No. 15-17134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELI'I AKINA, ET AL.,

Plaintiffs-Appellants,

v.

STATE OF HAWAII, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
CASE NO. 1:15-CV-00322-JMS-BMK (HON. MICHAEL SEABRIGHT)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANTS AND AFFIRMANCE

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The United States has authority to file an amicus curiae brief without consent of the parties or leave of the court under Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The United States has a special responsibility for the welfare of Native peoples throughout our Nation, including Native Hawaiians. Pursuant to that responsibility, Congress has enacted more than 150 statutes to benefit Native Hawaiians. Federal programs, services, and benefits specifically for Native Hawaiians run the gamut from education (20 U.S.C. §§ 7511-7517) to economic assistance (42 U.S.C. §§ 2991-2992) to health care (*id.* §§ 11701-11714).

The United States Department of the Interior recently published a Notice of Proposed Rulemaking (NPRM) titled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community," 80 Fed. Reg. 59113 (Oct. 1, 2015) [*attached as* Addendum]. During the district-court proceedings on plaintiffs' motion for a preliminary injunction, the court invited the Department to file an amicus brief regarding the NPRM and "its potential relationship to this action." Dist. Ct. Doc. No. 89. The Department did so, explaining that although the NPRM itself had only limited relevance to the issues presented by plaintiffs' motion, the premises underlying the NPRM are relevant and undermine plaintiffs' claim to injunctive relief.

In their opening brief, plaintiffs incorrectly suggest that the Department has reached final decisions on whether and how to proceed with its proposed rulemaking,

and that the Department's process lacks "any input from or participation by Appellants." Doc. No. 57, Appellants' Opening Br. on Appeal at 18-19, 29-30, 43-44 [hereinafter Opening Br.]. In fact, the Department accepted comments on its *proposal* up to December 30, 2015, *see* 80 Fed. Reg. at 59114, and several of the plaintiffs used that opportunity to share their views with the Department.[1] The Department has not yet reached a final decision and so cannot speak with finality about the issues addressed in the NPRM. *See* 5 U.S.C. § 553; *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Until the Department has considered all timely public comments, including those submitted by the plaintiffs, the Department cannot state whether it will promulgate a final rule, or what the precise contents of any such rule would be. Nor can the Department express a view on how any final rule would ultimately interact with any events litigated in this case; plaintiffs' suggestion to the contrary finds no support in the Department's prior filings. *Compare* Opening Br. at 18-19, *with* Doc. No. 21-1 at 5-6.

INTRODUCTION

Defendant Nai Aupuni, a nonprofit corporation, originally planned to hold a month-long vote-by-mail election of delegates to an "Aha," a convention charged

[1] *See, e.g.*, Grassroot Institute of Hawaii, President Kelii Akina, Comment Letter on NPRM (Dec. 29, 2015), http://www.regulations.gov/#!documentDetail;D=DOI-2015-0005-4308; Kealii Makekau, Comment E-mail on NPRM (Dec. 10, 2015), http://www.regulations.gov/#!documentDetail;D=DOI-2015-0005-3493; Melissa Moniz, Comment E-mail on NPRM (Dec. 30, 2015), http://www.regulations.gov/#!documentDetail;D=DOI-2015-0005-5744.

with considering paths for Native Hawaiian self-determination and potentially drafting a constitution (or other governing document) for a Native Hawaiian government. Voting in this election was going to be limited to Native Hawaiians. Plaintiffs sought to enjoin Nai Aupuni's counting of ballots in that election, primarily alleging that excluding non-Natives violates the Federal Constitution. *See* Doc. No. 9-1, Pls.' Mot. for Inj. Pending Appeal at 1, 10, 20. The district court denied both plaintiffs' motion for a preliminary injunction and their motion for an injunction pending appeal. This Court also denied plaintiffs' motion for an injunction pending appeal. But the Supreme Court, by a vote of 5 to 4, granted the plaintiffs' request and enjoined the counting of ballots and the certifying of winners, pending the final disposition of the appeal in this Court.

Citing concerns about the potential for years of delay in litigation, Nai Aupuni terminated the election and chose to never count the ballots. News Release, Nai Aupuni, Nai Aupuni Terminates Election Process (Dec. 15, 2015), *available at* http://naiaupuni.org/. Instead, Nai Aupuni offered seats at the convention to all 196 candidates. *Id.* Nai Aupuni's website reflects that approximately 150 planned to participate in the Aha which began on February 1, 2016. Nai Aupuni List of 154 Participants for February 'Aha (Jan. 5, 2016), *available at* http://naiaupuni.org/.

As explained in the defendants' answering briefs, the termination of the challenged election moots plaintiffs' appeal requesting a preliminary injunction of the election. Nonetheless, out of an abundance of caution, the United States files this

brief to explain both the NPRM and certain principles of Federal law that may be helpful to the Court.

While this appeal concerned an election potentially related to the reorganization of a Native Hawaiian government, the Department's NPRM focuses on a process that would commence only if a Native Hawaiian government is reorganized and then seeks a formal government-to-government relationship with the United States. The NPRM itself, and the criteria for entering into such a relationship that it proposes, are not at issue here and have only limited relevance to the issues presented. But the premises underlying the NPRM are pertinent to this appeal. As explained below, in accordance with Federal law, tribes in the continental United States routinely limit voting in tribal elections, including constitutional referenda, to members, while excluding non-Natives. There is no principled basis for treating the Native Hawaiian community differently.

BACKGROUND

A. The 2014 Advance Notice of Proposed Rulemaking

The Native Hawaiian community is one of the largest indigenous groups in the United States. But unlike more than 500 federally recognized Native communities on the continent, Native Hawaiians lack both an organized government and a formal government-to-government relationship with the United States. In response to requests from the Native Hawaiian community, as well as this Court's suggestion that the Department "appl[y] its expertise to … determine whether native Hawaiians, or

some native Hawaiian groups, could be acknowledged on a government-to-government basis," *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), the Department published an Advance Notice of Proposed Rulemaking. 79 Fed. Reg. 35296, 35296-303 (June 20, 2014). The ANPRM solicited public comment regarding whether the Department should facilitate (1) reorganization of a Native Hawaiian government and (2) reestablishment of a formal government-to-government relationship with the Native Hawaiian community. *See id.* at 35297, 35302-03.

After applying its expertise in Native American affairs to evaluate more than 5,000 comments, the Department determined that it would not propose a rule presuming to reorganize a Native Hawaiian government, prescribe the form or structure of that government, draft its constitution, or organize its elections. NPRM 59113, 59123.[2] "Consistent with the Federal policy of indigenous self-determination and Native self-governance, the Native Hawaiian community itself would determine whether and how to reorganize its government." NPRM 59114. The Department would, however, propose a rule creating a process that the Secretary of the Interior would use to determine whether to reestablish a formal government-to-government relationship if the Native Hawaiian community forms a government that then seeks such a relationship with the United States.

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[2] This brief cites the NPRM's preamble, found at 80 Fed. Reg. 59113-28, as "NPRM [page number]." The proposed rule — the portion of the NPRM that, if finalized, would be codified in Title 43 of the Code of Federal Regulations — is found at 80 Fed. Reg. 59128-32 and is cited here as "PR § [section number]."

B. The 2015 Notice of Proposed Rulemaking

The NPRM proposes an administrative procedure, as well as substantive criteria, for determining whether to reestablish a formal government-to-government relationship between the United States and any group that requests such a relationship and claims to represent the Native Hawaiian community. PR § 50.1. The proposed rule explains that a formal government-to-government relationship, if established, would allow the United States to more effectively implement and administer the special political and trust relationship that Congress has already established with the Native Hawaiian community by enacting more than 150 Federal statutes over the last century. PR § 50.1(a); *see* PR § 50.1(b) (listing some Acts of Congress creating Federal programs, services, and benefits specifically for Native Hawaiians); *see also* NPRM 59114-18 (providing historical overview).

The Department's proposed rule contemplates a multistep process for a Native Hawaiian government to request a government-to-government relationship with the United States, if it chooses to do so. First, the Native Hawaiian community would draft a constitution or other governing document. PR § 50.11; *see* PR §§ 50.3, 50.10(a), (c), 50.13, 50.16(b), (d)-(f). The proposed rule places few conditions on the drafting of a governing document that might be presented to the Department, merely stating that the governing document should "[be] based on meaningful input from representative segments of the Native Hawaiian community and reflect[] the will of [that] community." PR § 50.11. The Native Hawaiian community would make the

proposed constitution's text available to Native Hawaiians and announce an upcoming ratification vote. PR § 50.14(b)(1)-(2).

The community would then vote on the constitution in a ratification referendum open to adult Native Hawaiian citizens (regardless of residency) but not to persons lacking Native Hawaiian descent. PR §§ 50.10(b), (d), 50.12, 50.14, 50.16(c), (e). Consistent with Federal statutes and caselaw, the proposed rule's definition of "Native Hawaiian" is restricted to U.S. citizens who descend from the aboriginal people who occupied and exercised sovereignty in Hawaii prior to 1778, when the first Europeans arrived. PR § 50.4; *see* NPRM 59119, 59124. Reflecting the statutory definitions Congress has adopted, the proposed rule requires, if the community wishes to reestablish a formal government-to-government relationship, that the Native Hawaiian constitution be ratified both by a majority vote of Native Hawaiians ***and*** by a majority vote of those Native Hawaiians who qualify as "HHCA-eligible" (PR § 50.16(g)-(h); *see* NPRM 59120, 59124-25), meaning that they meet the more restrictive definition of "native Hawaiian" in the Hawaiian Homes Commission Act (HHCA). PR § 50.4 (citing HHCA § 201(a)(7), 42 Stat. 108 (1921) (requiring a high degree of Native Hawaiian descent)). When determining who may participate in the referendum, the community could — but is not required to — use a roll certified by a state commission such as the Native Hawaiian Roll Commission as a basis for those determinations, if the community conforms the roll to certain requirements in the proposed rule. PR § 50.12(b); *see* PR § 50.14(b)(5)(iii), (c); *see also* NPRM 59121.

If the constitution is approved, the community would hold elections to fill the offices it establishes. PR §§ 50.10(e), 50.15, 50.16(f). The newly installed governing body could enact a resolution seeking a formal government-to-government relationship with the United States. PR § 50.10(f). Then the appropriate officer of the new government could prepare, certify, and submit to the Secretary of the Interior a request to reestablish that relationship. PR §§ 50.2, 50.10(g), 50.16(a), 50.20.

The public could comment on the Native Hawaiian government's request, the Native Hawaiian government could respond to comments, and the Secretary could seek additional information if needed. PR §§ 50.30, 50.31, 50.40. Applying specific criteria set forth in the proposed rule, the Secretary would decide whether to grant or deny the request. PR §§ 50.16, 50.40, 50.41. If the Secretary grants the request, a *Federal Register* notice would trigger the start of a new, formal government-to-government relationship. PR §§ 50.42, 50.43. The Native Hawaiian community's government-to-government relationship with the United States would then be the same under the U.S. Constitution and Federal law as that of any federally recognized tribe in the continental United States, and the Native Hawaiian government would be recognized as having the same inherent sovereign governmental authorities, subject to Congress's plenary authority. PR § 50.44(a)-(b); *see also* PR § 50.44(c)-(g).

