role. I disagree. Now retired after 24 years in the Air Force Reserve and three deployments dealing with the Middle East, I have seen firsthand how sovereign nations negotiate with the Department of Defense. I have sat at high-level negotiation tables at the U.S. Central Command. I know that an agreement is not a surrender. It is the result of sometimes grueling diplomacy.

That is what we have done for the last three years regarding this PA. We had the difficult conversations with JRM to ensure we had a solid draft before bringing it to the public. And who am I negotiating with on the other side of the fence? Fellow CHamorus and people who call Guam home. Believe it or not, they too have the best interests for Guam. To those who doubt my intentions, just because I wore the cloth of your enemy does not make me an enemy. My blood is thicker than any fatigues. My father used to say, believe none you hear and half you see.

Now let's talk about the ask from your resolution. The ask to terminate the existing agreement and kick the draft into the landfill. Well, let's ask ourselves, what happens if we terminate this PA? Do we terminate all the PAs that we currently have with the military and other federal agencies? To be clear, the Advisory Council on Historic Preservation encourages the use of PAs as a key tool for compliance with Section 106 of the National Historic Preservation Act. If we walk away, we don't just lose this seat.

We potentially trigger nationwide PAs managed by the ACHP. In those scenarios, we lose local control entirely. And I guarantee you, 100%, that's what they will do. Will the legislature or the Attorney General provide the critical legal support required to navigate that complex fallout?

Under previous and existing agreements with the military, Guam has negotiated and gained, among other things, the Cultural Repository, the Guam Synthesis Study, much-needed technical expertise, a public access plan — whether it works or not, there is one — and mandatory cultural sensitivity training for military personnel, all unique to our island. With this new draft, we have

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

secured a commitment letter for four additional major items, not to mention updating the archaeological probability maps and fine-tuning the reporting processes.

Such agreement really encourages long-term cooperation with institutional relationships, not based on rotating military doors and ever-changing personalities. They are binded to the agreement. So we revert to project-by-project reviews as asked by your resolution. We lose all of that. We lose the big picture of cumulative impact. For those who still don't understand the process, we will offer Section 106 training for you and other stakeholders for better understanding and clarity to your questions and concerns.

As I've said in the past, this PA is an operational tool, not a political one. So I plead with this body, the activists, and the public: work with me, not against me. We are on the same team.

Use this same energy and attention in helping me update our local statutes, which currently fall far short of federal standards. Where is this outcry when developers and private landowners and telecom companies run all over our weak laws? I've had a legislative rewrite ready and for sale since 2021, and I'm still waiting for someone to take it for a test drive. There has been little to no action on that initiative.

But we have a cultural shakedown when a beneficial agreement with the military arises. Why? Let us show those who look at us as a colony that we can govern ourselves with maturity, honor, and respect. We are better than the division we see today. That concludes my testimony. I do respectfully ask that any further questions can be submitted in writing. I'm currently running on fumes after a long trip to bring our ancestors home, and I really do thank you for understanding.

Senator Perez: Thank you, State Historic Preservation Officer. Are you gonna be able to stay for questions now?

State Historic Preservation Officer Lujan: I'm really on fumes, to be honest with you.

Senator Perez: Maybe just a couple of questions. So, was the 2008 Programmatic Agreement terminated?

State Historic Preservation Officer Lujan: No, it's still alive.

Senator Perez: Has it been amended?

State Historic Preservation Officer Lujan: Not since I've been State Historic Preservation Officer.

Senator Perez: But to your knowledge, has it been amended prior to you being State Historic Preservation Officer?

State Historic Preservation Officer Lujan: I don't know.

Senator Perez: So how can this 2008 PA be used for future projects that didn't even exist when the 2008 Programmatic Agreement...? Case in point: the Missile Defense Agency used the 2008

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Programmatic Agreement for the finalization of the Record of Decision. Being you as the State Historic Preservation Officer, how was this 2008 PA used to finalize the Missile Defense Agency, a project that didn't exist until 2002?

State Historic Preservation Officer Lujan: The Missile Defense Agency is not using any Programmatic Agreement at this time. They are going through the 106 process.

Senator Perez: According to the Record of Decision, it states the 2008 PA was used.

State Historic Preservation Officer Lujan: It's not being used on my terms. We have been looking at it as case-by-case 106.

Senator Perez: So then you're saying the Record of Decision is false? There's something false about this Record of Decision?

State Historic Preservation Officer Lujan: I have not read the Record of Decision. In that manner, I know that operationally we have been looking at it from case-to-case situations.

Senator Perez: Okay, so obviously somebody's not saying the truth here, because the federal document — the Record of Decision — states the 2008 PA was used for the Missile Defense Agency, and you're saying it was not.

State Historic Preservation Officer Lujan: I'm looking at it as 106.

Senator Perez: Okay. Because I think even in the documents I FOIA'd, you were questioning how this was used. So you as the State Historic Preservation Officer should have known how this was used.

State Historic Preservation Officer Lujan: Well, that's one of the amendments that we're trying to do with the new version, and that could possibly fall into that. But we've been looking at it from a project-to-project standpoint for Missile Defense.

Senator Perez: Okay, so that has to be cleared up, because apparently there are some issues here. Who drafted this 2025 PA?

State Historic Preservation Officer Lujan: It was a collaboration with us and Joint Region Marianas Cultural Resources, or the Environmental Resource Division.

Senator Perez: So no indigenous groups were invited to this drafting?

State Historic Preservation Officer Lujan: We looked at it in terms of operational views, where we felt that there was need for improvement, and when we felt that we could come up with a product that we both felt comfortable with as far as how the process were going, that is why it is currently out for public review.

Senator Perez: Are you aware that the National Historic Preservation Act requires the State Historic Preservation Officer to include consulting parties, interested parties, and that you

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

between the Department of Defense made this executive decision not to include cultural practitioners, people who have an interest in historic preservation?

State Historic Preservation Officer Lujan: That is why we have until March 20th, and we've given two extensions for everyone to make comments.

Senator Perez: So that is different from consultation.

State Historic Preservation Officer Lujan: It is not finalized. Yes, this is part of consultation.

Senator Perez: This is not consultation. These are comments, not consultation.

State Historic Preservation Officer Lujan: We look at it as consultation.

Senator Perez: In regards to the 2008 PA, are you aware that there is no requirement for quarterly reporting of medium and high archaeological sensitive sites?

State Historic Preservation Officer Lujan: Can you repeat the question, please?

Senator Perez: Are you aware that in the 2008 Programmatic Agreement, there is no requirement for quarterly reporting on the medium and highly sensitive archaeological sites? Are you aware of that?

State Historic Preservation Officer Lujan: I would have to go back to the 2008 PA to look at it.

Senator Perez: Because if you look at the quarterly reporting, it leaves out Section VIII, I believe C, in the medium and high sections. It leaves only no and low archaeological sensitive sites. It leaves out the reporting of any notification to State Historic Preservation Officer regarding any work plans or archaeological recovery of the high sensitive archaeological sites. Do you support that omission? Do you support that omission of leaving out these quarterly reporting requirements of highly sensitive archaeological sites? Do you support that?

State Historic Preservation Officer Lujan: I support them reporting everything.

Senator Perez: Okay. So, in that case are you aware that this Draft 2025 Programmatic Agreement retains that omission? It carries over that loophole where the stipulations does not require quarterly reporting of highly archaeological sensitive sites. So you would be opposed to that?

State Historic Preservation Officer Lujan: I would be opposed to that, yes.

Senator Perez: Okay. So that's one main issue, one big loophole. And looking at some of the FOIA documents, that has resulted in the destruction of cultural sites. In just the one instance I saw in the documents I FOIA'd, there was a destruction of sites because of that. Are you in agreement with default approval after 30 days have lapsed without a response by State Historic Preservation Officer?

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

State Historic Preservation Officer Lujan: That is in line with the Section 106 processes, so it mirrors that. That's a federal guideline that, even though I don't agree with it, that's what the federal guideline says.

Senator Perez: So what that means is we're basically allowing non-consultation to exist if the State Historic Preservation Officer doesn't respond. How can that be aligned with the National Historic Preservation Act?

State Historic Preservation Officer Lujan: Going back to 106, it is deemed approved if the State Historic Preservation Officer's office does not respond within 30 days, correct.

Senator Perez: Okay. So do you think that's the appropriate way to manage our historic sites? For Guam, you're sitting before us talking about how important our historic and archaeological assets are. Do you think this is the best method forward to protect something that's so irreplaceable?

State Historic Preservation Officer Lujan: That's where we need to act within 30 days, because by federal law, if we don't, then it's considered concurrence.

Senator Perez: But couldn't this Programmatic Agreement be better written? You know, these are just minimum standards, right? When we talk about minimum standards, other laws, we can be more rigorous.

State Historic Preservation Officer Lujan: So you're asking to soften the 30 days and make it longer? I'm in agreement with that.

Senator Perez: Or just no automatic approval, right? I mean, why can't we have the consultation opportunity because we didn't respond within 30 days? Why are we letting it go basically because time has lapsed? For us, this is really critical. If we really want to protect the historic sites, why are we letting non-consultation be even an option?

State Historic Preservation Officer Lujan: Then that's when we need to act within the 30-day timeframe.

Senator Perez: But why can't we include that in a stipulation if we are going down this Programmatic Agreement route?

State Historic Preservation Officer Lujan: I think, ma'am, you can make that suggestion, and we'll take a look at it when we evaluate all of the comments. Again, it may come down to a legality issue. Where, if it doesn't legally go in our favor, but we will take a look at it.

Senator Perez: In this 2025 draft, you stated in one section, the duration, Stipulation XVII: "This PA shall become effective upon execution by either signatory and shall remain in effect in accordance with Stipulation XIV which is amendment, or expiration as provided in paragraph B below." This language basically allows for unilateral action by one signatory. Right now this draft PA only has two signatories: it's you, the State Historic Preservation Officer, and it's the

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Commander for Joint Region Marianas, which is at this time Brett Mietus. So this could potentially allow for unilateral action. In the 2008 agreement, it required all signatories for the document to be legally binding. Did you write this?

State Historic Preservation Officer Lujan: Did I write what?

Senator Perez: Did you write the fact that only one signatory need only make this effective?

State Historic Preservation Officer Lujan: No, it cannot be just one to make it effective.

Senator Perez: That's what it states here.

State Historic Preservation Officer Lujan: We'll change it.

Senator Perez: Have you looked at the fine print in this?

State Historic Preservation Officer Lujan: We'll change it.

Senator Perez: So you did not write this?

State Historic Preservation Officer Lujan: Not that portion.

Senator Perez: So who did? There's only two parties you mentioned — the Department of Defense and you. So you did not see this when you submitted this out for public comment?

State Historic Preservation Officer Lujan: If it says that, we will change it. That's not an agreement if it's only unilateral. Straight up.

Senator Perez: So then without this type of questioning, this could have gone through without any kind of ... This is a safeguard that's being removed in the protection of our historic sites, our cultural assets. Are you willing to... because this 2008 Programmatic Agreement is a 50-year agreement, so we're roughly 18 years into the programmatic agreement. Is there an opportunity to sit down and have a roundtable and discuss this with the public invited, rather than hope the comments get incorporated?

Because at this time, we don't know whether or not comments are going to be incorporated, no matter how good they are. And we've had experiences in this community with the EIS, for instance. I'm sure you're well aware. We talked about how we're going to have housing issues when the MITT came out. And look what happened. There was no meaningful response to housing. We know our community is well-informed and they are very highly concerned.

It's important that we as a community are able to be consulting in this draft. It's a huge document because it expands the scope to even future land acquisitions. And that may be a nice way of putting it. We don't know if that includes eminent domain.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

State Historic Preservation Officer Lujan: I want to comment on that. Even if there's a provision of future land acquisitions, if those particular lands were never previously surveyed from an archaeological standpoint, we will assure that that would have to be done before anything would be conducted.

Senator Perez: And so that's the other thing — there's nothing in Appendix B. Even my predecessors... Public Auditor B.J. Cruz, who wrote a very similar resolution. In his resolution they were very concerned about going into a Programmatic Agreement when we don't know what properties are being impacted. So it's like a blank check. We don't know how much is going to be drawn out of that bank account, is it going to be all of it, or if it's going to be overdrawn. This is a huge concern for our community. There's nothing in the Appendix B ?

It's a 50-year agreement. Why is there a rush to get a draft in when we have more years left of this 2008 Programmatic Agreement?

State Historic Preservation Officer Lujan: Why?

Senator Perez: Why are we rushing this?

State Historic Preservation Officer Lujan: There's no rush. We can operate off of the 2008 PA for the whole 50 years. What it is, it's, we made it better and smoother. This is after 17-plus years of operation, and so if the public feels that we can stick to the 2008, we're going to operate off of that. I just feel that the 2025 is a better version. Why not look at what types of agreements we've worked with — no matter who the partner is — and come up with better processes? And in the meantime, we're able to get other things out of it from a negotiation standpoint.

Senator Perez: So you go back to negotiation...

State Historic Preservation Officer Lujan: We're not really reinventing the wheel with the new PA, we're just making it better. Even the reporting. Where the quarterly reports, there's a small change of processes that would be, instead of after the fact, it's before the fact, and we put that in there.

Senator Perez: But it's still leaving that loophole for the medium and the high. It's gone. It's still retained. So it still has that loophole which we know has caused adverse impacts. The destruction of sites irreversibly.

State Historic Preservation Officer Lujan: We'll take a look at it, Senator. I'm here for the same purpose as you are. I don't want any destruction of our cultural resources. Please do not think that I'm okay with any type of illegal destruction or any of this. I am here to fight for that as well. So if you're finding these things, and this is why we are okay to extend the review period, because maybe you saw something that I didn't see, and that's great.

We'll look at it and we'll change it. Please, that's why I'm asking: let's work together. If you're trying to catch me that I don't know things, I may have... something may have come across looking different, I'm okay, you tell me, hey Patrick, this line right here looks strange. We'll take a look at how strange it looks and we'll fix it. It's not too late. I was gonna tell Baltazar, some of

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

his comments were great. We're going to take a look at his recommendations and make this as best as possible for our island.

Senator Perez: Are you open to having a roundtable? Because otherwise we won't know...

State Historic Preservation Officer Lujan: That's fine. I'm open to a roundtable.

Senator Perez: Okay. So that's important to hear, because our community really needs that relief. We need to see...

State Historic Preservation Officer Lujan: Senator, my door has always been open. I get a lot of emails, and I apologize if I didn't respond to some, but there are a lot of issues that are going on going on that people don't know about, and we're trying our best. This is a big piece, no doubt, and that's why we're taking some time to talk about it and accept every single email that's come through. We will respond to every single email that's come through. It's important. It's important to our community that their voices are heard.

That's why we went beyond the 30 days. We extended it 45 days and another 30 days. But I think we've got enough time to gather the data and information and input that we can take it back, and if you want a roundtable, we'll have a roundtable. I have no problem with that.

Senator Perez: I appreciate that, because even when I first started reading these documents, it's pretty inaccessible. A lot of this is jargon, and the regular public, it's not easy-access. I'm grateful to hear that you're willing to put a pause on this draft and have a roundtable to have the public assist, perhaps.

State Historic Preservation Officer Lujan: We're gonna take what comes in. We've already been gathering the input from the first two months. We'll give the window to expire on March 20th and we'll take all the comments. We've already evaluated, you know, what is your normal supportive comments as compared to what exactly could be adjusted within the draft. So we're already evaluating those things.

Senator Perez: In regards to the roundtable, we're going to have to move that deadline further because if we're going to host something, it has to be publicly noticed.

