

John M. Weisenberger
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

June 28, 2010

LEGAL MEMORANDUM

Ref: DPW 10-0564

TO: Director, Department of Public Works

FROM: Attorney General *JM*

SUBJECT: Appointment and Office of the State Historic Preservation Officer Pursuant to 21 G.C.A. Section 77302

The Department of Public Works (DPW) has asked this Office to provide a legal opinion on whether federal law or Guam law controls the appointment of the State Historic Preservation Officer for federal purposes.

BACKGROUND

In 1966, Congress enacted the NATIONAL HISTORIC PRESERVATION ACT (NHPA).¹ The NHPA is a federal law designed and intended to preserve historical and archaeological sites in the United States and its territories, including Guam.²

In order to support and carry out its program of historic preservation, and among other things, the NHPA established the institution of "State Historic Preservation Office."³ Subject to the approval of the Secretary of the Interior, each state is responsible for setting up its own local preservation program and office, which in turn is administered by a "State Historic Preservation Officer" or "SHPO."

¹ 16 U.S.C. §§ 470 et. seq.

² 16 U.S.C. §§ 470a (creating Historic Preservation Program); § 470w (defining "State" as including Guam).

³ 16 U.S.C. §§ 470a.

On July 30, 2007, and pursuant to NHPA Section 470a, Governor Felix P. Camacho designated and appointed Joseph W. Duenas to act as the SHPO for Guam. Mr. Duenas is the current Director of the Department of Parks and Recreation (DPR). In an appointment letter addressed to the National Park Service, Governor Camacho wrote:

In accordance with the National Historic Preservation Act (16 U.S.C. 470a) as amended, I hereby designate, Joseph W. Duenas, Acting Director, Department of Parks and Recreation, as Historic Preservation Officer, effective June 11, 2007.

He has been delegated authority to represent the Territory of Guam in carrying out the responsibilities specified in the [NHPA], and in the regulations and administrative requirements established for implementation of that Act.”

LETTER FROM GOV. FELIX P. CAMACHO TO JANE SNYDER MATTHEWS, PH.D, ASSOCIATE DIRECTOR OF CULTURAL RESOURCES FOR THE NATIONAL PARK SERVICE (JULY 30, 2007).

This Office has confirmed with the Office of the Governor that the appointment of Mr. Duenas as the SHPO continues to be valid. The appointment has not been rescinded nor has another individual been appointed to act as SHPO in Mr. Duenas’s place or stead.

QUESTION PRESENTED

The question presented is whether federal law or Guam law controls the appointment of the SHPO for purposes of compliance and administration with the NHPA.

The question arises because federal law provides that the Governor of Guam designates and appoints the official who shall serve in the position of SHPO. In contrast, Guam law provides that the SHPO “for federal purposes” is a classified position and that the official serving shall be selected by the Director of DPR.

DISCUSSION

Since the enactment of NHPA in 1966, it has been provided by federal law that the official holding the position and title of SHPO must be designated and appointed by the Governor of the State:

16 U.S.C. § 470a. Historic Preservation Program.

(b)(1) The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the

National Trust for Historic Preservation, shall promulgate or revise regulations for State Historic Preservation Programs. *Such regulations shall provide that a State program submitted to the Secretary under this section shall be approved by the Secretary if he determines that the program--*

(A) provides for the designation and appointment by the Governor of a "State Historic Preservation Officer" to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes. . . .

16 U.S.C. § 470a(b)(1)(A) (emphasis added).

The mandate and authorization for a gubernatorial appointment of the SHPO is reiterated in the federal regulations implementing the NHPA:

36 C.F.R. § 61.4. State programs.

(a) For a State to participate in the [NHPA] program that this part describes, the Governor must appoint and designate a State Historic Preservation Officer (SHPO) to administer the State historic preservation program.

36 C.F.R. § 61.4 (emphasis added).

In response to the NHPA and its call for States to establish local historic preservation offices, in 1990 the Guam Legislature enacted Public Law 20-151⁴ which created within the Department of Parks and Recreation a new division called the "*Guam Historic Resources Division.*" Echoing the model preservation program outlined in the NHPA, the Guam Historic Resources Division is charged with the responsibility of establishing and administering a comprehensive program for preserving and restoring local sites, buildings and objects significant in the history, architecture, archaeology or culture of Guam.⁵

The Guam Historic Resources Division and its preservation program is administered by a "*Guam Historic Preservation Officer*" or "*GHPO.*"⁶ Under 21 G.C.A. Section 77302, the

⁴ Public Law 20-151 has been codified into Title 21 G.C.A. Chapter 77.

