

NATIVE HAWAIIAN ORGANIZATIONS IN THE SECTION 106 REVIEW PROCESS

ADVISORY COUNCIL ON HISTORIC PRESERVATION
DEPARTMENT OF THE INTERIOR OFFICE OF NATIVE HAWAIIAN RELATIONS
HISTORIC HAWAI'I FOUNDATION

22 FEBRUARY 2020



SECTION 5: ASSESSING ADVERSE EFFECTS



Hanapēpē
Bridge public
meeting,
Hanapēpē,
Kauaʻi. Photo
courtesy
FHWA.

Requirements of Agencies

36 CFR Part 800.5

Federal agencies are required to continue consultation with the SHPO, NHOs, and other parties to determine if the undertaking will have an adverse effect on historic properties.

An adverse effect is defined as the **alteration, directly or indirectly, of any characteristics of a historic property that qualify the property for inclusion in the National Register** in a manner that would **diminish the integrity** of the property's location, design, setting, materials, workmanship, feeling, or association.

ADVERSE EFFECTS

Federal agencies are required to **consider all qualifying characteristics** of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

Adverse effects may also include **reasonably foreseeable effects** caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

ADVERSE EFFECTS MAY INCLUDE:

Physical destruction of or damage to all or part of the property

36 CFR § 800(a)(2) (i) Physical destruction of or damage to all or part of the property

Since 1999, damage to sites includes archaeological data recovery.



Earthquake Damage at Pu'ukohalā Heiau, Hawai'i. Photo courtesy NPS.

ADVERSE EFFECTS MAY INCLUDE:

Alteration of a property

36 CFR § 800.5(a)(2) (ii)

Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines.



A remodeling project affecting the historic Chief Petty Officers residence in the World War II Valor in the Pacific National Monument removed original materials and added new features that did not match the old in design, color, texture or materials. Photo courtesy HHF.

ADVERSE EFFECTS MAY INCLUDE:

Removal of the property from its historic location

36 CFR § 800(a)(2)(iii) Removal of the property from its historic location

Moving is an adverse effect – but may be preferable to destruction or other damage



Red Hill, Navy home relocation. Photo courtesy Forest City.

ADVERSE EFFECTS MAY INCLUDE:

Change of the character of the property's use or of physical features

36 CFR § 800.2(a)(2) (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance.

New construction introduces changes to the setting, feeling, association and physical features



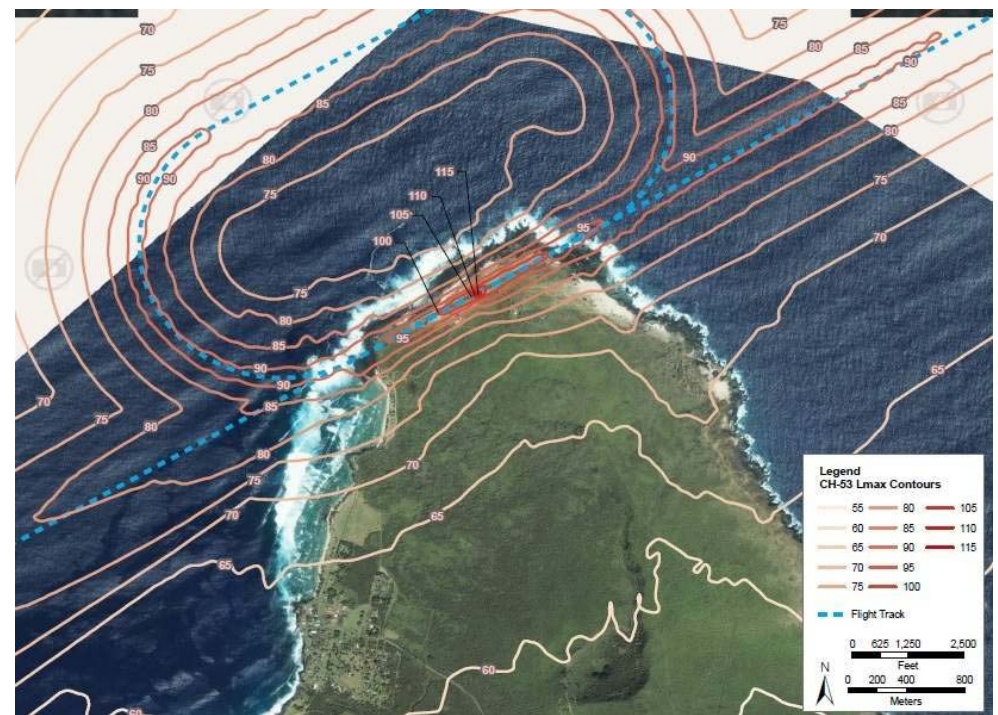
A segment of Honolulu's elevated transit project is adjacent to several sites, including the Sumida Watercress Farm. Photo courtesy HHF.