Significantly, although the proposed rule envisions that Native Hawaiians may choose to draft a governing document for a Native Hawaiian government (perhaps through a constitutional convention) and then to ratify that document, those steps

would be taken by the Native Hawaiian community without Federal involvement. *See* NPRM 59123. If a Native Hawaiian government reorganizes, that government can decide whether or not to seek a formal relationship with the United States. *See id.* The Federal Government's role would be limited to determining, under criteria promulgated through the current notice-and-comment rulemaking, whether to reestablish a formal government-to-government relationship if it receives a request from a reorganized Native Hawaiian government. *See id.*

ARGUMENT

The NPRM is rooted in the congressional enactments for Native Hawaiians over the last century and draws from the wellspring of authority related to Congress's long history with Indians and tribal self-determination. That authority is relevant here for four reasons; together, they demonstrate that the district court properly denied plaintiffs' motion for a preliminary injunction.

First, Congress has exercised its broad plenary authority to recognize and implement special political and trust relationships with Native American communities; to promote their self-determination and self-governance; and to safeguard their inherent powers to determine their membership, to reorganize their governments, to ratify constitutions, and to conduct elections. Second, consistent with that body of Federal law, tribes traditionally have not included non-Natives in either membership or voting, a practice that Federal courts uniformly have upheld. Third, non-Natives are properly excluded from tribal elections, whether conducted by the tribe itself or by

the Secretary of the Interior, because the exclusion is rationally designed to further Indian self-government. Fourth, with regard to these points, Federal law provides no reason to treat the Native Hawaiian community differently from any tribe in the continental United States.

A. Congress and the courts have long recognized Native communities' inherent powers to determine their membership, organize their governments, ratify constitutions, and conduct elections.

"The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citation and emphasis omitted). That sovereignty, however, is subject to Congress's exceptionally broad plenary power to regulate and modify the status of tribes. *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); JUDGE WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (6th ed. 2015). As the Supreme Court recently reaffirmed, "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2039.

Since the beginning of our Republic, Congress has exercised its plenary authority to recognize and implement special political and trust relationships with hundreds of Native communities. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24 (2011). Among those is the Native Hawaiian community. *See, e.g.*, 42

U.S.C. § 11701(17); 20 U.S.C. § 7512(12); Pub. L. No. 106-569, 114 Stat. 2968-69 (2000).

Especially in the last 40 years, Congress has used its plenary authority to promote tribal self-determination and self-governance. *See, e.g.*, 20 U.S.C. § 7512(12)(E) (reaffirming that "the aboriginal, indigenous people of the United States have … a continuing right to autonomy in their internal affairs; and … an ongoing right of self-determination and self-governance that has never been extinguished"). Likewise, the Supreme Court has held that tribes are "'distinct, independent political communities, retaining their original natural rights in matters of local self-government,'" with the power to regulate "'their internal and social relations,' … to make their own substantive law in internal matters," and "to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted).

Congress has accordingly shown great deference, in scores of statutes, to tribes' definitions of their own membership. *See, e.g.*, 25 U.S.C. §§ 450b(d), 1801(a)(1), 1903(3), 3103(9), 4103(10). The Supreme Court has been similarly deferential: "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see also Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are

generally beyond federal judicial scrutiny."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007) (affirming district court's conclusion that it lacked subject-matter jurisdiction to order a tribe to admit plaintiffs as members). "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[3], at 175 (2012 ed.).

Congress has also been highly protective of tribes' powers to organize or reorganize their own governments, to draft and ratify their own constitutions or other governing documents, and to conduct their own elections. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b; *see also id.* § 476(h)(1) ("each Indian tribe shall retain inherent sovereign power to adopt governing documents").

B. Consistent with Federal law, tribes traditionally have excluded non-Natives from both membership and voting, a practice that Federal courts uniformly have upheld.

Having worked on a government-to-government basis with more than 500 federally recognized Indian tribes in the continental United States, the Department of the Interior recognizes that tribes traditionally have not included non-Natives as full members of their political communities or as voters in tribal elections, including constitutional ratification referenda. This fact is not surprising, since, by definition, non-Natives lack Native American descent — which is essential to an aboriginal claim to sovereignty under the Constitution.

Moreover, excluding non-Natives from tribes' internal political processes fully comports with Federal law. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b. As the Supreme Court explained in *Rice v. Cayetano*, 528 U.S. 495 (2000), non-Indians lack the right to vote in tribal elections because "such elections are the internal affair of a quasi sovereign." *Id.* at 520.

Because tribes pre-date the Constitution and did not participate in the Constitutional Convention, they are not governed by "constitutional provisions framed specifically as limitations on federal or state authority," including the Bill of Rights and the Civil War Amendments. *Santa Clara Pueblo*, 436 U.S. at 56; *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). Therefore, a tribe's decision to exclude non-Natives from its membership rolls or from its elections cannot and does not violate the Fifteenth or Fourteenth Amendment.

Likewise, the Voting Rights Act of 1965, as amended, 52 U.S.C. §§ 10301-10314, is directed only to a "State or political subdivision." *Id.* § 10301(a). So any Voting Rights Act claim against an Indian tribe must fail. *See, e.g.*, *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).

Tribes' exercise of sovereign governmental powers is constrained, however, by the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1304. ICRA guarantees most, but not all, of the protections for individual liberties similar to those found in the Bill

of Rights and the Civil War Amendments, and makes them applicable to tribes. *See id.* § 1302(a). For example, ICRA expressly bars an Indian tribe from "deny[ing] to any person within its jurisdiction the equal protection of its laws," *id.* § 1302(a)(8). However, the Department is unaware of any court applying ICRA to invalidate a tribe's decision to exclude non-Natives from tribal elections. Indeed, these challenges have uniformly failed. *See, e.g.*, *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 439-41 (D.S.D. 1974); *see also Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975) (interpreting ICRA's equal-protection clause to require only that "a tribe treat equally votes cast by members of the tribe already enfranchised by the tribe itself," and not to allow claims seeking "to enfranchise a new class" of voters); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (describing ICRA standards).

More tellingly, Congress chose ***not*** to incorporate into ICRA a guarantee similar to the Fifteenth Amendment's prohibition against denying the "right … to vote … on account of race [or] color." U.S. CONST. amend. XV, § 1. Indeed, Congress consciously rejected the idea of incorporating a Fifteenth Amendment analogue into ICRA. *See Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971).

An early draft of ICRA would have applied the Fifteenth Amendment to tribal elections. *See* S. 961, 89th Cong. (1965). Then-Solicitor of the Interior Frank J. Barry testified against this feature of the draft: "No doubt a tribe would want to restrict voting to members and to restrict membership to persons having a certain proportion

of Indian blood." *Constitutional Rights of the American Indian: Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 18 (1965). Solicitor Barry added that a Federal statute requiring tribes to enfranchise non-Natives would not "be consistent at all with [our] system of Indian administration" and would effectively "abolish" tribal governments, subsuming them within state governments. *Id.* at 50. The Department proposed a substitute bill that selectively incorporated key constitutional protections while omitting any Fifteenth Amendment-like provision. *See id.* at 18-19. That proposal became the model for the bill that Congress ultimately passed, deleting the Fifteenth Amendment analogue from the legislation and enacting ICRA with no restrictions against barring non-Natives from tribal elections. *See Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong., Constitutional Rights of the American Indian: Summary Rep. of Hearings and Investigations Pursuant to S. Res. 194*, at 10, 25-26 (Comm. Print 1966).

C. Excluding non-Natives from tribal elections is also routine, and lawful, in tribal elections conducted by the Secretary of the Interior.

Unlike an Indian tribe, the Secretary of the Interior is constrained by the Federal Constitution. *See Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977). Under the Indian Reorganization Act, 25 U.S.C. § 476, and the Oklahoma Indian Welfare Act, *id.* § 503, the Secretary conducts elections to ratify new tribal constitutions. Although these Secretarial elections are subject to the

Constitution, the exclusion of non-Natives is routine, as the statutes are expressly designed to reorganize "Indians." *Id.* §§ 476, 503.

Part 81 of Title 25 of the Code of Federal Regulations governs these Secretarial elections to adopt a tribal governing document. One of the Department's responsibilities, through an election board chaired by a Bureau of Indian Affairs employee, is to "compile" and "post[]" the "official list of registered voters." 25 C.F.R. § 81.12 (2014). The Part 81 regulations further provide that, when a tribe is considering whether to reorganize for the first time, "[a]ny duly registered adult member [of the tribe,] regardless of residence[,] shall be entitled to vote on the adoption of a constitution." *Id.* § 81.6(a)(1). Historically, a "member" has been defined as "any ***Indian*** who is duly enrolled in a tribe [1] who meets a tribe's written criteria for membership or [2] who is recognized as belonging to a tribe by the local Indians comprising the tribe." *Id.* § 81.1(k) (emphasis added). So the right to vote in these Secretarial elections turned not on residence in the tribe's territory, but rather on membership in the tribe and Indian status. *See id.* § 81.6(a)(2) (permitting "registered adult nonresident members" to vote by absentee ballot). While the Secretary recently amended these regulations and now defines "member" solely in terms of a tribe's criteria for membership, tribal membership typically turns on descent. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[2], at 173 (2012 ed.); 80 Fed. Reg. 63094, 63108 (Oct. 19, 2015) (effective Nov. 18, 2015).

Like other tribal elections that include only Natives, these Secretarial elections, as well as the regulations authorizing them — which had been in effect for more than a third of a century before the recent amendments — have never been successfully challenged for excluding non-Natives. *See, e.g.*, *St. Germain v. U.S. Dep't of the Interior*, No. C13-945RAJ, 2015 WL 2406758, at *4-6 (W.D. Wash. May 20, 2015).

Other statutes have also authorized the federal government to assist in holding elections to organize Native communities while excluding non-Natives. The Menominee Restoration Act of 1973, 25 U.S.C. § 903b, for example, established federally supervised elections in which all Menominees — members of a community whose tribal status had been terminated — with "at least one-quarter degree of Menominee Indian blood" were entitled to vote on self-governance. Likewise, the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601-1629h, provides for the establishment of Native-run state corporations, and explicitly limits voting rights on certain matters to "Native" shareholders and their "descendant[s]," without regard to tribal status. *Id.* § 1606(h)(2)(C); *see id.* § 1606(h)(3)(D).

These facts are not surprising. Federal laws singling out Indians do not offend the Constitution as long as the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians" and "is reasonable and rationally designed to further Indian self-government." *Mancari*, 417 U.S. at 555; *see EEOC v. Peabody Western Coal Co.*, 773 F.3d 977, 987 (9th Cir. 2014). This standard reflects the settled principle — memorialized in an entire title of the U.S. Code (Title

25) — that Federal Indian laws regulate "once-sovereign political communities," not "a 'racial' group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977) (citation and internal quotation marks omitted); *see id.* at 645-47; *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979); *Mancari*, 417 U.S. at 551-55; *see also Peabody*, 773 F.3d at 985-89.