State Historic Preservation Officer Lujan: That's fine.

Senator Perez: So the March 20th deadline, yeah.

State Historic Preservation Officer Lujan: We'll provide the comments that have come in so that everybody sees who....

Senator Taitague: Madam Chair, I'm sorry, I appreciate that. Yes, Senator. Just since we're on that roundtable scenario, if I may add. And of course, I have some open dates that I'll be happy to give to you to coordinate that roundtable. But Patrick, you've heard some of the things that you weren't aware of, especially the part about the signature and some things in 2008 regarding reporting. And I know you're returning from off-island and thank you for your work on that.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Is there any chance that you can put together just another draft of something and then disseminate it amongst everybody to sit down for a roundtable – on things that are bluntly obvious that, maybe you agree about? Like there are at least two things you totally agree about. That we can just have another draft PA, then have that public hearing, have us all look at it, and then sit down? It would be almost like one roundtable, but technically it might be considered two because you've made some adjustments already and then we can review it and then have the final draft. I just wanted to make that suggestion, Madam Chair.

State Historic Preservation Officer Lujan: Yeah, I'm all for that. Maybe give me two weeks after the March 20th deadline so we can accumulate all the comments. We'll share the comments as well, and we can start implementing or adjusting the draft including those comments there, and then have a cleaner version prior to the roundtable discussion. Is that okay? All right, thank you.

Senator Perez: Yes, thank you, Senator Taitague, for offering those very valuable reservations. Senator Terlaje, did you want to ask questions?

Senator Taitague: Well, no, I think you've hit most everything on the nose. My biggest concern, of course, is if you don't agree, Patrick, as a signatory, what happens if you don't want to sign it? I'm kind of concerned that it's one-sided. Also, just my question, the agreement that came out had no maps attached. Can you explain why there were no maps attached to that?

State Historic Preservation Officer Lujan: Well, they're classified, right? I believe these are CUIs (Controlled Unclassified Information) from a military standpoint. It's like any type of mapping that we do from an archaeological standpoint. We have researchers who come into our office and we don't release the maps. They can come in and look at them and do studies, bring their own scanner and make copies on their own.

In this case, it's no different than if it was your property. There is also a federal law that tries to prohibit looting, right? If you see an area that has high probability, that's one of the things we try to protect.

Senator Taitague: Yeah, there's nothing actually stopping that. People have Google Maps all the time. You can zoom in on that area, and I don't think that is classified. If we could just see the area and what these maps are pertaining to, we could just get a simple Google Map so that everybody can see it.

State Historic Preservation Officer Lujan: The Google Maps are really just a surface view. Our mapping is from an archaeological standpoint from subsurface previous testing and surveys. So that's how we come up with the level of probability. And even then, you have gray areas that we debate, what is the line between low and medium? What's the line between medium and high?

That's why, within the language, we say that anything we have agreed to be considered medium and high has to go through a separate process. It doesn't fall within the PA. It's only low to no, so anything that's medium and high still has to go through a Section 106 review.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Taitague: Okay, thank you. But if we can just know the area we're discussing, that'd be very helpful. I appreciate, if I didn't mention it earlier, the extension granted in response to Senator Perez's and my letter asking for an extension. I appreciate that. And now knowing that we can have this roundtable is very reassuring to everybody. This is hitting hard for our community. We've been down this road before.

In fact, I was there when we did the 2008 Programmatic Agreement with Governor Calvo's office, Arthur Clark, as well as the previous State Historic Preservation Officer, and discussed this. But now that I have your understanding that what we're doing in this 2025 Programmatic Agreement is basically adjusting the 2008, like you said, cleaning up and taking care of the loopholes to make it a better one. I appreciate you stating that for the record, and I'm holding you to that, Patrick. You know that's the whole purpose of why we're here.

That was one of the issues. You talk a lot about Section 106, I'm digging more into that, and even myself, I don't know very much about Section 106 and looking at the 36 CFR Part 800 regulations. It's quite extensive. There's nothing stopping us because of this roundtable from extending it a little bit longer so that we're staying within your guidelines. We might have to do that. You can do that on your own without a letter, right?

State Historic Preservation Officer Lujan: Correct.

Senator Taitague: Okay, thank you.

State Historic Preservation Officer Lujan: It's just the new processes that we have within the draft. They don't kick in until it's actually, so we're still going to be operating off of the old processes.

Senator Taitague: Okay, yeah. And what are the consequences if JRM and State Historic Preservation Officer, or both parties, violate the Programmatic Agreement, the current one?

State Historic Preservation Officer Lujan: That's a good question. I asked myself that too. I was intending to reach out to ACHP and ask, 'what are the ramifications if a federal agency violates any type of stipulation or PA?' So I'm still going to do work on that.

Senator Taitague: Okay, yeah, let us know. Because that's a really big question I have. It's always about having teeth in the game. Other than that, that's pretty much it. I look forward to this roundtable and I offer anything I can do with dates to coordinate that. Thank you, Madam Chair, for the opportunity.

Senator Perez: Thank you, Senator Taitague. Senator Barnett.

Senator Chris Barnett: *Si Yu'os ma'åse*, Madam Chair, and thank you again to the panel for your testimony in advance. And thank you, State Historic Preservation Officer Lujan, for your attendance. Just to clarify, because the resolution is asking for us to scrap the agreement and start from the drawing board with a more inclusive process. Now that we've kind of reached what appears to be an agreement, you don't want to use the word 'compromise' yet.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I'm just not clear, because you have referenced the March 20th deadline, and I'm not sure I see the value in a roundtable that occurs after the comment period is closed. So are you committing here on the record to work to extend that deadline beyond March 20th?

State Historic Preservation Officer Lujan: Well, March 20th will be the public comment section. It doesn't mean we're not going to make any adjustments after that, right? We will just take those comments, make the draft better, and then we can have an open roundtable. And if there's more good things that come out of that, we'll adjust it again before we sign it. So we're okay with that.

Senator Barnett: That part I'm not just clear on, Pat. So is March 20th the deadline, or is there an additional opportunity to provide commentary and input past the March 20th deadline? Because if we have this roundtable, go ahead.

State Historic Preservation Officer Lujan: Sorry, Senator. And I just called you Chris. We're always open for comment. How about that? I'm never going to shy away from comments. Even if we have an agreement, even if we sign it, there's amendment clauses that we can use to make it better.

That's why we are in this state now. Because what we thought, in 2008, would be a great agreement, you put it into practice and you find out that there are little things here and there that are not working out quite well.

Instead of band-aiding it and amending it here and there, and you guys are pros at this, when it comes to amending laws. Sometimes you just have to create a new act with a cleaner version. So that's what we're doing here.

Senator Barnett: Yeah, and I think the argument, at least on this side of this issue, is that the document is so voluminous and it's very hard for the public to get a handle on it.

State Historic Preservation Officer Lujan: It's not easy. It's meant to accommodate the operational side of the business, right? So we're not doing this technicality thing on purpose to confuse anybody. It's just technical terms within our field that we understand, and I hope that I will be able to help simplify it for the public to understand.

Senator Barnett: I hope so, because in some of your testimony this afternoon, you've, at some points talked about how difficult it is to make changes, and then at others, you very quickly said, 'Oh, we'll change it. We'll do that. We'll take a look at it and we'll change it.' So I just worry.

State Historic Preservation Officer Lujan: Well now's the time, right?

Senator Barnett: The black and white of it is: after the public comment deadline ends...

State Historic Preservation Officer Lujan: We're not going to sign it. We're not going to sign it until after our roundtable.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Barnett: I just want to ensure that we can get as much input, because I'm still of the opinion that we should scrap the whole thing and start from point zero and involve all the voices and all the concerns from the get-go, because I think the process itself is skewed and it favors Joint Region Marianas. It is what it is.

So I look forward to the roundtable, but more importantly I want to preserve the ability for our people to make meaningful input and to ensure that this input is incorporated into some final version of the Problematic Agreement. *Si Yu'os ma'åse*, Madam Chair.

Senator Perez: Thank you, Senator Barnett. Senator Terlaje, you're recognized. Okay, so maybe just one more quick question, Patrick. You mentioned that it took three years for this PA. Is that correct?

State Historic Preservation Officer Lujan: The conversation has gone on for three years. It's not something that we spoke on consistently, but we identified the need to have a better product some years ago, and so the dialogue started every so often, 'let's amend it, let's amend it; hey, let's put a new product out there.'

And with that, this is our best foot forward right now, and with the public's help to look at it from different eyes ... because I myself, not only with this but with other documents, have seen the need for a different perspective, and so that's why we're open to getting all the other different types of perspectives.

Senator Perez: I mean, the reason why I ask is because I think the public needs the same amount of time to assist with this. Whatever amount of time you've given to consult with the Department of Defense, I think we, the public, should be granted that same amount of courtesy, considering the gravity of this document.

State Historic Preservation Officer Lujan: You're asking for three years?

Senator Perez: Well, I definitely not by the end of this month or the end of April. I feel like we need more time than just after a roundtable.

I think there should be more time than, of course, reasonable for the public to be consulted.

I think whatever that amount of time is, I don't want to put a hard stamp, for instance. This is about protecting our heritage. I think this is about protecting this for future generations, and so the time we put into this, we are getting the public aware and we really need this opportunity. So it shouldn't be just a roundtable and then done, right?

I feel like we need more voices at the table. That's my ask for you.

State Historic Preservation Officer Lujan: So the only thing, Senator, is we're never going to get a hundred percent buy-in in anything. I guess we can talk about it as time goes on and see where there's some mutual understanding and say, okay, let's go with it. At the end of the day, we're going to have to make a decision. In the meantime, we're still operating off of the 2008.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Perez: This is a 50-year agreement, so, like I said, there is time, right? There's time for drafting.

State Historic Preservation Officer Lujan: Well, even if it were a five-year agreement and the expiration was coming up, we'd have to move fairly fast to either extend the status quo or do something else.

Senator Perez: Sorry, I'm going to recognize Senator Terlaje for any questions.

Senator Terlaje: Thank you. I just want to talk about the kind of underlying premises. I want to hear, of course, from all of the panel. I guess this is where I disagree with you, and I respect all the work that you've done, but I really do not agree with the government of Guam having one single person representing the government of Guam going into negotiations with anyone for the benefit of all of us, without checking what it is that we can do better, according to all of us.

And I know you said you want to do a Section 106 training process for us because nobody here knows what they are talking about. I completely disagree with that.

I think we have real experts in our community, and they became experts because of the previous Programmatic Agreement that we had to go through. I just want to make sure that you're familiar with this process that we went through. I know you've been Acting State Historic Preservation Officer before, and then you came back as the permanent State Historic Preservation Officer, but this is the core of our disagreement. We want agreements that are going to help us, of course. We want agreements that are going to help your office, of course, to review these things better for us.

But we do not want agreements, necessarily, that just make it convenient for someone else to get default approvals from you, from us, because we couldn't negotiate anything better.

And that's where I feel like we get it backwards. If we want to negotiate, then you want the people behind you before you even get into that room. You don't want to put it out to the public and there's a big disagreement now in our community. I think this is what we were able to do before.

We had a State Historic Preservation Officer at one point, because of public outcry, who called us all in, Senators, public, community, lawyers, everyone who wanted to be, to come in and give her our best ideas. And we were able to get some of those in. Not all, but some. Another thing is that we were able to, I think for the first time, recognize cumulative impacts from these different ongoing projects that are covered by multiple PAs.

We actually had addressed cumulative impacts. And like you said, the PA was very useful at that time because we were able to get things that a normal Section 106 process would not. Such as, because of a cumulative impact, we were able to get the repository, right? We were able to get the other things that you mentioned.

But don't forget, I really appreciate Senator Perez pointing out that we did not get even what they promised to do in there. We had to fight all along the way, even with the Programmatic

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Agreement, to get some of those things. That's why I believe it's very fundamental; we want to go into negotiations with these people who are bringing their experts. They, trust me, have been working on this for years. They've got what they know makes it easier for them.

Especially these default approvals. Especially the no way for you to request any extensions if you're overwhelmed. And they know the bulk of projects that they're sending up to you. And that's why I feel like it's so very important that we not say, 'well, that's the law and that's the minimum requirement.'

It should be the opposite. This is the minimum requirement. And the reason we're entering into a PA is because this is such an expansive project. We need additional time. And that's what we try to negotiate with them, a better process than the minimum default process. So in some places, maybe you have that.

But when this PA was announced with a comment period, I really appreciate you actually announcing a comment period. I just don't think a comment period is the same as consultation.

Can you explain, was this sent to the Governor's office for her action or for her comment? What is that process?

State Historic Preservation Officer Lujan: Yeah, so there's no action that's been taken at all. They, being Adelup Legal.

Senator Terlaje: But you submitted it to Adelup Legal for review? Is that the review that this is going to get?

State Historic Preservation Officer Lujan: They will get a copy, of course. Yes. It's gone to their military... Vera Topasna's group. I forgot...

Senator Terlaje: But for what purpose?

State Historic Preservation Officer Lujan: They have a direct...

Senator Terlaje: You are soliciting comment or input from them after you finished negotiations?

State Historic Preservation Officer Lujan: Same period, right? This is for every entity to submit comment. I do want to clarify three things that you've said, Senator.

Senator Terlaje: Does the Governor, then, have a role in this?

State Historic Preservation Officer Lujan: Not right now.

Senator Terlaje: So you just sent it to their office the same as you sent it to the public, for your formal comment period?

State Historic Preservation Officer Lujan: Yes, ma'am.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Terlaje: All right.

State Historic Preservation Officer Lujan: Is that good or bad? I don't know.

Senator Terlaje: Well, it's one way to do it. It's one way to do it. You finish your negotiation and then you ask for our input. I think I'm just trying to impress upon you that we have learned from the past that the better way to do it is to get the experts in our community to give their input, do better than we have done in the past and get their input, get those who feel dissatisfied with the current process and let's get to the root of what is bothering us with this current process, that we got under the other PA and the others.

And that's why going back to the minimum is troubling for me. It's concerning for me. Especially this, they give you 30 days. They don't allow extensions. They will dictate whether they update the maps, the sensitivity maps. They do that.

State Historic Preservation Officer Lujan: That's their product.

Senator Terlaje: Based on your comments, yes, but those products are what they use to determine how much notice you're going to get, whether you get notice at all. And this is their product. That's what I'm saying.

State Historic Preservation Officer Lujan: This process, when it comes to the probability maps, is actually better than the 2008.

Senator Terlaje: Okay, that's great, but is it going to be as good for us? Can we get better?

State Historic Preservation Officer Lujan: We can always get better.

Senator Terlaje: Is this better than the 2011?

State Historic Preservation Officer Lujan: It's different.

Senator Terlaje: It is. So this is the thing, can we just get a list? I couldn't get your testimony. They said it's not being passed out until after the hearing. I'm not sure why. But I would like to get a list of what you say are the changes, what you've negotiated because of cumulative effects, and what changes to the 2008 process are in here and what 2011 processes are not in here. Because some of those were actually beneficial and some we had to challenge.

We had to keep pushing for the things that had been promised, including access. But the big picture for me is this: this agreement says it's going to cover every future project, right, that's not already covered by another PA and all future land acquisitions.

Meaning those lands are not at all reviewed by you at this time. And when there are future projects and future land acquisitions, they are going to do the sensitivity maps on those. They'll give it to you, and then they will use this PA to say, 'because we deemed it to be low sensitivity, this is the process we follow.' And I just think it's not enough ability for you.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

All over this thing, I've marked up 'no, no, no,' because it should be according to you [State Historic Preservation Officer], or it should be according to you, or you should have a period if it can't get done in 30 calendar days. Maybe other people can say that 30 calendar days is reasonable, but that's for these projects. For all future projects, we don't know the bulk of those right now, and it's just like the 2011.