ADVERSE EFFECTS MAY INCLUDE:

Introduced visual, atmospheric or audible elements that diminish the property's integrity

36 CFR § 800.2(a)(2)(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features

Examples of “atmospheric” elements = particulate matter (dust, smog), noxious smells



Noise Map from proposed military training at Kalaupapa NHL. Photo courtesy MCBH.

ADVERSE EFFECTS MAY INCLUDE:

Neglect of a property which causes its deterioration

36 CFR § 800.5(a)(2) (vi) Neglect of a property which causes its deterioration,

except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization.



'Ewa Plantation Villages Manager's House. Photo courtesy MASON

ADVERSE EFFECTS MAY INCLUDE:

Transfer, lease, or sale of property out of federal ownership or control

36 CFR § 800.5(a)(2)(vii) Transfer, lease, or sale of property out of federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.



Līhu'e Post Office, Kaua'i, USPS reversed its decision to transfer the historic post office after Sec 106 and other public input opposed the proposal. Photo courtesy HHF.

Agency findings and addressing disagreements

In situations where the SHPO, NHOs, or other consulting parties disagree with the federal agency's findings, they are required to **notify the agency in writing within 30 days** and provide the specific reasons for their disagreement.

Upon receipt of any disagreement, the **agency is then required to consult with the party to resolve the disagreement or it can request the ACHP to review their finding**. When submitting information to the ACHP, agencies are required to notify all consulting parties and make their submittal available for public review.

Upon receipt of the agency submittal, the ACHP has 15 days to review it and provide ACHP's opinion regarding the agency's finding on whether the adverse effect criteria were correctly applied.

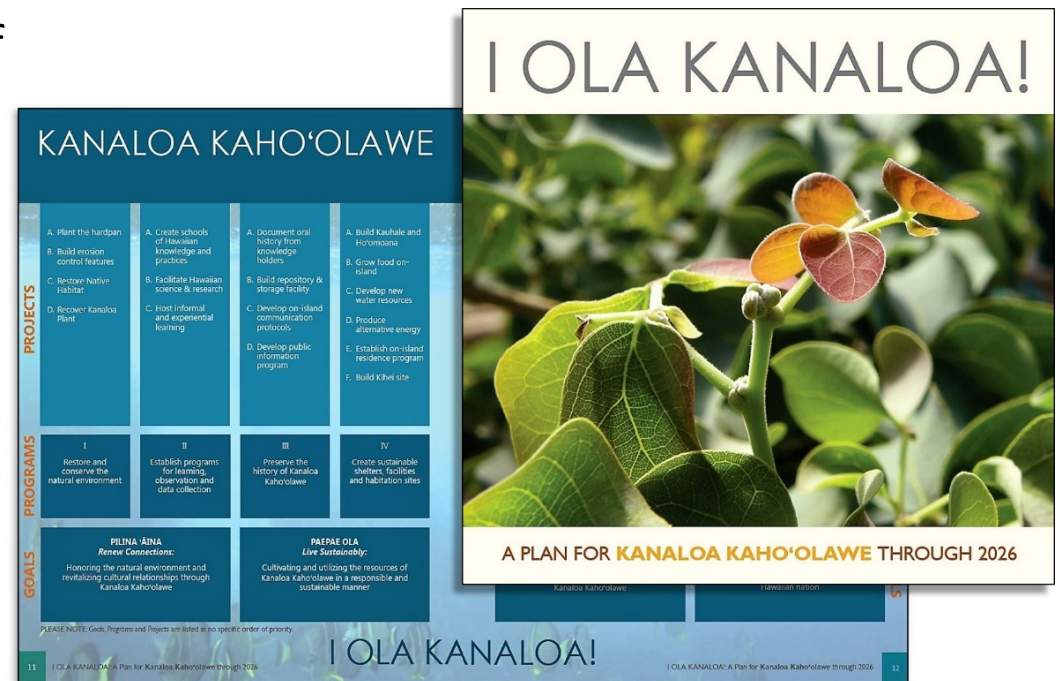
The federal agency, after receiving the ACHP opinion, is required to consider it and prepare a summary and rationale of its final decision to either affirm or revise its initial finding, and transmit these decision documents to the ACHP, SHPO, NHOs and other consulting parties.

