

Analysis of State of Hawai‘i Act 173 (2014)

Proposed Amendment to the HHCA

State of Hawai‘i Act 173 (2014) proposes to amend the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (HHCA), Section 204(a)(2), by adding an additional proviso to permit the State of Hawai‘i Department of Hawaiian Home Lands (DHHL) to “lease by direct negotiation and at fair market rents, and for a term not to exceed five years, any improvements on Hawaiian home lands, or portions thereof, that are owned or controlled by the [DHHL]” not required for homestead leasing under section 207(a) of the HHCA.

Context for the Department’s Analysis

The Department of the Interior’s (Department) analysis is guided by information, analyses, and opinions provided by the State of Hawai‘i (State) from its Hawaiian Homes Commission (Commission), DHHL, Department of the Attorney General, and Hawai‘i State Legislature (Legislature), as well as by individuals and organizations who provided testimony to the Legislature or participated in the Department’s electronic consultation.

The Department interprets DHHL’s statements in its submissions on Act 173 in the context of its stated mission:

To manage the Hawaiian Home Lands Trust effectively and to develop and deliver lands to native Hawaiians. We will partner with others towards developing self-sufficient and healthy communities.¹

The Department is also mindful of the historical and present-day progress, challenges, and concerns of the State and HHCA beneficiaries.

While the proposed amendment in Act 173 would apply to all Hawaiian home lands (Trust lands) statewide not required for homestead leasing under section 207(a) of the HHCA, it is helpful to view it in light of the high demands for homestead leases and the limited availability of Trust lands deemed suitable by DHHL for homesteading on the island of O‘ahu. According to an Applicant Waiting List posted on the DHHL website, as of June 30, 2016, there were 14,380 applications for homesteads – 10,690 residential and 3,690 agricultural – on the island of O‘ahu, out of a total of 44,429 applications for homestead leases statewide. Thus, approximately 32% of the homestead lease applications were for awards on O‘ahu.

DHHL estimated a shortfall of nearly 1,000 acres for residential homesteading on O‘ahu during a twenty-year planning period in which they projected delivering 3,400 homesteads and thus

¹ O‘ahu Island Plan, State of Hawai‘i Department of Hawaiian Home Lands, page 1-3 (July 2014), citing to the 2002 DHHL General Plan, page 2.

identified land acquisition as a high priority in its 2014 O‘ahu Island Plan.² Only 4% of Trust lands are located on O‘ahu,³ with more than 30% of those lands in environmentally sensitive areas that have been designated for conservation⁴ and another approximately 30% of those lands used for revenue generation,⁵ which accounts for approximately 45% of the income generated statewide.⁶ DHHL stated that the O‘ahu lands provided approximately \$6.6 million dollars in annual revenue supporting DHHL’s homesteading priority,⁷ and characterized those lands as being critical to DHHL’s long-term success.⁸ DHHL also acknowledged that, while there may be exceptions, once the Commission has designated a land use appropriate for disposition under general leases and licenses, it is not likely to revert to homesteading use.⁹

Department’s Analysis

1. What are the challenges or issues that the proposed amendment addresses?

The challenges and issues addressed by the proposed amendment are described by an excerpt from the DHHL analysis submitted to the Department in June 2016:

DHHL currently owns buildings and warehouses on its lands and as certain general leases expire, DHHL will become the owner of more of these improvements. In some cases, the lands and improvements thereon are returned to the DHHL’s inventory unexpectedly. This type of situation presents a challenge because DHHL does not currently have a means to dispose of these improvements, or space within an improvement, promptly and on a short-term basis. The consequence of which is that not only does DHHL lose the income generated by an active lease but it also becomes liable for the maintenance of the improvement while it sits vacant. This amendment addresses that type of challenge, therefore, by providing a "gap-fill" whereby DHHL would have the ability to gainfully dispose of these improvements, or space therein, through direct negotiations for a term less than [or equal to] five years, and thus generate revenue in the short term while a long-term tenant is secured.

2. Does the proposed amendment maintain or increase the benefits to the HHCA beneficiaries?

Yes, if the Department’s interpretations and resolution of ambiguities in Act 173 discussed below are accepted.

² O‘ahu Island Plan, page ES-7 (July 2014).

³ O‘ahu Island Plan, page ES-7 (July 2014).

⁴ O‘ahu Island Plan, page ES-5 (July 2014).

⁵ O‘ahu Island Plan, page 1-5 (July 2014).

⁶ O‘ahu Island Plan, page ES-5 (July 2014).

⁷ O‘ahu Island Plan, page ES-5 (July 2014).

⁸ O‘ahu Island Plan, page 1-5 (July 2014).

⁹ O‘ahu Island Plan, page 1-5 (July 2014).

The Department assesses the effect of Act 173 on the benefits to the HHCA beneficiaries by examining the disposition of Trust land for non-homesteading purposes, the opportunities for HHCA beneficiary participation in the non-homesteading disposition of Trust lands, and the maximizing of the income from Trust lands that must be used only in carrying out the provisions of the HHCA.

