OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SCR188/SR151
REQUESTING THE OFFICE OF HAWAIIAN AFFAIRS TO COMPLETE THE 2017 INDEPENDENT FINANCIAL AUDIT AND MANAGEMENT REVIEW OF THE OFFICE OF HAWAIIAN AFFAIRS AND ITS SUBSIDIARIES.
Senate Committee on Hawaiian Affairs

March 19, 2019 1:18 p.m. Room 016

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the OHA Board of Trustees take a position of **COMMENT** on this measure, which requests that OHA complete an audit that is under way.

OHA appreciates the intent of this resolution. The audit is still ongoing. We look forward to receiving the audit findings and recommendations, to help us improve our OHA operations in furtherance of our legal mandate to better the conditions of Native Hawaiians.

Mahalo for the opportunity to testify on this measure.

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Unity, Equality, Aloha for all

To: SENATE COMMITTEE ON HAWAIIAN AFFAIRS

For hearing Tuesday, March 19, 2019

Re: SCR 188 / SR 151
REQUESTING THE OFFICE OF HAWAIIAN AFFAIRS TO COMPLETE THE 2017 INDEPENDENT FINANCIAL AUDIT AND MANAGEMENT REVIEW OF THE OFFICE OF HAWAIIAN AFFAIRS AND ITS SUBSIDIARIES.

TESTIMONY IN SUPPORT, WITH RECOMMENDED IMPROVEMENTS

The Center for Hawaiian Sovereignty Studies strongly supports the intent of SCR 188/sr151 requesting the Office of Hawaiian affairs to complete the 2017 independent financial audit and management review of the Office of Hawaiian Affairs and its subsidiaries.

However, the language in this resolution should be strengthened
This RESOLUTION REQUESTING an audit to be completed should actually be a BILL REQUIRING it.

Although it is too late in the 2019 session to introduce a new bill, it is not too late to achieve that result -- any bill now under consideration to provide funding for OHA can and should be amended to specify that no money shall be transmitted to OHA unless and until OHA has completed the internal audit mentioned in this resolution, and unless and until OHA has published the official report of an independent fiscal audit of all limited liability corporations created or controlled by OHA, as called for in SCR70/SR48; and that any funds that would otherwise be transmitted to OHA shall be reduced by ten times the amount of money that the audit shows was improperly spent or cannot be accounted for.

The legislature should go on record as affirming that OHA and all its LLCs are government agencies and therefore are subject to laws such as the State Procurement Code, State Ethics Code, Sunshine Law, and Uniform Information Practices Act. Even if this is merely a resolution requesting, and not a bill requiring; the legislature can certainly use even a humble resolution to assert its strongly held opinion that OHA and all its LLCs are indeed government agencies -- an opinion which will be future evidence of legislative intent even on other topics.

PROOF THAT OHA IS A STATE GOVERNMENT AGENCY CAN BE FOUND IN THE FACT THAT THE LEGISLATURE HAS COMMANDED OHA TO SPEND TRUST FUND MONEY FOR SPECIFIC PURPOSES, AND OHA OBEDIENTLY COMPLIED.

One proof that OHA is a State government agency is found in the fact that the Legislature has the power to command OHA to spend money for particular projects which the Legislature mandates. For example, HB1745 and its companion SB2134 in the regular session of year

2018 ordered OHA to spend OHA's own ceded land trust funds to pay for materials and staffing to greatly enlarge the number of state employees required to take a course organized by OHA to indoctrinate those employees with OHA's views regarding special rights for ethnic

Hawaiians. The bills in 2018 cited a law enacted in 2015 that created this course, and made clear that the Legislature is mandating OHA to spend its own trust fund money for specific purposes:

"In Act 169, Session Laws of Hawaii 2015, the legislature found that pursuant to Hawaii's constitution, statutes, and case law, the State recognizes a mandate to protect native Hawaiian and Hawaiian traditional and customary rights. Accordingly, Act 169 amended chapter 10, Hawaii Revised Statutes, TO REQUIRE THE OFFICE OF HAWAIIAN AFFAIRS TO ESTABLISH, DESIGN, AND ADMINISTER A TRAINING COURSE on native Hawaiian and Hawaiian rights, the sources of these rights, and how infringement of these rights affects the native Hawaiian and Hawaiian people. ... The legislature finds that the training course required by Act 169 has been implemented ... the purpose of this [new 2018] Act is to require certain additional government decision-makers at both the state and county levels to attend the training established by Act 169. ... THE OFFICE OF HAWAIIAN AFFAIRS, AT ITS OWN EXPENSE, SHALL ESTABLISH, DESIGN, AND ADMINISTER A TRAINING COURSE relating to native Hawaiian and Hawaiian traditional and customary rights, native Hawaiian and Hawaiian natural resource protection and access rights, and the public trust, including the State's trust responsibility. The training course shall include: ... THE OFFICE OF HAWAIIAN AFFAIRS, AT ITS OWN EXPENSE, SHALL DEVELOP THE METHODS AND PREPARE ANY MATERIALS NECESSARY TO IMPLEMENT THE TRAINING COURSE, ADMINISTER THE TRAINING COURSE, AND NOTIFY EACH PERSON ..." [emphasis mine]

