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What is OHA?

By Walter Heen and Randall Roth
Sunday, December 20, 2015

The Hawaii State Constitution has established an Office of Hawaiian Affairs to own and manage property "in trust." The Constitution further provides for an elected board of trustees.

In "Regulating Paradise," University of Hawaii law professor David Callies has described OHA as "operating as a public trust."

In "Who Owns the Crown Lands of Hawaii?", the late Jon Van Dyke pointed out that OHA is "self-governing" and "independent from all branches of government."

A state statute implies that OHA is not a state department or instrumentality of state government by declaring a "duty and responsibility of all state departments and instrumentalities of state government … to cooperate with and assist wherever possible the Office of Hawaiian Affairs."

In short, one could reasonably conclude that OHA is a trust or some other kind of self-governing entity, and not a state agency.

But another statute includes in OHA's purposes that it serves as a "public agency." And many courts, including the United States Supreme Court, have called OHA a state agency, or treated it as such, at least for selected purposes. Various state agencies have done the same, such as when the Office of Information Practices treats OHA as being subject to state sunshine laws applicable to governmental agencies.

It is conceivable that OHA does not fit neatly in just one legal category, but such a unique status would all-but-guarantee legal confusion and unending litigation. Two ongoing lawsuits illustrate this point. The first is called Akana, and the second, Akina.

The Akana case began several years ago when one OHA trustee, Rowena Akana, sued the other eight OHA trustees for allegedly violating the state's Sunshine Law in connection with the trustees' 8-1 decision to acquire the Gentry Pacific Design Center for use as OHA headquarters. Trustee Akana also claims that the other trustees and OHA's staff regularly impede her ability to carry out her trusteeship.

The defendant trustees countersued Akana, claiming that she secretly sent confidential and privileged documents to former OHA trustee Mililani Trask, for Trask's use on the cable TV program, "First Friday Show — The Unauthorized News." They also allege that Akana continues to flout OHA's bylaws and behave in ways that are inconsistent with her fiduciary duties.

Legal fees in the Akana case are probably approaching a million dollars and could easily be double that by the time a final judgment has been rendered and all appeals concluded. Never mind that neither side is likely to pay or receive any monetary damages, or be removed from office.

Such seemingly pointless cases will continue for as long as OHA's legal status is in doubt. And the stakes in most such cases could be quite high.

If OHA were a trust, such as any of the ali'i trusts, the exact nature of Akana's duties would be clear and the attorney general would have standing to seek Akana's removal for what would appear to be serious breaches of trust. If the attorney general declined to take action, Akana's co-trustees would have legal standing and perhaps even a legal duty to seek her removal.

Also if OHA were just such a trust, Hawaii's sunshine laws would not apply. This is far more important than it might sound. Try to imagine Kamehameha Schools running its land management operations smoothly, and negotiating effectively, if it were subject to the Sunshine Law. The point is that sunshine laws do not and should not apply to non-governmental organizations.

Finally, if OHA were just a trust, we would know that the Native Hawaiian Trust Fund really *is* a trust fund, not simply state funds currently being managed by OHA, and that the Legislature lacks the power to countermand spending decisions made by the OHA trustees.

Circuit Court Judge Virginia Crandall has already ruled that Akana had a fiduciary duty not to disclose the information mentioned above, which suggests that Crandall may be viewing OHA as a trust.

If OHA were a state agency, rather than a trust, OHA's so-called trust funds could ultimately be controllable by the Legislature, at least indirectly, and the powers and duties of OHA trustees could be limited to those of other elected state government officials. Akana would be free to campaign on a platform of increased transparency and make good on those promises by divulging privileged and confidential information on cable TV or however else she might choose to reach her constituents.

In fact, if OHA were just a state agency, Akana and the others at OHA could find themselves in trouble if they collectively functioned like a non-governmental organization, such as by discussing pending matters privately.

The second lawsuit — the Akina case — is superficially unrelated to the Akana case, but it too reflects confusion over OHA's legal status.

In the Akina lawsuit, a group of Native Hawaiians and non-Hawaiians have raised constitutional questions about a Hawaiians-only election that would pave the way for a Native Hawaiian constitutional convention. The defendant, Na'i Aupuni, pushed the case into legal limbo this past Tuesday by canceling the election and expressing a desire to have the case dismissed. The plaintiffs may or may not resist a dismissal. In any event, legal issues raised in the Akina case are fundamental to OHA's legal status.

If OHA is a state agency, there would be obvious legal problems if it were to be directly involved in an election that placed race restrictions on candidates and voters. If OHA is not a state agency, its direct involvement in such an election would not necessarily be unconstitutional. One of many complications in the Akina lawsuit is that OHA did not fund the election directly. Instead, it made a grant to a non-government organization, Na'i Aupuni.

The legal issues in both cases — Akana and Akina — are too complicated to be discussed comprehensively in this commentary. The point, however, is simple. The people of Hawaii need clarification to a fundamental question: What exactly *is* OHA?

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