Determination that Lands Are Not Required for Homestead Leasing

Amending or adding a new means to dispose of Trust lands, often to the general public, even for a short term for purposes other than the homesteading program, has the potential to decrease the benefits to the HHCA beneficiaries as it could delay or foreclose consideration of designating such lands for future homesteading or other HHCA beneficiary use. With approximately 28,000 applicants on the DHHL Applicant Waiting List, homestead development remains a top priority and a determination that Trust lands are not required for homesteading must be subject to careful and recurring review.

The DHHL's September 2014 analysis of Act 173 argues that "this proposed amendment increases DHHL's flexibility and ability to manage physical improvements on Trust lands and to generate revenue from these lands during an interim period until long-term planning can be completed." While still generating revenue for the trust, this "interim period" also provides the State with time and an opportunity to review and reconsider whether the parcel is required, or can be designated, for homesteading, as well as planning for longer term leases. Thus, the Department views the short term disposition proposed in Act 173 as a tool to manage the improvements and generate revenue for the Trust while affording the Commission and DHHL the opportunity to evaluate how best to fulfill the goals of the HHCA and to advance the interests of the beneficiaries.

Opportunities for HHCA Beneficiary Participation in Non-Homesteading Dispositions

The proposed amendment may afford HHCA beneficiaries the opportunity to participate in short term leasing of improvements, or space within improvements, on Trust lands.¹⁰ By way of contrast, the same HHCA beneficiaries may not, on their own, have had the resources to lease improvements on a parcel of Trust lands for a longer term and to erect such improvements. Thus, the proposed amendment may increase the benefits to such HHCA beneficiaries, including all categories of HHCA beneficiaries separately addressed in questions 3, 4, and 5 below. This authorization to dispose of Trust lands to HHCA beneficiaries also furthers Congress's intent and

¹⁰ DHHL's analysis states that organizations that are beneficiary owned or employ beneficiaries may benefit from the proposed amendment if they need temporary space, referencing that section 204, HHCA, allows DHHL to negotiate with beneficiary owned entities before negotiating with the general public. DHHL analysis page 4, n.1 (submitted in June 2016).

DHHL's mission to assist the HHCA beneficiaries with achieving self-sufficiency quoted above in its mission statement.

A necessary component to allow HHCA beneficiaries to realize this benefit, however, is a requirement that they be notified of any location available for a short-term lease. Therefore, DHHL must continue to engage in the required public notice provisions in state law and its outreach efforts. It also should: provide instructions and guidance on how to participate in the respective disposition processes; provide notice directly to Homestead and HHCA Beneficiary Associations about the upcoming availability of short and long term non-homesteading dispositions; and negotiate the disposition to a native Hawaiian, or organization or association owned or controlled by native Hawaiians prior to negotiations with the general public.

Maximizing the Income from Trust Lands – “by direct negotiation and at fair market rents”

DHHL posits that when managing multiple commercial and industrial properties with different highest and best uses, it is important to have both short and long term leasing options available. According to the State, under current conditions, the only short term option available to allow a person or organization to use an improvement, or space within an improvement, on a Trust land parcel is a month-to-month revocable permit. The State posits that revocable permits generate less than market value rent and tenants do not invest in the space because there is no guarantee they will be allowed to stay for more than a month. The Trust and HHCA beneficiaries, in turn, do not receive the full income potential from the property and the potential funding for lot development, homestead loans, and rehabilitation projects is lost.

DHHL's analysis further states that Act 173 provides a general benefit to the Trust and its beneficiaries by allowing the maximum revenue from Trust land available for short term leasing. The premise that Act 173 allows for the maximum revenue rests on whether a lease “by direct negotiation and at fair market rents” maximizes revenue. Neither “direct negotiation” nor “fair market rents,” however, is defined in Act 173. Nor does Act 173 define other procedures. To interpret Act 173 and resolve any ambiguities created by these omissions, the Department relies on HHCA § 204(a)(2) and Hawai'i Revised Statutes (HRS) chapter 171 since the HHCA specifically applies the procedures set forth in that chapter to the Trust lands. The State does not distinguish DHHL's management needs, policies and procedures from those otherwise applicable to the State's public lands as defined in chapter 171, thus further indicating that the amendment would be more appropriately placed in chapter 171 and made applicable to all public lands.¹¹

With respect to the meaning of “direct negotiation” or “negotiation” of a lease, the Department relies on chapter 171, including HRS § 171-16 for public notice; HRS § 171-17(b) for appraisals

¹¹ See response to question 12 for further discussion regarding HRS chapter 171.

that require a “disinterested appraisal”; and HRS § 171-59 for disposition by negotiation. The Department interprets Act 173’s “direct negotiation” in conformance with these procedures.

