

An Informational Primer

by the CNHA Policy Center

on the

Advance Notice of Proposed Rule Making

Published by the Department of Interior, Office of the Secretary

on

Procedures for Reestablishing a Government-to-Government

Relationship with the Native Hawaiian Community



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**An Informational Primer by the CNHA Policy Center
on the Advance Notice of Proposed Rule Making on
Procedures for Reestablishing a Government-to-Government
Relationship with the Native Hawaiian Community Published by the
Department of the Interior, Office of the Secretary**

On June 20, 2014, the Department of the Interior published an Advance Notice of Proposed Rule Making to solicit public comment regarding whether the Federal Government should reestablish a government-to-government relationship with the reorganized Native Hawaiian government. A general diagram of the rule making process is included near the end of this document.

Organization of Informational Primer

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How to Participate

The Department of the Interior will be accepting comments until **August 19, 2014** on the Advance Notice of Proposed Rule Making (ANPRM). All comments should be identified with the Regulation Identifier Number 1090-AB05, and be submitted in one of the following ways:

- At one of the meetings held in Hawaii between June 23 and July 8, 2014 and on the Continent between July 29 and August 7. Meeting dates and locations are identified at the end of this document; or
- The Federal eRulemaking Portal: <http://www.regulations.gov>; or
- U.S. mail, courier, or hand delivery to Office of the Secretary, Department of the Interior, Room 7329, 1849 C Street, NW, Washington, DC 20240.

Background and Purpose

Currently, there is no federal process for a Native Hawaiian government, once reorganized, to engage in a government-to-government relationship with the United States. Such a process can be created through an act of Congress (the Native Hawaiian Government Reorganization Act) or administratively through federal rule-making. Various leaders in the Native Hawaiian community and the State of Hawaii have requested that President Obama through his Secretary of the Department of the Interior exercise the authority to create a federal process.

The ANPRM states that the Department is “seeking input solely on questions related to a potential administrative rule to facilitate the reestablishment of a government to government relationship with the Native Hawaiian community.”

The ANPRM further clarifies that since rule making will not “alter the fundamental nature of the political and trust relationship established by Congress”, “authorize compensation for past wrongs” or “impact the status of the Hawaiian home lands”, they are not seeking comments on those topics.

Additionally, the Department is “not seeking comments on what the contents of a reorganized Native Hawaiian government’s constitution or other governing document (if one were adopted) might include, how that Native Hawaiian government might be structured, or what powers that Native Hawaiian Government might exercise.”

The purpose of this solicitation is to receive public comments and determine whether the Secretary should take the next step of actual rule-making, and if so, what the content of those rules may be. They have identified 5 questions open for comment.

Process for Federal Rule Making

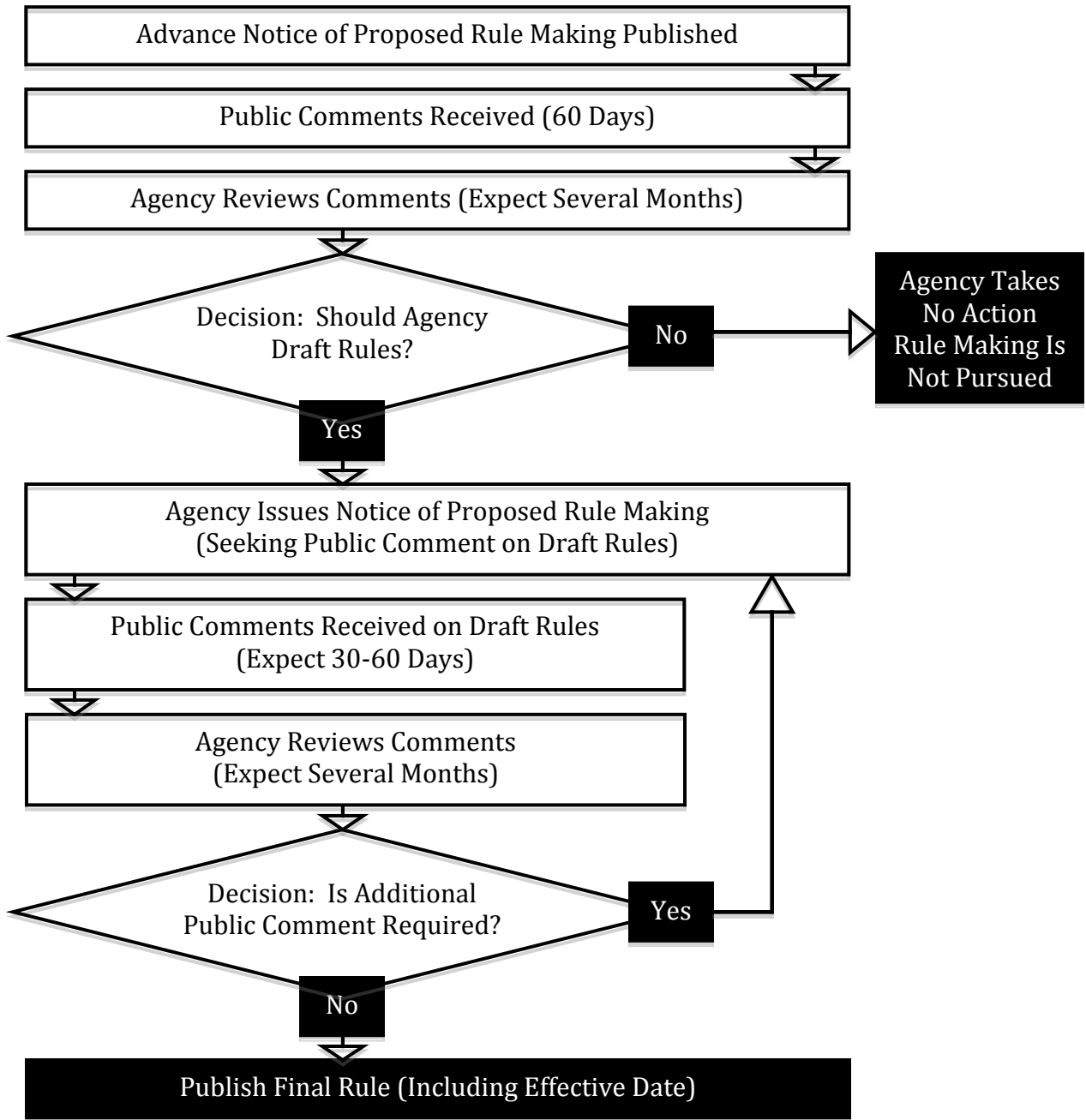
While Congress implements federal policy by enacting legislation, the Executive Branch has a rule making process to establish new rules or modify existing rules. A federal agency can initiate the rulemaking process to address a public need or policy issue under its jurisdiction. Thus, the federal rule making process notifies the public and enables them to comment as an agency, like the Department of the Interior, considers prior to issuing a final rule.

