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Unity, Equality, Aloha for all



To: Hawaii Coalition Against Legalized Gambling; Dianne F. Kay,
President

Date: January 10, 2014

From: Kenneth R. Conklin, Ph.D.

Aloha and best wishes for a happy and successful new year.

Thank you for your long and continuing efforts to stop legalized gambling from coming to Hawaii.

I'm writing to inform you about upcoming events in the Hawaii state legislature and the executive branch of the U.S. government that will be the greatest threat to your mission in 2014 and the years thereafter. The most irresistible, politically powerful event that would lead to gambling casinos in Hawaii would be the establishment of a "Native Hawaiian" Indian tribe officially recognized by the state and/or federal government.

That's why I'm asking you to step forward to oppose establishment of a "Native Hawaiian" tribe that would be officially recognized by the state and/or federal government.

I understand that HCALG views itself as a single-issue group narrowly focused on stopping legalized gambling, and that you are reluctant to offend some institutions among your supporters who are in favor of state or federal recognition of a Hawaiian tribe. But when you consider the facts I present below, you will easily see that your mission of preventing legalized gambling in Hawaii makes it imperative for you to step forward and oppose recognition of a Hawaiian tribe.

IN THE HAWAII STATE LEGISLATURE

As you're surely aware, efforts for recognition of a "Native Hawaiian" tribe are underway through the Kana'iolowalu racial registry established by an act of the state legislature and managed by OHA; and through intensive work inside the Obama administration seeking changes in the procedures for federal recognition by the Bureau of Indian Affairs or by direct issuance of a Presidential Executive Order.

You can make your voice heard in the state legislature, as you have done so effectively in previous years. Your own website displays numerous bills in the Hawaii legislature in recent years seeking to establish gambling casinos, which HCALG has testified against. Notable among those were bills to allow casinos on the Hawaiian homelands, submitted at the request of and strongly endorsed by the Office of Hawaiian Affairs and the Department of Hawaiian Homelands.

Here are three recent bills in the Hawaii legislature, as listed and described on the HCALG website, which clearly show the eagerness of OHA and DHHL to put casinos on the Hawaiian Homelands:

In 2011-2012:

HB1225 Allows bingo to be conducted by 1 licensee at 1 location on lands designated by the Hawaiian homes commission. Creates Hawaii bingo commission within department of commerce and consumer affairs to regulate bingo. Allocates 20% of general excise tax on gross receipts to the state general fund; 1% for a compulsive gambler

program; up to 4% for administrative expenses; and the balance for deposit into the Hawaiian home lands trust fund.

HB1227 Authorizes the Hawaiian homes commission to allow gaming on Hawaiian home lands and to consult with the Hawaiian Homes Commission Act, 1920 beneficiaries and designate specific Hawaiian home lands parcels for the purposes of establishing casino gaming operations. Creates the Hawaii gaming commission to regulate casino gaming operations. Imposes a wagering tax on gross receipts of casino gaming operations and provides for distribution to the general fund and Hawaiian home lands trust fund.

311HB2379 Authorizes the Hawaiian homes commission to allow gaming on Hawaiian home lands and to consult with the Hawaiian Homes Commission Act, 1920 beneficiaries and designate specific Hawaiian home lands parcels for the purposes of establishing gaming operations. Creates the Hawaii gaming commission to regulate gaming operations. Imposes a wagering tax on gross receipts of gaming operations and provides for distribution to the general fund and Hawaiian home lands trust fund.

DHHL is desperate for money, and both OHA and DHHL have come under intense scrutiny in reports by the state Auditor and investigative reports in the newspaper describing financial and bureaucratic mismanagement. OHA is finalizing its ten-year-long multimillion dollar effort through Kau Inoa and Kana'iolowalu to build a racial registry, and is expected to submit to the legislature a list of over 100,000 registrants which the legislature will be expected to recognize as the charter membership of a Hawaiian tribe. Such a state-recognized tribe will then be in a position to demand land, money, and its own sovereign authority from the legislature to build casinos in Hawaii, and to seek federal recognition.