IT IS LONG OVERDUE FOR THE LEGISLATURE TO REASSERT ITS RIGHTFUL AUTHORITY OVER OHA, WHICH HAS A LONG HISTORY OF ASSERTING INDEPENDENCE FROM STATE LAWS

On August 10, 2011 the online newspaper "Civil Beat" published an article entitled "OHA Employees Were Public Last Year -- But Not This Year?"

Civil Beat raised the issue (again!) because it wants information about the salaries of employees of the State of Hawaii Office of Hawaiian Affairs, in conjunction with CB's extensive research and publication of salary information about all state government employees.

In 2010 OHA refused to disclose such data. Office of Information Practices acting director Cathy Takase ruled that OHA is a state agency and must disclose such information on the same basis as any other state agency. But then Governor Abercrombie fired Takase over Takase's insistence that Abercrombie must disclose the names of nominees for a position on the Supreme Court (reminiscent of President Nixon's Saturday Night Massacre when he fired Watergate prosecutor Archibald Cox for demanding secret White House tapes).

So in 2011 OHA was again stonewalling in hopes that Abercrombie's new OIP director Cheryl Kakazu Park would issue a different ruling on the question whether OHA is a state agency and therefore must disclose salary information. For details see the Civil Beat article at http://www.civilbeat.com/posts/2011/08/10/12472-oha-employees-were-public-last-year-but-not-this-year/

See also a followup news report on August 29, 2011 where Civil Beat once again raises the issue of OHA employees being public employees, and once again criticized OHA for stonewalling and criticized OIP for letting OHA get away with it.
http://www.civilbeat.com/posts/2011/08/29/12666-oha-takes-second-shot-at-claiming-its-employees-arent-public/

IT IS ABSURD FOR OHA TO CLAIM THAT IT IS A STATE GOVERNMENT AGENCY ONLY WHEN IT SPENDS MONEY APPROPRIATED FOR OPERATING EXPENSES BUT IT IS NOT A STATE AGENCY WHEN IT SPENDS MONEY FROM ITS "TRUST FUND" (HOARDED CASH STASH OF CEDED LANDS REVENUE)

OHA likes to make the distinction between the money it receives in annual legislative appropriations of tax dollars (less than 10% of the money it gets), vs. revenues from the ceded lands (more than 90% of the money it gets).

Here's a quote which was seen on the OHA website here (but later deleted):
http://www.oha.org/index.php?
option=com_content&task=view&id=242&Itemid=152
The quote was also repeated on the Kau Inoa website here (but later deleted):
http://www.kauinoa.org/faq.php

"When OHA is spending State general fund revenues, it needs to operate as a state agency and, as such, must comply with various state laws and regulations. However, when OHA operates as a trust, its allegiance is to its beneficiaries."

It is ludicrous to claim that an organization is both a state agency and a private trust, depending on where the money comes from on different occasions. Various novels feature schizophrenic characters with split personalities: for example, Dr. Jekyll and Mr. Hyde; or The Three Faces of Eve. But in real life, there's only one OHA. If the source of money or property were the determining factor in deciding whether an organization is a government agency or a private trust, then the Boy Scouts would have to be called a government agency whenever they make use of the camp at the upper end of Pupukea Road whose land was donated to them by the government; and the City of Honolulu would be a private trust whenever it uses lands and memorial statues that were donated to the City from private sources.

The OHA "trustees" (a terrible misnomer) receive their salaries and benefits from the State of Hawaii just like all other elected officials. They are elected on the ballot in the statewide general election. If there's a vacancy on the board through death or resignation, and if the

board is unable to agree on a replacement, then the Governor appoints one. In February 2000, the U.S. Supreme Court ruled that the racial restriction on who can vote in OHA elections is unconstitutional. One result was that Governor Cayetano forced all nine OHA trustees to resign (because they had been illegally elected). The Governor then appointed temporary replacements for all of them, to serve until the elections later that year. Clearly, OHA is a state agency, as shown by the fact that the Governor seized control of it and that its board of directors are elected on the ballot in the state election.