D. Federal law provides no basis for treating the Native Hawaiian community differently from any tribe in the continental United States.

The principles of Federal law summarized above, developed largely in the context of Indian tribes in the continental United States, apply with equal force in the Native Hawaiian context. In enacting scores of Federal statutes directly affecting the Native Hawaiian community over the last century, Congress has exercised its Indian-affairs plenary power repeatedly — and often expressly. In 1920, Congress found constitutional precedent for the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921), "in previous enactments granting Indians … special privileges in obtaining and using the public lands." H.R. REP. NO. 66-839, at 11 (1920). In 1992, Congress stated that its constitutional authority "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." 42 U.S.C. § 11701(17). And in 2002, Congress "recognized and reaffirmed" that it "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has

established a trust relationship." 20 U.S.C. § 7512(12)(B); *see* Pub. L. No. 106-569, § 512(13)(B), 114 Stat. 2968 (2000).

Congress's treatment of the Native Hawaiian community as a distinct indigenous group for which it may enact special legislation is manifestly reasonable. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who once exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty. *See* Pub. L. No. 103-150, 107 Stat. 1510, 1512-13 (1993); NPRM 59114-18. *See generally United States v. Sandoval*, 231 U.S. 28, 46-47 (1913).

That history is why both this Court and the Hawaii Supreme Court have held that the Native Hawaiian community falls within the scope of Congress's Indian-affairs power. *See, e.g.*, *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998) (citing *Mancari* and rejecting plaintiffs' Fourteenth Amendment claim), *vacated on other grounds*, 528 U.S. 495, 522 (2000); *Ahuna v. Dep't of Haw. Home Lands*, 64 Haw. 327, 339 (1982); *see also Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 847-49, 849-57 (9th Cir. 2006) (en banc) (majority and concurring opinions); *Kahawaiolaa,* 386 F.3d at 1278-79 (applying *Mancari*'s rational-basis review and distinguishing *Rice*, 528 U.S. at 519-22).

The fact that the Native Hawaiian community currently lacks an organized government does not preclude the application of principles of Native self-governance and self-determination. *See United States v. John*, 437 U.S. 634, 649-53 (1978)

(upholding Congress's power to legislate for Indians who had no federally recognized tribal government); *see also Lara*, 541 U.S. at 203 (noting that Congress's broad power extends even to restoring a government-to-government relationship that Congress had "previously extinguished … [or] terminated"). Any ruling that purports to require the Native Hawaiian community to include non-Natives in organizing a government could mean in practice that a Native group could never organize itself, impairing its right to self-government and frustrating its eligibility for a government-to-government relationship with the United States.

Plaintiffs suggest (*e.g.*, Opening Br. at 35) that this appeal requires only a straightforward application of the Supreme Court's holding in *Rice v. Cayetano*, but they seek a decision reaching far beyond any issue resolved in *Rice*. The Court in *Rice* expressly reserved the question whether Congress generally "may treat the native Hawaiians as it does the Indian tribes," 528 U.S. at 518, and instead confined its holding to the specific Fifteenth Amendment context presented there: state elections for state officials responsible for administering state laws and for running a state agency established by the state constitution. *See id.* at 520-22. By contrast, this appeal is about a (now abandoned) Native Hawaiian election for Native Hawaiian delegates to a convention that might propose a constitution or other governing document for the Native Hawaiian community. This election had nothing to do with governing the State of Hawaii. Of course, now that Nai Aupuni has terminated the election, this appeal bears even less similarity to *Rice* than it did before.

Nor does the State's provision of assistance to the Native Hawaiian process of self-determination alter the legal analysis. On admitting Hawaii to the Union, Congress delegated to the State the day-to-day administration of key aspects of the Federal trust responsibility for Native Hawaiians. *See* Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4, 5-6 (1959); *Ahuna*, 64 Haw. at 337-38; *Rice v. Cayetano*, 941 F. Supp. 1529, 1542-44, 1549-50 (D. Haw. 1996); *see also* 42 U.S.C. § 11701(16). The Admission Act created a compact between the United States and the State, with the State adopting the HHCA as part of the State constitution. *See* Pub. L. No. 86-3, § 4, 73 Stat. at 5. The State also agreed to hold certain lands "as a public trust" for, in part, "the betterment of the conditions of native Hawaiians." *Id.* § 5, 73 Stat. at 6. The Admission Act "allow[ed] the State to assume responsibility for the welfare of native Hawaiians in accordance with the [HHCA] and to make such changes as are necessary to best implement the purposes of the act under changing circumstances." Comm. on Interior and Insular Affairs, *Providing for the Admission of the State of Hawaii into the Union*, S. Rep. No. 85-1164, at 2 (1957).

Subsequently, Congress has often called upon the State to serve as the United States' partner in implementing the special political and trust relationship with the Native Hawaiian community: More than 30 sections of the U.S. Code expressly refer to the state agencies for Native Hawaiian affairs and homelands. *See, e.g.*, 42 U.S.C. §§ 2991b-1, 11711(7)(A)(ii). Thus, Congress not only expressly delegated authority to Hawaii, but has also repeatedly ratified Hawaii's various efforts to meet that

responsibility. In light of Hawaii's unique historical and geographic circumstances, it is perhaps not surprising that Congress chose to delegate to the State authority to manage the public trust for Native Hawaiians. The pulls of federalism are particularly strong in the case of the most isolated land mass in the world, some 5,000 miles from our national Capital.

The programs the State administers with congressional authorization provide benefits to Native Hawaiians, and therefore necessarily entail identifying eligible Native Hawaiians — a function not unlike the one challenged in this litigation. *See, e.g.*, 42 U.S.C. §§ 2991b-1(a)(1)(A), 11709(a)(2), 11711(7)(A)(ii). Just as Federal assistance in a tribal election conducted under the Secretary's auspices does not divest a Native community's actions of their character as internal matters of self-governance, there is no reason to conclude that assistance from the State should have that effect here. *Cf. Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003) (applying rational-basis review to a state Indian law that was enacted in response to, and echoed the classifications in, a Federal Indian statute).

For many decades, the Native Hawaiian community has debated whether and how to organize a government. *See* NATIVE HAWAIIAN LAW, A TREATISE 271-79 (Melody Kapilialoha MacKenzie et al. eds., 2015). In a plebiscite of Native Hawaiians in 1996, over 73% of voters favored the Native Hawaiian people "elect[ing] delegates to propose a Native Hawaiian government." *Id.* at 276-78. The Native Hawaiian Convention that followed never finalized its proposals and "has not been able to

function due to lack of funding and an inadequate support system." *Id.* at 279. Now Nai Aupuni is holding its own Aha to discuss self-governance, and plaintiffs ask this Court to enjoin them from even meeting. *See* Opening Br. at 55. The Court should deny this request and allow these members of the Native Hawaiian community to meet and speak about whether and how they might pursue self-government.

CONCLUSION

As a political community entitled to self-determination, the Native Hawaiian people have the same fundamental rights of political liberty and local self-government as any Indian tribe. The Native Hawaiian community has an inherent right to organize and to develop any form of government it chooses. Native Hawaiians should not be relegated to second-class status among our Nation's indigenous peoples. Though the Department's NPRM does not directly impact the issues presented by plaintiffs' request for a preliminary injunction, the NPRM is rooted in a century of congressional precedent treating the Native Hawaiian people as a distinct indigenous political community, just as Congress treats tribes in the continental United States. That treatment does bear on the issues before the Court.

This Court should dismiss this appeal as moot; but if the appeal remains live, the Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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FEBRUARY 12, 2016
90-12-04078

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains **5,675 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Robert P. Stockman

ROBERT P. STOCKMAN

ADDENDUM

Notice of Proposed Rulemaking (NPRM) titled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community," 80 Fed. Reg. 59113 (Oct. 1, 2015).

- Specific proposed quality measures in the model, their prior validation, and how they would further the model's goals, including measures of beneficiary experience of care, quality of life, and functional status that could be used.
- How the model would affect access to care for Medicare and Medicaid beneficiaries.
- How the model will affect disparities among beneficiaries by race, and ethnicity, gender, and beneficiaries with disabilities, and how the applicant intends to monitor changes in disparities during the model implementation.
- Proposed geographical location(s) of the model.
- Scope of EP participants for the model, including information about what specialty or specialties EP participants would fall under the model.
- The number of EPs expected to participate in the model, information about whether or not EP participants for the model have expressed interest in participating and relevant stakeholder support for the model.
- To what extent participants in the model would be required to use certified EHR technology.
- An assessment of financial opportunities for model participants including a business case for their participation.
- Mechanisms for how the model fits into existing Medicare payment systems, or replaces them in part or in whole and would interact with or complement existing alternative payment models.
- What payment mechanisms would be used in the model, such as incentive payments, performance-based payments, shared savings, or other forms of payment.
- Whether the model would include financial risk for monetary losses for participants in excess of a minimal amount and the type and amount of financial performance risk assumed by model participants.
- Method for attributing beneficiaries to participants.
- Estimated percentage of Medicare spending impacted by the model and expected amount of any new Medicare/Medicaid payments to model participants.
- Mechanism and amount of anticipated savings to Medicare and Medicaid from the model, and any incentive payments, performance-based payments, shared savings, or other payments made from Medicare to model participants.
- Information about any similar models used by private payers, and how the current proposal is similar to or different from private models and whether and how the model could include additional payers other than Medicare, including Medicaid.
- Whether the model engages payers other than Medicare, including Medicaid and/or private payers. If not, why not? If so, what proportion of the model's beneficiaries is covered by Medicare as compared to other payers?
- Potential approaches for CMS to evaluate the proposed model (study design, comparison groups, and key outcome measures).
- Opportunities for potential model expansion if successful.

C. Technical Assistance to Small Practices and Practices in Health Professional Shortage Areas

Section 1848(q)(11) of the Act provides for technical assistance to small practices and practices in HPSAs. In general, under section 1848(q)(11) of the Act, the Secretary is required to enter into contracts or agreements with entities such as quality improvement organizations, regional extension centers and regional health collaboratives beginning in Fiscal Year 2016 to offer guidance and assistance to MIPS EPs in practices of 15 or fewer professionals. Priority is to be given to small practices located in rural areas, HPSAs, and medically underserved areas, and practices with low composite scores. The technical assistance is to focus on the performance categories under MIPS, or how to transition to implementation of and participation in an APM.

For section 1848(q)(11) of the Act—

- What should CMS consider when organizing a program of technical assistance to support clinical practices as they prepare for effective participation in the MIPS and APMs?
- What existing educational and assistance efforts might be examples of ''best in class'' performance in spreading the tools and resources needed for small practices and practices in HPSAs? What evidence and evaluation results support these efforts?
- What are the most significant clinician challenges and lessons learned related to spreading quality measurement, leveraging CEHRT to make practice improvements, value based payment and APMs in small practices and practices in health shortage areas, and what solutions have been successful in addressing these issues?
- What kind of support should CMS offer in helping providers understand the requirements of MIPS?
- Should such assistance require multi-year provider technical assistance commitment, or should it be provided on a one-time basis?
- Should there be conditions of participation and/or exclusions in the providers eligible to receive such assistance, such as providers participating in delivery system reform initiatives such as the Transforming Clinical Practice Initiative (TCPI; *http://innovation.cms.gov/initiatives/Transforming-Clinical-Practices/*), or having a certain level of need identified?

