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**4334-63**

**DEPARTMENT OF THE INTERIOR**

**Office of the Secretary**

**43 CFR Part 50**

**[Docket No. DOI-2015-0005; 145D010DMDS6CS00000.000000 DX.6CS252410]**

**RIN 1090-AB05**

**Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community**

**AGENCY:** Office of the Secretary, Department of the Interior.

**ACTION:** Final rule.

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**SUMMARY:** This final rule establishes the Secretary of the Interior's (Secretary) administrative process for reestablishing a formal government-to-government relationship with the Native Hawaiian community to more effectively implement the special political and trust relationship that Congress established between that community and the United States. The rule does not attempt to reorganize a Native Hawaiian government or draft its constitution, nor does it dictate the form or structure of that government. Rather, the rule establishes an administrative procedure and criteria that the Secretary would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States. Consistent with the Federal policy of self-determination and self-governance for indigenous communities, the Native Hawaiian community itself would determine whether and how to reorganize its government.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **Federal Register**].

**FOR FURTHER INFORMATION CONTACT:** Jennifer Romero, Senior Advisor for Native Hawaiian Affairs, Office of the Secretary, 202-208-3100.

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**(I) Executive Summary**

The final rule sets forth an administrative procedure and criteria that the Secretary would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States. The rule does not provide a

process for reorganizing a Native Hawaiian government. The decision to reorganize a Native Hawaiian government and to establish a formal government-to-government relationship is for the Native Hawaiian community to make as an exercise of self-determination.

Congress already federally acknowledged or recognized the Native Hawaiian community by establishing a special political and trust relationship through over 150 enactments. This unique special political and trust relationship exists even though Native Hawaiians have not had an organized government since the overthrow of the Kingdom of Hawaii in 1893. Accordingly, this rule provides a process and criteria for reestablishing a formal government-to-government relationship that would enable a reorganized Native Hawaiian government to represent the Native Hawaiian community and conduct government-to-government relations with the United States under the Constitution and applicable Federal law. The term “formal government-to-government relationship” in this rule refers to the working relationship with the United States that will occur if the Native Hawaiian community reorganizes and submits a request consistent with the rule’s criteria.

Importantly, the process set out in this rule is optional and Federal action will occur only upon an express, formal request from the reorganized Native Hawaiian government. The rule also provides a process for public comment on the request and a process for the Secretary to receive, evaluate, and act on the request.

## **(II) Background**

The Native Hawaiian community has a unique legal relationship with the United States, as well as inherent sovereign authority that has not been abrogated or relinquished, as evidenced by Congress’s consistent treatment of this community over an extended period of time. Over many decades, Congress enacted more than 150 statutes recognizing and implementing a

special political and trust relationship with the Native Hawaiian community. “Recognition is a formal political act [that] permanently establishes a government-to-government relationship between the United States and the recognized tribe as a ‘domestic dependent nation,’ and imposes on the government a fiduciary trust relationship to the tribe and its members. Recognition is also a constitutive act: It institutionalizes the tribe’s quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary.” *Cohen’s Handbook of Federal Indian Law* sec. 3.02[3], at 134 (2012 ed.) (citing H.R. Rep. No. 103-781, at 2 (1994)) (footnotes and internal quotation marks and brackets omitted).

A government-to-government relationship encompasses the political relationship between sovereigns and a working relationship between the officials of those two sovereigns. Although the Native Hawaiian community has been without a formal government for over a century, Congress recognized the continuity of the Native Hawaiian community through over 150 separate statutes, which ensures it has a special political and trust relationship with the United States. At the same time, a working relationship between government officials is absent. This rulemaking provides the Native Hawaiian community with an opportunity to have a working relationship, referred to as the “formal government-to-government relationship.” The Native Hawaiian community’s current relationship with the United States has substantively all of the other attributes of a government-to-government relationship, and might be described as a “sovereign to sovereign” or “government to sovereign” relationship. It is important to note that a special political and trust relationship may continue to exist even without a formal government-to-government relationship.

Among other things, the more than 150 statutes that Congress has enacted over many

decades create programs and services for members of the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally-recognized Indian tribes in the continental United States. But during this same period, the United States has not had a formal government-to-government relationship with Native Hawaiians because there has been no formal, organized Native Hawaiian government since 1893, when a United States officer, acting without authorization of the U.S. government, conspired with residents of Hawaii to overthrow the Kingdom of Hawaii. Many Native Hawaiians contend that their community's opportunities to thrive would be significantly bolstered through a sovereign Native Hawaiian government whose leadership could engage the United States in a formal government-to-government relationship, exercise inherent sovereign powers of self-governance and self-determination on par with those exercised by tribes in the continental United States, and facilitate the implementation of programs and services that Congress created specifically to benefit the Native Hawaiian community.

The United States has a unique political and trust relationship with federally-recognized tribes across the country, as set forth in the Constitution, treaties, statutes, Executive Orders, administrative regulations, and judicial precedent. The Federal Government's relationship with federally-recognized tribes includes a trust responsibility — a longstanding, paramount commitment to protect their unique rights and ensure their well-being, while respecting their inherent sovereignty. In recognition of that special commitment — and in fulfillment of the solemn obligations it entails — the United States, acting through the Department of the Interior, developed processes to help tribes in the continental United States establish mechanisms to conduct formal government-to-government relationships with the United States.

Strong Native governments are critical to tribes' exercising their inherent sovereign powers, preserving their culture, and sustaining prosperous and resilient Native American communities. It is especially true that, in the current era of tribal self-determination, formal government-to-government relationships between tribes and the United States are enormously beneficial not only to Native Americans but to *all* Americans. Yet an administrative process for establishing a formal government-to-government relationship has long been denied to members of one of the Nation's largest indigenous communities: Native Hawaiians. This rule provides a process to reestablish a formal government-to-government relationship with the Native Hawaiian community.

**(A) The Relationship Between the United States and the Native Hawaiian Community**

Native Hawaiians are the aboriginal, indigenous people who settled the Hawaiian archipelago as early as 300 A.D., exercised sovereignty over their island archipelago and, over time, founded the Kingdom of Hawaii. *See* S. Rep. No. 111-162, at 2-3 (2010). During centuries of self-rule and at the time of Western contact in 1778, "the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion." Native Hawaiian Education Act, 20 U.S.C. 7512(2); *accord* Native Hawaiian Health Care Act, 42 U.S.C. 11701(4). Although the indigenous people shared a common language, ancestry, and religion, four independent chiefdoms governed the eight islands until 1810, when King Kamehameha I unified the islands under one Kingdom of Hawaii. *See Rice v. Cayetano*, 528 U.S. 495, 500-01 (2000). *See generally* Davianna Pomaikai McGregor & Melody Kapilialoha MacKenzie, *Moolelo Ea O Na Hawaii: History of Native Hawaiian Governance in Hawaii* (2015), available at <http://www.regulations.gov/document?D=DOI-2015-0005-4290> (comment number 4290)

(*Moolelo Ea O Na Hawaii*); Ralph S. Kuykendall, *The Hawaiian Kingdom Vol. I: 1778-1854, Foundation and Transformation* (1947). Kamehameha I's reign ended with his death in 1819 but the Kingdom of Hawaii, led by Native Hawaiian monarchs, continued. *Id.*

Throughout the nineteenth century and until 1893, the United States “recognized the independence of the Hawaiian Nation,” “extended full and complete diplomatic recognition to the Hawaiian Government,” and “entered into several treaties with Hawaiian monarchs.” 42 U.S.C. 11701(6); *accord* 20 U.S.C. 7512(4); *see Rice*, 528 U.S. at 504 (citing treaties that the United States and the Kingdom of Hawaii concluded in 1826, 1849, 1875, and 1887); S. Rep. No. 103-126 (1993) (compiling conventions, treaties, and presidential messages extending U.S. diplomatic recognition to the Hawaiian government); *Moolelo Ea O Na Hawaii* at 209-11, 240-47. But during that same period, Westerners became “increasing[ly] involve[d] . . . in the economic and political affairs of the Kingdom,” *Rice*, 528 U.S. at 501, 504-05, over vocal protest by Native Hawaiians. *See, e.g.*, Kuykendall at 258-60. An example of such involvement was adoption of the 1887 “Bayonet Constitution” that resulted in mass disenfranchisement of Native Hawaiians by imposing wealth and property qualifications on voters, among other changes in Kingdom governance. *See, e.g.*, Noenoe K. Silva, Kanaka Maoli Resistance to Annexation, 1 *Oiwi: A Native Hawaiian Journal* 43 (1998); Kuykendall, *The Hawaiian Kingdom Vol. III: 1874-1893, The Kalakaua Dynasty* (1967); Neil M. Levy, Native Hawaiian Land Rights, 63 *Cal. L. Rev.* 848, 861 (1975) (chronicling the displacement of Native Hawaiians from their land). Although Native Hawaiian monarchs continued to rule the Kingdom, the Bayonet Constitution triggered mass meetings and other forms of organized political protest by Native Hawaiians. This led to the establishment of Hui Kalaiaina, a Native Hawaiian political organization that advocated the replacement of that Constitution and protested subsequent annexation efforts. *See*

Noenoe K. Silva, *Aloha Betrayed* 127-29 (2004); S. Rep. No. 107-66, at 19 n.29 (2001). It also foreshadowed the overthrow of the Kingdom in 1893 by a small group of non-Native Hawaiians, aided by the United States Minister to Hawaii and the Armed Forces of the United States. *See generally Moolelo Ea O Na Hawaii* at 387-402; S. Rep. No. 111-162, at 3-6 (2010); *Cohen's Handbook of Federal Indian Law* sec. 4.07[4][b], at 360-61 (2012 ed.); Kuykendall, *The Hawaiian Kingdom Vol. III* at 582-605.

The Kingdom was overthrown in January 1893 by a “Committee of Safety” comprised of American and European sugar planters, descendants of missionaries, and financiers. S. Rep. No. 103-126, at 21 (1993). The Committee established a provisional government, which later declared itself to be the Republic of Hawaii, and the U.S. Minister to the Kingdom of Hawaii “immediately extended diplomatic recognition” to the provisional government “without the consent of Queen Liliuokalani or the Native Hawaiian people.” *Id.* at 21. Indeed, in his December 18, 1893 message to Congress concerning the Hawaiian Islands, President Grover Cleveland described the provisional government as an “oligarchy set up without the assent of the [Hawaiian] people,” *id.* at 32, and noted, “there is no pretense of any [] consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government,” and that “it appears that Hawaii was taken possession of by the United State forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister.” *Id.* at 27-28 (quoting President Cleveland’s Message Relating to the Hawaiian Islands – December 18, 1893) (italics in original). Following the overthrow of Hawaii’s monarchy, Queen Liliuokalani, while yielding her authority under protest to the United States, called for reinstatement of Native Hawaiian governance. Joint Resolution of November 23, 1893, 107 Stat. 1511 (Apology Resolution). The Native Hawaiian

community answered, alerting existing Native Hawaiian political organizations and groups from throughout the islands to reinstate the Queen and resist the newly formed Provisional Government and any attempt at annexation. *See Moolelo Ea O Na Hawaii* at 45-50. In 1895, Hawaiian nationalists loyal to Queen Liliuokalani attempted to regain control of the Hawaiian government. *Id.* at 49-50. These attempts resulted in hundreds of arrests and convictions, including the arrest of the Queen herself, who was tried and found guilty of misprision or concealment of treason. The Queen was subsequently forced to abdicate. *Id.* These events, however, did little to suppress Native Hawaiian opposition to annexation. During this period, civic organizations convened a series of large public meetings of Native Hawaiians opposing annexation by the United States and led a petition drive that gathered 21,000 signatures, mostly from Native Hawaiians, opposing annexation. *See Moolelo Ea O Na Hawaii* at 424-28. These “Kue Petitions” are part of this rule’s administrative record.

The United States nevertheless annexed Hawaii “without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination.” Native Hawaiian Health Care Act, 42 U.S.C. 11701(11). The Republic of Hawaii ceded 1.8 million acres of land to the United States “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government,” Apology Resolution at 1512, and Congress passed a joint resolution — the Newlands Resolution (also known as the Joint Resolution of Annexation) — annexing the islands in 1898. *See Rice*, 528 U.S. at 505.

Under the Newlands Resolution, the United States accepted the Republic of Hawaii’s cession of “all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and

their dependencies,” and resolved that the Hawaiian Islands were “annexed as part of the territory of the United States” and became subject to the “sovereign dominion” of the United States. No consent to these terms was provided by the Kingdom of Hawaii; rather, the joint resolution “effectuated a transaction between the Republic of Hawaii and the United States” without direct relinquishment by the Native Hawaiian people of their claims to sovereignty as a people or over their national lands to the United States. *Moolelo Ea O Na Hawaii* at 431 (citing the Apology Resolution). Indeed, at the time of annexation, Native Hawaiians did not have an opportunity to vote on whether they favored annexation by the United States. Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 *Yale L. & Pol’y Rev.* 95, 103 (1998).

The Hawaiian Organic Act, enacted in 1900, established the Territory of Hawaii, extended the U.S. Constitution to the territory, placed ceded lands under United States control, and directed the use of proceeds from those lands to benefit the inhabitants of Hawaii. Act of Apr. 30, 1900, 31 Stat. 141 (Organic Act).

Hawaii was a U.S. territory for six decades prior to becoming a State, during which time the Hawaiian government’s “English-mainly” policy of the late 1850s was replaced by the territorial government’s policy of “English-only” and outright suppression of the Hawaiian language in public schools. See Paul F. Lucas, *E Ola Mau Kakou I Ka Olelo Makuahine: Hawaiian Language Policy and the Courts*, 34 *Hawaiian J. Hist.* 1 (2000); see also Kuykendall, *The Hawaiian Kingdom Vol. I* at 360-62. See generally Maenette K.P. Ah Nee Benham & Ronald H. Heck, *Culture and Educational Policy in Hawaii: The Silencing of Native Voices* ch. 3 (1998); *Native Hawaiian Law: A Treatise* at 1259-72 (Melody Kapilialoha MacKenzie ed., 2015). But various entities connected to the Kingdom of Hawaii adopted other methods of continuing their internal governance and social cohesion. Specifically, the Royal Societies, the

Bishop Estate (now Kamehameha Schools), the Alii trusts, and civic clubs are organizations, each with direct ties to their royal Native Hawaiian founders, and are prime examples of Native Hawaiians' continuing efforts to keep their culture, language, governance, and community alive. *See Moolelo Ea O Na Hawaii* at 560-63; *id.*, appendix 4. Indeed, post-annexation, Native Hawaiians maintained their separate identity as a single distinct community through a wide range of cultural, social, and political institutions, as well as through efforts to develop programs to provide governmental services to Native Hawaiians. For example, Ahahui Puuhonua O Na Hawaii (the Hawaiian Protective Association) was an organization formed in 1914 under the leadership of Prince Jonah Kuhio Kalaniana'ole (Prince Kuhio) alongside other Native Hawaiian political leaders. Its principal purposes were to maintain unity among Native Hawaiians, protect Native Hawaiian interests (including by lobbying the territorial legislature), and promote the education, health, and economic development of Native Hawaiians. It was organized "for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition." Hawaiian Homes Commission Act, 1920: Hearing on H.R. 13500 Before the S. Comm. on Territories, 66th Cong., 3d Sess. 44 (1920) (statement of Rev. Akaiko Akana). *See generally Moolelo Ea O Na Hawaii* at 501-07. The Association established twelve standing committees, published a newspaper, undertook dispute resolution, promoted the education and the social welfare of the Native Hawaiian community, and developed the framework that eventually became the Hawaiian Homes Commission Act (HHCA). In 1918, Prince Kuhio, who served as the Territory of Hawaii's Delegate to Congress, and other prominent Hawaiians founded the Hawaiian Civic Clubs, whose goal was "to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii." McGregor, *Aina Hoopulapula: Hawaiian Homesteading*, 24 *Hawaiian J. of Hist.* 1, 5 (1990). The Clubs' first

project was to secure enactment of the HHCA in 1921 to provide for the welfare of the Native Hawaiian people by setting aside and protecting Hawaiian home lands.

**(B) Congress’s Recognition of Native Hawaiians as a Political Community**

In a number of enactments, Congress expressly identified Native Hawaiians as “a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago,” Native Hawaiian Health Care Improvement Act, 42 U.S.C.

11701(1); *accord* Native Hawaiian Education Act, 20 U.S.C. 7512(1), with whom the United States has a “special” “trust” relationship, 42 U.S.C. 11701(15), (16), (18), (20); 20 U.S.C.

7512(8), (10), (11), (12). And when enacting Native Hawaiian statutes, Congress expressly stated in accompanying legislative findings that it was exercising its plenary power over Indian affairs: “The authority of the Congress under the United States Constitution to legislate in

matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.” Native Hawaiian

Health Care Improvement Act, 42 U.S.C. 11701(17); *see* H.R. Rep. No. 66-839, at 11 (1920) (finding constitutional precedent for the HHCA “in previous enactments granting Indians . . .

special privileges in obtaining and using the public lands”); *see also* Native Hawaiian Education Act, 20 U.S.C. 7512(12)(B). Indeed, since Hawaii’s admission to the United States, Congress

has enacted dozens of statutes on behalf of Native Hawaiians. For example, Congress:

- Established special Native Hawaiian programs in the areas of health care, education, loans, and employment. *See, e.g.*, Native Hawaiian Health Care Improvement Act of 1988, 42 U.S.C. 11701-11714; Native Hawaiian Education Act, 20 U.S.C. 7511-7517; Workforce Investment Act of 1998, 29 U.S.C. 3221; Native American Programs Act of 1974, 42 U.S.C. 2991-2992.

- Enacted statutes to study and preserve Native Hawaiian culture, language, and historical sites. *See, e.g.*, Kaloko-Honokokau National Park Re-establishment Act, 16 U.S.C. 396d(a); Native American Languages Act, 25 U.S.C. 2901-2906; National Historic Preservation Act of 1966, 54 U.S.C. 302706.
- Extended to the Native Hawaiian people many of “the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities” by classifying Native Hawaiians as “Native Americans” under numerous Federal statutes. Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701(19); *accord* Native Hawaiian Education Act, 20 U.S.C. 7512(13); *see, e.g.*, American Indian Religious Freedom Act, 42 U.S.C. 1996-1996a. *See generally* Native Hawaiian Education Act, 20 U.S.C. 7512(13) (noting that “[t]he political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians” in many statutes); *accord* Hawaiian Homelands Homeownership Act, 114 Stat. 2874-75, 2968-69 (2000).

These more recent enactments followed Congress’s enactment of the HHCA, a Federal law that designated tracts totaling approximately 200,000 acres on the different islands for exclusive homesteading by eligible Native Hawaiians. Act of July 9, 1921, 42 Stat. 108; *see also Rice*, 528 U.S. at 507 (HHCA’s stated purpose was “to rehabilitate the native Hawaiian population”) (citing H.R. Rep. No. 66-839, at 1-2 (1920)); *Moololo Ea O Na Hawaii* at 507-09, 520-35. The HHCA was enacted in response to the precipitous decline in the Native Hawaiian population since Western contact; by 1919, the Native Hawaiian population declined by some estimates from several hundred thousand in 1778 to only 22,600. 20 U.S.C. 7512(7). Delegate Prince Kuhio, Native Hawaiian politician and Hawaiian Civic Clubs co-founder John Wise, and

U.S. Secretary of the Interior Franklin Lane urged Congress to set aside land to “rehabilitate” and help Native Hawaiians reestablish their traditional way of life. *See* H.R. Rep. No. 66-839, at 4 (statement of Secretary Lane) (“One thing that impressed me was the fact that the natives of the islands, who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty”). Other HHCA proponents repeatedly referred to Native Hawaiians as a “people” (at times, as a “dying people” or a “noble people”). *See, e.g.*, H.R. Rep. No. 66-839, at 2-4 (1920); *see also* 59 Cong. Rec. 7453 (1920) (statement of Delegate Prince Kuhio) (“[I]f conditions continue to exist as they do today . . . , my people . . . will pass from the face of the earth.”). Congress found constitutional precedent for the HHCA in previous enactments addressing Indian rights in using public lands, H.R. Rep. No. 66-839, at 11, and has since acknowledged that the HHCA “affirm[ed] the trust relationship between the United States and the Native Hawaiians.” 42 U.S.C. 11701(13); *accord* 20 U.S.C. 7512(8).

In 1938, Congress again exercised its trust responsibility by preserving Native Hawaiians’ exclusive fishing rights in the Hawaii National Park. Act of June 20, 1938, ch. 530, sec. 3(a), 52 Stat. 784.

In 1959, as a condition of statehood, the Hawaii Admission Act contained two provisions expressly recognizing Native Hawaiians and requiring the State of Hawaii to manage lands for the benefit of the indigenous Native Hawaiian people. Act of March 18, 1959, 73 Stat. 4 (Admission Act). First, the Federal Government required the State to adopt the HHCA as a provision of its constitution, which effectively ensured continuity of the Hawaiian home lands program. *Id.* sec. 4, 73 Stat. 5. Second, it required the State to manage a Congressionally mandated public land trust for specific purposes, including the betterment of Native Hawaiians. *Id.* sec. 5(f), 73 Stat. 6 (requiring that lands transferred to the State be held by the State “as a public trust . . . for [among

other purposes] the betterment of the conditions of native Hawaiians, as defined in the [HHCA], as amended”). In addition, the Federal Government maintained an oversight role with respect to the home lands. *See* Admission Act sec. 4; Hawaiian Home Lands Recovery Act (HHLRA), Act of November 2, 1995, 109 Stat. 357. Congress again recognized in more recent statutes that “Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands.” Native Hawaiian Education Act, 20 U.S.C. 7512(12)(A); *accord* Hawaiian Homelands Homeownership Act, 114 Stat. 2968 (2000); Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701(1) (“The Congress finds that: Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778.”); *see also* Hawaiian Homelands Homeownership Act, 114 Stat. 2966 (2000); 114 Stat. 2872, 2874 (2000); Consolidated Appropriations Act, 118 Stat. 445 (2004) (establishing the U.S. Office of Native Hawaiian Relations). Notably, in 1993, Congress enacted the Apology Resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. In that Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii resulted in the suppression of Native Hawaiians’ “inherent sovereignty” and deprived them of their “rights to self-determination,” and that “long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people.” It further recognized that “the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional

beliefs, customs, practices, language, and social institutions.” Apology Resolution at 1512-13; *see* Native Hawaiian Education Act, 20 U.S.C. 7512(20); Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701(2). In light of those findings, Congress “express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.” Apology Resolution at 1513. Congress also urged the President of the United States to “support reconciliation efforts between the United States and the Native Hawaiian people.” *Id.* at 1511. These Congressional findings and other Congressional actions demonstrate that indigenous Hawaiians, like numerous tribes in the continental United States, have both an historical and existing cohesive political and social existence, derived from their inherent sovereign authority, which has survived despite repeated external pressures to abandon their way of life and assimilate into mainstream American society.

The Executive Branch also made findings and recommendations following a series of hearings and meetings with the Native Hawaiian community in 1999, when the U.S. Departments of the Interior and of Justice issued, “From Mauka to Makai: The River of Justice Must Flow Freely,” a report on the reconciliation process between the Federal Government and Native Hawaiians. The report found that “the injustices of the past have severely damaged the culture and general welfare of Native Hawaiians,” and that exercising self-determination over their own affairs would enable Native Hawaiians to “address their most pressing political, health, economic, social, and cultural needs.” Department of the Interior & Department of Justice, *From Mauka to Makai* at 4, 46-48, 51 (2000) (citing Native Hawaiians’ poor health, poverty, homelessness, and high incarceration rates, among other socioeconomic impacts). The report ultimately recommended as its top priority that “the Native Hawaiian people should have self-

determination over their own affairs within the framework of Federal law.” *Id.* at 3-4.

Congress also found it significant that the State of Hawaii “recognizes the traditional language of the Native Hawaiian people as an official language of the State of Hawaii, which may be used as the language of instruction for all subjects and grades in the public school system,” and “promotes the study of the Hawaiian culture, language, and history by providing a Hawaiian education program and using community expertise as a suitable and essential means to further the program.” Native Hawaiian Education Act, 20 U.S.C. 7512(21); *see also* Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701(3) (continued preservation of Native Hawaiian language and culture). Congress’s efforts to protect and promote the traditional Hawaiian language and culture demonstrate that it repeatedly recognized a continuing Native Hawaiian community. In addition, at the State level, recently enacted laws mandated that members of certain state councils, boards, and commissions complete a training course on Native Hawaiian rights, and approved traditional Native Hawaiian burial and cremation customs and practices. *See* Act 169, Sess. L. Haw. 2015; Act 171, Sess. L. Haw. 2015. These State actions similarly reflect recognition by the State government of a continuing Native Hawaiian community.

Congress consistently enacted programs and services expressly and specifically for the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally-recognized tribes in the continental United States. As Congress explained, it “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.” Hawaiian Homelands Homeownership Act, 114 Stat. 2968 (2000). Thus, “the political status of Native

Hawaiians is comparable to that of American Indians and Alaska Natives.” Native Hawaiian Education Act, 20 U.S.C. 7512(12)(B), (D). Congress’s treatment of Native Hawaiians flows from that political status of the Native Hawaiian community.

Congress, under its plenary authority over Indian affairs, repeatedly acknowledged its special relationship with the Native Hawaiian community since the overthrow of the Kingdom of Hawaii more than a century ago. Congress concluded that it has a trust obligation to Native Hawaiians in part because it bears responsibility for the overthrow of the Kingdom of Hawaii and suppression of Native Hawaiians’ sovereignty over their land. But the Federal Government has not maintained a formal government-to-government relationship with the Native Hawaiian community as an organized, sovereign entity. Reestablishing a formal government-to-government relationship with a reorganized Native Hawaiian sovereign government would facilitate Federal agencies’ ability to implement the established relationship between the United States and the Native Hawaiian community through interaction with a single, representative governing entity. Doing so would strengthen the self-determination and self-governance of Native Hawaiians and facilitate the preservation of their language, customs, heritage, health, and welfare. This interaction is consistent with the United States government’s broader policy of advancing Native communities and enhancing the implementation of Federal programs by implementing those programs in the context of a formal government-to-government relationship.

Consistent with the HHCA, which is the first Congressional enactment clearly recognizing the Native Hawaiian community’s special relationship with the United States, Congress requires Federal agencies to consult with Native Hawaiians under several Federal statutes. *See, e.g.*, the National Historic Preservation Act of 1966, 54 U.S.C. 302706; the Native

American Graves Protection and Repatriation Act, 25 U.S.C. 3002(c)(2), 3004(b)(1)(B). And in 2011, the Department of Defense established a consultation process with Native Hawaiian organizations when proposing actions that may affect property or places of traditional religious and cultural importance or subsistence practices. *See* U.S. Department of Defense Instruction Number 4710.03: Consultation Policy with Native Hawaiian Organizations (2011). Other statutes specifically related to implementation of the Native Hawaiian community's special trust relationship with the United States affirmed the continuing Federal role in Native Hawaiian affairs, such as the Hawaiian Home Lands Recovery Act (HHLRA), 109 Stat. 357, 360 (1995). The HHLRA also authorized a position within the Department to discharge the Secretary's responsibilities for matters related to the Native Hawaiian community. And in 2004, Congress provided for the Department's Office of Native Hawaiian Relations to effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; to continue the reconciliation process set out in 2000; and to assure meaningful consultation before Federal actions that could significantly affect Native Hawaiian resources, rights, or lands are taken. *See* Consolidated Appropriations Act, 118 Stat. 445-46 (2004).

### **(C) Actions by the Continuing Native Hawaiian Community**

As discussed above, Native Hawaiians were active participants in the political life of the Kingdom of Hawaii, and this activity continued following the overthrow through coordinated resistance to annexation and a range of other organized forms of political and social organizations. *See generally* Silva, *Aloha Betrayed*; Silva, 1 *Oiwi: A Native Hawaiian Journal* 40 (examining Hawaiian-language print media and documenting the organized Native Hawaiian resistance to annexation); Silva, *I Ku Mau Mau: How Kanaka Maoli Tried to Sustain National Identity Within the United States Political System* (documenting mass meetings, petitions, and

citizen testimonies by Native Hawaiian political organizations during and after the annexation period). The Native Hawaiian community maintained its cohesion and its distinct political voice through the twentieth century to the present day. Through a diverse group of organizations that includes, for example, the Hawaiian Civic Clubs and the various Hawaiian Homestead Associations, Native Hawaiians deliberate and express their views on issues of importance to their community, some of which are discussed above. *See generally Moolelo Ea O Na Hawaii* at 535-55; *see id.* at 606-30 & appendix 4 (listing organizations, their histories, and their accomplishments). Native Hawaiians' organized action to advance Native Hawaiian self-determination resulted in the passage of a set of amendments to the State Constitution in 1978 to reaffirm the "solemn trust obligation and responsibility to native Hawaiians" by providing additional protection and recognition of Native Hawaiian interests — a key example of political action in the community. Haw. Rev. Stat. 10-1(a) (2016). Those amendments established the Office of Hawaiian Affairs (OHA), which administers trust monies to benefit the Native Hawaiian community and generally promotes Native Hawaiian affairs, Hawaii Const. art. XII, secs. 4-6, and provided for recognition of certain traditional and customary legal rights of Native Hawaiians, *id.* art. XII, sec. 7. The amendments reflected input from broad segments of the Native Hawaiian community, as well as others, who participated in statewide discussions of proposed options. *See* Noelani Goodyear-Kaopua, Ikaika Hussey & Erin Kahunawaikaala Wright, *A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty* (2014).

There are numerous additional examples of active engagement within the community on issues of self-determination and preservation of Native Hawaiian culture and traditions: Ka Lahui Hawaii, a Native Hawaiian self-governance initiative, which organized a constitutional convention resulting in a governing structure with elected officials and governing documents; the

Hui Naauao Sovereignty and Self-Determination Community Education Project, a coalition of over 40 Native Hawaiian organizations that worked together to educate Native Hawaiians and the public about Native Hawaiian history and self-governance; the 1988 Native Hawaiian Sovereignty Conference, where a resolution on self-governance was adopted; the Hawaiian Sovereignty Elections Council, a State-funded entity, and its successor, Ha Hawaii, a nonprofit organization, which helped hold an election and convene *Aha Oiwi Hawaii*, a convention of Native Hawaiian delegates to develop a constitution and create a government model for Native Hawaiian self-determination; and efforts resulting in the creation and future transfer of the Kahoolawe Island reserve to “the sovereign native Hawaiian entity,” *see* Haw. Rev. Stat. 6K-9 (2016). Moreover, the community’s continuing efforts to integrate and develop traditional Native Hawaiian law, which Hawaii state courts recognize and apply in various family-law and property-law disputes, *see Cohen’s Handbook of Federal Indian Law* sec. 4.07[4][e], at 375-77 (2012 ed.); *see also Native Hawaiian Law: A Treatise* at 779-1165, encouraged development of traditional justice programs, including a method of alternative dispute resolution, “hooponopono,” that the Native Hawaiian Bar Association endorses. *See* Andrew J. Hosmanek, *Cutting the Cord: Hooponopono and Hawaiian Restorative Justice in the Criminal Law Context*, 5 Pepp. Disp. Resol. L.J. 359 (2005); *see also* Hawaii Const. art. XII, sec. 7 (protecting the traditional and customary rights of certain Native Hawaiian tenants).