We realized that was going to be such an enormous, overwhelming amount of projects for you to review in 30 days. And that's really my big concern. I think we can do it, Patrick. And I even know that roundtables are kind of awkward. But I'm just saying it's so much better to get the input. You said, a mature professional dialogue would have helped. Yes, I completely agree. That means, before you go negotiate, let's have the mature professional dialogues, even invite professionals. Do whatever. Let's just get it all in there.

We're all trying to make the process better and I think just pitting us against each other that way is not for our benefit and it makes it very hard to move forward.

Then we're going into this roundabout discussion about the sensitivity maps, the maps that are not in here. You're saying because they're trying to prevent looting. And we've had exactly this discussion on the 2011 PA. We're talking about properties behind fences, behind guards, within military bases. And we want to tell the people of Guam that we kept them from knowing what exactly is in there because they might go on base and loot those properties.

It sounds so ludicrous. And that's why anywhere where— this is your knowledge. This is the knowledge for the people to know. It's for them...

State Historic Preservation Officer Lujan: I've invited those who really want to see it. That they can.

Senator Terlaje: Otherwise, we are just wasting paper and just wasting time for the military to know what cultural assets do the people of Guam have. If they are the only ones who are going to know, this whole process is useless to me.

I think there are ways to make sure that your hands are not tied and that you have some discretion, and that the people of Guam who have every right to know about their history and their cultural assets will be able to know that. That's what I feel we have to make sure we can do in here.

And it's so very obvious to me that we have places that are subject to looting and we have places that will never, ever be subject to looting as long as there's a military base with guards on it, and that we should know what it is that they covered up, what it is that they built on top of, what it is that they removed. We have to know all of it. Otherwise, how are we going to be consulted in the future when we only have half knowledge? The people have to know everything so they can also be consulted from a place of knowing everything.

Let's continue to work together. But I just think we need to do better in working with each other and not going into closed rooms and trying to negotiate against us.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Thank you Madam Chair.

Senator Perez: *Si Yu'os ma'åse*, Senator Terlaje. Patrick.

State Historic Preservation Officer Lujan: Can I respond? Is that allowed? For clarification?

Senator Perez: No, that's for the roundtable and oversight that's going to happen.

State Historic Preservation Officer Lujan: Okay.

Senator Perez: Thank you for being here, Patrick. At this time, I want to recognize and thank you for your patience those who came here to testify. If we don't mind, Mr. Lotz may have to go. Yes, we can recognize you, Mr. Lotz, first.

David Lotz, *Historic Preservation Specialist*: Thank you. I appreciate this forum to review this. Just for some background: I've been a resident of Guam since 1970. I've been active-duty military and I've also worked for the Department of Defense as a civilian.

My background on the Historic Preservation Program goes back to the mid-1970s, when I actually started this program in the old Department of Commerce and continued with aspects of the National Historic Preservation Program through the '70s and '80s.

Subsequently, I had several years at Andersen Air Force Base being responsible for the National Historic Preservation Program for the Air Force in the Mariana Islands, and then most recently, for four years, responsible for National Historic Preservation Programs for the National Park Service in the Mariana Islands.

I'm really not convinced that there's a need for a Programmatic Agreement. Section 106 procedures can suffice. Now, perhaps there are reasons why there is a need for this, but I've not seen that demonstrated.

If there are perhaps concerns about how this program is reviewed, well the public does not have a clear understanding of the process, and we really should, so that we can support what efforts are being made. The Guam State Historic Preservation Officer office needs to realize that the people of Guam should be their partners in this program. Regarding public participation, Section 106 regulations that control this aspect mention the public 62 times. That is the governing regulation. This Programmatic Agreement does not mention the public once.

I also want to say there are flaws in prior Programmatic Agreements, such as the 2008. There's a simple one-liner in the 2008 agreement that led to the destruction that our previous State Historic Preservation Officer signed off on that resulted in the destruction of the CHamoru villages of Magua and Sabånan, Fadang, up at Camp Blaz. It also seems that the annual meetings are no longer being held, and even when they were, there were rather contentious discussions about 'should the public should be involved.' Those meetings should be strictly for the public.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I also want to mention that the Programmatic Agreement required a public access program, which took Joint Region Marianas five years to finally implement, and it is no longer functioning. The excuse is that the position is vacant.

If the program had a priority for the military, they would transfer a person or assign it as collateral duties. But to me, that is a clear indication it just does not have the emphasis that we feel. I have previously notified Patrick Lujan about this. I have not received any response relative to that program.

As previously mentioned, these appendices are simply missing. How can we review an incomplete agreement? And also I think we should be extremely concerned, there is a reference in the Programmatic Agreement to future military land acquisitions. A couple of decades ago, it seems like when the military buildup began, there were commitments by the Department of Defense that there would be no land acquisition. Now we see in this document a hint of land acquisitions. That should wake up everybody to what is coming down the road that we simply do not know.

For example, out for public input now and I think there is one meeting on Guam next week perhaps a week from today is a supplemental Mariana Islands Testing and Training environmental impact statement. I think it's a week from today. One meeting on Guam for more information about what's going to happen. That draft EIS, I believe, is over 700 pages long. So have fun reading the document.

And also in this project, there are virtually no descriptions of projects or impacts. We are completely left in the dark. I think it's very clear to say that one of the reasons you have a lot of public dissatisfaction is that the public has not been informed as to how these processes are reviewed, where public input is solicited. The military's program of public input puts your comments on a webpage form, and it goes into the black hole. You get no meaningful discussion or feedback.

In my letter that I sent you relative to this hearing, dated March 5, I did give some specifics. I think there needs to be Guam legislation that mandates and gives specifics as to how public input should be obtained for use in reviewing under the National Historic Preservation Act, perhaps even broadening the responsibilities of the Guam Review Board for Historic Preservation to set policy and have oversight responsibilities. I think, very simply, there is a current tool that can be used for Section 106 reviews. That's called the web.

Historic Preservation has a webpage. Every time you get a 106, post it. Give people an opportunity, a form, to post their comments. And why not every Friday at 5 o'clock have a meeting and invite the public to go over what their concerns are?

To me, getting public input is a priority and should be accomplished so that collectively the people of Guam have a voice as to what happens to our cultural resources. I'm paraphrasing my comments. That's my comment. Thank you so much.

Senator Perez: *Si Yu'os ma'åse*, Dave, for your testimony. At this time, I'd like to recognize Baltazar Aguon for his testimony. Thank you for your testimony.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Baltazar Aguon: *Håfa Adai yan Buenas*, Chairperson Perez, Senators Terlaje, Barnett, and Taitague. For the record, *si Batasåt Butdazu Aguon yu', låhen difuntu* Edward LG Aguon yan Katherine Butdazu Aguon [I am Baltazar Bordallo Aguon, son of the late...] . *Taotao Tomhom yu* [Person of Tumon]. And I stand in full support of Resolution 144-38.

Senator Perez's resolution is a demand for law, a demand for the rule of law. Section 106 of the National Historic Preservation Act is a federal mandate designed to ensure the public has a decisive voice in protecting our heritage. The 2008 Programmatic Agreement replaced that public voice with a closed-door policy, leaving us a legacy of broken promises.

Because the military and the State Historic Preservation Officer have failed to deliver the status reports and cultural assessments mandated nearly two decades ago, the 2008 PA stands in total breach.

Instead of holding the military accountable, this kills me, I'm really sorry, Patrick, but I just really have to say this. The State Historic Preservation Officer has collaborated on this draft, a legal maneuver to wipe the slate clean. We must see it truly for what it is: a strategic reset button intended to erase 18 years of failed oversight.

How can our elected leaders be expected to trust a new umbrella agreement when the military and the State Historic Preservation Officer remain in open default of the 2008 PA? The State Historic Preservation Officer's primary role is to be an advocate for the people of Guåhan. Instead, we are witnessing an abdication of that duty. On February 3rd, I submitted formal comments to the State Historic Preservation Officer and the ACHP. In Section VII.C, I specifically addressed Appendices A and B. Despite these numerous public requests to provide these documents, there has been zero action and zero answers. Is this silence intentional? Did the State Historic Preservation Officer review a complete document? Or is he intentionally keeping the public in a strategic fog?

By ignoring demands for transparency and allowing a draft with missing vital documents to proceed, the State Historic Preservation Officer has betrayed public trust and abandoned his role as an advocate. These missing appendices drop a wide steel cage over our island. The Area of Potential Effect is dangerously vague. Because the APE is undefined, *Tun* Pete's farm near Andersen could be reclassified as a security necessity without a single public hearing.

And because this cage covers the entire island, families in Piti and Hågat could wake up to find their ancestral lands absorbed for naval expansion under the guise of this superseding agreement, just like the families of Sumay were after World War II. By refusing to draw a hard line on the APE, the military has turned Guåhan into a playground where farms and forests are treated as disposable. And this APE is effectively infinite, granting the JRM a blank check to identify, claim, and take land without public consent.

The most alarming part of this draft is exactly what is not being said. While the APE creates the legal cage, Appendix A is the map of the targets inside it. The map detailing JRM land holdings and potential required lands remains hidden from public view. Why? They will claim national security, but whose security? The citizens of the continental U.S.? It certainly isn't ours.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Until we have a voting representative in Congress and two senators in the Senate to fight for our rights to life, liberty, and the pursuit of happiness, we are not truly part of the democratic fabric of the U.S.

For us in this unincorporated Pacific territory, true security is the safety of our water, the health of our soil, and the preservation of the culture that makes the Marianas a home worth fighting for. This PA is a land grab in disguise. We don't need hiking trails to lands we can't access or studies of caves on land stolen from indigenous families. We need the law. For 30 years, we have lived with the Toxic 12, a dozen major sites of military contamination across our island. While the 2008 PA sat in breach, these toxins didn't wait. They leached into our soil and migrated into our water. Because the military expects a fast pass through our history while our northern aquifer is poisoned by their legacy, it is time they pay the real debt.

- \$20 million for the *Naftan Mañaina'ta* to finally lay to rest the ancestors collected by Hornbostel and those unearthed at Maguå, Sabånan, Fadang, and Tailålo, who remained in private labs.
- \$55 million for water remediation to treat dieldrin still appearing in our wells decades, decades after it was identified.
- \$100 million for PFAS, PFOS soil remediation to stop the forever chemicals from destroying our primary source of life.

The EPA itself raised the alarm in June 2025.

They warned that construction for military buildup is disturbing buried PFAS and releasing it into our water. We are paying for their progress with our health.

And one more, which is probably the hardest debt to satisfy and probably the most egregious, is the immediate return of ancestral lands to the original landowners. To the Senators who have not signed on yet to Resolution No. 144-38: because the 2025 PA seeks to legalize the seizure of our history and our land, I urge you to stand with the sponsors.

We must demand a return to the transparency of Section 106. Rejecting this umbrella PA is the only path that ensures *Tun Pete* has a fighting chance to save his farm. It is the only way to guarantee the families of Piti and Hågat and villagers across the island can still pass down a sacred inheritance, not a toxic legacy, to the generations that follow.

Senators, we are asking you to choose our people over a strategic reset. As our elected leaders, you are our only shield. *Si Yu'os ma'åse*.

Senator Perez: That's very heartfelt. *Si Yu'os ma'åse*, Baltazar. All the trauma that our people have experienced, thank you for bringing those points up. *Si Yu'os ma'åse*. I'd like to recognize Jarren Saralu at this time.

Jarren Saralu: Thank you very much, Senators. For the record, my name is Jarren Saralu. I'm from the village of Yigo. I've been born and raised on Guam for about 20 years now.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

First, I would like to mention how unfortunate it is that I don't see any co-signing or any sponsorship from Senator Shelly Calvo, as she's the Chairwoman of the Committee for Historic Preservation. I would reckon this would be of interest to her, but it's unfortunate that she can't be here. So to reiterate, this is more of a continuation from the last session. I'd like to continue mentioning all the loopholes that I find in this Programmatic Agreement.

Mr. Lujan says it is better than the 2008 agreement, which quite frankly I don't see how, given so many loopholes in this agreement, would be better than what we already have.

To firstly mention, I also have copies here with me of the National Historic Preservation Act as well as the Archaeological Resources Protection Act, both of which are accessible over the internet. However, they're a really long read and quite frankly a lot of the jargon in there is inaccessible as well.

I would like to mention Stipulation VIII.A.3, line 3, quote, "If a previously approved work plan exists for a relevant prior project, either same location and/or same activities, that plan may be cited to fulfill the requirement." That plan, I believe, should also be based on, from an archaeological standpoint, a shovel test down one meter for every 15 meters for all undertakings.

I also want to mention Stipulation IX.A.1, 'In the case where a previously unrecorded resource is encountered during construction or other undertaking, the CJRM will adhere to the following, quote, "halt work in the immediate area and fully record the resource, taking reasonable measures to protect the find until consultation is completed. The CJRM will notify the SHPO of the lead."

Firstly, the PA does not mention exactly who will be fully recording the resources, nor does it mention any timeframe for the CJRM notifying the SHPO of the finding. Continuing on to line 3 of the same Stipulation IX.A, "if the CJRM determines the find to not be eligible for the National Register of Historic Places, then the project will proceed following documentation of the discovery and completion of a SHPO site form. The CJRM will submit a report of findings to the SHPO following completion of ground disturbance."

It doesn't mention consultation with SHPO on whether a find should be eligible for the NRHP. Quite frankly, in the National Historic Preservation Act, that should be the duty of the State Historic Preservation Officer to determine whether something is eligible to be under the registry. The CJRM itself also has no right to determine that solely on its own.

Stipulation XI, quote, "The SHPO may request an audit of activities carried out pursuant to this PA. The CJRM will cooperate with all document requests, provided that it will not result in delay or loss of military construction or other funding or mission execution. The signatories recognize that mission, operational, or other matters of national security may affect the schedule of any deliverable."

However, in this stipulation, there is no timeframe set, nor any mention of releasing the audit to the public, which should always be sent out to the public at least once a year. And then moving on to Stipulation II, which is the standard operating procedure for human remains, "The installation CRM, Cultural Resources Manager, shall confirm that the skeletal remains are

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

human. If the installation CRM is unable to confirm the remains are human, they will seek the opinion of a professional trained in the identification of human remains, such as an archaeologist, physical anthropologist, or a forensic specialist. If the skeletal remains are identified as human, or human cannot be ruled out, that proceeds to Step 3.”

Quite frankly, I don't think the cultural resources manager should be determining whether remains are human or not, much less examining them in the first place. I believe that if there are going to be any undertakings, there should at least be an SOI-qualified osteologist to take over any examination of any remains and determine whether or not they are human.

Then following was Stipulation II.E.1, line 5, 'If the skeletal remains are determined to be older than 50 years and not associated with World War II,' quote, "If a local organization, family, or agency expresses an interest in participating in the consultation process, they must submit a written request expressing their desire to participate and identify their relationship to the remains. All comments received during consultation will be considered in final making of disposition determinations." Though it does not say in what way the CJRM or responsible persons will inform the community or interested parties of the remains. The question remains, 'how would these people know, and what lengths is the CJRM willing to go through?'

Hopefully, Mr. Lujan can answer these questions and clarify further with these statements, come the roundtable.