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this document.

Dated: September 10, 2015.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2015–24906 Filed 9–28–15; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 50

[Docket No. DOI–2015–0005]; [145D0102DM DS6CS00000 DLSN00000.000000 DX.6CS25 241A0]

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: Proposed rule.

SUMMARY: The Secretary of the Interior (Secretary) is proposing an administrative rule to facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community to more effectively implement the special political and trust relationship that Congress has established between that community and the United States. The proposed 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 proposed rule would establish 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 indigenous self-determination and Native self-governance, the Native Hawaiian community itself would determine whether and how to reorganize its government.

DATES: Comments on this proposed rule must be received on or before December 30, 2015. Please see **SUPPLEMENTARY INFORMATION** for dates and locations of public meetings and tribal consultations.

ADDRESSES: You may submit comments by either of the methods listed below. Please use Regulation Identifier Number 1090–AB05 in your message.

1. *Federal eRulemaking portal: http://www.regulations.gov.* Follow the instructions on the Web site for submitting and viewing comments. The rule has been assigned Docket ID DOI–2015–0005.

2. *Email: part50@doi.gov.* Include the number 1090–AB05 in the subject line.

3. *U.S. mail, courier, or hand delivery:* Office of the Secretary, Department of the Interior, Room 7228, 1849 C Street NW., Washington, DC 20240.

We request that you send comments only by one of the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us.

FOR FURTHER INFORMATION CONTACT: Antoinette Powell, telephone (202) 208–5816 (not a toll-free number); *part50@doi.gov.*

SUPPLEMENTARY INFORMATION:

Public Comment

The Secretary is proposing an administrative rule to provide a procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community. The Department would like to hear from leaders and members of the Native Hawaiian community and of federally recognized tribes in the continental United States (*i.e.,* the contiguous 48 States and Alaska). We also welcome comments and information from the State of Hawaii and its agencies, other government agencies, and members of the public. We encourage all persons interested in this Notice of Proposed Rulemaking to submit comments on the proposed rule.

To be most useful, and most likely to inform decisions on the content of a final administrative rule, comments should:

—Be specific;
—Be substantive;
—Explain the reasoning behind the comments; and
—Address the proposed rule.

Most laws and other sources cited in this proposal will be available on the Department of the Interior's Office of Native Hawaiian Relations (ONHR) Web site at *http://www.doi.gov/ohr/.*

I. Background

Over many decades, Congress enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. Among other things, these statutes 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 tribes in the continental United States. But during this same period, the United States has not partnered with Native Hawaiians on a government-to-government basis, at least partly 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 by reorganizing their sovereign Native Hawaiian government to engage the United States in a 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 United States Constitution, treaties, statutes, Executive Orders, administrative regulations, and judicial decisions. The Federal Government's relationship with these tribes is guided by 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 (Department), developed processes to help tribes in the continental United States establish 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 the benefits of a formal government-to-government relationship have long been denied to members of one of the Nation's largest indigenous communities: Native Hawaiians. This proposed 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.'' 20 U.S.C. 7512(2); *accord* 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* (2014), *available at http://www.regulations.gov/#!documentDetail;D=DOI-2014-0002-0005* (comment number 2438) [hereinafter *Moolelo Ea O Na Hawaii*].

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 the Hawaiian monarch. 42 U.S.C. 11701(6); *accord* 20 U.S.C. 7512(4); *see Rice,* 528 U.S. at 504 (citing treaties that the two countries signed in 1826, 1849, 1875, and 1887);

Moolelo Ea O Na Hawaii 169–71, 195–200. But during that same period, Westerners became ''increasing[ly] involve[d] . . . in the economic and political affairs of the Kingdom,'' leading to the overthrow of the Kingdom in 1893 by a small group of non-Hawaiians, aided by the United States Minister to Hawaii and the Armed Forces of the United States. *Rice,* 528 U.S. at 501, 504–05. *See generally Moolelo Ea O Na Hawaii* 313–25; 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.).

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, 1993, 107 Stat. 1511. 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 36–39. In 1895, Hawaiian nationalists loyal to Queen Liliuokalani attempted to regain control of the Hawaiian government. *Id.* at 39–40. 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 (the ''Kue Petitions''). *See Moolelo Ea O Na Hawaii* 342–45.

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.'' 42 U.S.C. 11701(11). The Republic of Hawaii ceded its land to the United States, and Congress passed a joint resolution annexing the islands in 1898. *See Rice,* 528 U.S. at 505. The Hawaiian Organic Act, enacted in 1900, established the Territory of Hawaii, 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.

Hawaii was a U.S. territory for six decades prior to 1959, and during much of this period, educated Native Hawaiians, and a government led by them, were perceived as threats to the incipient territorial government. Consequently, the use of the Hawaiian language in education in public schools was declared unlawful. 20 U.S.C. 7512(19). But various entities connected to the Kingdom of Hawaii adopted other methods of continuing their government and education. Specifically, the Royal Societies, the Bishop Estate (now Kamehameha Schools), the Alii trusts, and civic clubs are examples of Native Hawaiians' continuing efforts to keep their culture, language, and community alive. *See Moolelo Ea O Na Hawaii* 456–58. Indeed, post annexation, Native Hawaiians maintained their separate identity as a single distinct political 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 (Hawaiian Protective Association) was a political organization formed in 1914 under the leadership of Prince Jonah Kuhio Kalanianaole (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* 405–10. The Association established 12 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 set aside and protect Hawaiian home lands.

B. Congress's Recognition of Native Hawaiians as a Political Community

By 1919, the decline in the Native Hawaiian population—by some estimates from several hundred thousand in 1778 to only 22,600—led Delegate Prince Kuhio Kalanianaole, Native Hawaiian politician and Hawaiian Civic Clubs co-founder John Wise, and U.S. Secretary of the Interior John Lane to recommend to Congress that land be set aside to help Native Hawaiians reestablish their traditional way of life. *See* H.R. Rep. No. 66–839, at 4 (1920); 20 U.S.C. 7512(7). This recommendation resulted in enactment of the HHCA, which 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)); *Moolelo Ea O Na Hawaii* 410–12, 421–33. The HHCA limited benefits to Native Hawaiians with a high degree of Native Hawaiian ancestry, suggesting a Congressional understanding that Native Hawaiians frequently had two Native Hawaiian parents and many Native Hawaiian ancestors, which indicated that this group maintained a distinct political community. The HHCA's 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.'').

In 1938, Congress again exercised its trust responsibility by granting 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 required the State of Hawaii to manage and administer two public trusts for the indigenous Native Hawaiian people. Act of March 19, 1959, 73 Stat. 4. 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 the benefit of the general public and 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 a continuing role in the management and disposition of the home lands. *See* Admission Act § 4; Hawaiian Home Lands Recovery Act (HHLRA), Act of November 2, 1995, 109 Stat. 357.

Since Hawaii's admission to the United States, Congress has enacted dozens of statutes on behalf of Native Hawaiians pursuant to the United States' recognized political relationship and trust responsibility. The 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, 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. 2911; 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.,* 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. 42 U.S.C. 11701(19); *accord* 20 U.S.C. 7902(13); *see, e.g.,* American Indian Religious Freedom Act, 42 U.S.C. 1996–1996a. *See generally* 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* 114 Stat. 2874–75, 2968–69 (2000).

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,'' 42 U.S.C. 11701(1); *accord* 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 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.'' 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* 20 U.S.C. 7512(12)(B).

In 1993, Congress enacted a joint resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510. In that Joint Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii thwarted Native Hawaiians' efforts to exercise their ''inherent sovereignty'' and ''right to self-determination,'' and stated 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.'' *Id.* at 1512–13; *see* 20 U.S.C. 7512(20); 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.'' Joint Resolution of November 23, 1993, 107 Stat. 1513.

Following a series of hearings and meetings with the Native Hawaiian community in 1999, the U.S. Departments of the Interior and 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 recommended as its top priority that ''the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law.'' Department of the Interior & Department of Justice, *From Mauka to Makai* 4 (2000).

In recent statutes, Congress again recognized 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.'' 20 U.S.C. 7512(12)(A); *accord* 114 Stat. 2968 (2000); *see also id.* at 2966; 114 Stat. 2872, 2874 (2000); 118 Stat. 445 (2004). Congress noted 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.'' 20 U.S.C. 7512(21); *see also* 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 Congress has 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 has 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.'' 114 Stat. 2968 (2000). Thus, ''the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives.'' 20 U.S.C. 7512(12)(B), (D); *see Rice,* 528 U.S. at 518–19. Congress's treatment of Native Hawaiians flows from that status of the Native Hawaiian community.

Although Congress repeatedly acknowledged its special political and trust relationship with the Native Hawaiian community since the overthrow of the Kingdom of Hawaii more than a century ago, the Federal Government does not maintain 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 of Hawaii's indigenous people 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 government-to-government relationship.

Consistent with the HHCA, which is the first Congressional enactment clearly recognizing the Native Hawaiian community's special political and trust 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 management of the Native Hawaiian community's special political and trust relationship with the United States affirmed the continuing Federal role in Native Hawaiian affairs, namely, 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* 118 Stat. 445–46 (2004).

C. Actions by the Continuing Native Hawaiian Political Community

Native Hawaiians maintained a distinct political community 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,* 434–551; *see id.* at 496–516 & appendix 4 (listing organizations, their histories, and their accomplishments). A key example of the Native Hawaiian community taking organized action to advance Native Hawaiian self-determination is a political movement, in conjunction with other voters in Hawaii, which led to a set of amendments to the State Constitution in 1978 to provide additional protection and recognition of Native Hawaiian interests. Those amendments established the Office of Hawaiian Affairs, which administers trust monies to benefit the Native Hawaiian community, Hawaii Const. art. XII, sections 5–6, and provided for recognition of certain traditional and customary legal rights of Native Hawaiians, *id.* art. XII, section 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 the community's active engagement on issues of self-determination and preservation of Native Hawaiian culture and traditions. For example, 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 non-profit 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. 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 generally Native Hawaiian Law: A Treatise* (Melody Kapilialoha MacKenzie ed., 2015), encouraged development of traditional justice programs, including a method of alternative dispute resolution, ''hooponopono,'' that is endorsed by the Native Hawaiian Bar Association. *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, § 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 history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *See Kahawaiolaa* v. *Norton,* 386 F.3d 1271, 1283 (9th Cir. 2004). 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 expressed a preference 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.'' [1] *Id.*

And 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 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. S10990, S10992 (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 trust relationship between Native Hawaiians and the United States, and established a process for reorganizing a Native Hawaiian governing entity. Some in Congress, however, expressed a preference not for recognizing a reorganized Native Hawaiian government by legislation, but rather for allowing the Native Hawaiian community to apply for recognition 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).

The State of Hawaii, in Act 195, Session Laws of Hawaii 2011, 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 created a five-member Native Hawaiian Roll Commission to oversee this process.