Strategies For Consultation on Effects

PRESERVATION MANAGEMENT PLAN

Clearly communicating the effects of the undertaking on the historic properties of importance to the NHO is essential.

Having a prepared management plan or strategy document that describes how the NHO interacts with the historic property will help the federal agency, SHPO, and if necessary, the ACHP better understand how the undertaking may pose adverse effects.

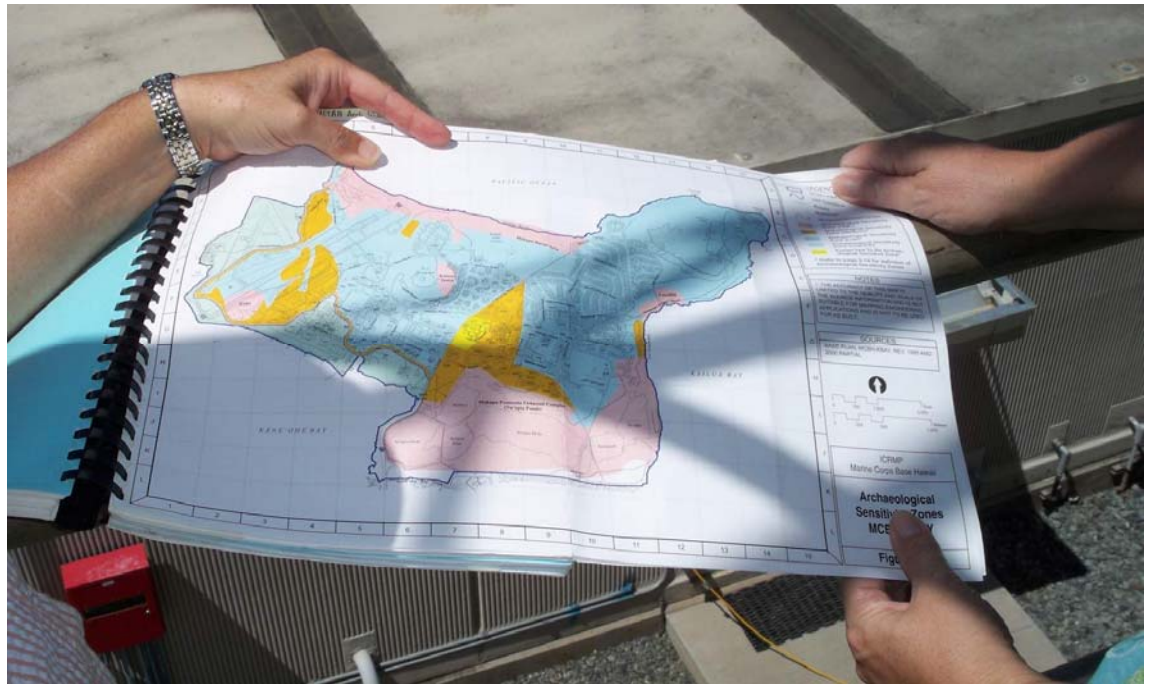


I Ola Kanaloa! Plan for Kanaloa Kaho'olawe, courtesy Kanaloa 2026 Working Group

BE PROACTIVE

Make sure any language used by the federal agency documenting effects is representative of the NHOs views.

Utilizing accurate terminology and even traditional place names is key to characterizing the unique nature of these resources as being affiliated with NHOs.



Consultation at Marine Corps Base Hawai'i, photo ACHP

DISAGREEMENT AND APPEALS to federal agency, SHPO, and ACHP

The federal **agency applies the adverse effect criteria in consultation** with the SHPO, NHOs and other consulting parties.

Sometimes the agency and a consulting party, or consulting parties will consider particular effects differently.

For example, an agency may not consider an undertaking's visual or atmospheric effects as adverse; but an NHO may consider such effects as substantial or disruptive to religious and cultural ceremonies.

In such instances, **NHOs should be prepared to accurately document their disagreement** with the federal agency and appeal the findings to the federal agency, SHPO, and the ACHP.

Knowledge Check 11

Question

Federal agencies are required to consider all qualifying characteristics of a historic property when determining effects.

True or False?

