[4334-63]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Parts 47 and 48

167D0102DM; DLSN00000.000000; DS61400000; DX61401

RIN 1090-AA98

Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920

AGENCY: Office of the Secretary, Interior

ACTION: Final Rule.

SUMMARY: This rule provides clarity in how the Department of the Interior administers certain provisions of the Hawaiian Homes Commission Act and the Hawaiian Home Lands Recovery Act. It facilitates the goal of the rehabilitation of the Native Hawaiian community, including the return of native Hawaiians to the land, consistent with the Hawaiian Homes Commission Act, the State of Hawai'i Admission Act, and the Hawaiian Home Lands Recovery Act. The rule clarifies the land exchange process for Hawaiian home lands, the documents required for land exchanges, and the respective responsibilities of the Department of the Interior, the Department of Hawaiian Home Lands, the Hawaiian Homes Commission, and other entities engaged in land exchanges of Hawaiian home lands. It also identifies the documentation requirements and the responsibilities of the Secretary of the Interior in the approval process for State of Hawai'i proposed amendments to the Hawaiian Homes Commission Act, 1920.

DATE: This rule is effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESS: The final rule is available on the internet at: http://www.regulations.gov

FOR FURTHER INFORMATION CONTACT: Ka'i'ini Kimo Kaloi, Director, Office of Native Hawaiian Relations, telephone (202) 208-7462.

SUPPLEMENTARY INFORMATION:

I. Background

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, to provide a homesteading program for native Hawaiians by placing approximately 200,000 acres of land (known as Hawaiian home lands) into the Hawaiian Home Lands Trust. The day-to-day administration of Hawaiian Home Lands Trust is by the Department of Hawaiian Home Lands (DHHL), an agency of the State of Hawai'i, headed by an executive board known as the Hawaiian Homes Commission (HHC). The HHCA provides the Chairman of the HHC the authority to propose to the Secretary of the Interior (Secretary) the exchange of Hawaiian home lands for land privately or publicly owned in furtherance of the purposes of the HHCA.

The HHCA also created a series of funds (the Hawaiian Home Lands Trust Funds, or "trust funds") *See, HHCA section 213 as amended.* The purpose of one of these trust funds is the "rehabilitation of native Hawaiians, native Hawaiian families, and Hawaiian homestead communities," which shall include "the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved and perpetuated." *Id.* Another in this series of trust funds seeks, for instance, to enhance construction of replacement homes, repairs or additions, and enhance development of farms, ranches or aquaculture, and to provide farm loans, including for soil and water conservation. Still another trust fund provides money for construction, reconstruction operations and maintenance of revenue-producing improvements intended to benefit occupants of Hawaiian

home lands; for investments in water and other utilities, supplies, equipment, and goods; and for professional services needed to plan, implement, develop or operate such projects that will improve the value of Hawaiian home lands for their current and future occupants. Other money is provided to establish and maintain an account to serve as a reserve for loans issued or backed by the Federal Government, to further the purpose of the HHCA. The purposes and goals of these funds reflect congressionally identified purposes and goals of the HHCA.

In 1959, Congress enacted the Hawai'i Admission Act, 73 Stat. 4 (Admission Act), to admit the Territory of Hawai'i (Hawai'i or State) into the United States as a state. In compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution.

In section 223 of the HHCA, Congress reserved to itself the right to alter, amend, or repeal the HHCA. Consistent with this provision, section 4 of the Admission Act provides limitations on the State's administration of the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds (hereafter referred to together as the Trust) and also provides that the HHCA is subject to amendment or repeal by the State only with the consent of the United States. Recognizing, however, that it was vesting the State with day-to-day administrative authority, Congress in section 4 of the Admission Act also provided exceptions within which the State could amend certain administrative provisions of the HHCA without the consent of the United States. The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law.

Consistent with the provisions of the HHCA and the Admission Act, Congress enacted the Hawaiian Home Lands Recovery Act in 1995 (HHLRA), 109 Stat. 357, which provides that the Secretary shall determine whether a State-proposed amendment to the HHCA requires the consent of the United States under section 4 of the Admission Act. It is appropriately the function of the United States to ensure conformance with the limitations in the Admissions Act and protect the integrity of this statutory framework.

The HHLRA also clarified the Secretary's role in the oversight of the Hawaiian Home Lands Trust. Section 204(a)(3) of the HHCA, in conjunction with Section 205 of the HHLRA, requires the approval or disapproval of the Secretary for the exchange of Hawaiian home lands. The HHLRA details the Secretary's responsibilities to ensure that Hawaiian home lands are administered in a manner that advances the interests of the beneficiaries.

While the Secretary has broad responsibilities under the HHCA and the Admissions Act, the HHLRA clarifies the scope of the continuing responsibilities of the Federal Government with regard to the HHCA. Two of these responsibilities are addressed in the final rule. First, it clarifies the role of the Secretary in land exchanges and, second, clarifies the process for the Secretary's review of State-proposed amendments to the HHCA. As to HHC Chairman-proposed land exchanges, the HHLRA provides that the HHC Chairman submit a report to the Secretary, including identification of the benefits to the parties of the proposed exchange. The Secretary shall approve or disapprove the proposed exchange depending on whether it advances the interests of the beneficiaries. As to State-proposed amendments to the HHCA, the HHLRA requires the State to notify the Secretary of any amendment it proposes to the HHCA and then requires the Secretary to determine whether it impacts Federal responsibilities under the HHCA or infringes on Federal interests or those of the HHCA beneficiaries. If the Secretary determines

the State's proposed amendment of the HHCA impacts the Federal responsibilities or infringes on either the Federal or beneficiaries' interests, the Secretary must submit the amendment to Congress for approval.

Since Hawai'i's admission to the Union, both Secretarial reviews occurred on an *ad hoc* basis using procedures accepted by the State and the Department. *See, letter dated August 21, 1987 to Chairman Morris Udall of the House Committee on Interior and Insular Affairs.* This rule establishes a clear process for Secretarial review and approval of land exchanges proposed by the HHC Chairman under the HHCA and HHLRA (Part 47), and of State-proposed amendments to the HHCA (Part 48).

II. Responses to Comments on the May 12, 2015 Notice of Proposed Rulemaking

On May 12, 2015, the Secretary issued a Notice of Proposed Rulemaking (NPRM), entitled "Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act." 80 FR 27134-27141 (May 12, 2015). The NPRM sought input from leaders and members of the Native Hawaiian community, HHCA beneficiaries, and the public about how the Secretary reviews land exchanges involving Hawaiian home lands proposed by the HHC Chairman and State-proposed amendments to the HHCA.

The NPRM set an initial 60-day comment period that ended on July 13, 2015. In response to requests from commenters, including the HHC on behalf of itself and HHCA beneficiaries, the Secretary extended the comment deadline another 30 days, ending on August 12, 2015. 80 FR 39991 (July 13, 2015).

The Secretary received over 500 written comments by the August 12, 2015 deadline. All comments received on the NPRM are available in the NPRM docket at http://www.regulations.gov/#!documentDetail;D=DOI-2015-0002-0001. Most of the comments

revolved around a limited number of issues. The issues discussed below encompass the range of substantive issues presented in comments on the NPRM.

After careful review and analysis of the comments on the NPRM, the Department concludes that it is appropriate to publish a final rule that would set forth the administrative procedures for the review of land exchanges involving Hawaiian home lands proposed by the HHC Chairman and amendments to the HHCA proposed by the State.

Overview of Comments

The Department received comments from the Native Hawaiian community, the State, HHCA beneficiaries, and others. One fundamental question raised in the comments was whether the rule expands the Secretary's authority beyond the HHCA, Admission Act, and HHLRA. We conclude that the rule is within the Secretary's authority and consistent with long-standing practice under the HHCA, Admission Act, and HHLRA.

State-proposed amendments. On August 21, 1987, the Secretary forwarded to the House Committee on Interior and Insular Affairs, a proposed procedure, agreed upon by the State and Secretary, for obtaining the consent of the United States to State-proposed amendments to the HHCA. That procedure provided for the HHC Chairman forwarding the proposed amendment to the Secretary with an opinion from an appropriate legal officer of the State, followed by the Secretary examining the material transmitted and then submitting to Congress a proposed report and bill. The parties anticipated that most State-proposed amendments would be free of controversy and national implications and would be submitted to Congress once every one to two years. The Department endeavored to follow these procedures subsequently embodied in the HHLRA and in this rule.

Land exchanges. In the late 1970's, the State and the DHHL were resolving claims between themselves over lands that the State had allegedly withdrawn illegally from the Hawaiian Home Lands Trust, while also addressing claims against the United States for lands allegedly withdrawn illegally from the Hawaiian Home Lands Trust or used by the United States during the territorial period. Congress considered addressing these claims and implementing some recommendations of the Federal-State Task Force Report from 1983, such as the existing informal process of Secretarial review of land exchanges proposed by the HHC Chairman. Accordingly, Congress passed the HHLRA which provides procedures for settlement of federal claims (section 203); approval of amendments to the HHCA (section 204); and approval of exchanges involving Hawaiian home lands (section 205). The HHLRA also designated a federal official within the Department "to administer the responsibilities of the United States" under the HHCA and the HHLRA, and to protect and advance HHCA beneficiaries' rights and interests, including promoting homesteading opportunities, economic self-sufficiency, and social well-being (section 206). *See, Hawaiian Home Lands Recovery Act: Hearing before the Senate Committee on Energy and Natural Resources on S. 2174, 103d Cong., 9-10, 19 (1994). See, response to questions 3 and 40.*

HHCA beneficiaries. The HHLRA defines "beneficiary" in the same terms as "native Hawaiian" is defined in the HHCA, which was adopted as a provision of the constitution of the State as a compact with the United States. In 1959, when section 4 of the Admission Act referred to amendments that "increase the benefits to lessees of Hawaiian home lands," all lessees met the definition of "native Hawaiian" and had a blood quantum of at least 50 percent. Beginning in 1986, however, certain persons with a lesser blood quantum could obtain lessees through succession or transfer. *See, 100 Stat. 3143 (1986).* The HHLRA, nevertheless, defined

beneficiary in terms of the HHCA definition, not in terms of lessees. Therefore, the rule evaluates and advances the interests of the beneficiaries as distinguished from all lessees.

Responses to Specific Issues Raised in the NPRM Comments

1. *How do claims concerning the United States occupation of the Hawaiian Islands impact the rule?*

Issue: Multiple commenters who objected to Federal rulemaking based their objections on the assertion that the United States violated and continues to violate international law by illegally occupying the Hawaiian Islands and thus is without jurisdiction on the Islands.