II. Responses to Comments on the June 20, 2014 Advance Notice of Proposed Rulemaking and Tribal Summary Impact Statement

In June 2014, the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) titled ''Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community.'' 79 FR 35,296–303 (June 20, 2014). The ANPRM sought input from leaders and members of the Native Hawaiian community and federally recognized tribes in the continental United States about whether and, if so, how the Department should facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community. 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 over 5,100 written comments by the August 19, 2014 deadline, more than half of which were identical postcards submitted in support of reestablishing a government-to-government relationship through Federal rulemaking. In addition, 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. All comments received on the ANPRM are available in the ANPRM docket at *http://www.regulations.gov/#!docketDetail;D=DOI-2014-0002-0005.* Most of the comments revolved around a limited number of issues. The Department believes that the issues discussed below encompass the range of substantive issues presented in comments on the ANPRM. To the extent that any persons who submitted comments on the ANPRM believe that they presented additional issues that are not adequately addressed here, and that remain pertinent to the proposed rule, the Department invites further comments highlighting those issues.

After careful review and analysis of the comments on the ANPRM, the Department concludes that it is appropriate to propose a Federal rule that would set forth an administrative procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community.

[1] The Department has carefully reviewed the *Kahawaiolaa* briefs. To the extent that positions taken in this proposed rulemaking may be seen as inconsistent with positions of the United States in the *Kahawaiolaa* litigation, the views in this rulemaking reflect the Department's current view.

Overview of Comments

A total of 5,164 written comments were submitted for the record. Comments came from Native Hawaiian organizations, national organizations, Native Hawaiian and non-Native-Hawaiian individuals, academics, student organizations, nongovernmental organizations, the Hawaiian Affairs Caucus of the Hawaii State Legislature, State legislators, Hawaiian Civic Clubs and their members, Alii Trusts, Royal Orders, religious orders, a federally recognized Indian tribe, intertribal organizations, an Alaska Native Corporation, and Members of the United States Congress, including the Hawaii delegation to the 113th Congress, as well as former U.S. Senator Akaka. The Department appreciates the interest and insight reflected in all the submissions and has considered them carefully.

A large majority of commenters supported a Federal rulemaking to facilitate reestablishment of a formal government-to-government relationship. At the same time, commenters also expressed strong support for reorganizing a Native Hawaiian government without assistance from the United States and urged the Federal Government to instead promulgate a rule tailored to a government reorganized by the Native Hawaiian community. The Department agrees: 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 United States. The process should be fair and inclusive and reflect the will of the Native Hawaiian community.

A. Responses to Specific Issues Raised in ANPRM Comments

1. Should the United States be involved in the Native Hawaiian nation-building process?

Issue: The Department received comments from the Association of Hawaiian Civic Clubs, the Sovereign Councils of the Hawaiian Homelands Assembly, the Native Hawaiian Chamber of Commerce, the Native Hawaiian Bar Association, the Native Hawaiian Legal Corporation, the Association of Hawaiians for Homestead Lands, the Native Hawaiian Chamber of Commerce, Alu Like, the Native Hawaiian Education Association, Hawaiian Community Assets, Papa Ola Lokahi, Koolau Foundation, Protect Kahoolawe Ohana, Kalaeloa Heritage and Legacy Foundation, the Waimanalo Hawaiian Homes Association, the Council for Native Hawaiian Advancement, the Kapolei Community Development Corporation, two Alii Trusts, and eight Hawaiian Civic Clubs, among others, that expressed support for a Federal rule enabling a reorganized Native Hawaiian government to seek reestablishment of a formal government-to-government relationship with the United States. Some of these commenters, and many others, also urged the Department to refrain from engaging in or becoming directly involved with the nation-building that is currently underway in Hawaii.

Response: Consistent with these comments, the Department is proposing only to create a procedure and criteria that would facilitate the reestablishment of a formal government-to-government relationship with a reorganized Native Hawaiian government without involving the Federal Government in the Native Hawaiian community's nation-building process.

2. Does Hawaii's multicultural history preclude the possibility that a reorganized Native Hawaiian government could reestablish a formal government-to-government relationship with the United States?

Issue: Some commenters opposed Federal rulemaking on the basis that the Kingdom of Hawaii had evolved into a multicultural society by the time it was overthrown, and that any attempt to reorganize or reestablish a ''native'' (indigenous) Hawaiian government would consequently be race-based and unlawful.

Response: The fact that individuals originating from other countries lived in and were subject to the rule of the Kingdom of Hawaii does not establish that the Native Hawaiian community ceased to exist as a native community exercising political authority. Indeed, as discussed above, key elements demonstrating the existence of that community, such as intermarriage and sustained cultural identity, persisted at that time and continue to flourish today.

To the extent that these comments suggest that the Department must reestablish a 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. That requirement is consistent with Federal law that generally requires members of a native group or tribe to show an ancestral connection to the indigenous group in question. *See generally United States* v. *Sandoval,* 231 U.S. 28, 46 (1913). Moreover, the Department must defer to Congress's definition of the nature and scope of the Native Hawaiian community.

3. Would reestablishment of a formal government-to-government relationship with the Native Hawaiian community create a political divide in Hawaii?

Issue: Some commenters stated that Hawaii is a multicultural society that would be divided if the United States reestablished a formal government-to-government relationship with the Native Hawaiian community, creating disharmony in the State by permitting race-based discrimination.

Response: The U.S. Constitution provides the Federal Government with authority to 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, cl. 2 (Treaty Clause). These constitutional provisions recognize and provide the foundation for longstanding special relationships between native peoples and the Federal Government, relationships that date to the earliest period of our Nation's history. Consistent with the Supreme Court's holding in *Morton* v. *Mancari,* 417 U.S. 535 (1974), and other cases, the Department believes that the United States' government-to-government relationships with native peoples do not constitute ''race-based'' discrimination but are political classifications. The Department believes that these relationships are generally beneficial, and the Department is aware of no reason to treat the Native Hawaiian community differently in this respect.

4. How do claims concerning occupation of the Hawaiian Islands impact the proposed rule?

Issue: Commenters who objected to Federal rulemaking most commonly based their objections on the assertion that the United States does not have jurisdiction over the Hawaiian Islands. Most of these objections were associated with claims that the United States violated and continues to violate international law by illegally occupying the Hawaiian Islands.

Response: As expressly stated in the ANPRM, comments about altering the fundamental nature of the political and trust relationship that Congress has established between the United States and the Native Hawaiian community were outside the ANPRM's scope and therefore did not inform development of the proposed rule. Though comments on these issues were not solicited, some response here may be helpful to understand the Department's role in this rulemaking.

The Department is an agency of the United States Government. The Department's authority to issue this proposed rule and any final rule derives from the United States Constitution and from Acts of Congress, and the Department has no authority outside that structure. The Department 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 of America.

In the years following the 1893 overthrow of the Hawaiian monarchy, Congress annexed Hawaii and established a government for the Territory of Hawaii. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898); Act of Apr. 30, 1900, 31 Stat. 141. In 1959, Congress admitted Hawaii to the Union as the 50th State. *See* Act of March 19, 1959, 73 Stat. 4. Agents of the United States were involved in the overthrow of the Kingdom of Hawaii in 1893; and Congress, through a joint resolution, has 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. Joint Resolution of November 23, 1993, 107 Stat. 1510, 1513.

The 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 established the current status of the State of Hawaii. The Admission Act 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 19, 1959, sec. 1, 73 Stat. 4. All provisions of the Admission Act were consented to by the State of Hawaii and its people through an election held on June 27, 1959. The comments in response to the ANPRM that call into question the State of Hawaii's legitimacy, and its status as one of the United States under the Constitution, therefore are inconsistent with the express determination of Congress, which is binding on the Department.

5. What would be the proposed role of HHCA beneficiaries in a Native Hawaiian government that relates to the United States on a formal government-to-government basis?

Issue: Some commenters sought reassurance that the proposed rule would not exclude HHCA beneficiaries and their successors from a role in the Native Hawaiian government. The Department received comments on this issue from the Office of Hawaiian Affairs (OHA) as well as others. The Hawaiian Homes Commission specifically noted the unique relationship recognized under the HHCA between the Federal Government and beneficiaries of that Federal law, urging that any rule should protect this group's existing benefits and take into account their special circumstances.

Response: The proposed rule recognizes HHCA beneficiaries' unique status under Federal law and protects that status in a number of ways:

a. The proposed rule defines the term ''HHCA-eligible Native Hawaiians'' to include any Native Hawaiian individual who meets the definition of ''native Hawaiian'' in the HHCA, 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.

b. The proposed 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-eligible 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 objectionable to HHCA-eligible Native Hawaiians. The Department expects that the participation of HHCA-eligible Native Hawaiians in the referendum process will ensure that the structure of any ratified Native Hawaiian government will include long-term protections for HHCA-eligible Native Hawaiians.

c. The proposed rule prohibits the Native Hawaiian government's membership criteria from excluding any HHCA-eligible Native Hawaiian citizen who wishes to be a member.

d. The proposed rule requires that the governing document protect and preserve rights, protections, and benefits under the HHCA.

e. The proposed rule leaves intact rights, protections, and benefits under the HHCA.

f. The proposed rule does not authorize the Native Hawaiian government to sell, dispose of, lease, or encumber Hawaiian home lands or interests in those lands.

g. The proposed rule does not diminish any Native Hawaiian's rights or immunities, including any immunity from State or local taxation, under the HHCA.

6. Would Hawaiian home lands, including those subject to lease, be ''subsumed'' by a Native Hawaiian government?

Issue: The Hawaiian Homes Commission noted that several Native Hawaiian beneficiaries were concerned that Hawaiian home lands, including those subject to lease, would be ''subsumed'' by a Native Hawaiian government ''with little input or control exercised over this decision by Hawaiian home lands beneficiaries.'' An individual homesteader, born and raised in the Papakolea Homestead community, also expressed support for a rule but raised concerns that the HHCA would be subject to negotiation between the United States and the newly reorganized Native Hawaiian government, and sought reassurance that the HHCA would be safeguarded. The Kapolei Community Development Corporation's Board of Directors raised similar concerns, particularly with respect to the potential transfer of Hawaiian home lands currently administered by the State of Hawaii under the HHCA to the newly formed Native Hawaiian government, cautioning that such transfer could ''threaten the specific purpose of those lands, and be used for non-homesteading uses.''

Response: Although the proposed rule would not have a direct impact on the status of Hawaiian home lands, the Department takes the beneficiaries' comments expressing concern over their rights and the future of the HHCA land base very seriously. In response to this concern, the proposed rule includes a provision that makes clear that the promulgation of this rule would not diminish any right, protection, or benefit granted to Native Hawaiians by the HHCA. The HHCA would be preserved regardless of whether a Native Hawaiian government is reorganized, regardless of whether it submits a request to the Secretary, and regardless of whether any such request is granted. In addition, for the reorganized Native Hawaiian government to reestablish a formal government-to-government relationship with the United States, its governing document must protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA.

7. Would reestablishment of the formal government-to-government relationship be consistent with existing requirements of Federal law?