Against this backdrop of activity, Native Hawaiians and Native Hawaiian organizations asserted self-determination principles in court. Notably, in 2001, they brought suit challenging Native Hawaiians’ exclusion from the Department’s acknowledgment regulations (25 CFR part 83), which establish a uniform process for Federal acknowledgment of Indian tribes in the continental United States. The United States Court of Appeals for the Ninth Circuit upheld the

geographic limitation in the part 83 regulations, concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the unique history of Hawaii and the history of separate Congressional enactments regarding the two groups. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). The Ninth Circuit also noted the question whether Native Hawaiians “constitute one large tribe . . . or whether there are, in fact, several different tribal groups.” *Id.* The court believed it appropriate for the Department to apply its expertise to “determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis.”<sup>1</sup> *Id.*

In recent years, Congress considered legislation to reorganize a single Native Hawaiian governing entity and reestablish a formal government-to-government relationship between it and the United States. In 2010, during the Second Session of the 111th Congress, nearly identical Native Hawaiian government reorganization bills were passed by the House of Representatives (H.R. 2314), reported out favorably by the Senate Committee on Indian Affairs (S. 1011), and strongly supported by the Executive Branch (S. 3945). In a letter to the Senate concerning S. 3945, the Secretary and the Attorney General stated: “Of the Nation’s three major indigenous

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<sup>1</sup> The Department carefully reviewed the *Kahawaiolaa* briefs, in which the United States suggested that Native Hawaiians have not been recognized by Congress as an Indian tribe. That suggestion, however, must be read in the context of the *Kahawaiolaa* litigation, which challenged the validity of regulations determining which Native groups should be recognized as tribes eligible for Federal Indian programs, services, and benefits and as having a formal government-to-government relationship with the United States. *See* 25 CFR 83.2 (2004). As noted throughout this rule, Congress has not recognized Native Hawaiians as eligible for general Federal Indian programs, services, and benefits; and while Congress has provided separate programs, services, and benefits for Native Hawaiians in the exercise of its constitutional authority with respect to indigenous communities in the United States, Congress has not itself established a formal government-to-government relationship with the Native Hawaiian community. That matter has been left to the Executive or for later action by Congress itself. So, in context, the suggestion in the United States’ *Kahawaiolaa* briefs is not inconsistent with the positions taken in this rulemaking. To the extent that other positions taken in this rulemaking may be seen as inconsistent with statements or positions of the United States in the *Kahawaiolaa* litigation, for the reasons stated in the proposed rule, and in this final rule, the views in this rulemaking reflect the Department’s policy.

groups, Native Hawaiians — unlike American Indians and Alaska Natives — are the only one that currently lacks a government-to-government relationship with the United States. This bill provides Native Hawaiians a means by which to exercise the inherent rights to local self-government, self-determination, and economic self-sufficiency that other Native Americans enjoy.” 156 Cong. Rec. S 10990, S 10992 (Dec. 22, 2010).

The 2010 House and Senate bills provided that the Native Hawaiian government would have “the inherent powers and privileges of self-government of a native government under existing law,” including the inherent powers “to determine its own membership criteria [and] its own membership” and to negotiate and implement agreements with the United States or with the State of Hawaii. The bills required protection of the civil rights and liberties of Natives and non-Natives alike, as guaranteed in the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, and provided that the Native Hawaiian government and its members would not be eligible for Federal Indian programs and services unless Congress expressly declared them eligible. And S. 3945 expressly left untouched the privileges, immunities, powers, authorities, and jurisdiction of federally-recognized tribes in the continental United States.

The bills further acknowledged the existing “special political and legal relationship with the Native Hawaiian people” and established a process for “the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single unified Native Hawaiian governing entity.” Some in Congress, however, expressed a preference for allowing the Native Hawaiian community to petition through the Department’s Federal acknowledgment process. *See, e.g.*, S. Rep. No. 112-251, at 45 (2012); S. Rep. No. 111-162, at 41 (2010).

In 2011, in Act 195, the State of Hawaii expressed its support for reorganizing a Native

Hawaiian government that could then be federally recognized, while also providing for State recognition of the Native Hawaiian people as “the only indigenous, aboriginal, maoli people of Hawaii.” Haw. Rev. Stat. 10H-1 (2015); *see* Act 195, sec. 1, Sess. L. Haw. 2011. In particular, Act 195 established a process for compiling a roll of qualified Native Hawaiians to facilitate the Native Hawaiian community’s development of a reorganized Native Hawaiian governing entity. *See* Haw. Rev. Stat. 10H-3-4 (2015); *id.* 10H-5 (“The publication of the roll of qualified Native Hawaiians . . . is intended to facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves.”); Act 195, secs. 3-5, Sess. L. Haw. 2011.

Act 195 established the Native Hawaiian Roll Commission to oversee the process for compiling the roll of qualified Native Hawaiians. The Commission accepted registrations from individuals subject to verification of their Native Hawaiian ancestry while also “pre-certifying” for the roll individuals who were listed on any registry of Native Hawaiians maintained by OHA. Haw. Rev. Stat. 10H-3(a)(2)(A)(iii) (2015). On July 10, 2015, the Commission certified an initial list of more than 95,000 qualified Native Hawaiians, as defined by Haw. Rev. Stat. 10H-3 (2015). In addition to the initial list, the Commission certified supplemental lists of qualified Native Hawaiians and published a compilation of the certified lists online — the Kanaiolowalu. *See Kanaiolowalu, Certified List* (Oct. 19, 2015), <http://www.kanaiolowalu.org/list> (last visited Apr. 19, 2016).

In December 2014, a private nonprofit organization known as Nai Aupuni formed to support efforts to achieve Native Hawaiian self-determination. It originally planned to hold a month-long, vote-by-mail election of delegates to an Aha, a convention to consider paths for Native Hawaiian self-governance. Nai Aupuni limited voters and delegates to Native Hawaiians

and it relied on the roll compiled by the Commission to identify Native Hawaiians. Delegate voting was to occur throughout the month of November 2015, but a lawsuit by six individuals seeking to halt the election delayed those efforts. *See Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1111 (D. Haw. 2015).

Plaintiffs alleged, among other things, violations of the Fifteenth Amendment to the U.S. Constitution and the Voting Rights Act. The district court ruled that plaintiffs did not demonstrate a likelihood of success on their claims and denied their motion for a preliminary injunction. The district court also found that the scheduled election was a private election “for delegates to a private convention, among a community of indigenous people for purposes of exploring self-determination, that will not — and cannot — result in any federal, state, or local laws or obligations by itself.” The court found it was “not a state election.” Plaintiffs appealed to the Ninth Circuit.

During the appeal, Nai Aupuni mailed the delegate ballots to certified voters and the voting for delegates began. Plaintiffs filed an urgent motion for an injunction pending appeal in the Ninth Circuit, which was denied. Plaintiffs then filed an emergency application for an injunction pending appellate review in the U.S. Supreme Court on November 23, 2015. Justice Kennedy enjoined the counting of ballots on November 27, 2015. Five days later, the Supreme Court, by a vote of 5 to 4, granted plaintiffs’ request and enjoined the counting of ballots and the certifying of winners, pending the final disposition of the appeal in the Ninth Circuit. *See Akina v. Hawaii*, 136 S. Ct. 581 (2015). These orders were not accompanied by opinions. On August 29, 2016, the Ninth Circuit dismissed plaintiffs’ appeal of the preliminary-injunction order as moot. *Akina v. Hawaii*, No. 15-17134, 2016 WL 4501686 (9th Cir. Aug. 29, 2016). The litigation remained pending in Federal district court at the time this final rule was issued.

After the Supreme Court enjoined the counting of the ballots, Nai Aupuni, citing concerns about the potential for years of delay in litigation, terminated the election and chose to never count the votes. Instead, Nai Aupuni invited all registered candidates participating in the election to participate in the Aha. During February 2016, nearly 130 Native Hawaiians took part in the Aha. On February 26, 2016, by a vote of 88-to-30 with one abstention (not all participants were present to vote), the Aha delegates voted to adopt a constitution. *See* Press Release, Native Hawaiian Constitution Adopted (Feb. 26, 2016); Constitution of the Native Hawaiian Nation (2016), *available at* <http://www.aha2016.com> (last visited Apr. 19, 2016). Aha participants also adopted a declaration that lays out a history of Native Hawaiian self-governance “so the world may know and come to understand our cause towards self-determination through self-governance.” Declaration of the Sovereignty of the Native Hawaiian Nation: An Offering of the Aha, *available at* <http://www.aha2016.com> (last visited Apr. 19, 2016).

The development of the roll of qualified Native Hawaiians, the effort to elect delegates to an Aha, and the adoption of a constitution by the Aha participants are all events independent of this rule. The purpose of the rule is to provide a process and criteria for reestablishing a formal government-to-government relationship that would enable a reorganized Native Hawaiian government to represent the Native Hawaiian community and conduct formal government-to-government relations with the United States under the Constitution and applicable Federal law. These events, however, provide context and significant evidence of the community’s interest in reorganizing and reestablishing the formal government-to-government relationship that warrants the Secretary proceeding with this rulemaking process.

### **(III) Overview of Final Rule**

The final rule reflects the totality of the comments from the Advance Notice of Proposed Rulemaking (ANPRM) and the Notice of Proposed Rulemaking (NPRM or proposed rule) stages of the rulemaking process in which commenters urged the Department to promulgate a rule announcing a procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship with the Native Hawaiian community. The Department will rely on this final rule as the sole administrative avenue for doing so with the Native Hawaiian community.

In accordance with the wishes of the Native Hawaiian community as expressed in the comments on the ANPRM and the NPRM, the final rule does not involve the Federal Government in convening a constitutional convention, in drafting a constitution or other governing document for the Native Hawaiian government, in registering voters for purposes of ratifying that document, or in electing officers for that government. Any government reorganization would instead occur through a fair and inclusive community-driven process. The Federal Government's only role is deciding whether the request satisfies the rule's requirements, enabling the Secretary to reestablish a formal government-to-government relationship with the Native Hawaiian government.

Moreover, if a Native Hawaiian government reorganizes, it will be for that government to decide whether to seek to reestablish a formal government-to-government relationship with the United States. The process established by this rule is optional, and Federal action would occur only upon an express formal request from the reorganized Native Hawaiian government.

**Existing Federal Legal Framework.** In adopting this rulemaking, the Department must adhere to the legal framework, discussed above, that Congress already established to govern

relations with the Native Hawaiian community. The existing body of legislation makes plain that Congress determined repeatedly, over a period of almost a century, that the Native Hawaiian population is an existing Native community within the scope of the Federal Government's powers over Native American affairs and with which the United States has already acknowledged or recognized an ongoing special political and trust relationship. Congress described this trust relationship, for example, in findings enacted as part of the Native Hawaiian Education Act, 20 U.S.C. 7512 *et seq.*, and the Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701 *et seq.* Those findings observe that “[t]hrough the enactment of the Hawaiian Homes Commission Act, 1920, Congress affirmed the special relationship between the United States and the Native Hawaiians,” 20 U.S.C. 7512(8); *see also* 42 U.S.C. 11701(13), (14) (also citing a 1938 statute conferring leasing and fishing rights on Native Hawaiians). Congress then “reaffirmed the trust relationship between the United States and the Hawaiian people” in the Hawaii Admission Act, 20 U.S.C. 7512(10); *accord* 42 U.S.C. 11701(16). Since then, “the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians” in at least ten statutes directed in whole or in part at American Indians and other native peoples of the United States such as Alaska Natives. 20 U.S.C. 7512(13); *see also* 42 U.S.C. 11701(19), (20), (21) (listing additional statutes). Although a trust relationship exists, today there is no single unified Native Hawaiian government in place, and no procedure for reestablishing a formal government-to-government relationship should such a government reorganize.

**Authority.**<sup>2</sup> The authority to issue this rule is vested in the Secretary by 25 U.S.C. 2, 9, 479a, 479a-1; 43 U.S.C. 1457; Act of January 23, 2004, sec. 148, 118 Stat. 445; and 5 U.S.C. 301. *See also United States v. Holliday*, 70 U.S. 407, 419 (1865) (“In reference to all matters of [tribal status], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.”).

Congress has plenary power with respect to Indian affairs. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Congress’s plenary power over Indian affairs flows in part from the Indian Commerce Clause, which authorizes Congress to “regulate Commerce with . . . Indian Tribes.”<sup>3</sup> U.S. Const. art. I, sec. 8, cl. 3. “[N]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities.” *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). Congress’s authority to aid Indian communities, moreover, extends to all such

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<sup>2</sup> Effective September 1, 2016, the U.S. House of Representatives’ Office of the Law Revision Counsel reclassified certain statutory provisions in Title 25 cited in the proposed rule. Because the reclassified version of Title 25 is not widely available in printed form as of the date of this publication, the Department retained the statutory citations referenced in the proposed rule. The new citations and more information about the reclassification of Title 25 can be found at: [http://uscode.house.gov/editorial\\_reclassification/t25/index.html](http://uscode.house.gov/editorial_reclassification/t25/index.html) (last visited Sept. 14, 2016).

<sup>3</sup>“The term “Indian” was first applied by Columbus to the native people of the New World based on the mistaken belief that he had found a sea route to India. The term has been understood ever since to refer to the indigenous people who inhabited the New World before the arrival of the first Europeans. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832) (referring to Indians as “those already in possession [of the land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man”); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572-74 (1823) (referring to Indians as “original inhabitants” or “natives” who occupied the New World before discovery by “the great nations of Europe”).

At the time of the Framers and in the nineteenth century, the terms “Indian,” “Indian affairs,” and “Indian tribes” were used to refer to the indigenous peoples not only of the Americas but also of the Caribbean and areas of the Pacific extending to Australia, New Zealand, and the Philippines. *See, e.g.,* W. Dampier, *A New Voyage Around the World* (1697); Joseph Banks, *The Endeavor Journal of Sir Joseph Banks* (1770); William Bligh, *Narrative of the Mutiny on the Bounty* (1790); A.F. Gardiner, *Friend of Australia* (1830); James Cook, *A Voyage to the Pacific Ocean* (1784) (referring to Native Hawaiians).

communities within the borders of the United States, “whether within its original territory or territory subsequently acquired.” *Sandoval*, 231 U.S. at 46. Thus, despite differences in language, culture, religion, race, and community structure, Native people in the East, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Plains, *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Southwest, *Sandoval*, 231 U.S. at 46, the Pacific Northwest, *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), and Alaska, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), all fall within Congress’s Indian affairs power. *See* Solicitor’s Opinion, *Status of Alaskan Natives*, 53 I.D. 593, 605 (Decisions of the Department of the Interior, 1932) (It is “clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians.”); Felix Cohen’s *Handbook of Federal Indian Law*, at 401, 403 (1942 ed.) (Constitution is source of authority over Alaska Natives). So too, Congress’s Indian affairs power under the Constitution extends to the Native Hawaiian community. *See* Organic Act (applying Constitution to Territory of Hawaii and declaring all persons who were citizens of the Republic of Hawaii on August 12, 1898 citizens of the United States); *see also* Nationality Act of 1940, 54 Stat. 1137, 1138 (making every “person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” a citizen).

Exercising this plenary power over Indian affairs, Congress delegated to the President the authority to “prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.” 25 U.S.C. 9. Congress charged the Secretary with directing, consistent with “such regulations as the President may prescribe,” the “management of all Indian affairs and of all

matters arising out of Indian relations.” 25 U.S.C. 2. And Congress expressly authorized the Secretary to supervise “public business relating to . . . Indians,” 43 U.S.C. 1457(10), and to “prescribe regulations for the government of [the Department of the Interior] . . . [and for] the distribution and performance of its business,” 5 U.S.C. 301.

Congress recognized and ratified its delegation of authority to the Secretary to recognize self-governing Native American groups in the Federally Recognized Indian Tribe List Act of 1994, 108 Stat. 4791 (the List Act). *See* 25 U.S.C. 479a & note (recognizing the Secretary’s authority to acknowledge that Native American groups “exist as an Indian tribe”). The Congressional findings included in the List Act confirm the ways in which an Indian tribe gains acknowledgment or recognition from the United States, including that “Indian tribes presently may be recognized by Act of Congress . . . .” 25 U.S.C. 479a note. Here, Congress recognized Native Hawaiians through more than 150 separate statutes. At the same time, the language of the List Act’s definition of the term “Indian tribe” is broad and encompasses the Native Hawaiian community. *See* 25 U.S.C. 479a(2).<sup>4</sup>

Over many decades and more than 150 statutes, Congress exercised its plenary power over Indian affairs to recognize that the Native Hawaiian community exists as an Indian tribe within the meaning of the Constitution. Through these statutes, the United States maintains a special political and trust relationship with the Native Hawaiian community. Congress also charged the Secretary with the duty to “effectuate and implement the special legal relationship between the Native Hawaiian people and the United States.” Act of January 23, 2004, sec. 148, 118 Stat. 445. The Secretary’s promulgation of a process and criteria by which the United States

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<sup>4</sup> As discussed more fully in Section (IV)(C), Native Hawaiians would not be added to the list that the Secretary is required to publish under sec. 104 of the List Act, 25 U.S.C. 479a-1(a), because Congress provides a separate suite of programs and services targeted directly to Native Hawaiians and not through programs broadly applicable to Indians in the continental United States.

may reestablish a formal government-to-government relationship with a reorganized Native Hawaiian government whose request satisfies the rule's requirements simply acknowledges and implements what Congress already made clear on more than 150 occasions, stretching back nearly a century. *See, e.g.*, 12 U.S.C. 1715z-13b; 20 U.S.C. 80q *et seq.*; 20 U.S.C. 7511 *et seq.*; 25 U.S.C. 3001 *et seq.*; 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 2991 *et seq.*; 42 U.S.C. 3057g *et seq.*; 42 U.S.C. 11701 *et seq.*; 54 U.S.C. 302706; HHCA, 42 Stat. 108; Admission Act, 73 Stat. 4; Apology Resolution, 107 Stat. 1510; HHLRA, 109 Stat. 357 (1995).

Reestablishment of a formal government-to-government relationship would allow the United States to more effectively implement the special political and trust relationship that Congress established between the United States and the Native Hawaiian community and administer the Federal programs, services, and benefits that Congress created specifically for the Native Hawaiian community. As discussed above, Native Hawaiians are indigenous people of the United States who have retained inherent sovereignty and with whom Congress established a special political and trust relationship through a course of dealings over many decades. Congress repeatedly regulated the affairs of the Native Hawaiian community as it has with other Indian tribes, consistent with its authority under the Constitution. Hence, § 50.44(a) of the final rule states that upon reestablishment of the formal government-to-government relationship, the Native Hawaiian Governing Entity will have the same formal government-to-government relationship under the United States Constitution as the formal government-to-government relationship between the United States and a federally-recognized tribe in the continental United States (subject to the limitation on programs, services, and benefits appearing in § 50.44(d)), will have the same inherent sovereign governmental authorities, and will be subject to the same plenary authority of Congress, *see* § 50.44(b).

**Definitions.** Congress employs two definitions of “Native Hawaiians,” which the rule labels as “HHCA Native Hawaiians” and “Native Hawaiians.” The former is a subset of the latter, so every HHCA Native Hawaiian is by definition a Native Hawaiian. But the converse is not true: some Native Hawaiians are not HHCA Native Hawaiians.

As used in the rule, the term “HHCA Native Hawaiian” means a Native Hawaiian individual who meets the definition of “native Hawaiian” in HHCA sec. 201(a)(7), 42 Stat. 108 (1921), and thus has at least 50 percent Native Hawaiian ancestry, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA. Satisfying this definition generally requires that documentation demonstrating eligibility under HHCA sec. 201(a)(7) be available, such as official Department of Hawaiian Home Lands (DHHL) records or other State records. *See* response to comment (1)(c)(1) below for further discussion. The availability of such documentation may be attested to by a sworn statement which, if false, is punishable under Federal or state law. *See, e.g.,* Haw. Rev. Stat. 710-1062 (2016). Alternatively, a sworn statement of a close family relative who is an HHCA Native Hawaiian may be used to establish that a person meets the HHCA’s definition.

The term “Native Hawaiian,” as used in the rule, means an individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. This definition flows directly from multiple Acts of Congress. *See, e.g.,* 12 U.S.C. 1715z-13b(a)(6); 25 U.S.C. 3001(10); 25 U.S.C. 4221(9); 42 U.S.C. 254s(c); 42 U.S.C. 11711(3). Satisfying this definition generally requires that records documenting generation-by-generation descent be available, such as enumeration on a roll or list of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where

the enumeration was based on documentation that verified descent, or through current or prior enrollment as a Native Hawaiian in a Kamehameha Schools program. The availability of such documentation may be attested to by sworn statement which, if false, is punishable under state law. A Native Hawaiian may also sponsor a close family relative through a sworn statement attesting that the relative meets the definition of Native Hawaiian. Enumeration in official DHHL records demonstrating eligibility under the HHCA also would satisfy the definition of “Native Hawaiian,” as it would show that a person is an HHCA Native Hawaiian and by definition a “Native Hawaiian” as that term is used in this rule.

In keeping with the framework created by Congress, the rule requires that, to reestablish a formal government-to-government relationship with the United States, a Native Hawaiian government must have a constitution or other governing document ratified both by a majority vote of Native Hawaiians and by a majority vote of those Native Hawaiians who qualify as HHCA Native Hawaiians. Thus, regardless of which Congressional definition is used, a majority of the voting members of the community with which Congress established a trust relationship through existing legislation will confirm their support for the Native Hawaiian government’s structure and fundamental organic law.

**Ratification Process.** The rule sets forth certain requirements for the process of ratifying a constitution or other governing document, including requirements that the ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that all voters are actually eligible to vote. Recognizing that the community may seek further explanation on the technical aspects of the rule, including the ratification process explained below and the use of sworn statements explained in Section

(IV)(B), the Department will provide technical assistance at the request of the Native Hawaiian community.

*Form of ratification.* The rule does not fix the form of the ratification referendum. For example, the ratification could be an integral part of the process by which the Native Hawaiian community adopts its governing document, or the referendum could take the form of a special election held solely for the purpose of measuring Native Hawaiian support for a governing document adopted through other means. The ratification referendum by the Native Hawaiian community need not be the same election in which the Native Hawaiian community initially adopts a governing document. The referendum could be conducted simultaneously or separately for both HHCA Native Hawaiians and Native Hawaiians. The ratification process must, however, provide separate vote tallies for (a) HHCA Native Hawaiian voters and (b) all Native Hawaiian voters.

*Thresholds indicating broad-based community support.* To ensure that the ratification vote reflects the views of the whole Native Hawaiian community, the turnout in the ratification referendum must be sufficiently large to demonstrate broad-based community support. Accordingly, the rule focuses on the number who vote in favor of the governing document rather than the number of voters who participate in the ratification referendum. Specifically, the rule requires a minimum of 30,000 affirmative votes from Native Hawaiian voters, including a minimum of 9,000 affirmative votes from HHCA Native Hawaiians, as an objective measure to ensure that the vote represents the views of the Native Hawaiian community as a whole. The Secretary will only evaluate a request under this rule that meets this minimum broad-based community participation threshold.

In addition to this minimum affirmative-vote threshold, the rule creates a presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 HHCA Native Hawaiians. If a request meets these thresholds (50,000 and 15,000), the Secretary would be well justified in finding broad-based community support among Native Hawaiians.

*Explanation of data used to support thresholds.* There is no existing applicable numerical standard for measuring broad-based community support. The Department accordingly applied its expertise to develop such a standard based on available data. For reasons explained in the proposed rule (*see* 80 FR at 59124-25) and in this rule's Responses to Comments (Section (IV)(B)), the Department took a range of evidence into account, including actual data on voter turnout in the State of Hawaii, which indicates that the above thresholds are appropriate and achievable in practice. Based on the volume of comments received on the issue during the proposed-rule stage, the Department determined there is a need for further explanation about how it calculated the range of voter turnout. Described below is one of the reasoned methods the Department used to calculate the numerical thresholds for community support as well as the ranges for affirmative votes. The following method illustrates one of the many reasonable methods for calculating the required thresholds.

#### *Summary*

The Department first reviewed Native Hawaiian voter turnout numbers in Hawaii for national and State elections and determined those numbers indicate broad-based participation within Hawaii in those elections. Actual voter data from 1998 supports this conclusion. There were just over 100,000 Native Hawaiian registered voters, nearly 65,000 of whom cast ballots in that off-year (*i.e.*, non-presidential) Federal election. That same year, the total number of

registered voters in Hawaii (Native Hawaiian and non-Native Hawaiian) was about 601,000, and about 413,000 of those voters cast a ballot. By the 2012 general presidential election, Hawaii's total number of registered voters (Native Hawaiian and non-Native Hawaiian) increased to about 706,000, of whom about 437,000 cast a ballot. And in the 2014 general gubernatorial election, the equivalent figures were about 707,000 and about 370,000, respectively. The Department concludes that such turnouts are a valid measure of broad-based participation in elections.

Second, to determine the turnout numbers today that indicate broad-based participation by the Native Hawaiian community, the Department estimated the percentage of Native Hawaiian voters within that general voter turnout. This estimate is based on actual voter data from 1988 to 1998 (*see* table below). The Department then adjusted that estimate to account for the growth in the number of Native Hawaiians as a percentage of the general population of Hawaii, and projected the percentage of Native Hawaiians within the reported voter turnout in recent elections in Hawaii, discussed below in more detail.

Third, the Department adjusted the estimate upward to account for out-of-State Native Hawaiian voters. These calculations result in a range of the number of anticipated Native Hawaiian voters, between 60,000 and 100,000, which the Department determined indicates broad-based community participation. The minimum required number of affirmative votes by Native Hawaiians is based on the low-end figure of this range, *i.e.*, 30,000.

Finally, the Department estimated the number of affirmative votes required of HHCA Native Hawaiians to demonstrate their broad-based support as 30 percent of the Native Hawaiian threshold, since HHCA Native Hawaiian adults are approximately 30 percent of the Native Hawaiian adult population, as discussed in more detail below.

*Supporting Explanation*

Different approaches result in different estimates based on the broad range of evidence that the Department examined. The Department is reassured, however, by the fact that different methods produced roughly similar estimates. Weighing the available data, and applying different methods to analyze those data, the Department concluded that it is reasonable to expect that a Native Hawaiian ratification referendum would have a turnout somewhere in the range between 60,000 and 100,000, although a figure outside that range is possible. The Department concludes that turnout within this range demonstrates broad-based participation.

Of course, turnout in a Native Hawaiian ratification referendum could diverge from Native Hawaiian turnout in a regular general election; but the year-to-year consistency of turnout figures from regular general elections in Hawaii suggests strong patterns that are likely to be replicated in a Native Hawaiian ratification referendum. Generally, more recent data are preferable to older data when projecting future turnout. If Native Hawaiian voter-turnout data for the most recent elections existed, the Department would have considered it. Because such data are not available, however, the Department analyzed the last six elections in which separate voter-turnout figures specifically for Native Hawaiians are available (1988 to 1998), as well as overall (Native Hawaiian and non-Native Hawaiian) voter-turnout figures for 1988 to 2014, the date of the most recent biennial general election. The figures are reproduced in the following table:

<b>Year</b>	<b>Overall Voter Turnout (Native Hawaiian and Non-Native Hawaiian, Combined)*</b>	<b>Native Hawaiian Voter Turnout**</b>	<b>Native Hawaiian Voters as % of Voter Turnout***</b>
1988	368,567	48,238	13.09
1990	354,152	49,231	13.90
1992	382,882	51,029	13.33
1994	377,011	55,424	14.70

1996	370,230	52,102	14.07
1998	412,520	64,806	15.71
2000	371,379	Unknown	
2002	385,462	Unknown	
2004	431,662	Unknown	
2006	348,988	Unknown	
2008	456,064	Unknown	
2010	385,464	Unknown	
2012	437,159	Unknown	
2014	369,642	Unknown	

\* Data from the Hawaii Office of Elections, which recorded on its website the actual voter-turnout figures from presidential-year (*e.g.*, 2012, 2008, 2004) and off-year or gubernatorial (*e.g.*, 2014, 2010, 2006) general elections in Hawaii.

\*\* For biennial general elections prior to the Supreme Court’s decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Office of Elections’ website shows voter-turnout figures for the State as a whole and also specifically for Native Hawaiian voters (because only Native Hawaiian voters were qualified to vote in OHA elections prior to 2000). Starting in 2000, the same source shows voter-turnout figures only for the State as a whole, that is, for the undifferentiated combination of Native Hawaiians and non-Native Hawaiians.

\*\*\* Native Hawaiian voters average 14.13 percent of the voter turnout in these six elections.

These figures show that overall turnout generally increased during the 1988-to-2014 period, although not always smoothly, and that Native Hawaiian turnout was doing the same during the 1988-to-1998 period, but at a somewhat faster rate than the overall turnout was increasing.

These trends are consistent with census data showing Hawaii’s population increasing and showing Hawaii’s Native Hawaiian population increasing more rapidly than its non-Native population.

As the table above shows, overall turnout for this entire period (1988 to 2014) ranged from a low of 348,988 to a high of 456,064. The Native Hawaiian percentage of the overall turnout, for the years for which the table contains such data (1988 to 1998), ranged from a low of 13.1 percent in 1988 (48,238 divided by 368,567) to a high of 15.7 percent in 1998 (64,806 divided by 412,520). Since 1998, the fraction of the State’s population that is Native Hawaiian grew by about 14.4 percent (this figure is derived by extrapolating from data showing Hawaii’s

Native Hawaiian population and Hawaii's total population in the 2000 and 2010 Federal decennial censuses).