Response: The Department is an agency of the United States. The Secretary's authority to issue this rule derives from the United States Constitution and from Acts of Congress, and the Secretary's authority is confined within that structure. The Secretary is bound by Congressional enactments concerning the status of Hawai'i. Under those enactments and under the United States Constitution, Hawai'i is a State of the United States of America.

In 1893, a United States officer, acting without authorization of the U.S. government, conspired with residents of Hawaii to overthrow the Kingdom of Hawaii. In the years following the 1893 overthrow, Congress annexed the Territory of Hawai'i and established a government for the Territory of Hawai'i. *See, Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898); Act of Apr. 30, 1900, 31 Stat. 141. In 1959, Congress admitted Hawai'i to the Union as the 50th State.* In 1993, Congress, through a joint resolution, apologized to Native Hawaiians for the overthrow and the deprivation of the rights of Native Hawaiians to self-determination, and expressed its support for reconciliation efforts with Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510, 1513 (commonly known as the "Apology Resolution").

The Apology Resolution, however, did not effectuate any changes to existing law. *See, Hawai'i v. Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009).* Thus, the Admission Act established the current status of the State of Hawai'i. The Admission Act proclaimed in section 1 that "the State of Hawai'i is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever." The Admission Act was consented to by the people of Hawai'i through an election held on June 27, 1959. The comments in response to the NPRM that call into question the legitimacy of the State of Hawai'i are inconsistent with the express determination of Congress, which is binding on the Department.

2. *Is the definition of a beneficiary of the HHCA consistent with the requirements of Federal law?*

Issue: Commenters questioned the Secretary's constitutional authority to promulgate rules for the Hawaiian Home Lands Trust, arguing that Congress's definition of a Native Hawaiian beneficiary is race-based because its use of a "blood quantum" violates the Constitution's guarantee of equal protection.

Response: The Federal Government has broad authority to regulate with respect to Native American communities. *See, U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause); Morton v. Mancari, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").* In the case of the Hawaiian Home Lands Trust, Congress specifically chose to use a 50 percent blood quantum requirement for all beneficiaries of the HHCA rather than a 1/32 blood quantum in order to make the bill more distinctly a Hawaiian rehabilitation scheme. *Proposed Amendments to the Organic Act of the Territory of Hawaii:*

Hearings on H.R. 7257 Before the House Comm. On the Territories, 66th Cong. 15 (1921). Acknowledging that the United States implemented similar rehabilitation programs for Indians because the government took away their lands without payment and violated treaties, Congressman Charles Curry, Chairman of the Committee on the Territories, said that it should be constitutional to do the same for the Hawaiians whose land had been taken away from them and noted that the Committee received opinions supporting the constitutionality of the proposed legislation from the Attorney General of Hawai'i and the Solicitor of the Department of the Interior. *Id.* at 141-142. Blood quantum reflects ties to the Native Hawaiian political community, as individuals marry within it. *Id.* at 140. And, as Congress explained, Congress "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous peoples of a once sovereign nation as to whom the United States has established a trust relationship." 114 Stat. 2968 (2000) (Hawaiian Homelands Homeownership Act).

3. *Is the Hawaiian Homes Commission Act still Federal Law?*

Issue: Commenters questioned whether the HHCA remains a Federal law, presuming that the passage of the Admission Act repealed it.

Response: Yes, the HHCA remains a Federal law. As explained in more detail above under "Background,", in compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution as a condition of its admission in 1959. The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law.

Furthermore, consistent with the provisions of the HHCA and the Admission Act, the HHLRA provides that the Secretary shall determine whether a proposed amendment to the HHCA requires the consent of the United States under section 4 of the Admission Act. It is appropriately the function of the United States to ensure conformance with the limitations in the Admission Act and protect the integrity of this statutory framework.

The HHLRA also clarified the role of the Secretary in the oversight of the Hawaiian Home Lands Trust. Section 204(a)(3) of the HHCA, in conjunction with section 205 of the HHLRA, requires the approval or disapproval of the Secretary for the exchange of Hawaiian home lands. The HHLRA details the Secretary's responsibilities to ensure that the administration of Hawaiian Home Lands Trust advances the interests of the beneficiaries.

The HHLRA thus confirms the continuing role of the Secretary in implementing the HHCA and defines the scope of the continuing responsibilities of the Federal Government related to approval of land exchanges of Hawaiian home lands and state-proposed amendments to the HHCA.

4. *Is the Secretary's interpretation of the term "rehabilitation" as including political, cultural and social reorganization correct?*

Response: The meaning of the term "rehabilitation" under the HHCA was provided for background purposes in the proposed rule, and resulted in a number of comments. We now clarify the Department's position.

The Secretary's interpretation of the term "rehabilitation" to include political, cultural, and social reorganization is consistent with both the statutory text and legislative history of HHCA. The term "rehabilitation" was added to the HHCA through the 1978 amendments to the Hawaiian Constitution. Section 213(i) of the HHCA, as amended, creates a "rehabilitation fund"

that can be used for "the rehabilitation of native Hawaiians" including "educational, economic, political, social, and cultural processes." Congress consented to this language through a joint resolution approved October 27, 1986, thereby amending the HHCA. 100 Stat. 3143. The purposes and goals of the rehabilitation fund are congressionally identified as some of the purposes and goals of the HHCA.

Furthermore, the legislative history of the HHCA indicates that the bill's purpose was to protect the welfare of the Native Hawaiian people. *See, 67 Cong. Rec. 3263 (1921) (statement of Rep. Almon). Methods to achieve that purpose included revitalizing the "mode of living" of Native Hawaiians from prior generations. See, Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawai'i: Before the House Comm. on the Territories*, 66th Cong 4 (1920) (quoting Sen. John H. Wise's testimony before the Territorial Legislature that: "[t]he Hawaiian people are a farming people and fishermen, out-of-door people, and [being] frozen out of their lands . . . is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.").

In 1982 the Secretary and the Governor of Hawaii created a task force whose purpose was to consider how to better effectuate the purposes of the HHCA. Federal-State Task Force on the Hawaiian Homes Commission Act Report to the Secretary of the Interior and the Governor of the State of Hawaii, Honolulu, Hawaii, August 1983, pp. 4, 8. That task force found that the term "rehabilitation" "implies that traditional and cultural practices of native beneficiaries, to the extent not precluded by law, should be respected and acknowledged by the DHHL in order to enable native beneficiaries to return to their lands and to provide for their self-sufficiency and

initiative and for the preservation of their culture." *Id.* at 55. Thus, the term "rehabilitation" has been consistently interpreted in ways that support the development of the Hawaiian community itself. The Secretary's interpretation of the term "rehabilitation" to include political, cultural, and social reorganization is consistent with the statutory language, congressional intent, and longstanding interpretation of the HHCA.

The funds Congress provided for in the HHCA represent factors that Congress identified as some of the purposes and goals of the HHCA. These purposes and goals guide the Secretary's review in determining whether a proposal advances the interests of the beneficiaries. Section 48.25 has been modified in response to these comments.

5. *Should leaseholds to beneficiaries be converted to fee simple allocations of land?*

Issue: Commenters recommend a path that would convert HHCA leaseholders into the outright owners of their leasehold property.

Response: Allowing for the conversion of leaseholds into fee simple ownership of Hawaiian home lands properties, which resembles the allotment process that was repudiated by Congress in 1934, is prohibited by current Federal law and is not within the scope of the rule.

6. *Does the State of Hawai'i have the ability to amend the HHCA?*

Issue: Commenters allege that the State has no ability to amend the HHCA through the process outlined in the Admission Act because it remains a Federal law.

Response: The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law. The Admission Act provided that the State could amend certain provisions of the HHCA but expressly limited the State's authority. The HHLRA provides further clarification, providing that the Secretary shall determine whether a State-

proposed amendment to the HHCA requires the consent or approval of Congress under section 4 of the Admission Act. If the State-proposed amendment is found not to require the approval of the United States, the rule provides that the effective date of the State-proposed amendment is the date of the Secretary's notification letter to the Congressional Committee Chairmen that Congressional approval was not required. It is appropriately the function of the United States to ensure conformity with the limitations in the Admission Act and protect the integrity of this Federal statutory framework.

7. *Do parts 47 and 48 create an administrative burden that would make it more difficult for the State to move forward with land exchanges or amendments to the HHCA that would benefit the Hawaiian home lands program?*

Issue: Commenters stated that while it may be lawful for the Secretary to engage in rulemaking, administrative requirements and criteria may constrain state officials and make it more difficult for them to proceed with land exchanges or amendments to the HHCA that they consider beneficial to the program.

Response: The three main Hawaiian Home Lands Trust statutes (the HHCA, the Admission Act, and the HHLRA) establish a trust relationship and grant the Secretary authority to protect and advance the interests of the beneficiaries. Section 206 of the HHLRA charges the Secretary with advancing the interests of the beneficiaries in administering the HHCA. Parts 47 and 48 will assist the Secretary in carrying out this responsibility and make the Secretary's actions more transparent to the public. Similarly, the rule will assist the State in understanding what information the Secretary considers necessary in order to evaluate the proposed actions. As evidenced by the fact that the HHLRA requires the Secretary to approve or disapprove all land exchanges involving Hawaiian home lands and to review all proposed amendments to the HHCA

proposed by the State, Congress not only recognized the benefit of an independent Federal determination that the proposal advances the interests of the beneficiaries, but also recognized that the interests of the Hawaiian Home Lands Trust and its beneficiaries may not always coincide with the interests of the State and their overall program. Congress prioritized the interests of the beneficiaries and in doing so circumscribed the day-to-day administration of the Trust by the State, notwithstanding benefits to other State goals.

8. *Should a federalism assessment be performed for this rule?*

Issue: One commenter suggests that the rule has sufficient federalism implications to warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

Response: No. While the HHCA, the Admission Act, and the HHLRA, limit what the State can do in administering the Trust, 43 CFR parts 47 and 48 merely provide a path for administering those Federal laws within the original limited delegation to the State in the Admission Act; thus, no federalism assessment needs to be performed. Recognizing the direct effect the three statutes have on the State and the benefits of working with the State to protect the beneficiaries and the Hawaiian Home Lands Trust, the Department held high level discussions with State officials as early as 2011 that resulted in this rulemaking to formalize the process for review of land exchanges and State proposed amendments to the HHCA.