The term “fair market rents” used in Act 173 is not a term defined in HRS chapter 171. HRS § 171-17(b) does not include the term “fair market rents” and although “fair market value” is referenced in HRS § 171-17(c) and “fair market rental” is referenced in HRS § 171-17(d), neither section defines the terms nor articulates a substantive standard. Therefore, the Department interprets the Act 173 provision for “fair market rents” as the State’s intent to apply a “fair market value” or “market value”¹² standard in which the amount of rent to be paid is established through a disinterested appraisal in conformance with HRS § 171-17(b). This interpretation is consistent with the State’s representation that appraisals assess and determine market value.¹³

Conformance with HRS § 171-17 means an appraisal that is independently and impartially prepared by a qualified disinterested appraiser setting forth an opinion as to the market value of the land or interests in lands to be leased, supported by the presentation and analysis of relevant market information. Similarly, the term “market rents” used in Act 173 is interpreted as having the same meaning as “market rental value” defined in Section 4.7 of the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA). That definition is:

The rental price in cash or its equivalent that the leasehold would have brought on the date of value on the open competitive market, at or near the location of the property acquired, assuming reasonable time to find a tenant.

Subject to these interpretations of “direct negotiation” and “fair market rents” discussed above, the Department accepts the premise that Act 173 allows for the maximum revenue.

3. How does the proposed amendment advance or otherwise impact the interests of current lessees?

In response to questions 3, 4, 5, and 6, the Department engages in analyses similar to question 2, distinguishable by the assessment of how Act 173 advances the homesteading purpose of the

¹² The State of Hawai‘i Act 173 (2014) utilizes the term “fair market” to denote the standard by which the price for a short term lease would be set. Based upon the State’s use of this term and the need to protect the Trust, we find that the intended meaning is best articulated as the term “market value.” In developing the generally applied rule that market value is the measure of just compensation, the courts have employed variations of the term market value, as explained by the Supreme Court in *United States v. Miller*, 317 U.S. 369, 374 (1943) (*The owner has been said to be entitled to the “value,” the “market value,” and the “fair market value” of what is taken. The term “fair” hardly adds anything to the phrase “market value” which denotes what “it fairly may be believed that a purchaser in fair market conditions would have given,” or, more concisely, “market value fairly determined.”*)

¹³ This position also is based on the State’s response of August 2014 that requires a disinterested appraisal: *[a]s with any commercial lease, an appraisal would be required to assess and determine the market value of the property. Discretion on rent price is limited because of the requirement in Act 173 for fair market rent and the disinterested appraisal.*

HHCA and the separate treatment of the interests of specific categories of HHCA beneficiaries and lessees.

DHHL, in its June 2016 analysis of Act 173, stated that:

[A]ll revenues received as a result of the disposition of improvements must be deposited in the Hawaiian home administration account. The HHCA section 213 provides that any amount in the Hawaiian home administration account “in excess of the amount approved by the legislature or made available for the fiscal period may be transferred to the Hawaiian home operating fund.” Moneys in the Hawaiian home operating fund can be used for “construction and reconstruction of revenue-producing improvements intended to serve principally occupants of Hawaiian home lands, including acquisition or lease therefor of real property and interests therein, such as water rights or other interests” and “the purchase of water or other utilities, goods, commodities, supplies, or equipment needed for services, or to be resold, rented, or furnished on a charge basis to occupants of Hawaiian home lands.” Additionally, moneys in the Hawaiian home operating fund with the prior written approval of the Governor can be used for “offsite improvements and development necessary to serve present and future occupants of Hawaiian home lands” and “improvements constructed for the benefit of beneficiaries of this Act and not otherwise permitted in the various loan funds or the administration account.”

Thus, from DHHL’s June 2016 analysis, it appears that Act 173 may not provide any specific benefit to current lessees in the near term with the exception of any short term disposition negotiated with a HHCA beneficiary or beneficiary-owned or operated organization as noted in question 2 above. Revenue generated from short term dispositions under Act 173 would need to make its way from DHHL’s administration account to the Hawaiian home operating fund and exceed funds needed for the prioritized purpose of awarding more homestead leases as discussed in question 4 below before it could be made available for purposes that would benefit lessees.

4. How does the proposed amendment advance or otherwise impact the interests of HHCA beneficiaries currently on the waiting list for a Hawaiian homestead lease?

DHHL made the following comment when asked if Act 173 increases or decreases the benefits to the HHCA beneficiaries or the Hawaiian Home Lands Trust:

The Hawaiian Homes Commission is responsible for the “big picture,” which means best managing the Trust in the interest of all beneficiaries—lessees, applicants, and those who would qualify but have not applied. In balancing these sometimes competing interest[s], the current HHC envisions (1) moving applicants from the waitlist on to the land; (2) strengthening the corpus financially; and (3) building healthy communities.

Act 173 aims to increase benefits by ensuring that funds will be available to accomplish these HHC priorities and, in particular, move applicants from the waitlist on to the land.¹⁴

The Department interprets this statement to mean revenue generated from short term dispositions under Act 173 that are carried over from DHHL's administration account to the Hawaiian home operating fund will be prioritized for the purpose of awarding homestead leases and advance the interests of those HHCA beneficiaries currently on the waiting list for a Hawaiian homestead lease. To the extent that the short term leases provide the Commission and DHHL with time and an opportunity to review and reconsider whether the parcel is required, or can be designated, for homesteading, it would advance the interests of the beneficiaries on the wait list.

This conclusion is based, in part, on the assumptions discussed in the response to question 2. Please refer to the response to that question for further detail. Also, please refer to the response to question 3 for a similar analysis of other beneficiaries' interests.