Applying the population growth percentage of 14.4 to the voter-turnout numbers and then applying the Native Hawaiian voter-turnout percentage figures to those adjusted numbers results in a potential turnout of in-State Native Hawaiians that ranges from a low of about 52,300 ( $1.144 \times 348,988 \times 0.131 = 52,300$ ) to a high of about 81,913 ( $1.144 \times 456,064 \times 0.157 = 81,913$ ). The Department concludes that this voter-turnout range would reflect broad-based community participation of in-State Native Hawaiians.

The rule also accounts for Native Hawaiians residing out-of-State who can participate in the ratification referendum. The out-of-State Native Hawaiian population is roughly comparable in size to the in-State Native Hawaiian population. Many Native Hawaiians living outside Hawaii remain strongly engaged with the Native Hawaiian community, as reflected in the substantial number of comments on this rule from Native Hawaiians residing out-of-State and by many Native Hawaiian civic organizations in the continental United States. Notwithstanding the number of comments, the Department concludes that the rate of participation of this population in a nation-building process is likely to be considerably lower than that of in-State Native Hawaiians.

One indicator of lower out-of-State Native Hawaiian voter turnout is the relatively low number of out-of-State Native Hawaiians on the Native Hawaiian Roll Commission's (NHRC's) Kanaiolowalu roll. Although the precise number of out-of-State Native Hawaiians on the roll is not public information, delegates were initially apportioned based on their percentage participation in the roll. Seven of the 40 delegates were apportioned to out-of-State Native Hawaiians, indicating that approximately 17.5 percent of the persons on the roll are from out-of-

State, even though approximately half of all Native Hawaiians reside out-of-State. Based on these figures, the Department projected a significantly lower participation rate for out-of-State Native Hawaiians, and adjusted its in-State voter turnout figures upward by approximately 20-percent to reflect anticipated participation by out-of-State Native Hawaiians. Since the seven out-of-State delegates are equivalent to 21.2 percent of the 33 in-State delegates, the 20-percent adjustment factor is generally consistent with available information about the likely rate of engagement of the out-of-State Native Hawaiian population (33 times 120 percent equals approximately 40 delegates total).

Some data would point to a lower adjustment factor and some would point to a higher factor. For example, in 1996 when the Hawaiian Sovereignty Elections Council (HSEC) conducted its “Native Hawaiian Vote” election, which asked Native Hawaiians whether they wished to elect delegates to propose a Native Hawaiian government, only 3.2 percent of the more than 30,000 returned ballots came from out of State. The Department did not use this low percentage, however, as it appears to be attributable, at least in part, to the fact that the HSEC’s list of potential voters contained relatively few Native Hawaiians living outside Hawaii. *See* Hawaiian Sovereignty Elections Council, *Final Report* 28 (Dec. 1996).

Census data is another source of information about the potential participation in, or affiliation with, the Native Hawaiian community is the distribution of speakers of the Hawaiian language. Census data from 2009 to 2013 indicate that about 29 percent of U.S. residents who speak the Hawaiian language (7,595 out of 26,205) resided out-of-State. Although use of native language indicates strong ties to the community, the Department gave the language data less weight than information on actual participation in voting or other political or nation-building

processes, because official efforts in Hawaii to suppress the Hawaiian language in the early twentieth century artificially alters the significance of this distribution.

In sum, the Department concludes that 20 percent is a reasonable adjustment factor given the limits of available data and the uncertainties with respect to participation of the out-of-State population. Applying that 20-percent adjustment factor for out-of-State voters to the in-State turnout estimate (52,300 to 81,913) results in a total range (in-State plus out-of-State) from about 62,760 to about 98,296. This range is an estimate, based on one specific methodology. This range — like the ranges produced by many other methodologies, employing a broad set of data — comports with the Department’s conclusion that it is reasonable to expect that a Native Hawaiian ratification referendum would have a turnout somewhere in the range between 60,000 and 100,000, although a figure outside that range is possible.

A majority vote is necessary to support a governing document. With voter turnout of 60,000, a majority would require over 30,000 affirmative votes; with a voter turnout of 100,000, a majority would require over 50,000 affirmative votes. On this basis, the Department determined that 30,000 affirmative votes (where they represent a majority of those cast) is the rule’s minimum threshold for potentially showing broad-based community support, and 50,000 affirmative votes (where they represent a majority of those cast) creates a presumption of such support.

Finally, for the HHCA Native Hawaiians, each figure in the rule is exactly 30-percent of the equivalent figure for Native Hawaiians. As explained in detail below, the Department’s best estimate is that adult HHCA Native Hawaiians comprise approximately 30 percent of adult Native Hawaiians. This estimate is based not on DHHL records, but on the Department’s best estimate of the respective populations of the two groups.

The derivation of this 30-percent figure requires some background. Justice Breyer’s concurring opinion in *Rice v. Cayetano*, 528 U.S. 495, 526 (2000), cited the *Native Hawaiian Data Book*, which indicated that about 39 percent of the Native Hawaiian population in Hawaii in 1984 had at least 50 percent Native Hawaiian ancestry and therefore would satisfy the rule’s definition of an HHCA Native Hawaiian. See *Native Hawaiian Data Book* (2015), available at <http://www.ohadatabook.com>. The 1984 data included information by age group, which suggested that the fraction of the Native Hawaiian population with at least 50 percent Native Hawaiian ancestry is likely declining over time. Specifically, the 1984 data showed that Native Hawaiians with at least 50 percent Native Hawaiian ancestry constituted about 20.0 percent of Native Hawaiians born between 1980 and 1984, about 29.5 percent of Native Hawaiians born between 1965 and 1979, about 42.4 percent of Native Hawaiians born between 1950 and 1964, and about 56.7-percent of Native Hawaiians born between 1930 and 1949. The median voter in most U.S. elections today (and for the next several years) is likely to fall into the group born between 1965 and 1979. Therefore, the current population of HHCA Native Hawaiian voters is estimated to be about 30 percent as large as the current population of Native Hawaiian voters.

The conclusion that the median voter in an election held in 2016 (and for the next several years) is likely to fall into the 1965-to-1979 group is bolstered by data from the Hawaiian Sovereignty Elections Council’s 1996 “Native Hawaiian Vote.” In that election, the median voters were in their low- to mid-40s, roughly the equivalent of a voter today who was born in 1971 or 1972. See Hawaiian Sovereignty Elections Council, *Final Report* 28 (Dec. 1996).

Although the data from DHHL records are of limited relevance here, the rule’s 9,000- and 15,000-affirmative-vote thresholds appear to be in harmony with key DHHL data. According to the 2014 DHHL Annual Report there were 9,838 leases of Hawaiian home lands as of June

30, 2014, of which 8,329 were residential (the remaining leases were for either agricultural or pastoral land). Therefore, it is reasonable to assume there are at least 8,329 families living in homestead communities throughout Hawaii, in addition to the nearly 28,000 individual applicants awaiting a homestead lease award. And a significant number of HHCA Native Hawaiians likely are neither living in homestead communities nor awaiting a homestead lease award. The DHHL data therefore are consistent with the Department's conclusion that it is reasonable to expect that a ratification referendum would have a turnout of HHCA Native Hawaiians somewhere in the range between 18,000 and 30,000, although a figure outside that range is possible. And to win a majority vote in that range would require over 9,000 (for a turnout of 18,000) to over 15,000 (for a turnout of 30,000) affirmative votes from HHCA Native Hawaiians. On this basis, the Department determined that 9,000 affirmative votes from HHCA Native Hawaiians (where they represent a majority of those cast) is the rule's minimum threshold for potentially showing broad-based community support and 15,000 affirmative votes from HHCA Native Hawaiians (where they represent a majority of those cast) creates a presumption of such support.

**The Native Hawaiian Government's Constitution or Governing Document.** The form or structure of the Native Hawaiian government is left for the community to decide. Section 50.13 of the rule does, however, set forth certain minimum requirements for reestablishing a formal government-to-government relationship with the United States. The constitution or other governing document of the Native Hawaiian government must provide for "periodic elections for government offices," describe procedures for proposing and ratifying constitutional amendments, and not violate Federal law, among other requirements.

The governing document must also provide for the protection and preservation of the rights of HHCA beneficiaries. In addition, the governing document must protect and preserve the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers in accord with the Indian Civil Rights Act of 1968, as amended (25 U.S.C. 1301 *et seq.*). The Native Hawaiian community would make the decisions as to the institutions of the new government, the form of any legislative body, the means for ensuring independence of the judiciary, whether certain governmental powers would be centralized in a single body or decentralized to local political subdivisions, and other structural questions.

As to concerns that a subsequent amendment to a governing document could impair the safeguards of § 50.13, Federal law provides both defined protections for HHCA beneficiaries and specific guarantees of individual civil rights, and such an amendment could not contravene applicable Federal law. The drafters of the governing document may also choose to include additional provisions constraining the amendment process; the Native Hawaiian community would decide that question in the process of drafting and ratifying that document.

**Membership Criteria.** As the Supreme Court explained, a Native community's "right to define its own membership . . . has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). The rule therefore provides only minimal guidance about what the governing document must say with regard to membership criteria. HHCA Native Hawaiians must be included, non-Natives must be excluded, and membership must be voluntary and relinquishable. But the community itself would otherwise be free to decide its membership criteria.

**Single Government.** The rule provides for reestablishment of relations with only a single sovereign Native Hawaiian government. This limitation is consistent with Congress's

enactments with respect to Native Hawaiians, which treat members of the Native Hawaiian community as a single indigenous people. The Native Hawaiian community will decide what form of government to adopt, and may provide for political subdivisions if it so chooses. Such political subdivisions could be defined by island, by geographic districts, by historic circumstances, or otherwise in a fair and reasonable manner. Allowing for political subdivisions is consistent with principles of self-determination applicable to Native groups, and provides some flexibility should Native Hawaiians wish to provide for subdivisions with whatever degree of autonomy the community determines is appropriate, although only a single formal government-to-government relationship with the United States would be established.

**The Formal Government-to-Government Relationship.** Statutes such as the National Historic Preservation Act of 1966, the Native American Graves Protection and Repatriation Act, and the HHLRA established specific processes for interaction between the Native Hawaiian community and the U.S. government. The rule provides a process and criteria for reestablishing a “formal government-to-government relationship,” which would, among other benefits, enable the Native Hawaiian community to work directly with the Federal Government to implement additional appropriate Native Hawaiian programs. The rule requires that the request to reestablish a formal government-to-government relationship reflect the will of the Native Hawaiian people through broad-based community support.

**Submission and Processing of the Request.** In addition to establishing a set of criteria for the Secretary to apply in reviewing a request from a Native Hawaiian government, the rule sets out the procedure by which the Department will receive and process a request from the authorized officer of the governing body seeking to reestablish a formal government-to-government relationship. This rule includes processes for submitting a request, for public

comment on any request received, and for issuing a final decision on the request. Because Congress has already acknowledged or recognized the Native Hawaiian community, the Secretary's determination in this part is limited to the process for reestablishing a formal government-to-government relationship with the Native Hawaiian Governing Entity. Additional processes are not required.

**Other Provisions.** The rule also contains provisions governing technical assistance, clarifying the implementation of the formal government-to-government relationship, and addressing related issues. The rule explains that the formal government-to-government relationship with the Native Hawaiian Governing Entity would have virtually the same legal basis and structure as the formal government-to-government relationship between the United States and federally-recognized tribes in the continental United States. Accordingly, the government-to-government relationship with the Native Hawaiian Governing Entity would have very different characteristics from the government-to-government relationship that formerly existed with the Kingdom of Hawaii. The Native Hawaiian Governing Entity would remain subject to the same authority of Congress and the United States to which federally-recognized tribes in the continental United States are subject and would remain ineligible for Federal Indian programs, services, and benefits provided to Indian tribes in the continental United States and their members (including funding from the Bureau of Indian Affairs and the Indian Health Service) unless Congress expressly declared otherwise.

The rule also clarifies that neither this rulemaking nor granting a request submitted under the rule would affect the rights of HHCA beneficiaries or the status of HHCA lands. Section 50.44(f) makes clear that reestablishment of the formal government-to-government relationship does not affect the title, jurisdiction, or status of Federal lands and property in Hawaii. This

provision does not affect lands owned by the State or provisions of state law. *Cf.* Haw. Rev. Stat. 6K-9 (2016) (“[T]he resources and waters of Kahoolawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.”). Section 50.44 also explains that the reestablished government-to-government relationship would more effectively implement statutes that specifically reference Native Hawaiians, but would not extend the programs, services, and benefits available to Indian tribes in the continental United States to the Native Hawaiian Governing Entity or its members, unless a Federal statute expressly authorizes it. These provisions also state that if the Secretary determines to grant the request to reestablish a formal government-to-government relationship, the Department will publish notice in the **Federal Register** and the determination will be effective 30 days after publication, at which time the formal government-to-government relationship will be reestablished. Individuals’ eligibility for any program, service, or benefit under any Federal law that was in effect before the final rule’s effective date would be unaffected. Likewise, the rule does not affect Native Hawaiian rights, protections, privileges, immunities, and benefits under Article XII of the Constitution of the State of Hawaii. This rule would not alter the sovereign immunity of the United States or the sovereign immunity of the State of Hawaii.

**(A) How the Rule Works**

If a reorganized Native Hawaiian government decides to seek a formal government-to-government relationship with the United States, it must submit a written request to the Secretary, as provided in § 50.20. The request must include a written narrative with supporting documentation thoroughly addressing the elements set forth in § 50.10. If the Secretary determines that the request appears to contain these elements and is consistent with the

affirmative-vote requirements set out in § 50.16(g)-(h), the Secretary will publish notice of receipt of the request in the **Federal Register** and post the request to the Department’s website. The public will have the opportunity to comment on the request and submit evidence on whether the request meets the criteria described in § 50.16, and the requester may respond to those comments or evidence. The Secretary will review the request to determine whether it meets the criteria described in § 50.16 and is consistent with this part, along with any public comments and evidence and the requester’s responses to those comments and evidence, to make a decision granting or denying the request. If the request is granted, the Secretary’s decision will take effect 30 days after publication of a notice in the **Federal Register** and the requester will be identified as the Native Hawaiian Governing Entity (or the official name stated in that entity’s governing document), and a formal government-to-government relationship will be reestablished with the Native Hawaiian Governing Entity as the sole representative sovereign government of the Native Hawaiian community.

**(B) Major Changes**

After the Department reviewed and considered public comments, it made several key clarifications and changes in this final rule (indicated below in italics). The final rule:

- Includes the Native Hawaiian community’s ability to *more effectively exercise its inherent sovereignty and self-determination* as an additional purpose of the rule (§ 50.1(a));
- Adds definitions of “*sponsor*,” “*State*,” and “*sworn statement*” (§ 50.4);
- *Eliminates the U.S. citizenship requirement* (§§ 50.4; 50.12);

- Provides that the *Native Hawaiian community itself must prepare a list of eligible voters* to ratify its governing document and clarifies that *reliance on existing rolls prepared by others is optional* (§ 50.12(a));
- Clarifies means for individuals to demonstrate a right to vote in the ratification referendum, *e.g.*, individuals may use *sworn statements* for self-certification or for sponsoring a close family relative to demonstrate “HHCA Native Hawaiian” and “Native Hawaiian” status for purposes of voting in the ratification referendum (§ 50.12(b), (c));
- Increases the comment period for the public to submit comments and evidence on a request to reestablish a government-to-government relationship to *60 days*, provides the Department *20 days* after the close of that comment period to post comments/evidence to its Web site (§ 50.30), and permits the requester *60 days* to respond to any such comments/evidence (§ 50.31);
- Limits extensions of any deadline under §§ 50.30 and 50.31 to a total of *90 days*, provided that an extension request is *in writing and sets forth good cause* (§ 50.32);
- Clarifies that *if the Secretary is unable to render a decision on a request within 120 days following close of the comment periods, the Secretary will provide notice to the requester, and include an explanation of the need for more time and an estimate of when a decision will be made* (§ 50.40);
- *Delays the effective date of the Secretary’s decision until 30 days after publication in the Federal Register* (§ 50.42); and
- Further clarifies that reestablishment of the formal government-to-government relationship *does not* affect the title, jurisdiction, or status of Federal lands and property in Hawaii (§ 50.44(f)).

### (C) Key Issues

The Department reviewed comments on a wide range of issues, but received significant comment on a narrow set of key issues. These issues are more fully addressed in responses to comments in Section (IV)(B) below, but are summarized here:

- **Land into trust.** The Department's ability to take land into trust for the Native Hawaiian Governing Entity is constrained by Federal law. The Indian Reorganization Act does not apply to Hawaii and therefore does not authorize the Department to take land into trust for the Native Hawaiian Governing Entity. And no other current Federal law authorizes such action. *See* Section (IV)(B).
- **Indian Gaming Regulatory Act.** The Native Hawaiian Governing Entity may not conduct gaming activities under the Indian Gaming Regulatory Act (IGRA). *See* Section (IV)(B).
- **Federally Recognized Indian Tribe List Act of 1994 (List Act).** The Native Hawaiian Governing Entity will not appear on the list of federally-recognized Indian tribes required under the List Act. *See* Section (IV)(C).

### (D) Section-by-Section Analysis

This portion of the preamble previews the final rule and highlights certain aspects of the rule that may benefit from additional explanation.

#### **Subpart A – General Provisions, Sections 50.1, 50.2, 50.3, and 50.4.**

These provisions establish the purpose of this rule and explain that if a Native Hawaiian government requests a formal government-to-government relationship with the United States, as described in § 50.10, such a relationship will be reestablished only if the request is granted as described in §§ 50.40 to 50.43. The general provisions also provide that the United States will

reestablish a formal government-to-government relationship with only a single Native Hawaiian government.

These provisions also define key terms used throughout the rule. *Native Hawaiian community* and *Native Hawaiian* are defined in terms that encompass all the Native Hawaiians recognized by Congress, while *HHCA Native Hawaiian* is limited to Native Hawaiians as defined in the HHCA. The rule defines *Federal Indian programs, services, and benefits* separately from *Federal Native Hawaiian programs, services, and benefits* to parallel Congress's approach limiting eligibility for specific programs, services, and benefits. *Federal Indian programs, services, and benefits* include, but are not limited to, those provided by the Bureau of Indian Affairs and the Indian Health Service, which do not extend to Native Hawaiians.

**Subpart B – Criteria for Reestablishing a Formal Government-to-Government Relationship, Sections 50.10, 50.11, 50.12, 50.13, 50.14, 50.15, and 50.16.**

These provisions collectively explain what the Native Hawaiian community must include in its request submitted under this part.

Section 50.10 sets out the elements of the request itself. Those elements include specific written narratives for four elements, a ratified governing document that meets the requirements of § 50.13, a resolution of the Native Hawaiian governing body authorizing its officer to submit a request for a government-to-government relationship, and the officer's certification of that request. The narratives must describe: how the governing document reflects the will of the Native Hawaiian community (§ 50.11); who could participate in ratifying the governing document, and how the community distinguished HHCA Native Hawaiians from other Native Hawaiians (§ 50.12); information about the ratification referendum (§ 50.14); and information about the elections for government offices (§ 50.15). The Department respects the Native Hawaiian community's self-determination, particularly through drafting a governing document.

As a result, the rule's provisions relating to the process of drafting the community's governing document provide only minimum criteria that must be satisfied for the Secretary to reestablish a formal government-to-government relationship with the community. And, while the rule text refers to "periodic elections for government offices identified in the governing document," nothing in the rule precludes the establishment of appointed positions as well. Section 50.16 lists the eight criteria that the Secretary will consider when determining whether to reestablish a formal government-to-government relationship. The final rule makes clear that, in determining whether the request meets the criteria described in § 50.16, the Secretary may also consider whether the request is consistent with this part. *See* §§ 50.40, 50.41.

### **Subpart C – Process for Reestablishing a Formal Government-to-Government Relationship.**

This subpart addresses the procedural aspects of the rule, from the mechanics of submission to the notice-and-comment process. The final two sections, §§ 50.43 and 50.44, discuss the impact and implementation of reestablishing a formal government-to-government relationship.

The provisions of this rule are generally applicable only in response to a specific request for the reestablishment of a formal government-to-government relationship. Section 50.21 recognizes that the Department is prepared to provide technical assistance if requested. The rule does not, however, create an individual interest or cause of action allowing a challenge to the Native Hawaiian community's drafting, ratification, or implementation of a governing document, separate and apart from any proceedings that would follow the submission of a request under this part. By their terms, §§ 50.43 and 50.44 only apply following reestablishment of a formal government-to-government relationship and define the implementation of that relationship.

## **(IV) Public Comments on the Proposed Rule and Responses to Comments**

### **(A) Overview**

The Department actively sought public input in two stages on the rule's administrative procedure and criteria for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

First, in June 2014, the Department published an ANPRM seeking input from leaders and members of the Native Hawaiian community and federally-recognized tribes in the continental United States. 79 FR 35296-303 (June 20, 2014). The ANPRM asked five threshold questions: (1) Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community? (2) Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship? (3) If so, what process should be established for drafting and ratifying a reorganized government's constitution or other governing document? (4) Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with Federal law? (5) If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgment of a government-to-government relationship with the reorganized Native Hawaiian government? The Department posed 19 additional, specific questions concerning the reorganization of a Native Hawaiian government and a Federal process for reestablishing a formal government-to-government relationship. The ANPRM marked the beginning of ongoing discussions with the Native Hawaiian community, consultations with federally-recognized tribes in the continental United States, and input from the public at large.

The Department received extensive public comments on the ANPRM. The Department received general comments, both supporting and opposing the ANPRM, from individual members of the public, Members of Congress, State legislators, and community leaders.

Second, after careful review and analysis of the comments on the ANPRM, in October 2015 the Department issued a Notice of Proposed Rulemaking, *Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community*, 80 FR 59113-132 (Oct. 1, 2015), setting forth an administrative procedure and criteria that the Secretary would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States. The proposed rule did not provide a process for reorganizing a Native Hawaiian government, agreeing with many ANPRM commenters that the process of drafting a constitution or other governing document and reorganizing a government should be driven by the Native Hawaiian community, not by the Federal Government. Over the course of a 90-day comment period that ended on December 30, 2015,<sup>5</sup> the Department again received extensive public comments, including unique public submissions and duplicate mass mailings covering a wide range of issues. The issues discussed in Section (IV)(B) encompass the range of significant issues presented in the comments on the proposed rule.

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<sup>5</sup> The comment period closed on Wednesday, December 30, 2015, at 11:59 p.m. Eastern Time. The time zone of the submissions deadline was not indicated in the **Federal Register** document (80 FR 59113, 59114), though it was indicated on [www.regulations.gov](http://www.regulations.gov). Additionally, the deadline occurred during a busy holiday period. The Department received 277 submissions within three business days after the comment period closed, with many of those comments arriving electronically to [part50@doi.gov](mailto:part50@doi.gov) (an email address set up specifically to receive comments during the comment period) in the early-morning hours of December 31 (Eastern Time), when it was still December 30 in Hawaii. The Department kept a running tally of all comments submitted to [part50@doi.gov](mailto:part50@doi.gov) after the deadline. As of January 8, 2016, the Department received four more comments to [part50@doi.gov](mailto:part50@doi.gov) in addition to the 277. Given the Department's interest in considering the full range of public comments, the confusion caused by omitting time zone information in the **Federal Register**, and the volume of comments received after the published deadline, the Department determined to consider all public comments received by January 8, 2016.

Comments came from Members of Congress, Hawaii State government offices and legislators, academics, members of the public residing in Hawaii and in the continental United States, as well as individuals residing internationally. Specifically, many Native Hawaiian Civic Clubs and Native Hawaiian community, legal, cultural, and business organizations, as well as the National Congress of American Indians, submitted comments.

Numerous commenters expressed support for the Department's proposal without suggesting any changes and requested that the Department proceed to implement the rule as quickly as possible. Commenters who expressed general support frequently stated that the rule would provide a foundation for achieving parity in Federal policy related to indigenous communities in the United States. These commenters recognized and anticipated that there would be benefits to the Native Hawaiian Governing Entity from working directly with the Federal Government to implement existing Federal programs, and listed several other perceived benefits of a government-to-government relationship, including the Native Hawaiian Governing Entity's ability to (in no particular order): (1) acquire land and create affordable housing solutions for its members; (2) enable more direct and effective management of assets and resources by Native Hawaiians in accordance with customary and traditional practices; (3) facilitate negotiations regarding the return of land and other assets to the Native Hawaiian people; (4) formalize management agreements with Federal, State, and local governments that enhance the ability of Native Hawaiians to contribute their knowledge and expertise to care for the environment and natural resources; (5) improve Native Hawaiians' ability to strengthen and perpetuate their indigenous culture and languages; (6) access certain veterans' benefits and health services for Native Hawaiian veterans; (7) compete for certain government contracts on a government-wide basis; and (8) more effectively coordinate health services with other human

services to improve the overall health and wellness of the Native Hawaiian people. Other supporters noted that a government-to-government relationship could help preserve existing Native Hawaiian Federal benefits, such as culture-based charter and language-immersion schools, scholarships, and training programs, as well as economic, housing, and health services.

Many commenters, however, expressed opposition to the rule, advocating that the Department abandon its efforts entirely. Most of these opponents argued that the United States lacks jurisdiction to promulgate a rule, is illegally occupying the Hawaiian Islands, and violated and continues to violate international law respecting what the commenters argued is Native Hawaiians' right to self-determination under international law. Others objected to any Federal process that pertains to Native Hawaiian self-determination, stating that the rule would violate the U.S. Constitution as impermissibly race-based.

All public comments received on the ANPRM and the NPRM, along with supporting documents, are available in a combined docket at <http://www.regulations.gov/#!docketDetail;D=DOI-2015-0005>.

## **(B) Responses to Significant Public Comments on the Proposed Rule**

The Department decided to proceed to the final-rule stage. As described in Section (III)(B) of this preamble, the Department made specific changes in response to public comments, including clarifications to address specific concerns. The Department appreciates the time commenters took to provide helpful information and valuable suggestions. Responses to significant comments relating to specific issues as well as comments relating to particular sections of the proposed rule follow below.

### **(1) Issue-Specific Response to Comment**

#### **(a) Authority**

*Issue:* Several commenters called into question the Department’s authority to promulgate this rule and Congress’s plenary authority over Native Hawaiians. The Department made no changes to the proposed rule in response to these comments.

(1) *Comment:* Several commenters questioned the Department’s authority to reestablish a formal government-to-government relationship with the Native Hawaiian community, pointing out that former U.S. Senator Daniel Akaka introduced several bills that would have expressly established a government-to-government relationship between the Native Hawaiian community and the United States, but none of those bills became law. Several commenters also questioned Congress’s plenary authority over Native Hawaiians.

*Response:* The authority to issue this rule is vested in the Secretary by 25 U.S.C. 2, 9, 479a, 479a-1; 43 U.S.C. 1457; Act of January 23, 2004, sec. 148, 118 Stat. 445; and 5 U.S.C. 301. *See also Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001) (stating that recognition is an executive function requiring no legislative action). The Federal Government has authority to enter into a government-to-government relationship with the Native Hawaiian community. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause). These constitutional provisions recognize and provide the foundation for longstanding special relationships between indigenous peoples and the Federal Government, relationships that date to the earliest period of our Nation’s history. When enacting Native Hawaiian statutes, Congress has expressly stated in accompanying legislative findings that it was exercising its plenary power under the Constitution over Native American affairs: “The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and

Hawaii.” Native Hawaiian Health Care Act, 42 U.S.C. 11701(17); *see* H.R. Rep. No. 66–839, at 11 (1920) (finding constitutional precedent for the HHCA “in previous enactments granting Indians . . . special privileges in obtaining and using the public lands”); *see also* Native Hawaiian Education Act, 20 U.S.C. 7512(12)(B), (D) (extending services to Native Hawaiians “because of their unique status as the indigenous people of a once sovereign nation” and explaining that “the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives”). Over many decades, Congress enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. These Congressional actions establish that the community is federally “acknowledged” or “recognized” by Congress. Thus, the Native Hawaiian community has a special political and trust relationship with the United States. This final rule addresses the further and distinct issue of recognizing a government of the Native Hawaiian community for purposes of entering into a formal government-to-government relationship. The statutes cited above, in combination with the Department’s existing authorities related to Indian affairs, establish the Department’s authority to promulgate the final rule to confirm that the reorganized Native Hawaiian government, through which the Native Hawaiian community can conduct formal government-to-government relations with the United States, is authorized to represent the community. The Department accordingly concludes, based on these Congressional enactments and on its analysis of the record and of applicable law, that the Secretary may reinstate a formal government-to-government relationship with a Native Hawaiian government in accordance with this rule.

(2) *Comment:* Some commenters claimed that Congress lacks plenary authority over Native Hawaiians or any Native Hawaiian governing entity, and objected to the provision of the proposed rule that indicated Congress would have such authority.

*Response:* The United States strongly supports principles of self-determination and self-governance of indigenous peoples; nevertheless, if a Native Hawaiian Governing Entity is formed, that entity would exercise its retained inherent sovereign authority subject to the plenary authority of Congress. *See* Section (III) (Authority), *supra*. Additionally, to the extent these comments assert that Hawaii is not part of the United States, that assertion is incorrect. As discussed in the next response to comment, the Department is bound by Congressional enactments concerning the status of Hawaii.

(3) *Comment:* Many commenters objected to any rulemaking by the Department, indicating their belief that Hawaii was illegally annexed by the United States, that Hawaii is currently being “occupied” by the United States, and that the Kingdom of Hawaii continues to exist as a sovereign nation-state independent of the United States. Some commenters questioned whether Hawaii is properly considered to be part of the United States, suggesting the Department lacks jurisdiction to promulgate a rule.

*Response:* The Department made no changes to the rule in response to these comments, which address the validity of the relationship between the United States and the State of Hawaii. To the extent commenters claim that Hawaii is not a State within United States, the Department rejects that claim. Congress admitted Hawaii to the Union as the 50th State. The Admission Act, which was consented to by the State of Hawaii and its citizens through an election held on June 27, 1959, proclaimed that “the State of Hawaii 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.” Act of March 18, 1959, sec. 1, 73 Stat. 4. This express determination by Congress is binding on the Department as an agency of the United States Government that is

bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States.

Agents of the United States were involved in the overthrow of the Kingdom of Hawaii in 1893; and Congress, through a joint resolution, both acknowledged that the overthrow of Hawaii was “illegal” and expressed “its deep regret to the Native Hawaiian people” and its support for reconciliation efforts with Native Hawaiians. Apology Resolution at 1513. This Apology Resolution, however, did not effectuate any changes to existing law. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009). Thus, the Admission Act establishing the current status of the State of Hawaii remains the controlling law.