As discussed above, the statutory framework of the HHCA, the Admission Act, and the HHLRA result in a compound of interdependent Federal and State law. Those laws undoubtedly have federalism implications. This rule, however, does not. In accordance with E.O. 13132, rules or policies have federalism implications if they "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Parts 47 and 48 have

none of those effects. The rule merely formalizes the process the Secretary will use in reviewing and approving land exchanges and in reviewing proposed amendments to the HHCA under existing law, and clarifies the documentation that the HHC Chairman, an officer of the State of Hawai'i, must submit to implement existing law. The relationship between the State and the Secretary is unchanged by this rule. We expect the HHC Chairman will continue to submit proposed land exchanges and proposed amendments to the Secretary as it has since passage of the HHRLA. The distribution of power and responsibilities remains unchanged; the respective decision making authority of the Secretary and State are limited by section 4 of the Admission Act and sections 205 and 206 of the HHLRA. The only "direct effect" imposed on the State by this rule is the requirement to submit some additional documentation, which, given the level of documentation required and the frequency of submissions, does not rise to a "substantial direct effect." We therefore conclude that no federalism analysis is necessary.

9. *Do parts 47 and 48 allow the Secretary to amend the HHCA?*

Issue: Commenters suggest that parts 47 and 48 amend or allow the Secretary to amend the HHCA.

Response: The rule does not amend the HHCA. Parts 47 and 48 merely assist in the administration of the HHCA. One of the purposes of part 48 is, however, to provide clarity, consistent with Federal law, on what subjects under the HHCA the State may amend on its own and which subjects Congress must approve. Similarly, part 47 adds clarity to Federal review of land exchanges. This rulemaking process provided the public and all interested parties an opportunity to review and comment on the Department's existing process before it is replaced with a formalized one under this rule.

10. *Should the Secretary monitor State legislation that poses a threat to the HHCA?*

Issue: Commenters recommend that under part 48 the Secretary adequately monitor any legislation that would pose a threat to the HHCA.

Response: Section 204 of the HHLRA requires that the Chairman of the HHC submit for review by the Secretary and if required, congressional approval, all State enactments proposing to amend the HHCA. Any proposed amendments to any terms or provisions of the HHCA by the State should also specify that the proposed amendment seeks to amend the HHCA, which puts all persons on notice that the amendment needs review by the Secretary. Consistent with the Admission Act and HHCA, if Federal review finds that any State enactment impacts any of the factors in section 48.20 of this rule, Congressional action is required before it has any effect on the provisions of the HHCA or administration of the Trust. It is the responsibility of the HHC Chairman to monitor the State's legislative activities and to obtain the required review by the Secretary if it is the State's intent to amend the HHCA.

Once the Department determines that Congress must approve a proposed amendment to the HHCA and the Department transmits the proposed amendment to Congress, there is no requirement that the Administration monitor or advocate its passage. The Administration may oppose an amendment that does not advance the interests of the HHCA beneficiaries.

11. *Do State-proposed amendments to the HHCA require Congressional approval or consent?*

Issue: A commenter suggests that Congressional consent and not approval is required for certain proposed amendments to the HHCA.

Response: Congress provided in section 4 of the Admission Act that certain amendments to the HHCA would require the consent of the United States. Congress also clarified in section 204

of the HHLRA that the consent of the United States is provided through the approval by Congress. Thus, approval is required.

Section 204(c)(1) also requires the Secretary to submit to Congress a draft joint resolution approving the proposed amendment. Section 397, Joint Resolutions, of Jefferson's Manual of the House of Representatives of the United States Congress, provides, with the exception of joint resolutions proposing amendments to the Constitution, all resolutions are sent to the President for approval and have the full force of law.

12. *Does section 47.50(a)(8)(i) authorize the State of Hawai'i to evict tenants from property being considered for a land exchange?*

Issue: Multiple commenters expressed concern that section 47.50(a)(8)(i) authorizes the State to evict tenants from property being considered for a land exchange.

Response: Section 47.50(a)(8)(i) does not authorize the State or any other entity to evict tenants from property being considered for a land exchange. This provision asks that *if* a party to the exchange will evict a tenant from land being exchanged under separate legal authority, the party should provide the Secretary details of arrangements for the relocation of the tenants. The provision in section 47.50(a)(8)(i) does not expand or grant such authority. The provision in section 47.50(a)(8)(i) is almost identical to section 43 CFR section 2201.1(c)(11) which applies to other Federal land exchanges. The purpose of both 43 CFR sections 2201.1(c)(11) and final rule 43 CFR section 47.50(a)(8)(i) is to assist the Secretary in identifying all costs, both economic and social, to all persons directly affected by an exchange.

13. *Should the definition of consultation in both parts 47 and 48 of this rule require face-to-face meetings with beneficiaries to be valid?*

Issue: Commenters question whether consultation with beneficiaries without face-to-face meetings will allow for a sufficient opportunity to engage in dialogue with the beneficiaries, consider their views, and, where feasible, seek agreement with them.

Response: The definition of consultation in this rule provides a minimum requirement and is intended to give the Secretary, the HHC Chairman, as well as beneficiaries and interested parties, flexibility in the consultation process in order to efficiently and effectively engage beneficiaries and interested parties in informed consideration of proposed actions. Such actions may involve a wide spectrum of issues ranging from those that are singular, simple, and straight forward to those that are multi-faceted and complicated or complex. Such actions may also vary from those that are mandatory to others that allow greater discretion. Face-to-face meetings may be necessary under certain circumstances while other means of communications, including but not limited to letters delivered by the postal service, e-mail, teleconferences, etc., may be just as effective in other circumstances.

One commenter suggested requiring face-to-face consultations with beneficiaries and lessees who live within a 50-mile radius of the existing Hawaiian home lands to be exchanged or received into the Trust. While the rationale for not requiring face-to-face consultations presented in the previous paragraph still holds true, the Secretary encourages the State to engage in face-to-face consultations, at a minimum, within a 50-mile radius. The beneficiaries who live within a 50-mile radius of a proposed exchange will likely have a great deal of information important in making a decision about an exchange that would assist the Department in its review.

The final rule modified the definition of consultation in response to these comments.

14. *Does section 47.45(a) impede the State's ability to engage in land exchanges involving Hawaiian home lands?*

Issue: Commenters raised the question whether section 47.45(a), which recommends the HHC Chairman and the other party seeking the exchange meet with the Department prior to finalizing an exchange, would hamper the progress of land exchanges involving Hawaiian home lands.

Response: Section 47.45(a) is a suggested course of action and does not require pre-land exchange meetings. The Department finds, however, that getting all parties who are interested in a particular land exchange talking to one another can be extremely useful and time-saving. It is especially useful to have this type of pre-meeting to avoid the submission of a presumed final document that cannot be approved by the Department. The language of section 47.45(a) would leave it to the discretion of the HHC Chairman as to whether to engage in the pre-land exchange meeting. The meeting may be conducted via teleconferencing or web-conferencing rather than in-person.

15. *Should section 47.65(b) clarify the circumstances under which the Secretary will consult with the beneficiaries when making a determination if a land exchange advances the interests of the beneficiaries?*

Issue: Commenters suggest that it is unclear when and under what circumstances consultation might occur by the Secretary when reviewing a HHC Chairman-proposed land exchange.

Response: When reviewing a land exchange proposal submitted by the HHC Chairman, it is essential to the Secretary's decision-making process to have input from the beneficiary community about the effect the land exchange may have on the beneficiaries and the Hawaiian Home Lands Trust. The reason for making consultation under section 47.65(b) permissive is that if the HHC Chairman has already consulted with the beneficiaries on the land exchange proposal

that is before the Secretary, and records of this consultation provide the input that the Secretary seeks, then no further consultation by the Secretary may be necessary. If the HHC Chairman forgoes consultation on a land exchange or a proposed amendment to the HHCA, the Secretary may be required to consult directly with the beneficiaries in order to approve the exchange or to find that an amendment does not require Congressional approval.

Upon consideration of the comments, language similar to that in section 47.65(b) was inserted into section 48.20.

16. *Should the term "consultation" be better defined?*

Issue: Commenters suggested that there be greater clarity and formalization as to when the Secretary would seek such consultation, what such consultation would entail, and how beneficiary input will be taken into account in any decision making process.

Response: The Department agrees with this point and modified the definition of consultation in both parts 47 and 48 so that they are consistent with the definition used by Federal agencies when consulting with the Native Hawaiian community under section 106 of the National Historic Preservation Act.

17. *Are the standards for the review of land exchanges sufficiently clear to protect the interests of the beneficiaries?*

Issue: Commenters suggest the standards for review of land exchanges is not sufficient to guarantee the Hawaiian Home Lands Trust will be preserved.

Response: The definition of land exchanges in section 47.10 is based upon section 204 of the HHCA and the Secretary's experience with reviewing land exchanges involving Hawaiian home lands and other properties throughout the United States. Exchanges can be a valuable tool for the HHCA Chairman in managing the Hawaiian Home Lands Trust and advancing the

interests of the beneficiaries. Part 47 seeks to clarify the section 205 of HHLRA to ensure it is carried out in compliance with section 206 of the HHLRA that requires the Secretary, in administering the HHCA, to advance the interests of the beneficiaries. The protections provided by the HHCA, Admission Act, and HHLRA, along with the details laid out in part 47, allow the HHC Chairman to engage in land exchanges involving Hawaiian home lands without endangering the Trust.

18. *Should the definition of "market value" be amended to take into consideration such things as utility and cultural significance of the properties?*

Issue: Commenters suggest that when there are multiple reasons for a land exchange to occur that the appraisals of the properties should take those reasons into account.

Response:

The Secretary is authorized to approve a land exchange under section 204 of the HHCA if the property to be added to the Hawaiian Home Lands Trust is of "equal value" to the property leaving the Hawaiian Home Lands Trust. The Secretary interprets this requirement to be referring to market value, similarly to the BLM land exchange regulations included in 43 CFR part 2200 that only consider the economic uses of the subject property. In order to approve the exchange, however, the Secretary must determine whether the proposed exchange advances the interests of the beneficiaries as required by section 206 of the HHLRA and as implemented in section 47.20 of this rule. At that point, the Secretary may take into account things such as the utility and cultural significance of the properties.

19. *Should the Secretary ensure that the appreciation rate of any new property being proposed for inclusion in the Hawaiian Home Lands Trust be at least equal to the rate of return for the property proposed to leave the Hawaiian Home Lands Trust?*

Issue: A commenter suggests that an appreciation rate of any new property being proposed for inclusion in the Hawaiian Home Lands Trust be at least equal to the rate of return for the trust property proposed to leave the Hawaiian Home Lands Trust. The example given by the commenter is that the return on the generation of electricity on a current trust property and the revenue it can potentially generate is more important than its present cash value of the property.