5. How does the proposed amendment advance or otherwise impact the interests of HHCA beneficiaries who have not yet applied for a Hawaiian homestead lease?

DHHL asserts in its June 2016 analysis that HHCA beneficiaries who have not yet applied for a Hawaiian homestead lease may be more inclined to apply for a Hawaiian homestead lease if they see homestead leases being awarded and additional lands being prepared for homestead development with additional revenue from dispositions under Act 173.

Please refer to the assumptions discussed in the response to question 2 and the response to that question for further detail. Also, please refer to the responses to questions 3 and 4 for a similar analysis of other beneficiaries' interests.

6. How does the proposed amendment weigh the interests among the different categories of HHCA beneficiaries and lessees and do the benefits to one category outweigh any detriment to the other categories?

The proposed amendment affects leases on non-homesteaded land prior to its availability for homesteading. As such, there is no explicit balancing in the Act between the categories of beneficiaries and lessees. Rather, as discussed in the responses to questions 3, 4, and 5 above, Act 173 would create effects that impact each subset of beneficiaries in a different manner. The exact relationship between these effects and the categories of lessees is unclear.

See discussions in responses to questions 2, 3, and 4.

¹⁴ DHHL statement quoted in DOI Act 173 Consultation Report, July 2016.

7. Does the proposed amendment reduce or impair the Hawaiian Home Loan Fund, the Hawaiian Home Operating Fund, or the Hawaiian Home Development Fund?

No. There is no apparent reduction or impairment of any of the protected funds by Act 173.

8. Does the proposed amendment impair or place at risk the corpus of the Trust?

No. The proposed amendment does not impair the real property comprised of the available lands or Trust lands, or the funds comprised of the Hawaiian Home Loan Fund, the Hawaiian Home Operating Fund, and the Hawaiian Home Development Fund, that form the corpus of the Trust.

9. Does the proposed amendment increase the encumbrances authorized to be placed on Trust lands?

The proposed amendment's authorization of a lease with a term not to exceed five years does not increase the encumbrances authorized to be placed on Trust lands because leasing for a term of 65 years is already permitted. The new shorter term permitted under Act 173 would allow for the lessening of encumbrances on Trust lands not required for homesteading under section 207(a) of the HHCA. Conversely, an authorization to extend a current lease of Trust lands not required for homesteading beyond 65 years or to increase the base lease terms beyond 65 years would increase the encumbrances authorized to be placed on Trust lands and would require Congressional approval.

See additional discussion pertaining to encumbrances authorized to be placed on Trust lands by DHHL in response to question 12.

10. Does the proposed amendment change the qualifications for lessees?

No. The proposed amendment does not pertain to the qualifications for lessees.

11. Is the proposed amendment consistent with the requirement that all proceeds and income from the available lands shall be used only in carrying out the provisions of the HHCA?

Yes. Act 173 does not redirect any proceeds or income generated from the proposed short term leasing of improvements on Trust lands to be used in any manner other than in carrying out the provisions of the HHCA.

12. Is the proposed amendment related to administration or related to the powers and duties of officers other than those charged with the administration of the HHCA, as further defined in Section 4 of the Admission Act?

No. Act 173 is not related to administration and is not related to the powers and duties of officers other than those charged with the administration of the HHCA, within the meaning of Section 4 of the Admission Act. Further, it conflicts with the HHCA requirement that when DHHL manages Trust lands not required for homestead leasing under section 207(a) of the HHCA, it needs to do so in accord with the procedures and criteria set forth in HRS chapter 171 for public lands.

Statutory Framework

The Hawai‘i Admission Act, 1959, 73 Stat. 4 (Admission Act), admitted Hawai‘i as a state of the United States. Section 4 provides that as a compact with the United States “relating to management and disposition of the Trust lands,” the State shall adopt the HHCA as part of its Constitution “subject to amendment or repeal only with the consent of the United States, and in no other manner.” There is one three-part proviso to the requirement of consent to amendments, which provides in part:

[S]ections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation[.]

Proposed Amendment

Act 173 proposes to amend HHCA § 204(a)(2) to add an additional proviso that authorizes the department (DHHL) to “in addition to dispositions made pursuant to chapter 171. . . lease by direct negotiation and at fair market rents, and for a term not to exceed five years, any improvements on Trust lands, or portions thereof, that are owned or controlled by the department.”

State Position

The State Attorney General posits by letter dated July 8, 2016, that the proposed amendment in Act 173 relates to administration, falls within the category of “other provisions relating to administration” and, therefore, is an amendment that does not require the consent of the United States. The letter asserts that “administration” in the context of the Admission Act means:

[T]he management or performance of the executive duties of a government, institution, or business; collectively, all the actions that are involved in managing the work of an organization; or in public law, the practical management and direction of the executive department and its agencies.

The State asserts that “Section 204(a)(2) relates to administration” because it provides that lands not needed for homesteading “may be retained for management by [DHHL].” (Emphasis deleted). The State posits that “manage” is “a lesser included term” of “administer.”¹⁵ The State acknowledges that HHCA paragraph 2 of section 204 provides that management “may involve disposing of the land to the public under the same criteria used for disposing of other State lands under Haw. Rev. Stat. chapter 171” and that chapter 171 includes leasing. The State then concludes, “[s]imilarly, Act 173 authorizes DHHL to issue leases . . . without need for public auction, and therefore involves the same kinds of procedural requirements” as contained in chapter 171. The State does not further articulate how with the deletion of a procedural requirement – the need for a public auction – Act 173 nonetheless “involves the same kinds of procedural requirements.”