FEDERAL RECOGNITION OF A NATIVE HAWAIIAN TRIBE THROUGH ACTION BY THE EXECUTIVE BRANCH

Although the Akaka bill was not introduced in Congress during 2013, the final version written by Senators Inouye and Akaka and intended to be their legacy was passed by the Committee on Indian Affairs in September 2012, containing explicit language authorizing and enabling Hawaiian tribal casinos not only in Hawaii but throughout America (see bill language and analysis below). Even without Congressional action, efforts are now underway to change the rules whereby the Bureau of Indian Affairs grants recognition to new tribes, or to produce a Presidential Executive Order recognizing a Hawaiian tribe. By following either of these pathways, a Hawaiian tribe would be added to the list of federally recognized tribes and have all the same rights, including the right to put land into trust and build gambling casinos either in Hawaii or on the mainland.

At the federal level HCALG can quietly but effectively contact any friends you might have among officials in the U.S. Department of Interior or Bureau of Indian Affairs. You might also contact leaders or members of mainland Indian tribes whose casino business would be hurt if a federally recognized Hawaiian tribe decides to put land into trust in mainland states and build casinos there. Tribes have already been buying land and building casinos outside the states where they have their main reservations, so the Hawaiian tribe could certainly put casinos on the mainland. Census 2010 identified 527,077 people who checked the box for being "Native Hawaiian." 237,107 were residents of other states. For example 74,932 people in California checked the race box for "Native Hawaiian", which would make the California branch of the Hawaiian tribe the largest tribe in that state and easily able to compete against the genuine tribes in conducting gambling operations.

In the past the genuine Indian tribes officially supported the Akaka bill because they feared the power of Senators Inouye and Akaka (both of whom always served together on the Indian Affairs Committee and

directly dealt with legislation giving money and authority to the tribes), and especially because the Akaka bill contained language inserted at the request of the genuine tribes that prohibited the Akaka tribe from conducting gambling activities either in Hawaii or on the mainland.

But now Senators Inouye and Akaka are gone. Their legacy version of the Akaka bill removed all restrictions on gambling, declared that the Akaka tribe would be fully equal to all the genuine tribes, and provided a "Carcieri fix" specially tailored to allow the Akaka tribe to take land into trust for casinos in Hawaii or on the mainland, even when all other tribes recognized after 1934 are forbidden from doing so because of the Supreme Court decision *Carcieri v. Salazar*.

The remainder of this message focuses on the authorization for gambling in the final, legacy version of the Akaka bill. It was introduced on September 13, 2012 in the U.S. Senate Committee on Indian Affairs, whose chairman was Senator Daniel Akaka (D, HI). Barely one minute after it was introduced, the committee passed it on a voice vote.

Text of the new bill was copied from Senator Akaka's official website (which was demolished after 2012 due to his retirement) and saved permanently on Ken Conklin's website at

<http://big09.angelfire.com/AkakaS675Amended091312.pdf>

The older version it replaces, introduced on March 30, 2011 and including the usual prohibitions against gambling, can be seen for comparison at

<http://www.angelfire.com/big09/AkakaBill033011HR1250S675.html>

The Akaka bill formerly had a prohibition against utilizing the Indian Gaming Regulatory Act to establish casinos. Section 10(a) of the Akaka bill S.675 in place before September 13, 2012 (and all versions of the bill for many years) said "The Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission." That prohibition was put in the bill more than a decade ago. It has been maintained continuously until September 13, 2012, and sometimes strengthened so that mainland tribes fearing Hawaiian competition would not pressure their states' Senators to oppose the Akaka bill; and to allay the fears of Hawaii citizens in a state which has staunchly refused to allow any form of legalized gambling.

But the new bill reverses that prohibition and now explicitly encourages gambling:. The new, legacy version says "The Native Hawaiian governing entity is subject to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) (including regulations promulgated pursuant to that Act by the Secretary or the National Indian Gaming Commission)."