Response: The definition of market value used in this rule requires that the estimate of value be made in terms of cash or its equivalent. The appreciation rate and rate of return reflect future income potential, of the properties being considered in an exchange and will be considered in the appraisal of a property if the highest and best use of the property is for generating income. Properties considered for exchange will be valued at their highest and best use as required by UASFLA for market value appraisals. The income capitalization approach, which is required to be completed on income producing properties under UASFLA, requires the appraiser to analyze a property's ability to generate future benefits and capitalizes the income into an indication of present cash value. The result is that the market value of the property as of the date of appraisal takes into account future income and any appreciation by converting future benefits into a present cash value. If the two exchange properties have similar highest and best uses, similar capitalization rates would likely be used ensuring equal treatment of the properties under appraisal.

20. *Should only Federal employees licensed in the State of Hawai'i be allowed to conduct appraisals of properties involved in an exchange involving Hawaiian home lands?*

Issue: A commenter suggests only Federal employees licensed in the State of Hawai'i be allowed to conduct appraisals of properties involved in an exchange of Hawaiian home lands.

Response: The vast majority of Department's appraisals are completed by private contract appraisers under the direction of the Department. The review of those reports is done, however, exclusively by Federal employees. Requiring that appraisals be conducted by only Federal employees would place an unnecessary obstacle in the path of completing these land exchanges.

21. *Should the Secretary include in 43 CFR part 47 a process that addresses section 205(c) of the HHLRA which authorizes the Secretary to initiate a land exchange involving Hawaiian home lands?*

Issue: Commenters suggest 43 CFR part 47 include a process that addresses section 205(c) of the HHLRA which authorizes the Secretary to initiate a land exchange involving Hawaiian home lands.

Response: In this rule, the Department did not include procedures governing land exchanges involving Hawaiian home lands initiated by the Secretary, but chose to address the primary way in which land exchanges are currently initiated. The Department is unaware of any land exchange involving Hawaiian home lands being initiated or proposed to be initiated by the Secretary. Thus, the need to address such an exchange through rulemaking is not necessary. Should the Secretary decide to engage in a land exchange involving Hawaiian home lands under the authority of section 205(c) and (d), we will consider then what process is required and if a rule is warranted.

22. *Should the factors listed in section 47.20 include "reduce the diversion of staff resources dedicated to deriving revenues from land dispositions to fund the DHHL's administrative and operating expenses"?*

Response: It is unnecessary to specifically insert the suggested language as it is encompassed within section 47.20(i).

23. *After approving or disapproving a proposed amendment to the HHCA, should the Secretary provide an email notice to the Native Hawaiian Organization List maintained by the Secretary and post on the Department of the Interior's website?*

Response: The Secretary does not approve or disapprove proposed amendments to the HHCA but merely reviews proposed amendments to determine if Congressional approval is required. Following the required review, the Secretary will post notice of the determination on the Department of the Interior website.

24. *Should the Secretary review and provide rulings to Congress and the HHC Chairman on State-proposed amendments to the HHCA that in accordance with their own provisions require Congressional approval to become effective?*

Issue: The State will sometimes pass legislation that proposes to amend the HHCA but is expressly contingent on approval by Congress.

Response: When the State passes legislation that proposes to amend the HHCA but includes a provision that the effectiveness of the proposed amendment is contingent on approval by Congress, no proposal to amend the HHCA was made for purposes of section 206 of the HHLRA. In circumstances such as these, the State is merely taking on a general advisory role and providing advice to Congress on what Federal laws they should pass. Congress may consider the proposed amendment offered by the State of Hawai'i and this does not require a review under section 206 of HHLRA.

25. *Is it the responsibility of DHHL and the HHC to determine whether proposed land exchanges are appropriate for the Hawaiian people?*

Response: In accordance with section 205(b) of the HHLRA, "the Secretary shall approve or disapprove the proposed exchange" submitted by the HHC Chairman. While the Chairman may propose an exchange, the ultimate responsibility for determining the appropriateness of the proposed exchange remains with the Secretary.

26. *Are the factors the Secretary will consider in analyzing a land exchange listed in section 47.20 too restrictive to allow for the proper use of the land exchange tool by the HHC Chairman?*

Issue: A commenter suggests that the rule relies solely on the language listed in section 204(3) of the HHCA, which provides for an exchange of equal value "to consolidate its holdings or to better effectuate the purposes of the HHCA."

Response: Section 206 of the HHLRA requires that the Secretary "advance the interest of the beneficiaries" in administering the HHCA. Implementation of this provision is consistent with the purposes of section 204(a)(3) of the HHCA, which is to advance the interest of its beneficiaries when managing the Hawaiian Home Lands Trust. Section 47.20 articulates factors that are consistent with the purposes of the HHCA and with advancing the interest of the beneficiaries to provide transparency in the Secretary's decision making process. Section 47.20 of the rule implements both statutes in a consistent manner and utilizes the Secretary's expertise in reviewing land exchanges involving trust lands held for other U.S. indigenous communities.

27. *Should the factors the Secretary will consider in analyzing a land exchange listed in section 47.20 be expanded to include such things as the development of Hawaiian home lands for mercantile use and to protect ecological and cultural resources?*

Response: Section 47.20 specifies that the main purpose of engaging in a land exchange must be to advance the interests of the beneficiaries as provided in section 206 of the HHLRA.

Accordingly, it lists the factors the Secretary will consider in analyzing a land exchange. These factors themselves are purposefully broad to allow flexibility in the analysis.

Moreover, in order for the exchange to be approved, the purpose of the land exchange must be well documented and demonstrate how the land exchange advances the interests of the beneficiaries. For instance, it would be insufficient under the rule for the party proposing the exchange to make only a conclusory statement that the exchange advances the interests of the beneficiaries without further explanation. Sections 47.20 and 47.30 provide the necessary information for the Secretary to make a reasoned decision to approve or disapprove a proposed land exchange.

28. *Should there be a requirement that land exchanges not increase or decrease the acreage in the Trust in order to keep it whole?*

Response: While acreage is an important aspect of determining the market value of properties involved in a land exchange, it is not the exclusive determining factor. For example, 50 acres of heavily sloped rocky land will likely not be as valuable as a smaller number of acres of usable farm land or other more readily developable acres. Therefore, the HHCA requires that the exchange be of equal value, not that the acreage be the same. The Secretary needs to ensure the market value of the property coming into the Hawaiian Home Lands Trust is equal to or greater than the property leaving the trust as required by section 204(c) of the HHCA, rather than rely on identical acreages.

29. *Should the rule provide a more defined role for the Hawaiian Homes Commission in the review of land exchanges and amendments to the HHCA?*

Issue: Commenters suggest that the rule specifically recognize the role of the HHC because of its fiduciary duty to the beneficiaries of the HHCA.

Response: Section 202 of the HHCA provides that the DHHL be headed by an executive board known as the HHC. The HHC and its Chairman are appointed by the Governor of the State of Hawai'i. The Chairman of the HHC is also the Director of DHHL and an Officer of the State of Hawaii. As officers of the State who are placed in their positions as Hawaiian Homes Commissioners to oversee the day-to-day management of the Hawaiian Home Lands Trust, the Secretary values their input. In response to comments, section 47.60(a)(1) now requires a statement of approval for a land exchange from the HHC, including the Commissioners' recorded vote on the exchange, and section 48.15(b)(2) requires that all testimony and correspondence from the HHC and its Commissioners related to proposed amendments be submitted to the Secretary in order to better inform the Secretary's review of proposed amendments to the HHCA. In addition, the rule now specifically references the Chairman of the HHC as submitting the State-proposed amendments to the HHCA and Chairman-proposed land exchanges to the Secretary to conform to the language in sections 204(a) and 205(a) of the HHLRA.

30. *In addition to requiring the submission of homestead association testimony and correspondence regarding proposed amendments to the HHCA, should section 48.15 also require the same documents from beneficiary associations whose membership is composed of persons who have submitted applications to the State for homesteads but are currently awaiting the assignment of a lot?*

Response: The Department appreciates the question. It is important for the Secretary to obtain the input of beneficiaries who are on the State's homestead waiting list as their priorities may diverge from the priorities of those beneficiaries who hold a homestead lease. Therefore, new definitions of HHCA Beneficiary Association and of Homestead Association are included in

the rule and are referenced in section 48.15(b)(2), and beneficiaries are added to section 48.15(b)(2).

31. *Should the definition of "beneficiary" include those Native Hawaiians with a blood quantum of more than 25 percent but less than 50 percent who qualify to receive a homestead through transfer or succession?*

Response: Section 202 of the HHLRA states "the term 'beneficiary' has the same meaning as given the term 'native Hawaiian' under section 201(7) of the Hawaiian Homes Commission Act." Section 201(7) of the HHCA states, "Native Hawaiian means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Changing the definition of "beneficiary" to include those Native Hawaiians with a blood quantum of at least 25 percent but less than 50 percent who received a homestead through transfer or succession is not consistent with the HHLRA and HHCA and would require Congressional action.

32. *Will the rule assist in meeting the Congressional deadlines for the review of State-proposed amendments to the HHCA and HHC Chairman-proposed land exchanges involving Hawaiian home lands?*

Response: In order to provide a rational basis for decisions regarding land exchanges involving Hawaiian home lands and proposed amendments to the HHCA, the Secretary requires sufficient information on which to base those decisions. This rule details what information the Department requires to make an informed decision. The intention of the rule is to reduce the amount of time the Department takes to make an informed decision by providing clarity on the information necessary from the State about proposed land exchanges involving Hawaiian home lands or proposed amendments to the HHCA.

33. *Should the purpose of the rule regarding land exchange procedures be for the benefit of the beneficiaries of the HHCA?*

Response: While each part in the rule has a specific purpose, the overall purpose of the Secretary's oversight of the Hawaiian Home Lands Trust is to advance the interests of the beneficiaries of the HHCA in accordance with section 206(b) of the HHLRA. Advancement of these interests in both parts 47 and 48 must be specific to the interests of the beneficiaries, not others, and documented. For the purposes of an HHCA review, the interests of parties other than the beneficiaries are not relevant to the Secretary's decision making process; rather, the Secretary's approval is contingent upon a determination that the proposal does not decrease benefits to the beneficiaries. In response to comment, section 48.25 was modified to require that the Secretary consider the goals and purposes of the Trust when determining whether a proposed amendment to the HHCA decreases the benefits to the HHCA beneficiaries.

It is important to note that there are other factors the Secretary must find to approve a proposed land exchange in addition to finding that the proposed exchange advances the interest of the beneficiaries. *See, HHCA Section 204(a)(3) and final rule section 47.35 requiring the Department to ensure the market value of the property coming into the Trust is equal or greater than the property departing the Trust.* Similarly, a finding that a proposed amendment to the HHCA advances the interests of the beneficiaries does not obviate the need for Congressional approval. *See, Admission Act Section 4 (detailing circumstances in which Congress reserved its own authority over the Trust).* Consideration of whether a land exchange advances the interests of the beneficiaries or a proposed amendment decreases the benefits to beneficiaries are separate steps in the Secretary's review processes in both parts 47 and 48.

