DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AC66

Kaloko-Honokohau National Historical Park, Hawaii; Public Nudity

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service (NPS) is issuing this final rule to prohibit public nudity within the boundaries of Kaloko-Honokohau National Historical Park, Hawaii. Public nudity is in conflict with the enabling legislation of the park and the traditional values of native Hawaiian culture, which the park was created to perpetuate and preserve.

EFFECTIVE DATE: This rule becomes effective on May 21, 1999.

FOR FURTHER INFORMATION CONTACT: Bryan Harry, Superintendent, National Park Service, Pacific Islands Support Office, 300 Ala Moana Blvd., Suite 6–226, P.O. Box 50165, Honolulu, Hawaii 96850. Telephone 808–541–2693.

SUPPLEMENTARY INFORMATION:

Background

Public Law 95–625 (16 U.S.C. 396d) established Kaloko-Honokohau National Historical Park on November 10, 1978 ''to provide a center for the preservation, interpretation and perpetuation of traditional native Hawaiian activities and culture, and to demonstrate historic land use patterns as well as to provide needed resources for the education, enjoyment and appreciation of such traditional native Hawaiian activities and culture by local residents and visitors * * *'' Public nudity, an activity that can be construed as contemptuous and insulting in traditional native Hawaiian culture, is in conflict with the above stated purpose for which this park was established. Continued use of the park in this manner derogates resources that are used traditionally and creates a condition that is in conflict with related traditional native Hawaiian practices.

In traditional Hawaiian culture, public nudity had strong social connotations. The following excerpts, pertaining to nudity, document the traditional viewpoint of Hawaiians. Nudity and public display of genitals was very strictly regulated within a defined traditional social context.

Mourning: * * * displaying genitals was neither common nor approved, Mrs. Pukui explains. Such actions were excusable only because the mourner was considered pupule (crazy) from grief. (Kamakau 1919–20:2–45; Campbell 1967:101; Pukui, Haertig, and Lee, 1972 Vol. I: 124,133; 1972 Vol. II:183; Valeri 1985:261, 308).

Sorcery: As nudity is excused during mourning, nudity in the ceremony of anewanewa, was excused due to fear of sorcery. These two circumstances were probably the only time Hawaiians of both sexes were ever nude in public. Exposure of the genitals was not approved. (Pukui, Haertig, and Lee, 1972:124).

Nudity, general: Hawaiian tradition, for those following the kapu exposing the buttocks (hoopohopoho) was a gesture of complete contempt * * * and a grave insult to the beholder and for this reason even the slit-in-the-back hospital gown thus becomes a threat to ordinary courtesy. (Pukui, Haertig, and Lee, 1972:91).

Today, the reaction of Hawaiian cultural experts to public nudity echoes the past pre-missionary view towards nakedness (personal communication with Pat Bacon, who is Mary Kawena Pukui's daughter). Specifically, she was asked as to what circumstances in the Hawaiian culture would nudity be acceptable. Ms. Bacon stated that traditionally, children were allowed to go naked until they were about 10 years old, and that adult, female or male, nudity was not acceptable, and that men were nude only for rituals.

The park initially attempted to encourage voluntary compliance to prohibit public nudity. When this failed, the park enacted a temporary restriction of public nudity through the Superintendent's Compendium (36 CFR 1.5(a)(2)). This temporary prohibition is currently in place.

A proposed rule was published in the **Federal Register** April 20, 1998 (63 FR 19436). The public comment period for the proposed rule was open for 60 days.

Summary of Comments

We received a total of 1,355 letters and five petitions with comments on the proposed rule during the public comment period ending June 19, 1998. We have carefully considered all comments received. The legitimate concerns of both Hawaiian residents and of individuals from areas outside Hawaii were given consideration in the review process. In addition, we completed a critical review of the content and format of the final regulation. A summary of comments and our response to these comments follows.

A total of 468 letters opposed the proposed rule to ban public nudity at Kaloko-Honokohau. Of the 468 letters opposing the proposed rule, 47 were from the State of Hawaii and 375 were from out-of-state. Twenty-eight of the 47 Hawaii addresses were from the island of Hawaii where this national historical park is located. The addresses of origin of 46 of the letters opposing the rule could not be determined.

