



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

DEC 02 2022

The Honorable Ed Case  
House of Representatives  
Washington, D.C. 20515

The Honorable Kaiali'i Kahele  
House of Representatives  
Washington, D.C. 20515

Re: Act 80, 2017 Hawai'i Session Laws / H.J. Res 55, the Prince Jonah Kūhiō  
Kalaniana'ole Protecting Family Legacies Act

Dear Representative Case and Representative Kahele:

I am writing to inform you of the Department of the Interior's (Department) preliminary assessment of Hawai'i Act 80 (2017 Hawai'i Session Laws) (Act 80) pursuant to the Department's obligations under 43 C.F.R Part 48, titled "Amendments to the Hawaiian Homes Commission Act." While the Department does not recommend that Congress adopt H.J. Res. 55 to enact Act 80 for the reasons outlined below, it is committed to ongoing communication with the State, congressional delegation, and the Native Hawaiian Community, including beneficiaries, as it considers these issues going forward.

On December 27, 2017, the Department received materials from the Chairman of the Hawaiian Homes Commission on behalf of the State of Hawai'i (State) concerning Act 80, a proposed amendment to the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (HHCA). On February 22, 2018, the Department sent a set of questions and data requests to the State to clarify and quantify the challenges that Act 80 seeks to address. The Department also sought to confirm that qualified HHCA beneficiaries, particularly those adversely impacted by the proposed amendment, were informed about Act 80's effects on the administration of the Hawaiian Home Lands Trust (Trust) and the material facts necessary to understand and protect their interests.

While the Department received the State's response on February 28, 2022, the State did not provide answers to most of the Department's questions, citing a lack of data. The State also made clear that no further information regarding Act 80 would be forthcoming. The State's decision not to conduct further reviews, supply necessary baseline data, or clarify their initial analysis as requested has impeded the Department's timely analysis of Act 80.

Although the information supplied by the State regarding Act 80 was not sufficiently comprehensive, the Department used the best information available to complete this preliminary assessment. The Department's responsibilities with respect to the Trust require that it examine

more than just the text of the proposed amendment. The Department must analyze how the proposed amendment affects the Trust and its beneficiaries per 43 C.F.R. §§ 48.10(a) and 48.25. At this preliminary stage, the Department concludes that the State is proposing a significant policy shift that lowers the blood quantum requirement for non-beneficiaries who wish to succeed to leases reserved for eligible HHCA beneficiaries and their successors. This shift in policy would adversely affect tens of thousands of eligible beneficiaries awaiting lease awards. The Department is concerned that the State's attempt to accommodate the successorship interests of non-beneficiaries did not duly consider Act 80's inequitable effects on the approximately 29,000 known beneficiaries, among other qualified individuals, eligible to receive or succeed to homestead awards under the HHCA's existing terms.

Importantly, the HHCA and the Hawaiian Home Lands Recovery Act (HHLRA) define a beneficiary of the Trust as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." With respect to the Trust, the Department uses the Congressionally defined terms "native Hawaiian" and "beneficiary" interchangeably. The Department maintains the distinction among beneficiaries (native Hawaiians who may or may not hold a lease), beneficiary lessees (native Hawaiians who hold leases), and lessees (persons who hold leases who may or may not be native Hawaiian). Currently, section 209 of the HHCA permits a surviving sibling of a deceased lessee to succeed to decedent's lease if they have at least one-half (1/2) Hawaiian blood. A similar but reduced blood quantum requirement applies to surviving spouses, children, or grandchildren, each of whom needs only one-quarter (1/4) Hawaiian blood to succeed. If approved by Congress, Act 80 would reduce existing blood quantum requirements for all such successors to one-thirty-second (1/32). As a result, previously ineligible descendants in some families will be allowed to keep lease awards within their family for up to three to four additional generations.

Trust law requires the State to administer the Trust *solely* in the interest of the beneficiaries. The existing class of HHCA beneficiaries includes, at minimum, approximately 29,000 "wait list" individuals, most of who have yet to receive first-time lease awards under the HHCA's existing terms. Trust beneficiaries also include native Hawaiians under the age of 18, as well as those who desire but may not currently be able to afford to build or purchase a home on the Trust lands. Other native Hawaiians may be entitled to apply for a lease but are dissuaded from doing so because of the current wait list. None of these beneficiaries benefit from Act 80, which applies only to lessees (less than 10,000) and would extend its benefits to an expanded class of non-beneficiary successors.