34. *Should the rule require public input or a public vote when determining if a State-proposed amendment to the HHCA or HHC Chairman-proposed land exchange involving Hawaiian home lands is reviewed by the Secretary?*

Response: When reviewing land exchanges involving Hawaiian home lands proposed by the Chairman of the HHC or State-proposed amendments to the HHCA, the Secretary will consider all information provided by the State, including any public input it received. For purposes of land exchanges, it is the Chairman's decision as to whether to include public input, including any vote results from the public, in a land exchange proposal submitted to the Secretary. Section 47.60 sets forth the documentation that the Chairman must submit to the Secretary in a land exchange packet, which, in response to this comment, now includes the recorded vote of the Commissioners. The rule requires in section 48.15 that the final vote totals for votes taken by the HHC and the State of Hawai'i Legislature on a proposed HHCA amendment be forwarded to the Secretary when it is submitted for review. These vote totals help to provide the Secretary with a full picture of the State's position on a proposed amendment and whether that amendment decreases the benefits to the beneficiaries. This requirement is retained in the final rule.

35. *Should the rule require that the HHC Chairman engage in consultation with the beneficiaries before any land exchange involving Hawaiian home lands is approved or the Secretary makes a final determination regarding a proposed amendment to the HHCA?*

Response: The HHCA, Admission Act, and the HHLRA define the three parties involved in reviewing land exchanges involving Hawaiian home lands and proposed amendments to the HHCA. These parties are the State of Hawai'i (represented by the DHHL and HHC), the HHCA beneficiary community, and the Federal Government (represented by the Secretary of the Interior). The beneficiary community obtains much of this voice through consultation with

either the State or the Department. Thus, while the HHC Chairman is not required to engage in consultation with the beneficiary community, without it the Department may not have sufficient information to evaluate whether a Chairman-proposed land exchange or a State-proposed amendment advances the interests of the HHCA beneficiaries.

36. *Should the rule provide a definition of a homestead association?*

Response: The Department agrees that the rule should provide a definition of a homestead association to provide clarity to the definition in the HHCA. The Secretary added a definition of homestead association in section 48.6 of this rule based on the language provided in sections 204(a)(2), 213, and 214(a) of the HHCA. This definition is also based on the definition of a Native Hawaiian organization listed in the National Historic Preservation Act and Native American Graves Protection and Repatriation Act (NAGPRA). The Secretary will maintain a list of the homestead associations that meet this definition and file a statement, signed by the association's governing body, of governing procedures and a description of the territory it represents.

37. *Should the purpose of consultation be only to engage in good faith efforts to educate the beneficiaries, discuss and solicit their comments, and not to seek agreement?*

Response: As the National Historic Preservation Act provides Federal agencies with guidance on how to work with the Native Hawaiian community, the Department chose to use the Act's definition of consultation for working with the Native Hawaiian beneficiary community. The National Historic Preservation Act defines consultation as the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement.

38. *Do the rules already in place that deal with the treatment of land exchanges involving indigenous lands held in trust for Federally recognized tribes with whom the United States has a formal government-to-government relationship provide sufficient guidance to the Secretary when reviewing land exchanges involving Hawaiian home lands?*

Response: No. The rules related to exchanges to lands held in trust are located in 25 CFR part 151 that do not apply to Hawaiian home lands. Congress enacted the HHCA and HHLRA to govern land exchanges involving Hawaiian home lands.

39. *Is the rule necessary to provide HHCA beneficiaries with options to hold the DHHL and the State accountable when proposing land exchanges involving Hawaiian home lands and amendments to the HHCA?*

Issue: A commenter questions the need for parts 47 and 48 and states "Beneficiaries have held DHHL as well as the State accountable through the judicial process, both federal and state; special legislative hearings; legislative audits; and media reports (including traditional print and TV media as well as social and internet based media resources). Statutorily, beneficiaries can pursue action for breaches of trust under Hawaii Revised Statutes Chapter 673 (Native Hawaiian Trusts Judicial Relief Act; aka Right to Sue)."

Response: Parts 47 and 48 seek to provide clarity and transparency in the Federal administration of the Hawaiian Home Lands Trust statutes. By providing this clarity, the Secretary can better implement section 206(b) of the HHLRA that requires the Secretary to administer these statutes in a way that advances the interests of the beneficiaries. This rule also seeks to provide transparency about what information is necessary to make decisions regarding HHC Chairman-proposed land exchanges involving Hawaiian home lands and State-proposed amendments to the HHCA. Such transparency should increase confidence of the beneficiary

community in the decisions of the Secretary and State, thus minimizing any risk and need for litigation.

The rule incorporates consultation with the HHCA beneficiaries and consideration of the interests of the HHCA beneficiaries as provided by Congress in the HHLRA during the proposal and review processes. Such provisions address HHCA beneficiary concerns that they are often the last to be informed about proposed actions affecting their interests and are often informed after-the-fact when decisions have already been made. Such consultation should result in better-informed decision-making and lessen the need of beneficiaries to seek recourse after decisions have already been made.

40. *Does the rule expand the Secretary's authority beyond the HHLRA?*

Response: No. The rule simply provides uniform processes for implementing the authorities and responsibilities Congress granted the Secretary in the HHCA and HHLRA, consistent with the standards and requirements established by Congress in these and other applicable Federal laws, including those listed in section 47.15. It is important to note that Congress did not exempt the Secretary's actions under the HHLRA from other applicable Federal laws, such as Native American Graves Protection and Repatriation Act that directly apply to Hawaiian home lands.

The information delineated in this rule provides clarity in the Department's decisions regarding land exchanges involving Hawaiian home lands and amendments to the HHCA proposed by the State. While the Secretary will give weight to the State in its findings and analysis, the rule seeks to make certain the information gathered is substantive and reasonably verifiable in order to ensure the Hawaiian Home Lands Trust statutes are administered in a way that advances the interests of the beneficiaries as required by section 206 of the HHLRA.

41. *Should the rule provide for recourse if the Secretary fails to follow the rule or act within specific timeframes?*

Response: No. Congress provides for uniform and consistent systems of recourse and judicial review through other statutes, such as the Administrative Procedure Act, and has not provided any other specific recourse with regard to the Secretary's responsibilities under the HHCA or HHLRA.

42. *Should the rule provide for automatic approval of a HHC Chairman-proposed land exchange or State-proposed amendments to the HHCA if the Secretary fails to follow the rule or act within specific timeframes?*

Response: Automatic approval of HHC Chairman proposed land exchanges or State-proposed amendments to the HHCA is inconsistent with sections 204 and 205 of the HHLRA, section 4 of the Admission Act, and potentially section 206 of the HHLRA, which requires that these Hawaiian Home Lands Trust statutes be administered to advance the interests of the beneficiaries. Moreover, such automatic approvals would deprive the beneficiary community of the reasoned analysis and considered judgment of the Department in its exercise of these statutory responsibilities.

43. *Should part 47 include a fast-track process for approval of land exchanges involving emergency situations, smaller acreages, less intense uses, or already developed land where the use will remain the same?*

By following the provisions of sections 47.50 – 47.60, the HHC Chairman and DHHL can dramatically reduce the amount of time necessary to complete a land exchange and increase the likelihood the exchange will be acted on by the Secretary without the delay necessitated by requests for additional information. In cases where a proposed land exchange is between the

DHHL and another agency of the State or a Federal agency, where no change in land use is planned, a categorical exclusion under NEPA may be applicable as listed under Chapter 7.5 of the Department of the Interior Departmental Manual, which reduces the time required in preparation and review.

If the HHC Chairman chooses not to seek the assistance of the Secretary in developing an exchange proposal, the HHC Chairman may merely submit the documentation listed in section 47.60. In accordance with section 205 of the HHLRA, the Secretary will approve or disapprove the proposed exchange not later than 120 days after receiving the information required in section 47.60.

44. *Does an assessment of beneficiary interests by the Secretary undermine the State's subject matter expertise and usurp the executive power of the HHC by re-evaluating the Commission's determination?*

Response: No. While the Hawaiian Home Lands Trust statutes provide the State and its subdivisions, including the HHC and its Chairman, certain responsibilities, nowhere do they relieve the Secretary of the requirement in section 206(b) of the HHLRA to administer the Hawaiian Home Lands Trust statutes in a way that advances the interests of the beneficiaries. For proper care of the Trust to take place, all three parties, the State, the Secretary, and the beneficiary community, must work together and fulfill their respective duties assigned by Congress. It is because the Federal government has an independent interest in implementing the Trust and because Congress understood that the State and its subdivisions might have interests that conflict with the interests of the beneficiaries, that Congress required Secretarial approval or disapproval of the HHC Chairman-proposed land exchange or State proposed amendment to the

HHCA in section 205 of the HHLRA and section 204 of the HHCA. In addition, the Secretary has an interest in enforcing Federal law within her responsibility.

45. *Does the language "benefits to the parties of the proposed exchange" in section 205(a)(3) of the HHLRA require the Secretary to look at the benefits to the DHHL because the parties to an exchange will always be DHHL and another?*

Response: No. Such language requires the Secretary to look at the benefits to the beneficiaries of the Hawaiian Home Lands Trust. This provision must be read to be consistent with section 206, which requires the Secretary to advance the interests of the beneficiaries. Such a reading is also consistent with the purposes of the HHCA. The Hawaiian Home Lands Trust was established for the benefit of the HHCA beneficiaries. Section 206(b)(1) of the HHLRA specifically directs the Department to "(1) advance the interests of the beneficiaries." To read the language in section 205(a)(1) as suggested by the commenter, gives no weight to this provision of section 206 and ignores the responsibilities of the State to the beneficiaries. In response to this comment, the language in section 47.30(a) was edited to remove the reference of "administration."

46. *Does the rule limit the amount of consultation that the HHC Chairman or the Secretary may engage in with beneficiaries when reviewing Chairman-proposed land exchanges involving Hawaiian home lands or State-proposed amendments to the HHCA?*

Response: The definition of consultation provided in both parts 47 and 48 outline the minimum requirements for consultation. If the HHC Chairman chooses to engage in additional consultation efforts or decides to require a higher standard, such as holding face-to-face consultation with beneficiaries on all proposed land exchanges and amendments to the HHCA,

the Department supports such efforts as beneficial to the beneficiaries, the Chairman, and the Secretary.