I would also like to mention that, as for the [sensitivity] maps themselves, 'prevention-of-looting' is no excuse at all to exclude maps from the Programmatic Agreement, because essentially all this land belongs to the people of Guåhan. This is their home, and quite frankly, we have every right to look through these things. I know they are accessible through SHPO, but they should already be present in the PA itself in the first place.

Another question, as we've mentioned, a roundtable, the question still remains: how far was SHPO going to go with this PA should we not have mentioned a roundtable, should we not have mentioned any public input or consultation with the Government of Guam, or the public, or any interested parties?

And that pretty much concludes my testimony. Thank you very much.

Senator Perez: *Si Yu'os ma'åse*, Jarren.

I know this is additional to the testimony you provided that very first day, and it seems like every time I read it there's something new that comes out of it. There's more loopholes showing. That's why it's really critical for the public to have eyes on this.

Is there anyone here who would like to provide oral testimony? I know you submitted written testimony, Ian, did you want to provide oral testimony as well?

[Ian Catling indicated he would testify.]

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Ok, feel free to come up. And then, is there anybody else? Kallen, Jesse, are you here for testimony? No, okay. Yeah, there are mics for both of you. Ian, you're recognized. I'm sorry, Kallen was here first. My apologies.

Kallen Perez, Mother and Food Security Advocate, Guåhan Sustainable Culture: Håfa Adai.

My name is Kallen Perez. I'm a mother, a UOG graduate, and I work in food security at Guåhan Sustainable Culture. I've been an advocate for responsible military activities since, I think 2015 is when we first were reading the EIS, well 2008, when I was still in college.

But I want to thank the SHPO for being here today. We missed you at the last hearing, but I know you were busy bringing back the ancestral remains from New York, which is really relevant today, because what we're talking about is protecting the remains that currently are on our island.

I'm disappointed to hear from your testimony that it doesn't seem like a priority for you. I heard things like we're trying to streamline the process for operations, we're trying to make it better. I think it's pretty obvious that it's better for JRM to have less stipulations or approvals for their operations, and easier for DoD, which is frustrating because it's a federal agency that has a nearly unlimited budget, and it is developing our island at the expense of our cultural heritage.

I'm frustrated because I don't understand why that is the goal. It seems a bit backwards. We should be protecting our cultural heritage rather than making it easier. I'm not sure if you remember this, Mr. Lujan, but in 2015 or 2016, we sat in this room during a roundtable hearing...

Senator Perez: Sorry, Kallen, if you just address the panel.

Kallen Perez: A few of you in this panel will remember the roundtable hearing we had here with DoD. They would say things like, we have four pillars of the buildup, like, cultural preservation, public input—I don't remember the other two; basically saying, "we're going to be really responsible."

Net negative impact, net negative land taking. And I sat in this room with not just advocates, not just activists. There were scientists. Dr. Elsa from the Center for Island Sustainability was here.

I remember her and Joni Kerr and several others, who are sustainability specialists, talking about the Håyun Lågu tree, the most rare, mature tree of the *Serianthes nelsonii* species, which is so special to the people of Guam. It's named after a person from Guam who discovered it, and the only remaining mature tree of its kind was at Tailålo, right? We talked about "what about this tree, what about this tree?"

In that roundtable, I remember Rear Admiral Shoshana Chatfield, she said, "we're going to make provisions for the tree." They decided that they would build a fence around the tree. "We're going to prevent it from being bulldozed."

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

And as we all know, during Typhoon Mawar, the tree died, and the JRM blamed it on the storm. I'm not a scientist, but I was just wondering, 'how many storms did this tree live through when its habitat around it was not desecrated?'

These are what we're talking about when we're saying, 'our experience with Programmatic Agreements has not been good so far.' I remember asking Rear Admiral Shoshana Chatfield, "what is your most important cultural site that you can think of in the 48 contiguous United States? Is it Yosemite National Park? Is it Arlington National Cemetery? Is that a good place to build a firing range?"

We're trying to create this analogy for them. These places where development is happening for military activity on our island are really special to us, and they're unique because there's only one of each kind. We don't have a lot of land on Guam. The military already has so much of it.

But the difference between someone like Rear Admiral, I don't know who the current Rear Admiral is, but I'll never forget Shoshana Chatfield's name. The difference between that person and me, or that person and our historic preservation officer, is that their grandchildren are not going to be living on an island of Guåhan that is recklessly developed.

We're not trying to be anti-military or anti-national security. We're asking for the DoD to be a good neighbor, to be responsible in their development. Mr. Aguon very clearly stated a lot of the ways that DoD has developed things, and it has been harmful to our people.

I really just disagree with this premise of trying to make a Programmatic Agreement be something that makes things easier for operations. I don't think that should be the goal. And I just want to say, I'm really looking forward to having more roundtable discussions like the one we had in 2016. But being able to understand what are these concerns, what are ways that this relationship has not been mindful, in the past, of the things that are being done that are harmful. How do we prevent these things?

Maybe, are we creating safeguards for retroactive processes to be done when there is extreme harm done? What are the consequences for things like the Håyun Lågu tree? We knew that would happen. We said these things, the scientists said these things, and now that it did happen, what is the result of that?

I want to say thank you to Senator Perez, Senator Terlaje, Senator Barnett, and Senator Taitague for being on the front line of this. And like Jarren said, it's really disappointing that Shelly Calvo is not here today, as the Chair of Historic Preservation.

I went to Charter Day last hearing. This is the continuation of the last hearing. Last hearing, my kids were here; we went to Charter Day after. And I got a poster of the Håyun Lågu tree; it said, "one of Guam's rarest trees."

And I really hope that my kids are not going to have to get posters of things that they are currently able to go and see, and that we could protect right now if we could do this better. That's my hope.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

I just want to say thank you to you all, and thank you, SHPO, for being here today, and thank you to everyone else who testified. *Si Yu'os ma'åse*.

Senator Perez: *Si Yu'os ma'åse*, Kallen. At this time, I'd like to recognize Ian Catling.

Ian Catling, Former Historic Preservation Specialist and Science Teacher, Southern High School: *Håfa Adai*. Ian Catling, currently a science teacher at Southern High School. Former historic preservation specialist, worked alongside Pat for many years. I also worked alongside the esteemed Mr. Dave Lotz. And former Alternate State Liaison Officer for the Department of DPR [Department of Parks and Recreation]. And former senatorial candidate, 37th Guam Legislature.

As a former historic preservation specialist for the office of SHPO, I speak with the hopes of educating the greater community as well as the esteemed members of the Congress/Legislature as to this process.

There needs to be a lot of defined terms here. This is very esoteric knowledge. Very few members of the community know the jargon, know the lingo. Even the legal staff want to stay away from this, because this is rarely treaded-on territory.

I just want to make some clarifications. First, in terms of decolonizing the mind, renaming things, I do have a recommendation for the SHPO's office that the Legislature has agency over, and that is a name change. Currently, we are the State Historic Preservation Office. My recommendation is to change that to the Tribal Historic Preservation Office.

The reason is this, 'State' has two meanings in this context, right? It's an independent country that controls its own borders and generates its own GDP [Gross Domestic Product]. We do not do either of those. It also, in the more obvious definition, is any one of the states that are part of the United States, but we are an unincorporated territory, so we do not fit that definition either.

I feel as though THPO, Tribal Historic Preservation Office, is a better term for the office. The reason being is that the language used affects the outcomes, especially here. Especially here.

The second recommendation I have and I need everybody to understand within the greater community, the person sitting to my left is technically a Guåhan Historic Preservation Officer, a GHPO, not a SHPO. A SHPO is a gubernatorially appointed position. The Governor appoints the position of SHPO. SHPO has not been appointed in I don't know how many years.

The position changed over to a classified position to GHPO because of continuity of service. If SHPO, just like any director of any agency, is at the mercy of the executive branch in power at that time, so is SHPO. So you can have a SHPO that moves around every four years or every eight years, depending on the administration in power. From what my take is, we classified that position. If you want a change, if you feel that there is a conflict of interest, ask your sitting Governor or the next elected sitting governor to appoint a SHPO. Because in the absence of SHPO, GHPO takes their position.

Senator Perez: Sorry, I think we have information.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Terlaje: If I could just interrupt, Mr. Lujan, can you please confirm whether you are appointed by the Governor, because she has announced that you are appointed by her.

State Historic Preservation Officer Lujan: Yes, I'm the SHPO.

Ian Catling: I was not aware. When I was working in the office, that's what the situation was. Congratulations on your appointment. But at that time, that appointment wasn't in place. It was a classified position within Guam. In fact, apparently there is a position available for a GHPO as well, if one so chooses.

State Historic Preservation Officer Lujan: I'm both.

Ian Catling: Okay, all right, right on. No position available. Thank you for the clarification. And then the third recommendation, in this one, is to contact the ACHP. The Advisory Council on Historic Preservation was fundamental in the 2008 Programmatic Agreement. They're the advisory council. They're there to help, they're there to assist.

If we have questions, as a community, if we have questions as Congress people/legislators, you can call them and ask for assistance. That's what they do. We have asked for their assistance before. We can ask for their assistance now because we are in new territory.

Something that was happening behind closed doors is now being brought out into the open for all of us to see. During the time in which I served under Pat, he had asked me to do public outreach, which is, from what I'm hearing from the voices here, there is a lack thereof. My job, I was tasked to find out whether or not there was an interest in the community for the creation of a Burial Council.

According to the National Historic Preservation Act, the military is required to admit at least three organizations into the room. But they have to make a formal request. So Pat was the one who tasked me to find and seek out individuals who would comprise this Burial Council.

I reached out to the community but got a lot of 'sitting on the fence.' And this is for people in the community. If we want a better situation for ourselves, we need to be able to show up when needed. If we have a Burial Council, if we have any organization that would like a seat at the table, then the military has to— and this is for the Section 106 process, not just for Programmatic Agreements— they have to admit at least three organizations.

The reason for the Burial Council is that it is established; it gives them ease of access into the room. And the Burial Council is supposed to serve as the speaking points for the greater community. That was the purpose.

In most situations, in other tribal situations, that's what happens. The Burial Council is the one that releases the information to the public. It also alleviates a lot of the stress that SHPO has to deal with when it comes to the disposition of remains, because the Burial Council then takes that head.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

So any member of the Legislature can write to the military and request, because each of you represents the constituency, the groups of voters. You have the right to sit at the table as well. All you have to do is make a request. The military is obligated for three. And that is all I have for today. Thank you.

Senator Perez: *Si Yu'os ma'åse*, Ian, for your testimony. I see there are no others here to testify. So, we'll open it up to questions. I don't have questions for those who testified after the SHPO. But I just want to thank you for all that you're doing as far as being engaged and for your depth of knowledge and just studying these Programmatic Agreements and being able to decipher them and present them to the public in a testimonial form.

I appreciate the reminder to our community about how valuable the Section 106 process is in protecting our resources, especially when we don't have a full accounting of how these Programmatic Agreements have been implemented or utilized. And from what we can see with our own eyes, we see the destruction of villages. We see the destruction of sites. And we don't know the full accounting of the cumulative impacts.

One would think that we're fighting so many things all at once. This is something within our control. It's our own people that are in these positions to make these decisions, to help encourage or involve consultation. It's not like deep sea mining where we have no control. This is something within our own backyard. And so, to me, we should be able to learn from the past. We don't want to repeat that past. It was very hard to see that happen. I think we could do better.

How did we live on this island for over 3,500 years if we did not learn from our environment? I think we want to continue this legacy of the CHamoru people, our heritage. We need to draw deep within ourselves and make it better not just for ourselves, but for our future generations, so that they can experience these in real life and not as a poster. A poster or sitting in a museum.

There's so much meaning lost when something is displaced from its site.

We have this opportunity to put a stop to that. We have this chance. And we just need to work towards that goal. I do want to say I also want to thank the Oversight Chair; she is holding Oversight on March 18th at 2:00 p.m. on this, on the Programmatic Agreement. I do want to invite the public, also, to be here and to provide any kind of testimony. We'll see what the instructions are regarding that.

But again, I want to thank you, everyone. I want to thank you, Patrick, for making it here. I know you're probably in a different time zone and willing to really work with the community— I think that's really critical.

I want to thank Dave Lotz, Jarren, Baltazar, Ian, Kallen, all those who also came to the first public hearing, Dr. Underwood, Dr. Hope Cristobal, for their presence, Maria Hernandez, Monaeka Flores, Eva Cruz, even those who submitted testimony: Molly Aguon-Diaz, Cassie Bordallo, Veronica Cruz, and I might have missed a couple.

But I definitely want to appreciate your eye on this, because we definitely need to work together. I don't have any questions, but I know there were some questions you posed, Jarren, we'll

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

definitely seek those answers in the oversight. Thank you. Thank you for your critical eye. At this time, I'd like to recognize my colleagues. Senator Taitague.

Senator Taitague: Thank you, Madam Chair, and thank you so much for moving this forward and continuing the hearing.

I did watch the first one. I was able to catch up and listen to all those who testified who are not here, mostly, except Mr. Lotz, you just came for the first time today, right? Today was your first time. So thank you so much. I read your article as well, the December article, as well as the recent one in March. I actually appreciate all your articles that come out. I want you to know I do read them.

But everyone who was here at the last hearing, thank you so much for staying on this. Some people just come to testify and then don't show up again, so your being here is very important. And I do recommend that you take up Senator Barnett's recommendation. I know that Ian, you have already run for senator, do it again, my friend. And he's saying 'wrong side.' No, you were on the right side.

But yeah, I was so happy when I heard Senator Barnett mention the fact that your voices can be heard constantly, not just during public hearings, if you do sit on this side of the bench. I definitely welcome that as well. I appreciate all your hard work and your tenacity and not giving up, that's most important. Patrick, again, thank you so much. Being here cleared up a lot of things for many of us. I think just hearing the fact that you want to work together with the community, that this is a work in progress, and it's about making the first Programmatic Agreement better.

Which, unfortunately, it's true: there should never have been a Programmatic Agreement in the first place. But unfortunately, there was one in 2008. And now what we're trying to do is clear up some of the issues that it brought us, that provided a lot of loopholes. I'm looking forward to working with this roundtable and providing any kind of assistance I can to the Chair of this hearing. So again, *Si Yu'os ma'åse. Dångkulu na' si Yu'os ma'åse*. Thank you, Madam Chair.

Senator Perez: *Si Yu'os ma'åse*, Senator Taitague. Senator Barnett, you're recognized.

Senator Barnett: *Si Yu'os ma'åse*, Madam Chair, for the opportunity to again thank the panel for all their testimony. I just want to recognize the SHPO's testimony here today in the People's House and what really sounded like a willingness for him to engage with a lot of the stakeholders and relevant partners who've been calling for more accountability and transparency in this process. That's greatly appreciated, SHPO Lujan. Just some comments, if I may, Madam Chair.

I know, SHPO in his testimony had said when trying to make a point that 'a lot of people look at us like a colony and we can show them that we can govern ourselves.'

I think that's kind of like the root of a lot of the challenges that we're facing with these Problematic Agreements: we are a colony and we don't have the sovereignty that the people of Guam really deserve and require to navigate these processes in a more independent and assertive

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

manner. I've also always said in my commentary on this issue that we need an alignment from Adelup on down to the Legislature so that we can move in concert in the directions that our people want us to.

I've heard people make assumptions about the lean of the SHPO. And that being said, I think the fact remains that we have a Governor who has repeatedly told the media that she's afraid, that she's negotiating from a place of fear, from a place and a narrative that we have to allow the Department of War to have their way with our lands and our people, because if we don't, then one day we're going to end up speaking Chinese. I think that's ridiculous, actually, and it's insulting, because first of all, I don't think that's the case.