(4) *Comment*: One commenter was critical of the Department’s citation to Federal laws relating to, for example, Hawaiian language, burials, and cultural activities, and appropriations as evidence of Congress’s recognition of a special political and trust relationship with the Native Hawaiian community. The commenter argued that these Federal laws do not “rise to the level of an exercise of plenary power sufficiently analogous to those addressed in the Commerce Clause of the [U.S.] Constitution in dealing with Indian Affairs.” Other commenters echoed this concern.

*Response*: The Department interprets Congress’s course of dealings treating Native Hawaiians as a distinctly native community of indigenous people as analogous to its treatment of tribes in the continental United States and within the scope of Congress’s power to legislate with respect to “Indian tribes” under the U.S. Constitution. U.S. Const. art. I, sec. 8, cl. 3. In the Apology Resolution, Congress acknowledged that the illegal overthrow of the Kingdom of Hawaii “resulted in the suppression of the inherent sovereignty of the Native Hawaiian people” and apologized for the role its agents and citizens played to “depriv[e]” Native Hawaiians of their

“rights of self-determination”. Apology Resolution, Section 1(1); (2). And by expressing its commitment to a process of reconciliation with the Native Hawaiian people, the United States acknowledged the ramifications the Kingdom’s overthrow had on Native Hawaiians, including “long-range economic and social changes” that devastated the indigenous population and contributed to its decline in health and well-being. *Id.*, Section 1(4). The socioeconomic effects of the overthrow spanned generations and disparities continue today. But lack of a formal, organized government after the overthrow did not extinguish Native Hawaiians’ ability to exercise self-determination. As discussed in Section (II), various Native Hawaiian political, community, and social organizations connected to the Kingdom continued to meet and exercise forms of self-governance outside the scope of the State and local governments. The Native Hawaiian community’s continuation of internal self-governance post-annexation to the current day demonstrates its resilience and cohesion as a political community. Indeed, Congress specifically recognized Native Hawaiians’ unique needs as a distinct indigenous community by enacting legislation creating programs for their exclusive benefit, *e.g.*, the Native Hawaiian Education Act, 20 U.S.C. 7511 *et seq.*; the Native Hawaiian Health Care Act, 42 U.S.C. 11701 *et seq.*; the Native American Housing Assistance and Self-Determination Act (NAHASDA), 42 U.S.C. 4221 *et seq.*, and by specifically including them in other legislation pertaining to Indian tribes, *e.g.*, American Indian Religious Freedom Act, 42 U.S.C. 1996; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001-3013; Native American Programs Act of 1974, 42 U.S.C. 2991-2992d. These and other Federal acts contribute to the process of rehabilitating the Native Hawaiian community in the areas of health care, education, housing, religious freedom, social welfare, and cultural preservation, a process that lays the groundwork for the

Native Hawaiian community to formally reorganize its government and exercise self-determination and self-governance.

Appropriations to fund the programs created by these and other Federal acts are an essential part of Congress's exercise of its plenary authority over indigenous peoples. Accordingly, the Department treats Congressional appropriations laws similar to legislation respecting programs for the Native Hawaiian community.

**(b) Constitutionality**

*Issue:* Commenters opposed to the proposed rule alleged that it would violate the U.S. Constitution.

*Comment:* Commenters expressed concern that any government-to-government relationship is inherently race-based and violates both the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's guarantee of the right to vote regardless of race. Some commenters expressed the view that it is not appropriate for indigenous groups to have separate governments that are recognized by the United States, or that Native Hawaiians are not appropriately accorded that status.

*Response:* The U.S. Constitution provides the Federal Government with authority to recognize and enter into government-to-government relationships with Native communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2 (Treaty Clause); *see also* *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."). These constitutional provisions recognize and provide the foundation for longstanding special relationships between Native peoples and the Federal Government, relationships that date to the early days of our Nation's history. Consistent with the Supreme Court's holding in

*Morton v. Mancari*, and other cases, the United States' government-to-government relationships with Native peoples do not constitute "race-based" discrimination but rather are political classifications.

Moreover, this final rule only creates a pathway through which a formal government-to-government relationship can be reestablished; it does not by itself establish such a relationship. It is clear that Congress recognized the Native Hawaiian community as an indigenous community within the scope of Congress's Indian affairs power under the Constitution, as well as the community's inherent sovereignty and the United States' role in suppressing what the Apology Resolution described as the community's "rights to self-determination" through the overthrow of the Kingdom. It accordingly has provided that community with certain programs and benefits. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943) (once the United States "overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection . . . [it] assumed the duty of furnishing . . . protection and with it the authority to do all that was required to perform that obligation"). As Congress explained, it "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." Native Hawaiian Homelands Homeownership Act of 2000, 114 Stat. 2968. Thus, "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives." Native Hawaiian Education Act, 20 U.S.C. 7512(12)(B), (D); *see Rice*, 528 U.S. at 518–19. Therefore, reestablishing a government-to-government relationship here gives further expression to the special political and trust relationship Congress already established with the Native Hawaiian community, in a manner similar to the United States' relationship with Indian tribes in the

continental United States. Such a relationship is constitutional. Congress and the Department both encourage self-government by tribes, and have done so for decades. This policy is beneficial not only to indigenous communities but also to the United States as a whole.

**(c) Voter Eligibility**

*Issue:* The Department received numerous comments on the provisions in the proposed rule concerning the Native Hawaiian community’s ability to determine and verify voter eligibility based on Native Hawaiian ancestry. The Department made key changes to § 50.12 in response to these comments.

(1) *Comment:* In the preamble to the proposed rule, 80 FR 59124, the Department asked for comment on whether there are circumstances in which the rule should rely on sworn statements punishable under state law to document “HHCA Native Hawaiian” status under § 50.4 and corresponding sections of the proposed rule. Citing the lack of official databases that distinguish between “HHCA Native Hawaiians” and other “Native Hawaiians,” one commenter suggested that sworn statements punishable under state law should be accepted as sufficient evidence of “HHCA Native Hawaiian” status for voting purposes only. Other commenters supported the use of sworn statements for “Native Hawaiians” as well.

*Response:* The Department concludes that sworn statements may be used to demonstrate “HHCA Native Hawaiian” or “Native Hawaiian” status for purposes of voting in the ratification referendum. New language was added to the final rule indicating that reliable self-certifying sworn statements are sufficient for purposes of participation in the ratification referendum.

In light of this change, the Department added a definition of “sworn statement” and introductory language in § 50.12 requiring the Native Hawaiian community to explain the procedures it used for verifying the self-certifying “Native Hawaiians” and “HHCA Native Hawaiians.” Section 50.12(b) sets out five ways in which a potential voter could, through a

sworn statement, affirm his or her Native Hawaiian status. *See* § 50.12(b)(i)-(v). For example, the sworn statement could affirm that the potential voter:

- is enumerated on a roll or list prepared by the State of Hawaii under State law (where enumeration is based on documentation that verifies Native Hawaiian descent);
- is currently or previously enrolled as a Native Hawaiian in a Kamehameha Schools program;
- is identified as “Native Hawaiian” (or some equivalent term) on a birth certificate; or
- is identified as “Native Hawaiian” (or some equivalent term) in a Federal, state, or territorial court order determining ancestry.

A sworn statement is sufficient evidence of HHCA Native Hawaiian status as long as that statement affirms that there are specific means to establish the potential voter’s eligibility as Native Hawaiian under HHCA sec. 201(a)(7), or if the statement affirms that a court order does so. *See* § 50.12(c). Acceptable documentation to support the sworn statements could include, but is not limited to, a Hawaiian home-lands lease as Native Hawaiian under HHCA sec. 201(a)(7) or correspondence from DHHL indicating such Native Hawaiian beneficiary status. Notably, documentation of either status need not actually accompany a sworn statement, unless the community requires it. If the Native Hawaiian community chooses, it may identify HHCA Native Hawaiians on its voter list of Native Hawaiians at the time the votes are cast. Regardless of when the community identifies its HHCA Native Hawaiian voters, however, the community must account for both HHCA Native Hawaiians and Native Hawaiians vote tallies.

The rule provides safeguards against potential voter fraud by requiring specific support for the potential voter’s status, § 50.12(b), (c), as well as requiring separate vote tallies for Native

Hawaiians and HHCA Native Hawaiians, § 50.14(b)(5)(v). In addition to these foundational provisions, the rule provides the public with an opportunity to present evidence on whether the community's request meets the standards set out in § 50.16 (§ 50.30(a)(2)(iv)), which could include evidence that, for example, the Native Hawaiian community did not meet the requirements of § 50.12 or § 50.14. Finally, the Secretary may request additional documentation and explanation with respect to the request submitted under this part (§ 50.40).

The comments make clear that there is no comprehensive listing of "Native Hawaiians" and "HHCA Native Hawaiians." Therefore, it is likely that many may not be enumerated in any roll maintained by the State or other entity. The comments also make clear that many "Native Hawaiians" and "HHCA Native Hawaiians" objected to being enumerated on any roll, State sponsored or otherwise, without their consent (even if there is an established process to have their names removed), and that some may not have any ancestral documentation. Accordingly, in addition to sworn statements described above, the Department amended the proposed rule to permit an eligible voter to *sponsor* a closely related blood relative (mother, father, child, brother, sister, grandparent, aunt, uncle, grandchild, niece, nephew, or first cousin) as qualified for participation in a ratification referendum through a sworn statement based on the voter's personal knowledge that the blood relative meets the definition of Native Hawaiian or HHCA Native Hawaiian, with the consent of that relative. The sponsor would not be required to document the blood relative's ancestry because the sponsor's eligibility would already have been addressed.

To be clear, sworn statements to verify a potential voter's own ancestry must reliably establish some degree of Native Hawaiian ancestry. Native Hawaiian ancestry is absolutely required for all Native Hawaiians seeking to participate in the ratification referendum.

Accordingly, the sworn statement should describe the evidence relied on to establish eligibility to vote in the ratification referendum. The Native Hawaiian community could do so by requiring the potential voter to affirm that he or she is able to establish his or her Native Hawaiian or HHCA Native Hawaiian status through one of the methods listed in § 50.12(b)(3)(i)-(v) or (c)(2)(i)-(iv), respectively. The methods in § 50.12(b) and (c) are optional.

At the end of the sworn statement, the Native Hawaiian community could require language such as:

“I swear/affirm that the information I have provided is true to the best of my knowledge and understand that a false statement is punishable under state law. If I have provided false information, I may be fined, imprisoned, or both.”

The Native Hawaiian community may verify sworn statements by an appropriate method, such as through review of such documentation where it is readily available, or through maintaining a voter registration list that it makes public to allow for objections, and providing a mechanism to resolve any challenges by registered voters. Such a list must be maintained for a reasonable period after the Secretary has made a determination to accept or reject a request for a government-to-government relationship based on that ratification vote.

(2) *Comment:* One commenter suggested that the final rule should include alternative methods to demonstrate Native Hawaiian ancestry, to accommodate individuals who do not have written documentation.

*Response:* For purposes of the ratification vote, the proposed rule provided for documentation of ancestry using “other means to document generation-by-generation descent from a Native Hawaiian,” and “other records or documentation demonstrating eligibility under the HHCA” in § 50.12. But to address more specifically those without any written ancestry documentation, the

Department includes new language in the final rule. The rule accordingly permits an eligible voter to sponsor a closely related blood relative, *i.e.*, mother, father, child, brother, sister, grandparent, aunt, uncle, grandchild, niece, nephew, or first cousin, for participation in a ratification referendum as a Native Hawaiian or an HHCA Native Hawaiian. Such sponsorship must be made by sworn statement based on personal knowledge that the relative meets the definition of Native Hawaiian or HHCA Native Hawaiian. *See* § 50.12(b), (c); response to comment (c)(1). For the sponsorship to be valid, the sponsor must be enumerated on a roll certified by the State of Hawaii under State law, be enumerated in official DHHL records demonstrating eligibility under the HHCA, provide proof of current or prior enrollment in Kamehameha Schools as a Native Hawaiian, or provide a birth certificate or court order listing Hawaiian or Native Hawaiian ancestry. *See* § 50.12(a). The rule also permits “other similarly reliable means of establishing generation-by-generation descent from a Native Hawaiian ancestor” and “other similarly reliable means of establishing eligibility under HHCA sec. 201(a)(7)” in § 50.12.

(3) *Comment:* On 80 FR 59124, the Department asked for comment on whether documenting descent from a person enumerated on the 1890 Census by the Kingdom of Hawaii, the 1900 U.S. Census of the Hawaiian Islands, or the 1910 U.S. Census of Hawaii as “Native” or part “Native” or “Hawaiian” or part “Hawaiian” is reliable evidence of lineal descent from the aboriginal, indigenous, native people who exercised sovereignty over the territory that became the State of Hawaii.

*Response:* Commenters who responded to this question supported “requiring processes and standards of documentation that are consistent with the processes used by the State of Hawaii Department of Hawaiian Home Lands (DHHL), the Kamehameha Schools, and other existing

public and private trusts currently providing services to and verifying the status of individual Native Hawaiians because of their status as members of Hawaii’s only indigenous people, the Hawaiian people.” They specifically did not support documenting descent using the 1890, 1900, or 1910 censuses because DHHL, Kamehameha Schools, and other entities “have well-established processes that the Native Hawaiian community is most familiar with, and account for any historical events that present challenges for Native Hawaiians seeking to establish a generation-by-generation connection to a census roll that is more than 100 years old.” The Department determined that there is a lack of support for specifically naming the censuses in a final rule for purposes of documenting generation-by-generation descent and therefore did not include such references. The rule does not prevent the Native Hawaiian community from relying on those censuses if it determines that they are reliable evidence of lineal descent from the native peoples who occupied and exercised sovereignty over the territory that became the State of Hawaii.

In further response, the Department determined that current or prior enrollment as a Native Hawaiian in a Kamehameha Schools program is acceptable verification of ancestry based on the Department’s own research and commenters’ confidence in that process as legitimate and well-established within the Native Hawaiian community for purposes of documenting Native Hawaiian descent. This change further necessitated a change to the introductory provisions of § 50.12 to require that the Native Hawaiian community explain its requirements for use of any sworn statements and the procedures it used for verifying the self-certifying “Native Hawaiians” and “HHCA Native Hawaiians.” *See* response to comment (1)(c)(1).

(4) *Comment:* One commenter offered that any deliberations about what constitutes “sufficient” proof of descent “must incorporate Hawaiian language records,” arguing that “a broader

literature for verification needs to be engaged including name chants, birth chants, and various genres of grief chants which are filled with genealogical and land information.” Another commenter suggested that, in the absence of birth certificates, other documents to verify descent should be added, such as “church documents, marriage and death certificates, land ownership, employment records, etc.”

*Response:* Although some of the enumerated items may provide acceptable genealogical evidence, particularly in combination with other sources, these items were not expressly added to the final rule because § 50.12 already provides for documentation of ancestry using “other similarly reliable means of establishing generation-by-generation descent from a Native Hawaiian ancestor” and “other similarly reliable means of establishing eligibility under HHCA sec. 201(a)(7)” in § 50.12. These “other similarly reliable means” could include the commenters’ proposed alternative sources as long as the Native Hawaiian community explains in its written narrative how and when those sources were acceptable as “reasonable and reliable” documentation of descent under § 50.12. In response to these comments, the Department included birth certificates indicating “Native Hawaiian” (or an equivalent term) and court orders determining such ancestry as acceptable for establishing Native Hawaiian ancestry.

#### **(d) Membership**

(1) *Comment:* One commenter noted that the proposed rule prevents the Native Hawaiian community from excluding “HHCA Native Hawaiians” from its membership in § 50.13, which “cuts against” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and could be “read to prohibit the Native Hawaiian government from revoking membership, another practice of tribal sovereignty upheld by the [U.S.] Supreme Court.”

*Response:* While it is true that § 50.13(f)(1) requires that “HHCA Native Hawaiians” be permitted to enroll, nothing in § 50.13 addresses whether and on what basis the Native Hawaiian community may disenroll individual members. Membership in a political community is voluntary and not compulsory. Importantly, in the HHCA, Congress recognized “HHCA Native Hawaiians” as a vital part of the Native Hawaiian community, so any Native Hawaiian government that seeks to reestablish a formal government-to-government relationship under this rule must permit them to enroll and guarantee their civil rights. Section 50.13, however, does not address disenrollment, but any such action must be done in compliance with due-process principles. *See* response to comment (1)(m)(10). Any existing benefits under Federal law that a member has would be unaffected by the community action. *See* response to comment (1)(f).

(2) *Comment:* One commenter noted that while a Native Hawaiian ancestral connection is a requirement for membership under the proposed rule, “there is no test specified in the rule that must be used,” and that “anyone” (non-Hawaiians) could be a member if such a test is not adopted. Another commenter suggested that genealogical DNA testing should be listed as a method to determine ancestry.

*Response:* Neither the proposed nor final rules specify what “tests” the Native Hawaiian community must use in order to verify that the individuals who apply for membership meet the community’s membership requirements. Such “tests” are for the Native Hawaiian community to decide in accord with *Santa Clara Pueblo*. Although the rule specifies criteria for participation in the ratification process, that is a distinct question from the issue of membership in the community’s governing entity, which will be determined by the community itself.

(3) *Comment:* Some commenters expressed the view that decisions as to the membership and scope of the community should be left for the community itself to decide. One commenter

recommended deleting § 50.13(f), which requires the Native Hawaiian community's governing document to describe its criteria for membership subject to certain conditions.

*Response:* The Department agrees that the Native Hawaiian community should define its own membership as an exercise of self-determination, but rejects the commenter's suggestion to eliminate § 50.13(f). Section 50.13(f) provides certain minimum criteria that must be met by any governing document, including, among other provisions, safeguards for HHCA Native Hawaiians to ensure that the governing document fairly reflects the composition of the Native Hawaiian community that Congress recognized and to which Congress provided special programs and services. 80 FR at 59125-26. These criteria provide the Native Hawaiian community with firmly established standards consistent with Congressional intent and provide the Department clear criteria to apply when considering a request to reestablish a formal government-to-government relationship. Section 50.13(f) seeks to ensure that the community represented by the Native Hawaiian Governing Entity is the community recognized by Congress, and is a reasonable exercise of Department's authority in determining the community it is responsible to serve.

**(e) Terminology**

*Issue:* The Department received extensive comments on the effect and impact of the proposed rule's use and distinction between the terms "Native Hawaiian" and "HHCA Native Hawaiian." The Department made no changes to the proposed rule in response to these comments.

(1) *Comment:* Multiple commenters objected to the proposed rule's distinction between "Native Hawaiians" and "HHCA-eligible Native Hawaiians," arguing that such a distinction based on blood quantum is a "foreign concept" within their community. Others similarly objected to the proposed rule's criteria for membership that excludes non-Hawaiians.

*Response:* Congress recognizes both HHCA Native Hawaiians and Native Hawaiians as one people, but through statutory definition establishes that the HHCA Native Hawaiians are a subset of the other. Consistent with Congressional policy, the Department accounted for both statutory definitions in the process for reestablishing a formal government-to-government relationship with the recognized Native Hawaiian community. . The rule uses these Congressional definitions to ensure that the will of the recognized community as a whole is reflected in the ratification process.

The Department is aware of community concerns with respect to distinguishing between Native Hawaiians and HHCA Native Hawaiians. The rule includes relatively few conditions on the Native Hawaiian community's exercise of its inherent sovereignty to determine its own membership in any governing document. It is important to note that the rule sets forth a process to facilitate reestablishing a formal government-to-government relationship between the Native Hawaiian community and the United States, and does not impose a specific, or "foreign," form of government on the community. Congressional dealings with the Native Hawaiian community also require that non-Native Hawaiians be excluded from the ratification vote and membership because the statutory definitions of the recognized community require a demonstration of descent from the population of Hawaii as it existed before Western contact. *See* 80 FR at 59119. The Department must also follow Congress's definition of the nature and scope of the Native Hawaiian community. Therefore, the Department did not make any changes to the rule in response to these comments.

(2) *Comment:* Some commenters stated that the term "Indian" is not properly applied to Native Hawaiians, and that the term "tribe" is not properly applied to a Native Hawaiian sovereign or its governing body. They noted the distinctive history of Native Hawaiians and of the Kingdom of

Hawaii, and asserted that this history renders these terms inappropriate for Native Hawaiians and for their government.

*Response:* As discussed above, the drafters of the U.S. Constitution used the terms “Indians” and “Indian tribes” to define Congress’s power and authority with regard to indigenous political sovereigns. These terms encompass Native peoples who have diverse cultures, languages, and ethnological backgrounds throughout the United States. Congress repeatedly exercised its Indian affairs power when legislating for the Native Hawaiian community over the course of the last century. It is on that basis that Congress established a special political and trust relationship with the Native Hawaiian community.

(3) *Comment:* Some commenters stated that Native Hawaiians do not consider themselves to be “Indians” or members of a “tribe.”

*Response:* Congress recognizes the diversity among the indigenous peoples that fall within the Indian affairs powers. The Department respects that the Native Hawaiian and Native American communities on the mainland have exceptionally diverse histories and cultures, and that many of these communities use their own terminology in referencing their members and their governments. Accordingly, it is up to the Native Hawaiian community to establish what terminology it believes is most appropriate, in accordance with principles of self-determination.

(4) *Comment:* A commenter noted that Native Hawaiians became United States citizens at the time of Hawaii’s annexation, and that this distinguished them from Indians elsewhere in the United States, who did not become citizens until enactment of the Indian Citizenship Act of 1924.

*Response:* Congress accorded U.S. citizenship to many groups of Indians, by treaty and by statute, throughout the course of the nineteenth century and continued to do so until the adoption

of the Indian Citizenship Act. *See Cohen's Handbook of Federal Indian Law* sec. 14.01[3], at 926-31 (2012 ed.). The fact that Congress accorded Native Hawaiians U.S. citizenship at the time of Hawaii's annexation, well before passage of the Indian Citizenship Act, is therefore not a meaningful distinction.

**(f) HHCA Native Hawaiian rights**

*Issue:* The Department received numerous comments on the proposed rule's express protections for "HHCA-eligible Native Hawaiians" and their existing rights under Federal law. No changes to the proposed rule were made in response to these comments.

(1) *Comment:* Many commenters were concerned that the proposed rule would permit the Native Hawaiian Governing Entity to "take control of the Hawaiian home lands," and otherwise "deprive the [HHCA beneficiaries and] homesteaders of protections they have come to expect." In the process, the commenters allege, the Department would "abdicate" its fiduciary duties to this new entity that has no enforceable commitment to protect HHCA Native Hawaiians, thus jeopardizing their rights and protections under Federal law.

*Response:* The Department appreciates the importance of protecting HHCA beneficiaries' unique status under Federal law. The rule protects that status in a number of ways:

- The rule requires that the governing document protect and preserve rights, protections, and benefits under the HHCA.
- The rule leaves intact rights, protections, and benefits under the HHCA.
- The rule does not authorize the Native Hawaiian government to sell, dispose of, lease, tax, or otherwise encumber Hawaiian home lands or interests in those lands.

- The rule does not diminish any Native Hawaiian’s rights or immunities, including any immunity from State or local taxation, under the HHCA.
- The rule defines the term “HHCA Native Hawaiians” to include any Native Hawaiian individual who meets the definition of “native Hawaiian” in the HHCA.
- The rule requires that the Native Hawaiian constitution or other governing document be approved in a ratification referendum not only by a majority of Native Hawaiians who vote, but also by a majority of HHCA Native Hawaiians who vote; and both majorities must include enough voters to demonstrate broad-based community support. This ratification process effectively eliminates any risk that the United States would reestablish a formal relationship with a Native Hawaiian government whose form is broadly objectionable to HHCA Native Hawaiians. The Department expects that the participation of HHCA Native Hawaiians in the referendum process will ensure that the structure of any ratified Native Hawaiian government will include long-term protections for HHCA Native Hawaiians.
- The rule prohibits the Native Hawaiian government’s membership criteria from excluding any HHCA Native Hawaiian who wishes to be a member.

*See* 80 FR at 59120. Moreover, because Federal law provides both defined protections for HHCA beneficiaries and specific guarantees of individual civil rights, HHCA beneficiaries would continue to be protected after a formal government-to-government relationship is established. *See* § 50.13(g)-(j); 80 FR 59125-26.

In short, HHCA beneficiaries’ existing rights under Federal law, and the Secretary’s and the State’s authority and concurrent obligations, are unchanged by promulgation of this rule or the reestablishment of a formal government-to-government relationship with the Native

Hawaiian Governing Entity. Ultimately, only Congress can diminish or otherwise modify the existing rights of HHCA beneficiaries, and the Native Hawaiian Governing Entity is bound by Federal law. Similarly, Congressional action would be required before the Native Hawaiian Governing Entity, or any political subdivision within it, would be authorized to manage Hawaiian home lands.

(2) *Comment:* Some HHCA beneficiaries expressed concern that they will be reduced to a political subdivision when they currently have the most rights under Federal law.

*Response:* The Department takes no position on the internal organization of any Native Hawaiian government, including the existence and nature of any political subdivisions. The Department notes, however, that should such political subdivisions exist, being a political subdivision of a larger political community does not necessarily mean that the members of the subdivision will lose rights or benefits. Questions of what political subdivisions to create, if any, and what authorities those subdivisions should possess, are for the Native Hawaiian community to decide.

(3) *Comment:* Commenters argued that the proposed rule pits non-HHCA Native Hawaiians against HHCA Native Hawaiians by providing express protections for the latter while offering the former only the ability to participate in a government with no guarantee of lands or power over non-Hawaiians.

*Response:* As explained above, the rule reflects distinctions between HHCA Native Hawaiians and Native Hawaiians made by Congress, and in so doing, protects those existing rights that Congress provided in the HHCA *and* in over 150 other statutes relating to the Native Hawaiian community. If a Native Hawaiian government reorganizes and a formal government-to-government relationship is reestablished pursuant to the rule, all Native Hawaiians would benefit

through improved facilitation of their existing Federal benefits and a government-to-government relationship.

(4) *Comment:* One commenter suggested that the Secretary's role and responsibility to the HHCA beneficiaries should be defined in the rule; as an alternative, this commenter suggested authorizing an Inspector General or Ombudsman specifically for HHCA beneficiaries.

*Response:* The Secretary's role and responsibilities toward Native Hawaiians are defined by multiple Acts of Congress, *see, e.g.*, the HHCA, the Admission Act, and the HHLRA. Congress specifically authorized the Department's Office of Native Hawaiian Relations within the Office of Policy, Management, and Budget to focus on Native Hawaiian relations, including HHCA beneficiaries' rights and benefits under the HHCA. That office is the primary office to address concerns by these constituents, and can involve other Departmental offices or agencies as necessary. The Department made no changes to the rule in response to this comment.

(5) *Comment:* Commenters stated that the HHCA Native Hawaiians should be permitted to submit a separate request to the Secretary based on broad-based support within that group.

*Response:* Congress consistently treated the Native Hawaiian community as a single entity through more than 150 Federal laws. Congress's recognition of a single Native Hawaiian community reflects the fact that a single Native Hawaiian government was in place prior to the overthrow of the Kingdom of Hawaii. *See* response to comment (1)(m)(18). Congress established a special political and trust relationship with a single Native Hawaiian community, even as it used different definitions to focus on specific persons within that one community. For example, in 2000, Congress enacted the American Homeownership and Economic Opportunity Act to help satisfy the need for affordable homes in Indian communities. 12 U.S.C. 1701, 25 U.S.C. 4101; Act of December 27, 2000, 114 Stat. 2944. As part of that program, Congress

addressed housing assistance for Native Hawaiians and broadly defined the term “Native Hawaiian” consistent with the definition of Native Hawaiians in this rule. *See* 25 U.S.C. 4221(9). In the same statute, Congress separately recognized that the “beneficiaries of the Hawaiian Homes Commission Act” should be given a unique opportunity to comment on particular aspects of the program. 25 U.S.C. 4239(d). In the Act’s findings, Congress specifically stated that, among the Native Hawaiian population, those eligible to reside on the Hawaiian home lands have the most severe housing needs. 25 U.S.C. 4221 Note; Act of December 27, 2000, 114 Stat. 2944. It follows that the Department cannot support an approach that would permit a subset of the Native Hawaiian community to separately request a government-to-government relationship independent of the rest of the community recognized by Congress. Instead, any request must demonstrate broad-based support from the recognized Native Hawaiian community as a whole.

**(g) Ratification Referendum**

*Issue:* The Department received numerous comments on the proposed rule’s provisions related to the requirements of and the process for voting in the ratification referendum for the Native Hawaiian government’s governing document, as well as who may vote and how those votes must be tallied.

(1) *Comment:* Commenters state that the rule should not set numerical thresholds for the ratification referendum. Instead, ratification of the governing document should be demonstrated by a majority (or a plurality) of actual voters, regardless of turnout.

*Response:* The Department disagrees. The ratification vote must reflect the views of the Native Hawaiian community as demonstrated through broad-based community participation in the ratification referendum and broad-based community support for the governing document.

Broad-based community participation and support are essential to ensuring the legitimacy of the Native Hawaiian government and the viability of its formal government-to-government relationship with the United States.

A low vote in favor of the governing document would demonstrate a lack of broad-based community support. Similarly, a high voter turnout that fails to secure a majority of votes in favor of the governing document would also demonstrate a lack of broad-based community support. Accordingly, the rule sets numerical thresholds for community participation in support *and* requires that the number of votes in favor be a majority of all votes cast. These thresholds are based on an objective measure of broad-based community participation and on the requirement that votes in favor constitute a majority of all votes cast. Without them, multiple Native Hawaiian groups could purport to lead the effort to reestablish a government-to-government relationship with the United States, each with its own governing document approved through a “ratification” process, each purporting to legitimately represent the entire community. Establishing reasonable numerical thresholds at the outset provides a transparent and sound basis for distinguishing a governing document that has the Native Hawaiian community’s broad-based support from a governing document that lacks such support.

(2) *Comment:* Some commenters state that the numerical thresholds in the proposed rule’s § 50.16(g)-(h) are too high and could not be met as a practical matter. Other commenters stated that they are too low in light of census data on the size of the Native Hawaiian population.

*Response:* A number of commenters urged higher numerical thresholds; others urged lower thresholds; and many commenters supported the proposed thresholds. These comments are significant because they indicate that there is no clear consensus on whether the Department’s threshold numbers are too high or too low. The Department concludes that the thresholds

enumerated in § 50.16 are reasonable and achievable. The methodology for producing these ranges is explained in detail in Section (III).

(3) *Comment:* Commenters questioned the significance of the 50,000 and 15,000 affirmative-vote presumptions of broad-based community support since the proposed rule requires that a minimum of 30,000 affirmative votes, including a minimum of 9,000 affirmative votes from HHCA Native Hawaiians, is sufficiently large to show broad-based community support.