Knowledge Check 11

Answer

Federal agencies are required to consider all qualifying characteristics of a historic property when determining effects.

TRUE

This statement is true:

Federal agencies are required to consider all qualifying characteristics of a historic property in order to determine the adverse effects to the historic property or those eligible to the National Register.

Knowledge Check 12

Question

A consulting party has how much time to agree or comment on a federal agency finding of effect?

- A. 15 days
- B. 20 days
- C. 30 days
- D. 45 days

Knowledge Check 12

Answer

A consulting party has how much time to agree or comment on a federal agency finding of effect?

- A. 15 days
- B. 20 days
- C. 30 days**
- D. 45 days

The SHPO, NHOs, and other consulting parties are afforded 30 calendar days to review the finding.

Knowledge Check 13

Question

An NHO can bring their disagreement regarding a federal agency finding and appeal to the _____.

- A. State Historic Preservation Officer/Division
- B. Advisory Council on Historic Preservation
- C. Federal Agency
- D. Any or All of the Above

Knowledge Check 13

Answer

An NHO can bring their disagreement to a federal agency finding and appeal to the _____.

- A. State Historic Preservation Officer/Division
- B. Advisory Council on Historic Preservation
- C. Federal Agency

D. Any or All of the Above

NHOs should be prepared to accurately document their disagreement with the federal agency and appeal the findings. An NHO can bring their disagreement to the agency finding directly to the federal agency, SHPO, and or the ACHP. It is more effective to notify the federal agency, SHPO, and the ACHP, if participating, at the same time.

SECTION 6: RESOLVING ADVERSE EFFECTS TO HISTORIC PROPERTIES



Keahiakawelo, Lānaʻi. Photo courtesy Lānaʻi Culture & Heritage Center

Requirements of Agencies

36 CFR Part 800.6

When a federal **agency determines that an undertaking will adversely affect historic properties**, the agency continues consultation with the SHPO, NHOs, and other consulting parties to resolve the adverse effects.

The federal agency is also required to notify the ACHP of the adverse effect finding and invite the ACHP to participate in consultation. Note that the regulations do not impose time frames for this part of the process.

In addition to the consulting parties, the federal agency is also required to make documents regarding the undertaking available to the general public for review and comment.

CONSULTATION

36 CFR Part 800 16(f):

Consultation is the process of:

- seeking,
- discussing, and
- considering

the views of other participants, and, where feasible,

- seeking agreement with them
- on matters arising in the Section 106 process



Photo by HHF.

Requirements of Agencies

36 CFR Part 800.6 (a)

The agency official shall consult with the SHPO and other consulting parties, including NHOs, to develop and evaluate alternatives or modifications to the undertaking that could:

Avoid,

Minimize, or

Mitigate

adverse effects on historic properties.

Information

In order to participate effectively in the federal decision-making process, Section 106 participants must be well informed.

Federal agencies should have considered whether appropriate and relevant information has been shared with consulting parties and opportunities for broader public outreach have been explored.

The federal agency should have provided quality information in a clear, complete, and timely manner, and should make consulting parties aware of project timelines, milestones, agency obligations, limitations, and scope.

This also helps guard against unrealistic expectations regarding agency responsibilities and what it can and cannot do.

Timing

The development of an MOA should happen only after the federal agency, through consultation with the SHPO, NHOs, and other consulting parties (including applicants, local governments, and the ACHP if participating), has completed earlier steps to establish the APE, identify historic properties, assess the potential effects of its undertaking on them, and determine that its undertaking may adversely affect a historic property.

Agencies should not present a draft agreement document until the broad outlines of the stipulations have been developed.

Premature drafts can have a chilling effect on effective consultation and do not convey good faith efforts to consult.

Successful Consultation

Successful consultation adheres to the proper sequence of steps in the Section 106 review process.

Keep in mind that the Section 106 process **begins with a broad range of possibilities that are refined through consultation to reach a focused resolution.**

One step builds on another. If a step is taken out of sequence or skipped altogether, it is likely that the federal agency will have to go back and fulfill that missed responsibility (e.g., to determine the APE or identify historic properties or consult about eligibility).



Field consultation at Moa'ulanui, Kaho'olawe, photo courtesy ONHR.

Mitigation

The term “mitigation” in Section 106 refers to **measures to resolve the adverse effects to identified historic properties when those effects cannot be avoided or minimized.**

In those circumstances, the federal agency seeks other ways to address those effects to historic properties.