That sentence clearly anticipates that the Akaka tribe will have gambling casinos, and those casinos will be permitted and regulated the same way as all other tribal casinos.

The new bill adds that the Native Hawaiian governing entity "may not conduct gaming activities (within the meaning of section 4 of that Act (25 U.S.C. 2703) unless the State of Hawaii permits such an activity for any purpose by an individual, organization, or entity."

That last sentence clearly means that if the State of Hawaii ever allows any form of legalized gambling, even as small as a permit for one church to have a Saturday night bingo game, then the Akaka tribe is allowed to have full-blown casinos in Hawaii. There have been numerous

efforts for many years in the state legislature to pass bills allowing gambling. Powerful mainland groups send lobbyists to the Hawaii legislature and to make appearances on TV and radio programs in hopes they will reap huge profits if gambling is ever allowed.

Even when the Akaka bill had the provision forbidding the tribe to sponsor gambling, there were bills in the state legislature to allow casinos on the Hawaiian Homelands; and those bills were supported by OHA and DHHL who probably imagined that when the Akaka bill passed then the tribe would take over the homelands and thus acquire casinos built at the expense of state taxpayers.

Here's language in the September 2012 legacy Akaka bill that says the Akaka tribe is to be treated the same as every other federally recognized tribe. The bill creates

"a single Native Hawaiian governing entity that exercises the inherent powers of self-government of a native government under existing law with the same privileges and immunities available to other federally recognized Indian tribes" and the Akaka tribe "shall be considered to be an Indian tribe for purposes of section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1)" and "The Secretary [of Interior] may consider the Native Hawaiian governing entity to be an Indian tribe for purposes of carrying out any activity authorized under the Act of June 18, 1934 (commonly known as the "Indian Reorganization Act") (25 U.S.C. 461 et seq.)."

Here's an example of how strenuously previous versions of the Akaka bill prohibited the Akaka tribe from gambling -- these prohibitions have now been removed from the bill. In the 111th Congress, the Akaka bill then-numbered S.708 and H.R.1711 was introduced on March 25, 2009 specifically for the purpose of adding very strong protections against gambling. Here's the full text of Section 10 from the 2009 Akaka bill:

"SEC. 10. APPLICABILITY OF THE INDIAN GAMING REGULATORY ACT. (a) Prohibition- The Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission. (b) Applicability- The prohibition in subsection (a) related to the use of Indian Gaming Regulatory Act and inherent authority to game apply regardless of whether gaming by Native Hawaiians or the Native Hawaiian governing entity would be located on land within the State of Hawaii or within any other State or Territory of the United States."

Those protections are now totally absent from the legacy September 2012 Akaka bill, and have been replaced by language anticipating and encouraging gambling operations.

The end of Section 6 of the new Akaka bill has a strange sentence which will be meaningless to anyone not familiar with the controversy over proposed legislation for Congress to do a "Carcieri fix." The controversy will be briefly described below, and is extremely significant in relation to the ability of newly recognized tribes to have gambling casinos. Here's the sentence:

"RATIFICATION AND CONFIRMATION OF ACTIONS. -- Any action taken by the Secretary pursuant to the Act of June 18, 1934 (commonly known as the "Indian Reorganization Act") (25 U.S.C. 461 et. seq.) for the Native Hawaiian governing entity is ratified and confirmed to the extent that the action is challenged based on the question of whether the Native Hawaiian governing entity was federally recognized or under Federal jurisdiction on June 18, 1934."

Huh? What the heck does that mean? Why is it so important to the ability of the Akaka tribe to have gambling casinos, as well as gas stations, liquor stores, and other businesses that will be free from taxation, zoning laws, labor laws, or regulation by state and county governments?

In 2009 the U.S. Supreme Court ruled in *Carcieri v. Salazar*, 555 U.S. 379 that the term "now under Federal jurisdiction" in the 1934 Indian Reorganization Act referred only to tribes that were federally recognized in 1934 when the IRA became law. The Court ruled that "now" meant back in 1934, not the present moment (as the new tribes would like). Therefore, the Court ruled, the federal government cannot take land into trust for tribes that were recognized after 1934.