A total of 887 letters and the five petitions, containing a total of 74 signatures, were in support of the proposed rule and against public nudity at Kaloko-Honokohau. Of the 887 letters supporting the rule, 849 had addresses from the State of Hawaii and eight had out-of-state addresses. A total of 815 of the 887 Hawaii addresses were from the island of Hawaii where this national historical park is located. The addresses of origin of 30 letters could not be determined.

More than three hundred letters of comment opposing the rule appeared to come from members of the Naturist Society and the American Association for Nude Recreation (AANR). These letters contained statements similar to those found in advisory alerts forwarded to members by the Naturist Action Committee and contained in the AANR's monthly publication, *The Bulletin*. Members were asked to submit individual letters and were provided with the following suggested points to make in those letters:

1. State that you are a federal taxpayer objecting to the proposed rule against Nudity at Honokohau National Park.

2. You can also mention: That, as a federal taxpayer, you believe national parks are for everyone; that, with the right planning, nude recreation and other uses such as educational tours of the historic park can be accommodated; and that the availability of nude beaches is a factor in your decision-making about where you and your family choose to spend vacation dollars.

A total of 317 letters opposing the proposed rule contained references to the above points.

A total of 173 of the letters opposing the proposed rule disputed or disagreed that public nudity could be construed as contemptuous and insulting in traditional native Hawaiian culture and in conflict with the stated purpose of the Kaloko-Honokohau National Historical Park. These letters contained statements that native Hawaiians swam nude at Honokohau beach for centuries and that nude use was not in conflict with traditional practices by native Hawaiians, and that nude use of Honokohau beach is not offensive to native Hawaiians.

Letters were received from members of Hawaii's Congressional Delegation, a member of the State Legislature, the

Office of Hawaiian Affairs, the Kaloko-Honokohau Advisory Commission, the Naturist Society, the Naturist Action Committee, the American Association of Nude Recreation, the Western Sunbathing Association, and organizations and foundations representing Native Hawaiians. The content of these letters is summarized below.

Hawaii Senator Daniel K. Inouye stated he was pleased to learn that a proposed rule had appeared in the April 20, 1998 **Federal Register** to prohibit nude sunbathing at Kaloko-Honokohau National Historical Park. Senator Inouye requested that the proposed rule be approved and ratified. The letter closed with the following: ''I am convinced that this rule is essential to the proper management of the national park, and as a means of demonstrating federal sensitivity to native Hawaiian cultural practices and historic sites.''

Hawaii Senator Daniel Akaka expressed full support for the proposed rule to prohibit public nudity within the boundaries of Kaloko-Honokohau National Historical Park. The senator added that ''[p]ublic nudity was never intended to be permitted on park premises when Congress considered the establishment of the park.''

U.S. Congresswoman Patsy T. Mink, within whose district the national historical park is located, wrote, ''to urge the adoption of the proposed rule to prohibit nude sunbathing at Kaloko-Honokohau National Historical Park.'' Congresswoman Mink further stated that as the sponsor of legislation to establish Kaloko-Honokohau as a national park, ''it was not my intention nor the intention of Congress to allow public nudity at this significant Native Hawaiian site.''

State of Hawaii Representative Paul Whalen, whose legislative district contains Kaloko-Honokohau, supported including the proposed rule in the Code of Federal Regulations. Representative Whalen's letter stated ''[g]iven the stated purpose of the park and the native Hawaiian view of public nudity, nude sunbathing at the park site is both inappropriate for such a learning center and culturally insensitive.''

The Hawaii Island Trustee of the Office of Hawaiian Affairs supported the proposed regulation prohibiting public nudity at Kaloko-Honokohau National Historical Park. The Trustee stated that public nudity runs counter to the purpose of the park which is for reorientation to things Hawaiian. The Office of Hawaiian Affairs was established by the Hawaii Legislature as a self-governing, corporate body whose purpose is the betterment of conditions for all Hawaiians.

A letter was received from the Chairman of the Na Hoa Pili O Kaloko-Honokohau, the Advisory Commission established by Congress to advise NPS ''with respect to the historical, archeological, cultural, and interpretive programs of the park.'' The letter stated that at the Commission's December 13, 1997 meeting the members present voted unanimously in favor of an amended motion to ban all nudity in the park. The letter further stated that at their March 28, 1998 meeting, the Commission reiterated its position that nudity at the park be prohibited.