For example, measures might include redesign of new buildings, modification of site plans, realignment of corridors or rights of way, documentation, or preservation-in-place of certain historic properties.

Any treatment and mitigation measures developed through the Section 106 process should be referenced and documented in an MOA or PA that is developed in consultation with consulting parties.



Interpretive signage for "Brewer's Pier" where sailors and marines from the USS Boston disembarked in support of the overthrow of the Kingdom of Hawai'i in 1893. Photo courtesy ONHR.

Agreement Documents

Agreements to resolve adverse effects

The federal agency, SHPO, and ACHP agreement on how the adverse effects will be resolved is memorialized in a legally-binding document that outlines agreed upon measures and evidences the federal agency's compliance with Section 106.

This document can take the form of a **Memorandum of Agreement** (MOA) or a **Programmatic Agreement** (PA) depending on the nature and complexity of the undertaking.

Signatories

The *signatories* to the MOA or PA are:

- the Federal Agency,
- the State Historic Preservation Officer (SHPO), and
- the Advisory Council on Historic Preservation (ACHP), if participating.

The signatories to the MOA or PA have sole authority to execute, amend, or terminate the agreement.

The Agency may *invite* other signatories, including:

- The applicant for federal assistance
- Any other consulting party invited to sign by the agency, including NHOs


The signatories may also invite other Consulting Parties to *concur* with the MOA or PA.

FINAL// UNCLASSIFIED
25 September 2018

Execution of this PA by the USAG-Pōhakuloa, USAG-HI, the Hawaii SHPO, and the ACHP, and implementation of its terms evidence that the Army has taken into account the effects of these undertakings on historic properties and afforded the ACHP an opportunity to comment.

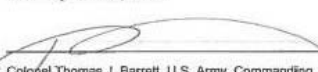
SIGNATORIES:

U.S. Army Garrison, Pōhakuloa Training Area


Lieutenant Colonel Lorenzo V. Borce, Jr., U.S. Army, Commanding

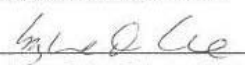
Date: 26 Sept 18

U.S. Army Garrison, Hawaii


Colonel Thomas J. Barrett, U.S. Army, Commanding

Date: 26 Sept 18

Hawaii State Historic Preservation Officer


Ms. Suzanne D. Case, Chairperson, Department of Land and Natural Resources

Date: 26 Sept 2018

Advisory Council on Historic Preservation


John M. Fowler, Executive Director

Date: 9/27/18

FINAL// UNCLASSIFIED
Programmatic Agreement Among the U.S. Army Garrison, Pōhakuloa Training Area, U.S. Army Garrison Hawaii, the Hawaii State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Routine Military Training Actions and Related Activities at United States Army Installations on the Island of Hawai'i, Hawai'i
Page 27 of 27

PA signature page for U.S. Army Garrison, Pōhakuloa Training Area, Regarding Routing Military Training Actions and Related Activities at United States Army Installations on the Island of Hawai'i, Hawai'i, 25 September 2018

Strategies For Resolving Effects

PRIORITIZE resolution actions

Consultation to resolve adverse effects involves discussions about the effects to the historic properties and measures to **avoid, minimize, or mitigate** the adverse effects.

NHOs, in developing ideas or proposing actions, should prioritize which actions provide the best outcomes for the historic properties of religious and cultural significance to them.

If avoidance is not possible, it may be desirable to identify ways to minimize impacts or identify mitigation measures that are appropriate to the nature and significance of the historic property.

ENGAGEMENT and DIALOGUE

Be aware that federal agencies should be looking to **avoid or minimize effects to historic properties** before looking to mitigate those effects.

NHOs should articulate what is considered adequate mitigation.

Mitigation does not have to occur within the footprint of the project, but should be designed to offset impacts resulting from the adverse effects which may harm historic properties.

Articulating significance and integrity is key to both documenting a site as a historic property and determining adequate mitigation.

Mitigation is ultimately determined by the federal agency.

If the NHO feels the federal agency's mitigation proposals are inadequate to address adverse effects to historic properties of religious and cultural significance to it, the NHO should be prepared to articulate why the property is significant.



Site visit and field consultation at Mākua Valley. Photo by ACHP

CLARITY and COMMITMENT in MOA or PA stipulations

In consulting to develop an agreement, insist that stipulations are clear and understandable to avoid confusion over roles and responsibilities.