47. *If the factors from section 47.20 refer to the non-Hawaiian home lands that would be received, how are the benefits in retaining Hawaiian home lands determined in order to apply the balancing test in section 47.30(b)?*

Response: The factors listed in section 47.20 are utilized by the Secretary to review both the non-Hawaiian home lands proposed to be received into the Hawaiian Home Lands Trust and the Hawaiian home lands the HHC Chairman proposes to remove from the Hawaiian Home Lands Trust. Section 47.30(b) provides explicit instruction on how the section 47.20 factors are to be weighed.

48. *The factors listed in section 47.30(a) and (c) are ambiguous.*

Response: The language in section 47.30(a) is not ambiguous. It requires the exercise of judgment when reviewing land exchanges covering a wide range of circumstances. Section 47.30(a) emphasizes the need for the Secretary to consider the long term effects a land exchange will have on the lands in the Hawaiian Home Lands Trust. These trust lands are being held in order to advance the interests of the HHCA beneficiaries. Section 47.30(b) is intended to ensure that beneficiaries benefit from every exchange. Section 47.30(c) emphasizes the need for the Secretary to consider whether a proposed exchange will significantly conflict with the beneficiaries' interests in adjacent Hawaiian home lands.

49. *Is the analysis presented in section 47.20 and section 47.30 highly discretionary and provide for circumstances where the various factors may conflict?*

Response: Section 204(a)(3) of the HHCA and section 205(b) of the HHLRA make clear that a land exchange is not valid until it has been approved by the Secretary, but does not suggest

that the Secretary is required to approve every proposed land exchange. Indeed, Congress provided expressly in section 205(b) of the HHLRA that "the Secretary shall approve or disapprove the proposed exchange." The Secretary must also, at a minimum, be satisfied that the purposes of the Hawaiian Home Land Trust statutes are met. Each of these factors requires the exercise of judgment. Thus, the discharge of the responsibility placed on the Secretary is not ministerial. Nor is it "discretionary" as the factors to be considered are enumerated. There is, nonetheless, some subjectivity in the evaluation. Sections 47.20 and 47.30 provide factors to clarify the weighing process the Secretary must engage in when determining if a land exchange advances the interests of the beneficiaries. The factors in section 47.20, however, are not exhaustive.

It is possible certain proposed exchanges will present situations where certain factors listed in section 47.20 may conflict with each other. In those circumstances the Department will be required to exercise expertise and judgment within these limits in weighing the factors in order to determine whether a proposed land exchange advances the interests of the beneficiaries. If the factors listed in section 47.20 conflict with section 47.30 (a) and (c), however, the Secretary will be required to disapprove the proposed land exchange.

III. Summary of Impacts

1. Regulatory Planning and Review (Executive Orders 12866 and 13563.)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce

uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that rules must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. This final rule is consistent with these requirements.

2. Regulatory Flexibility Act.

The Department of the Interior certifies that this final rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) as the final rule merely describes agency procedures and practices when reviewing HHC Chairman-proposed land exchanges involving Hawaiian home lands and State-proposed amendments to the HHCA. These procedures and practices are not agency activities that will have a significant economic effect on a substantial number of small entities. This rule neither imposes burdens on small entities nor requires actions by them. As such, the Regulatory Flexibility Act does not apply.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA).

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act.

This final rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The final rule does not have a significant or unique effect on State, local or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

5. Takings (E.O. 12630).

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 as the taking of private property is not a subject covered or even contemplated under this rule. A takings implication assessment is not required.

6. Federalism (E.O. 13132).

In accordance with Executive Order 13132, the final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. Based on research and the deliberations outlined in the response to questions number 8, the final rule does not substantially and directly affect the relationship between the Federal and state governments. The Secretary of the Department of the Interior has oversight to ensure that land under the HHCA is administered in a manner that advances the interests of the beneficiaries. A federalism assessment is not required.

7. Civil Justice Reform (E.O. 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all rules be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all rules be written in clear language and contain clear legal standards.

8. Consultation with Indian Tribes (E.O. 13175).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We evaluated this rule under the Secretary's consultation policy and under the criteria in Executive Order 13175 and determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Secretary's tribal consultation policy is not required.

9. Paperwork Reduction Act.

This rule does not contain information collection requirements subject to the Paperwork Reduction Act and therefore a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

10. National Environmental Policy Act.

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act, 1969(NEPA) is not required. Under Departmental Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement "policies, directives, regulations and guidelines of an administrative, financial, legal,

technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case." We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. Effects on the Energy Supply (E.O. 13211)

This final rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

12. Clarity of this Regulation

The Secretary is required by Executive Orders 12866 (section 1(b)(12), 12988 (section 3(b)(1)(B), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This rule meets the requirements that each rule the Secretary publishes must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

List of Subjects in 43 CFR Parts 47 and 48

Hawaii, Intergovernmental Programs, Land, State-Federal Relations

May 6, 2016
Date

Kristen J. Sarri
Principal Deputy Assistant Secretary for Policy, Management and Budget

For the reasons stated in the preamble, the Department of the Interior amends title 43 of the Code of Federal Regulations by adding new parts 47 and 48 as set forth below:

PART 47 – Land Exchange Procedures

Sec.

47.5 What is the purpose of this part?

47.10 What definitions apply to terms used in this part?

47.15 What laws apply to exchanges made under this part?

Subpart A -- The Exchange Process

47.20 What factors will the Secretary consider in analyzing a land exchange?

47.30 When does a land exchange advance the interests of the beneficiaries?

47.35 Must lands exchanged be of equal value?

47.40 How must properties be described?

47.45 How does the exchange process work?

47.50 What should the Chairman include in a land exchange proposal for the Secretary?

47.55 What are the minimum requirements for appraisals used in a land exchange?

47.60 What documentation must the Chairman submit to the Secretary in the land exchange packet?

Subpart B -- Approval and Finalization

47.65 When will the Secretary approve or disapprove the land exchange?

47.70 How does the Chairman complete the exchange?

Authority: State of Hawai'i Admission Act, 73 Stat. 4, approved March 18, 1959; Hawaiian Homes Commission Act, 1920, as amended, Act of July 9, 1921, 42 Stat. 108; Hawaiian Home

Lands Recovery Act, 1995, 109 Stat. 537, 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; 112 Departmental Manual 28.

§ 47.5 What is the purpose of this part?

This part sets forth the procedures for conducting land exchanges of Hawaiian home lands authorized by the Hawaiian Homes Commission Act, 1920 (HHCA).

§ 47.10 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section.

Appraisal or *Appraisal report* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of the lands or interests in lands to be exchanged as of a specific date(s), supported by the presentation and analysis of relevant market information.

Beneficiary or beneficiaries means "native Hawaiian(s)" as that term is defined under section 201(a) of the Hawaiian Homes Commission Act.

Chairman means the Chairman of the Hawaiian Homes Commission designated under section 202 of the Hawaiian Homes Commission Act.

Commission means the Hawaiian Homes Commission established by section 202 of the Hawaiian Homes Commission Act, which serves as the executive board of the Department of Hawaiian Home Lands.

Consultation or consult means representatives of the government engaging in an open discussion process that allows interested parties to address potential issues, changes, or actions. Consultation does not necessarily require formal face-to-face meetings. The complexity of the matter along with the potential effects that the matter may have on the Trust or beneficiaries will dictate the appropriate process for consultation. Consultation requires dialogue (oral, electronic,

or printed) or a good faith, dialogue or documented effort to engage with the beneficiaries, consideration of their views, and, where feasible, seek agreement with the beneficiaries when engaged in the land exchange process.

DHHL or *Department of Hawaiian Home Lands* means the department established by the State of Hawai'i under sections 26-4 and 26-17 of the Hawai'i Revised Statutes to exercise the authorities and responsibilities of the Hawaiian Homes Commission under the Hawaiian Homes Commission Act.

Hawaiian Home Lands Trust means all trust lands given the status of Hawaiian home lands under section 204 of the Hawaiian Homes Commission Act, and those lands obtained through approval under this part, and as directed by Congress.

Hawaiian Home Lands Trust Funds means the funds established in the HHCA section 213.

Hazardous substances means those substances designated under Environmental Protection Agency regulations at 40 CFR part 302.

HHCA or *Hawaiian Homes Commission Act* means the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, as amended.

HHCA Beneficiary Association means an organization controlled by beneficiaries who submitted applications to the DHHL for homesteads and are awaiting the assignment of a homestead; represents and serves the interests of those beneficiaries; has as a stated primary purpose the representation of, and provision of services to, those beneficiaries; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the beneficiaries it represents.

HHLRA or *Hawaiian Home Lands Recovery Act* means the Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 357.

Homestead Association means a beneficiary controlled organization that represents and serves the interests of its homestead community; has as a stated primary purpose the representation of, and provision of services to, its homestead community; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the territory it represents.

Land exchange is any transaction, other than a sale, that transfers Hawaiian home lands from the Hawaiian Home Lands Trust to another entity and in which the Hawaiian Home Lands Trust receives the entity's land as Hawaiian home lands. A land exchange can involve trading Hawaiian home lands for private land, but it can also involve trading land between the Hawaiian Home Lands Trust and State or Federal agencies.

Market value means the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.

Native Hawaiian or *native Hawaiian* has the same meaning as that term defined under section 201(a) of the Hawaiian Homes Commission Act.

Office of Valuation Services (OVS) means the Office with real estate appraisal functions within the Office of the Assistant Secretary – Policy, Management, and Budget of the Department of the Interior.

Outstanding interests means rights or interests in property involved in a land exchange held by an entity other than a party to the exchange.

Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of the Secretary have been delegated.

Trust means the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds.

§ 47.15 What laws apply to exchanges made under this part?

(a) The Chairman may only exchange land under the authority of the HHCA in conformity with the HHLRA.

(b) When the Chairman makes any land exchange, the following laws and regulations constitute a partial list of applicable laws and regulations:

Legislation or regulation	**Citation**
(1) The National Historic Preservation Act, 1966	16 U.S.C. 470 et seq.
(2) Implementing regulations for the National Historic Preservation Act	36 CFR part 800
(3) Section 3 of the Native American Graves Protection and Repatriation Act (NAGPRA)	25 U.S.C. 3002
(4) Implementing regulations for the Native American Graves Protection and Repatriation Act	43 CFR part 10
(5) The National Environmental Policy Act, 1969 (NEPA)	42 U.S.C. 4371 et seq.
(6) Implementing regulations for NEPA	40 CFR parts 1500-1508; 43 CFR part 46
(7) The State of Hawai'i Admission Act	73 Stat. 4
(8) Hawaiian Homes Commission Act, 1920, as amended	42 Stat. 108
(9) Hawaiian Home Lands Recovery Act, 1995	109 Stat. 537
(10) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	42 U.S.C. 9601 et seq.
(11) Implementing regulations for CERCLA	40 CFR part 312

No new legal rights or obligations are created through listing applicable laws and regulatory provisions in this section.

