



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

SEP 27 2016

The Honorable Jobie Masagatani, Chair
Hawaiian Homes Commission
State of Hawai'i
Department of Hawaiian Home Lands
P.O. Box 1879
Honolulu, Hawai'i 96805

Re: Review of Act 114, Session Laws of Hawai'i 2011

Dear Chair Masagatani:

Thank you for providing us with the Department of Hawaiian Home Lands' (DHHL) and State of Hawai'i Office of the Attorney General's analysis of Act 114, Session Laws of Hawai'i 2011. The documents helped the Department in its review of the State's proposed amendment to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108).

The DHHL characterized the proposed amendment, Act 114, as increasing the ceiling on DHHL's ability to borrow money and guarantee of home loans made to Hawaiian home lands lessees from \$50,000,000 to \$100,000,000. Based upon our review and the criteria listed in Section 4 of the Hawai'i Admission Act, it is the opinion of the Department that Act 114, 2011 Haw. Sess. Laws, does not require the consent and approval of Congress. Please refer to enclosures (1) and (2) for greater detail of the Department's review of Act 114.

If you have any comments or questions about our analysis, please contact me or Ka'i'ini Kaloi, Director for the Office of Native Hawaiian Relations.

Sincerely,

Kris Sarri
Principal Deputy Assistant Secretary for Policy,
Management and Budget

Enclosures

**Summary of Comments Received in Response to an Electronic Consultation
Regarding Act 114, Session Laws of Hawai'i 2011
Proposing to Amend the
Hawaiian Homes Commission Act, 1920, 42 Stat. 108**

Overview

On January 22, 2013, the Office of Native Hawaiian Relations (ONHR) distributed an email to Native Hawaiian Community members seeking their input on Act 114, Session Laws of Hawai'i 2011. This State Act proposes to amend the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (HHCA) by raising the ceiling on the State of Hawai'i's liability for moneys borrowed and loans to lessees guaranteed by the Department of Hawaiian Home Lands (DHHL), increasing the ceiling from \$50 million to \$100 million. The summary below lists responses to questions asked of the consultation participants and other comments organized by issue.

Responses to Questions

1. Does Act 114 decrease the benefits to the beneficiaries or the lessees of Hawaiian Home Lands? If so, please explain.

All comments suggested that Act 114 does not decrease the benefits to the beneficiaries or the lessees of Hawaiian home lands. Rather, it provides the means to purchase services, equipment, materials, etc., to develop Hawaiian home lands for the rehabilitation of native Hawaiians.

2. Does Act 114 advance homesteading opportunities for the beneficiary community?

Two comments expressed that Act 114 does not advance opportunities for beneficiary organizations and the beneficiary community, but does for individuals. The reasons given for these opinions are that DHHL does not loan money to beneficiary organizations and DHHL does not guarantee the loans made by other institutions to beneficiary organizations.

One comment suggested that perhaps approval of Act 114 will re-energize DHHL's home-building program, which has dropped exponentially during the current Abercrombie administration.

3. Are you in favor or opposed to Act 114?

One comment expressed opposition to Act 114 at the time that it was submitted because of a lack of response and justification from DHHL regarding "consents to mortgage", which were presumed by the commenter to include a guarantee of such mortgage loans by DHHL.

One comment expressed support for the intent of Act 114 to raise the ceiling on loan guarantees from \$50 million to \$100 million, providing DHHL the ability to borrow money and guarantee home loans to lessees. This commenter supported the intent to assure that DHHL may continue to provide homesteading privileges to native Hawaiians.

One comment favored providing every native Hawaiian the opportunity to access fair financing and to use such financing to create economic opportunity, as well as supporting other uses of Hawaiian home lands such as agriculture, aquaculture, alternative energy, hospitals, shopping centers, hotels, newspapers, television stations, etc. This commenter also shared the need for financing to extend existing homes to support multi-generational households and suggested 0% to 1% interest financial products.

4. What community do you live in or, if you are seeking a homestead, where is that homestead community located?

Comments were received from the Waimea Hawaiian Homestead community on Hawai'i Island and the Kapolei and Nānākuli Hawaiian homestead communities on O'ahu.

5. Do you have any additional comments related to Act 114 or whether it impacts the special funds, increases encumbrances on Hawaiian home lands by officers other than those charged with administering the HHCA, or changes the qualification of lessees?