⁵ 21 G.C.A. § 77301; 21 G.C.A. Chapter 76.

⁶ 21 G.C.A. § 77303 (duties of GHPO); § 76103 (describing details of historic preservation program).

GHPO is a classified position and the official serving in it is selected by the Director of DPR. According to Section 77302, the official selected to be the GHPO “shall” also act as the SHPO “for federal purposes”:

§ 77302. Guam Historic Preservation Officer. The position of Guam Historic Preservation Officer is hereby created in the classified service under the Department of Parks and Recreation (the “Department”), the holder of which position shall be the State Historic Preservation Officer for federal purposes. The Director of Parks and Recreation (the “Director”) shall select a qualified candidate to fill the position based on training, work experience and education pertinent to cultural resources management. The Guam Historic Preservation Officer shall be under the supervision of the Director and shall be the head of the Historical Resources Division of the Department and Executive Director for the Guam Preservation Trust Fund.

21 G.C.A. § 77302 (emphasis added); *see also* GUAM PUB.L. 20-151:1 (“The Legislature has determined that the historic preservation program of Guam can be enhanced by making the Guam Historic Preservation Officer a classified position. . .”).

A plain reading of Guam’s Section 77302 and NHPA Section 470a(b)(1) (A) reveals a clear conflict between the two statutes on how the SHPO for federal purposes is selected. Under Section 77302, the Director of DPR makes the selection and the position is a classified one protected by the merit system. Under the NHPA, the Governor makes the selection. The position is a political appointment, and the selected official serves at the pleasure of the Governor.

When there is a conflict between a local Guam law and a Federal law, the Guam Supreme Court has held that the doctrine of conflict preemption applies. A conflict arises when “*it is impossible to comply with both state and federal requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives underlying federal law.*”⁷ When an actual conflict is found to exist, preemption arises under the Supremacy Clause of the United States Constitution which states that, “[t]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby; any

⁷ Bank of Guam v. Guam Banking Board, 2003 Guam 9, ¶16-17; 2003 WL 21051699, *4 (Sup. Ct. Guam). *See also*, Gibbons v. Ogden, 22 U.S. 1 (1824) (under the Supremacy Clause, any state law that conflicts with a federal law is preempted); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (a conflict exists if a party cannot comply with both state law and federal law); Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (even in the absence of a conflict between state and federal law, a conflict exists if the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

Thing in the Constitution or the Laws of any State Contrary notwithstanding.”⁸ In other words, “state law that conflicts with federal law is ‘without effect.’”⁹

That is the case here. The NHPA is a federal law, and the position of SHPO is a title and position created by that law. Although the NHPA permits local governments to promulgate rules and regulations for local application and administration of the NHPA, the plain language of NHPA Section 470a(b)(1) requiring that any regulations be approved by the Secretary of the Interior¹⁰ conclusively establishes that Congress intended to occupy the field and to preempt any contradictory state legislation.

Moreover, the Government of Guam cannot pick and choose which provisions of the NHPA it wants to have apply to Guam or which it wants to comply with. For example, the Government cannot apply and enforce NHPA Section 106 (concerning review of actions which may affect historical properties), and then at the same time fail to comply with NHPA Section 470a(b)(1)(A).

Title 16 U.S.C. Section 470a(b)(1)(A) and Title 36 C.F.R. Section 61.4 of the NHPA clearly and unambiguously identify the Governor as the only person authorized to designate and appoint the SHPO. To the extent that 21 G.C.A. Section 77302 conflicts with the NHPA, then according to the Guam Supreme Court, Section 77302 is preempted and “without effect.”

Further analysis reveals that Section 77302 also violates the Organic Act of Guam and the constitutional doctrine of Separation of Powers. The Organic Act functions as Guam’s constitution.¹¹ The Guam Supreme Court has held that the Organic Act requires application of the doctrine of Separation of Powers to government of Guam functions.¹²

To this end, the Guam Supreme Court has consistently also held that the Legislature cannot enact laws which are in derogation of the Organic Act, including laws that encroach upon the Governor’s authority and powers:

[I]t is a “well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act.” We underscored this principle in *In*

⁸ Bank of Guam, 2003 Guam 9 at ¶ 9 (citations omitted).

⁹ Id.

