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William Manley

william.manley@navy.mil

Randy Sablan

randel.sablan@fe.navy.mil

RE: Comment submitted on behalf of We Are Guåhan and its members regarding the Guam and CNMI Build-up Programmatic Agreement

To Whom It May Concern:

Thank you for the invitation to submit comments on the Guam and CNMI Build-up Programmatic Agreement. We Are Guåhan objects to the Programmatic Agreement until DoD addresses several areas of concern. We Are Guåhan is specifically concerned with: (1) the lack of public input in the development of the Programmatic Agreement; (2) the lack of consultation with the Chamorro people of Guam throughout the Section 106/NHPA process; (3) the culturally ignorant framing of “inadvertent discoveries” of human remains, particularly those located in coastal areas and near latte sites; 4) the stipulations pertaining to projects that are recognized to have adverse effects on historic properties; (5) the mitigation measures outlined in the Programmatic Agreement; and (6) the ambiguity regarding the construction of a firing range complex at Pågat.

**I. Five (5) days is insufficient time for the public and Section 106 consulting parties to review and comment on the Programmatic Agreement.**

“The views of the public are *essential* to informed Federal decisionmaking in the section 106 process.” 36 CFR § 800.3(d)(1) (emphasis added). The most recent draft of the Programmatic Agreement is dated August 20, 2010 with comments originally due on August 25, 2010 at 5:00pm. DoD held a meeting on August 25, 2010, scheduled to occur

from 1:30pm to 4:30pm to discuss the most recent Programmatic Agreement. This would have given Section 106 consulting parties thirty (30) minutes to submit their comments. DoD later extended the deadline to submit comments by five (5) days. This means that the community of Guam had a total of five (5) days to review and comment on an agreement that would govern the preservation of historic properties.

Upon information and belief, DoD outright denied the request for a public hearing on the Programmatic Agreement. We Are Guåhan urges DoD to reconsider its position that a public hearing on the Programmatic Agreement would be a waste of its time.

DoD's actions, consistent with its actions throughout the NEPA process, create the appearance that DoD is more concerned with Fiscal Year 2011 than it is with drafting a Programmatic Agreement that takes into consideration the views of the people of Guam.

The Programmatic Agreement should not be signed until DoD complies with the requirement under the NHPA to make reasonable and good faith efforts to engage in substantive and meaningful consultation with the Chamorro people of Guam, especially where the Undertaking may (1) affect historic properties to which Chamorros attach religious and cultural significance, and 2) affect historic properties situated in any coastal area and known or suspected to contain any latte. Moreover, the Programmatic Agreement should not be signed until the public has had an adequate opportunity to (1) identify possible historic properties affected by the Undertaking, and (2) review and comment on the proposed Programmatic Agreement.

## **II. The Chamorro people of Guam have a “trust” relationship akin to Indian tribes and Native Hawaiian organizations for NHPA purposes**

The Chamorro people of Guam have a “trust” relationship akin to Indian tribes and Native Hawaiian organizations for NHPA purposes and are, consequently, beneficiaries of the 1992 Amendments to the NHPA, which require more consultation regarding historic properties to which Chamorros attach religious and cultural significance. The ACHP amended the regulations implementing Section 106, 36 CFR § 800, to incorporate the requirement that federal agencies, in carrying out their Section 106 responsibilities, consult with Indian tribes and Native Hawaiian organizations that attach religious or cultural significance to historic properties.

Although Congress has not explicitly denominated the Chamorro people of Guam an Indian tribe, as noted by the ACHP, DoD’s responsibilities under the NHPA emanate from the United States’ “trust” relationship with said tribes and organizations, which principally arise under its treaties. A simple extension of this logic renders the Chamorro people of Guam an entity akin to an Indian tribe or Native Hawaiian organization for NHPA consultation purposes. The Chamorro people of Guam are the undisputed native inhabitants of Guam, which remains under the administration of the United States, the latter having assumed a sacred “trust” obligation under the U.N. system, *see* U.N. Charter art. 73, to ensure the Chamorro people exercise self-determination. The U.N. Charter as well as the International Covenant on Civil and Political Rights, which sets out the classic text of the self-determination right and has been legally binding on the United States since 1992, are also treaties which safeguard the “trust” relationship and should similarly trigger the right to consultation envisioned in the NHPA. Because the right to consultation under the NHPA arises principally from a “trust” relationship, it is consistent with the spirit and

purpose of the 1992 Amendments to the NHPA to afford the Chamorro people of Guam an opportunity to have more than cursory say in the Section 106/NHPA process.