The Founder and President of the Naturist Society (TNS) requested that the proposed rule be discarded and in its place a Special Regulation be formulated to provide for the management of nude recreation at Honokohau Beach. TNS has been actively engaged for nearly two decades in promoting nude recreation on appropriate public lands.

The American Association of Nude Recreation (AANR), on behalf of its more than 50,000 members wrote to request that the proposed rule be delayed and ultimately rescinded. The AANR based its request on pending cases related to the current ban on nudity at Kaloko-Honokohau and their awareness of a forthcoming lawsuit challenging both the current ban and the proposed rule. Further, AANR's letter presented the view that informational signs could be posted in the park to manage conflicting uses.

The Naturist Action Committee (NAC), affiliated with the Naturist Society, expressed opposition to the proposal to prohibit public nudity at Honokohau Beach. The letter asked that the proposed rule be abandoned and a Special Regulation be established to express a more positive attitude toward nude recreation at Kaloko-Honokohau. NAC's stated objectives focus on perpetuating nude recreational activities that have existed on federal and state-managed recreational lands for many generations.

A letter was received from Ms. Mililani Trask on behalf of Ka Lahui Hawaii, a native Hawaiian organization claiming membership of 23,000 individuals of Hawaiian heritage. The letter, in part, states:

> Nudity in our Hawaiian culture *was not* and *is not* culturally appropriate. In our culture, public nudity was considered insulting and contemptuous and where it occurred in relation to sacred sites (wahi pana), it was considered an act of desecration. The only exceptions to this rule are religious ritual and mourning. These exceptions do not apply to Pu'uoina Heiau [a sacred Hawaiian temple near Honokohau beach]. Our cultural practices regarding nudity have been well documented by Ms. Mary Kawena Pukui, a renowned and often cited cultural expert.

The Edith Kanaka'ole Foundation, a private non-profit organization established to uphold and practice the indigenous Hawaiian culture, opposed naked sunbathing in the National Park of Kaloko-Honokohau. The letter states why nudity in general and naked sunbathing in particular was not and is not a traditional Hawaiian cultural practice.

The President of the Western Sunbathing Association, an affiliate of AANR, wrote to oppose the proposed ban on nudity at Honokohau Beach. The letter stated that until the enactment of the temporary ban on nudity effective January 1, 1997, nudists had peacefully coexisted with other beach users for many years. The association has over 8,000 members and is affiliated with the Kona Sun Club.

The chairperson of Na Kokua Kaloko-Honokohau, a non-profit organization established to assist NPS at Kaloko-Honokohau, wrote in opposition to nude sunbathing in Kaloko-Honokohau National Historical Park and in support of the proposed rule.

A letter and a petition containing 25 signatures were received from the Waimea Hawaiian Civic Club. These civic organizations were formed throughout the State of Hawaii to promote the interests of native Hawaiians. The purpose of the Waimea Hawaiian Civic Club's letter was to inform NPS of their stand banning nudity in public places in Hawaii, particularly at Kaloko-Honokohau.

None of the letters of comment supporting the proposed rule included suggestions or recommendations for any modification in content or format. Therefore, we have not prepared responses to comment letters supporting the proposed rule.

The following are responses to statements and suggestions made in several hundred comment letters opposing the proposed rule:

Comment: With the right planning, nude recreation can be accommodated at the park.

Response: The practice of nude sunbathing at Kaloko-Honokohau is a recreational activity that has been the cause of many complaints over the past decade from visitors and is therefore considered to be disruptive to orderly management of the park. Restricting this activity to certain locations within the park and/or to certain times has been eliminated as a management option because Honokohau beach is a small area and cultural practices take place throughout the park at different times. More important, nude sunbathing is a recreational activity that is in conflict with the purpose for which this national historical park was established. Therefore, anything less than a prohibition of public nudity at Kaloko-Honokohau is judged to be not feasible.

Comment: Public nudity is consistent with native Hawaiian culture and the stated purpose of the park and is not offensive to the native Hawaiians.

Response: The published cultural and historical record and the views of contemporary cultural experts, including native Hawaiians, do not support this view. Historically, in Hawaii, nudity has a wide range of strong social connotations from submission to spiritual ties to the aina, or earth. When done without purpose,

the exposure of the buttocks and anal area could be construed as a supreme gesture of contempt. Displaying genitals was neither common nor approved. Such actions were excusable during mourning only because the mourner was considered pupule (crazy) from grief. In general, adult nudity, outside of the family and without a reason for it, was disapproved. Today, the reaction of contemporary cultural experts to public nudity is consistent with the Hawaiian pre-missionary view of nakedness.