*Response:* The 30,000 and 9,000 affirmative-vote thresholds are minimum thresholds designed to help the Department determine whether a requester demonstrates that the governing document has broad-based community support. For example, if 29,999 or fewer Native Hawaiians vote in favor of the requester's governing document, it is reasonable to find a lack of broad-based community support among Native Hawaiians, and the Secretary would decline to process the request. In contrast, if 50,000 or more Native Hawaiians vote in favor of the requester's governing document (and they constitute a majority of all Native Hawaiians who vote), the Secretary is justified in applying a presumption that the broad-based community support criterion is satisfied. The proposed rule referred to the presumption as "strong." The Department has only referenced a "presumption" in the final rule, to clarify that the Secretary has full authority to review the request and accompanying materials for consistency with this rule and with Federal law. If the number of affirmative votes constitutes a majority and falls in between those figures—*i.e.*, if the number of affirmative votes is in the range of 30,000 to 49,999—the Secretary will consider the request and will need to determine, unaided by any presumption, whether the requester demonstrated that the governing document has broad-based support from the Native Hawaiian community.

The same approach applies to the tally of affirmative votes cast by the subset of Native Hawaiians who are also “HHCA Native Hawaiians,” except the affirmative vote thresholds are 9,000 (rather than 30,000) and 15,000 (rather than 50,000).

(4) *Comment:* Commenters state that the rule’s numerical thresholds should not be based solely on census data, which rely entirely on self-reporting rather than on documentary verification of Native Hawaiian descent.

*Response:* The rule’s numerical thresholds are not based solely on census data, as the sample methodology presented above demonstrates. In setting the thresholds, the Department not only considered data from the Federal decennial censuses of 2000 and 2010 (both for Hawaii and for the United States), but also considered: (1) voter-registration data for all Hawaiians; (2) voter-registration data for Native Hawaiians (when such data were kept); (3) voter-turnout data for all Hawaiians; (4) voter-turnout data for Native Hawaiians (again, when such data were kept); (5) data from the 2014 American Community Survey (ACS) (both for Hawaii and for the United States); (6) data from the Native Hawaiian Roll Commission’s Kanaiolowalu roll; (7) data from a 1984 survey summarized in the *Native Hawaiian Data Book*; (8) population projections from the Strategic Planning and Implementation Division of the Kamehameha Schools; and (9) data from the Hawaiian Sovereignty Elections Council’s 1996 “Native Hawaiian Vote.”

The Department finds the actual election data particularly probative. As explained above, in the 1990s, the Hawaii Office of Elections tracked Native Hawaiian status. The Office found that the percentage of Hawaii’s registered voters who were Native Hawaiian was rising, from about 14.7 percent in 1992, to 15.5 percent in 1994, to 16.0 percent in 1996, and 16.7 percent in 1998. This trend is generally consistent with census data showing growth in recent decades in the number of persons identifying as Native Hawaiian. Thus, the census data and voter data are

consistent and reliance on the voter data is reasonable. *See also* Kamehameha Schools, *Ka Huakai: 2014 Native Hawaiian Education Assessment* 16-22 (2014) (population projections) (citing Justin Hong, *Native Hawaiian Population Projections* (unpublished 2012)).

(5) *Comment:* Commenters state that numerical thresholds in 2016 should not be based on obsolete data from Census 2010.

*Response:* First, as explained above, the Census Bureau is only one of several sources used in setting the rule's numerical thresholds. Second, 2010 is the year of the most recent Federal decennial census of population, so the Department gave it greater weight than earlier census data. Third, the Department also considered data from the 2000 Federal decennial census to discern population trends that could be projected forward to 2016. Finally, the Department considered more recent census data from the ACS. Figures from the 2014 ACS are based on statistical sampling rather than an enumerated headcount and therefore may have a sizable margin of error, but are broadly consistent with figures from the decennial censuses.

The Department based this analysis on existing, available data. If significant new data become available, the Secretary may elect to issue a supplemental rule revising the rule's thresholds.

(6) *Comment:* The rule provides that those seeking to vote in any ratification referendum must be able to reliably verify their Native Hawaiian ancestry. Some commenters stated that the numerical thresholds should be adjusted downward because some self-reported Native Hawaiians may not be able to verify their Native Hawaiian ancestry, and because the verification process will impose administrative burdens that will reduce participation in the referendum.

*Response:* The verification process is not likely to be burdensome enough to significantly deter voter participation. In addition, the final rule includes new provisions in § 50.12 to afford the

Native Hawaiian community flexibility in compiling a voter list that is based on documenting Native Hawaiian ancestry without significant administrative burdens in verifying ancestry.

(7) *Comment:* Commenters suggest that numerical thresholds should reflect actual “participation rates for the larger U.S. citizenry” in actual elections.

*Response:* As described above, in establishing the rule’s numerical thresholds, the Department relied in part on actual turnout figures in Hawaii’s presidential and off-year (gubernatorial) elections, both in the 1990s and in recent years, and adjusted them for out-of-state voters. The Department concludes that the adjustments to the voter-turnout data for in-state Native Hawaiians provide a reasonable objective measure on which to base its affirmative vote-thresholds to demonstrate broad-based community support.

(8) *Comment:* Commenters state that the proposed rule’s numerical thresholds are inconsistent with requirements established for Indian tribes in the continental United States, including the so-called “30-percent rule” in 25 U.S.C. 478a, a 1935 amendment to the Indian Reorganization Act of 1934 (IRA), which provides that certain tribal constitutions may be adopted only by a majority vote in an election where the total votes cast are at least “30 per centum of those entitled to vote.”

*Response:* The IRA elections referenced by these commenters do not apply to this rule because the IRA does not encompass Native Hawaiians. The number of persons “entitled to vote” is based on Congressional definitions and on projections from necessarily imprecise demographic and voter-turnout data. Some degree of approximation therefore is inevitable.

Although the IRA’s 30-percent rule is not applicable, available demographic evidence suggests that the threshold numbers the Department selected are generally consistent with that rule. To take one example: It appears that, at some point between 2015 and 2017, the number of

Native Hawaiian adults residing in Hawaii topped or will top 200,000. *See Ka Huakai: 2014 Native Hawaiian Education Assessment, supra*, at 20. Thirty percent of 200,000 is 60,000 Native Hawaiian voters—that is, the number of such adults who would be expected to vote in an election whose turnout barely meets 25 U.S.C. 478a’s 30-percent requirement—and a majority vote in a 60,000-voter election would require 30,001 affirmative votes. These figures, among others, support the rule’s 30,000-affirmative-vote threshold for Native Hawaiians.

Likewise, it is reasonable to estimate the number of HHCA Native Hawaiian adults residing in Hawaii to now be about 60,000. *See infra* (estimating the fraction of Native Hawaiians who are also HHCA Native Hawaiians). Thirty percent of 60,000 is 18,000 HHCA Native Hawaiian voters – that is, the number of such adults who would be expected to vote in an election whose turnout barely meets 25 U.S.C. 478a’s 30-percent requirement – and a majority vote in an 18,000-voter election would require 9,001 affirmative votes. These figures, among others, support the rule’s 9,000-affirmative-vote threshold for HHCA Native Hawaiians.

(9) *Comment:* Commenters state that the rule’s numerical thresholds should account for out-of-state Native Hawaiians and should not “disenfranchise” out-of-state Native Hawaiians or assume that they are not interested in issues involving the Native Hawaiian community. Other commenters state that the thresholds are too low given census data on the size of the Native Hawaiian population nationwide.

*Response:* Many out-of-State Native Hawaiians show great interest in their community and the Department adjusted the estimated voter turnout upward to include their participation. They are not disenfranchised by this rule. Indeed, § 50.14(b)(5)(iii) expressly accounts for them by requiring that the ratification referendum be “open to all persons who were verified as satisfying the definition of a Native Hawaiian . . . and were 18 years of age or older [on the last day of the

referendum], *regardless of residency*” (emphasis added). It is likely, however, that out-of-State Native Hawaiians will not participate to the degree that in-state Native Hawaiians will participate in the ratification referendum. Almost half of all self-identified Native Hawaiians in the 2010 Census and the 2014 ACS resided out of state, but fewer than one-fifth of those on the Native Hawaiian Roll Commission’s Kanaiolowalu roll reside out of state. Thus, while the rule does not disenfranchise out-of-state Native Hawaiians, it significantly discounts their expected participation rate in calculating numerical thresholds.

(10) *Comment:* Commenters suggest that the threshold for HHCA Native Hawaiians should be based solely on the number of Hawaiian home lands residential leases and the number of individuals on the DHHL waitlist.

*Response:* The rule is designed to reestablish a formal government-to-government relationship with the entire Native Hawaiian community, not just with the community of Native Hawaiians who reside or wish to reside on Hawaiian home lands. The rule requires separate tallying of the ratification referendum ballots cast by HHCA Native Hawaiians because Congress defined the community using the narrower definition (limiting the population to what this rule refers to as “HHCA Native Hawaiians,” rather than “Native Hawaiians”). Further narrowing the population to exclude HHCA Native Hawaiians who never obtained or even sought a Hawaiian home lands residential lease would be inconsistent with Congress’s approach.

(11) *Comment:* Commenters stated that the numerical thresholds for affirmative votes cast by HHCA Native Hawaiians should be more than 30 percent of the equivalent numbers for Native Hawaiians because the former will “(a) be more aware that they actually are Hawaiian, (b) [be] more aware that there is a nation-building initiative afoot, (c) have a bigger stake in the issue, and (d) be more likely to be currently part of an active Hawaiian sovereignty or cultural group.”

*Response:* Assuming that the assertions listed in the comment are true, they may render it easier for the community to meet the 9,000-affirmative-vote threshold. But these assertions do not justify raising the threshold, which is tied principally to the size of the community of HHCA Native Hawaiians, just as the 30,000-affirmative-vote threshold is tied principally to the size of the community of Native Hawaiians. As explained in detail above, the Department’s best estimate of the size of the HHCA Native Hawaiians is that it is about 30 percent the size of the Native Hawaiian community (including HHCA Native Hawaiians).

(12) *Comment:* Several commenters suggested that the proposed rule be revised to allow the ratification referendum to consider multiple potential governing documents, and permit adoption of the document that secures a plurality of the vote.

*Response:* After evaluating comments on this issue, the Department determined to leave these provisions of the rule unchanged.

The proposed and final rules leave open the option of structuring a referendum process and balloting in such a way that the voters may cast votes on multiple documents at once—in effect, combining referenda on several documents into the same proceeding. Such an approach would provide the members of the Native Hawaiian community options while still providing clear evidence of which documents have broad-based support from the community through a majority vote.

But a simple plurality vote is not an appropriate way to measure whether a governing document has broad-based community support. Under a “plurality wins” rule, the number of votes required to prevail becomes a function of the number of options on the ballot, not how strongly and broadly supported any one option is. A majority vote is essential to show that the number of Native Hawaiians supporting a particular governing document exceeds the number

opposing it. If the Native Hawaiian people want to consider more than one governing document in a single ratification referendum, they may do so by putting each document to its own up-or-down vote. Then, if only one governing document garners a majority of the votes cast, it satisfies the rule's majority-vote requirement. If two or more governing documents each garner a majority, then the community must apply a previously announced method for determining which governing document prevails. For example, the community could decide, prior to the referendum, that the "winner," as between two (or more) governing documents that each receive majority support, will be the one that receives the greatest number of affirmative votes. This approach would also satisfy the rule's majority-vote requirement. But a document that is not supported by much more than a third, or a quarter, of Native Hawaiian voters cannot form the proper basis for a formal government-to-government relationship with the United States.

(13) *Comment:* Commenters suggest that the rule should require a supermajority vote, such as a two-thirds majority, because a constitutional ratification typically is held to a higher standard than regular legislation, which may pass with a simple majority vote.

*Response:* While the Department recognizes that many constitutional processes, in the United States and elsewhere, require supermajority votes, the exact fraction (two-thirds, three-quarters, three-fifths, etc.) is often highly controversial. Furthermore, the broad-based-community support requirement does not rely on just one simple majority, but instead turns on both (1) a required voter turnout of both Native Hawaiians and HHCA Native Hawaiians and (2) a requirement of a minimum number of affirmative votes from both Native Hawaiians and HHCA Native Hawaiians. Indeed, if total turnout in a ratification referendum fell a bit short of 60,000 Native Hawaiians (or 18,000 HHCA Native Hawaiians), the 30,000- and 9,000-affirmative-vote thresholds would effectively serve as supermajority-vote requirements. Also, in calculating a

simple majority, the number of votes cast in favor of the governing document must exceed the sum of the number of votes cast against the governing document and the number of spoiled ballots (*i.e.*, ballots that were mismarked, mutilated, rendered impossible to determine the voter's intent, or marked so as to violate the secrecy of the ballot); this, too, is akin to a slight supermajority-vote requirement.

Moreover, if the Native Hawaiian community wishes to require a supermajority vote to adopt its governing document, it certainly may do so without running afoul of the rule. However, the rule itself does not impose that requirement.

(14) *Comment:* Some commenters objected to defining “Native Hawaiians” and “HHCA Native Hawaiians” separately for purposes of voting in the ratification referendum and suggested that all Native Hawaiians should have “equal input” in establishing a formal relationship with the United States. Some also suggested that the separate voting unnecessarily divides the community.

*Response:* In the response to comments section in the proposed rule, the Department explained the HHCA beneficiaries’ unique status under Federal law and the importance of recognizing and protecting their Federal rights and benefits in the rule. *See* 80 FR 59119-20, 59123-24, 59126.

*See also* response to comment (1)(f)(1). The Department further explained that Congressional definitions of the Native Hawaiian community, in the HHCA and other Acts of Congress, require that any reestablishment of a formal government-to-government relationship must take account of both “HHCA Native Hawaiians” and “Native Hawaiians,” respectively, to keep within this statutory framework. 80 FR 59124. Therefore, the rule requires that a majority of the voting members of both the “HHCA Native Hawaiians” and “Native Hawaiians” confirm their support for the Native Hawaiian government’s structure and fundamental organic law in order to eliminate any risk that the United States would reestablish a formal relationship with a Native

Hawaiian government whose form is broadly objectionable to either HHCA Native Hawaiians or Native Hawaiians, and to ensure that the structure of any Native Hawaiian government reflects the views of Native Hawaiians and HHCA Native Hawaiians. 80 FR 59120.

The rule also requires that the Native Hawaiian community demonstrate in its request to reestablish a formal government-to-government relationship that its constitution or other governing document received broad-based community support from both HHCA Native Hawaiians and Native Hawaiians. Thus, regardless of which Congressional definition is used, a majority of each defined group within the voting members of the community must confirm their support for the Native Hawaiian government's structure and fundamental organic law. Although the distinction may be viewed unfavorably by some commenters, the Department chose to defer to the Congressional definition appearing in the HHCA in defining a class of eligible voters.

Accordingly, both "HHCA Native Hawaiians" and "Native Hawaiians" may participate and have an opportunity to influence the content of a constitution or other governing documents and equally decide whether that constitution or other governing document is ratified. *See* § 50.16.

(15) *Comment:* Some commenters supported the proposed rule's approach of providing for distinct votes by HHCA Native Hawaiians and Native Hawaiians to be tallied separately — a "double vote" based on the two relevant Congressional definitions. These commenters stated that this approach was an important safeguard to ensure that "the rights of the HHCA-eligible are not subsumed by the rights of the non HHCA-eligible." But others expressed the view that the double-vote structure of the proposed rule is "undemocratic" because it gives greater voting and veto power to HHCA Native Hawaiians.

*Response:* The rule provides that a majority of the voting members of the Native Hawaiian community recognized by Congress must confirm their support for the Native Hawaiian

government's structure and fundamental organic law in order to demonstrate "broad-based community support." Congress defines the Native Hawaiian community in two separate ways, and the Department is simply using the definitions adopted by Congress. Moreover, this approach is consistent with many voting systems that reflect existing geographic or legal distinctions, such as the U.S. Constitution's provision that each State has two senators irrespective of population.

(16) *Comment:* Commenters state that distinguishing HHCA Native Hawaiian voters from other Native Hawaiian voters imposes a significant administrative burden of verifying HHCA Native Hawaiian status and cannot be done without substantial monetary and other resources from the Federal Government.

*Response:* The response to comment (1)(c)(1) above explains how sworn statements may be used to demonstrate "HHCA Native Hawaiian" or "Native Hawaiian" status for purposes of voting in the ratification referendum. The sworn statement could be an option for the Native Hawaiian community to establish potential voters' eligibility to vote in the ratification referendum. Such sworn statements do not impose a significant administrative burden and do not require financial or other assistance by the Federal Government.

(17) *Comment:* Some commenters expressed the view that non-HHCA Native Hawaiians should not be allowed to "outvote" HHCA Native Hawaiians.

*Response:* Because the rule requires that a majority of HHCA Native Hawaiians who participate in the ratification referendum must vote in favor of the governing document, it is effectively impossible for them to be "outvoted." See response to comments on § 50.13(4).

(18) *Comment:* Some commenters stated that participants in the ratification referendum for the governing document, and candidates for election to the government established by that document, should be required to show proof of political loyalty to the Native Hawaiian community and proof of affiliation with Native Hawaiian cultural, social, or civic groups. Commenters similarly suggested that the numerical thresholds should not be based on the total number of Native Hawaiians, but rather on the total number of Native Hawaiians who voluntarily seek to participate in exercising a Native status under the U.S. Constitution. These commenters stated that persons who do not seek to exercise Native status under the U.S. Constitution, or who vehemently oppose their status as U.S. citizens because they consider themselves subjects of their own Kingdom, should not be counted when determining numerical thresholds.

*Response:* The Department considered these comments and elected not to revise the rule to include such limitations. The rule is intended to promote self-determination and self-governance for the entire Native Hawaiian community, without distinguishing between members of the community on the basis of political beliefs or points of view. All Native Hawaiian adults should have the opportunity to vote in any ratification referendum, and this broad population also provides a metric against which broad-based community support is measured. The goal of the ratification referendum is to measure whether the governing document has broad-based support within the Native Hawaiian community. It is appropriate to allow the broadest possible participation in that referendum. Commenters' suggested requirement of proof of political loyalty or affiliation with Native Hawaiian cultural, social, or civic groups would limit participation in the referendum inconsistent with Congress's recognition of the entire community and the purposes of this rule.

The Department did not include any requirements relating to qualifications for officers in the Native Hawaiian government because such qualifications are a matter of internal self-government. These issues should be decided by the Native Hawaiian community and reflected in its governing document.

(19) *Comment:* Commenters stated that the Department’s voting requirement is contrary to the methodology used for the Native Hawaiian Roll Commission’s roll under Act 195.

*Response:* On July 6, 2011, the Hawaii legislature passed SB1520, which was signed into law as Act 195 by Governor Neil Abercrombie. That act recognized Native Hawaiians as the indigenous people of the Hawaiian Islands and established the Native Hawaiian Roll Commission to certify and publish a roll of “qualified Native Hawaiians.” Although the findings in Act 195 reference the lack of a formal government-to-government relationship between a Native Hawaiian government and the United States, the purpose of Act 195 articulates the State’s interests in implementing “the recognition of the Native Hawaiian people by means and methods that will facilitate Native Hawaiian self-governance,” including the “use of lands by the Native Hawaiian people, and by further promoting their culture, heritage, entitlements, health, education and welfare.” In 2013, the Hawaii legislature adopted Act 77, which provided for the inclusion of additional persons on the roll compiled by the Native Hawaiian Roll Commission.

The Act 195 process is a separate and distinct process from that set out in this rule, and has a separate, although similar, purpose. The Department did not conform the requirements in the final rule to the provisions of any roll or process now existing or underway within the State of Hawaii. Nonetheless, as the Native Hawaiian community prepares its list of eligible voters, the rule does not prohibit it, in the exercise of self-determination over its own affairs, from relying on a State roll or State documentation that is based on verified documentation of descent

as an alternative to doing its own verification of descent. The rule is intended to provide guidance and a process to a Native Hawaiian government that submits a request and can meet the rule's requirements. Such a request could be submitted at any time in the future, so the rule is not linked to any existing processes or circumstances that could limit its future application. Nor does the Department endorse any particular roll or process over any other.

Commenters refer to the fact that the rule's requirements differ from those applied by the Native Hawaiian Roll Commission. Differing requirements reflect the separate nature of the two processes and their results. Further, the Department notes that the requirements applied by the Commission have changed since the initial enactment of Act 195, and may be subject to subsequent changes. If the Department receives a request seeking to reestablish a government-to-government relationship, the Department will evaluate whether the request meets the rule's criteria and is consistent with this part.

#### **(h) U.S. Citizenship**

*Issue:* The proposed rule required that Native Hawaiians be U.S. citizens. The Department received a significant volume of comments requesting that the Department eliminate this requirement in the final rule, noting that Congress frequently defined "Native Hawaiian" without requiring U.S. citizenship.

*Comment:* One commenter conducted a survey of statutes containing a definition of the term "Native Hawaiian" and concluded that of 45 identified Federal statutes containing such a definition, 31 do not limit that definition to U.S. citizens. The commenter also noted that the definition of "native Hawaiian" in the HHCA does not incorporate a U.S. citizenship requirement, and that a review of 48 tribal government constitutions revealed that 92 percent do not require U.S. citizenship as an express condition of tribal membership. The commenter stated

that, in at least one instance, the Federal Government adjusted Federal law to accommodate a Native government's citizenship definition that allowed for non-citizens to become members (citing the Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983)). The commenter also stated that "the practical reality is that the number of Native Hawaiians who are not U.S. citizens represents a de minimis percentage of the overall population of qualified Native Hawaiians."

*Response:* After considering these comments, the Department eliminated the U.S. citizenship requirement in the final rule. Section 4 of the Hawaiian Organic Act declared all persons who were citizens of the Republic of Hawaii on August 12, 1898, citizens of the United States. Further, Congress made every "person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe" a citizen with the enactment of the Nationality Act of 1940, 54 Stat. 1137, 1138.<sup>6</sup>

Although some statutes require U.S. citizenship as an element of the statutory definition of membership in the Native Hawaiian community, those statutes generally involve eligibility for federally funded programs or benefits. *See, e.g.*, 25 U.S.C. 4221(9) (requiring U.S. citizenship for Native Hawaiians to participate in programs under the Native American Housing Assistance and Self-Determination Act). It is common for Congress to restrict availability of programs or benefits to U.S. citizens; by doing so, however, Congress did not exclude non-citizens from the Native Hawaiian community with which the United States established a special political and trust relationship. Moreover, the Supreme Court has explained that indigenous communities generally may determine their own membership as a matter of internal self-governance. *E.g.*, *Santa Clara Pueblo*, 436 U.S. at 72 n.32. The Department determined that Congressional

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<sup>6</sup> Congress made all non-citizen Indians citizens by the Act of June 2, 1924, 43 Stat. 253.

requirements for federally funded programs or benefits do not override this important principle of self-governance, and eliminated the citizenship requirement in the final rule.

Although the Department considers membership criteria to be matters of internal self-governance, to the extent Federal law incorporates U.S. citizenship as a requirement for participation in a Federal program or for eligibility for Federal benefits, that requirement remains in effect, notwithstanding membership provisions adopted by a Native Hawaiian government.

**(i) Roll**

*Issue:* Commenters expressed views on the proposed rule’s reliance on a State roll, also called Kanaiolowalu, compiled by the Native Hawaiian Roll Commission (NHRC).

(1) *Comment:* Some commenters stated that they objected to provisions of the proposed rule, including § 50.12(a)(1)(ii) and (b), “that would allow a roll of Native Hawaiians certified by a State of Hawaii commission like Kanaiolowalu that is being used by Nai Aupuni to determine participation” and requested that these provisions be removed. The commenters stated that it was not appropriate to accord special status to a roll compiled by a State agency, and also opposed any use of the NHRC Roll because of the nature of the process used by the NHRC.

*Response:* The Department considered these comments and determined it appropriate to revise these provisions of the proposed rule to address this issue.

The Department agrees with this comment in part. The proposed rule incorporated distinct standards for use of a roll compiled by a State agency. In response to these comments, the rule now provides that the Native Hawaiian community will compile its list of eligible voters. The rule provides a uniform standard to govern the list of eligible voters for the ratification referendum, which would apply irrespective of who prepared the list. That approach allows the

Native Hawaiian community the freedom to determine how it will develop a list for use in ratification of its governing documents.

The rule does not, however, bar the use of a roll that incorporates work by State agencies, especially if it is efficient to do so. For instance, the Department sees little benefit in the Native Hawaiian community redoing work done by the State that verified Native Hawaiian ancestry, including its determination that an individual qualifies as an HHCA Native Hawaiian. To the extent a State roll is based on documented ancestry, the Native Hawaiian community may rely on it, if it so chooses. Such reliance will facilitate the process of preparing its list of voters, particularly if relevant records are within the exclusive control of State agencies, and will minimize the burdens on individual Native Hawaiians who previously submitted documentary evidence and were determined to be qualified. The Department respects the Native Hawaiian community's ability to reorganize its government for the purposes of reestablishing a formal government-to-government relationship as it sees fit, and therefore defers to the community as to whether and to what extent it wishes to rely on State sources to tailor a list of eligible voters for ratification purposes. The Department revised § 50.12 to address these comments.

*(2) Comment:* Some commenters questioned the methods used to compile the NHRC roll, stating that the names of deceased individuals, minors, and persons who did not consent to be listed appear on the roll. Others stated that “most Hawaiians have not agreed to” the NHRC roll process and that the roll will not benefit the Native Hawaiian people generally.

*Response:* The Department reviewed these comments and made changes in the final rule in § 50.12.

For instance, the Department acknowledged commenters' concerns by providing a uniform standard for preparation of the list of eligible voters by the Native Hawaiian community.

The criteria for the list provide that it must not include adults who object to being listed, and revised § 50.12(a) provides that the community must make reasonable and prudent efforts to ensure the integrity of its list. Importantly, the proposed rule did not require use of any State roll; and the final rule permits, *but does not require*, the Native Hawaiian community to use a State roll, with conditions and modifications, for purposes of demonstrating how it determined who could participate in ratifying a governing document. *See* § 50.12(a).

Moreover, the Department defers to the Native Hawaiian community itself to establish the process by which it will compile any list of voters, subject to certain requirements set forth in the final rule. These requirements address some of issues raised by commenters relating to the NHRC. For instance, the proposed and final rules both contain provisions that are intended to provide for the integrity of the process of compiling the list and to protect the integrity of the voting process itself. The rule permits the community to rely on documented sources that it determines are reliable in compiling its list.

If a reorganized government submits a request to the Secretary to reestablish a formal government-to-government relationship, the rule provides that the request must include an explanation of the manner in which the rule's requirements were satisfied. The public will have an opportunity to comment on any request the Secretary receives. Individuals who continue to have concerns about the process used in compiling the voter list may submit comments at that time. In making a decision, the Secretary will review not only the specific request but also the overall integrity of the ratification process to determine if it was free and fair and otherwise complies with the rule's requirements.

(3) *Comment:* A commenter said that it was not appropriate for the roll used in conducting the ratification referendum under § 50.12 to incorporate any considerations of racial ancestry, and that use of the NHRC roll was inappropriate for this reason.

*Response:* To the extent that these comments suggest that the Department must reestablish a formal government-to-government relationship with a government that includes non-Native Hawaiians as members, that result is precluded by longstanding Congressional definitions of Native Hawaiians, which require a demonstration of descent from the population of Hawaii as it existed before Western contact. The Department adheres to Congress's definition of the nature and extent of the Native Hawaiian community.

(4) *Comment:* A commenter stated that “the Supreme Court’s injunction [in the *Akina* litigation] should caution any prudent public official to question the wisdom of using Hawaii’s tainted registration roll for any purpose whatsoever.”

*Response:* As explained above, the proposed and final rules do not require the use of any particular roll, including the NHRC roll. The final rule requires the Native Hawaiian community to prepare its list of voters and sets out the requirements for that list, but it does not preclude reliance on any pre-existing roll as long as that roll meets the standards in the rule.

The Department need not and will not address the merits of the *Akina* litigation in this rulemaking. The injunction referenced by the commenter preserved the status quo during a pending appeal, and did not resolve the merits of the case. The United States’ views on the *Akina* litigation are available for review in briefs submitted to the United States District Court for the District of Hawaii and to the United States Court of Appeals for the Ninth Circuit.

(5) *Comment:* One commenter objected to the use of the Kanaiolowalu because it based eligibility to register in part on a declaration of “civic, cultural, or social connection as demonstrated in their unrelinquished sovereignty.”

*Response:* The proposed rule did not require reliance on the Kanaiolowalu or any other state roll as the sole means to determine eligibility to vote in the ratification referendum. Sections 50.12; 50.14(b)(5)(iii). The preamble to the proposed rule at 80 FR 59122 provided expressly that such a declaration as referred to by the commenter was not required for purposes of participation in the ratification referendum. Further, the proposed rule placed express conditions on any use of a State roll, such as the Kanaiolowalu, *see* § 50.12(b)(2). Nevertheless, the comments indicate some confusion on the permissible use of any State roll under the terms of the proposed rule.

Accordingly, the final rule includes a revised § 50.12(a) that provides that the Native Hawaiian community itself prepares the list of eligible voters. It also clarifies alternative means by which an individual Native Hawaiian can demonstrate a right to vote in the referendum, even if that individual is not on a roll that the community may choose as a foundation from which to build its complete voter list. Finally, the final rule includes, in response to other comments, sworn statements for self-certification or for sponsoring another, and reliance on current or prior enrollment as a Native Hawaiian in a Kamehameha Schools program, certain birth certificates, and court orders. Such changes also address the commenter’s concerns. In sum, even if a declaration as described by the commenter were required for purposes of being on a State roll that the community may rely on under § 50.12(a), the Native Hawaiian community must also accept, for purposes of the referendum ratification, other persons who demonstrate eligibility based on HHCA-eligibility or Native Hawaiian ancestry.

**(j) Nai Aupuni**

*Issue:* Commenters expressed concern about the nation-building process facilitated by Nai Aupuni, a nonprofit organization that convened a constitutional convention, known as an Aha, of Native Hawaiians to reorganize as a government.

(1) *Comment:* Several commenters indicated their belief that the purpose of the proposed rule was to design, implement, or evaluate the outcome of the Aha coordinated by Nai Aupuni. They suggested that the proposed rule had a predetermined outcome —either that no entity would be able to meet the criteria to reestablish a formal relationship with the United States, particularly because doing so would pose a significant financial impediment, or that only the entity that emerged from the Aha coordinated by Nai Aupuni would qualify.