**III. The Programmatic Agreement is culturally ignorant and highly offensive with regard to the process to be followed upon what is termed “inadvertent discovery” of human remains in Guam**

The Programmatic Agreement is daft regarding the process to be followed upon what is termed “inadvertent discovery” of human remains in Guam. In fact, the Programmatic Agreement painfully ignores the reality that there is an incontestably high likelihood that in any given area immediately seaward of the coast and any area enclosed within latte stones are located numerous burial sites containing ancestral human remains. The DoD, upon consultation with the Chamorro people of Guam as articulated in the preceding section, must modify the Programmatic Agreement to reflect this reality. Such modification must include writing into the document a legal presumption that prehistoric and historic human remains are reasonably foreseeable to be found in any areas enclosed within latte stones or immediately seaward of the coast; said foreseeability must in turn inform the process to be followed upon discovery of human remains and/or funerary objects in areas deemed likely to contain said remains and/or objects.

**IV. DoD should not proceed with projects that will have adverse effects on historic properties until there has been a discussion with consulting parties on possible avoidance and or mitigation measures.**

The Programmatic Agreement provides in pertinent part that “[f]or those projects listed in Appendix D for which adverse effects have been determined to occur . . . the mitigations and procedures defined in Stipulations VI, VII and VIII will be considered to adequately resolve these effects, consistent with 36 CFR § 800.6.” Appendix D of the

Programmatic Agreement identifies twenty-six (26) sites that will be adversely affected as a result of buildup projects out of over one hundred eighty (180) projects. The Programmatic Agreement does not appear to require DoD to hold off on projects identified as having an adverse effect on historic properties until there has been consultation about the possibility of avoiding and/or minimizing adverse effects. The Programmatic Agreement should explicitly state that no DoD projects proceed until consulting parties have been given an opportunity to suggest mitigation and/or avoidance measures.

Furthermore, the Programmatic Agreement's stipulation regarding the development of mitigation and avoidance measures for adverse effects is inadequate. DoD will give "full consideration" of mitigation measures suggested by consulting parties. "If adverse effects cannot be avoided to these historic properties, the DoD will mitigate adverse effects as specified in Stipulation IV." This means that, although DoD is obligated to give "full consideration" of avoidance and mitigation measures, it is also free to ignore them.

For example, there appear to be projects that should not require the disturbance of historic properties. A few of the projects that will admittedly have an impact on historic properties are the construction of a dining facility and a gym, which must be built in a location where there will be adverse effects on historic properties. DoD owns a lot of land on Guam and intends on "acquiring" even more. It is legally and culturally unprincipled for DoD to suggest that it does not currently own enough property to put these facilities in a location that would not require the disturbance of historic properties.

We Are Guåhan therefore requests that: (1) no projects identified in the Programmatic Agreement as having adverse effects on historic properties proceed until

consulting parties have been given an opportunity to suggest mitigation and/or avoidance measures; and (2) the Programmatic Agreement be revised to refer all disputes regarding mitigation and avoidance efforts according to Stipulation XII, Resolving Objections.

**V. The general mitigation measures identified in the Programmatic Agreement are inadequate.**

The Programmatic Agreement provides that the mitigation measures outlined in Stipulations VI and VII will be considered adequate to resolve all adverse effects on recognized historic properties. Stipulation VI identifies data recovery plans and public education and interpretation as its primary mitigation measures. These mitigation measures require DoD to create an “information package developed for use on the Internet that includes photos, a summary of excavations, materials recovered, and significance of the site to regional culture.” DoD will also “[p]rovide 100 copies of a fact sheet on the site, which may be distributed and reprinted by the appropriate SHPO.”