The Department's analysis finds that reducing successorship requirements as proposed harms the majority of existing Trust beneficiaries, whose opportunity to receive a homestead lease in their lifetime diminishes when available homesteading lands remain static compared to demand or in the hands of an expanding class of non-beneficiary successors. Indeed, the degree to which Act 80 reduces existing blood quantum requirements—from 1/2 or 1/4 to 1/32—allows non-beneficiaries to retain an already limited number of Hawaiian homeland leases for conceivably three to four additional generations, while many Trust beneficiaries are awaiting first-time leasehold awards. A review of the history of this type of change underscores the risk of harm to Trust beneficiaries.

In 1986, Congress first amended section 209 of the HHCA to lower the blood quantum (from ½ to ¼) for certain successors. Amendment supporters then-cited many of the same justifications invoked for Act 80: housing stability, incentivizing home and property improvements, and avoiding inhumane results. At that time, the State had awarded less than 6,000 leases while 8,000 beneficiaries were on the wait list, some having been on it for many years. Notably, the then Hawaiian Homes Commission Chair testified that no adverse impacts would befall wait list beneficiaries because “all interested native Hawaiians [could] be accommodated by lands available for homesteading.”<sup>1</sup> In the intervening decades, however, the State awarded leases to less than half of those wait list beneficiaries and largely failed to keep pace with the 21,000 new beneficiaries added to the wait list.

Simply stated, the demand for homesteads has historically outpaced the State’s awarding of leases by orders of magnitude. That demand is unlikely to be resolved in the near term.<sup>2</sup> And it appears that circumstances for wait list beneficiaries are worse now than in 1986. Not only has the wait list nearly quadrupled in size, but none of the measures reducing blood quantum requirements, including Act 80, applies to those beneficiaries. For a wait list beneficiary who dies before receiving their lease award, there is no right to succession unless one of their descendants is at least one-half (½) Hawaiian blood.<sup>3</sup> Act 80 provides no exceptions, assurances, or protections for these HHCA beneficiaries. That existing inequity is manifestly unfair to wait list beneficiaries and their successors. The Department cannot countenance compounding and exacerbating those inequities by endorsing the amendments proposed by Act 80.

The Department recognizes the housing stability challenges the State endeavored to address through enactment of Act 80. Nevertheless, well-settled trust law principles and duties require the State to explore and identify solutions just and equitable for all beneficiaries, irrespective of their leasehold standing. The State is legally obligated to protect all Trust assets for the benefit of all qualified beneficiaries, not merely for those first awarded leases and certainly not to the detriment of those awaiting their lease awards. And it bears repeating that the more than 200,000 acres of land set aside under the HHCA are Trust assets, akin to a Hawaiian *communal* land base, used to support a homesteading program that places eligible native Hawaiians on land in Hawai‘i. These homesteading tracts are not private, fee simple, family-owned parcels for indefinite tenure. Rather, these are limited-term leasehold acres encumbered by numerous restrictions (eligibility, use, etc.) and administered to serve the Trust purpose. As enacted, the HHCA provided that the homelands would be held in trust for native Hawaiian beneficiaries and, except as provided by the statute, could not be sold, encumbered, or otherwise alienated.

The Department is mandated by law to administer the federal laws governing the Trust in a manner that advances the interests of all beneficiaries as provided by Congress. For the above stated reasons, the Department does not recommend that Congress adopt H.J. Res. 55, which would approve and enact Act 80. However, it remains willing to work with the State, congressional delegation, and HHCA beneficiaries to identify solutions to the housing stability

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<sup>1</sup> H.J. Res. 17, S. Hrg. 99-1025, at 70.

<sup>2</sup> The State’s landmark investment in the Trust via Act 279 (2022 Hawai‘i Session Laws), also known as the “Waitlist Reduction Act,” is important, but the appropriation is not expected to significantly reduce the waitlist.

<sup>3</sup> The State annually undertakes to identify descendants of at least one-half (½) Hawaiian blood for wait list beneficiaries who die without designating a successor. The [notice published on November 23, 2022](#) lists 119 deceased applicants.

challenges Act 80 sought to mitigate as well as the interests of all Trust beneficiaries. The Department is committed to ensuring that proposed solutions reflect direct input from the Native Hawaiian Community and from the beneficiaries themselves. Use of the Department's first-ever consultation policy with the Native Hawaiian Community, for which formal consultation is now underway, may offer a productive means to achieve this goal.

The Department and the State have long worked cooperatively and collaboratively to ensure that our respective responsibilities under the HHCA are faithfully executed. Making sure our federal involvement helps to improve Trust administration, holds us accountable to beneficiaries, and safeguards this Hawaiian communal land base in perpetuity remains our steadfast commitment.

Sincerely,



Robert T. Anderson  
Solicitor