One comment expressed an opinion that loan guarantees put the Hawaiian Home Lands Trust in harm's way, thus any benefit from increasing the ceiling on liability from \$50 million to \$100 million should be for the HHCA beneficiaries and beneficiary organizations and not for anyone or any organization that is not a beneficiary or a beneficiary organization. The ceiling on liability should not be increased by \$50 million if it will be used to guarantee loans for non-Hawaiians and non-beneficiaries. If the consents to mortgage for non-beneficiaries are not loan guarantees which hold DHHL liable for the loans, then the increase in the ceiling on liability would be a benefit to the HHCA beneficiaries.

One comment suggested that approval of Act 114, and re-energizing DHHL's home-building program, would help to resolve recent DHHL internal discord and minimize external political challenges so that DHHL can focus on its mission.

One comment suggested that Act 114 changes the qualifications to benefit from the HHCA, further stating that the HHCA does not prescribe financial qualifications.

One comment suggested that the money made available as a result of Act 114 should be used in such a manner that allows beneficiaries to construct or select residences that meet cultural standards rather than accept homes designed and built for them by DHHL and its contractors.

One comment suggested that the money made available as a result of Act 114 should be used for refinancing, debt reduction, and financial literacy programs.

One comment suggested that the money made available as a result of Act 114 should be used to develop Hawaiian home lands for all of the purposes of the HHCA.

Other Comments

Definition of “native Hawaiian”

One commenter suggested that Congress, in the original HHCA, defined a “native Hawaiian” to be “descendants of native Hawaiians living in Hawai‘i prior to Captain Cook[’s arrival] in 1778.” He then questioned why a 1921 amendment imposing a 50% to 100% blood quantum to qualify as a “native Hawaiian” was not reviewed under the same criteria of whether it decreased or increased the benefits to the native Hawaiian beneficiaries of the HHCA.

Other Uses of Hawaiian Home Lands, the Special Funds, and Trust Funds

One comment expressed concern about the use of Hawaiian home lands, trust funds, and special funds for purposes outside of DHHL and the HHCA, including: paying special assistants to the Governor on Homelessness and using Hawaiian home lands for homeless solutions; paying the Attorney General and Hawai‘i Housing Finance and Development Corporation out of trust funds; and paying many non-bid service contracts out of special trust funds.

Summary

Commenters generally support the proposed amendment in Act 114 if the increase in DHHL’s borrowing and loan guarantee capacities are exclusively for the benefit of HHCA beneficiaries, especially in light of the trust’s increased risk exposure with the potential of incurring up to \$100 million in liability as one commenter pointed out.

Commenters also suggested that there should be better justifications and accountability from DHHL to the HHCA beneficiaries regarding how they are going to allocate the increased liability, including how much DHHL will use to borrow money and towards what purposes those borrowed moneys will be applied, and how much will be allocated for loan guarantees for individual lessees, native Hawaiians, and cooperative associations of native Hawaiians to support homesteading and other uses of Hawaiian home lands authorized by the HHCA.

DOI Analysis of Act 114, 2011 Haw. Sess. Laws to the HHCA

Proposed Amendment to the HHCA

Act 114, 2011 Haw. Sess. Laws, amends section 214 of the Hawaiian Homes Commission Act, 1920, as amended (HHCA), raising the ceiling on the State of Hawai'i's liability for moneys borrowed, and loans to lessees guaranteed, by the Department of Hawaiian Home Lands (DHHL), increasing the ceiling from \$50 million to \$100 million. The State of Hawai'i characterizes this amendment as increasing DHHL's authority to borrow money and guarantee loans to lessees in order to provide more homesteads and home ownership opportunities to beneficiaries.

1. Challenge/Issue that the Proposed Amendment Addresses

The State reported that DHHL's loan guarantees in 2011 totaled \$30 million and that DHHL had approximately \$16.8 million in loans to be closed over the next six months, bringing the total very close to the \$50 million ceiling. The State also shared that as part of its housing strategy, DHHL partnered with local lenders on programs with complementing mortgage insurance to minimize DHHL's guarantee obligations. However, DHHL must still utilize loan programs that serve specific income level families such as Habitat for Humanity, U.S. Department of Agriculture (USDA) Rural Development and county programs. Thus, the State concluded, the exponential growth of both house construction and mortgage amounts of these programs will still require an increase in the ceiling. DHHL previously asserted that the ceiling prevented it from obtaining loans for other discretionary purposes such as the construction of offsite improvements, including water systems to serve existing homestead communities.