If we had leadership that was assertive and aggressive in defending the rights, not just of the CHamoru people, but the people of Guam as well, this would be an entirely different conversation. If we had a Governor who said 'not a day more until we hear these concerns, throw that Programmatic Agreement into the landfill' as the SHPO said, so that we can start from day one and ensure that the people of Guam not only have a seat at the table, but have a voice in the conversation.

I think that's really what's been lacking with these Programmatic Agreements and these so-called negotiations that are going on between the SHPO and the Department of War, because of our political status and because we don't have sovereignty.

I think it's more incumbent and more important for our elected leaders to really assert themselves on this issue. And I'm going to again reiterate my call to the people of Guam: our island's in trouble.

We are that tree that Kallen Perez talked about. We have faced so many storms and challenges, existential threats to the CHamoru people and to the people of Guam, but we're still standing. We're still here. But this is the storm. This is the typhoon, this buildup, this process, this erasure, if you will. This is the storm that may close the door on the future of our people on our island, and that's why I think that we have to be guardians of our lands, and we have to be leery of this process and involved in this process.

And at the end of the day, it really requires us to have more like-minded people sitting up here on this side, so that when we go in with legislation, when we go in on issues, we can move as a group. Mr. Lotz, I called you before the last election and asked you to run for senator, and I'm going to reiterate my ask. In fact, everybody who's testified at this table, and even Mr. Aguon, I think would make great candidates. So just consider it a draft. We want to draft more like-minded voices into the People's House, because I think it's clear when you look at the number of senators who have shown up to not just this hearing, but even the previous one, that we struggle to get a majority of senators to agree that this process demands more accountability and more transparency. It's not a case of being anti-military or against the federal government.

I said this before, that's a case of really being for Guam and our people, and ensuring that we end up with the best agreement, the best arrangement that we can, especially given the special circumstances of our political status. If you guys need me to pick up a packet for you, I can do that. If you need help passing around your petitions, in all seriousness, we need help. And we

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

need a lot of people who have chosen to take up this life of activism, chosen to take up coming to the People's House and providing testimony and speaking out on these issues. Let's evolve together and take that next step to be the voices that the people deserve to have speaking for them. Thank you, Madam Chair, for the opportunity to do my recruitment pitch, and I eagerly await the roundtable and oversight hearing for the opportunity to really ask some of these questions that Mr. Saralu and the others have put forth today.

Senator Perez: *Dångkulu na' si Yu'os ma'åse*, Senator Barnett. I believe we have one more individual here to testify. Please state your name for record-keeping purposes.

Kyle Riordan, *Historic Preservation Specialist*: Thank you. *Håfa Adai*. Thank you to all of our senators for being here today to facilitate this public hearing. My name is Kyle Riordan. I work in the field of historic preservation here on Guam. I have a master's degree in anthropology, a specialty in archaeology. I've worked within cultural resource management on Guam. I come here today to give testimony from myself. My perspectives and my statements are not to be affiliated with my employer or the work that I do professionally. It should not be conflated as such.

I would like to say thank you to everyone who has given testimony, including Mr. Patrick Lujan, for coming here today. It's incredibly important that you have been here to give your perspective and to show that you're willing to work with the people of Guam. And I apologize for having to keep you all here a little bit longer. I'm going to try not to speak too quickly and get through most of what I have in my testimony. I wrote this out and have submitted it as written testimony, so some of the details I'm going to leave out will still be seen there.

I am here today to offer my testimony in support of Resolution No. 144-38, which calls for the withdrawal of the draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense Undertakings in Guåhan and demands the full implementation of the National Historic Preservation Act.

Of all the options available to the public at this stage, this resolution represents the most procedurally consequential and the most defensible step. It is also the most likely to produce the meaningful public participation that this process has thus failed to deliver.

My prediction is that it will not produce a case-by-case Section 106 review process, but rather would only continue the PA drafting process and increase the time for revisions to be included from more perspectives, from the Advisory Council on Historic Preservation as well as others here locally. I think it needs to be said at this point that intentions don't matter in this situation. The appeal to emotion which that sentiment stems from is misplaced at best and distracting at worst.

I would like to think we all have good intentions here if we have shown up. Standing further than we are now in solidarity and in collaboration is what we need. Dreaming bigger is what we need. Making sure more inclusive representation and collaborative drafting is conducted is long past due regardless of intentions.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

The roundtable process is not just past due, the roundtable should be the SOP for drafting these PAs from the very beginning. Why that is not in place to this day in 2026 is mind-boggling to me.

As the Guam SHPO stated in his comments, there are ‘little things that are not working out quite well.’ I see that we are here in part because trying to address all those little things that are not working out quite well is still falling well short in this new draft, to replace the one already not working well. If we are here to make it better together, then perhaps the following points could be useful.

First, the reason why withdrawal is the right course of action, which I believe is the only viable path forward, is structural, not rhetorical. Withdrawal is the only mechanism that legally obligates the federal agency to re-engage in substantive consultation and address the many things that are missing or made vague. Every other path leaves revision to the discretion of Joint Region Marianas and its counterparts. Only withdrawal triggers mandatory procedural pathways, including potential Advisory Council on Historic Preservation involvement, which was part of the 2008 agreement as a signatory party. They are not currently listed right now.

The current draft process either bypasses or forecloses that entirely. Without withdrawal, the federal agency is permitted to consult more deeply. With withdrawal, it is compelled to. That distinction matters enormously.

Whether the outcome is a case-by-case Section 106 review process or a new Programmatic Agreement drafted with genuine community input and ACHP involvement, the results will be more accountable, more transparent, and more protective of the people of Guam.

What is wrong with this draft is that it does not merely streamline Section 106 compliance, it substitutes a weaker consultation process for the more rigorous one that the National Historic Preservation Act envisions, effectively using the Act’s own flexibility provisions against the very public protections the act was designed to guarantee.

This is not what a Programmatic Agreement is designed to do, and I believe the community’s characterization of it as a ‘problematic agreement’ is analytically apt, not merely rhetorical. The accountability measures are not spelled out. And what is still missing or inadequate from the original 2008 agreement is about to be washed over completely under the guise that it’s for a better agreement. I disagree and I don’t see where that agreement can be substantiated. It falls apart when you look at what fell through the cracks of the past PAs. The more rigorous consultative standard that the NHPA envisions is only vaguely reflected in this draft.

More concerning than that, what is missing is what the draft’s mild provisions make a moot point. Namely, the incredibly passive posture the agency appears to have constructed for itself in this process. To understand just how the draft falls short, it helps to compare it directly to the 2008 PA that it would replace. I want to be clear that I cannot fully explain why these differences exist, because the party that drafted this PA did so behind closed doors and has not provided us explanations. We are left to assume, and that alone should trouble this body.

With that said, here is what the record shows.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

The PA in 2008 was a three-party agreement with the Commander of the Navy Region Marianas, the Advisory Council on Historic Preservation, and the Guam SHPO. This 2025 draft removes the ACHP as a signatory, making it a two-party agreement. The ACHP still plays a role in dispute resolution, but its removal as a signatory is a significant reduction in structural accountability.

The scope has expanded. Where the 2008 PA covered Navy undertakings only, the 2025 draft covers all DoD undertakings within the JRM Area of Responsibility, including Andersen AAFB and Marine Corps Base Camp Blaz. This expanded scope makes the weakening of consultative standards even more concerning.

On the positive side, the 2025 draft adds a new professional qualification standard for traditional cultural place studies, requiring a graduate degree in anthropology or related field and documented Pacific Island cultural expertise. The 2008 PA had no TCP-specific provisions at all. Those did come in later PAs. The 2025 draft also formalizes a public access plan with a designated coordinator and explicitly includes access for collecting medicinal plants and visiting culturally significant sites.

However, several changes represent meaningful regressions. Reporting frequency has been reduced from quarterly to twice yearly. The SHPO response window has been codified at 30 calendar days, with CJRM permitted to proceed with no response, a provision not present in the 2008 PA.

The duration of the agreement has been shortened from 50 years to a five-year renewable term, with automatic renewal unless a party provides written notice within 30 days of the term's end that they'd like to terminate.

The 2008 PA required meetings every five years. The 2025 draft requires annual meetings, which is an improvement, though it must be weighed against other regressions.

So what I have drafted here are some proposed revisions to the draft stipulations. If the PA is revised rather than withdrawn outright, or whatever proceedings come after this require revisions to the current draft, the following changes would substantially improve it, I believe. I offer these in the spirit of constructive engagement while maintaining that withdrawal remains the most defensible course.

In Stipulation X: Notification and Reporting, the twice-yearly reports currently go only to the SHPO. This section should be expanded to require a public summary version of each report made available to the community in layman's terms, mandate that findings be presented at an annual public forum, and include metrics on community access requests granted and denied, with reasons for denial, to create accountability.

On Stipulation IX: Discoveries and Emergencies, when significant cultural discoveries are made, the current draft only requires notification to the SHPO. It should also require community notification for discoveries of broad cultural significance, establish a community liaison role

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

separate from the SHPO for significant finds, and add language prioritizing consultation with CHamoru cultural organizations, not only the SHPO, before treatment decisions are finalized.

In Stipulation IV: Archaeological Sensitivity Maps and ICRMP, the public currently has no role in ICRMP development as far as it is stated in the PA draft, just like the drafting of this PA. This should be corrected by requiring the same roundtable drafting process and a public comment period when ICRMPs are developed or updated, and by mandating that sensitivity maps be made publicly available in non-sensitive forms. What does non-sensitive form mean in practice?

The four-tiered sensitivity framework, no, low, medium, and high sensitivities, can be displayed at a scale broad enough to show general areas without pinpointing specific sites. Think of it like a weather radar map: useful for understanding general conditions without revealing precise coordinates.

Aggregated statistical information can be included: total acreage per sensitivity category, number of new sites identified per reporting period, general descriptions of site types, all could be made available without disclosing locational information. The historical maps and ethnohistoric data used to generate sensitivity maps could also be shared in educational formats as well. Traditional land use patterns and village locations from historical records are often already in the public domain.

I've included some language on how that stipulation could actually be written out in the PA. This would create a meaningful public benefit while keeping the protective provisions already in the draft intact. It would also align with the spirit of the public access plan in Stipulation VI, creating an information access framework that parallels the physical access framework already envisioned.

The next stipulation, Stipulation V— on GIS data: GIS sharing currently runs only between CJRM and the SHPO. The draft should include a provision for a publicly accessible, appropriately redacted version of cultural resource location data, community notification when new cultural sites are identified in areas of traditional significance, and a formal partnership with the University of Guam or the Guam Museum to make non-sensitive findings accessible for research and education.

Whoever you collaborate with, the Mayor's Council, something that makes it accessible and shows that there's an engaged platform, not just a website, not just somebody to call.

Stipulation VI on the Public Access Plan: this is the most direct area for expanding public benefit. The current language is fairly passive, 'the public must seek access through the access plan coordinator.' It should instead require proactive publication and solicitation of the public access plan, establish minimum guaranteed access hours or days for culturally significant sites, create a formal community advisory role in updating the public access plan annually, explicitly include CHamoru cultural practitioners rather than only generic 'individuals and organizations,' and add language about educational programming or interpretive access at sites.

On this last point, I want to offer a concrete example of what is possible and what can be missed out on if we don't push for deliberate concessions.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

The Guam Preservation Trust worked with Guma Architects LLC and invested over \$18,000 to develop a conceptual plan for the Maguå Archaeological Site at the U.S. Naval Computer and Telecommunications Station in Finegayen. The goal was to provide meaningful interpretation of the cultural and natural resources of Guåhan's upland pre-contact sites and to foster understandings of ancient CHamoru culture across all age groups.

The proposed interpretive park would have incorporated archaeological data, recovered latte structures, lusong [grinding mortars], and native flora accessible to residents, military personnel, and visitors alike. This is the kind of vision a robust PA should enable and support, not foreclose. However, when this conceptual plan was given to the DoD, despite local representatives in DoD and their intentions to implement that conceptual plan and construct the interpretive park, it was not originally a stipulation in a PA, and therefore did not have an approved budget and process created for it. The conceptual plan was scrapped and will not be built at the visitor center at the Marine Corps Base Camp Blaz because of this. The plan still exists.

The next point I want to talk about is the TCP gap, the Traditional Cultural Property gap. This is what I would call research without protection. The 2025 PA draft demonstrates awareness that Traditional Cultural Place research requires specialized expertise and must be conducted in accordance with current guidance. These are necessary and welcomed improvements. However, the TCP provision remains incomplete in ways that are substantially significant.

The absence of structured community participation in the TCP identification and consultation process, and the absence of any requirement to nominate eligible TCPs to the National Register, mean that the PA's elevated research standards may produce robust documentation without producing meaningful protection. For the CHamoru people of Guam whose relationship to ancestral lands on CJRM installations is both deep and historically disputed, these gaps are not technical oversights in my opinion. They're clear.

They reflect a broader pattern in which federal military land management has prioritized operational continuity over substantive cultural preservation. I mean, they've already done this in past PAs. There have already been Traditional Cultural Property studies that have been completed for Guam and for Tinian. Those reports can only be found if you request them from SHPO, who must then request them to be released by DoD. Again, they are eligible sites, but they are not nominated.

There is no stipulation within a Programmatic Agreement to nominate them, although there are stipulations within Programmatic Agreements to nominate eligible historic sites. It doesn't designate that those historic sites must be Traditional Cultural Properties, but if you have it for eligible historical sites, why not for Traditional Cultural Properties that are also eligible? There's missing stipulations here as well. Entirely missing.

This section on other agreements, Stipulation III: lists program alternatives, but it's silent on community input into those frameworks. It should be expanded to reference the importance of engaging the Guam Legislature on matters affecting cultural heritage. It should acknowledge the unique political status of Guam and the particular significance of land access for the CHamoru people, and include a provision for periodic community-wide consultation separate from the

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

SHPO process, particularly for cultural field monitors, as is allowable under NAGPRA [Native American Graves Protection and Repatriation Act].

The most significant gap in the 2025 draft, compared to what it could be, is the complete absence of any affirmative community benefit provisions. The document is structured almost entirely around compliance and process. What is missing are a formal cultural stewardship partnership with CHamoru organizations, requirements for DoD to support local archaeological training and employment opportunities. I know the SHPO said that they would give Section 106 training to the Legislature; I don't know who would be budgeting that, but it could be expanded from there, I think.

Another provision would be for community-nominated sites to be evaluated for cultural significance, something similar to the way Traditional Cultural Properties are put on the map.

The closed-door process that brought us here is a strong reason for the argument for withdrawal. It's not just about the document's content, it's also about the process that produced it. As Senator Terlaje has documented previously, one of the most recent examples of the closed communications model we are locked in began before the 2025 draft was even released. Consultations stopped being public.

This was exactly what made this so problematic, and why the Honorable Senator was in the public hearing on the resolution today, voicing dissent to the process we are currently locked in. The SHPO and DoD came to the draft agreement, then invited public comment after that, placing the burden on the people of Guam to voice concerns before the agreement was signed. This history is not speculation. It supports the conclusion that the existing process has been insufficiently consultative during the drafting, not after, and during a comment period.

And that structural intervention is warranted because of this. Hence the withdrawal stance. The drafting table needs to be open during drafting. A public comment period is not adequate enough, and that is apparent from the community input from this comment period.

One path forward, I included some template language here in my comment for CHamoru consulting party status, because I want to be able to offer a concrete model for what more inclusive language could look like in a revised Programmatic Agreement.

