

**FREQUENTLY ASKED QUESTIONS ON  
PART 50 – THE FINAL RULE FOR  
PROCEDURES FOR REESTABLISHING A FORMAL GOVERNMENT-TO-  
GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY  
SEPTEMBER 2016**

**What does the final rule say?**

Part 50 – Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community (the “final rule”) creates an administrative path for a reorganized Native Hawaiian government to reestablish a formal government-to-government relationship with the United States. Reestablishing a formal government-to-government relationship with the Native Hawaiian community would allow the United States to more effectively implement the special political and trust relationship that Congress established with the community, and issuing the final rule constitutes the next step in the Federal reconciliation process that began decades ago.

Public comments throughout the rulemaking process urged the Department to move forward with a rule that sets out a process for reestablishing a formal government-to-government relationship with the Native Hawaiian community. The rule, therefore, establishes a procedure and criteria that the Secretary of the Interior would apply if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States. The process is optional and triggered only when a Native Hawaiian government submits a written request to the Secretary. The written request requires, among other elements, a showing that the community’s governing document has broad-based community support in order to ensure that the will of the community as a whole is respected.

The decision to reorganize a Native Hawaiian government and the further decision to reestablish a formal government-to-government relationship with the United States are for the Native Hawaiian community to determine as an exercise of its self-determination. Therefore, the rule does not attempt to reorganize a Native Hawaiian government or dictate the form or structure of that government.

**How did the Department arrive at its decision to move forward with a final rule?**

After extensive public comment on the Advance Notice of Proposed Rulemaking (ANPRM) and the Notice of Proposed Rulemaking (NPRM), the Department decided to take the next step in the reconciliation process set in motion by Federal law (the Apology Resolution) over 20 years ago by issuing a final rule. The Department believes that reestablishing a formal government-to-government relationship would allow the United States to more effectively implement the special political and trust relationship that Congress has long recognized with the Native Hawaiian community.

**What are the benefits associated with reestablishing a formal government-to-government relationship?**

The Federal government has a longstanding policy of supporting self-determination and self-governance for Native peoples throughout the United States. Such self-government provides many Native populations enhanced economic development and greater ability to preserve their distinctive cultures and traditions.

A formal government-to-government relationship with the United States can significantly enhance a Native community's ability to exercise self-government. For example, if a Native Hawaiian government seeks and obtains a formal government-to-government relationship with the United States, it could establish courts or other institutions to interpret and enforce its laws. Federal courts could defer to those laws enacted by that Native Hawaiian government and the decisions of the Native Hawaiian courts. That deference, in turn, will facilitate and support self-governance by enabling the community to exercise powers of self-government over many issues directly impacting community members. The formation of a single representative government, recognized by the United States, also would provide a Native Hawaiian government with additional abilities to protect its members' interests by filing suit in Federal court.

Moreover, once a formal government-to-government relationship exists, Federal agencies would treat the Native Hawaiian government as the legal representative of the community. Many Federal agencies have procedures in place for regular communication and consultation with recognized Native governments.

**Will the Department provide technical assistance to facilitate compliance with the final rule if the Native Hawaiian community requests it?**

Yes. The final rule permits the Department to provide technical assistance upon request by the Native Hawaiian community. Such assistance could include providing Departmental expertise related to the community's ratification process and other technical matters related to the rule.

*Public Comment & Consultation*

**Did the Department hold public meetings or consultations to discuss the rule?**

Yes. The Department held public meetings to gather testimony at both the ANPRM and the NPRM stages of the rulemaking process.

In June and July 2014, staff from the Departments of the Interior and Justice traveled to Hawaii to conduct 15 public meetings on the ANPRM across the State. Hundreds of stakeholders and interested parties attended sessions on the islands of Hawaii, Kauai, Lanai, Maui, Molokai, and Oahu. Also during that time, staff conducted extensive, informal outreach with Native Hawaiian organizations, groups, and community leaders. Following the public meetings in Hawaii, the Department held five U.S. mainland regional consultations in Indian country, supplemented with

targeted community outreach in locations with significant Native Hawaiian populations. To build on the extensive record gathered during the ANPRM stage, in October and November 2015 the Department held four three-hour teleconferences on the NPRM: two teleconferences were open to the public, one was targeted to Native Hawaiian organizations, and one was targeted to tribal leaders in the continental United States.