The stated purpose of the park is to ''provide a center for the preservation, interpretation, and perpetuation of the traditional native Hawaiian activities and culture* * *'' Public nudity, an activity that can be construed as contemptuous and insulting to traditional native Hawaiian culture, is in direct conflict with the above stated purpose.

Letters of comment received from contemporary native Hawaiian individuals and organizations consistently maintain that they regard public nudity is regarded by them to be offensive.

Comment: Rescind the proposed rule because of the pending criminal case involving the nudity prohibition in the superintendent's compendium. Because the case raises several Constitutional issues, its outcome could well conflict with the proposed rule.

Response: The defendants in that case withdrew their constitutional challenge to the compendium closure. Therefore, the ruling on this case will not conflict with this rulemaking.

Comment: The proposed rule should be rescinded because the AANR is aware of a civil lawsuit about to be filed in federal court, which poses similar concerns.

Response: The possibility of future lawsuits is not a sufficient basis for NPS to rescind this rulemaking.

Comment: A preferable way to prevent conflict among users of Honokohau is with informational signs providing notice of areas where clothes-free swimming and sunbathing occur.

Response: Informational signs would not prevent the conflicts between users engaged in public nudity and the traditional Hawaiian cultural purposes for which the park was established.

Comment: Formulate a new Special Regulation that provides FOR the management of nude recreation.

Response: Such a rule would be inconsistent with the park's enabling legislation and would derogate the values and purposes for which the park was established. The purpose of the proposed rule is to create an ambience and setting that fosters rather than inhibits the preservation and perpetuation of the traditional Hawaiian culture.

Comment: Until the enactment of the temporary ban on nudity effective January 1, 1997, nudists had peacefully coexisted with other beach users for many years.

Response: Since acquiring the property on which nude sunbathing is occurring, NPS has regularly received complaints from visitors—cultural education groups, the native Hawaiian community, school groups, and segments of the general public—regarding the presence of nude sunbathers in the park. Park rangers, in a lengthy series of case incident reports, document all these complaints. Some visitors stated they would choose to stay away rather than to visit the park where this kind of recreational activity was taking place.

Comment: Nude recreation is a legal activity on federal property, a point well established by NPS's own Special Directive 91–3 (Information on Public Nudity) dated May 29, 1991.

Response: This Special Directive, which Kaloko-Honokohau has followed, provides the following information on NPS policy regarding recreational activities:

> The National Park Service will encourage recreational activities that are consistent with applicable legislation, and that are compatible with other visitor uses.
>
> Unless the activity is mandated by statute, the National Park Service will not allow a recreational activity in a park or in certain locations within a park if it would involve or result in * * * unacceptable impacts on visitor enjoyment due to interference with or conflict with other visitor use activities, among other things.
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> When unacceptable visitor conflicts occur, as a result of public nudity, a resolution of the situation should be attempted informally, if appropriate, with the persons who are the subjects of the complaint. If informal attempts fail to resolve the conflict and enforcement action becomes necessary, the option may exist of either applying NPS regulations, or State or local laws that specifically prohibit public nudity. The latter method has the advantage of providing consistency in enforcement on both Federal lands and adjacent areas.
>
> Park areas experiencing a particularly difficult situation that cannot be solved by the above methods may wish to propose park specific rulemaking that will address these problems.

Notwithstanding that nude sunbathing is inconsistent with the park's enabling legislation and that the park received many complaints from visitors about this recreational activity, the NPS, over a period of several years, attempted to resolve the situation informally with the persons who were the subjects of the complaint. In addition, attempts were made to apply State or county laws that prohibit public nudity. None of these attempts succeeded in resolving the situation and the Superintendent subsequently chose to propose park specific rulemaking to address this problem.

Comment: Naturist individuals and organizations in Hawaii were unable to gain a place at the table in the discussion of management options at Kaloko-Honokohau National Historical Park.