2. Is the Proposed Amendment Limited to Administration and Powers and Duties of Officers Other Than Those Charged with the Administration of the HHCA, as Further Defined in Section 4 of the Admissions Act?

No.

3. Does the Proposed Amendment Reduce or Impair the Hawaiian Home Loan Fund, the Hawaiian Home Operating Fund, or the Hawaiian Home Development Fund?

No.

The State contends that the Hawaiian Home Loan Fund is protected from the increased liability by Haw. Const. Art. VII Sec. 13. This provision of the State Constitution requires the State to stand in surety for all loans and bonds issued by the State. However, Section 214(b) of the HHCA requires the State to use available loan fund moneys or other funds specifically available (e.g., the Hawaiian Home Loan Fund, the Hawaiian Home General Loan Fund, etc...) for such purposes as cash guarantees when required by lending agencies. The result is the DHHL loan funds, including the Hawaiian Home Loan Fund, must first be depleted before the State will

stand in surety for any outstanding debt. Thus, the increase in debt ceiling puts the Hawaiian Home Loan Fund at greater risk for depletion.

While Act 114 does increase the debt ceiling to \$100,000,000 and thus puts the Hawaiian Home Loan Fund at greater risk for depletion, the raising of the debt ceiling in and of itself should not reduce or impair the Hawaiian Home Loan Fund. How the debt is managed and the program administered are the determining factor on whether the Hawaiian Home Loan Fund will be reduced or impaired. For example, just as there is greater potential liability for outstanding loans there is also greater potential to increase revenues from interest payments if proper lending and loan servicing practices are followed. We are mindful of the Hawai'i State Auditor's Report 13-02, *Audit of the Department of Hawaiian Home Lands' Homestead Services Division*, issued in April 2013, and the *Follow-Up on Recommendations Made in Report 13-02* in Report 16-04, issued in April 2016, which identify concerns and make recommendations for improved loan administration. We appreciate that the State is following up on these concerns.

Upon review of the DHHL's annual Financial and Compliance Audits (available at <http://dhhl.hawaii.gov/fo/>), we also accept the DHHL's good faith representations and commitments that funds in the Hawaiian Home Loan Fund have not and will not be reserved for the purposes of loan guarantees, thus maintaining their availability for direct loans to beneficiaries. As such, Act 114 does not reduce or impair the Hawaiian Home Loan Fund.

Because the interest and investment income from the Hawaiian Home Loan Fund is required to be deposited into the Hawaiian Home Operating Fund, some may argue that Act 114 is a detriment to the Hawaiian Home Operating Fund. However, the interest and investment income deposited into the Hawaiian Home Operating Fund is negligible and its loss should not impair the Hawaiian Home Operating Fund.

4. Does the Proposed Amendment Increase the Encumbrances Authorized to be Placed on Hawaiian Home Lands by Officers Other than Those Charged with the Administration of the HHCA?

No

5. Does the Proposed Amendment Change the Requirement That All Proceeds and Income From the Available Lands Shall be Used Only In Carrying Out the Provision of the HHCA?

No

6. Does the Proposed Amendment Change the Qualifications of Lessees?

No

7. Does the Proposed Amendment Increase the Benefits to Lessees of Hawaiian Home Lands?

Yes. Act 114 makes it possible for DHHL to increase benefits to lessees through more financing options and homestead development, but it also makes it possible for DHHL to invest in non-

homesteading dispositions of Hawaiian home lands (HHL) benefitting others which could be a detriment to lessees of HHL. In addition to guaranteeing more loans to lessees by third parties, DHHL could borrow more money to provide direct loans to lessees and for other §214 purposes pursuant to §213(c) and to improve and develop more homesteads pursuant to §213(e). However, DHHL could borrow money to improve and develop HHL for general leasing and other non-homestead dispositions of HHL “to serve present and future occupants of Hawaiian home lands” (not limited to beneficiaries and lessees) pursuant to §213(e).

8. How Does the Proposed Amendment Advance or Otherwise Impact Current Hawaiian Homestead Lessees (native Hawaiians and Native Hawaiians) of Hawaiian Home Lands?