¹⁰ 16 U.S.C. § 470(a)(b) (“Such regulations shall provide that a State program submitted to the Secretary under this section shall be approved by the Secretary . . .”.)

¹¹ In re. Request of Felix P. Camacho, 2004 Guam 10, ¶ 53; 2004 WL 1293239 (Sup.Ct. Guam).

¹² Villagomez-Palissou v. Superior Court, 2004 Guam 13, ¶ 14; 2004 WL 1618524 (Sup.Ct. Guam).

re Request of Governor Gutierrez, when we stated that ““the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.’

The Ninth Circuit Court of Appeals similarly recognizes that Guam's self-government is “constrained by the Organic Act” and therefore, held that courts must “invalidate Guam statutes in derogation of the Organic Act.”¹³

In short, the Legislature may not enact legislation which strips the Governor of the powers granted to him by the Organic Act. The Legislature may only enact legislation of local application not inconsistent with the Organic Act and with the laws of the United States applicable to Guam.¹⁴

Under the Organic Act, the Governor is empowered to “commission all officers he may be authorized to appoint.”¹⁵ Through the NHPA, Congress has authorized the Governor to appoint the SHPO for Guam. The conflict that 21 G.C.A. Section 77302 creates with the NHPA violates the Organic Act and the doctrine of Separation of Powers because it openly usurps from the Governor an express appointment power granted to him by Congress. When a local Guam statute is in derogation of the Governor’s Organic Act powers, the statute is inorganic and invalid.¹⁶

Moreover, not only does Section 77302 confiscate from the Governor the authority and prerogative to select the SHPO, it additionally bestows upon the SHPO the privilege and benefits reserved to permanent classified employees of the Government of Guam, complete with all of the protections afforded by the merit system. As a classified position, the SHPO would not be subject to change or removal at the will of the administration.

The classification of the SHPO is directly contrary to the plain language and intent of the NHPA because by making the SHPO a politically appointed position, Congress intended that the official chosen would serve at the discretion and pleasure of the Governor. Indeed, the Advisory

¹³ In re Request of Governor Felix P. Camacho, 2004 Guam 10 at ¶ 33.

¹⁴ Nelson v. Ada, 1988 WL 242618, *2 (D.Guam App. Div), *aff'd*, 878 F.2d 277 (9th Cir. 1989); *citing* Bordallo v. Baldwin, 624 F.2d 932 (9th Cir. 1980).

¹⁵ 48 U.S.C. § 1422.

¹⁶ In re Request of Governor Felix P. Camacho, 2004 Guam 10 at ¶¶ 1, 41.

Council on Historic Preservation (which is the oversight agency of the State SHPOs)¹⁷ has itself stated that the nature of the SHPO position “*reflects the interests of the State by virtue of being a State official appointed by the elected State Governor.*”¹⁸

CONCLUSION

The NHPA is a federal law. The title and position of SHPO was created by that federal law.” To the extent that Title 21, G.C.A. Section 77302 conflicts with the NHPA and its regulations with respect to the SHPO “for federal purposes”, the statute is preempted. Additionally, to the extent that Section 77302 purports to permit the Director of DPR to select an official to serve as the SHPO, and to the extent that it purports to permanently classify the SHPO position, the statute also violates the Organic Act of Guam and is invalid.

This does not mean, however, that the official holding the classified position of Guam Historic Preservation Officer (GHPO) may not dually serve as the SHPO for federal purposes. As long as the classified GHPO is appointed by the Governor of Guam to act as the SHPO, the official may lawfully hold both titles.

Whether to appoint the GHPO to also act as the SHPO is a policy decision reserved to the discretion of the Governor. Although it would appear ideal to have the same official act as both the GHPO and the SHPO, it is nevertheless possible that as administrations change, the two positions may be filled by two different officials.

Finally, we conclude that based upon the appointment letter issued by Governor Camacho on July 30, 2007, the current Guam SHPO for federal purposes is Joseph W. Duenas.



J. PATRICK MASON
Deputy Attorney General

¹⁷ The Advisory Council on Historic Preservation is the independent Federal agency established by the NHPA. In addition to overseeing the SHPOs, the Council also acts as a major policy advisor and is generally charged with the legal responsibility of balancing historic preservation concerns with federal project requirements.

¹⁸ “THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, 36 CFR PART 800, FINAL RULE; REVISION OF CURRENT REGULATIONS,” 65 Fed.Reg. 239 (Dec. 12, 2000) at at p. 77701.