And it's tricky, because trying to protect the community's indigenous identity and rights under the federal acknowledgment process is not straightforward because of how that is structured. There are specific hooks within the language in these stipulations that need to be used, and it will likely also need to be connected to policy at the local legislative level.

What the Government of Guam can and should do, by the way, the language I included is specifically for trying to get cultural monitors on site, how that can be worded in the Programmatic Agreement, and what would then need to be the local apparatus here in the local Legislature to connect it all.

What the Government of Guam can do, I think, that can strengthen the regulations and protocols available in this consultation process: chief among them is the development of the Local Review

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

and Drafting Committee for Programmatic Agreements, as well as the development of a cultural monitor legal framework for Guam.

Public Law 26-46, the Guam Historic Preservation Act, provides local legal grounding to institute cultural monitoring provisions comparable to those enacted in other state and local governments across the United States, including Hawaii's Revised Statutes Chapter 6E, California's Assembly Bill 52 and State Bill 18 compliance laws, Washington State SEPA and RCW 27.44, Oregon House Bill 2020; there are numerous examples of this, there are a lot of templates out there for this.

What needs to be developed and what this PA could help invest in— it actually could be a stipulation, is the structural framework for cultural monitoring that makes mitigation clear and therefore implementable.

The framework would need to stipulate the purpose and applicability of cultural monitoring, qualification and approval standards for cultural monitors, defining monitor roles, rights, and responsibilities, defining an inadvertent discovery protocol, defining monitoring zones and scheduling, defining reporting requirements, defining dispute resolution procedures, as well as defining associated costs.

This would not be unprecedented policy, it just has to be built. These are things that are done at local and state levels and they are then connected directly to the Tribal Historic Preservation Office or the State Historic Preservation Office duties in those areas. If the State Historic Preservation Office were to get into a Programmatic Agreement with a federal agency, that is what all of their regulations would have to adhere to.

In conclusion, the resolution before you is not a rejection of historic preservation work; it is a demand that the work be done right. The draft 2025 PA as written does not meet that standard. Withdrawal is the only procedural mechanism that compels the federal agency to return to the table and engage in the kind of substantive, community-inclusive consultation that the National Historic Preservation Act was designed to require.

The people of Guam deserve a Programmatic Agreement that acknowledges them by name, specifically the CHamoru people, that they have a right that is special in this case and these types of agreements, that creates meaningful pathways for participation, and that treats cultural preservation as a public benefit rather than a bureaucratic compliance exercise.

I urge your support, for everyone here and for everyone not here who can sign on this. I urge your support of Resolution No. 144-38. *Si Yu'os ma'åse.*

Senator Perez: *Si Yu'os ma'åse*, Kyle, and for making it here. I could see you incorporated a lot of the comments that we were speaking about, quick work, and I'm glad you caught your breath coming in here. Do you think that this draft PA is in violation of the National Historic Preservation Act?

Kyle Riordan: Simply put, no. I don't think that it is in violation. I think that it institutes Section 106 process. That is true. This is happening because it is following the Section 106 process, following what it's supposed to be doing.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

But that Act, its implementations are flexible. Very flexible. And something like a Programmatic Agreement, it's a deal. It's a tool to make a deal. So it's following the law. It's very flexible in how the outcomes may be.

Senator Perez: Okay, thank you. There's a lot to go over here. I appreciate your expertise in looking at this. I'm sure there's more that could be seen that's missing. But I do appreciate your input. I do not have questions in regards to this at this time, but I'd like to recognize my colleagues if they have any questions. Senator Taitague?

Senator Taitague: Thank you so much for that lengthy presentation. Thank you so much. Other than that, thank you, Madam Chair.

Senator Perez: Thank you, Senator Taitague. Senator Barnett, any other questions?

Senator Barnett: *Si Yu'os ma'åse*, Madame Chair, for the opportunity to just encourage the testimony that we heard. Kyle, wow, I feel like I just got my degree in anthropology. But you raised a lot of good points. I think similar to what we tried to do to establish on our local books, laws relative to open burning and open detonation, I think there's a lot here that hopefully we can shore up some of our local statutes and kind of create like a people of Guam Bill of Rights that deals specifically with cultural monitors and all this stuff.

It's one thing to suggest it in the PA, but it's another to put it on our books. So thank you very much for your testimony and also your suggestions, which I'm sure, at least for myself, I'm going to incorporate into my comment submissions. But just to go back to my earlier point and the point of the resolution: the point of the resolution, I think, is not to try and reach an agreement within the confines of a system that is designed to favor the federal government and the Department of War.

I think, I agree, we need to just scrap this, start from the drawing board, and demand the inclusion of all the voices and all the advocates who were left out of the process. So again, I just want to thank you for making the hearing and also for this very insightful testimony. I agree with Senator Perez, there's a lot to digest here. It looks like I've got some light reading for tonight. And thank you. Please, there's a roundtable that was agreed to. There's also an oversight hearing.

I encourage your perspective. It's not often we get a perspective like yours, with the kind of experience that you bring to the table—pun intended. Thank you very much, Kyle. And again, Jarren, thank you very much for your consistently passionate and accurate testimony. *Si Yu'os ma'åse*, Madam Chair.

Senator Perez: *Si Yu'os ma'åse*, Senator Barnett. Senator Terlaje, you're recognized.

Senator Terlaje: *Si Yu'os ma'åse*, Madam Chair. I missed the previous panel, I didn't get to thank them, but I want to thank all of you who've come and testified today and for your excellent testimony. Very helpful. I appreciate the specifics that you have gone through, sometimes much better articulated than any of us, and the specific recommendations that you make.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

The SHPO left before you finished your presentation, Mr. Riordan, but I'm glad that you came and made this presentation with the details, because some of these are other things I wanted to ask him to provide.

I wanted him to provide, as the resolution asks for, an accounting and documentation of the outcomes of the 2008 agreement, including the number of projects conducted, sites disturbed or preserved, ancestral remains encountered, disputes resolved, and how they were resolved, and then a very specific comparison between that document and this one, which is what you have done in this testimony.

And I wanted to ask him: does this new Programmatic Agreement that he's negotiated make better, to me, the fundamental problem we have had in all the Programmatic Agreements, and that is, does it empower him to stop the desecration of any site if JRM determines that avoidance of historic properties is not feasible? Because I read in this PA the same language that we've seen in previous PAs: if avoidance of historic properties is not feasible, data recovery consistent with standard practices shall be conducted.

And this is the dispute we've had and I don't see an improvement here, that he even gets to have an impact as to that determination of whether it's feasible or not to avoid disturbance of the property versus data recovery, which as we all know is pretty much just clearing the site. So I don't see an improvement on that, and I wanted to ask him if he felt like this new agreement was empowering him in that regard, which has been our problem in the previous agreements.

I wanted to ask him if there was anything in this resolution that he disagreed with, because I think all of the findings are pretty factually based. And maybe one 'Resolved' clause, like, would he disagree with the withdrawal of the agreement until they come up with something else or not.

I really want to get that on the record. I would have liked to ask him, for any of the other facts stated in this resolution, I hope he agrees with all of them, that the large-scale and high-impact military projects, including the Enhanced Integrated Air and Missile Defense System, are included within the scope of the draft 2025 Programmatic Agreement, despite their significant environmental, cultural, and social consequences.

That this new agreement allows military undertakings to proceed without defined opportunities for public comment, consultation, et cetera; that it applies to construction, demolition, land clearing, infrastructure development, archaeological monitoring, treatment of cultural resources across all current and future Department of Defense lands, the plain language shows that, and thus are all of our concerns.

I wanted to ask him to do the same for the other Programmatic Agreements we were asked to review simultaneously with this one, the MITT: Mariana Islands Training and Testing Area Programmatic Agreement that they want to update. I want to ask what impacts or losses are reflected in that upgrade, or is there something more beneficial to the people of Guam in that update?

I wanted to ask him if he can account for the 2008 PA, where we negotiated that the military was going to, in addition to the repository, seek funding for a museum, that we would have annual

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

meetings, that we would have an access plan, all of those things. If he's satisfied with the outcomes, that we did not get them to advocate for funding for a museum, we do not have a museum as a result of that. We do not have an access plan as a result of that, even though in that case, it was even stated in there.

But I also wanted to ask him, he cited four things that we are getting in this PA that are actually not even in the PA. He says that's the benefit of this PA is that we're getting these four additional items. And the only place we can find those items is the November 14, 2025 letter from the Department of the Navy to Patrick.

It doesn't mention this PA at all. It's from the Rear Admiral of the U.S. Navy, saying "I wanted to provide you an update on several shared interests," and they talk about these projects and the potential funding of these projects, such as the Star Cave Study, the Cultural Resources Workforce Development Program, the West Bonya Latte Sites Interpretive Hiking Trail, and the e-SHPO Portal, and how, according to the Commander, the Rear Admiral, funding for these might be accomplished.

So I wanted to ask our SHPO if this is going to be accomplished, if he can pursue this to be accomplished, regardless of what happens with this PA, since it looks like it was independently negotiated or agreed to by the Navy and that we should proceed with that. It should not be a condition of this one necessarily.

That's what it looks like to me and I'm hoping that's the case, that they are going to proceed with these because they are good projects. And because, as he says, in the end, JRM remains committed to our continued partnership and shared goal of protecting the historic properties and cultural resources on the island.

I think I've covered everything I just want to get off my chest as well. But I am very appreciative of the concrete recommendations and concerns stated by the public, and I completely agree with you and thank you for articulating it much better than I could. It's this backwards approach that we really do not need to divide our community in order to do better for them.

I think we can do better for them by inviting them and recognizing that they are very concerned, that they are knowledgeable, that it's their culture, our culture, and we deserve to have a say about it and how it's going to be protected or acted upon, and that agreements should be negotiated as far as we can, not as minimally as we can.

I really very much thank you and I thank you again, Madam Chair, for your work on all of this. And as I look through your resolution again, each paragraph seems very well stated, factual.

I think if there's anything to debate, it's whether we want to resolve that we demand full implementation of Section 106 process for all military undertakings versus making a better agreement, right, but maybe both are hand-in-hand. I think that's how you've interpreted it, and that's how you've interpreted it, Mr. Riordan, and so I think that's a great idea. And again, thank you.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

One more thing I wanted to ask SHPO, I'm not sure why he left, he had mentioned in his testimony recommendations for changes to our local laws.

Yes, we have been going back and forth on this for years trying to get consensus, and I think, Mr. Riordan, you did a lot of work on that as well, for the Guam Preservation Trust and the SHPO's office as well as my office. But one of the things he's asking is that the big change should be to remove the SHPO's office from the Department of Parks and Recreation and put it under the Governor. And it always perplexed me.

I mean, I agree that the Parks and Recreation Director should not be dictating what the SHPO does, and I think the law has made that very clear that should not be occurring. But that has absolutely occurred. We've even seen the Department of Parks and Recreation remove the SHPO from projects with telecoms and certain consumers, and I think they've restricted him from using what was always used before for burial grounds when human remains were found.

But we got notice of this comment period from the office of the Governor, and so when I asked him what is the role of the Governor in this process, he said none, he just submitted it to them. But actually, it was not him who sent out the press release asking for comment; it was the Governor's office. And they said: submitting comments, we're going to identify sections or provisions of the draft that we support, have concerns about, or wish to see amended, provide suggested language or recommendations where possible, share information about cultural sites, traditional practices, or community concerns that should be considered.

And again, we go back to, we can't talk about specific cultural sites because we haven't been told which sites we're really looking at them affecting, unless we're going to spend a long time talking about every cultural site on Guam and how it should be treated in particular, or whether we agree with the assessment of that high sensitivity or not. And again, it's just confusing. This request for comment comes out of the Governor's office. We're asking the SHPO himself to give us an extension, and now he's saying...

I want to make sure from him that he has this ability, and hopefully an agreement to withdraw this and we work some more. So thank you, Madam Chair. I hope that's clear.

Senator Perez: *Si Yu'os ma'åse*, Senator Terlaje. I just want to thank everyone who's come to testify. Very well written, very well-researched testimony, and heartfelt as well. Definitely would like to continue the dialogue with you. I want to thank my colleagues that have come here today and who are the co-sponsors of this resolution. And I look forward to the support of other colleagues, as well, to really make it more of a priority for historic preservation and for our cultural resources preservation.

As you know, most of the public really are in support of this, and this is a really critical time. Like my colleague said, we are in jeopardy right now in regards to historic preservation with what I could call the master agreement. This could potentially be the master agreement of all historic preservation agreements here on Guam, the way it's written. It's going to affect all DoD undertakings, so it's going to be all-encompassed under this agreement.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

And so really this document, the Programmatic Agreement, is not just a document. It's about how our historic sites, our cultural sites, are going to be protected. The 2008 Programmatic Agreement governed more than a decade of military expansion on Guåhan. And before adopting a new framework, the people of this island deserve a comprehensive public accounting of how that agreement was implemented, how historic properties were treated, and how consultation obligations were fulfilled.

The draft 2025 Programmatic Agreement introduces structural changes that affect how undertakings are categorized, how archaeological discoveries are managed, how consultation occurs, and how disagreements are resolved. These structural decisions determine whether cultural resources receive full legal protection.

During Mes CHamoru, we celebrate who we are, but celebration must be paired with responsibility. Our ancestors exercised agency and we must do the same.

Resolution No. 144-38 affirms that federal preservation law must be fully implemented, that consultation must be meaningful, and that transparency must be restored before any new governing framework is adopted. Protecting CHamoru cultural resources is not symbolic. It's not performative. It's an intergenerational obligation. Thank you again for all those who have provided testimony.

We will continue to receive testimonies today until 5:00 p.m. Please submit to:

Senator Sabina Flores Perez
710 Marine Corps Drive, Suite 303A
Hagåtña, Guam 96910

and testimonies should be emailed to office.senatorperez@guamlegislature.gov.

In addition, I would like to encourage the public to send public comments pertaining to the draft 2025 Programmatic Agreement to patrick.lujan@dpr.guam.gov. The stated deadline is March 20th, but it was stated here earlier that he will continue to accept comments.

If there are no further questions or testimonies, Resolution No. 144-38 is duly heard. The time is now 4:45 p.m., and this hearing is now adjourned. *Si Yu'os ma'åse.*



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

III. FINDINGS & RECOMMENDATIONS

The Committee finds the following with respect to Resolution No. 144-38 (COR), based on testimony received during the public hearing held on March 5, 2026 and continued on March 11, 2026.

Legislative Context

Resolution No. 144-38 (COR) seeks to call for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

Testimony Summary and Individual Findings

Kumisión i Fino' CHamoru

Represented by: Dr. Laura M. Torres Souder

Summary of Written Testimony:

- Expressed strong support for Resolution No. 144-38.
- Emphasized the need for accountability regarding both the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement.
- Stressed the responsibility of the federal government to engage community organizations and cultural institutions when decisions affecting land use and cultural resources are considered.
- Highlighted the importance of protecting vulnerable cultural resources and Guam's ancestral legacy.

Finding: The Committee finds that consultation with cultural institutions and community organizations is essential in safeguarding CHamoru cultural heritage. Ensuring meaningful engagement with entities such as the Kumisión i Fino' CHamoru strengthens transparency and helps protect cultural resources that hold historical and ancestral significance.