The prior position of the State Attorney General articulated in a letter dated August 4, 2014, posited first, without limitation, that paragraph (2) of section 204 could be amended without the consent of the United States.¹⁶ Second, the State argued that the HHCA already authorizes DHHL “to issue commercial leases pursuant to the provision of chapter 171 . . . which governs the disposition of other State lands” and since “Act 173 . . . amends the process through which DHHL may issue certain non-homestead leases, . . . [it] relates solely to the administration of the HHCA.”¹⁷

Both letters from the State Attorney General agree that a five-year lease without public auction is not authorized for public lands.

Department Position

Relevant Statutory Provisions

Section 4 of the Admission Act lists the sections of the HHCA relating to administration: sections 202, 213, 219, 220, 222, 224, and 225. As delineated in these sections, administration

¹⁵ By letter of June 6, 2016, DHHL submitted its analysis of Act 173 and three other state acts proposing to amend the HHCA. In its analysis of Act 173, DHHL answered “no” in response to whether the proposed amendment was limited to administration and power and duties of officers other than those charged with the administration of the HHCA. In response to question 18 concerning whether Congressional approval was necessary, however, DHHL responded that “[i]t is the opinion of the State of Hawaii Attorney General that this amendment does not require the consent of Congress as it falls within one of the enumerated exceptions provided for under Section 4 of the Hawaii Admission Act.” DHHL’s responses to questions 2 and 18 appear inconsistent.

¹⁶ “Because Act 173 amends this particular provision of the HHCA, consent of the United States is not required under the Admission Act.” *Id.*

¹⁷ The letter, contrary to our analysis, provides:

Second, paragraph (2), section 204 of the HHCA in part authorizes DHHL to issue commercial leases pursuant to the provision of chapter 171 . . . which governs the disposition of other State lands. Act 173 further allows DHHL to issue five-year leases for improvements on Hawaiian home lands through direct negotiation, without having to conduct public auctions as mandated under Chapter 171. Act 173 therefore amends the process through which DHHL may issue certain non-homestead leases, and relates solely to the administration of the HHCA.

includes, for example, the make-up of the Commission and the DHHL (§ 202), terms of office (§ 202), hiring of staff under state law (§ 202), employment of agricultural and aquacultural experts and compensation (§ 219), and issuance of revenue bonds (§ 219). Section 213 provides for the establishment of Trust funds in the treasury of the State, including their respective uses for certain types of loans, guarantees of repayment, construction of improvements including payment of interest and principal charges for state bonds, payment for appraisals, engineering and planning services, and the creation of a budget. Section 225 concerns the investment and reinvestment of money in the funds. These funds are further protected in section 4 of the Admission Act. Section 220 authorizes general water and other development projects and other activities having to do with the economic and social welfare of the homesteaders, such as construction and irrigation projects and payment of costs and rights-of-way. Section 222 deals with expenditures of the department and annual reporting of leases, subleases, size and area of lease and rental to the legislature. Finally, section 224 concerns State payment for a resident-federal expert advising on sanitation, rehabilitation and reclamation.

The next phrase in section 4 similarly enumerates parts of the HHCA that may be amended by the State: “paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of [the HHCA].” The referenced officers, now the governor and chairperson of the board of land and natural resources, have authority over Hawai‘i’s public lands and over Trust lands that are not leased for homesteading under HHCA section 207(a) that are returned to the board by DHHL. They have only such powers and duties as to the Trust lands as specifically provided in the HHCA (§ 206). Section 212 limits disposition of the Hawaiian home lands by the board of land and natural resources to general leases which include withdrawal clauses allowing termination and return of the lands to DHHL when required.

In 1986, Congress consented to a series of state-proposed amendments to paragraph (2) of section 204 which had the cumulative effect of expressly authorizing DHHL also to manage those Trust lands not required for homesteading.¹⁸ Thus, paragraph (2) of section 204, now § 204(a)(2), includes both “officers other than those charged with the administration of the HHCA” and the DHHL, the agency charged with the administration of the HHCA.¹⁹

This Congressional amendment to HHCA paragraph 2 section 204 mandates a withdrawal clause in DHHL’s leases thereby authorizing DHHL to withdraw any land leased during the term of the

¹⁸ Congress consented to these amendments in a bill that consented to all but one of the State’s proposed amendments to the HHCA through June 30, 1985. Congress did not consent to the amendment of the HHCA proposed by Act 112 of 1981, which concerned the method of appraising lessees’ interests and conflicted with later amendments. *See* Act of October 27, 1986, 100 Stat. 3143 and S. Rep. No. 99-478, at 3 (1986).