There is no doubt whatsoever that OHA is an agency of the government of the State of Hawaii.

Therefore there is no doubt that the State legislature has the power, jurisdiction, and authority to ORDER OHA to complete the internal audit already underway and to pay for and perform an audit of the LLC entities which it has created, and to publish a report about the audits to be made available for scrutiny by the news media and the legislature. Indeed, the LLCs themselves are government entities -- they were created by OHA, received their funding from OHA, and have their administrative officers appointed by OHA's CEO.

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THE U.S. SUPREME COURT HAS RULED IN AT LEAST THREE DIFFERENT CASES, BETWEEN YEARS 2000 TO 2016, THAT THE OFFICE OF HAWAIIAN AFFAIRS IS INDEED A STATE GOVERNMENT AGENCY

AND IN THE MOST RECENT OF THOSE CASES THE SUPREME COURT RULED THAT A SO-CALLED "PRIVATE" ENTITY CREATED AND FUNDED BY OHA [JUST LIKE THE LLCS] IS A GOVERNMENT AGENCY AND THEREFORE CANNOT HOLD AN ELECTION WHOSE VOTERS ARE RESTRICTED BY RACE.

1. RICE V. CAYETANO, 2000, REGARDING THE RIGHT OF ALL REGISTERED VOTERS, REGARDLESS OF RACE, TO VOTE FOR BOARD MEMBERS OF THE OFFICE OF HAWAIIAN AFFAIRS

http://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/29/15-17134.pdf

RICE v. CAYETANO 528 U.S. 495 (2000)
Decided February 23, 2000

https://www.law.cornell.edu/supct/html/98-818.ZS.html

Syllabus
Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. The elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies

https://www.law.cornell.edu/supct/pdf/98-818P.ZO

pg 1
"The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, §5."

pg 24
"OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, §§5–6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e] State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw. Rev. Stat. §10–3(3)); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993–94, p. 5 (May 27, 1994)

(admitting that “OHA is technically a part of the Hawai’i state government,” while asserting that “it operates as a semi-autonomous entity”)

p.25
"Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State."

HAWAII V. OFFICE OF HAWAIIAN AFFAIRS, 2009, REGARDING THE RIGHT OF THE STATE TO SELL CEDED LANDS AND THE INEFFECTIVENESS OF THE APOLOGY RESOLUTION TO BLOCK SUCH SALES

https://www.supremecourt.gov/opinions/08pdf/07-1372.pdf

Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009)

No. 07–1372. Argued February 25, 2009—Decided March 31, 2009

The Hawaii State Supreme Court had ruled unanimously, 5-0, that the State of Hawaii cannot sell any parcel of ceded lands until such time as a final settlement is reached between native Hawaiians and the State regarding ownership of the former government and crown lands of the Kingdom of Hawaii; because the U.S. apology resolution in 1993 stated that the overthrow of the monarchy had been illegal and would not have occurred without U.S. intervention. But the State of Hawaii appealed directly to the U.S. Supreme Court, which ruled unanimously, 9-0, that the ceded lands rightfully belong to the State of Hawaii in fee simple absolute, under terms of the Statehood Admissions Act of 1959; and that the federal apology resolution of 1993 has no force or effect to retroactively change the terms of that transfer of lands.

"JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether Congress stripped the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role that the United States played in overthrowing the Hawaiian monarchy in the late 19th century. Relying on Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain of its lands, pending resolution of native Hawaiians' land claims that the court described as "unrelinquished." We reverse."

This case made it abundantly clear that the State of Hawaii is the rightful owner of its public lands, and that OHA is a state agency which must obey state law and has no right to interfere with state government decisions to sell public lands.