Subpart A – The Exchange Process

§ 47.20 What factors will the Secretary consider in analyzing a land exchange?

The Secretary may approve an exchange only after making a determination that the exchange will advance the interests of the beneficiaries. In considering whether a land exchange will advance the interests of the beneficiaries, the Secretary will evaluate the extent to which it will:

(a) Achieve better management of Hawaiian home lands;

(b) Meet the needs of HHCA beneficiaries and their economic circumstances by promoting:

(1) homesteading opportunities,

(2) economic self-sufficiency, and,

(3) social well-being;

(c) Promote development of Hawaiian home lands for residential, agricultural, and pastoral use;

(d) Protect cultural resources and watersheds;

(e) Consolidate lands or interests in lands, such as agricultural and timber interests, for more logical and efficient management and development;

(f) Expand homestead communities;

(g) Accommodate land use authorizations;

(h) Address HHCA beneficiary needs; and

(i) Advance other identifiable interests of the beneficiaries consistent with the HHCA.

§ 47.30 When does a land exchange advance the interests of the beneficiaries?

A determination that an exchange advances the interests of the beneficiaries must find that:

(a) The exchange supports perpetuation of the Hawaiian Home Lands Trust;

(b) The interests of the beneficiaries in obtaining non-Hawaiian home lands exceeds the interests of the beneficiaries in retaining the Hawaiian home lands proposed for the exchange, based on an evaluation of the factors in section 47.20; and

(c) The intended use of the conveyed Hawaiian home lands will not significantly conflict with the beneficiaries' interests in adjacent Hawaiian home lands.

§ 47.35 Must lands exchanged be of equal value?

Hawaiian home lands to be exchanged must be of equal or lesser value than the lands to be received in the exchange, as determined by the appraisal. Once the market value is established by an approved appraisal, an administrative determination as to the equity of the exchange can be made based on the market value reflected in the approved appraisal.

§ 47.40 How must properties be described?

The description of properties involved in a land exchange must be either:

(a) Based upon a survey completed in accordance with the Public Land Survey System laws and standards of the United States; or

(b) If Public Land Survey System laws and standards cannot be applied, based upon a survey that both:

(1) Uses other means prescribed or allowed by applicable law; and

(2) Clearly describes the property and allows it to be easily located.

§ 47.45 How does the exchange process work?

(a) The Secretary recommends the parties prepare a land exchange proposal in accordance with section 47.50. The Secretary also recommends the Chairman and the non-Chairman party in the exchange meet with the Secretary before finalizing a land exchange proposal and signing an agreement to initiate the land exchange to informally discuss:

(1) The review and processing procedures for Hawaiian home lands exchanges;

(2) Potential issues involved that may require more consideration; or

(3) Any other matter that may make the proposal more complete before submission.

(b) Whether or not a land exchange proposal is completed, the Chairman initiates the exchange by preparing the documentation, conducting appropriate studies, and submitting them to the Secretary in accordance with section 47.60.

(c) Upon completing the review of the final land exchange packet under section 47.60, the Secretary will issue a Notice of Decision announcing the approval or disapproval of the exchange.

(d) If the Secretary approves an exchange, title will transfer in accordance with State law.

§ 47.50 What should the Chairman include in a land exchange proposal for the Secretary?

(a) A land exchange proposal should include the following documentation:

The proposal should include...	that should contain...
(1) Identifying information	(i) The identity of the parties involved in the proposed exchange; and (ii) The status of their ownership of the properties in the exchange, or their ability to provide title to the properties.
(2) Descriptive information	A legal description of: (i) The land considered for the exchange; and (ii) The appurtenant rights proposed to be exchanged or reserved.

The proposal should include…	that should contain…
(3) Authorized use information	(i) Any authorized uses including grants, permits, easements, or leases; and (ii) Any known unauthorized uses, outstanding interests, exceptions, adverse claims, covenants, restrictions, title defects or encumbrances.
(4) A time schedule for completing the exchange.	Expected dates of significant transactions or milestones.
(5) Assignment of responsibilities	Responsibilities for: (i) Performance of required actions; and (ii) Costs associated with the proposed exchange.
(6) Hazardous substance information	Notice of: (i) Any known release, storage, or disposal of hazardous substances on non-Hawaiian Home Land Trust properties in the exchange; (ii) Any commitments regarding responsibility for removal or remedial actions concerning hazardous substances on non-Hawaiian Home Land Trust properties; and (iii) All terms and conditions regarding hazardous substances on non-Hawaiian Home Land Trust properties.
(7) Grants of permission by each party to the other	Permission to enter the properties for the purpose of conducting physical examination and studies in preparation for the exchange. Written permission to appraise the properties should also be included.
(8) Three statements	Details of: (i) Arrangements for relocating tenants, if there are tenants, occupying the Hawaiian Home Land Trust and non-Hawaiian Home Land Trust properties involved in the exchange; (ii) How the land exchange proposal complies with the HHCA and HHLRA; and (iii) How the documents of conveyance will be exchanged once the Secretary has approved the exchange.

(b) When the parties to the exchange agree to proceed with the land exchange proposal, they may sign an agreement that the Chairman will initiate the exchange.

§ 47.55 What are the minimum requirements for appraisals used in a land exchange?

(a) The following table shows the steps in the appraisal process.

Appraisal process step	Requirements
(1) The parties to the exchange must arrange for appraisals.	(i) The parties must arrange for appraisals within 90 days after executing the agreement to initiate the land exchange, unless the parties agree to another schedule. (ii) The parties must give the appraiser the land exchange proposal, if any, and the agreement to initiate the land exchange, and any attachments and amendments. (iii) The Chairman may request assistance from the Office of Valuation Services (OVS). OVS can provide valuation services to the Chairman, including appraisal, appraisal review, and appraisal advice on a reimbursable basis. OVS is also available for post-facto program review to ensure that appraisals conducted by the State are in conformance with the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions as appropriate.
(2) The qualified appraiser must provide an appraisal report.	The appraiser must: (i) Meet the qualification requirements in paragraph (b) of this section; (ii) Produce a report that meets the qualifications in paragraph (c) of this section; and (iii) Complete the appraisal under the timeframe and terms negotiated with the parties in the exchange.
(3) The Secretary will review appraisal reports.	The Secretary will evaluate the reports using: (i) The Uniform Standards of Professional Appraisal Practice; and (ii) The Uniform Appraisal Standards for Federal Land Acquisitions.

(b) To be qualified to appraise land for exchange under paragraph (a)(2) of this section, an appraiser must:

(1) Be competent, reputable, impartial, and experienced in appraising property similar to the properties involved in the appraisal assignment; and

(2) Be approved by the OVS, if required by the Department of the Interior's Office of Native Hawaiian Relations.

(3) Be licensed to perform appraisals in the State of Hawai'i unless a Federal employee whose position requires the performance of appraisal duties. Federal employees only need to be licensed in one State or territory to perform real estate appraisal duties as Federal employees in all States and territories.

(c) Appraisal reports for the exchange must:

(1) Be completed in accordance with the current edition of the Uniform Standards of Professional Appraisal Practice (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA); and

(2) Include the estimated market value of Hawaiian home lands and non-Hawaiian home lands properties involved in the exchange.

§ 47.60 What documentation must the Chairman submit to the Secretary in the land exchange packet?

The documents in the exchange packet submitted to us for approval must include the following:

The packet must contain...	**that must include...**
(a) Required statements	(1) A statement of approval for the exchange from the Commission that includes the recorded vote of the Commission; (2) A statement of compliance with the National Historic Preservation Act and, as appropriate, a cultural and historic property review;

The packet must contain…	that must include…
	(3) An explanation of how the exchange will advance the interests of the beneficiaries; (4) A summary of all consultations with beneficiaries, HHCA homestead associations, or HHCA beneficiary associations; and (5) A statement of compliance with the Native American Graves Protection and Repatriation Act.
(b) Required analyses and reports	(1) Environmental analyses and records sufficient to meet CERCLA, NEPA, and all other pertinent Federal environmental requirements; (2) Land appraisal reports and statements of qualification of the appraisers in accordance with section 47.55; and (3) If property conveyed is adjacent to Hawaiian home lands: (i) An analysis of intended use of the Hawaiian home lands conveyed; (ii) A finding that the intended use will not conflict with established management objectives on the adjacent Hawaiian home lands; and (4) A copy of the land exchange proposal, if any.
(c) Relevant legal documents	(1) Any land exchange agreements entered into regarding the subject properties between Chairman and the non-Chairman party; (2) Evidence of title; and (3) Deeds signed by the parties, with a signature block for the Secretary of the Interior or our authorized representative to approve the transaction.

§ 47.65 When will the Secretary approve or disapprove the land exchange?

On receipt of the complete land exchange packet from the Commission, the Secretary will approve or disapprove the exchange within 120 calendar days.

(a) Before approving or disapproving the exchange, the Secretary will review all environmental analyses, appraisals, and all other supporting studies and requirements

to determine whether the proposed exchange complies with applicable law and advances the interests of the beneficiaries.

(b) The Secretary may consult with the beneficiaries when making a determination if a land exchange advances the interests of the beneficiaries.

(c) After approving or disapproving an exchange, the Secretary will notify DHHL, the Commission, and other officials as required by section 205(b)(2) of the HHLRA. The Secretary will post notice of the determination on the DOI website and give email notice of the posting to all those on the notification list maintained by the Office of Native Hawaiian Relations requesting notice of actions by the Secretary.

§ 47.70 How does the Chairman complete the exchange once approved?

(a) The Chairman completes the exchange in accordance with the requirements of State law.

(b) The Chairman shall provide a title report to the Secretary as evidence of the completed exchange.

PART 48 – Amendments to the Hawaiian Homes Commission Act

Sec.

48.5 What is the purpose of this part?

48.6 What definitions apply to terms used in this part?

48.10 What is the Secretary's role in reviewing proposed amendments to the HHCA?

48.15 What are the Chairman's responsibilities in submitting proposed amendments to the Secretary?

48.20 How does the Secretary determine if the State is seeking to amend Federal law?

48.25 How does the Secretary determine if the proposed amendment decreases the benefits to beneficiaries of Hawaiian home lands?

48.30 How does the Secretary determine if Congressional approval is unnecessary?

48.35 When must the Secretary determine if the proposed amendment requires Congressional approval?

48.40 What notification will the Secretary provide?

48.45 When is a proposed amendment deemed effective?

48.50 Can the State of Hawai'i amend the Hawaiian Homes Commission Act without Secretarial review?

Authority: State of Hawai'i Admission Act, 73 Stat. 4, approved March 18, 1959; Hawaiian Homes Commission Act, 1920, 42 Stat. 108 et seq., Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 537; 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; 112 Departmental Manual 28.

