GRASSROOT
Institute of Hawaii

June 23, 2014

To: Secretary of the Interior

From: Grassroot Institute of Hawaii
President Keli'i Akina, Ph.D.

RE: Proposed Rule - Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community

Dear Secretary:

The Grassroot Institute of Hawaii writes to urge the Department of the Interior not to propose an administrative rule facilitating a government to government relationship with the Native Hawaiian community, nor to assist that community in organizing a government entity. Though there are myriad reasons and concerns that we have related to the establishment of a Native Hawaiian government and its effect on the state of Hawaii and the Native Hawaiian community as a whole, for the purposes of this comment, we will focus on the three areas that most concern the ANPRM: 1.) The lack of historical basis for the government envisioned; 2.) The lack of support for such a governing entity among the Native Hawaiian people and accompanying questions about the state process; and 3.) The possibility that action from the Department of the Interior is premature and infringes on the powers allocated to the Congress under the Constitution and that there are further questions regarding the Constitutionality of the government envisioned.

There is no historical basis for a Native Hawaiian government as envisioned by this rule

It is easy to feel sympathetic toward the idea of righting the supposed wrongs done to Hawaiians as a tribe. The problem with this thinking is that Hawaiians never were and certainly are not today a tribe. From the time the Hawaiian Kingdom was established by its first monarch King Kamehameha through the 1895 abdication of the throne by its last monarch Queen Lili'uokalani, citizenship in Hawaii was never based upon race. If the Hawaiian Kingdom were somehow to be reinstated today, there would be no racial tribe to give anything back to, as the Hawaiian citizenry consisted of Polynesians, Caucasians, Asians, and others who lived under a constitutional monarchy.

The fact that the proposed rule is framed in the idea of "re-establishing" a relationship with a Native Hawaiian government means that the Department is specifically calling back to the Kingdom of Hawaii. After all, there has never been a Native Hawaiian tribe with a treaty relationship to the United States. The closest historical analogue to the Native Hawaiian government envisioned in the proposed rule is the multi-ethnic citizenry that existed under the Hawaiian monarchy. However, the Supreme Court has been clear that tribes are political and not racial entities. The procedure for recognizing a tribe does not include the creation of one where no such entity existed. While the historical circumstances of the overthrow of the Hawaiian monarchy may be cause for debate, it is undeniable that there has never been an exclusively Native Hawaiian tribe or government either at the time of the overthrow or in the 120 years since.

The Native Hawaiian community is not united behind the state nation-building effort (which, in addition, raises questions of Constitutionality)

Another reason for urging caution in the Department's adoption of a rule recognizing a government-to-government relationship with the Native Hawaiian community is the fact that said community has demonstrated a distinct lack of support for the State's nation-building process. Though powerful government interests may portray Native Hawaiians as unified behind the state effort, the reality is very different. This lack of support is well-illustrated by the story behind the Native Hawaiian Roll.

In 2011, the Hawaii State Legislature passed and the Governor signed into law Act 195 which established the Native Hawaiian Roll Commission, an agency to operate within the Office of Hawaiian Affairs. The purpose of the Commission is to enroll Native Hawaiians who will become the citizenry of a Native Hawaiian governing entity.

Charged with the duty to prepare a roll of "qualified" Native Hawaiians, the Commission is required to certify that the individuals enrolled meet the definition of Hawaiian for the purposes of the Act. Moreover, the Commission itself has the ability to determine whether an individual satisfies the criteria for enrollment as follows:

> "Has an ancestor who lived in Hawaii prior to 1778; or is a direct descendant of an ancestor who was eligible for Hawaiian Homes Commission Act in 1921; and has maintained a significant cultural, social or civic connection to the Native Hawaiian community and wishes to participate in the organization of a Native Hawaiian entity and is 18 years of age or over."

The Native Hawaiian Roll Commission was required to file a report before the opening of the 2012 legislative session, and their filing on December 28, 2011 outlined its setup and plans. The initial enrollment effort was launched on July 20, 2012 with a signing ceremony at Washington Place. At the time, the Commission outlined a detailed plan to enroll eligible Hawaiians for one year (through July 20, 2013) with the goal of registering 200,000 Native Hawaiians in that period.

In 2013, due to the underwhelming response from the Native Hawaiian community and lower-than-expected enrollment numbers, the Commission and OHA supported a legislative proposal intended to boost the enrollment process and results. Enacted as Act 77 SLH 2013 and signed into law on May 24,

2013, the law in question amended Section 10H-3 HRS to require the Commission to include in the Roll anyone who had previously been accepted as a Native Hawaiian by OHA, Kamehameha Schools, or by another Hawaiian registry program. This wholesale importation of additional names into the Roll was effective July 1, 2013.

The wholesale importation of names from other sources into the Native Hawaiian Roll has the effect of further distorting the success of the enrollment process. Those who signed up for the Roll through official channels were (in addition to meeting eligibility requirements on ancestry) required to agree with an affidavit, stating, "I affirm the unrelinquished sovereignty of the Hawaiian people and my intent to participate in the process of self-governance." The majority of names on the roll were transferred from non-political lists of ethnic Hawaiians who have not affirmed such a statement. Therefore, the majority of Native Hawaiians on the Roll did not "sign up" for it. Moreover, it cannot be known how many of those "imported" into the list would have objected to the language of the affidavit or the goals of the Roll.