*Response:* These commenters misunderstood the proposed rule. The process set forth in the proposed rule is applicable to any entity that results from the current government-reorganization process, or from any other such process in the future. The final rule does not change this broad applicability. It is entirely up to the Native Hawaiian community to determine whether or when it will reorganize a formal government, and it may seek financial assistance from various sources to fund its future governmental activities, including conducting the ratification referendum. Similarly, it is entirely up to the Native Hawaiian community to determine the form and functions of such government and to avail itself of the process established in the final rule. The rule does not infringe on the self-determination of the Native Hawaiian community, and addresses only those matters necessary to reestablishing a formal government-to-government relationship with the United States.

(2) *Comment:* Some commenters stated that Nai Aupuni did not represent their views and could not speak for them without their consent. Others expressed concerns about alleged flaws in the nation-building process conducted by Nai Aupuni.

*Response:* Section 50.11 provides that the written narrative thoroughly describing the process for drafting the governing document must describe how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community. This general requirement helps to ensure that the process for drafting the governing document includes input from representative segments of the community. The regulations do not set specific requirements relating to the process of nation-building. The process of nation-building is one for the Native Hawaiian community to undertake on its own, and the Department will defer to the community to carry out that process. Accordingly, the proposed rule sets forth only general requirements for submitting a request to reestablish a formal government-to-government relationship. The final rule retains these limited general requirements. The Department takes no position in the rule as to whether any ongoing nation-building process might meet those requirements. If Native Hawaiians do not agree with a particular nation-building process or approach, they will have the opportunity to vote in a referendum and express that view.

If a reorganized government submits a request to the Secretary to reestablish a formal government-to-government relationship, the rule provides that the request must include an explanation of the manner in which these requirements were satisfied. The public will have an opportunity to comment on any request the Secretary receives. Individuals who have concerns about the process used by the Native Hawaiian community may submit comments at that time.

**(k) Land status**

*Issue:* Commenters objected to § 50.44(f) of the proposed rule, which expressly preserves the title, jurisdiction, and status of Federal lands and property in Hawaii.

(1) *Comment:* Some commenters stated that the proposed rule should provide for certain Federal lands to be transferred to Native Hawaiians or Native Hawaiian entities, and questioned the legal validity of Federal acquisition of lands formerly owned by the Kingdom of Hawaii and its monarchs.

*Response:* Changes in title to Federal lands require statutory authority. This rule does not alter any existing Federal law that authorizes the transfer of Federal property. It is possible, however, that a future Native Hawaiian Governing Entity may be qualified to receive Federal property under provisions of Federal law.

With respect to comments questioning the legal status of existing Federal property, the Supreme Court recently discussed this issue in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), and found that title was properly in the Federal government. Therefore, only Congress can resolve the commenters' concerns.

Several commenters expressed the importance of allowing a future Native Hawaiian sovereign to hold property, noting that Native Hawaiians are spiritually connected to the land and that title to land can facilitate self-governance. Although the rule does not affect Federal lands, a future Native Hawaiian government could acquire property by other methods. For example, an existing provision of State law provides for the transfer of one of the Hawaiian Islands, Kahoolawe, to "the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii." Haw. Rev. Stat. 6K-9 (2016). A future Native Hawaiian government could also acquire property by other means, and the rule does not affect its ability to do so.

(2) *Comment:* Commenters requested that the final rule omit § 50.44(f) entirely, while others suggested revising § 50.44(f) in the final rule by changing the word "will" to "does" and adding

the word “current” before “title” so the paragraph reads: “Reestablishment of the formal government-to-government relationship *does* not affect the *current* title, jurisdiction, or status of Federal lands and property in Hawaii” (emphasis added).

*Response:* Section 50.44(f) expressly preserves the title, jurisdiction, and status of Federal lands and Federal property in Hawaii. Therefore, because reestablishment of the formal government-to-government relationship, by itself, would not affect title, jurisdiction, or status of Federal lands either at the time of reestablishment of the relationship or at any time thereafter, the Department did not revise § 50.44(f) with “current” as suggested. The Department did, however, revise this paragraph by changing “will” to “does” to make express that nothing in the rule itself would affect the status of Federal lands and property.

As stated above, the Department appreciates that members of the community believe it is important to secure a land base for the future reorganized Native Hawaiian government; however, providing for jurisdiction or changing the status of Federal lands and property may only occur with statutory authorization. Following reestablishment of a government-to-government relationship, the Native Hawaiian Governing Entity may advance any concerns it may have on land-related issues to the executive and legislative branches of the United States Government on a government-to-government basis.

### **(l) Gaming**

*Issue:* The Department solicited public comments in the proposed rule, 80 FR 59121, about whether the reestablishment of a formal government-to-government relationship would entitle the Native Hawaiian government to conduct gaming under the Indian Gaming Regulatory Act (IGRA).

*Comment:* Some commenters responded that IGRA should apply, others commented that the Native Hawaiian Governing Entity’s inherent sovereign powers would include the power to conduct gaming activities, and that this inherent power could not be limited in any way, or be “subordinate” to State law. One commenter suggested that “[g]aming by the Native Hawaiian government should be left to . . . negotiations with the Federal government.”

*Response:* The Department concludes that IGRA does not apply. For the reasons set forth below in Section (IV)(C), the Native Hawaiian Governing Entity would not be within the definition of “Indian tribe” appearing in IGRA, which is limited to those tribes that are “recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. 2703(5); 25 CFR 292.2. IGRA was enacted to balance the interest of states and tribes and to provide a framework for regulating gaming on “Indian lands.” There are no such lands in Hawaii. Even if it could be argued that certain Hawaiian lands are similar to “Indian lands” within the meaning of IGRA, IGRA does not permit gaming in any State that prohibits all forms of gaming. *See* 25 U.S.C. 2710(b)(1)(A) and (d)(1)(B). Hawaii statutes broadly prohibit all forms of gaming. *See State v. Prevo*, 361 P.2d 1044, 1048-49 (Haw. 1961).

**(m) Reestablishment of a Government-to-Government Relationship**

*Issue:* Commenters asked specific questions related to the reestablishment of a formal government-to-government relationship and its potential impacts.

(1) *Comment:* Commenters asserted that the HHCA authorized land to be taken into trust for the benefit of HHCA beneficiaries, including acquisitions and land exchanges, citing to HHCA Section 206. These commenters suggest that the HHCA is sufficient legal authority for the

Department to place lands into trust for the benefit of the Native Hawaiian Governing Entity without further Congressional authorization.

*Response:* The Department recognizes the vital importance of a land base to the governments of indigenous communities in the United States, including the Native Hawaiian community. There is no present Federal statutory authority, however, for taking land into trust for the Native Hawaiian community, including the HHCA, which applies to the Hawaiian home lands that are under State (not Federal) jurisdiction. A primary source of the Department's authority to take land in trust for tribes in the continental United States is the IRA, and Native Hawaiians are outside its scope. *See Kahawaiolaa v. Norton*, 386 F.3d at 1280 (noting that the IRA's geographic-scope provision, 25 U.S.C. 473, expressly excluded territories but included Alaska, and that the definition of "Indian" in 25 U.S.C. 479 specifically referenced aboriginal peoples of Alaska, a territory like Hawaii at the time the IRA was enacted, and finding that, by its terms, the IRA "did not include any native Hawaiian group"). Consequently, the Secretary does not have authority to take land into trust for Native Hawaiians under the IRA.

(2) *Comment:* The Department received a number of comments that indicated a belief that the final rule would alter an existing regulatory structure. The comments did not, however, state specifically which existing regulations would be altered.

*Response:* The rule does not alter an existing regulatory structure. It creates a new, one-time procedure for reestablishing a formal government-to-government relationship with the Native Hawaiian community. No such rule is currently in place. The Department has regulations in place for facilitating the reorganization of tribal governments, but those regulations by their terms do not apply to the Native Hawaiian community. *See* 25 CFR part 81. In addition, Department regulations under part 83 do not apply to Native Hawaiians, nor do those regulations

apply to an Indian tribe that already has been recognized by Congress. 25 CFR part 83. The final rule is not an amendment to those regulations, but a freestanding rule that takes into account the unique status of the Native Hawaiian community.

(3) *Comment:* Some commenters indicate concern that development of a procedure to reestablish a formal government-to-government relationship with the Native Hawaiian community would surrender either Native Hawaiian sovereignty or the future ability of some groups to assert self-governance rights.

*Response:* The premise of this rulemaking process is that Native Hawaiian people retain their inherent sovereignty, which Congress recognizes and acknowledges through enacting over 150 statutes, thereby creating a special political and trust relationship with the Native Hawaiian community. The rule creates a process to reestablish a formal government-to-government relationship with a future Native Hawaiian reorganized government. The existence of such a process, however, does not change the nature or the inherent sovereignty of the Native Hawaiian community.

(4) *Comment:* Some commenters expressed concern that the future Native Hawaiian government would not have the ability to bring suit to seek redress for past wrongs. They referenced claims relating to “1.8 million acres of land ceded by the Republic of Hawaii to the United States,” to “Hawaiian Homelands used now for airports or harbors,” to “people who have died without an award while waiting on the list of Hawaiian Homes,” and other claims.

*Response:* Neither the proposed rule nor the final rule presumes to address possible claims by Native Hawaiians for past wrongs. The rule provides, in § 50.44(a), that the Native Hawaiian Governing Entity will have “the same inherent sovereign governmental authorities” as do federally-recognized tribes in the continental United States. The Native Hawaiian Governing

Entity will have the capacity to sue and be sued (subject to sovereign immunity and other jurisdictional limitations), as do other indigenous sovereigns in the United States. The inherent governmental authorities of tribes in the continental United States include the ability to file suit to seek redress for past wrongs. This rule does not alter the sovereign immunity of the United States or of the State of Hawaii against claims for past wrongs. The Department will not address the validity of particular legal claims identified by commenters because they are beyond the scope of the proposed rule.

(5) *Comment:* Multiple comments requested that the proposed rule be clarified to indicate that it was not intended to affect any claims that the Native Hawaiian people may have for redress under Federal law.

*Response:* Any existing claims that the Native Hawaiian people may have for redress under Federal law, either individually or collectively, are not addressed by this rule. The Department makes no comment as to the potential merits of any such claims, which are properly addressed by the legislative or judicial branches of the Federal Government rather than in this rulemaking. The existence and consideration of any claims that may exist are not related to the final rule and are separate and distinct matters. Accordingly, the Department made no changes to the proposed rule in response to this comment.

(6) *Comment:* Some commenters suggested that once a formal relationship is reestablished pursuant to the rule, the Native Hawaiian Governing Entity could rely on the Trade and Intercourse Act, 25 U.S.C. 177, to trigger lawsuits alleging unconstitutional takings of Federal, State, and private lands in Hawaii.

*Response:* The Trade and Intercourse Act requires Congressional ratification of transfers of real property from Indian tribes. The U.S. Supreme Court recognized in *Hawaii v. Office of*

*Hawaiian Affairs*, 556 U.S. 163 (2009), that claims to title of public lands were extinguished when Hawaii was annexed as a United States territory. As a result, subsequent transfers of these lands are not subject to the Act. Moreover, the Act does not apply to lands transferred into private ownership before annexation, as Hawaii was then a separate sovereign that was not subject to the requirements of the Act.

(7) *Comment*: Several commenters requested that the rule address procedures for consultation between Federal agencies and the Native Hawaiian Governing Entity, following reestablishment of a government-to-government relationship.

*Response*: Procedures for consultation with federally-recognized tribes in the continental United States are set forth generally in Executive Order 13175. In addition, many Federal agencies have their own policies governing tribal consultation. The Department of the Interior and other Federal agencies already consult with Native Hawaiian organizations under these existing policies. Should a government-to-government relationship be reestablished with a Native Hawaiian government pursuant to this Rule, Federal agencies would evaluate whether consultation could occur under existing consultation policies, or whether those policies would need to be modified.

(8) *Comment*: Several commenters expressed the view that Native Hawaiians should be eligible for programs available to Native Americans under Federal law.

*Response*: Congress provides a distinct set of programs and benefits for Native Hawaiians. In some instances, Congress provides for Native Hawaiians to participate in programs directed to Native Americans generally. In others, Congress provides a parallel set of benefits to Native Hawaiians within the framework of legislation that also provides programs to other Native groups. As explained elsewhere in the Preamble, the Department determined that Congress

included Native Hawaiians in a large number of Federal programs in various ways. In some instances, Congress expressly provided for Native Hawaiians to receive benefits as part of a program provided to Native Americans generally; in others, Congress has provided a distinct program or set of programs, parallel to those that exist for other Native American groups. *See* Section (IV)(C).

To the extent that Native Hawaiians are not eligible for certain programs, it follows that this treatment reflects a conscious decision by Congress. Moreover, because of the structure of many Federal programs, to treat a Native Hawaiian government or its members as eligible for programs provided generally to federally-recognized tribes or their members in the continental United States could result in duplicative services or benefits. The Department concludes that it is for Congress to decide to include Native Hawaiians in additional Federal programs directed towards Native Americans.

(9) *Comment:* The List Act states: “The Congress finds that . . . (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.’” List Act findings, sec. 103. A commenter expressed concern that this language is inconsistent with the Department’s proposal in the notice of proposed rulemaking.

*Response:* The Department notes that the quoted language refers to the Department’s existing part 83 procedures, and that Congress’s reference to part 83 signals Congressional approval of the Department’s authority to adopt such procedures by regulation. The Department adopted part 83, following notice and comment, through the exercise of its delegated authorities. This rule is adopted through the same process and under the same authorities. Nonetheless, the

significant difference between part 83 petitioners and the Native Hawaiian community is that Congress itself has already recognized, and established a special political and trust relationship with, the Native Hawaiian community; the finding cited by the commenter also references the power of Congress in this respect. Therefore, this rule addresses a fundamentally different situation than that addressed in part 83.

(10) *Comment:* A commenter states that the Department’s proposed approach of including Native Hawaiians within the scope of the Indian Civil Rights Act, but not within the scope of other Federal statutes, did not reflect a consistent approach to the application of existing Federal statutes addressing Native Americans.

*Response:* To determine which statutes will apply to the Native Hawaiian Governing Entity, the Department considers each statute’s language defining its scope of application. The requirements of the Indian Civil Rights Act apply to “Indian tribes,” and that act uses broad language to define the term “Indian tribe”: “any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.” This language would include the Native Hawaiian Governing Entity. By contrast, many other Federal statutes define the term “Indian tribe” by referring to tribes that are “eligible for the special programs and services provided to Indians because of their status as Indians,” and as discussed in Section (IV)(C), Congress provided for the Native Hawaiian community under a separate panoply of programs and services.

(11) *Comment:* A commenter expressed concern about the possibility that the Indian Child Welfare Act and the Violence Against Women Act would become applicable in Hawaii by virtue of reestablishment of a government-to-government relationship, stating that the application of these statutes would have disruptive effects in Hawaii.

*Response:* Neither the Indian Child Welfare Act nor the Violence Against Women Act’s tribal-criminal-jurisdiction provision would apply to the Native Hawaiian Governing Entity. The Indian Child Welfare Act applies only with respect to “Indian tribes,” and defines “Indian tribe” to mean “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43.” 25 U.S.C. 1903(8). Because the Native Hawaiian Governing Entity would not be an entity “recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians,” the statute would not apply. And the Violence Against Women Act’s provision recognizing tribal criminal jurisdiction over certain domestic-violence crimes applies only to conduct that “occurs in the Indian country of the participating tribe.” 25 U.S.C. 1304(c)(1), 1304(c)(2)(A). As explained in these responses to comments, there will not be Indian country in Hawaii absent some affirmative Congressional action, and these provisions will therefore not apply unless Congress determines otherwise.

(12) *Comment:* Commenters requested that the language of § 50.44(a) be amended to state: “§ 50.44 (a) Upon reestablishment of the formal government-to-government relationship, the Native Hawaiian Governing Entity will have the same government-to-government relationship under the United States Constitution and Federal law as the government-to-government relationship between the United States and a federally-recognized tribe, with the same privileges, immunities and inherent sovereign governmental authorities.” Commenters stated that this language will clarify that the Native Hawaiian government will have both the same privileges and immunities as other federally-recognized tribes in the continental United States, and possess the same inherent sovereign governmental authorities.

*Response:* The Department agrees that, following the reestablishment of a formal government-to-government relationship pursuant to this Part, the Native Hawaiian government will have the same inherent sovereign governmental authorities as federally-recognized tribes in the continental United States, as set forth in § 50.44(a). Those authorities include certain inherent attributes of sovereignty, such as sovereign immunity. Likewise, Native Hawaiian rights, protections, privileges, immunities, and benefits under Article XII of the Constitution of the State of Hawaii would not be affected by reestablishment of a government-to-government relationship. The Department determined that the existing language of § 50.44(a) adequately describes the inherent authorities of the Native Hawaiian Governing Entity, and therefore made no changes in the rule.

(13) *Comment:* A few commenters expressed concern that existing Federal and State laws would no longer apply to members of the Native Hawaiian Governing Entity.

*Response:* Members of the Native Hawaiian Governing Entity would remain subject to applicable Federal and State law, as well as laws enacted by the Native Hawaiian Governing Entity.

For example, the Native Hawaiian Governing Entity would have authority to exercise jurisdiction over relationships between its members by enacting family laws, contract laws, or other laws that would govern those relationships. To the extent that the Native Hawaiian Governing Entity adopts such laws, they generally would apply as between its members notwithstanding contrary State law. *See Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016); *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999).

Because there is no Indian country in Hawaii, upon reestablishing a government-to-government relationship with the United States, the Native Hawaiian Governing Entity would

not have territorial jurisdiction. While Congress imposed certain restrictions on alienation of Hawaiian home lands, title to those lands is held by the State, not the Federal Government. Therefore, the State retains jurisdiction over Hawaiian home lands unless Congress provides otherwise in the future. *See* response to comment (1)(2).

(14) *Comment:* One commenter stated that the rule would “open a Pandora’s box” for other groups, such as the Amish and Cajuns, to seek tribal status. Others expressed similar concerns.

*Response:* These commenters do not appear to appreciate the important distinction between communities based on shared history and culture and a political community that represents the continuous existence of an inherent indigenous sovereign, such as the Native Hawaiian community. The U.S. Constitution expressly references Indian tribes and provides for relationships with them; the Amish, Cajuns, and similar groups do not have native or indigenous status under Federal law. *See* further discussion of the continuing Native Hawaiian political community in Section (II).

(15) *Comment:* Some commenters expressed concern that the rule would divide Hawaii’s integrated, multicultural Hawaiian society and create unnecessary social divisions between Native Hawaiians and non-Native Hawaiians.

*Response:* The rule is based on the pre-existing sovereign authority of the Kingdom of Hawaii that was evidenced by treaties with the United States and later suppressed as part of the annexation process; it is not creating any “social divisions” as the commenter suggests. The rule provides a process for reestablishing a formal government-to-government relationship between two sovereigns and will assist the Native Hawaiian community in preserving their unique culture, language, and traditions. Congress found that the constitution and statutes of the State of Hawaii similarly “protect the unique right of the Native Hawaiian people to practice and

perpetuate their cultural and religious customs, beliefs, practices, and language.” Native Hawaiian Health Care Act, 42 U.S.C. 11701(3); *see* Native Hawaiian Education Act, 20 U.S.C. 7512(21). Consistent with these findings, the Department agrees with the commenter who observed that “[t]he Native Hawaiian people and their culture are the foundation of the culture of the State of Hawaii, and an integral part of what makes Hawaii work as a multicultural society . . . . A federally-recognized Native Hawaiian government will help to improve the Native Hawaiian people’s ability to strengthen and perpetuate the indigenous culture and language of these islands, thereby strengthening Hawaii for all.”

(16) *Comment:* Commenters questioned the use of the term “reestablish” in referring to a future government-to-government relationship between the United States government and a Native Hawaiian government. They noted that the relationship between the United States government and the Hawaiian Kingdom was a treaty relationship between nation-states, and that a future relationship with a Native Hawaiian government would have a different character.

*Response:* The Department agrees that the formal government-to-government relationship with a Native Hawaiian government would have very different characteristics from the government-to-government relationship that formerly existed with the Kingdom of Hawaii, and would much more closely resemble the relationship with federally-recognized tribes in the continental United States. The Department’s use of the term “reestablish” is intended to be understood in this broader context.

The Department notes that, due to the unique history of Hawaii, either the term “reestablish” or the term “establish” could be used to describe the formalization of the relationship between the United States Government and a Native Hawaiian Governing Entity, and believes that either term is appropriate. The relationship between the United States and the

Native Hawaiian community is reflected in a significant number of Congressional actions recognizing and providing benefits to Native Hawaiians, though the Native Hawaiian community has lacked a unified formal government since the nineteenth century. The Native Hawaiian community historically had a unified formal government that was recognized through formal treaties with the United States. Due, in part, to actions taken by representatives of the United States, the Kingdom of Hawaii was overthrown, and the Native Hawaiian community has not maintained a unified formal government over the past several generations. The United States relationship with a Native Hawaiian Governing Entity would be “reestablished” in the sense that the United States previously maintained a formal relationship with a Native Hawaiian government, not that the former relationship between the United States and the Kingdom of Hawaii would resume or be resurrected.

(17) *Comment:* One commenter stated that because the Kingdom of Hawaii included native-born and naturalized non-Hawaiian citizens, many of whom served in high-ranking positions in the Kingdom government, no “Native Hawaiian” government consisting solely of Native Hawaiians could now “reorganize” itself and “reestablish” a formal government-to-government relationship with the United States. Other commenters similarly asserted that the “multiethnic” nature of the Kingdom at the time of its overthrow disqualifies any future Native Hawaiian government from exercising self-determination and self-governance pursuant to Federal law, and that consequently the Department lacks the authority to promulgate this rule.

*Response:* The Department does not agree that the presence of non-Native Hawaiians in the Hawaiian Kingdom indicates that the Native Hawaiian community lost its character as a self-governing indigenous community. For example, many Indian tribes in the continental United States welcomed outsiders and intermarried with non-Indians, and others found themselves

living in close association with non-Indians as a result of patterns of migration and settlement. Those circumstances did not preclude those Indian tribes from continuing to exist as self-governing and sovereign nations. Moreover, Congress established a special political and trust relationship with the Native Hawaiian community, and thus determined that the community's political existence was not negated by the historical events identified by these commenters. It follows that the Department has authority to reestablish a formal government-to-government relationship with a future reorganized Native Hawaiian government.

That the Kingdom of Hawaii included non-Hawaiian citizens among its citizenry does not establish that the Native Hawaiian community ceased to exist or exercise political authority. As set forth in the background discussion of this rule, the Native Hawaiian community continued to demonstrate its existence as a distinct political community separate and apart from non-Native Hawaiians before, during, and after the Kingdom's overthrow. Moreover, though non-Native Hawaiians participated in governance of the Kingdom, they were considered "foreigners" and their rights were limited. *See* I Ralph S. Kuykendall, *The Hawaiian Kingdom* 227-41 (1947) (citing Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III (1842)). The rights of such "foreigners" evolved over time, but the Kingdom was a monarchy, and only Native Hawaiians served as monarchs. The United States had a treaty relationship with the Kingdom of Hawaii that persisted through active involvement by Native Hawaiians in the Kingdom's government. The fact that "foreigners" lived and participated in the political process in Hawaii at the time does not alter the fundamental fact that the United States had a prior political relationship with the Native Hawaiian community's government in the 1800s.

(18) *Comment:* Some commenters objected to the proposed rule's limitation on reestablishing a government-to-government relationship with a single Native Hawaiian government. Among these commenters, some proposed that the Secretary allow separate government-to-government relationships with HHCA Native Hawaiians and with other, non-HHCA Native Hawaiians based on Congress's separate treatment of these groups. Other commenters stated that Native Hawaiians did not have a single unified government until after contact with Western societies, so that there is no historical basis for treating them as a single community in the proposed rule.

*Response:* Many other commenters, however, supported the Department's approach to provide for a single government-to-government relationship. History shows that many Native groups changed their form of government over time, including in response to Western contact. The single, centralized government of the Kingdom of Hawaii, which was in place for almost a century before its overthrow in 1893, provides a strong basis on which to proceed here with a single Native Hawaiian government to conduct relations with the United States on a formal government-to-government basis. Moreover, doing so is consistent with how Congress treated the Native Hawaiian community as a single entity through more than 150 laws that established programs and services for its benefit.

As correctly noted by commenters, Congress used two definitions of Native Hawaiian to establish eligibility for Native Hawaiian programs and services. *See* response to comment (e)(1). In the rule, the Department reconciled Congress's use of these two definitions with its treatment of Native Hawaiians as a single community by providing for a government-to-government relationship with one Native Hawaiian government that has broad-based community support among both HHCA Native Hawaiians and the broader group of Native Hawaiians. Moreover, the Department is aware of no Federal statutes directed specifically to individuals who are Native

Hawaiians but who are not HHCA Native Hawaiians. This lack of statutory separation of the two demonstrates that Congress views HHCA Native Hawaiians as included within the broader group of Native Hawaiians, rather than treating the two as distinct and separate for Federal programs and services. Finally, as noted above in response to comments about political subdivisions, it is not uncommon for the United States to have a government-to-government relationship with a single indigenous government that represents multiple communities with distinct historical and cultural roots and property rights.

The final rule also envisions that the Native Hawaiian government may adopt either a centralized structure or a decentralized structure with political subdivisions defined by island, by geographic districts, historic circumstances, or otherwise in a fair and reasonable manner. Allowing for political subdivisions is consistent with principles of self-determination applicable to Native groups, and provides some flexibility should Native Hawaiians wish to provide for subdivisions with whatever degree of autonomy the community determines is appropriate, although only a single formal government-to-government relationship with the United States would be established.

**(n) Other**

(1) *Comment:* Some commenters opposed the proposed rule because a group of Native Hawaiians or, as they assert, the majority of Native Hawaiians, do not support such an action.

*Response:* The Department is aware that some in the Native Hawaiian community do not support reestablishment of a formal government-to-government relationship. Others in the Native Hawaiian community, however, urge the Department to create the administrative procedure and criteria proposed in the NPRM and support such action. While there may be differences of opinion on the issue, the community's views may change over time, and most

importantly, the rule would apply only if the Native Hawaiian community reorganizes their government and formally submits a request to reestablish a formal government-to-government relationship with the United States. Therefore, the Department determined that it would be appropriate to finalize the rule in order to give the community notice of what the Secretary would require if at some point in the future there is broad-based community support for a reorganized Native Hawaiian government that seeks to reestablish a formal government-to-government relationship.

(2) *Comment:* One commenter expressed concern that the proposed rule was drafted without input from the Native Hawaiian community and that no “meaningful consultation” occurred during the comment period.

*Response:* The proposed rule was the product of extensive consultations with the Native Hawaiian community, beginning with the ANPRM issued in June 2014.

As discussed in Section (V), the ANPRM specifically solicited comments through a series of questions relating to whether the Department should assist the Native Hawaiian community in reorganizing its government and whether the Department should take administrative action to facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community. The issuance of an ANPRM is not required by statute, and it is an option that Federal agencies often determine is not necessary to pursue. The Department determined, however, that issuing an ANPRM would be a vital first step in gathering diverse and informed input from the Native Hawaiian community itself. To that end, the Department held 15 public meetings in Hawaii, divided among the major islands, over a three-week period. These public meetings provided opportunities for extensive comment from the community, resulting in over 40 hours of testimony. The Department met with a range of

Native Hawaiian community organizations in Hawaii for educational outreach during the same period. The Department also conducted five consultations on the U.S. mainland where many Native Hawaiians offered comment on the ANPRM, and accepted invitations from mainland-based Native Hawaiian organizations to participate in forums regarding the ANPRM.

Based on the comprehensive input received on the ANPRM, the Department drafted the proposed rule that was published in October 2015. Following publication of the proposed rule, the Department further consulted with the public and the Native Hawaiian community through four teleconferences and produced a video that explained its provisions, *available at* <https://www.doi.gov/hawaiian/procedures>. The Department received thousands of written comments, which it considered closely in preparing the final rule as noted in Section (IV)(A).

(3) *Comment:* A commenter stated that the rule relies on the erroneous assertion that the population of HHCA Native Hawaiians is declining.

*Response:* Nothing in the proposed or final rule rests on any assumption about whether the total number of HHCA Native Hawaiians is decreasing or increasing. The preamble to the proposed rule noted that the ratio of HHCA Native Hawaiians to all Native Hawaiians likely is declining over time, as the general Native Hawaiian population is increasing. Any fluctuation in population, however, is not a valid basis to abandon this rulemaking, as there remains a sizable Native Hawaiian community that may ultimately choose to reorganize its government. Furthermore, there is great variety in the population levels of federally-recognized tribes in the continental United States.

(4) *Comment:* Some commenters criticized the proposed rule's reliance on certain sources documenting the history of relations between the United States and Native Hawaiians. One commenter suggested that these sources are insufficient historical evidence compared to what

must be produced under 25 CFR part 83, the procedures for Federal acknowledgment of Indian tribes.

*Response:* The Department relies on Federal statutes, Congressional preambles to the findings, case law and independent research in setting out relevant historical events in the proposed and final rules. As the Federal agency with primary jurisdiction over and subject-matter expertise on Native Hawaiian affairs, the Department reviewed the sources cited in the proposed rule and determined that they were sufficiently reliable before citing them. In response to this comment, however, the Department welcomed additional information from commenters, reviewed commenters' suggested sources, and included new citations to supplement the final rule.

With regard to 25 CFR part 83, the Ninth Circuit concluded that the regulations for Federal acknowledgment of tribes in the continental United States do not apply to Native Hawaiians. *Kahawaiolaa v. Norton*, 386 F.3d at 1274 (citing 25 CFR 83.3 (2004), restricting application of part 83 to "those indigenous groups indigenous to the continental United States"). In upholding part 83's express geographic limitation, the Ninth Circuit concluded that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *Id.* at 1283. The court expressed a preference for the Department to apply its expertise to determine whether the United States should relate to the Native Hawaiian community "on a government-to-government basis." *Id.* But unlike a part 83 petitioner, the Native Hawaiian community has already been "acknowledged" or "recognized" by Congress in over 150 enactments. Accordingly, this rule establishes a process for determining *how* (not whether) a representative sovereign government of the Native Hawaiian

community can relate to the United States on a formal government-to-government basis, in addition to the existing special political and trust relationship. *See* 80 FR at 59122.

## **(2) Section-by-Section Response to Comment**

### **(a) Section 50.1 – Purpose**

(1) *Comment:* A commenter suggested adding an additional purpose for the rule: “to more effectively implement and administer – ‘(c) Native Hawaiians’ exercise of their inherent sovereignty and right to self-determination.”