¹⁹ This paragraph of the HHCA, provides, in part:

Any available land, including land selected by the department . . . not leased as authorized by section 207(a) of this Act, may be returned to the board of land and natural resources as provided under section 212 of this Act, or may be retained for management by the department. .

lease for purposes of the HHCA. It further provides, in part, that “in the management” of such lands not required for homesteading:

[T]he department may dispose of those lands or any improvements thereon to the public, including native Hawaiians on *the same terms, conditions, restrictions, and uses applicable to the disposition of public lands as provided in chapter 171, Hawaii Revised Statutes*. . . ²⁰

(Emphasis added). This paragraph also includes two provisos. One prohibits the sale of these Trust lands and a second proviso that “expressly authorized” DHHL to negotiate, “prior to negotiations with the general public, the disposition of Trust lands or any improvement thereon to a native Hawaiian or organization or association owned or controlled by native Hawaiians . . . in accordance with the procedures set forth in chapter 171.”

Chapter 171 of the Hawai‘i Revised Statutes concerns the public lands of Hawai‘i, the board of land and natural resources, and the management and disposition of the public lands by the board of land and natural resources. Chapter 171 includes extensive provisions on the required procedures for the sale or leasing of public lands, such as public notice, appraisals, auction, drawing, and limitations on persons eligible to lease or purchase the lands.²¹ The series of amendments consented to by Congress in 1986 thus ties the disposition of Trust lands by DHHL to the procedures for the disposition of public lands set forth in chapter 171. The Department addresses the significance of this tie further below.

Analysis

Act 173 proposes to add the following second proviso to paragraph (2) section 204 of the HHCA:

[P]rovided further that in addition to dispositions made pursuant to chapter 171, Hawaii Revised Statutes, the department may lease by direct negotiation and at fair market rents, and for a term not to exceed five years, any improvements on Hawaiian home lands, or portions thereof, that are owned or controlled by the department.

As articulated more fully above, the State argues that “manage” is “a lesser included term” of “administer” and that management by DHHL “may involve” disposing of land “under the same criteria used for disposing of other State lands under Haw. Rev. Stat. chapter 171.” The State admits that chapter 171 includes leasing through public auction, but then states “[s]imilarly, Act 173 authorizes DHHL to issue leases . . . without need for public auction, and therefore involves

²⁰ The phrase “or any improvements thereon” was a technical correction made by the State per Act 119 (2000) and approved by the Secretary on August 7, 2009.

²¹ See, requirements for disposition by lease only (§ 171-32), public auction (§ 171-14), public notice (§ 171-16(a)), and appraisals (§ 171-17(a)), and, specified general terms (§ 171-35) and restrictions (§ 171-36), such as no renewable terms.

the same kinds of procedural requirements” as contained in chapter 171. The Department does not agree with this reasoning because the Department does not read the term “administration” in Section 4 of the Admission Act to include the term “management” in paragraph 2 of section 204 of the HHCA.

The Admission Act delineated the sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and differentiated them from paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act. This differentiation by Congress is significant. Congress recognized the management of Trust lands for non-homesteading purposes as a power and duty that may be conducted effectively by other State officers and agents possessing similar experience managing the public lands of Hawai‘i, *subject to* constraints imposed to ensure the primacy of the interests of the beneficiaries and the Trust. Thus, the Admission Act prohibited any increase in the encumbrances authorized to be placed upon Trust lands used for non-homesteading purposes by those other officers without the consent of the United States. When Congress authorized DHHL to manage the Trust lands not required for homesteading, such authorization logically occurred in the same “powers and duties” section pertaining to the management of non-homesteaded Trust lands, not in any of the enumerated sections dealing with “administration.” Thus, State-proposed amendments to increase the encumbrances authorized to be placed on Trust lands managed for non-homesteading purposes became subject to the consent of the United States regardless of which State officers or agents, including DHHL, conduct such management. This deliberate placement of DHHL along with the powers and duties authorized in the board of land and natural resources is consistent with “management” of the lands as a “power and duty,” not as “administration.” The placement of this 1986 amendment in section 204 is entitled to weight.

In addition, giving DHHL the management of the leasing program on these non-homesteaded lands was a significant program change for the DHHL, giving it authority that had been assigned previously solely to the board of land and natural resources. The management of the leasing program, which is open to the public at large, differs from the administration provisions in the HHCA that are oriented within the department itself, or, as in section 220 concerning irrigation projects, limited to homesteaders. Thus, placement of the 1986 amendment in the power and duty provision in section 204 is consistent with this expansion of authority.

When Congress amended section 204 to allow DHHL itself to manage lands not required for homestead leasing under section 207(a) of the HHCA, it did so “on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands as provided in chapter 171, Hawaii Revised Statutes.” As such, Congress added DHHL as an alternative agency that could lease those lands, as well as utilize other dispositions under chapter 171 that were consistent with the HHCA. Congress expressly continued to apply the state procedures applicable to these lands when managed by the board, not distinguishing the powers and duties of the board and DHHL in