A further complication is raised by the state laws governing the creation and management of the Roll. The constitutionality of Section 10H-3 HRS (as amended by Act 195 and Act 77) is brought into question by the Supreme Court's decision in *Rice v. Cayetano*, and it appears that the state is attempting to do precisely what the Court said was proscribed by the Fifteenth Amendment

In *Rice*, the Court held that the definitions of both "Hawaiian" and "Native Hawaiian" under state law (based on ancestry in the Islands prior to 1778) were racial classifications and that restricting voting rights based on this definition therefore violated the Fifteenth Amendment. That amendment protects citizens against discrimination in the elective franchise based on race, and applies to any election of public officials or in which public issues are decided.

Despite the holding in *Rice*, Section 10H-3 HRS uses ancestry as one of its primary bases for eligibility, excluding anyone who does not have an ancestor who lived in Hawaii before 1778 or is not a descendent of a person eligible for HHCA in 1921. However, the courts have been consistent in rejecting the use of ancestry as a proxy for race, and the conditions of eligibility for the Roll are in clear violation of the *Rice* decision and the Fifteenth Amendment.

The Roll was reopened briefly in the spring of 2014 for the purposes of boosting Native Hawaiian participation in an election for a Constitutional Convention to be held later this year. However, there remain only about 125,631 Native Hawaiians eligible to participate in the nation-building process through the Native Hawaiian Roll. This is out of the approximately 527,077 Native Hawaiians living in the U.S. according to the 2010 census. That means that more than 75% of Native Hawaiians would not be able to participate in the creation of the proposed government entity. To say that this signifies a lack of support for a separate government on the part of the Native Hawaiian people is an understatement. In fact, the Office of Hawaiian Affairs has been urged on multiple occasions to delay the nation-building process in order to allow the Native Hawaiian community to debate and discuss the issue further.

A look at the history of the relationship between the Native Hawaiian community and the elites who have managed its trusts and land provides a simple explanation for the reluctance to embrace the

creation of a Native Hawaiian government. Because it has been made clear that the primary motivation for the creation of the governing entity is the protection of revenues and entitlements for Native Hawaiians, it is understandable that such motives should be looked on with suspicion. Concerns about possible corruption and continued use of land and revenues by an entrenched elite have led many Native Hawaiian groups to reject the state effort outright and insist that the sovereignty issue be handled without government interference.

The proposed rule is premature and infringes upon powers allocated to Congress

As mentioned above, there is no precedent for a Native Hawaiian tribe, nor for the recognition of any tribe based on race. In fact, this was one of the major barriers to the passage of the Akaka Bill, and that problem is not solved by relying on the state nation-building effort and an accompanying administrative rule. The Department of the Interior does not have the authority to recognize a Hawaiian government because the Constitution gives Congress the power to ratify treaties and recognize tribes. Neither the executive branch nor the states have the power to create or recognize a tribal government, which thereby makes both the existing nation-building process and any action by the Department of the Interior vulnerable to legal challenge.

In September 2013, four members of the eight member US Commission on Civil Rights wrote a letter to President Obama specifically addressing the possibility of an executive action to recognize a Native Hawaiian tribal government: "We believe that provisions of the Akaka bill are both unwise and unconstitutional. Executive action implementing provisions of the Akaka bill would be at least as unwise and unconstitutional." The letter provides evidence that there has been no continuous Native Hawaiian governing entity and that Native Hawaiians are not a tribe. Thus, a key argument of the commissioners is that… "Neither Congress nor the President has to power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor do they have the power to reconstitute a tribe or other sovereign entity that has ceased to exist as a polity in the past." The commissioners' letter is attached.

And this is assuming that the creation of a race-based government survives an equal protection challenge—something that *Rice v. Cayetano* casts into considerable doubt, regardless of whether the acting body involved was Congress, the state, or the executive branch. To proceed in creation of an administrative rule recognizing a Native Hawaiian government before it can be demonstrated that the current nation-building effort will sustain either political or legal challenges is premature. Considering the political and social upheaval that could accompany the creation of a Native Hawaiian tribe in the state of Hawaii, we urge the Department to put any such action on hold while its legality and support are in question.

Conclusion

We recognize the unique contributions of the Native Hawaiian people and sympathize with the desire to help the Native Hawaiian community and preserve their culture. However, we strongly dispute that these causes are advanced by the recognition of a race-based governing entity. There is no legal basis for the recognition of a Native Hawaiian government, and there remain serious questions of constitutionality regarding its creation. The likelihood that such an effort fails a legal challenge as well as

the lack of support for such action even within the Native Hawaiian community make this proposed rule premature and ill-advised. We urge the Secretary not to proceed with any action to foster the recognition or creation of a government-to-government relationship with the Native Hawaiian community.

Thank you for the opportunity to submit our comments.

Sincerely,
Keli'i Akina, Ph.D.
President, Grassroot Institute of Hawaii