The Programmatic Agreement therefore provides as catch-all mitigation measures: (1) developing procedures governing the removal of archaeological and human remains; (2) a website; and (3) the distribution of 100 copies of a fact sheet. How do these measures *mitigate* the disturbance of historic properties? This is similar to saying that DoD would mitigate the destruction of a historic building by: (1) following procedures in its destruction; (2) taking photos of the building before destroying it for use on a website; and (3) printing 100 fact sheets about why the building was important.

The mitigation measures for indirect effects on historic properties are also lacking. With all due respect, how much impact does DoD believe an annual briefing to DoD personnel and their families on historic properties will be?

DoD also wishes to afford public access to historic properties “[i]n recognition of the significance that many historic properties located within DoD installations have to various cultural and historic groups.” It is disingenuous for DoD to now recognize the benefit in public access to historic lands located on DoD property.

We Are Guåhan requests that the Programmatic Agreement create an explicit preference for the avoidance of adverse effects. We Are Guåhan also requests that a public access plan to historic properties be developed prior to the signing of the Programmatic Agreement.

#### **VI. The Programmatic Agreement is ambiguous regarding Págat.**

The Programmatic Agreement must clearly provide for an entirely separate Section 106 consultation process with respect to Págat. The Summary of Changes provides:

Discussions have resulted in a change in the PA to state that a subsequent consultation will be conducted to consider effects on historic properties from new ranges. Relative to proposed new training ranges, the DoD has agreed in the revised PA to address effects on historic properties and any measures to be implemented to mitigate for those effects in a focused agreement specific to the ranges.

In the Programmatic Agreement, however, Págat is identified in Appendix A as part of the Undertaking. Furthermore, Appendix D identifies land acquisition for firing ranges as a site that has “Further Evaluation Required.” Stipulation V.C.3 governs all projects in the Undertaking requiring additional evaluation to determine effects. Assuming that DoD agreed there would be adverse effects on Págat, the remedy would be to comply with Stipulation V.C.2. This does not appear to reflect the intent of the revision.

Stipulation VII.B.6 states that “DoD will conduct supplementary consultations under this PA . . . to address the effects on historic properties of construction and operation of new firing ranges.” It is still unclear whether the procedures set forth in Stipulation V.C.3 constitute “supplementary consultations.”

We Are Guåhan therefore requests that the Programmatic Agreement explicitly state that a supplemental Section 106 process be initiated with respect to actions surrounding the Pågat area. The Programmatic Agreement, as drafted, creates an ambiguity that could potentially allow DoD to move forward with the proposed firing ranges after giving thirty (30) days worth of notice, “supplementary consultation,” and a finding of adverse effect.

### **CONCLUSION**

Based on the foregoing, We Are Guåhan hereby requests:

1. The Programmatic Agreement not be approved until there has been a reasonable amount of time for the public and consulting parties to identify historic properties and the possible impacts on historic properties;
2. The Programmatic Agreement not be approved until there has been a reasonable amount of time for the public and consulting parties to review and comment on its provisions;
3. The Programmatic Agreement not be approved until there has been consultation with the Chamorro people of Guam, whose treaty-based “trust” relationship with the United States triggers the consultation right for NHPA purposes;



4. The Programmatic Agreement not be approved until the DoD has made all reasonable and good faith efforts to consult with the Chamorro people of Guam, particularly where the Undertaking may affect any historic property to which Chamorros attach religious or cultural significance;
5. The Programmatic Agreement be revised to provide that no projects with adverse effects on historic properties proceed until there has been a discussion of avoidance and/or mitigation measures with consulting parties and the public;
6. The Programmatic Agreement be revised to refer all disputes regarding avoidance and or mitigation measures as set forth in Stipulation XII;
7. The Programmatic Agreement be revised to create an explicit preference for avoidance of adverse effects;
8. The Programmatic Agreement be revised to include a public access plan;
9. The Programmatic Agreement be revised to explicitly provide for supplemental review under Section 106 for the proposed firing range complex at Pãgat.

Please contact [leevin@weareguahan.com](mailto:leevin@weareguahan.com) if you have any questions or concerns about this comment.

Sincerely,

Julian Aguon

Leevin T. Camacho

Ana Maria Won Pat-Borja