What does this have to do with casinos, tax-free booze and gasoline, etc.? When Congress passed legislation allowing tribes to operate casinos, and giving tribes priority in establishing casinos over non-Indian businesses, large numbers of Indian groups suddenly decided they wanted to become federally recognized tribes. Thus, numerous new tribes have been recognized since 1934. However, the only way for a tribe to get a casino, or other business that is free from state taxation and regulation, is for the tribe to persuade the federal government to take either existing reservation land or newly purchased land into trust. That means the land is now owned by the federal government (but held in trust for the tribe). Federally owned land cannot be taxed or regulated by state or local governments, because of the supremacy clause in the Constitution. But according to the *Carcieri* decision tribes recognized after 1934 cannot have the federal government take land into trust for them. Tribes recognized after 1934 have been banging loudly on the doors of Congress demanding legislation to overrule the Supreme Court; i.e., legislation that would change the law so that new tribes can have land taken into trust. But old, established tribes don't want the competition from new tribes; and the old tribes, many with casinos raking in hundreds of millions of

dollars, have high-paid lobbyists opposing any Carcierì fix. So far, they have been successful in blocking it.

The Akaka tribe would clearly be a new tribe not recognized until after 1934 and therefore not able to have the federal government take land into trust and therefore not able to establish casinos (or tax free unregulated gas stations, liquor stores, tobacco shops, etc.). So the sentence at the end of Section 6 of the new Akaka bill is a special little Carcierì fix just for Dan Akaka's and Dan Inouye's favorite tribe.

Regarding federal recognition through changes in the rules whereby the Bureau of Indian Affairs recognizes tribes, or especially through a Presidential Executive Order: Such recognition would have the same effect as the legacy September 2012 version of the Akaka bill, removing all restrictions on gambling because the Hawaiian tribe would simply be added to the list of federally recognized tribes with all the same rights as the genuine tribes. Indeed, during the 112th Congress (2011-2012) there were at least two occasions when Senator Inouye used stealth maneuvers, as Chairman of the Appropriations Committee with authority to make last-minute changes to the text of legislation, to add a sentence or two to appropriations bills to simply add the Hawaiian tribe to the list of federally recognized tribes. It was after those stealth maneuvers were exposed and defeated that the legacy September 2012 version of the Akaka bill was introduced in and immediately passed the Senate Indian Affairs Committee.

Some supporters of creating a Hawaiian tribe might try to mislead HCALG by saying that the Supreme Court decision in *Carcieri v. Salazar* would automatically prevent the Hawaiian tribe from putting land into trust and building a casino, because the Hawaiian tribe is being created in 2013 which is long after 1934. However, the clever folks at OHA, and attorneys for the Hawaiian tribe, would make the following argument, which their friend President Obama and his Attorney General

Eric Holder would eagerly embrace. The Hawaiian Homes Commission Act was passed by Congress in 1921 and set aside 203,500 acres of land for the Hawaiian Homelands for residential, pastoral, and commercial leases. That Congressional act constituted federal recognition of a Hawaiian tribe; and it was passed in 1921, which was clearly before 1934. Therefore the Carcieri decision has no impact on the Hawaiian tribe. Even in the doubtful event that courts interpreted Carcieri to apply to lands of the Hawaiian tribe newly acquired after 1934, Carcieri would not apply to the Hawaiian Homelands identified in the HHCA passed in 1921. Therefore casinos could be built on the original Hawaiian Homelands. But in fact the genuine tribes on the mainland have been purchasing new lands even after the Carcieri decision of 2009, and putting those new lands into federal trust and building casinos on them; thus a newly recognized Hawaiian tribe would have no legal barrier to using the HHCA from 1921 to use the original Hawaiian Homelands as a base of operations with full authority to expand land-into-trust and casino-building into other newly acquired lands both in Hawaii and on the mainland.