Generally, a notification of a proposed rule is made in the Federal Register and the public has an opportunity to provide comments for a set period; those comments are reviewed by the initiating agency; and then a final rule is developed based on the proposed rule and comments. The initiating agency uses its discretion to determine whether subsequent drafts of the rule require additional public comment, and will determine when a rule is finalized.

The final step is to publish the final rule in the Federal Register. Preliminary stages of rule making such as an Advance Notice of Proposed Rule Making precede the development of a proposed rule or final rule, formally inviting the public’s comment that will be considered if and as the agency develops a proposed rule.

The following flowchart illustrates the general process.

Basic Illustration of Federal Rule Making Process



Public Meeting Dates & Locations

Following are the meeting dates announced by the Department of the Interior in their press release, dated 6/18/2014. Each meeting is scheduled for 3 hours.

Oahu

Monday, June 23 at 9:00 am
Hawaii State Capitol Auditorium

Monday, June 23 at 6:00 pm,
Waimanalo Elementary and
Intermediate School

Tuesday, June 24 at 6:00 pm
Nanaikapono Elementary School

Wednesday, June 25 at 6:00 pm
Heeia Elementary School

Thursday, June 26 at 6:00 pm
Makakilo Elementary School

Lanai

Friday, June 27 at 6:00 pm
Lanai Senior Center

Molokai

Saturday, June 28 at 1:00 pm
Kaunakakai Elementary School

Kauai

Monday, June 30 at 6:00 pm
Waimea Neighborhood Center

Tuesday, July 1 at 6:00 pm
Kapaa Elementary School

Hawaii Island

Wednesday, July 2 at 6:00 pm
Keaukaha Elementary School

Thursday, July 3 at 10:00 am
Waimea Community Center

Thursday, July 3 at 6:00 pm
Kealakehe High School

Maui

Saturday, July 5 at 1:00 pm
Hana High and Elementary School

Monday, July 7 at 6:00 pm
King Kamehameha III Elementary

Tuesday, July 8 at 6:00 pm
Pomaikai Elementary School

Indian Country Consultations – July 29 through August 7

Tuesday, July 29 at 9:00 am
Mystic Lake Casino, Prior Lake, MN

Wednesday, July 30 at 1:00 pm
Rushmore Civic Center, Rapid City, SD

Friday, August 1 at 9:00 am
Tulalip Resort, Seattle, WA

Tuesday, August 5 at 9:00 am
Talking Stick Resort, Scottsdale, AZ

Thursday, August 7 at 9:00 am
Mohegan Sun, Uncasville, CT

Specific Questions Posed by DOI

Following are the questions DOI has posed, in italics, and bulleted recommended responses in bold.

1. Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community?

- **Answer: Yes, the Secretary should propose an administrative rule.**
 - Administrative rule making is the mechanism for the federal government to implement how it will function, perform and engage. The Native Hawaiian people are the only federally-recognized indigenous people without an administrative process for achieving a government-to-government relationship with the United States.
 - The Congress has enacted over 150 pieces of legislation implementing the political and trust relationship with the Native Hawaiian people, and the government-to-government relationship with other Native Governments (tribes) emanates from the trust relationship. An administrative rule for Native Hawaiians will ensure that the already expressed recognition by the Congress is implemented by the federal government.

2. Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United State could reestablish a government-to-government relationship?

- **Answer: Yes, the Secretary should provide assistance.**

The federal government has an obligation to assist. The Native Hawaiian people, with assistance from the State of Hawaii through enactment of Act 195 have established a base roll of over 125,000 Native Hawaiians intent on participating in a process of reorganizing our government, formally recognized by the State of Hawaii in a government-to-government relationship. This roll is known as Kanaioluwalu, and is expected to be certified by the Native Hawaiian Roll Commission. As long as the State of Hawaii Office of Hawaiian Affairs continues in its commitment to fund the process of reorganization, full scale assistance from the Secretary of the Interior is not necessary. However, areas of assistance by the Secretary are recommended as follows:

- **Office of Native Hawaiian Relations.** The Secretary should dedicate funding to the Department of Interior Office of Native Hawaiian Relations to provide even temporary staff to support the rule making process.
- **Legal and Technical Expertise.** The Secretary should facilitate access, including serving as a source, to legal and technical expertise at the Department of Interior, the Department of Justice and other agencies, to be considered by Native Hawaiians in the development of convening processes, and the development of any constitutional or other governing documents. The Secretary should also provide assistance in distributing information, notices and other communications available.

- **Convene Discussion Teleconferences.** The Secretary should facilitate discussions with Native Hawaiian leaders of vital services such as affordable housing, healthcare, education, social programs and other services typical in the exercise of any sovereign government to be responsive to concerns and/or general questions.

3. *If so, what process should be established for drafting and ratifying a reorganized Native Hawaiian government's constitution or other governing document?*

- **Answer: The process should be established by Native Hawaiians in coordination with KanaioLOWALU and the State of Hawaii.**

KanaioLOWALU has the support of over 125,000 adult Native Hawaiians, the Hawaii congressional delegation, the State of Hawaii Governor and Legislature representing the people of Hawaii.

Senator Akaka's NHGRA has been an excellent guide because it has been modified many times to address community and federal concerns, (S. 675 as reported by the Senate Committee on Indian Affairs on December 17, 2012) and represents the results of more than a decade of consultation with the public, the Native Hawaiian community in particular, Indian country, and key federal departments. Moreover, the State of Hawaii is supporting the reorganization of a Native Hawaiian government through Act 195.

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?*

- **Answer: Yes as described above. Established by Native Hawaiians.**

Similar to the processes of the federal government that respects the rights of other Native peoples, the reorganization of a Native Hawaiian government must be accomplished by Native Hawaiians, and should be relied upon as such by the Secretary. The State of Hawaii enactment of Act 195 supports this recommendation, which should be honored by the Secretary to ensure consistency at the State and Federal levels.

To the extent practicable, the Secretary should make technical assistance available to Native Hawaiians on the KanaioLOWALU roll and to the State of Hawaii to understand applicable federal law, should the Native Hawaiian government pursue the administrative process finalized by the federal government.

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?*

- **Answer: The Secretary should establish prerequisites based on the reality of a singular cultural identity of Native Hawaiians, the specific geography of our homelands and the current reorganization efforts underway.**

Prerequisites should honor the 125,000 Native Hawaiians that have enrolled to date and should coincide with the State of Hawaii expressed desire to engage in a government-to-

government relationship. In short, a prerequisite should be an existing government-to-government relationship with the State of Hawaii. A prerequisite should also protect the collective rights of beneficiaries of the Hawaiian Homes Commission Act as an existing separate land trust responsibility.

In addition, prerequisites for formal federal acknowledgement of a government-to-government relationship should include the following in any ratified governing documents of the Native Hawaiian government:

- a. Include the right of Native Hawaiians to establish our own criteria for membership in our Native Hawaiian government;
- b. Require the adoption or ratification by a majority of those members on the certified Native Hawaiian Roll (Kanaioluwalu) that voted on ratification;
- c. Include the authority of the Native Hawaiian government to negotiate with Federal, State and local governments, and other entities;
- d. Provide for the exercise of inherent and other governmental authorities;
- e. Provide for the protection of the civil rights of the citizens of the Native Hawaiian government and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian government.

Closing Message

We know that there will be those in favor of total independence from the United States that will oppose any advancement in any federal relationship with Native Hawaiians. We know that some of these voices will be disrespectful, antagonistic even. It is the nature of a great democracy that each of us has the right to express our views. However, it is not necessary to expose yourselves to any mistreatment.

If you are more comfortable submitting testimony in writing or on-line over attending the many public meetings over the next 60 days, please take that route. Your work, safety and time are far more important.

This is one of the single most important actions by the federal government to implement and support the work that all of you do in our communities. Don't let this opportunity go by without weighing in your support, giving the next generation solid footing to perpetuate our culture and malama our people. That is what sovereignty is all about! Not anger, not "no can" – it is about serving and creating opportunities for the wellbeing of our community.

Onipaa – this is our time to stand strong.

Mahalo, Michelle Kauhane, CNHA President and CEO