leasing these lands. Congress placed DHHL on par with the board in its management of these lands, applying the same procedures that the State applies to its public lands. In doing so, Congress recognized that the protections afforded to public lands pursuant to chapter 171 should similarly apply to protect Trust lands. In the HHCA, Congress has not differentiated day-to-day management of the non-homesteaded home lands from other public lands, except in prohibiting their sale, as a sale would be inconsistent with the HHCA, and limiting the board of land and natural resources to only leasing non-homesteaded home lands (§ 212). Otherwise, the only exception to the identical treatment of home lands and public lands is an express authorization through Congressional amendment that DHHL could negotiate with native Hawaiians and native Hawaiian organizations prior to negotiations with the general public, but even then, those negotiations were to be “in accordance with the procedures set forth” in chapter 171. The State offers no explanation to justify providing less protective procedures to Trust lands by allowing direct negotiations for up to a five-year lease of Trust lands (Act 173), a different procedure than it allows for the board in its leasing of the public lands. Further, the State’s policy choice reflected in chapter 171 to require public auction for disposing of public lands is equally applicable to non-homesteaded Trust lands. The procedures that protect the general public in the leasing of public lands similarly protect HHCA beneficiaries in the leasing of home lands.

Conclusions

HRS chapter 171 includes provisions dealing with the manner in which the board could dispose of the public land through leasing, sale, granting of easements, use of appraisals, public notice, limitation on the duration of the lease, etc.²² The Department concludes that when Congress approved the amendment to paragraph 2 of section 204 of the HHCA to allow DHHL to manage lands not required for homestead leasing under section 207(a) of the HHCA, Congress treated DHHL and the board equally in how to manage those lands, applying the same procedures to DHHL as the State required of the board. Thus, by providing for direct negotiations for leases of homelands up to five years, Act 173 conflicts with the express language of the HHCA. It does this by seeking to establish procedures different from those provided in chapter 171 as Congress directed in the HHCA and, therefore, requires Congressional consent. Chapter 171 provides broad authority for DHHL to manage Trust lands, but only when not required for homestead leasing, and the provisions of the HHCA and Admission Act both limit such authority in the interest of the Trust.

The Department also differs from the State on the interpretation of the verb “may dispose” in the HHCA. The State views this language as an option for DHHL to follow chapter 171 or as allowing other procedures for leasing *inconsistent* with those in chapter 171, such as Act 173’s avoidance of the public auction requirements in chapter 171. The State considers this inconsistency to be allowed by characterizing this process change as “administration.” The

²² Chapter 171 Haw. Rev. Stat. includes provisions on reporting requirements, meeting requirements, make-up of the board, etc., that are similar to the administration provisions in the HHCA.

Department concludes that the better reading of “may dispose” is that Congress recognized that DHHL did not have to lease the lands under section 204, it could instead lease the lands under section 207 for homesteading. However, if DHHL leases them under paragraph 204, then chapter 171 is one of the limitations on its authority. Thus, Congress deferred to the procedures previously established by the State for the board for the management of the home lands *and* its public lands and made those procedures equally applicable to disposition of non-homesteaded lands done through DHHL.

Further, there is no indication in the record that the 1986 amendment intended also to allow DHHL to lease the lands on terms different than those allowed in chapter 171, *i.e.*, there is no indication that Congress intended an open-ended or unqualified grant to DHHL to manage the lands. If such were intended, it would have been a grant of authority without reference to chapter 171 specifications or the “same terms, conditions, restrictions and uses applicable to the disposition of public lands as provided in chapter 171.” Similarly, the State in its language in Act 173 assumes that chapter 171 was limiting on the DHHL. Act 173 was enacted to provide powers in DHHL “in addition” to those in chapter 171, an augmentation of powers by avoiding public auction requirements for a five-year lease. The Department concludes that the references in the HHCA to chapter 171 limit how DHHL could manage the lands and, therefore, Act 173, which diverges from the prescribed chapter 171 procedures for public lands, requires Congressional consent.

The State mentions that it could amend chapter 171 and accomplish the same result. The Department agrees that if the State were to amend chapter 171, maintaining the *same procedure for public lands as for the home lands*, it could do so, *provided* such amendment to chapter 171, as determined by Secretarial review, does not conflict with the HHCA and section 4 of the Admission Act. That is the path that Congress established in its 1986 amendment – deferring to the policies adopted by the State in regards to its public lands as equally applicable to the home lands not used for homesteading. In short, that which is good for the public lands is good for the home lands.²³ Conversely, that which is not allowed for the disposition of public lands must be approved by Congress before it applies to home lands.

In sum, Act 173 as a proposed amendment to the HHCA needs Congressional approval for three reasons: 1) It is not related to “administration;” 2) It is not related to officers other than those charged with the administration of the HHCA; and 3) It conflicts with the HHCA requirement that when DHHL manages lands not required for homestead leasing under section 207(a) of the

²³ As explicitly stated in section 4 of the Admission Act: “[A]nd the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States[.]” Similarly, encumbrances on home lands by DHHL may not be increased except with congressional consent, as DHHL must follow chapter 171. An increase in encumbrances is not “administration.”

HHCA, it needs to do so in accord with the same procedures and same criteria set forth in HRS chapter 171 for public lands, as further prescribed by Congress.

13. How does the proposed amendment advance or otherwise impact interests other than those of the HHCA beneficiaries and lessees? (*The reason for this particular analysis is so the Department can fully understand the motivation(s) for seeking to amend the HHCA.*)

Act 173 provides a new short term lease option for the general public to lease improvements, or portions thereof, on Trust lands.