§ 48.5 What is the purpose of this part?

(a) This part sets forth the policies and procedures for:

(1) Review by the Secretary of amendments to the Hawaiian Homes Commission Act proposed by the State of Hawai'i; and

(2) Determination by the Secretary whether the proposed amendment requires congressional approval.

(b) This part implements requirements of the Hawaiian Homes Commission Act, the State of Hawai'i Admission Act, 1959, and the Hawaiian Home Lands Recovery Act, 1995.

§ 48.6 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section.

Beneficiary or beneficiaries means "native Hawaiian(s)" as that term is defined under section 201(a) of the Hawaiian Homes Commission Act.

Chairman means the Chairman of the Hawaiian Homes Commission designated under section 202 of the Hawaiian Homes Commission Act.

Commission means the Hawaiian Homes Commission, established by section 202 of the Hawaiian Homes Commission Act, which serves as the executive board of the Department of Hawaiian Home Lands.

Consultation or consult means representatives of the government engaging in an open discussion process that allows interested parties to address potential issues, changes, or actions. Consultation does not necessarily require formal face-to-face meetings. The complexity of the matter along with the potential effects that the matter may have on the Trust or beneficiaries will dictate the appropriate process for consultation. Consultation requires dialogue (oral, electronic, or printed) or a good faith, dialogue or documented effort to engage with the beneficiaries, consideration of their views, and, where feasible, seek agreement with the beneficiaries when engaged in the land exchange process.

DHHL or *Department of Hawaiian Home Lands* means the department established by the State of Hawai'i under sections 26-4 and 26-17 of the Hawai'i Revised Statutes to exercise the authorities and responsibilities of the Hawaiian Homes Commission under the Hawaiian Homes Commission Act.

Hawaiian Home Lands Trust means all trust lands given the status of Hawaiian home lands under section 204 of the Hawaiian Homes Commission Act, and those lands obtained through approval under part 47, and as directed by Congress.

Hawaiian Home Lands Trust Funds means the funds established in the HHCA section 213.

HHCA or *Hawaiian Homes Commission Act* means the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 et seq., as amended.

HHCA Beneficiary Association means an organization controlled by beneficiaries who submitted applications to the DHHL for homesteads and are awaiting the assignment of a homestead; represents and serves the interests of those beneficiaries; has as a stated primary purpose the representation of, and provision of services to, those beneficiaries; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the beneficiaries it represents.

HHLRA or *Hawaiian Home Lands Recovery Act* means the Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 537.

Lessee means either a:

(1) Beneficiary who has been awarded a lease under section 207(a) of the Hawaiian Homes Commission Act;

(2) Person to whom land has been transferred under section 208(5) of the Hawaiian Homes Commission Act; or

(3) Successor lessee under section 209 of the Hawaiian Homes Commission Act.

Homestead Association means a beneficiary controlled organization that represents and serves the interests of its homestead community; has as a stated primary purpose the representation of, and provision of services to, its homestead community; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the territory it represents.

Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of the Secretary have been delegated.

Trust means the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds.

§ 48.10 What is the Secretary's role in reviewing proposed amendments to the HHCA?

(a) The Secretary must review proposed amendments to the Hawaiian Homes Commission Act (HHCA) by the State of Hawai'i to determine whether the proposed amendment requires approval of Congress.

(b) The Secretary will notify the Chairman and Congress of this determination, and if approval is required, submit to Congress the documents required by §48.35(b).

§ 48.15 What are the Chairman's responsibilities in submitting proposed amendments to the Secretary?

(a) Not later than 120 days after the State approves a proposed amendment to the HHCA, the Chairman must submit to the Secretary a clear and complete:

(1) Copy of the proposed amendment;

(2) Description of the nature of the change proposed by the proposed amendment; and,

(3) Opinion explaining whether the proposed amendment requires the approval of Congress.

(b) The following information must also be submitted:

(1) A description of the proposed amendment, including how the proposed amendment advances the interests of the beneficiaries;

(2) All testimony and correspondence from the Director of the Department of Hawaiian Home Lands, Hawaiian Homes Commissioners, Homestead Associations, HHCA Beneficiary Associations, and beneficiaries providing views on the proposed amendment;

(3) An analysis of the law and policy of the proposed amendment by the Department of Hawaiian Home Lands and the Hawaiian Homes Commission;

(4) Documentation of the dates and number of hearings held on the measure, and a copy of all testimony provided or submitted at each hearing;

(5) Copies of all committee reports and other legislative history, including prior versions of the proposed amendment;

(6) Final vote totals by the Commission and the legislature on the proposed amendment;

(7) Summaries of all consultations conducted with the beneficiaries regarding the proposed amendment; and

(8) Other additional information that the State believes may assist in the review of the proposed amendment.

§ 48.20 How does the Secretary determine if the State is seeking to amend Federal law?

(a) The Secretary will determine that Congressional approval is required if the proposed amendment, or any other legislative action that directly or indirectly has the effect of:

(1) Decreasing the benefits to the beneficiaries of the Trust;

(2) Reducing or impairing the Hawaiian Home Land Trust Funds;

(3) Allowing for additional encumbrances to be placed on Hawaiian home lands by officers other than those charged with the administration of the HHCA;

(4) Changing the qualifications of who may be a lessee;

(5) Allowing the use of proceeds and income from the Hawaiian home lands for purposes other than carrying out the provisions of the HHCA; or

(6) Amending a section other than sections 202, 213, 219, 220, 222, 224, or 225, or other provisions relating to administration, or paragraph (2) of section 204, section 206, or 212 or other provisions relating to the powers and duties of officers other than those charged with the administration of the HHCA.

(b) The Secretary may consult with the beneficiaries when making a determination.

§ 48.25 How does the Secretary determine if the proposed amendment decreases the benefits to beneficiaries of Hawaiian home lands?

(a) In determining benefits to the beneficiaries, the Secretary will consider the goals and purposes of the Trust, including, but not limited to, the following:

(1) The provision of homesteads to beneficiaries;

(2) The rehabilitation of beneficiaries and their families and Hawaiian homestead communities;

(3) The educational, economic, political, social, and cultural processes by which the general welfare and conditions of beneficiaries are improved and perpetuated;

(4) The construction of replacement homes, repairs or additions;

(5) The development of farm, ranch or aquaculture, including soil and water conservation;

(6) The enhanced construction, reconstruction, operation and maintenance of revenue-producing improvements intended to benefit occupants of Hawaiian home lands;

(7) The making of investments in water and other utilities, supplies, equipment, and goods, as well as professional services needed to plan, implement, develop or operate

such projects that will improve the value of Hawaiian home lands for their current and future occupants; and,

(8) The establishment and maintenance of an account to serve as a reserve for loans issued or backed by the Federal Government.

(b) The Secretary will determine if the proposed amendment or any other legislative action decreases the above-described or similar benefits to the beneficiaries, now or in the future, by weighing the answers to the following questions:

(1) How would the proposed amendment impact the benefits to current lessees of Hawaiian home lands?

(2) How would the proposed amendment impact the benefits to beneficiaries currently on a waiting list for a Hawaiian home lands lease?

(3) How would the proposed amendment impact the benefits to beneficiaries who have not yet applied for a Hawaiian home lands lease?

(4) If the interests of the beneficiaries who have not been awarded a Hawaiian home lands lease and the lessees differ, how does the proposed amendment weigh the interests of beneficiaries who have not been awarded a Hawaiian home lands lease with the interests of Hawaiian home lands lessees?

(5) If the interests of the beneficiaries who have not been awarded a Hawaiian home lands lease and the lessees differ, do the benefits to the lessees outweigh any detriment to the beneficiaries who have not been awarded a Hawaiian home lands lease?

(6) If the interests of the beneficiaries differ from the interests of the lessees, do the benefits to the beneficiaries outweigh any detriment to the lessees?

§ 48.30 How does the Secretary determine if Congressional approval is unnecessary?

The Secretary will determine that Congressional approval is unnecessary if the proposed amendment meets none of the criteria in section 48.20.

§ 48.35 When must the Secretary determine if the proposed amendment requires Congressional approval?

The Secretary will review the documents submitted by the Chairman, and if they meet the requirements of section 48.15, the Secretary will determine within 60 days after receiving them if the proposed amendment requires Congressional approval.

§ 48.40 What notification will the Secretary provide?

(a) If the Secretary determines that Congressional approval of the proposed amendment is unnecessary, the Secretary will:

(1) Notify the Chairmen of the Senate Committee on Energy and Natural Resources and of the House Committee on Natural Resources, the Governor, Speaker of the House of Representatives and President of the Senate of the State of Hawai`i, and the Chairman of the Hawaiian Homes Commission; and

(2) Include, if appropriate, an opinion on whether the proposed amendment advances the interests of the beneficiaries.

(b) If the Secretary determines that Congressional approval of the proposed amendment is required, the Secretary will notify the Chairmen of the Senate Committee on Energy and Natural Resources and of the House Committee on Natural Resources, the Governor, Speaker of the House of Representatives and President of the Senate of the State of Hawai`i, and the Chairman of the Hawaiian Homes Commission. The Secretary will also submit to the Committees the following:

(1) A draft joint resolution approving the proposed amendment;

(2) A description of the change made by the proposed amendment and an explanation of how the proposed amendment advances the interests of the beneficiaries;

(3) A comparison of the existing law with the proposed amendment;

(4) A recommendation on the advisability of approving the proposed amendment;

(5) All documentation concerning the proposed amendment received from the Chairman; and

(6) All documentation concerning the proposed amendment received from the beneficiaries.

(c) The Secretary will post notice of the determination on the Department of the Interior's website.

§ 48.45 When is a proposed amendment deemed effective?

(a) If the Secretary determines that a proposed amendment meets none of the criteria in §48.20, the effective date of the proposed amendment is the date of the notification letter to the Congressional Committee Chairmen.

(b) If the Secretary determines that the proposed amendment requires congressional approval then the effective date of the proposed amendment is the date that Congress's approval becomes law.

§ 48.50 Can the State of Hawai'i amend the Hawaiian Homes Commission Act without Secretarial review?

The Secretary must review all proposed amendments to the Hawaiian Homes Commission Act. Any proposed amendments to any terms or provisions of the Hawaiian Homes Commission Act by the State must also specifically state that the proposed amendment proposes to amend the Hawaiian Homes Commission Act. Any state enactment that impacts any of the

criteria in section 48.20 shall have no effect on the provisions of the HHCA or administration of the Trust, except pursuant to this part.