All written comments on the ANPRM and the NPRM are available in the online docket ([www.regulations.gov/docket?D=DOI-2015-0005](http://www.regulations.gov/docket?D=DOI-2015-0005)). Transcripts from all public meetings held during the ANPRM and NPRM stages are also available in the online docket, as well as on the Department's website ([www.doi.gov/hawaiian](http://www.doi.gov/hawaiian)). The Department also produced a video, available on the Department's Web site (<https://www.doi.gov/hawaiian/procedures>) that explained the provisions of the proposed rule.

**Did the Department consider public comments on the proposed rule when it decided to issue the final rule?**

Yes. The Department received comments from leaders and members of the Native Hawaiian community and of federally recognized tribes in the continental United States. The State of Hawaii and its agencies, the Hawaii congressional delegation, current and former Members of Congress, and members of the public also commented for the record. The Department took all these comments, written and oral, into account in issuing the final rule.

**Did the Department make any changes to the proposed rule based on its review of public comments?**

While substantively the final rule is very similar to the proposed rule, key technical changes were made in response to comments, such as clarifying the rule's purpose, eliminating the proposed rule's U.S. citizenship requirement, providing that the Native Hawaiian community prepare a list of eligible voters, clarifying means for individuals to demonstrate a right to vote in the ratification referendum for the community's governing document, increasing the comment period for public comment on a request, and limiting deadline extensions. See preamble to the Final Rule, Section (III)(B).

*Effects of the Final Rule*

**Does the final rule alter the fundamental nature of the special political and trust relationship established by Congress between the United States and the Native Hawaiian community?**

No. Over many decades, Congress enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. These Federal laws help preserve and protect Native Hawaiian culture, language, and historical sites, as well as establish special Native Hawaiian programs in the areas of health care, education, loans, and employment, among others. Nothing in the final rule changes Federal law respecting programs, services, and benefits for Native Hawaiians.

**Does the final rule have any direct impact on the status of the Hawaiian home lands?**

No. Nothing in the rule, or granting a request submitted under it, would affect the status of Hawaiian Homes Commission Act beneficiaries or Hawaiian home lands.

**Does the final rule authorize compensation for past wrongs?**

No. The rule does not authorize or in any way contemplate compensation for any past wrongs. But because the Native Hawaiian Governing Entity would have the same inherent sovereign governmental authorities as do federally recognized tribes in the continental United States, it would have the capacity to sue and be sued (subject to sovereign immunity and other jurisdictional limitations), and the ability to file suit to seek redress for past wrongs. The final rule does not, however, alter the sovereign immunity of the United States or of the State of Hawaii against claims for past wrongs.

**What is the impact of the final rule on Federal or State lands in Hawaii?**

The rule makes clear that reestablishment of a formal government-to-government relationship does not affect the title, jurisdiction, or status of Federal lands or property in Hawaii. Questions relating to title under State law are an issue of State law and are not addressed by this Federal rulemaking.

**Does the final rule determine who ultimately would be a member or citizen of a Native Hawaiian government?**

Under the final rule, a Native Hawaiian government would have significant discretion to define its own membership criteria. Under principles of Federal law, however, only persons with Native Hawaiian ancestry could be members if a formal government-to-government relationship is reestablished. The rule also requires that any person who is within Congress's definition of beneficiaries under the HHCA be eligible for membership.

**Does the final rule determine the process for ratifying a constitution or other governing document in a ratification referendum? Does it limit who would be eligible to vote in a ratification referendum?**

The final rule requires that a ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that those who vote are actually eligible to vote. To ensure that the ratification vote reflects the views of the Native Hawaiian community as a whole, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support.

Congress uses two approaches in defining the Native Hawaiian community. The definition appearing in the HHCA requires at least 50 percent Native Hawaiian ancestry; in other statutes, Congress defines the term more broadly to include individuals who descend from the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes

the State of Hawaii. Because Congress uses both definitions, the final rule does the same, requiring that a majority of voters from each of these groups support the governing document in a ratification referendum. The rule also considers the total number of affirmative votes cast in favor of the governing document to ensure that support is genuinely broad-based, creating a presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian. At a minimum, the affirmative votes must exceed 30,000, including affirmative votes from at least 9,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian.