Issue: Four U.S. Senators submitted comments generally opposing the rulemaking on constitutional grounds and asserting that the executive authority used to federally acknowledge tribes in the continental United States does not extend to Native Hawaiians. Another Senator submitted similar comments, primarily questioning the Secretary's constitutional authority to promulgate rules and arguing that administrative action would be race-based and thus violate the Constitution's guarantee of equal protection. The Department also received comments from the Heritage Foundation and the Center for Equal Opportunity urging the Secretary to forgo Federal rulemaking on similar bases.

Response: The Federal Government has broad authority with respect to Native American communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause); *Morton* v. *Mancari,* 417 U.S. at 551–52 (''The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.''). Congress has already exercised that plenary power to recognize Native Hawaiians through statutes enacted for their benefit and charged the Secretary and others with responsibility for administering the benefits provided by the more than 150 statutes establishing a special political and trust relationship with the Native Hawaiian community. The Department proposes to better implement that relationship by establishing the administrative procedure and criteria for reestablishing a formal government-to-government relationship with a native community that has already been recognized by Congress. As explained above, moreover, the Supreme Court made clear that legislation affecting Native American communities does not generally constitute race-based discrimination. *See Morton* v. *Mancari,* 417 U.S. at 551–55; *id.* at 553 n.24 (explaining that the challenged provision was ''political rather than racial in nature''). The Department's statutory authority to promulgate the proposed rule is discussed below. *See infra* Section III.

8. Would reestablishment of a government-to-government relationship entitle the Native Hawaiian government to conduct gaming under the Indian Gaming Regulatory Act?

Issue: Several commenters stated that Federal rulemaking would make the Native Hawaiian government eligible to conduct gaming activities under the Indian Gaming Regulatory Act (IGRA), a Federal statute that regulates certain types of gaming activities by federally recognized tribes on Indian lands as defined in IGRA.

Response: The Department anticipates that the Native Hawaiian Governing Entity would not fall within the definition of ''Indian tribe'' in IGRA, 25 U.S.C. 2703(5). Therefore, IGRA would not apply. Moreover, because the State of Hawaii prohibits gambling, the Native Hawaiian Governing Entity would not be permitted to conduct gaming in Hawaii. The Department welcomes comments on this issue.

9. Under this proposed rule could the United States reestablish formal government-to-government relationships with multiple Native Hawaiian governments?

Issue: Many commenters who support a Federal rule urged the Department to promulgate a rule that authorizes the reestablishment of a formal government-to-government relationship with a single official Native Hawaiian government, consistent with the nineteenth-century history of Hawaii's self-governance as a single unified entity.

Response: Congress consistently treated the Native Hawaiian community as a single entity through more than 150 Federal laws that establish programs and services for the community's benefit. Congress's recognition of a single Native Hawaiian community reflects the fact that a single centralized, organized Native Hawaiian government was in place prior to the overthrow of the Hawaiian Kingdom.

This approach also had significant support among commenters. The proposed rule therefore would authorize reestablishing a formal government-to-government relationship with a single representative sovereign Native Hawaiian government. That Native Hawaiian government, however, 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.

10. Would the proposed rule require use of the roll certified by the Native Hawaiian Roll Commission to determine eligibility to vote in any referendum to ratify the Native Hawaiian government's constitution or other governing document?

Issue: Several commenters made statements regarding the potential role that the roll certified by the Native Hawaiian Roll Commission might play in reestablishing the formal government-to-government relationship between the United States and the Native Hawaiian community.

Response: Under the proposed rule, the Department permits use of the roll certified by the Native Hawaiian Roll Commission, and such an approach may facilitate the reestablishment of a formal government-to-government relationship. The Department, however, does not require use of the roll. Section 50.12(a)(1)(B) of the proposed rule provides that a roll of Native Hawaiians certified by a State commission or agency under State law may be one of several sources that could provide sufficient evidence that an individual descends from Hawaii's aboriginal people. Section 50.12(b) of the proposed rule provides that the certified roll could serve as an accurate and complete list of Native Hawaiians eligible to vote in a ratification referendum if certain conditions are met. For instance, the roll would need to, among other things, exclude all persons who are not U.S. citizens, exclude all persons who are less than 18 years of age, and include all adult U.S. citizens who demonstrated HHCA eligibility according to official records of Hawaii's Department of Hawaiian Home Lands. (See also the response to question 13 below, which discusses requirements for participation in the ratification referendum under § 50.14.)

11. Would the proposed rule limit the inherent sovereign powers of a reorganized Native Hawaiian government?

Issue: OHA and numerous other commenters expressed a strong interest in ensuring that the proposed rule would not limit any inherent sovereign powers of a reorganized Native Hawaiian government.

Response: The proposed rule would not dictate the inherent sovereign powers a reorganized Native Hawaiian government could exercise. The proposed rule does establish certain elements that must be contained in a request to reestablish a government-to-government relationship with the United States and establishes criteria by

which the Secretary will review a request. *See* 50.10–50.15 (setting out essential elements for a request); *id.* 50.16 (setting out criteria). These provisions include guaranteeing the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers. Although those elements and criteria will inform and influence the process for reestablishing a formal government-to-government relationship, they would not undermine the fundamental, retained inherent sovereign powers of a reorganized Native Hawaiian government.

12. What role will Native Hawaiians play in approving the constitution or other governing document of a Native Hawaiian government?

Issue: Numerous commenters discussed the role of Native Hawaiians in ratifying the constitution or other governing document that establishes the form and functions of a Native Hawaiian government. One commenter, in particular, stated that the Secretary should not require that the governing document be approved by a majority of *all* Native Hawaiians, regardless of whether they participate in the ratification referendum, because such a requirement would be unrealistic and unachievable.

Response: Section 50.16(g) and (h) of the proposed rule would require a requester to demonstrate broad-based community support among Native Hawaiians. The proposed rule requires a majority only of those voters who actually cast a ballot; the number of eligible voters who opt not to participate in the ratification referendum would not be relevant when calculating whether the affirmative votes were or were not in the majority. The proposed rule, however, requires broad-based community support in favor of the requester's constitution or other governing document, thus also safeguarding against a low turnout. The Department solicits comments on this approach and requests that if such comments provide an alternate approach that the commenters explain the reasoning behind any proposed method to establish that broad-based community support has been demonstrated in the ratification process.

13. Who would be eligible to participate in the proposed process for reestablishing a government-to-government relationship?

Issue: Several commenters expressed concern about who would be eligible to participate in the process for reestablishing a government-to-government relationship. Some commenters expressed the belief that participation should be open to persons who have no Native Hawaiian ancestry. Other commenters expressed opposition to the reorganization of a Native Hawaiian government, or to the reestablishment of a government-to-government relationship between such a community and the United States.

Response: Under the proposed rule, to retain the option of eventually reestablishing a formal government-to-government relationship with the United States, the Native Hawaiian community would be required to permit any adult person who is a U.S. citizen and can document Native Hawaiian descent to participate in the referendum to ratify its governing documents. *See* 50.14(b)(5)(C). As discussed in question 2 above, existing Congressional definitions of the Native Hawaiian community and principles of Federal law limit participation to those who can document Native Hawaiian descent and are U.S. citizens. Native Hawaiian adult citizens who do not wish to affirm the inherent sovereignty of the Native Hawaiian people, or who doubt that they and other Native Hawaiians have sufficient connections or ties to constitute a community, or who oppose the process of Native Hawaiian self-government or the reestablishment of a formal government-to-government relationship with the United States, would be free to participate in the ratification referendum and, if they wish, vote against ratifying the community's proposed governing document. And because membership in the Native Hawaiian Governing Entity would be voluntary, they also would be free to choose not to become members of any government that may be reorganized. The Department seeks public comment on these aspects of the proposed rule.

14. Shouldn't the Department require a Native Hawaiian government to go through the existing administrative tribal acknowledgment process?

Issue: The Department promulgated regulations for Federal acknowledgment of tribes in the continental United States in 25 CFR part 83. These regulations, commonly referred to as ''Part 83,'' create a pathway for Federal acknowledgment of petitioners in the continental United States to establish a government-to-government relationship and to become eligible for Federal programs and benefits. Several commenters submitted statements regarding the role of the Department's existing regulations on Federal acknowledgment of tribes with respect to Native Hawaiians, and have articulated arguments about whether the Part 83 regulations should or should not be applied to Native Hawaiians.

Response: Part 83 is inapplicable to Native Hawaiians on its face. The Ninth Circuit has upheld Part 83's express geographic limitation, concluding 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. *Kahawaiolaa* v. *Norton,* 386 F.3d 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.* The Department, through this proposed rule, seeks to establish a process for determining how a formal Native Hawaiian government can relate to the United States on a formal government-to-government basis, as the Ninth Circuit suggested.

Moreover, Congress's 150-plus enactments, including those in recent decades, for the benefit of the Native Hawaiian community establish that the community is federally ''acknowledged'' or ''recognized'' by Congress. Thus, unlike Part 83 petitioners, the Native Hawaiian community already has a special political and trust relationship with the United States. What remains in question is how the Department could determine whether a Native Hawaiian government that comes forward legitimately represents that community and therefore is entitled to conduct relations with the United States on a formal government-to-government basis. This question is complex, and the Department welcomes public comment as to whether any additional elements should be included in the process that the Department proposes.

B. 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 proposed 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 proposed 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 proposed 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.

Tribal Officials' Concerns: Officials of tribal governments in the continental United States and intertribal organizations strongly supported Federal rulemaking to help reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. To the extent they raised concerns, the predominant one was 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 Indian tribes in the continental United States or their members because of their Indian status. For example, comments from the National Congress of American Indians 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 and services for a reorganized Native Hawaiian government remain separate from programs and services dedicated to tribes in the continental United States.

Response: Generally, Native Hawaiians are not eligible for Federal Indian programs, services, or benefits unless Congress has expressly and specifically declared them eligible. Consistent with that approach, the Department's proposed rule would not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise. Federal laws expressly addressing Native Hawaiians will continue to govern existing Federal programs, services, and benefits for Native Hawaiians and for a reorganized Native Hawaiian government if one reestablishes a formal government-to-government relationship with the United States.

The term ''Indian'' has been used historically in reference to indigenous peoples throughout the United States despite their distinct socio-political and cultural identities. Congress, however, has distinguished between Indian tribes in the continental United States and Native Hawaiians when it has provided programs, services, and benefits. Congress, in the Federally Recognized Indian Tribe List Act of 1994, 108 Stat. 4791, defined ''Indian tribe'' broadly as an entity the Secretary acknowledges to exist as an Indian tribe but limited the list published under the List Act to those governmental entities entitled to programs and services because of their status as Indians. 25 U.S.C. 479a(2), 479a–1(a). The Department seeks public comment on the scope and implementation of this distinction, and which references to ''tribes'' and ''Indians'' would encompass the Native Hawaiian Governing Entity and its members.

Further, given Congress's express intention to have the Department's Assistant Secretary for Policy, Management and Budget (PMB) oversee Native Hawaiian matters, as evidenced in the HHLRA, Act of November 2, 1995, sec. 206, 109 Stat. 363, the Assistant Secretary—PMB, not the Assistant Secretary—Indian Affairs, would be responsible for implementing this proposed rule.