*Response:* The Department agrees with the substance of this comment and revised the purpose section of the rule. The rule identifies that one of its purposes is to provide the Native Hawaiian community the opportunity to more effectively exercise its inherent sovereignty and exercise self-determination.

(2) *Comment:* One commenter noted that the listed purposes of the rule (§ 50.1(a), (b)) are inadequate and that the Department should indicate how the rule will improve Federal implementation of existing Native Hawaiian benefits.

*Response:* The Department made no changes to the rule in response to this comment. As stated in the preamble, strong Native governments are critical to exercising inherent sovereign powers, preserving Native culture, and sustaining Native communities. A unified, reorganized Native Hawaiian government could provide a formal, direct link on a government-to-government basis between the Native Hawaiian community as a whole and the United States.

(3) *Comment:* A commenter suggested adding an additional purpose for the rule that describes the HHCA Native Hawaiian community as having its own right to self-determination and land use.

*Response:* The Department made no changes to the rule in response to this comment because the Department will only reestablish a formal government-to-government relationship with a single Native Hawaiian government in order to be consistent with Congress’s statutory treatment of Native Hawaiians. *See* response to comment (m)(18).

**(b) Section 50.3 – Political subdivisions**

(1) *Comment:* Commenters suggested amending the rule to provide for more than one Native Hawaiian government that could seek a government-to-government relationship with the United States. They assert that allowing multiple Native Hawaiian governments would more accurately reflect the composition of the Native Hawaiian community, particularly HHCA Native Hawaiians who already have a special relationship with the United States under the HHCA. Similarly, commenters suggested amending the rule to allow homestead associations or moku-puni (island-wide councils) to seek formal relationships with the United States.

*Response:* The Department made no changes to the rule in response to this comment. The Department appreciates that the Native Hawaiian community has a rich history of self-governance both as geographically defined chiefdoms and as a unified government under one Native Hawaiian monarch. Congress, however, has dealt with Native Hawaiians as a single community. As a result, the Department will reestablish a government-to-government relationship with a single Native Hawaiian government although that government may recognize political subdivisions based on this history or other distinctions within the community consistent with Federal law. *See* response to comment (f)(2).

(2) *Comment:* One commenter suggested that the final rule should define the scope of or clarify a political subdivision’s “limited powers” in § 50.3.

*Response:* The Department made no changes to the rule in response to this comment. By definition, any political subdivision provided for in the governing document would not be independent of the Native Hawaiian Governing Entity and thus would have only governmental authorities derived from the larger entity, *i.e.*, “limited powers.” The scope of those “limited powers” would be determined by the Native Hawaiian community and defined in the governing document.

(3) *Comment:* One commenter suggested revising the proposed rule to require that the Native Hawaiian governing document include a provision establishing a political subdivision limited to HHCA Native Hawaiians “with the express purpose of managing the federal and state relationships involved in the implementation of the HHCA and the HHLRA.”

*Response:* The Department made no changes to the proposed rule in response to this comment. The Department respects a Native Hawaiian government’s inherent authority to exercise self-determination and self-governance by developing a governing document that best suits its needs and those of its citizenry. The proposed rule accordingly permitted the Secretary to reestablish a government-to-government relationship with a single Native Hawaiian government that may include political subdivisions based on island or other geographic, historical, or cultural ties out of respect for the Native Hawaiian community’s unique history of self-governance prior to and during the Kingdom of Hawaii. If HHCA Native Hawaiians determine that their interests are best served by participating in a Native Hawaiian government through a political subdivision with specific authorities, they may advocate for such a requirement during development of the community’s governing document. If the governing document adopted by the community as a whole provides specific authorities to political subdivisions defined in a fair and reasonable manner, the Department will respect that grant of authorities. The Department expects that

HHCA Native Hawaiians will play a key role in developing the governing document, which must be ratified to reflect the will of the Native Hawaiian community as a whole through a process that is free and fair.

**(c) Section 50.4 – Definitions**

(1) *Comment:* A number of commenters claimed that by defining the term “Native Hawaiian” consistent with past Congressional usage of the term, the Department potentially undermines attempts by the Native Hawaiian community to identify their own membership.

*Response:* Congress has already established a special political and trust relationship with the Native Hawaiian community. Accordingly, in this rulemaking the Department applies existing definitions Congress has adopted in establishing this relationship. The Department recognizes and supports the community’s interest in self-governance, and notes that any governing document that the community adopts will appropriately include membership criteria that reflect the community’s own definition of its membership consistent with § 50.13(f).

(2) *Comment:* A commenter suggested revising the definition of “HHCA-eligible Native Hawaiian” to parallel the definition of “native Hawaiian” under HHCA sec. 201(a)(7), reasoning that “HHCA-eligible Native Hawaiian” is “overly complicated” and could cause confusion in the community, among other reasons.

*Response:* The Department amended the definition of “HHCA-eligible Native Hawaiian” in the final rule to more clearly reflect the definition of “native Hawaiian” under the HHCA, as suggested. And for simplicity, the Department changed the term to “HHCA Native Hawaiian.”

(3) *Comment:* A commenter notes that the definition of HHCA Native Hawaiian “seems to disallow descent by out-of-wedlock birth or claiming a different father than your mother’s husband,” as well as descent by adoption or from outside the Native Hawaiian community.

*Response:* The Department made no changes to the rule in response to this comment. Nothing in the definition of “HHCA Native Hawaiian” requires a marriage certificate or would preclude an out-of-wedlock child from qualifying under the definition. In contrast, a non-Native Hawaiian child adopted within the community would not be eligible to participate in the ratification referendum. *See* § 50.13; response to comment (c)(1); (i)(3).

(4) *Comment:* A commenter requested that the Department add “which was not repealed and remains in effect with the elements of both Federal and State law” to the definition of “HHCA” in the definitions section of subpart C in order to clarify that this law was not repealed two years after Hawaii became a state.

*Response:* The Department agrees that the HHCA remains in effect and has elements of both Federal and State law. It is unnecessary to include clarifying language to that effect in the final rule.

(5) *Comment:* A commenter requested that the Department add definitions for the terms “Secretary,” “Rehabilitation of native Hawaiians” and “State.”

*Response:* The Department made no changes to the definition of Secretary. The Department chose not to define “rehabilitation of Native Hawaiians” because the term is not used in the rule and is outside of the scope of the rulemaking. The Department added a definition of “State.”

(6) *Comment:* A commenter asked whether the term “Native Hawaiian community” refers to “the Hawaiian Nation” as defined to mean “a large aggregate of people united by common descent, history, culture, or language inhabiting a particular country or territory.”

*Response:* The term “Hawaiian Nation” has a variety of different meanings and the Department is not aware of any single, authoritative definition of that term. The term “Native Hawaiian community” is defined in the final rule as “the distinct Native Hawaiian indigenous political

community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.” The term “Native Hawaiian community” includes the entire community recognized by Congress and excludes all individuals outside of that community.

(7) *Comment:* One commenter was concerned that the proposed rule indicated that individuals with leaseholds on Hawaiian home lands were, by definition, considered “Native Hawaiian,” and that such a definition was problematic because some individuals have Hawaiian home land leaseholds because they lived on lands that were subject to the Hawaiian Homes Commission Act. In short, these individuals became lessees simply because of the location of their ancestral homestead, not due to their ancestry. Examples included lands that currently make up the Papakolea community (including Papakolea, Kewalo, and Auwailimu).

*Response:* Ancestry is a crucial component to the definitions of “Native Hawaiian” and “HHCA Native Hawaiian” in the rule, and a non-Native Hawaiian lessee would not meet these definitions.

(8) *Comment:* One commenter expressed concern that the proposed rule defines “Native Hawaiian” in the same terms the Supreme Court found to be racial in *Rice v. Cayetano*, 528 U.S. 495 (2000). Numerous commenters stated, more generally, that the Department’s proposed action was unconstitutional and violated the Equal Protection Clause of the U.S. Constitution.

*Response:* The Department disagrees that it defines “Native Hawaiian” in racial terms. Rather, it defines “Native Hawaiian” consistent with the special political and trust relationship Congress acknowledged and recognized in over 150 statutes. The final rule sets out procedures to reestablish a formal government-to-government relationship with a distinct indigenous political community recognized by Congress, and therefore does not violate the Equal Protection Clause

of the U.S. Constitution for the same reasons that the Supreme Court found provisions of Title 25 of the United States Code relating to Indians and Indian tribes constitutional in *Morton v. Mancari*, 417 U.S. at 554 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”). The rule is distinguishable from the provisions found unconstitutional in *Rice v. Cayetano*. In *Rice*, the Court expressly recognized that *Mancari* and its progeny authorize distinct treatment of tribes and their members. 528 U.S. at 518-19.

(9) *Comment*: Several commenters noted that the proposed definition of “HHCA-eligible Native Hawaiian” does not include individuals who obtained their homestead leases through either Section 208 or 209 of the HHCA, that is, through valid successorship or transfer pursuant to federally approved amendments to the HHCA.

*Response*: The Department made no changes to the rule in response to these comments. The State proposed an amendment to the HHCA to allow certain relatives of HHCA lessees to receive a lease through successorship or transfer; and Congress approved that amendment, making it law. In general, the amendment permits a homestead lessee to designate a husband, wife, child, or grandchild who is at least one-quarter Native Hawaiian ancestry to receive a lease through succession or transfer. Congress also approved amendments to permit succession to certain others who meet the definition of “native Hawaiian” in HHCA sec. 201(a)(7). Notably, these amendments do not expand the definition of “native Hawaiian” in HHCA sec. 201(a)(7), and only permit certain individuals to receive leases through successorship or transfer. Further, Congress in enacting the HHLRA, defined “beneficiary” in terms of the HHCA definition of “native Hawaiian” without reference to these transfer and successorship amendments. Congress

also provided that the Department “advance the interest of the beneficiaries” in administering the HHLRA and HHCA. The Department therefore concludes that the HHCA definition in sec. 201(a)(7), as originally enacted, remains the controlling Congressional definition for purposes of this rulemaking.

(10) *Comment:* A commenter suggested that in lieu of eliminating the U.S. citizenship requirement, the Department could consider amending the definition in § 50.4 to read that Native Hawaiians must be “eligible to be considered within the Citizenship clause of the U.S. Constitution.” The commenter stated that this amendment would allow the Native Hawaiian government to include individuals who may have reasonable concern about being classified as a U.S. citizen, given the history of the overthrow, but who would otherwise be eligible for such status under the Constitution.

*Response:* The Department eliminated the U.S. citizenship requirement from the rule as unnecessary and inconsistent with many Federal statutes concerning Native Hawaiians.

**(d) Section 50.10 – Elements of a request**

(1) *Comment:* A commenter suggested that the final rule permit an appointed interim Native Hawaiian governing body to submit a request for reestablishment of a formal government-to-government relationship, noting that “Federal law and policy respects the rights of Native people in determining their own political priorities.” Others agreed and suggested such a governing body could additionally assist in organizing the organic activities of the reorganized government.

*Response:* The Department made no changes to the rule in response to this comment. Section 50.10(f)-(g) requires that an officer of the Native Hawaiian government submit and certify a duly enacted resolution of the governing body requesting a formal government-to-government relationship. This provision presupposes that government officers would be elected and seated

before a request to reestablish a formal government-to-government relationship could be “duly” enacted and submitted under the rule. To ensure that it is the will of the Native Hawaiian community to present a request to reestablish a formal government-to-government relationship, the requester must be an elected governing body, not an appointed one.

(2) *Comment:* A commenter noted that because elections for government offices would occur prior to submission of a request to the Department, those elections seemed “premature” since the Department could reject the governing document that sets out the elections process and procedures.

*Response:* The Department made no changes to the proposed rule in response to this comment. As stated below, the Department is committed to providing technical assistance at the request of the Native Hawaiian community. In the event the Department does not accept a governing document as a basis for a formal government-to-government relationship, the elected officials’ status as officers would presumptively be unaffected, however, the text of the governing document would ultimately determine if the election of officers was premature. Similarly, if the Secretary denies a request to reestablish a formal government-to-government relationship, that decision would not affect the authority of the governing document within the community.

**(e) Section 50.11 – Process for drafting governing document**

(1) *Comment:* Commenters suggested amending the rule to provide the criteria or types of evidence that the Secretary will consider in a finding that the minimum standards for demonstrating “meaningful input” from “representative segments of the Native Hawaiian community” were met.

*Response:* The Department made no changes to the rule in response to this comment. The Native Hawaiian community itself is in the best position to determine how to obtain and

implement “meaningful input” from its diverse membership. The Department anticipates deferring to reasonable approaches adopted by the community to implement this standard.

(2) *Comment:* A commenter asked whether the Department would consult with the Native Hawaiian government on laws or policies it proposed for enactment in order to determine whether they could conflict with State or Federal law.

*Response:* The Department is willing to provide technical assistance to facilitate compliance with the final rule and with other Federal law, upon request for assistance, but encourages the Native Hawaiian community to seek guidance as to State law from appropriate State officials and other non-Federal sources.

**(f) Section 50.12 – Documents that demonstrate who participates in ratification referendum**

(1) *Comment:* One commenter suggested removing proposed § 50.12(b) to accommodate Native Hawaiians who object to State-led efforts to compile a roll of Native Hawaiians, such as the Kanaiolowalu, to “encourage a more fair and inclusive referendum for Native Hawaiians of all political views.” By contrast, another commenter suggested amending this provision of the proposed rule to specify the NHRC as responsible for compiling and certifying the roll.

*Response:* The Department revised § 50.12 to make clear that the Native Hawaiian community must develop its own voter list but may rely on a roll of Native Hawaiians prepared by others, provided certain conditions are met. Since it is the Native Hawaiian community’s voter list, the Department rejected the suggestion that the final rule place responsibility for carrying out the conditions set forth in § 50.12 on the NHRC.

(3) *Comment:* To accommodate Native Hawaiians who lack traditional “paper” documentation of their status, one commenter recommended enhancing the rule’s criteria for demonstrating Native Hawaiian and HHCA Native Hawaiian status for ratification purposes to include

“verification by kupuna (elders) or kamaaina (long term community residents)” which some Federal laws currently provide.

*Response:* The Department made changes to § 50.12 to enhance the ability of individuals who may not have traditional documentation to document descent. It is for the Native Hawaiian community to determine in the first instance whether this commenter’s suggestions should be adopted as “[o]ther similarly reliable means” under § 50.12(b)(5) and (c)(4), and the Department would expect to give deference to the community’s judgment.

(4) *Comment:* The DHHL expressed concern that the integrity of its processes for certifying eligibility for HHCA programs and benefits could be negatively impacted if alternative methods for certification of “HHCA-eligible Native Hawaiian” status are accepted as proposed in § 50.12(a)(2)(ii). Moreover, citing “significant administrative burden” and its “responsibility and . . . obligation to lessees, wait-listers, and applicants to maintain the confidentiality and security of their personally identifiable information,” among other concerns, DHHL objected to being identified as a source to demonstrate “HHCA Native Hawaiian” status in the proposed rule at § 50.12(a)(1)(i) and (a)(2)(i).

*Response:* The proposed rule did not intend to burden or assign a role for DHHL in the verification process, and nothing in the rule mandates such involvement. For instance, DHHL may be willing to certify to an individual that he or she is a Native Hawaiian lessee under HHCA sec. 201(a)(7), but the rule does not require DHHL to do so. Individuals who are enumerated on a DHHL roll or list as HHCA-eligible should have some kind of documentation from DHHL indicating their status under HHCA sec. 201(a)(7) and such documents are sufficient proof of their status as “HHCA Native Hawaiians” without further involvement by DHHL. Further, the Department sees no reason to require such individuals to resubmit ancestry documentation that

DHHL previously found acceptable to those compiling the list of eligible voters. The Department also finds that persons who meet the definition of “native Hawaiian” in HHCA sec. 201(a)(7) should be permitted to document such status by using other records or documentation demonstrating such eligibility, *see* final rule § 50.12(c), even if they have not applied to DHHL or their application has not been acted upon by DHHL.

Finally, as to DHHL’s concern about collateral effects on its certification processes, a determination by the Native Hawaiian community that an individual is an “HHCA Native Hawaiian” for purposes of compliance with this rule would not have any collateral effect on eligibility determinations made by DHHL for its own purposes under its own processes, which may rely on a distinct methodology or distinct documentation standards.

**(g) Section 50.13 – Contents of governing documents**

(1) *Comment:* Commenters objected to the proposed rule’s requirement excluding non-Native Hawaiians from membership. They expressed their belief that the Native Hawaiian government should have the opportunity to decide whether to include non-Native Hawaiians in the formulation of its governing documents.

*Response:* The Department made no changes to the rule in response to this comment. Federal law requires a demonstration of Native ancestry to be eligible for membership. See response to comment (i)(3).

(2) *Comment:* A commenter suggested either eliminating § 50.13(j)’s requirement that the Native Hawaiian governing document “[n]ot contain provisions contrary to Federal law” or amending it to read: “Not contain provisions contrary to *current* Federal law” (emphasis added).

*Response:* The Department made no changes to the rule in response to this comment. The ordinary reading of § 50.13(j) is that the governing document must comply with then-applicable

Federal law. The comment is correct, however, in noting that Federal law can change over time, and the result may be to broaden or narrow the scope of Native governments' ability to exercise their inherent sovereign authorities, including authorities identified in their governing documents. *See United States v. Lara*, 541 U.S. 193 (2004). Thus, if a governing document contains a provision that may not be exercised because it is inconsistent with Federal law, that provision will not necessarily render that document "contrary to Federal law" for purposes of this section. The result instead would be that the provision will not be enforceable.

(3) *Comment*: One commenter asked for guidance on the meaning of § 50.13(b), which requires the Native Hawaiian governing document to "prescribe the manner in which the government exercises its sovereign powers."

*Response*: This language is intended to refer to a governing document's enumeration of powers of the respective branches of government and of officials, and establishment of the processes by which governmental power is exercised. It is intended to be read together with § 50.13(c), which references establishment of "the institutions and structure of the government, and of its political subdivisions (if any)."

(4) *Comment*: One commenter expressed the opinion that the Department would be unable to "enforce" the terms of the Native Hawaiian Governing Entity's initial governing document because the entity, like an Indian tribe, would be able to amend this document without Secretarial approval.

*Response*: The Department made no changes to the rule in response to this comment. § 50.13 provides minimum requirements for a governing document, including that it must "[d]escribe the procedures for proposing and ratifying amendments to the governing document." Section 50.13(i). Under this rule, the Department does not have a responsibility to approve or disapprove

amendments to the governing document that are ratified after the formal government-to-government relationship has been reestablished.

**(h) Section 50.14 – Ratification referendum**

(1) *Comment:* One commenter suggested adding a provision requiring verified Native Hawaiians and HHCA Native Hawaiians to “indicate[] a willingness to participate in the referendum by enrolling on the referendum voter list acknowledging U.S. citizenship and the Native status recognized by Congress. A willingness to participate, regardless of a vote for or against ratification, is a key baseline criteria that should be included” in the final rule. Others echoed the substance of this comment requiring that the voter list be created through an “opt-in” process.

*Response:* The Department made no changes to the rule in response to these comments. The proposed and final rules provide that the voter list exclude any individual who requests to be removed, which can be characterized as the ability to “opt-out.” Whether “opt-in” or “opt-out,” each process ensures that individuals are empowered to exclude themselves from the list. The Native Hawaiian community, however, may not impose additional criteria, as suggested by the commenter, which could result in excluding individuals recognized by Congress as part of the Native Hawaiian community.

(2) *Comment:* One commenter observed that while the proposed rule requires a written narrative of the Native Hawaiian government’s ratification process and procedures, there is no “real review” by the Department until after the ratification concludes. This commenter suggested the final rule include authority for the Native Hawaiian government to submit its proposed ratification procedures for the Department’s review prior to implementation as an “intermediate step” that could potentially prevent avoidable delay or disapproval of the request on procedural grounds.

*Response:* The Department made no changes to the rule in response to this comment. Section 50.21 of the rule authorizes technical assistance to facilitate compliance with the final rule and other Federal law upon request by the Native Hawaiian community. Technical assistance could, for instance, include providing Departmental expertise related to the community’s ratification process and other technical matters.

**(i) Section 50.16 – Secretarial criteria**

*Comment:* One commenter requested that the requirement that the ratification referendum and elections for public office were “conducted in a manner not contrary to Federal law” be revised to refer to “then established Federal law” because of the possibility that Federal law would change at some point following the ratification referendum.

*Response:* The Department notes that Federal law imposes fairly few limitations on a referendum or election conducted by a Native sovereign. The Voting Rights Act does not apply to such elections, for example. *See Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1125-26 (D. Haw. 2015); *Gardner v. Ute Tribal Court Chief Judge*, 36 Fed. App’x 927, 928 (10th Cir. 2002); *Cruz v. Ysleta Del Sur Tribal Council*, 842 F. Supp. 934, 935 (W.D. Tex. 1993). The reference to Federal law may therefore have a fairly limited application. Moreover, the Department believes that the ordinary reading of this provision is that the referendum and election must comply with then-applicable Federal law. The Department accordingly believes that no revision to this provision of the rule text is necessary, as this is the most natural interpretation of the existing language.

**(j) Section 50.21 – Technical assistance**

*Comment:* Commenters requested that the Department be required to provide technical assistance on all aspects of the rule, from drafting of organic documents to compliance with

various standards articulated in the proposed rule, and that such technical assistance include Federal grants.

*Response:* The Department made no changes to the rule in response to this comment. The Department is committed to assisting the Native Hawaiian community's efforts to exercise self-determination and reorganize its government, and therefore will provide technical assistance upon request of the Native Hawaiian community. Regulations, however, cannot independently authorize Federal grants; statutory authority is required. The Native Hawaiian community may seek financial assistance from various funding sources.

**(k) Section 50.30 to 50.32 -- Public comment / Deadline extension**

(1) *Comment:* A few commenters stated that the 30-day public comment period on a request submitted under the proposed rule was insufficient for substantive review of any request. These commenters urged the Department to increase the public comment period to 90 days. Others urged the Department to limit the number of days by which a deadline may be extended and the number of times those deadline extensions may be granted. These commenters specifically urged that deadlines should only be extended by 30 or 60 days, and that deadlines should only be extended once or twice.

*Response:* The Department agrees that more time for substantive review of any request submitted under this Part is warranted. The final rule allows 60 days for the public to submit any comments on the request and permits a single extension by a maximum of 90 days for good cause. Similarly, the requester will have 60 days to respond to any comment or evidence, which may be extended by up to 90 days for good cause. Accordingly, the amount of time the Department has for posting any comments received during this period is extended to a total of 20 days in § 50.30(b).

(2) *Comment:* A commenter urged limiting the Secretary to a maximum of 210 days to review any request, including any extensions granted. Others added that the Department should not be given complete discretion to extend its own deadlines and that it should be required to seek the requester’s consent prior to issuing an extension to itself. Finally, commenters urged amendment of the proposed rule to mandate action within the allowable timeframes so that the Secretarial review process is not “unduly delayed.”

*Response:* The Department appreciates the importance of timely review of and action on a request. In response to the comments, the final rule requires notice to the requester, including an estimate of when the decision will issue, if the Secretary is unable to act within 120 days. The Department made no further changes to the rule in response to this comment.

**(l) Section 50.40 – Secretary’s decision**

*Comment:* Commenters urged that the final rule impose a limit to the Secretary’s decision-making time frame, and if the Secretary fails to act within that time frame, the request should be deemed approved.

*Response:* The Department clarified that the Secretary may request additional documentation and explanation from the requester and the public with respect to the material submitted, including whether the request is consistent with this part. The Department made no further changes to the rule in response to this comment. The significance of reestablishing a formal government-to-government relationship requires an affirmative act by the Secretary, so that there can be no question about the status of that formal relationship.

**(m) Section 50.44 – Implementation of government-to-government relationship**

(1) *Comment:* Commenters requested that the final rule be amended by adding: “Nothing in this part explicitly or implicitly abrogates, affects, or impairs any claim or claims of the Native

Hawaiian people under Federal law or International law or affects the ability of the Native Hawaiian people or their representatives to pursue such claim or claims in Federal or International forums.” Similarly, other commenters requested that the final rule include a provision stating that the rule itself shall not serve as a settlement of any such claims.

*Response:* The Department made no changes to the final rule in response to these comments. As stated above, this rule does not address any existing claims that the Native Hawaiian people, either individually or collectively, may assert for redress under Federal or international law. All such claims are outside the scope of this rulemaking, as also discussed above.

(2) *Comment:* Commenters suggest amending § 50.44(a) to make express that the Native Hawaiian Governing Entity will have the same privileges and immunities as federally-recognized Indian tribes in the continental United States. Another commenter suggested amendments to the contrary, urging the Department to eliminate language in the rule that “may unduly imply that the Native Hawaiian Governing Entity must be exactly the same as an Indian tribe in all respects.”

*Response:* Section 50.44(a) states that the Native Hawaiian Governing Entity would have the same inherent sovereign governmental authorities as do federally-recognized tribes in the continental United States and the same government-to-government relationship under the U.S. Constitution and Federal law. Accordingly, the Native Hawaiian Governing Entity would have the same inherent privileges and immunities as do federally-recognized tribes in the continental United States. *See* response to comment (1)(m)(12). As to the question whether the Native Hawaiian Governing Entity is “exactly the same as an Indian tribe in all respects,” the Department responds that Congress systematically treats the Native Hawaiian community separately from tribes in the continental United States. The Native Hawaiian Governing Entity

will have the inherent sovereign governmental authorities of a tribe, except to the extent that Federal law constrains those authorities. For example, because there is no land in Hawaii meeting the definition of “Indian country” and no authority to take land into trust, the Native Hawaiian Governing Entity will necessarily have limited territorial authority in the absence of Congressional action to establish such authority.

(3) *Comment:* A commenter expressed concern that the rule did not provide a “list of permitted powers” that the Native Hawaiian Governing Entity could exercise, such as powers that federally-recognized Indian tribes in the continental United States exercise.

*Response:* The Native Hawaiian Governing Entity may exercise all its inherent sovereign powers, and all powers vested in it by Congress, subject to the limitations in its governing document or established by Federal law.

(4) *Comment:* One commenter stated that the proposed rule’s restriction on Native Hawaiians’ eligibility for Federal Indian programs, services, and benefits would be unenforceable because the Native Hawaiian Governing Entity would be able to amend its initial governing document without Federal approval just as federally-recognized Indian tribes in the continental United States are able to do under 25 CFR part 81.

*Response:* The Native Hawaiian Governing Entity may not alter Congress’s approach that distinguishes between programs, services, and benefits provided to federally-recognized tribes in the continental United States and programs, services, and benefits provided to Native Hawaiians by amending its governing document after a government-to-government relationship is reestablished. This rulemaking carefully adheres to Congress’s separate treatment of federally-recognized tribes in the continental United States and the Native Hawaiian community for

purposes of funding programs, services, and benefits. Congress’s approach binds the Department and the community. *See* response to comment (1)(g)(4).

### **(C) Tribal Summary Impact Statement**

Consistent with sections 5(b)(2)(B) and 5(c)(2) of Executive Order 13175, and because the Department consulted with tribal officials in the continental United States prior to publishing this rule, the Department seeks to assist tribal officials, and the public as a whole, by including in this preamble the three key elements of a tribal summary impact statement. Specifically, the preamble to this rule (1) describes the extent of the Department’s prior consultation with tribal officials; (2) summarizes the nature of their concerns and the Department’s position supporting the need to issue the rule; and (3) states the extent to which tribal officials’ concerns have been met. The “Public Meetings and Tribal Consultations” section below describes the Department’s prior consultations.

**Comments regarding access to Federal programs, services, and benefits available to federally-recognized Indian tribes:** The Department received comments strongly supporting Federal rulemaking to reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. Comments expressed concern about the rule’s potential impact, if any, on Federal Indian programs, services, and benefits — that is, federally funded or authorized special programs, services, and benefits provided by Federal agencies (such as the Bureau of Indian Affairs and the Indian Health Service) to federally-recognized Indian tribes in the continental United States. Comments expressed an understanding that Native Hawaiians are ineligible for Federal Indian programs and services absent express Congressional declarations to the contrary, and recommended that existing and future programs,

services, and benefits for a reorganized Native Hawaiian government remain separate from programs and services dedicated to tribes in the continental United States.

*Response:* The Department agrees with these comments. Native Hawaiians are ineligible for Federal Indian programs and services absent express Congressional declarations to the contrary.

When creating programs, services, and benefits, Congress systematically distinguishes between programs, services, and benefits to Indian tribes in the continental United States and those provided to the Native Hawaiian community. Congress enacted programs and services expressly and specifically for the Native Hawaiian community that are in many respects parallel and analogous to — but distinct from — the programs and services enacted for federally-recognized tribes in the continental United States. Federal Native Hawaiian programs and services are provided to Native Hawaiians as an indigenous Native Hawaiian community under the Indian affairs power, just as Federal Indian programs and services are provided to Indian tribes in the continental United States under the Indian affairs power.

In some instances, Congress expressly provided for Native Hawaiians to receive benefits as part of a program provided to Native Americans generally; in others, Congress has provided a distinct program or set of programs, parallel to those that exist for other Native American communities. To the extent that Native Hawaiians are not eligible for certain programs under current law, it follows that this treatment reflects a conscious decision by Congress. Moreover, because of the structure of many Federal programs, treating a Native Hawaiian Governing Entity or its members as eligible for programs provided generally to federally-recognized Indian tribes in the continental United States or their members could result in duplicative services or benefits. Congress's systematic provision of separate benefits for Native Hawaiians gives rise to a presumption that Congress did not intend that Native Hawaiians would also receive essentially

duplicative programs, services, and benefits through programs available to tribes in the continental United States.<sup>7</sup> The Department accordingly concludes that, absent Congressional action that provides Federal programs directed towards Indians to include Native Hawaiians, the Native Hawaiian community cannot be treated as “eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. 479a-1(a).

The distinction between Federal Native Hawaiian programs and services and Federal Indian programs and services is apparent in the List Act, which requires the Secretary to publish in the **Federal Register** a list of those Indian tribes that “the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. 479a-1(a). A comparison of the definition of “Indian tribe” in 25 U.S.C. 479a(2), with the narrower specification of which tribes may appear on the list itself, *see* 25 U.S.C. 479a-1(a), indicates that the reference to “programs and services” in section 479a-1(a) is limited to those Federal programs and services available to tribes *generally, i.e.*, those in the continental United States, as opposed to Federal programs and services identified for specific tribes or communities, such as the Native Hawaiian community.<sup>8</sup> As explained above, Congress

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<sup>7</sup> *Cf. Kahawaiolaa*, 386 F.3d at 1283 (noting Congress’s intent to treat Native Hawaiians and members of Indian tribes “differently” and reasoning that allowing Native Hawaiians to apply for Federal recognition under part 83 could “allow native Hawaiians to obtain greater benefits than the members of all American Indian tribes”).