*Reestablishment of a Formal Government-to-Government Relationship*

**If the Native Hawaiian community decides to seek a formal government-to-government relationship with the United States, and that relationship is reestablished pursuant to the rule, how will that affect ongoing concerns of the Native Hawaiian community?**

If a formal government-to-government relationship is reestablished pursuant to the rule, the Native Hawaiian Governing Entity would be the representative government of the Native Hawaiian people. Accordingly, the governing entity could choose to engage with the United States (and the State of Hawaii, if appropriate) in formal, government-to-government discussions over issues impacting Native Hawaiians' self-determination and self-governance. For example, federally recognized Indian tribes in the continental United States exercise their government-to-government relationship with the United States to conduct formal discussions on matters of governmental, cultural, social, and religious importance, such as access to sacred sites and other property, management of natural resources, and land title and usage rights.

Any existing claims that the Native Hawaiian people may have for redress under Federal or international law, either individually or collectively, are not addressed by this rule.

The final rule does not authorize or in any way contemplate compensation for any past wrongs; however, the Native Hawaiian Governing Entity, like other indigenous sovereigns, will have the capacity to sue or be sued (subject to sovereign immunity and other jurisdictional limitations). The rule does not address the validity of particular legal claims because they are beyond the scope of the rule. The preamble to the final rule also explains that comments relating to claims to independence are outside the scope of the rule, as the Department's authority is defined by relevant Congressional acts, including the admission of Hawaii as a State of the United States.

**Will the Secretary reestablish a formal government-to-government relationship with more than one Native Hawaiian government?**

No. The final rule provides that the Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, but that government may include political subdivisions.

The structure of the Native Hawaiian government is left for the community to decide. Should a Native Hawaiian government seek to reestablish a formal government-to-government relationship with the United States, the rule has a short list of requirements for that government's constitution or governing document. For example, the governing document must provide for elections, guarantee civil rights protections, and protect rights and benefits arising under the HHCA.

**Would reestablishment of a formal government-to-government relationship under the final rule make the Native Hawaiian Governing Entity eligible for Federal Indian programs and services?**

No. Congress enacted programs and services expressly and specifically for the Native Hawaiian community that are separate from the programs and services that Congress enacted for federally recognized tribes in the continental United States. Native Hawaiians are therefore not eligible for Federal Indian programs, services, or benefits unless Congress expressly and specifically declares them eligible.

Consistent with that approach, the rule does not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise.

**Does the final rule make the Native Hawaiian Governing Entity eligible to be "listed" under the Federally Recognized Indian Tribe List Act of 1994?**

No. The Native Hawaiian Governing Entity will not appear on the annual list of federally recognized tribes required under the List Act. As noted above and explained in detail in the final rule, Congress enacted a separate suite of programs and services targeted directly to Native Hawaiians, separate from programs applicable to Indian tribes in the continental United States. *See* the preamble to the Final Rule Section (IV)(C).

**Will the Department go forward with reestablishing a formal government-to-government relationship if the Native Hawaiian community decides it does not want to do so?**

No. If the community does not support a formal government-to-government relationship, no such relationship will be reestablished. The final rule sets out a process under which the Native Hawaiian community can, through a democratic process, request a formal government-to-government relationship with the United States if the community chooses.

**Does the final rule make the Native Hawaiian Governing Entity eligible to invoke the Indian Gaming Regulatory Act (IGRA)?**

No. The IGRA would not apply to the Native Hawaiian Governing Entity. Furthermore, because Hawaii state law prohibits gambling, the Native Hawaiian Governing Entity would not be permitted to conduct gaming in Hawaii.

**If a formal government-to-government relationship is reestablished pursuant to the final rule, could the Department take land into trust for the Native Hawaiian Governing Entity?**

No. The Department's ability to take land into trust for the Native Hawaiian Governing Entity is constrained by Federal law. The Indian Reorganization Act, which authorizes the Department to take land into trust for federally recognized Indian tribes, does not apply to Hawaii. *See* preamble to the Final Rule Section (IV)(B).

**Has the Obama Administration previously supported reestablishment of a government-to-government relationship with the Native Hawaiian community?**

Yes. The Obama Administration has a strong commitment to enhancing principles of self-determination and self-governance for Native communities, including Native Hawaiians. Notably, in 2010, Secretary of the Interior Salazar and Attorney General Holder sent Congress a letter strongly supporting legislation to reorganize a Native Hawaiian government to which the United States could relate on a government-to-government basis.