AKINA V. HAWAII, 2015-2016, PREVENTING A NON-PROFIT "PRIVATE" CORPORATION FINANCED BY OHA FROM COMPLETING A RACE-BASED ELECTION, BECAUSE THE NON-PROFIT CONTRACTOR WAS A GOVERNMENT AGENCY BECAUSE IT WAS FUNDED AND DIRECTED BY OHA WHICH IS A GOVERNMENT AGENCY (see Rice v. Cayetano)

On July 6, 2011 Hawaii Governor Abercrombie signed Act 195 (formerly SB1250, Legislature regular session of 2011) which established a Native Hawaiian Roll Commission (thus an agency of the State government) whose members would be appointed by the Governor, whose purpose would be to compile a list of qualified "Native Hawaiians" who would then be allowed to vote in an election of delegates to a "Constitutional convention" for the purpose of writing a Constitution for a Hawaiian tribe, which Constitution would then be ratified by a vote of the Native Hawaiians who had registered with the Roll Commission. Governor Abercrombie then appointed the members of the Roll Commission, including former Governor John Waihe'e III as its chairman. OHA (state government agency) gave many millions of dollars (government money from ceded land revenue) to the Roll Commission during the next several years. A non-profit corporation called "Na'i Aupuni" [which means "Conqueror" and was a title used by

King Kamehameha The Great] was created by a group of "Native Hawaiians" under the guidance of OHA and the Roll Commission. The Roll Commission hired Na'i Aupuni as a contractor to organize, publicize, and conduct an election of delegates to the Constitutional convention with the voters being people who had signed up with the Roll Commission. However, the Grassroot Institute of Hawaii headed by President Keli'i Akina, with help from the nationally famous Judicial Watch organization, filed a federal lawsuit to block the election. The lawsuit was dismissed by the U.S. District Court in Honolulu, and the dismissal was upheld by the 9th Circuit Court of Appeals. But as the time grew near for the votes to be counted in the election of Convention delegates, Grassroot Institute and Judicial Watch filed an emergency request with the U.S. Supreme Court to block the counting and/or publication of election results. Supreme Court Justice Kennedy (author of the 2000 decision in Rice v. Cayetano, who was also the Justice overseeing emergencies in the 9th Circuit) issued the temporary injunction; and a few days later the full Supreme Court upheld the injunction by vote of 5-4. The case was remanded to the 9th Circuit for further proceedings. Meanwhile Na'i Aupuni, now prohibited from completing the election or publishing the results, declared that all the candidates in the election would be seated as delegates to the convention. The convention then met for the entire month of February 2016, with salaries and expenses paid by OHA, and produced a Constitution which the delegates approved. Na'i Aupuni declared that its work was finished, and dissolved itself. Later in 2016 the 9th Circuit Court ruled that the lawsuit Akina v. Hawaii was now moot because Na'i Aupuni no longer existed. On October 14, 2016, the U.S. Department of Interior proclaimed a law in the Federal Register -- a lengthy, detailed new federal regulation, to take effect on November 14 -- providing a process whereby a Hawaiian tribe could obtain federal recognition by creating a Constitution and holding an election to ratify it, and getting it approved by the Secretary of Interior. So far as the public has been informed (or not informed!) no further action has been taken since the election of President Trump in November 2016.

Throughout all the court proceedings in the District Court, the 9th Circuit Court, and the Supreme Court, the focus of attention was on the question whether OHA is an agency of the State government, and especially whether Na'i Aupuni was a government agency. Because according to the decision in Rice v. Cayetano, it is a violation of the 15th Amendment for a State government, or any agency of a State government, to hold an election where there is a racial requirement or racial restriction on who can vote. The U.S. Supreme Court, in issuing its emergency injunction against the Na'i Aupuni election, clearly relied on the precedent of Rice v. Cayetano, and clearly concluded that Na'i Aupuni was a subsidiary of the Roll Commission, and OHA, and Act 195 (2011) of the Hawaii legislature. Follow the money. Follow the chain of command. If it looks like a duck, walks like a duck, quacks like a duck; then ...

The final ruling by the 9th Circuit Court of Appeals on remand from the Supreme Court, was handed down on August 29, 2016. It dismissed the lawsuit for being moot after Na'i Aupuni dissolved itself. The decision provides useful details, and can be viewed here:
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 15-17453
D.C. No. 1:15-cv-00322- JMS-BMK
http://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/29/15-17134.pdf

Akina v. Hawaii – The Documents are collected here by the Grassroot Institute of Hawaii.
http://www.grassrootinstitute.org/2015/10/akina-v-hawaii-the-documents/

Further information including full text of news reports and commentary is here:
History of efforts to create a Hawaiian tribe during the 114th Congress (January 2015 through December 2016), including efforts to create a state-recognized tribe and efforts to get federal recognition through administrative rule changes, executive order, or Congressional legislation
http://big11a.angelfire.com/AkakaHist114thCong.html