14. What were the alternatives considered and reasons rejected?

In the Hawaiian Homes Commission Chairman's 2014 testimonies²⁴ included in the State's initial submittal to the Department, the Chairman asserted that DHHL "has the authority to dispose of [] improvements [that it owns or controls on Hawaiian home lands] pursuant to Chapter 102, Hawaii Revised Statutes, but it is currently not feasible to lease space for just a short term."²⁵ The Chairman's testimonies further stated that "[t]he ability to dispose of these improvements, or space therein, through direct negotiations for a term less than five year[s] would allow the department greater flexibility to generate revenue on its lands."

According to the State, under current conditions, the only other feasible short term option available to allow a person or organization to use an improvement on a Trust land parcel, or a portion thereof, is the issuance of a month-to-month revocable permit in conformance with HRS § 171-55. Revocable permits, however, generate less than market value rent, according to the State, and tenants do not have any incentive to invest in the space because there is no guarantee they will be allowed to stay for more than a month. The Trust and HHCA beneficiaries, in turn, do not receive the full income potential from the property and the potential funding for lot development, homestead loans, and rehabilitation projects are lost.

15. Were there anomalies created by the proposed amendment?

²⁴ The testimonies dated February 3, 2014, February 26, 2014, March 19, 2014, and March 28, 2014 all contained the same quoted language and were in support of State of Hawai'i House Bill 2288, Twenty-Seventh Legislature, 2014, which the State eventually enacted as Act 173.

²⁵ HRS § 171-56, authorizes, subject to HRS chapter 102, the disposition of concessions through contracts or licenses for no more than fifteen years. Chapter 102 HRS concerns "concessions" on public property, defined in HRS § 102-1 as including good and beverage establishments, retail stores, communications and telecommunication services, etc. HRS § 102-2(a), requires public notice for sealed bids before any concession or concession space shall be leased, let, licensed, rented out, or otherwise disposed of. The only exception is for nonrenewable dispositions for a period not in excess of 14 days. HRS § 102-2(c).

Yes. Act 173 conflicts with the HHCA requirement that when DHHL manages Trust lands not required for homestead leasing under section 207(a) of the HHCA, it needs to do so in accord with the procedures and criteria set forth in HRS chapter 171 for public lands.

See discussion in response to question 12.

16. Are there additional considerations and discussion required?

During the Act 173 review process, the State questioned whether the references to HRS chapter 171 in HHCA § 204 might be a “rolling incorporation” such that any amendment to HRS chapter 171 dealing with public lands would apply automatically to the disposition of Trust lands by DHHL without the review of the Secretary or approval of Congress. Since Congress reserved to itself the right to alter, amend, or repeal the HHCA (§ 223) and the Admission Act limits the authority of the State with regard to the Trust, the answer to the State’s question is “no.”

Consistent with the limitations in the Admissions Act, the HHCA, the HHLRA, and other Federal law, any state enactment (including amendments to chapters 171 or other chapters it references, such as chapter 102) which meets any of the following criteria, or otherwise impacts the provisions of the HHCA, has no effect on the management of the Trust unless approved by the Secretary or Congress:

- Decreases the benefits to the beneficiaries of the Trust;
- Reduces or impairs the Hawaiian Home Lands Trust Funds;
- Allows for additional encumbrances to be placed on Trust lands, whether by officers other than those charged with the administration of the HHCA, or by DHHL;
- Changes the qualifications of who may be a lessee;
- Allows the use of proceeds and income from the Trust lands for purposes other than carrying out the provisions of the HHCA; or
- Amends a section other than sections 202, 213, 219, 220, 222, 224, or 225, or other provisions relating to administration, or paragraph (2) of section 204, sections 206 or 212 or other provisions relating to the powers and duties of officers other than those charged with the administration of the HHCA.²⁶

Thus, any amendment to HRS chapter 171 by the State that would do any of the above, or which singles out home lands and thus conflicts with the HHCA § 204 language of “the same terms, conditions . . . applicable to . . . public lands,” must be reviewed by the Secretary. On July 12, 2016, 43 CFR part 48 became effective and controls the applicability of state law to the

²⁶ The HHCA generally prohibits the sale of any Trust lands, which prohibition cannot be changed in state law. See HHCA sections 204, 205, and 212. It is undisputed that chapter 171 that authorizes the sale of public lands does not apply to, and could not apply to Trust lands, without Congressional approval. Similarly, for example, an amendment to chapter 171 that prohibits a withdrawal clause in a lease would conflict with HHCA sections 204 and 212, and would increase encumbrances on Trust lands – and thus would not be applicable to Trust lands without Congressional approval. See discussion in footnote 21 above.

Hawaiian Home Lands Trust. Amendments to state law cannot violate Federal law and thus before being applied to Trust lands, must be reviewed pursuant to 43 CFR part 48 by the Secretary and found not to violate Federal law or must be consented to by Congress.

17. Is Congressional approval of the proposed amendment required?

Yes. Act 173 is an amendment to the HHCA and is inconsistent with its provisions.