Dr. Robert A. Underwood

Guam Delegate of the 107th Congress and Chairman of the Pacific Center for Island Security (PCIS)

Summary of Oral and Written Testimony:

- Expressed support for Resolution No. 144-38.
- Raised concerns regarding the lack of transparency surrounding the implementation of the 2008 Programmatic Agreement.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Suggested that the Draft 2025 Programmatic Agreement may weaken protections under the National Historic Preservation Act Section 106 process.
- Noted the absence of clear environmental protections related to construction impacts, including potential effects on Guam's aquifer and natural environment.
- Highlighted the importance of protecting Guam's natural and cultural resources as a matter of public responsibility.
- Emphasized that trust and accountability are essential in agreements governing federal activities on Guam.

Finding: The Committee finds that transparency and public accountability regarding the implementation of the 2008 Programmatic Agreement are necessary before adopting a new governing framework. Understanding the outcomes and impacts of the previous agreement is critical for evaluating whether the proposed agreement adequately protects Guam's cultural and environmental resources. Additionally, transparency and mutual trust between federal agencies and the people of Guam are essential to the successful implementation of cultural preservation frameworks.

Baltazar Bordallo Agunon

Community Member

Summary of Oral and Written Testimony:

- Expressed support for Resolution 144-38 and urged the withdrawal of the Draft 2025 Programmatic Agreement (PA).
- Argued that the Draft 2025 Programmatic Agreement prioritizes military construction timelines over cultural preservation.
- Raised concerns regarding dispute resolution provisions that grant final decision-making authority to the Commander of Joint Region Marianas.
- Highlighted concerns about emergency provisions that could allow cultural sites to be impacted during declared operational emergencies.
- Argued that the resolution represents a demand for adherence to the rule of law under Section 106 of the National Historic Preservation Act, which ensures public participation in protecting cultural and historic resources.
- Claimed that the 2008 Programmatic Agreement is already in breach, stating that required status reports and cultural assessments were not delivered and that the 2025 draft attempts to reset oversight without addressing past failures.
- Raised concerns about the lack of transparency in the drafting process, including missing appendices and unanswered public requests for documents.
- Warned that the draft's undefined Area of Potential Effect (APE) could allow military expansion or land designation decisions affecting private and ancestral lands without adequate public consultation.
- Expressed concern that the agreement could facilitate future land acquisitions or restrictions on land use while limiting public oversight.
- Highlighted environmental and cultural impacts associated with past military activities, including soil and water contamination, and called for remediation efforts and accountability.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Advocated for the return of ancestral lands to original landowners and stronger legal protections for cultural heritage and community resources.
- Urged lawmakers to reject the draft agreement and ensure that cultural preservation and community rights remain central to any future consultation process.

Finding: The Committee finds that testimony raised significant concerns regarding transparency, public access to information, and the adequacy of consultation processes related to the Draft 2025 Programmatic Agreement. Ensuring that the public has access to key documents, clearly defined consultation boundaries, and meaningful participation in decisions affecting cultural heritage, land use, and environmental protection is essential to maintaining public trust and safeguarding Guåhan's historical and ancestral resources. The Committee further finds that dispute resolution structures within the Programmatic Agreement must ensure independent oversight and balanced decision-making. Concentrating authority within a single federal entity may limit accountability and weaken protections for Guam's cultural resources.

Jarren Saralu

Community Member

Summary of Oral and Written Testimony:

- Expressed opposition to the Draft 2025 Programmatic Agreement and support for Resolution No. 144-38.
- Highlighted the definition of 'undertaking' as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency" as per the National Historic Preservation Act of 1966.
- Raised concerns about blatant loopholes in the draft agreement that enable federal agencies to bypass oversight and consultation by the State Historic Preservation Officer.
- Highlighted issues related to archaeological discovery procedures and reporting requirements.
- Expressed that the 72 hour advance notice when practicable "is almost insulting as all necessary measures should be followed as there is no absolute way to tell whether an area with No Archeological Sensitivity is true before groundbreaking can be made," and this discretionary power weakens protection of archeological resources.
- Potential amendments, recommendations, comments, and questions pertaining the Draft 2025 PA:
 - Stipulation II: CRM should NOT be determining and examining if remains are human or not. An SOI qualified Osteologist should be present to take over examinations of any remains.
 - Stipulation II.E.1: Does not state how and to what extent CJRM or responsible persons will inform the community and interested parties of the findings of skeletal remains older than 50 years and are not associated with WWII.
 - Stipulation VIII.A.3 : Work plans should be made based on a shovel test down 1 meter for every 15 meters for all undertakings in lieu of previously approved workplans "for a relevant prior project (e.g. same geographic location and/or same activities)"

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Stipulation IX.A.1: in the case of previously unrecorded resources are encountered during construction or other undertakings, “halt work in the immediate area and fully record the resources, taking reasonable measures to protect the find until consultation is completed. CJRM will notify the SHPO of the find.” Who will be fully recording the resources and what is the timeframe that CJRM will notify SHPO of the finding?
- Stipulation IX. A.3: There must be consultation with the SHPO on whether a find should be eligible for the National Registry of Historic Places. CJRM has not right to determine that solely on his own.
- Stipulation XI: No timeframe set for audit nor mention of releasing audit to the public. Should be set once a year.
- Emphasized the need to withdraw the proposed agreement to prevent further destruction of historical resources.

Finding: The Committee finds that procedural safeguards within the Programmatic Agreement must ensure strong oversight mechanisms and clear reporting requirements. Adequate notification procedures and oversight are necessary to protect archaeological resources and ancestral remains from unintended disturbance.

David Lotz

Community Member, Former Guam Historic Preservation Board Member

Summary of Oral and Written Testimony:

- Supported Resolution 144-38 and called for the withdrawal of the Draft 2025 Programmatic Agreement (PA) and full implementation of the National Historic Preservation Act Section 106 process.
- Raised concerns that the draft PA omits meaningful public involvement, noting that Section 106 regulations require public participation while the draft agreement does not reference the public.
- Highlighted that the draft agreement is incomplete, stating that key documents such as Appendix A (Joint Region Marianas Landholdings) and Appendix B (Archaeological Sensitivity Maps) were not included.
- Expressed concern that the draft references future military land acquisitions without providing details about potential land takings or impacts on Guam.
- Noted that the agreement does not clearly identify specific projects or potential impacts to cultural resources, limiting transparency and public understanding.
- Criticized the draft agreement as shifting responsibility away from the Guam State Historic Preservation Officer (SHPO) and toward the military.
- Recommended legislative measures to strengthen historic preservation oversight, including assigning policy-making and oversight responsibilities to the Guam Review Board for Historic Preservation.
- Proposed establishing formal public review procedures for all Section 106 undertakings, publishing Section 106 documents online, and requiring the SHPO to issue annual public reports on federal and Guam undertakings reviewed.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Finding: The Committee finds that testimony emphasized the need for greater transparency, public participation, and accountability in historic preservation processes affecting Guåhan. Ensuring that Section 106 documentation, land use information, and cultural resource assessments are accessible to the public strengthens oversight and helps protect CHamoru cultural heritage for future generations.

Monaeka Flores

Lead Organizer of Prutehi Guåhan

Summary of Oral Testimony:

- Expressed support for Resolution No. 144-38 and opposition to the Draft 2025 Programmatic Agreement.
- Raised concerns about the lack of access to key appendices and documents necessary for public review.
- Highlighted concerns regarding limited transparency and insufficient opportunities for public participation.
- Criticized the draft agreement for shifting decision-making authority primarily between the Department of Defense and the State Historic Preservation Office.

Finding: The Committee finds that transparency and public access to information are essential to ensuring meaningful community participation in cultural preservation processes.

Veronica Cruz

Artist and UOG Student

Summary of Oral and Written Testimony:

- Expressed opposition to the Draft 2025 Programmatic Agreement and support for Resolution No. 144-38.
- Cited concerns that the draft agreement does not adequately reflect standards outlined in the United Nations Declaration on the Rights of Indigenous Peoples.
- Emphasized the importance of Indigenous consultation, consent, and cultural stewardship.
- Highlighted concerns about potential impacts on ancestral burial grounds, natural resources, and cultural identity and importance of protecting land and cultural heritage for future generations.

Finding: The Committee finds that Indigenous participation and cultural stewardship are critical elements of cultural resource protection. Processes governing federal undertakings must incorporate meaningful consultation and respect the cultural and historical relationships between Indigenous communities and their ancestral lands.

Cassie Bordallo

Community Member

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Summary of Written Testimony:

- Expressed support for Resolution No. 144-38.
- Raised concerns that the Draft 2025 Programmatic Agreement weakens transparency and limits public participation.
- Highlighted the possibility that construction, demolition, and land acquisition activities could proceed without project-specific Section 106 review.
- Emphasized the importance of Indigenous participation consistent with international standards.

Finding: The Committee finds that maintaining project-specific review under the Section 106 process is essential to ensuring transparency and accountability. Robust review procedures allow the public to understand and evaluate potential impacts to cultural resources before projects proceed.

Victoria Manley

Community Member

Summary of Written Testimony:

- Expressed opposition to the Draft 2025 Programmatic Agreement because it bypasses public engagement
- Highlighted the need to protect ancestral lands in order to retain the knowledge of our past
- Emphasized the importance of Indigenous participation and access to information and to burials

Finding: The Committee finds that programmatic agreements have been often referred to as “problematic agreements”, because of irreversible damage to historic and cultural sites of the CHamorus. In order to right this wrong, it is imperative to include CHamorus in any drafting of programmatic agreements in order to protect our ancestral lands because it holds information of our cultural past and identity.

Molly Aguon-Diaz

Community Member and Educator

Summary of Written Testimony:

- Expressed concerns about the Draft 2025 Programmatic Agreement and its potential impacts on Guam’s cultural heritage.
- Emphasized the need for greater transparency and sufficient time for public review.
- Highlighted the importance of meaningful community consultation before decisions affecting cultural resources are made.
- Stressed the responsibility to protect cultural heritage for future generations.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Finding: The Committee finds that inclusive consultation and adequate public review periods are essential to responsible cultural resource management. Ensuring community participation supports long-term stewardship of Guam's cultural heritage for future generations.

Hope A. Cristobal

Senator of the 23rd Guam Legislature

Summary of Oral Testimony:

- Expressed support for Resolution No. 144-38.
- Noted agreement with the resolution's call to withdraw the Draft 2025 Programmatic Agreement.
- Emphasized support for legislative efforts that protect the interests of the people of Guam.

Finding: The Committee finds that community leaders and former policymakers continue to support efforts to strengthen oversight and protections for Guam's cultural resources.

Maria Hernandez

Member of Hita Litekyan

Summary of Oral Testimony:

- Expressed support for Resolution No. 144-38.
- Described the impacts of military development on ancestral lands and cultural sites in areas such as Litekyan.
- Raised concerns that the Draft 2025 Programmatic Agreement could shift decision-making authority away from transparent public processes.
- Emphasized the importance of protecting ancestral lands and cultural heritage for future generations.

Finding: The Committee finds that the protection of ancestral lands and sacred cultural sites is a central concern of the community and must remain a priority in federal decision-making processes.

Eva Cruz

Community Member

Summary of Oral Testimony:

- Expressed support for Resolution No. 144-38.
- Highlighted the importance of distinguishing between preservation and desecration in the management of cultural resources.
- Emphasized that cultural preservation must respect ancestral remains and sacred places.
- Stressed that Guam's people must be consulted regarding activities affecting cultural sites.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Finding: The Committee finds that cultural preservation requires respect for ancestral remains and sacred sites, and that community consultation is essential in maintaining cultural integrity.

Jesse Chargualaf

Member of Independent Guåhan

Summary of Oral Testimony:

- Expressed support for Resolution No. 144-38.
- Described Programmatic Agreements as mechanisms that can streamline approvals for federal projects.
- Raised concerns that such agreements may reduce scrutiny compared to project-by-project Section 106 reviews.
- Encouraged continued advocacy to protect Guam's cultural resources.

Finding: The Committee finds that project-specific review under Section 106 provides an important safeguard for evaluating the impacts of federal undertakings on cultural resources.

Ian Catling

Community Member

Summary of Oral and Written Testimony:

- Expressed concerns about the Draft 2025 Programmatic Agreement and its impact on cultural preservation.
- Referenced standards under the Native American Graves Protection and Repatriation Act (NAGPRA) as a stronger framework for handling culturally sensitive sites.
- Recommended establishing cultural monitors independent of archaeological teams to oversee activities affecting cultural sites.
- Argued that the entire island of Guam should be treated as culturally sensitive rather than relying on limited archaeological sensitivity maps.
- Raised concerns regarding restricted access to cultural sites located on military bases.

Finding: The Committee finds that additional oversight mechanisms, including cultural monitoring and stronger cultural resource safeguards, may help strengthen accountability in the protection of culturally sensitive areas. Recognizing the island-wide significance of Guam's cultural landscape underscores the need for robust preservation practices.

Kallen Perez

Community Member

Summary of Oral Testimony:

- Expressed support for Resolution 144-38 and emphasized the need for stronger protections for cultural and environmental resources.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Identified herself as a mother, University of Guam graduate, and food security advocate with Guåhan Sustainable Culture, noting her long-standing involvement in reviewing military environmental impact processes.
- Criticized efforts to streamline the Programmatic Agreement in ways that prioritize military operations, arguing that cultural heritage protection should take precedence over operational convenience.
- Recalled previous roundtable discussions between community advocates, scientists, and military officials, highlighting promises that military development would minimize environmental and cultural impacts.
- Cited the loss of the Håyun Lågu tree (*Serianthes nelsonii*) at Tailålo' as an example of failed protections despite earlier assurances that the tree would be safeguarded during military development.
- Emphasized that Guam's cultural and natural resources are unique and irreplaceable, noting that military development occurs on an island with limited land and already significant federal landholdings.
- Stressed that local residents and future generations will live with the long-term consequences of development decisions, while federal officials responsible for those decisions often do not.
- Called for greater accountability, stronger safeguards, and continued public roundtable discussions to address community concerns about cultural and environmental impacts.
- Urged policymakers to ensure that decisions today do not result in future generations only learning about important cultural and natural sites through historical records rather than lived experience.
- Highlighted the need for elected leaders to defend Guam's cultural resources.
- Emphasized the importance of community advocacy and public participation in cultural preservation efforts.
- Raised concerns regarding the potential weakening of protections under the Draft 2025 Programmatic Agreement.

Finding: The Committee finds that continued public participation and advocacy play an important role in strengthening accountability in cultural resource protection.

Kisha Borja-Quichocho-Calvo

Community Member

Summary of Written Testimony:

- Expressed support for Resolution No. 144-38.
- Raised concerns that the Draft 2025 Programmatic Agreement limits consultation to only two parties, the Joint Region Marianas Commander and the Guam State Historic Preservation Officer.
- Emphasized the need for broader community engagement in decisions affecting Guam's land, water, and cultural resources.
- Highlighted concerns about the expansion of military activities without sufficient public disclosure.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Finding: The Committee finds that broader community consultation is necessary when federal actions may affect Guam's cultural resources and environment. Inclusive engagement ensures that decisions reflect community values and respect the cultural significance of Guam's lands and heritage.