III. Overview of the Proposed Rule

The proposed rule reflects the totality of the comments urging 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. If the Department ultimately promulgates a final rule along the lines proposed here, the Department intends to rely on that rule as the sole administrative avenue for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

The authority to issue this rule is vested in the Secretary by 25 U.S.C. 2, 9, 479a, 479a–1; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 43 U.S.C. 1457; 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). Through its plenary power over Native American affairs, Congress recognized the Native Hawaiian community by passing more than 150 statutes during the last century and providing special Federal programs and services for its benefit. The regulations proposed here would establish a procedure and criteria to be applied if that community reorganizes a unified and representative government and if that government then seeks a formal government-to-government relationship with the United States. And as noted above, Congress enacted scores of laws with respect to Native Hawaiians—actions that also support the Department's rulemaking authority here. *See generally* 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, Act of July 9, 1921, 42 Stat. 108, as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; HHLRA, 109 Stat. 357 (1995); 118 Stat. 445 (2004).

In accordance with the wishes of the Native Hawaiian community as expressed in the comments on the ANPRM, the proposed rule would 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 to reestablish a formal government-to-government relationship with a reorganized 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 would be optional, and Federal action would occur only upon an express formal request from the newly reorganized Native Hawaiian government.

Existing Federal Legal Framework. In adopting this rulemaking, the Department must adhere to the legal framework that Congress already established, as discussed above, 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 that is within the scope of the Federal Government's powers over Native American affairs and with which the United States has an ongoing special political and trust relationship.[2]

[2] 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 ''through the enactment of the Hawaiian Homes Commission Act, 1920, Congress affirmed the special relationship between the United States and the Hawaiian people,'' 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

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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.

Congress has employed two definitions of ''Native Hawaiians,'' which the proposed rule labels as ''HHCA-eligible Native Hawaiians'' and ''Native Hawaiians.'' The former is a subset of the latter, so every HHCA-eligible Native Hawaiian is by definition a Native Hawaiian. But the converse is not true: Some Native Hawaiians are not HHCA-eligible Native Hawaiians.

Individuals falling within the definition of ''HHCA-eligible Native Hawaiians'' are beneficiaries or potential beneficiaries of the HHCA, as amended. They are eligible for a set of benefits under the HHCA and are, or could become, the beneficiaries of a program initially established by Congress in 1921 and now managed by the State of Hawaii (subject to certain limitations set forth in Federal law). As used in the proposed rule, the term ''HHCA-eligible 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, which results from marriages within the community, 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. To satisfy this definition would require some sort of record or documentation demonstrating eligibility under HHCA sec. 201(a)(7), such as enumeration in official Department of Hawaiian Home Lands (DHHL) records demonstrating eligibility under the HHCA. Although the proposed rule does not approve reliance on a sworn statement signed under penalty of perjury, the Department would like to receive public comment on whether there are circumstances in which the final rule should do so.

The term ''Native Hawaiian,'' as used in the proposed rule, means an individual who is a citizen of the United States and 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(6); 25 U.S.C. 4221(9); 42 U.S.C. 254s(c); 42 U.S.C. 11711(3). To satisfy this definition would require some means of documenting descent generation-by-generation, such as enumeration on a roll 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. And, of course, 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-eligible Native Hawaiian and by definition a ''Native Hawaiian'' as that term is used in this proposed rule. The Department would like to receive public 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.

In keeping with the framework created by Congress, the rule that the Department proposes 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-eligible 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 proposed 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.

The actual form of the ratification referendum is not fixed in the proposed rule; the Native Hawaiian community may determine the form within parameters. 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 that was adopted through other means. The ratification referendum must result in separate vote tallies for (a) HHCA-eligible Native Hawaiian voters and (b) all Native Hawaiian voters.

To ensure that the ratification vote reflects the views of the Native Hawaiian community generally, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support. Even support from a high percentage of the actual voters would not be a very meaningful indicator of broad-based community support if the turnout was minuscule. The proposed rule focuses not on the number of voters who participate in the ratification referendum, but rather on the number who vote in favor of the governing document. The proposed rule creates a strong presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 HHCA-eligible Native Hawaiians.

These numbers proposed in the regulations (50,000 and 15,000) are derived from existing estimates of the size of those populations, adjusted for typical turnout levels in elections in the State of Hawaii, although the ratification referendum would also be open to eligible Native Hawaiian citizens of the United States who reside outside the State and may vote by absentee or mail-in ballot. The following figures support the proposed rule's reference to 50,000 affirmative votes from Native Hawaiians. According to the 2010 Federal decennial census, there are about 156,000 Native Hawaiians in the United States, including about 80,000 who reside in Hawaii, who self-identified on their census forms as ''Native Hawaiian'' alone (*i.e.,* they did not check the box for any other demographic category). The comparable figures for persons who self-identified either as Native Hawaiian alone or as Native Hawaiian in combination with another demographic category are about 527,000 for the entire U.S. and 290,000 for Hawaii. According to the census, about 65 percent of these Native Hawaiians are of voting age (18 years of

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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).

age or older). Hawaii residents currently constitute roughly 80 to 85 percent of the Native Hawaiian Roll Commission's Kanaiolowalu roll, which currently lists about 100,000 Native Hawaiians, from all 50 States.

In the 1990s, the State of Hawaii's Office of Elections tracked Native Hawaiian status and 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.) In the most recent of those elections, in 1998, there were just over 100,000 Native Hawaiian registered voters, about 65,000 of whom actually turned out and cast ballots in that off-year (*i.e.,* non-presidential) Federal election. That same year, the total number of registered voters (Native Hawaiian and non-Native Hawaiian) was about 601,000, of whom about 413,000 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.

Weighing these data, the Department concludes that it is reasonable to expect that a ratification referendum among the Native Hawaiian community in Hawaii would have a turnout somewhere in the range between 60,000 and 100,000, although a figure outside that range is possible. But those figures do not include Native Hawaiian voters who reside outside the State of Hawaii, who also could participate in the referendum; the Department believes that the rate of participation among that group is sufficiently uncertain that their numbers should be significantly discounted when establishing turnout thresholds.

Given these data points, if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum was a majority of all votes cast and exceeded 50,000, the Secretary would be well justified in finding broad-based community support among Native Hawaiians. And if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum fell below 60 percent of that quantity—that is, less than 30,000—it would be reasonable to presume a lack of broad-based community support among Native Hawaiians such that the Secretary would decline to process the request. The 30,000-affirmative-vote threshold represents half of the lower bound of the anticipated turnout of Native Hawaiians residing in the State of Hawaii (*i.e.,* half of the lower end of the 60,000-to-100,000 range described above).

As for the proposed rule's reference to 15,000 affirmative votes from HHCA-eligible Native Hawaiians, that figure is based on the data described above, as well as figures from DHHL and from a survey of Native Hawaiians. According to DHHL's comments on the ANPRM, as of August 2014, there were nearly 10,000 Native Hawaiian families living in homestead communities throughout Hawaii, and 27,000 individual applicants awaiting a homestead lease award. And a significant number of HHCA-eligible Native Hawaiians likely were neither living in homestead communities nor awaiting a homestead lease award. Furthermore, in his concurring opinion in *Rice* v. *Cayetano,* Justice Breyer cited the *Native Hawaiian Data Book* which, in turn, reported data indicating 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 proposed rule's definition of an HHCA-eligible Native Hawaiian. *See Rice* v. *Cayetano,* 528 U.S. at 526 (Breyer, J., concurring in the result) (citing *Native Hawaiian Data Book* 39 (1998) (citing Office of Hawaiian Affairs, *Population Survey/Needs Assessment: Final Report* (1986) (describing a 1984 study))); *see also* Native Hawaiian Data Book (2013), 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 the fraction of Native Hawaiians with at least 50 percent Native Hawaiian ancestry was about 20.0 percent for Native Hawaiians born between 1980 and 1984, about 29.5 percent for those born between 1965 and 1979, about 42.4 percent for those born between 1950 and 1964, and about 56.7 percent for those 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 1965-to-1979 cohort. Therefore, the current population of HHCA-eligible Native Hawaiian voters is estimated to be about 30 percent as large as the current population of Native Hawaiian voters.

Multiplying the 50,000-vote threshold by 30 percent results in 15,000; it follows that, if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum is a majority of all votes cast by such voters, and also exceeds 15,000, the Secretary would be well justified in finding broad-based community support among HHCA-eligible Native Hawaiians. And if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum falls below 60 percent of that quantity—that is, less than 9,000—it would be reasonable to presume a lack of broad-based community support among HHCA-eligible Native Hawaiians such that the Secretary would decline to process the request.

The Department seeks public comment on whether these parameters are appropriate to measure broad-based support in the Native Hawaiian community for a Native Hawaiian government's constitution or other governing document, and on whether different sources of population data should also be considered. *See* response to question 13 above.

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 proposed 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 accordance 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, who could decide 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 potential 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 proposed rule therefore provides only minimal guidance about what the governing document must say with regard to membership criteria. HHCA-eligible Native Hawaiians must be included, non-Natives must be excluded, and membership must be voluntary and relinquishable. But under the proposed rule, the community itself would be free to decide whether to include all, some, or none of the Native Hawaiians who are not HHCA-eligible.

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. It is also consistent with the wishes of the Native Hawaiian community as expressed in comments on the ANPRM. Again, the Native Hawaiian community will decide what form of government to adopt, and may provide for political subdivisions if they so choose.

The Formal Government-to-Government Relationship. Because statutes such as the National Historic Preservation Act of 1966, the Native American Graves Protection and Repatriation Act, and the HHLRA established processes for interaction between the Native Hawaiian community and the U.S. government that in certain limited ways resemble a government-to-government relationship, the proposed rule refers to reestablishment of a ''formal'' government-to-government relationship, the same as the relationship with federally recognized tribes in the continental United States.

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 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.[3] The Department will respond to significant public comments when it issues its final decision document. We seek comment on whether these proposed processes provide sufficient opportunity for public participation and whether any additional elements should be included.

Other Provisions. The proposed rule also contains provisions governing technical assistance, clarifying the implementation of the formal government-to-government relationship, and addressing similar issues. The proposed rule explains that the government-to-government relationship with the Native Hawaiian Governing Entity is the same as that with 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 those tribes are subject and would remain ineligible for Federal Indian programs, services, and benefits (including funding from the Bureau of Indian Affairs and the Indian Health Service) unless Congress expressly declared otherwise.

The proposed rule also clarifies that neither this rulemaking nor granting a request submitted under the proposed 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 will not affect title, jurisdiction, or status of Federal lands and property in Hawaii. This provision does not affect lands owned by the State of Hawaii or provisions of State law. *See, e.g.,* Haw. Rev. Stat. 6K–9 (''[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.''). They also explain 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 immediately upon completion of the Federal administrative process, the United States will reestablish a formal government-to-government relationship with the single sovereign government of the Native Hawaiian community that submitted the request to reestablish that relationship. 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, Native Hawaiian rights, protections, privileges, immunities, and benefits under Article XII of the Constitution of the State of Hawaii would not be affected. And nothing in this proposed rule would alter the sovereign immunity of the United States or the sovereign immunity of the State of Hawaii.