NHOs should critically review MOA or PA stipulations and insist the responsibilities are clear and the agreement includes accountability for and during implementation.

All Stipulations need to address:

WHO will do WHAT by WHEN and HOW will the parties know if it is sufficient, accurate and complete.

FINAL// UNCLASSIFIED
25 September 2018

PROGRAMMATIC AGREEMENT
AMONG
THE U.S. ARMY GARRISON, PŌHAKULOA TRAINING AREA,
THE U.S. ARMY GARRISON, HAWAII,
THE HAWAII STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING
ROUTINE MILITARY TRAINING ACTIONS AND RELATED ACTIVITIES AT
UNITED STATES ARMY INSTALLATIONS
ON THE ISLAND OF HAWAII, HAWAII

WHEREAS, the U.S. Army Garrison-Pōhākuloa Training Area (USAG-Pōhākuloa) has a mission to support military training through the management and maintenance of Pōhākuloa Training Area (PTA) and Kawaihae Military Reservation on the island of Hawaii in the State of Hawaii; and

WHEREAS, PTA is located in the center of Hawaii Island and encompasses portions of four *moku* (districts) and *ahupua'a* (subdistricts), including Humu'ula Ahupua'a of North Hilo District, Ka'ohe Ahupua'a of Hāmākua District, Pu'u Anahulu Ahupua'a of North Kona District, and Waikoloa Ahupua'a of South Kohala District; and

WHEREAS, Kawaihae Military Reservation is located on the northwest coast of Hawaii Island in Kawaihae 1st Ahupua'a of South Kohala District; and

WHEREAS, the USAG-Pōhākuloa is an indirect reporting installation under the mission command of United States Army Garrison, Hawaii (USAG-HI) which maintains oversight of USAG-Pōhākuloa; and

WHEREAS, the United States Army Range Division Hawaii (RDH) operates USAG-HI and USAG-Pōhākuloa training areas and ranges in accordance with Army Regulation (AR) 350-19 and under the direction of the USAG-HI and USAG-Pōhākuloa Garrison Commanders, and provides oversight and coordination of training and related activities on Hawaii Island; and

WHEREAS, the USAG-Pōhākuloa operates a cultural resources program with a qualified staff of specialists to ensure compliance with applicable laws and regulations; and

WHEREAS, pursuant to AR 200-1, the Army has designated the USAG-Pōhākuloa Garrison Commander to serve as the agency official responsible for compliance with the requirements of Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, for undertakings within training areas managed by USAG-Pōhākuloa and operated by RDH; and

WHEREAS, in accordance with Section 106 of the NHPA and the implementing regulations at 36 CFR § 800.14(b), this PA governs the implementation of multiple

FINAL // UNCLASSIFIED
Programmatic Agreement Among the U.S. Army Garrison, Pōhākuloa Training Area, U.S. Army Garrison, Hawaii, the Hawaii State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Routine Military Training Actions and Related Activities at United States Army Installations on the Island of Hawaii, Hawaii
Page 1 of 27

MONITORING DEVELOPMENT of Agreement Documents

Participating in and monitoring the preparation of a Section 106 agreement and then reviewing the draft document is critical,

Even the very best consultation effort can be undermined if agreed-upon actions are not recorded clearly and accurately in the stipulations section.

The Section 106 agreement document should be straightforward and concise and use plain language wherever possible.

A cold reader should be able to understand when, how, and by whom the stipulations will be implemented.



Ulaino Stream Bridge is one of six bridges along Maui's historic Hāna Highway that are part of a state-federal improvement project. Photo courtesy FHWA.

Knowledge Check 14

Question

A federal agency is required to notify the ACHP of an adverse effect finding and invite the ACHP to participate in the consultation.

True or False?

Knowledge Check 14

Answer

A federal agency is required to notify the ACHP of an adverse effect finding and invite the ACHP to participate in the consultation.

TRUE

This statement is true:

The federal agency is required to notify the ACHP of the adverse effect finding and invite the ACHP to participate in consultation.

Knowledge Check 15

Question

A Memorandum of Agreement or Programmatic Agreement memorializes the consultation and completes the Section 106 review.

True or False?

Knowledge Check 15

Answer

A Memorandum of Agreement or Programmatic Agreement memorializes the consultation and completes the Section 106 review.

TRUE

This statement is true:

An MOA or PA is a legally binding document that outlines agreed upon measures and evidences the federal agency's compliance with Section 106.