Patrick Lujan

State Historic Preservation Officer

Summary of Oral and Written Testimony:

- Expressed concern that terminating existing 2008 Programmatic Agreement (PA) may terminate all other local PAs and the supplanting of non-local PAs managed by the ACHP
- Raised concern that reverting to project-by-project reviews will lose the opportunity of cumulative impact
- Testified that Advisory Council on Historic Preservation encourages PAs as a tool for streamlining compliance with Section 106 of the NHPA
- Stated Programmatic agreements were used as a tool to negotiate for the construction of the Cultural Repository, Guam Synthesis Study, technical expertise, Public Access Plan, and mandatory cultural sensitivity training for military personnel
- Draft Programmatic Agreement was used to secure the following four items:
 - Implementation and Maintenance of the Electronic State Historic Preservation Office (E-SHPO)
 - Star Cave Study
 - Cultural Resources Workforce Development Program
 - West Bonya Latte Sites Interpretive Hiking Trail
- Testified draft was developed over a 3-year period solely with the Department of Defense without other consulting or interested parties, such as the Guam Legislature, Chamoru organizations, cultural practitioners or other interested community members
- Does not support unilateral execution of the PA by one signatory as it is currently written in Stipulation XVII of the draft 2025 PA
- Agreed to a roundtable with the community to present an updated draft PA and accepting comments past the March 20th deadline.

Finding: The Committee finds that programmatic agreements has been used as a tool to negotiate for additional projects, some of which have been delayed (Guam Synthesis Study) or not fully implemented (Public Access Plan) in exchange for streamlined process that has decreased oversight and safeguards in the protection of ancestral lands and sacred cultural sites.

Kyle Riordan

Community Member

Summary of Oral and Written Testimony:

- Supported Resolution 144-38 and urged the withdrawal of the Draft 2025 Programmatic Agreement (PA).

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

- Argued that withdrawal is the only mechanism that would legally compel the Department of Defense to re-engage in meaningful consultation under the National Historic Preservation Act Section 106 process.
- Raised concerns about reduced oversight in the draft PA, including the removal of the Advisory Council on Historic Preservation as a signatory and weakened accountability measures.
- Noted that the draft expands the scope of the agreement to include all Department of Defense undertakings under Joint Region Marianas while weakening consultative standards and reporting requirements.
- Emphasized the need for greater transparency and meaningful community participation in drafting and implementing cultural resource agreements.
- Recommended stronger protections for Traditional Cultural Places, including community involvement in identification and nomination processes.
- Proposed revisions to improve public access and accountability, such as public summaries of cultural resource reports, access to non-sensitive archaeological information, and stronger public access provisions for culturally significant sites.
- Called for recognition of CHamoru communities as consulting parties in the agreement.
- Encouraged the Government of Guam to develop a formal cultural monitoring framework to strengthen heritage protection and oversight.

Finding: The Committee finds that the current draft Programmatic Agreement lacks sufficient transparency, accountability, and meaningful community participation. Testimony supports the need for a more inclusive consultation process that formally recognizes CHamoru communities, strengthens protections for Traditional Cultural Places, and ensures public access to information and oversight in matters affecting cultural and historic resources on Guåhan.

Synthesis of Findings

Based on oral and written testimony received during the public hearing, the Committee finds broad consensus among community members, cultural practitioners, advocates, and policymakers regarding the need to strengthen transparency, accountability, and cultural protections in federal undertakings affecting Guåhan.

1. Testifiers expressed support for Resolution No. 144-38 and called for the withdrawal of the Draft Programmatic Agreement in order to restore full implementation of the National Historic Preservation Act Section 106 process. Expert testimony and community perspectives also emphasized that Programmatic Agreements must not replace the core requirements of the Section 106 process, which are designed to ensure transparency, public involvement, and careful consideration of impacts before federal undertakings proceed.
2. The Draft 2025 Programmatic Agreement, which is intended to supersede the 2008 Programmatic Agreement, expands the scope by including future land acquisitions and incorporating not only the Navy but all Department of Defense undertakings, which means “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency” as per the National Historic Preservation Act of 1966.

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

3. The Draft 2025 Programmatic Agreement would streamline the NEPA process by finalizing the Record of Decision, for example, for the supplemental EIS for the Mariana Islands Testing and Training.
4. Several testimonies raised concerns that the Draft 2025 Programmatic Agreement reduces oversight and accountability in cultural resource management by consolidating decision-making within the Department of Defense and allow federal agencies to exercise greater discretion in determining archaeological findings, consultation procedures, and reporting requirements, thereby weakening protections for archaeological resources, ancestral remains, and culturally significant landscapes.
5. Testifiers raised concerns regarding potential land acquisitions, environmental impacts, and the treatment of archaeological discoveries under the proposed agreement. Testifiers warned that provisions prioritizes administrative efficiency and project timelines over the protection of cultural sites, burial grounds, and archaeological landscapes. Witnesses emphasized that decisions affecting ancestral lands and culturally significant sites must include strong oversight mechanisms, clear reporting requirements, and public access to information.
6. Multiple testifiers highlighted the lack of transparency regarding the implementation of the 2008 Programmatic Agreement, noting that no comprehensive public report has documented the number of projects conducted, cultural sites disturbed or preserved, ancestral remains encountered, or disputes resolved under that agreement. Several witnesses also referenced historical shortcomings in implementing the 2008 Programmatic Agreement, including incomplete reporting requirements and delays in negotiated preservation initiatives. The Committee finds that this absence of publicly accessible information limits the ability of policymakers and the community to evaluate the effectiveness of the current framework before adopting a new agreement.
7. Several testimonies raised concerns regarding the limited transparency surrounding the drafting of the proposed agreement. Testifiers noted that the draft was developed solely between the Department of Defense and the State Historic Preservation Office without participation from the Guam Legislature, CHamoru cultural organizations, cultural practitioners, or other community stakeholders. Concerns were also raised regarding missing appendices, incomplete documentation, and the absence of key supporting materials necessary for meaningful public review.
8. Testimony further emphasized that Guam's cultural resources, ancestral lands, sacred cultural landscapes, and environmental heritage are uniquely significant, irreplaceable, and central to CHamoru identity and heritage, and that decisions affecting these resources must include meaningful consultation with Indigenous communities, cultural practitioners, and local institutions.
9. Community members stressed that development decisions made today will have long-term consequences for future generations of CHamoru people, underscoring the importance of meaningful consultation with local communities and cultural practitioners in decisions affecting heritage resources.
10. Several testimonies referenced international standards, including principles reflected in the United Nations Declaration on the Rights of Indigenous Peoples, which recognize

OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Indigenous peoples' rights to participate in decision-making processes affecting their lands, cultural heritage, and ancestral remains.

11. Overall, testimony demonstrates broad community concern that the Draft 2025 Programmatic Agreement weakens existing safeguards for cultural resources while limiting transparency and public participation in the consultation process. Testifiers consistently emphasized the need for stronger oversight, clearer accountability measures, and meaningful engagement with CHamoru communities in the protection of Guåhan's cultural heritage.
12. Overall Finding: Resolution No. 144-38 reflects strong community interest in ensuring that federal undertakings affecting Guåhan's cultural resources are conducted transparently, with meaningful consultation, and under robust oversight. Testimony indicates that protecting ancestral lands, archaeological resources, and culturally significant sites requires adherence to the consultation safeguards established under the National Historic Preservation Act Section 106 process.

Overall Finding: Resolution No. 144-38 reflects substantial community support for stronger oversight and transparency in federal undertakings affecting Guåhan's cultural resources. Testimony indicates that the protection of ancestral lands, burial sites, and historic landscapes requires full implementation of the National Historic Preservation Act Section 106 process and meaningful consultation with the people of Guam.

Recommendation

Based on the foregoing findings, the Office of Senator Sabina Flores Perez finds that Resolution No. 144-38 (COR) advances an important policy position to protect CHamoru cultural resources, strengthen transparency in federal undertakings, and reaffirm the community's role in cultural preservation decisions.

By calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement until a full public accounting is conducted and Section 106 protections are restored, the resolution:

- Reinforces the importance of the National Historic Preservation Act Section 106 process in protecting historic properties and cultural resources.
- Promotes transparency and public accountability regarding the implementation of past agreements governing federal undertakings on Guåhan.
- Strengthens the role of community consultation and Indigenous participation in decisions affecting ancestral lands and cultural heritage.
- Encourages meaningful public involvement and access to information regarding projects that may affect archaeological sites, burial grounds, and cultural landscapes.
- Supports the protection of CHamoru cultural resources for present and future generations.



OFFICE OF SENATOR SABINA FLORES PEREZ

I Mina'trentai Ocho Na Liheslaturan Guåhan

38th Guam Legislature

Senator Sabina Flores Perez, Prime Author, hereby reports out of **Resolution No. 144-38 (COR)**
- **As Introduced** - Sabina Flores Perez, Chris Barnett, Therese M. Terlaje, Telo T. Taitague –
**“Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the
2008 Programmatic Agreement governing Department of Defense undertakings on
Guåhan, and demanding full implementation of the National Historic Preservation Act
Section 106 process to protect CHamoru cultural resources for future generations.**

I MINA'TRENTAI OCHO NA LIHESLATURAN GUÅHAN
2026 (SECOND) Regular Session

Resolution No. 144-38 (COR)

Introduced by:

Sabina Flores Perez *SFP*
Chris Barnett *CB*
Therese M. Terlaje *TMT*
Telo T. Taitague *TTT*

Relative to calling for the withdrawal of the Draft 2025 Programmatic Agreement and the 2008 Programmatic Agreement governing Department of Defense undertakings on Guåhan, and demanding full implementation of the National Historic Preservation Act Section 106 process to protect CHamoru cultural resources for future generations.

1 **BE IT RESOLVED BY *I MINA'TRENTAI OCHO NA LIHESLATURAN***
2 ***GUÅHAN*:**

3 **WHEREAS**, the CHamoru people have developed a distinct oceanic civilization
4 on Guåhan for over 3,000 years, and the island contains ancestral burials, latte sets,
5 water wells, shell artifacts, pottery, limestone mortars, and other irreplaceable cultural
6 resources that reflect CHamoru history, identity, and continued presence; and

7 **WHEREAS**, Guåhan has experienced extensive military occupation and land
8 acquisition, resulting in cumulative impacts to cultural sites, sacred lands, and ancestral
9 remains, many of which remain inaccessible or inadequately protected; and

10 **WHEREAS**, the National Historic Preservation Act (NHPA) was enacted to
11 ensure federal accountability in protecting historic and cultural resources, and Section

1 106 of the NHPA requires federal agencies to consider the effects of undertakings on
2 historic properties through a transparent, consultative, and public process; and

3 **WHEREAS**, the NHPA Section 106 process mandates public involvement,
4 consultation with Indigenous communities, consideration of alternatives to avoid or
5 minimize harm, and clear documentation of decisions and mitigation measures; and

6 **WHEREAS**, Programmatic Agreements are intended only for limited
7 circumstances involving repetitive or routine activities and must still meet the standards
8 of transparency, consultation, and accountability established under 36 CFR Part 800;
9 and

10 **WHEREAS**, the 2008 Programmatic Agreement between the Commander, Navy
11 Region Marianas (CNRM), the Guam State Historic Preservation Officer (SHPO), and
12 Executive Director, Advisory Council on Historic Preservation, has governed military
13 undertakings on Guåhan for more than fifteen years without a comprehensive public
14 accounting of its implementation, enforcement, or cumulative impacts on cultural
15 resources; and

16 **WHEREAS**, no publicly accessible report has been issued documenting the
17 outcomes of the 2008 Programmatic Agreement, including the number of projects
18 conducted, sites disturbed or preserved, ancestral remains encountered, or disputes
19 resolved; and

20 **WHEREAS**, the Draft 2025 Programmatic Agreement proposes to replace the
21 2008 Programmatic Agreement without providing transparency or accountability
22 regarding the performance or failures of the existing agreement; and

23 **WHEREAS**, the Draft 2025 Programmatic Agreement dramatically expands the
24 scope of military authority by automatically including all future Department of Defense
25 land acquisitions on Guåhan without triggering additional consultation or public review;
26 and

1 **WHEREAS**, the Draft 2025 Programmatic Agreement applies broadly to
2 construction, demolition, land clearing, infrastructure development, archaeological
3 monitoring, and the treatment of cultural resources across all current and future
4 Department of Defense lands; and

5 **WHEREAS**, large-scale and high-impact military projects, including the
6 Enhanced Integrated Air and Missile Defense System (EIAMDS), are included within
7 the scope of the Draft 2025 Programmatic Agreement, despite their significant
8 environmental, cultural, and social consequences; and

9 **WHEREAS**, the Draft 2025 Programmatic Agreement allows military
10 undertakings to proceed without defined opportunities for public comment, meaningful
11 consultation, or access to archaeological sensitivity maps and supporting
12 documentation; and

13 **WHEREAS**, the Draft 2025 Programmatic Agreement centralizes decision-
14 making authority within the Department of Defense and limits the Guam SHPO’s ability
15 to independently halt, pause, or terminate undertakings that threaten historic properties
16 or ancestral remains; and

17 **WHEREAS**, the Draft 2025 Programmatic Agreement fails to formally include
18 CHamoru cultural organizations, Indigenous practitioners, community groups, or the
19 Guam Legislature as consulting or concurring parties; and

20 **WHEREAS**, the United Nations Declaration on the Rights of Indigenous
21 Peoples (UNDRIP), supported by the United States government, affirms Indigenous
22 peoples’ rights to self-determination, cultural protection, participation in decision-
23 making, and free, prior, and informed consent regarding projects affecting their lands
24 and heritage; and

1 **WHEREAS**, Articles 12, 18, 19, 26, and 32 of UNDRIP specifically affirm
2 Indigenous rights to ancestral remains, cultural sites, lands, and participation in
3 decisions involving military and development projects; and

4 **WHEREAS**, the Draft 2025 Programmatic Agreement does not align with these
5 international standards and does not ensure Indigenous consent or leadership in
6 decisions affecting CHamoru cultural resources; and

7 **WHEREAS**, community members, cultural practitioners, and advocacy
8 organizations have publicly called for the withdrawal of both the Draft 2025
9 Programmatic Agreement and the 2008 Programmatic Agreement and for the
10 restoration of full NHPA Section 106 protections; now, therefore, be it

11 **RESOLVED**, that *I Mina'trentai Ocho Na Liheslaturan Guåhan* does hereby call
12 for the immediate withdrawal of the Draft 2025 Programmatic Agreement between the
13 Commander, Joint Region Marianas and the Guam State Historic Preservation Officer;
14 and be it further

15 **RESOLVED**, that the Legislature further calls for the withdrawal of the 2008
16 Programmatic Agreement governing Department of Defense undertakings on Guåhan
17 until a full public accounting of its implementation, impacts, and outcomes has been
18 completed; and be it further

19 **RESOLVED**, that *I Mina'trentai Ocho Na Liheslaturan Guåhan* demands the
20 full implementation of the National Historic Preservation Act Section 106 process for
21 all military undertakings on Guåhan, including case-by-case review, public
22 participation, and Indigenous consultation; and be it further

23 **RESOLVED**, that the Legislature calls for the formal inclusion of CHamoru
24 cultural organizations, Indigenous practitioners, community groups, and concerned
25 residents as consulting parties in any future cultural resource agreements; and be it
26 further

1 **RESOLVED**, that the Speaker and the Legislative Secretary certify, and the
2 Legislative Secretary attest to, the adoption hereof, and that copies of the same be
3 thereafter transmitted to the Patrick Lujan, Guam State Historic Preservation Officer;
4 Brett W. Mietus, Rear Admiral, U.S. Commander, Joint Region Marianas; Travis
5 Voyles, Vice Chairman, Advisory Council on Historic Preservation; Dr. Albert K.
6 Barume, United Nations Special Rapporteur on the Rights of Indigenous Peoples; and
7 to the Honorable Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*.

DULY AND REGULARLY ADOPTED BY *I MINA'TRENTAI OCHO NA LIHESLATURAN GUÅHAN* ON THE DAY OF 2026.

FRANK BLAS, JR.
Speaker

SABRINA SALAS MATANANE
Legislative Secretary