[3] Because Congress has already established a relationship with the Native Hawaiian community, the Secretary's determination in this part is focused solely on the process for reestablishing a government-to-government relationship. As a result, the Department believes that additional process elements are not required.

IV. Public Meetings and Tribal Consultations

An integral part of this rulemaking process is the opportunity for Department officials to meet with leaders and members of the Native Hawaiian community. Likewise, a central feature of the government-to-government relationships between the United States and each federally recognized tribe in the continental United States is formal consultation between Federal and tribal officials. The Department conducts these tribal consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the continental United States, as discussions are held on a government-to-government basis. These sessions may be closed to the public.

A. Past Meetings and Consultations

Shortly after the ANPRM's June 2014 publication in the **Federal Register**, staff from the Departments of the Interior and Justice conducted 15 public meetings across the State of Hawaii to gather testimony on the ANPRM. Hundreds of stakeholders and interested parties attended sessions on the islands of Hawaii, Kauai, Lanai, Maui, Molokai, and Oahu, resulting in over 40 hours of oral testimony on the ANPRM. Also during that time, staff conducted extensive community outreach with Native Hawaiian organizations, groups, and community leaders. The Department also conducted five mainland regional consultations in Indian country that were also supplemented with targeted community outreach in locations with significant Native Hawaiian populations.

B. Future Meetings and Consultations

To build on the extensive record gathered during the ANPRM, the Department will hold teleconferences to collect public comment on the proposed rule. The Department will also consult with Native Hawaiian organizations and with federally recognized tribes in the continental United States by teleconference. Interested individuals may also submit written comments on this proposed rule at any time during the comment period. The Department will consider statements made during the teleconferences and will include them in the administrative record along with the written comments. The Department strongly encourages Native Hawaiian organizations and federally recognized tribes in the continental United States to hold their own meetings to develop comments on this proposed rule, and to share the outcomes of those meetings with us.

1. *Public Meetings by Teleconference.* The Department will conduct two public meetings by teleconference to receive public comments on this proposed rule on the following schedule:

Monday, October 26, 2015

2 p.m.–5 p.m. Eastern Time/8 a.m.–11 a.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Saturday, November 7, 2015

3 p.m.–6 p.m. Eastern Time/9 a.m.–12 p.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

2. *Consultations with Native Hawaiian Organizations.* The Department is legally required to consult with Native Hawaiian organizations in some circumstances. Although such consultation is not required for this proposed rule, the Department is electing to conduct such consultation in order to enhance participation from the Native Hawaiian community. The Department maintains a Native Hawaiian Organization Notification List, *available at www.doi.gov/ohr/nholist/nhol,* which includes Native Hawaiian organizations registered through the designated process. Representatives from Native Hawaiian organizations that appear on this list are invited to participate in a teleconference scheduled below:

Tuesday, October 27, 2015

3 p.m.–6 p.m. Eastern Time/9 a.m.–12 p.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Participation will be limited to one telephone line for each listed organization and up to two of their representatives. Only those organizations that appear on the Native Hawaiian Organization Notification List may participate in this consultation. Please RSVP to *RSVPpart50@doi.gov* for this meeting only. No RSVP is necessary for the other meetings.

3. *Tribal Consultation.* The Department will also conduct a tribal consultation by teleconference. The Department conducts such consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the continental United States, as discussions are held on a government-to-government basis. The following teleconference may be closed to the public:

Wednesday, November 4, 2015

1:30 p.m.–4:30 p.m. Eastern Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Meeting information will also be made available for the tribal consultations in the continental United States by ''Dear Tribal Leader'' notice.

Further information about these meetings, and notice of any additional meetings, will be posted on the ONHR Web site (*http://www.doi.gov/ohr/*).

V. 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 proposed 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 E.O. 12866.

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 proposed rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department certifies that this proposed 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.*).

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed rule.

I. Paperwork Reduction Act

This proposed 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.

J. National Environmental Policy Act

This proposed 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 proposed 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 proposed 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.

M. Clarity of This Regulation

Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, require the Department to write all rules in plain language. This means that each rule the Department publishes must:

(a) Be logically organized;

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

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

If you feel that the Department did not met these requirements, please send comments by one of the methods listed in the ''COMMENTS'' section. To better help the Department revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask the Department in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

If you send an email comment directly to the Department without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the Department recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the Department cannot read your comment due to technical difficulties and cannot contact you for clarification, the Department may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses.

The Department cannot ensure that comments received after the close of the comment period (*see* **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

List of Subjects in 43 CFR Part 50

Administrative practice and procedure, Indians—tribal government.

Proposed Rule

For the reasons stated in the preamble, the Department of the Interior proposes to amend title 43 of the Code of Federal Regulations by adding part 50 to read as follows:

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

Subpart A—General Provisions

Sec.

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

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a, 479a–1; 43 U.S.C. 1457; Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 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 to allow the United States to more effectively implement and administer:

(a) The special political and trust relationship that Congress established between the United States and the Native Hawaiian community; and

(b) 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 any Federal agency (including, but not limited to, the Bureau of Indian Affairs and the Indian Health Service) to Indian tribes in the continental United States or their 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 any Federal agency to a Native Hawaiian government, its political subdivisions (if any), its members, the Native Hawaiian community, Native Hawaiians, or HHCA-eligible 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-eligible Native Hawaiian means a Native Hawaiian individual who meets the definition of ''native Hawaiian'' in HHCA sec. 201(a)(7), 42 Stat. 108, 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.

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:

(1) Citizen of the United States, and

(2) 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 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 designation as the Native Hawaiian Governing Entity.

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

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

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 can

participate in ratifying a 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 a governing document?

The written narrative thoroughly describing how the Native Hawaiian community determined who could participate in ratifying a governing document must explain the processes for verifying that participants were Native Hawaiians and for verifying those who were also HHCA-eligible Native Hawaiians, and should further explain how those processes were rational and reliable. For purposes of determining who may participate in the ratification process:

(a) The Native Hawaiian community may provide:

(1) That the definition for a Native Hawaiian may be satisfied by:

(i) Enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States;

(ii) Enumeration on a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where enumeration is based on documentation that verifies descent, excluding noncitizens of the United States; or

(iii) Other means to document generation-by-generation descent from a Native Hawaiian; and

(2) That the definition for an HHCA-eligible Native Hawaiian may be satisfied by:

(i) Enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States; or

(ii) Other records or documentation demonstrating eligibility under the HHCA; or

(b) The Native Hawaiian community may use a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law as an accurate and complete list of Native Hawaiians eligible to vote in the ratification referendum: *Provided,* that:

(1) The roll was:

(i) Based on documentation that verified descent;

(ii) Compiled in accordance with applicable due-process principles; and

(iii) Published and made available for inspection following certification; and

(2) The Native Hawaiian community also:

(i) Included adult citizens of the United States who demonstrated eligibility under the HHCA according to official DHHL records;

(ii) Removed persons who are not citizens of the United States;

(iii) Removed persons who were younger than 18 years of age on the last day of the ratification referendum;

(iv) Removed persons who were enumerated without documentation that verified descent; and

(v) Removed persons who voluntarily requested to be removed.

§ 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 of Hawaii, and political subdivisions of the State of Hawaii, 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-eligible Native Hawaiians to enroll;

(2) May permit Native Hawaiians who are not HHCA-eligible 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-eligible 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-eligible Native Hawaiians, who cast a ballot in the ratification referendum;

(4) The number of HHCA-eligible Native Hawaiians who cast a vote in favor of the governing document; and

(5) The total number of HHCA-eligible 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-eligible Native Hawaiians votes cast by persons who were not HHCA-eligible 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-eligible 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 shall grant a request if the Secretary determines that the following exclusive 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-eligible 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 strong presumption that this criterion is satisfied; and

(h) The number of votes that HHCA-eligible Native Hawaiians cast in favor of the governing document exceeded half of the total number of ballots that HHCA-eligible 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-eligible Native Hawaiians; *and Provided Further,* that, if fewer than 9,000 HHCA-eligible 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-eligible Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a strong 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?

A request under this part may be submitted to the 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 is consistent with § 50.10 and § 50.16(g)–(h), the Department will publish notice of receipt of the request in the **Federal Register** and post the following on the Department Web site:

(1) The request, including the governing document;

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

(3) The date of receipt; and

(4) Notice of an opportunity for the public, within a 30-day comment period following the Web site posting, to submit comments and evidence on whether the request meets the criteria described in § 50.16.

(b) Within 10 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 under paragraph (a)(4) 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 30 days to respond to any comment or evidence that was timely submitted to the Department under § 50.30(a)(4).

§ 50.32 May the deadlines in this part be extended?

Yes. Upon a finding of good cause, the Secretary may extend any deadline in this part by posting on the Department Web site and publishing in the **Federal Register** the length of and the reasons for the extension.

The Secretary's Decision

§ 50.40 When will the Secretary issue a decision?

The Secretary may request additional documentation and explanation with respect to material required to be submitted by the requester under this part. 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, after receiving any additional information the Secretary deems necessary and after receiving all the information described in §§ 50.30 and 50.31.

§ 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.

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

The Secretary's decision will take effect with the publication of a document 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 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 in the continental United States, and the same inherent sovereign governmental authorities.

(b) The Native Hawaiian Governing Entity will be subject to Congress's plenary authority.

(c) Absent Federal law to the contrary, any member of the Native Hawaiian Governing Entity 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-eligible 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, or 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 will 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 provision of Federal law, including case law, affecting the privileges, immunities, rights, protections, responsibilities, powers, limitations, obligations, authorities, or jurisdiction of any tribe in the continental United States.

Michael L. Connor,

Deputy Secretary.

[FR Doc. 2015–24712 Filed 9–29–15; 11:15 am]

BILLING CODE 4334–63–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2015–0045]

RIN 2127–AL01

Federal Motor Vehicle Safety Standards; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the preamble to a proposed rule published in the **Federal Register** of May 21, 2015, regarding Federal Motor Vehicle Safety Standard for Motorcycle Helmets. This correction removes language relating to the incorporation by reference of certain publications that was inadvertently and inappropriately included in the preamble to the proposed rule.

DATES: October 1, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Otto Matheke, Office of the Chief Counsel (Telephone: 202–366–5253) (Fax: 202–366–3820).

SUPPLEMENTARY INFORMATION:

Correction

In proposed rule FR Doc. 2015–11756 beginning on page 29458 in the issue of May 21, 2015, make the following correction in the **DATES** section. On page 29458 in the 2nd column, remove at the end of the second paragraph the following:

''The incorporation by reference of certain publications listed in the proposed rule is approved by the Director of the Federal Register as of May 22, 2017.''

Dated: September 25, 2015.

Frank S. Borris II,

Acting Associate Administrator for Enforcement.

[FR Doc. 2015–24918 Filed 9–30–15; 8:45 am]

BILLING CODE 4910–59–P

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Robert P. Stockman
ROBERT P. STOCKMAN