<sup>8</sup> The definition in 25 U.S.C. 479a(2) specifies that the term “Indian tribe” includes an “Indian or Alaska Native tribe” because Congress wished to remove any doubt that Alaska Natives were included within the scope of that term. Indeed, the definition makes clear that an Alaska Native tribe could be acknowledged by the Secretary “to exist as an Indian tribe.” And the use of the term “Indian” in section 479a-1(a) confirms that the term was being used broadly and must necessarily include Alaska Natives. 25 U.S.C. 479a-1(a) (instructing the Secretary to publish a list of “all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States *to Indians* because of *their status as Indians*” (emphasis added)); *see also* 25 U.S.C. 1212-1215 (provisions enacted together with the List Act that reaffirmed the eligibility of an Alaska Native tribe, and which refer to a “federally recognized Indian tribe” and an “Alaska Native tribe” interchangeably); H.R. Rep. No. 103-781 at 5 (noting that the List Act “requires that the Secretary continue the current policy of including Alaska Native entities on the list of federally-recognized Indian tribes which are eligible to receive services”).

provides a separate suite of programs and services targeted directly to Native Hawaiians, and not through programs broadly applicable to Indians. Congress thus makes plain that Native Hawaiians receive a distinct set of Federal programs and services so that they are not eligible for general Indian programs and services.<sup>9</sup>

This unique provision of separate programs and services removes Native Hawaiians from the scope of the **Federal Register** list published under the List Act. Therefore, following any reestablishment of a formal government-to-government relationship with the United States, the Native Hawaiian community would not be recognized by the Secretary “to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians,” 25 U.S.C. 479a-1(a), and the Native Hawaiian Governing Entity would not appear on the list compiled under the List Act.

Section 50.44(c)-(d) of the final rule similarly implements Congress’s longstanding distinction between Native Hawaiian programs and services and general Indian programs and services for tribes in the continental United States.<sup>10</sup> The List Act’s central purpose is to provide “various departments and agencies of the United States” with an “accurate, regularly updated, and regularly published” list that they could use “to determine the eligibility of certain groups [in the continental United States] to receive services from the United States.” List Act findings, sec.

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<sup>9</sup> Even before adoption of the List Act, the Department maintained a list of tribes that were generally eligible for BIA programs and services. *See* Indian Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 FR 7235 (1979). The List Act ratified and codified the process for preparing that list. Notably, 25 CFR part 83, “Procedures for Federal Acknowledgment of Indian Tribes,” contains a provision stating that its purpose is to “determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 CFR 83.2. Hawaii is outside the scope of part 83, which further demonstrates the Department’s longstanding conclusion that Native Hawaiians fall outside the scope of these general programs and services. *See* 25 CFR 83.3 (stating that “this part applies only to indigenous entities that are not federally recognized Indian tribes”); 25 CFR 83.1 (defining “indigenous” to mean “native to the continental United States in that at least part of the petitioner’s territory at the time of first sustained contact extended into what is now the continental United States”).

<sup>10</sup> *See* § 50.4 of the final rule defining the terms “Federal Indian programs, services, and benefits” separately from “Federal Native Hawaiian programs, services, and benefits.”

103(7) (codified at 25 U.S.C. 479a note). The List Act is mandatory and prescriptive, stating that the Secretary “*shall* publish” a list of “*all* Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. 479a-1(a) (emphasis added); *see also* List Act findings, sec. 103(8). In enacting the List Act, Congress specifically sought to eliminate inconsistencies, to ensure uniformity in the treatment of federally-recognized tribes in the continental United States, and to accord those tribes and their membership access to the same Federal programs and services. *See* H.R. Rep. No. 103-781. It follows that federally-recognized tribes in the continental United States are all “eligible for the special programs and services provided by the United States to Indians because of their status as Indians,” and that the Secretary has no authority to exclude a federally-recognized tribe in the continental United States from the list compiled under the List Act.

The vast bulk of Federal Indian statutes providing programs and services expressly state that they cover only those Indian tribes that the Secretary deems eligible for the special programs and services that the United States provides to Indians because of their status as Indians. Such statutes include the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450b(e). These Federal Indian statutes do not currently cover the Native Hawaiian community, nor would they cover that governing entity with which the United States reestablishes the formal government-to-government relationship.

Some Federal statutes, however, extend to all Indian tribes without expressly stating that they cover only those Indian tribes that the Secretary deems eligible for the special programs and services that the United States provides to Indians in the continental United States. Unless the statute’s text, structure, purpose, or legislative history is to the contrary, these statutes would

cover the Native Hawaiian Governing Entity. *See, e.g.*, 25 U.S.C. 1301(1)-(2) (Indian Civil Rights Act definitions) (covering “any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government,” which include “all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed”); 25 U.S.C. 2801(6) (using the same definition, in the law-enforcement context); 28 U.S.C. 1362 (providing Federal-court jurisdiction over Federal claims “brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior”).

For certain Federal statutes there may be additional indicators that particular provisions should or should not be available to the Native Hawaiian Governing Entity or its members. The Department’s interpretation of a Federal statute providing programs and services to tribes and their members typically will turn on the statute’s definition of the term “Indian tribe,” but a clear expression of Congressional intent will control. Also, a Federal agency administering a statute will have authority to resolve any question that may arise as to the meaning of that statute and the scope of available programs, services, and benefits.

This determination that the Native Hawaiian Governing Entity is not eligible for general Federal Indian programs, services, and benefits also comports with Congress’s express intent that the Department’s Assistant Secretary for Policy, Management and Budget (PMB), not the Assistant Secretary for Indian Affairs, oversee Native Hawaiian matters, as stated in the HHLRA, sec. 206, 109 Stat. 363.

#### **(V) Public Meetings and Tribal Consultations**

The Department held public meetings to gather testimony at both the ANPRM and proposed rule stages of this rulemaking. 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, in October and November 2015, the Department held four three-hour teleconferences on the NPRM: two teleconferences that were open to the public, one specifically targeted to Native Hawaiian organizations, and one specifically targeted to tribal leaders. Transcripts from all public meetings held during the ANPRM and NPRM stages are available in the online docket as well as on the Department's website ([www.doi.gov/hawaiian](http://www.doi.gov/hawaiian)).

## **(VI) Procedural Matters**

### *A. Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA determined that this final rule is significant because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

E.O. 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 regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department developed this final rule in a manner consistent with these requirements.

*B. Regulatory Flexibility Act*

The Department 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.*). Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The Department certified that the proposed rule to implement these changes to 43 CFR part 50 regulations would not have a significant economic impact on a substantial number of small entities (80 FR 59113). The Department did not receive any information during the public comment period that changes this certification.

The Regulatory Flexibility Act, as amended, requires that Federal agencies evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, not on indirectly regulated entities. If a reorganized Native Hawaiian government decides to seek a formal government-to-government relationship with the United States, the rule provides the requirements for submitting a written request to the Secretary of the Interior. The rule would directly affect any such Native Hawaiian government. A small governmental jurisdiction is the government of a city, town, township, village, school district, or special district, with a population of less than fifty thousand, unless the agency establishes a different definition that is appropriate to the activities of the agency by notice and comment. *See* 5 U.S.C. 601(5). The Department has not established a different definition by notice and comment. Therefore, a Native Hawaiian government would not be considered a small entity under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(6). No other small entities would be directly affected by the rule, thus no small entities will be affected by this rule.

*C. Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by state, local, or tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. The rule's requirements will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*D. 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 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.

*E. Takings (E.O. 12630)*

Under the criteria in Executive Order 12630, this final rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable “taking.” A takings implications assessment therefore is not required.

*F. Federalism (E.O. 13132)*

Under the criteria in Executive Order 13132, this final rule has no substantial and direct effect 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. A federalism implications assessment therefore is not required.

*G. Civil Justice Reform (E.O. 12988)*

This final rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

*H. Consultation with Indian Tribes (E.O. 13175)*

Under Executive Order 13175, the Department held several consultation sessions with federally-recognized tribes in the continental United States. Details on these consultation sessions and on comments the Department received from tribes and intertribal organizations are

described above. The Department considered each of those comments and addressed them, where possible, in the final rule.

*I. Paperwork Reduction Act*

This final rule does not require an information collection from ten or more parties, and a submission under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, is not required. An OMB form 83-I is not required.

*J. National Environmental Policy Act*

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, or procedural nature. *See* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act of 1969.

*K. Information Quality Act*

In developing this final rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106-554).

*L. 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. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

**List of Subjects in 43 CFR Part 50**

Administrative practice and procedure, Indians—tribal government.

For the reasons stated in the preamble, the Department of the Interior amends title 43 of the Code of Federal Regulations by adding part 50 as set forth below:

**PART 50 — PROCEDURES FOR REESTABLISHING A FORMAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY**

**Subpart A — General Provisions**

Sec.

- 50.1 What is the purpose of this part?
- 50.2 How will reestablishment of this formal government-to-government relationship occur?
- 50.3 May the Native Hawaiian community reorganize itself based on island or other geographic, historical, or cultural ties?
- 50.4 What definitions apply to terms used in this part?

**Subpart B — Criteria for Reestablishing a Formal Government-to-Government Relationship**

- 50.10 What are the required elements of a request to reestablish a formal government-to-government relationship with the United States?
- 50.11 What process is required in drafting the governing document?
- 50.12 What documentation is required to demonstrate how the Native Hawaiian community determined who could participate in ratifying the governing document?
- 50.13 What must be included in the governing document?
- 50.14 What information about the ratification referendum must be included in the request?
- 50.15 What information about the elections for government offices must be included in the request?
- 50.16 What criteria will the Secretary apply when deciding whether to reestablish the formal government-to-government relationship?

**Subpart C — Process for Reestablishing a Formal Government-to-Government Relationship**

**Submitting a Request**

- 50.20 How may a request be submitted?
- 50.21 Is the Department available to provide technical assistance?

**Public Comments and Responses to Public Comments**

- 50.30 What opportunity will the public have to comment on a request?
- 50.31 What opportunity will the requester have to respond to comments?
- 50.32 May the deadlines in this part be extended?

**The Secretary's Decision**

- 50.40 When will the Secretary issue a decision?
- 50.41 What will the Secretary's decision include?
- 50.42 When will the Secretary's decision take effect?
- 50.43 What does it mean for the Secretary to grant a request?
- 50.44 How will the formal government-to-government relationship between the United States Government and the Native Hawaiian Governing Entity be implemented?

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9; 25 U.S.C. 479a, 479a-1 (2015) (reclassified to 25 U.S.C. 5130, 5131 (2016)); 43 U.S.C. 1457; Pub. L. 67-34, 42 Stat. 108, as amended; Pub. L. 86-3, 73 Stat. 4; Pub. L. 103-150, 107 Stat. 1510; sec. 148, Pub. L. 108-199, 118 Stat. 445; 112 Departmental Manual 28.

## **Subpart A — General Provisions**

### **§ 50.1 What is the purpose of this part?**

This part sets forth the Department’s administrative procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community that will allow:

- (a) The Native Hawaiian community to more effectively exercise its inherent sovereignty and self-determination; and
- (b) The United States to more effectively implement and administer:
  - (1) The special political and trust relationship that exists between the United States and the Native Hawaiian community, as recognized by Congress; and
  - (2) The Federal programs, services, and benefits that Congress created specifically for the Native Hawaiian community (*see, e.g.*, 12 U.S.C. 1715z–13b; 20 U.S.C. 80q *et seq.*; 20 U.S.C. 7511 *et seq.*; 25 U.S.C. 3001 *et seq.*; 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 2991 *et seq.*; 42 U.S.C. 3057g *et seq.*; 42 U.S.C. 11701 *et seq.*; 54 U.S.C. 302706).

### **§ 50.2 How will reestablishment of this formal government-to-government relationship occur?**

A Native Hawaiian government seeking to reestablish a formal government-to-government relationship with the United States under this part must submit to the Secretary a request as described in § 50.10. Reestablishment of a formal government-to-government relationship will occur if the Secretary grants the request as described in §§ 50.40 through 50.43.

**§ 50.3 May the Native Hawaiian community reorganize itself based on island or other geographic, historical, or cultural ties?**

The Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, which may include political subdivisions with limited powers of self-governance defined in the Native Hawaiian government's governing document.

**§ 50.4 What definitions apply to terms used in this part?**

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

*Continental United States* means the contiguous 48 states and Alaska.

*Department* means the Department of the Interior.

*DHHL* means the Department of Hawaiian Home Lands, or the agency or department of the State of Hawaii that is responsible for administering the HHCA.

*Federal Indian programs, services, and benefits* means any federally funded or authorized special program, service, or benefit provided by the United States to any Indian or Alaska Native tribe, band, nation, pueblo, village, or community in the continental United States that the Secretary of the Interior acknowledges to exist as an Indian tribe, or to its members, because of their status as Indians.

*Federal Native Hawaiian programs, services, and benefits* means any federally funded or authorized special program, service, or benefit provided by the United States to a Native Hawaiian government, its political subdivisions (if any), its members, the Native Hawaiian community, Native Hawaiians, or HHCA Native Hawaiians, because of their status as Native Hawaiians.

*Governing document* means a written document (e.g., constitution) embodying a government's fundamental and organic law.

*Hawaiian home lands* means all lands given the status of Hawaiian home lands under the HHCA (or corresponding provisions of the Constitution of the State of Hawaii), the HHLRA, or any other Act of Congress, and all lands acquired pursuant to the HHCA.

*HHCA* means the Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended.

*HHCA Native Hawaiian* means a Native Hawaiian individual who meets the definition of "native Hawaiian" in HHCA sec. 201(a)(7).

*HHLRA* means the Hawaiian Home Lands Recovery Act (Act of November 2, 1995, 109 Stat. 357), as amended.

*Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

*Native Hawaiian community* means the distinct Native Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.

*Native Hawaiian Governing Entity* means the Native Hawaiian community's representative sovereign government with which the Secretary reestablishes a formal government-to-government relationship.

*Request* means an express written submission to the Secretary asking for recognition as the Native Hawaiian Governing Entity.

*Requester* means the government that submits to the Secretary a request seeking to be recognized as the Native Hawaiian Governing Entity.

*Secretary* means the Secretary of the Interior or that officer's authorized representative.

*Sponsor* means an individual who makes a sworn statement that another individual is:

- (1) A Native Hawaiian or an HHCA Native Hawaiian; and
- (2) The sponsor's parent, child, sibling, grandparent, grandchild, aunt, uncle, niece, nephew, or first cousin.

*State* means the State of Hawaii, including its departments and agencies.

*Sworn statement* means a statement based on personal knowledge and made under oath or affirmation which, if false, is punishable under Federal or state law.

## **Subpart B — Criteria for Reestablishing a Formal Government-to-Government**

### **Relationship**

#### **§ 50.10 What are the required elements of a request to reestablish a formal government-to-government relationship with the United States?**

A request must include the following seven elements:

- (a) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community drafted the governing document, as described in § 50.11;
- (b) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community determined who could participate in ratifying the governing document, consistent with § 50.12;
- (c) The duly ratified governing document, as described in § 50.13;

- (d) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community adopted or approved the governing document in a ratification referendum, as described in § 50.14;
- (e) A written narrative with supporting documentation thoroughly describing how and when elections were conducted for government offices identified in the governing document, as described in § 50.15;
- (f) A duly enacted resolution of the governing body authorizing an officer to certify and submit to the Secretary a request seeking the reestablishment of a formal government-to-government relationship with the United States; and
- (g) A certification, signed and dated by the authorized officer, stating that the submission is the request of the governing body.

**§ 50.11 What process is required in drafting the governing document?**

The written narrative thoroughly describing the process for drafting the governing document must describe how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community.

**§ 50.12 What documentation is required to demonstrate how the Native Hawaiian community determined who could participate in ratifying the governing document?**

The written narrative thoroughly describing how the Native Hawaiian community determined who could participate in ratifying the governing document must explain how the Native Hawaiian community prepared its list of eligible voters consistent with paragraph (a) of this section. The narrative must explain the processes the Native Hawaiian community used to verify that the potential voters were Native Hawaiians consistent with paragraph (b) of this

section, and to verify which of those potential voters were also HHCA Native Hawaiians, consistent with paragraph (c) of this section, and were therefore eligible to vote. The narrative must explain the processes, requirements, and conditions for use of any sworn statements and explain how those processes, requirements, and conditions were reasonable and reliable for verifying Native Hawaiian descent.

- (a) *Preparing the voter list for the Ratification Referendum.* The Native Hawaiian community must prepare a list of Native Hawaiians eligible to vote in the ratification referendum.
- (1) The list of Native Hawaiians eligible to vote in the ratification referendum must:
  - (i) Be based on reliable proof of Native Hawaiian descent;
  - (ii) Be made available for public inspection;
  - (iii) Be compiled in a manner that allows individuals to contest their exclusion from or inclusion on the list;
  - (iv) Include adults who demonstrated that they are Native Hawaiians in accordance with paragraph (b) of this section;
  - (v) Include adults who demonstrated that they are HHCA Native Hawaiians in accordance with paragraph (c) of this section;
  - (vi) Identify voters who are HHCA Native Hawaiians;
  - (vii) Not include persons who will be younger than 18 years of age on the last day of the ratification referendum; and
  - (viii) Not include persons who requested to be removed from the list.
- (2) The community must make reasonable and prudent efforts to ensure the integrity of its list.

- (3) Subject to paragraphs (a)(1) and (2) of this section, the community may rely on a roll of Native Hawaiians prepared by the State under State law.
  
- (b) *Verifying that a potential voter is a Native Hawaiian.* A potential voter may meet the definition of a Native Hawaiian by:
  - (1) Enumeration on a roll or other list prepared by the State under State law, where enumeration is based on documentation that verifies Native Hawaiian descent;
  - (2) Meeting the requirements of paragraph (c) of this section;
  - (3) A sworn statement by the potential voter that he or she:
    - (i) Is enumerated on a roll or other list prepared by the State under State law, where enumeration is based on documentation that verifies Native Hawaiian descent;
    - (ii) Is identified as Native Hawaiian (or some equivalent term) on a birth certificate issued by a state or territory;
    - (iii) Is identified as Native Hawaiian (or some equivalent term) in a Federal, state, or territorial court order determining ancestry;
    - (iv) Can provide records documenting current or prior enrollment as a Native Hawaiian in a Kamehameha Schools program; or
    - (v) Can provide records documenting generation-by-generation descent from a Native Hawaiian ancestor;
  - (4) A sworn statement from a sponsor who meets the requirements of paragraph (b)(1), (2), or (3) of this section that the potential voter is Native Hawaiian; or
  - (5) Other similarly reliable means of establishing generation-by-generation descent from a Native Hawaiian ancestor.

- (c) *Verifying that a potential voter is an HHCA Native Hawaiian.* A potential voter may meet the definition of an HHCA Native Hawaiian by:
- (1) Records of DHHL, including enumeration on a roll or other list prepared by DHHL, documenting eligibility under HHCA sec. 201(a)(7);
  - (2) A sworn statement by the potential voter that he or she:
    - (i) Is enumerated on a roll or other list prepared by DHHL, documenting eligibility under HHCA sec. 201(a)(7);
    - (ii) Is identified as eligible under HHCA sec. 201(a)(7) in specified State or territorial records;
    - (iii) Is identified as eligible under HHCA sec. 201(a)(7) in a Federal, state, or territorial court order; or
    - (iv) Can provide records documenting eligibility under HHCA sec. 201(a)(7) through generation-by-generation descent from a Native Hawaiian ancestor or ancestors;
  - (3) A sworn statement from a sponsor who meets the requirements of paragraph (c)(1) or (2) of this section that the potential voter is an HHCA Native Hawaiian; or
  - (4) Other similarly reliable means of establishing eligibility under HHCA sec. 201(a)(7).

**§ 50.13 What must be included in the governing document?**

The governing document must:

- (a) State the government's official name;
- (b) Prescribe the manner in which the government exercises its sovereign powers;
- (c) Establish the institutions and structure of the government, and of its political subdivisions (if any) that are defined in a fair and reasonable manner;

(d) Authorize the government to negotiate with governments of the United States, the State, and political subdivisions of the State, and with non-governmental entities;

(e) Provide for periodic elections for government offices identified in the governing document;

(f) Describe the criteria for membership, which:

(1) Must permit HHCA Native Hawaiians to enroll;

(2) May permit Native Hawaiians who are not HHCA Native Hawaiians, or some defined subset of that group that is not contrary to Federal law, to enroll;

(3) Must exclude persons who are not Native Hawaiians;

(4) Must establish that membership is voluntary and may be relinquished voluntarily; and

(5) Must exclude persons who voluntarily relinquished membership;

(g) Protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA;

(h) Protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers, *see* 25 U.S.C. 1301 *et seq.*;

(i) Describe the procedures for proposing and ratifying amendments to the governing document; and

(j) Not contain provisions contrary to Federal law.

**§ 50.14 What information about the ratification referendum must be included in the request?**

The written narrative thoroughly describing the ratification referendum must include the following information:

- (a) A certification of the results of the ratification referendum including:
  - (1) The date or dates of the ratification referendum;
  - (2) The number of Native Hawaiians, regardless of whether they were HHCA Native Hawaiians, who cast a vote in favor of the governing document;
  - (3) The total number of Native Hawaiians, regardless of whether they were HHCA Native Hawaiians, who cast a ballot in the ratification referendum;
  - (4) The number of HHCA Native Hawaiians who cast a vote in favor of the governing document; and
  - (5) The total number of HHCA Native Hawaiians who cast a ballot in the ratification referendum.
  
- (b) A description of how the Native Hawaiian community conducted the ratification referendum that demonstrates:
  - (1) How and when the Native Hawaiian community made the full text of the proposed governing document (and a brief impartial description of that document) available to Native Hawaiians prior to the ratification referendum, through the Internet, the news media, and other means of communication;
  - (2) How and when the Native Hawaiian community notified Native Hawaiians about how and when it would conduct the ratification referendum;
  - (3) How the Native Hawaiian community accorded Native Hawaiians a reasonable opportunity to vote in the ratification referendum;
  - (4) How the Native Hawaiian community prevented voters from casting more than one ballot in the ratification referendum; and
  - (5) How the Native Hawaiian community ensured that the ratification referendum:

- (i) Was free and fair;
- (ii) Was held by secret ballot or equivalent voting procedures;
- (iii) Was open to all persons who were verified as satisfying the definition of a Native Hawaiian (consistent with § 50.12) and were 18 years of age or older, regardless of residency;
- (iv) Did not include in the vote tallies votes cast by persons who were not Native Hawaiians; and
- (v) Did not include in the vote tallies for HHCA Native Hawaiians votes cast by persons who were not HHCA Native Hawaiians.

(c) A description of how the Native Hawaiian community verified whether a potential voter in the ratification referendum was a Native Hawaiian and whether that potential voter was also an HHCA Native Hawaiian, consistent with § 50.12.

**§ 50.15 What information about the elections for government offices must be included in the request?**

The written narrative thoroughly describing how and when elections were conducted for government offices identified in the governing document, including members of the governing body, must show that the elections were:

- (a) Free and fair;
- (b) Held by secret ballot or equivalent voting procedures; and
- (c) Open to all eligible Native Hawaiian members as defined in the governing document.

**§ 50.16 What criteria will the Secretary apply when deciding whether to reestablish the formal government-to-government relationship?**

The Secretary will grant a request if the Secretary determines that each criterion on the following list of eight criteria has been met:

- (a) The request includes the seven required elements described in § 50.10;
- (b) The process by which the Native Hawaiian community drafted the governing document met the requirements of § 50.11;
- (c) The process by which the Native Hawaiian community determined who could participate in ratifying the governing document met the requirements of § 50.12;
- (d) The duly ratified governing document, submitted as part of the request, meets the requirements of § 50.13;
- (e) The ratification referendum for the governing document met the requirements of § 50.14(b) and (c) and was conducted in a manner not contrary to Federal law;
- (f) The elections for the government offices identified in the governing document, including members of the governing body, were consistent with § 50.15 and were conducted in a manner not contrary to Federal law;
- (g) The number of votes that Native Hawaiians, regardless of whether they were HHCA Native Hawaiians, cast in favor of the governing document exceeded half of the total number of ballots that Native Hawaiians cast in the ratification referendum: *Provided*, that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among Native Hawaiians; *and Provided Further*, that, if fewer than 30,000 Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further*, that, if more than

50,000 Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a presumption that this criterion is satisfied; and

- (h) The number of votes that HHCA Native Hawaiians cast in favor of the governing document exceeded half of the total number of ballots that HHCA Native Hawaiians cast in the ratification referendum: *Provided*, that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among HHCA Native Hawaiians; *and Provided Further*, that, if fewer than 9,000 HHCA Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further*, that, if more than 15,000 HHCA Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a presumption that this criterion is satisfied.

### **Subpart C — Process for Reestablishing a Formal Government-to-Government Relationship**

#### **Submitting a Request**

##### **§ 50.20 How may a request be submitted?**

If the Native Hawaiian community seeks to reestablish a formal government-to-government relationship with the United States, the request under this part must be submitted to the Secretary, Department of the Interior, 1849 C Street, NW, Washington, DC 20240.

##### **§ 50.21 Is the Department available to provide technical assistance?**

Yes. The Department may provide technical assistance to facilitate compliance with this part and with other Federal law, upon request for assistance.

#### **Public Comments and Responses to Public Comments**

##### **§ 50.30 What opportunity will the public have to comment on a request?**

(a) Within 20 days after receiving a request that appears to the Department to be consistent with §§ 50.10 and 50.16(g) and (h), the Department will:

(1) Publish in the **Federal Register** notice of receipt of the request and notice of the opportunity for the public, within 60 days following publication of the **Federal Register** notice, to submit comment and evidence on whether the request meets the criteria described in § 50.16; and

(2) Post on the Department Web site:

(i) The request, including the governing document;

(ii) The name and mailing address of the requester;

(iii) The date of receipt; and

(iv) Notice of the opportunity for the public, within 60 days following publication of the **Federal Register** notice, to submit comment and evidence on whether the request meets the criteria described in § 50.16.

(b) Within 20 days after the close of the comment period, the Department will post on its Web site any comment or notice of evidence relating to the request that was timely submitted to the Department in accordance with paragraphs (a)(1) and (a)(2)(iv) of this section.

**§ 50.31 What opportunity will the requester have to respond to comments?**

Following the Web site posting described in § 50.30(b), the requester will have 60 days to respond to any comment or evidence that was timely submitted to the Department in accordance with § 50.30(a)(1) and (a)(2)(iv).

**§ 50.32 May the deadlines in this part be extended?**

Yes. Upon a finding of good cause, the Secretary may extend any deadline in § 50.30 or § 50.31 by a maximum of 90 days and post on the Department Web site the length of and the reasons for the extension: *Provided*, that any request for an extension of time is in writing and sets forth good cause.

### **The Secretary's Decision**

#### **§ 50.40 When will the Secretary issue a decision?**

The Secretary will apply the criteria described in § 50.16 and endeavor to either grant or deny a request within 120 days of determining that the requester's submission is complete and after receiving all the information described in §§ 50.30 and 50.31. The Secretary may request additional documentation and explanation from the requester or the public with respect to the material submitted, including whether the request is consistent with this part. If the Secretary is unable to act within 120 days, the Secretary will provide notice to the requester, and include an explanation of the need for more time and an estimate of when the decision will issue.

#### **§ 50.41 What will the Secretary's decision include?**

The decision will respond to significant public comments and summarize the evidence, reasoning, and analyses that are the basis for the Secretary's determination regarding whether the request meets the criteria described in § 50.16 and is consistent with this part.

#### **§ 50.42 When will the Secretary's decision take effect?**

The Secretary's decision will take effect 30 days after the publication of notice in the **Federal Register**.

#### **§ 50.43 What does it mean for the Secretary to grant a request?**

When a decision granting a request takes effect, the requester will immediately be identified as the Native Hawaiian Governing Entity (or the official name stated in that entity's

governing document), the special political and trust relationship between the United States and the Native Hawaiian community will be reaffirmed, and a formal government-to-government relationship will be reestablished with the Native Hawaiian Governing Entity as the sole representative sovereign government of the Native Hawaiian community.

**§ 50.44 How will the formal government-to-government relationship between the United States Government and the Native Hawaiian Governing Entity be implemented?**

- (a) Upon reestablishment of the formal government-to-government relationship, the Native Hawaiian Governing Entity will have the same formal government-to-government relationship under the United States Constitution and Federal law as the formal government-to-government relationship between the United States and a federally-recognized tribe in the continental United States, in recognition of the existence of the same inherent sovereign governmental authorities, subject to the limitation set forth in paragraph (d) of this section.
- (b) The Native Hawaiian Governing Entity will be subject to the plenary authority of Congress to the same extent as are federally-recognized tribes in the continental United States.
- (c) Absent Federal law to the contrary, any member of the Native Hawaiian Governing Entity presumptively will be eligible for current Federal Native Hawaiian programs, services, and benefits.
- (d) The Native Hawaiian Governing Entity, its political subdivisions (if any), and its members will not be eligible for Federal Indian programs, services, and benefits unless Congress expressly and specifically has declared the Native Hawaiian community, the Native Hawaiian Governing Entity (or the official name stated in that

entity's governing document), its political subdivisions (if any), its members, Native Hawaiians, or HHCA Native Hawaiians to be eligible.

- (e) Reestablishment of the formal government-to-government relationship will not authorize the Native Hawaiian Governing Entity to sell, dispose of, lease, tax, or otherwise encumber Hawaiian home lands or interests in those lands, or to diminish any Native Hawaiian's rights, protections, or benefits, including any immunity from State or local taxation, granted by:
- (1) The HHCA;
  - (2) The HHLRA;
  - (3) The Act of March 18, 1959, 73 Stat. 4; or
  - (4) The Act of November 11, 1993, secs. 10001–10004, 107 Stat. 1418, 1480–84.
- (f) Reestablishment of the formal government-to-government relationship does not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.
- (g) Nothing in this part impliedly amends, repeals, supersedes, abrogates, or overrules any applicable Federal law, including case law, affecting the privileges, immunities, rights, protections, responsibilities, powers, limitations, obligations, authorities, or jurisdiction of any federally-recognized tribe in the continental United States.

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Michael L. Connor,

Deputy

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Secretary.