The State asserts that the proposed amendment advances the interests of the nearly 10,000 current Hawaiian homestead lessees by increasing the amount DHHL can borrow or guarantee from external sources of loan financing, thereby providing access to funds for lessees to complete home improvements, renovations or repairs. The State goes on to say that more lessees and cooperative associations will be able to obtain DHHL guaranteed loans as a result of the proposed amendment. Though the proposed amendment neither specifically prescribes the uses for which DHHL can borrow additional money, nor for whom DHHL shall provide loan guarantees, the Department will defer to the State’s assertions that increasing the amount DHHL can borrow or loan with guarantees will provide access to funds for lessees to complete home improvements, renovations or repairs. If at a future date the State seeks to increase the debt ceiling again, the State should provide evidence of how this increase in debt ceiling actually benefited the HHCA lessees as anticipated. Without such evidence, there will be little if any basis to find that a future increase would advance the interests of the HHCA lessees.

9. How Does the Proposed Amendment Advance or Otherwise Impact HHCA Beneficiaries (native Hawaiians) Currently On a Waiting List For a Hawaiian Homestead Lease?

The DHHL reports that similar to the response in question 8, the proposed amendment advances the interests of over 27,000 HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease by increasing the amount DHHL can borrow or guarantee a loan from an external source in order to deliver more homesteads and home ownership opportunities. As stated under question 8, the Department will defer to the State’s assertions. However, if at a future date the State seeks to increase the debt ceiling again, the State needs to provide evidence supporting those assertions of more homestead and home ownership opportunities in order to use them as examples of how the increased debt ceiling advances the interests of HHCA beneficiaries on the waiting list.

10. How Does the Proposed Amendment Advance or Otherwise Impact HHCA native Hawaiians Beneficiaries Who Have Not Yet Applied For a Hawaiian Homestead Lease?

The State responds that HHCA native Hawaiian beneficiaries who have not yet applied for a Hawaiian homestead lease wouldn’t realize a benefit from the proposed amendment.

11. How Does the Proposed Amendment Advance or Otherwise Impact Interests Other Than Those of the HHCA native Hawaiian Beneficiaries and Hawaiian Homestead Lessees?

The State asserts that the trust obligation and duty owed to administer the trust solely in the interest of HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees is clear and responds to the previous three questions and takes priority over the interests of third parties. The State goes on to say that still in response to the question above, the increase in the ceiling will allow DHHL to increase construction of affordable units and home ownership, thereby creating jobs, and infusing millions of dollars in Hawaii's local economy benefiting the entire state, including beneficiary owned businesses or businesses that employ beneficiaries.

The Department agrees with the sentiments of the State that no priority can be given to the interest of third parties when reviewing a proposed amendment to the HHCA. The reason the answer to this particular question is important is so the Department can better understand the motivations for the proposing of an amendment.

12. How Does the Proposed Amendment Balance the Interests of HHCA native Hawaiian Beneficiaries and Hawaiian Homestead Lessees?

According to the State, all lessees, whether they received a homestead lease as an HHCA beneficiary or through succession or transfer of the lease by an HHCA beneficiary, will have equal access to the benefits of a higher debt ceiling.

13. Does the Purpose/Benefit to Lessees of the Proposed Amendment Outweigh the Impact of the Change in Qualifications of Lessees on the Existing Class of HHCA Beneficiaries?

Not applicable.

14. Does the Proposed Amendment Impair or Place at Risk the Corpus of the Trust?

This proposed amendment does not impair or increase risks to the corpus of the trust.

15. Alternatives Considered and Reasons Rejected

None.

16. Anomalies Created and Explained

None.

17. Additional Considerations and Discussion (optional)

In 2009, the Department of the Interior (Department) reviewed Act 232, 1996 Haw. Sess. Laws, and determined that congressional consent and approval was not required. That analysis read as follows:

“9. Act 232, 1996 Haw. Sess. Laws, amends the HHCA by increasing the ceiling on the aggregate departmental guarantee of loans made to lessees from \$21 million to \$50 million.

Does the amendment alter the qualifications of lessees?

No.

Does the amendment allow for an increase of encumbrances on DHHL lands?

No.

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

No. The DHHL guarantee of loans does not affect the Hawaiian Home Operating Fund in any way. The loan guarantee fund capitalization comes from State appropriations that are financed by general fund or general obligation bonds.

Does the amendment increase the benefits to lessees of Hawaiian home lands?

Yes. The increase in the ceiling of debt/guarantee liability clearly intends to increase the benefits to the lessees of Hawaiian home lands by making available an additional \$30 million, either by borrowing the money and lending it to them directly or by guaranteeing loans to them from other sources.

State AG Position: No Congressional Consent Required

U.S. Department of the Interior Position: No Congressional Consent Required”

18. Is Congressional Approval of the Proposed Amendment Required?

No.