Response: The proponents of recreational nudity, including naturists, stated their views in substantial numbers at the public scoping meetings held in 1991 on the proposed general management plan. At these meetings and during the open public comment period that followed, the NPS was asked to designate Honokohau beach as clothing optional. In 1992, during the public meetings on the draft general management plan and during the open public comment period that followed, proponents of public nudity at Honokohau beach again asked that Honokohau beach be designated clothing optional. The NPS carefully weighed the feasibility of these requests against the park's enabling legislation and other public comments received during the development of the general management plan. Approved in 1994, the plan, while recognizing the use of Honokohau beach by nude sunbathers, states that this use will be prohibited in the future as the park is developed. Moreover, during the 60-day comment period on the proposed rule, naturists were able to express their views regarding recreational nudity at Kaloko-Honokohau. Over the past several years, there have been many opportunities for naturists to discuss the future of recreational nudity at Kaloko-Honokohau with the NPS.

After careful review and analysis of the comments received during the public review period, NPS finds that the proposed rule is in accord with the congressionally established purpose of this national historical park. Specifically, the NPS judges the proposed rule to be consistent with Section 505(a) of Public Law 95–625 which states the purpose of Kaloko-Honokohau National Historical Park to be ''the preservation, interpretation, and perpetuation of traditional native Hawaiian activities and culture.* * *'' Further, the NPS finds the proposed rule to be consistent with what past and contemporary cultural experts inform the Park Superintendent is Hawaiian tradition. Finally, the letters of comment contained no information that would

cause the NPS to modify either the content or format of the proposed rule.

Drafting information. The principal authors of this final rule are James Martin, Superintendent, Hawaii Volcanoes National Park; Bryan Harry, Superintendent, National Park Service, Pacific Islands Support Office; Laura Carter-Schuster, Resource Manager, Kaloko-Honokohau National Historical Park; Dennis Burnett and Chip Davis, Washington Office of Ranger Activities, National Park Service.

Compliance With Other Laws

Regulatory Planning and Review (E.O. 12866)

This document is not a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule is local in nature and only impacts visitors to the Kaloko-Honokohau National Historical Park. Visitor conflicts will be reduced, enhancing the enjoyment of the area for the vast majority of visitors, who were previously offended by public nudity.

This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The rule will not adversely impact public visitation or perpetuation and observance of traditional Native Hawaiian cultural practices for which the park was established.

This rule does raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The economic effects of this rulemaking are local in nature and negligible in scope.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Does not represent a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State local or tribal governments or the private sector.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. No property acquisition or impacts on private property owners are expected due to the administrative nature of the rule.

Federalism (E.O. 12612)

In accordance with Executive Order 12612, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. State Representatives and organizations expressed support for the rule.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not require an information collection from 10 or more parties and submissions under the Paperwork Reduction Act or OMB form 83–I are not required. The visitor use management aspect of this rule does not require information collection.

National Environmental Policy Act

The NPS has determined that this rulemaking will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce incompatible uses that compromise the nature and characteristics of the area or cause physical damage to it;

(c) Conflict with adjacent ownership or land uses; or

(d) Cause a nuisance to adjacent owners or occupants.

Based upon this determination, this rulemaking is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental guidelines in 516 DM 6 (49 FR 21438). As such, neither an Environmental Assessment nor an Environmental Impact Statement has been prepared specifically for this regulation. However, a Final EIS and Record of Decision were issued in 1994 along with the General Management Plan for the management and development of Kaloko-Honokohau National Historical Park under the provisions of NEPA.

List of Subjects in 36 CFR Part 7

District of Columbia, National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I is amended as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for part 7 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8–137 (1981) and D.C. Code 40–721 (1981).

2. New § 7.87 is added to read as follows:

§ 7.87 Kaloko-Honokohau National Historical Park.

(a) *Is public nudity prohibited at Kaloko-Honokohau National Historical Park?* Yes. Public nudity, including nude bathing, by any person on Federal land or water within the boundaries of Kaloko-Honokohau National Historical Park is prohibited. This section does not apply to a person under 10 years of age.

(b) *What is public nudity?* Public nudity is a person's failure, when in a public place, to cover with a fully opaque covering that person's genitals, pubic areas, rectal area or female breast below a point immediately above the top of the areola.

(c) *What is a public place?* A public place is any area of Federal land or water subject to Federal jurisdiction within the boundaries of Kaloko-Honokohau National Historical Park, except the enclosed portions of restrooms or other structures designed for privacy or similar purposes.

Dated: April 7, 1999.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 99–9958 Filed 4–20–99; 8:45 am]

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