

2012 NNALSA Moot Court Question

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Governor of Molokini, et al. v. Secretary of the Interior, et al., No. 12-345

The Native Molokinians are the only Native group within the boundaries of the Pacific islands that currently comprise the State of Molokini. The ancestors of the Native Molokinians were the original inhabitants of Molokini, and they exercised independent, self-governing authority in Molokini for millennia before sustained contact with non-Molokinians began in 1778. Although the Native Molokinians historically operated an organized and highly sophisticated government that, at one point, transacted through treaties with the United States, France, the United Kingdom, and other international powers, their government was decimated at the hands of United States troops in the late nineteenth century. In 1898, Molokini was incorporated as a territory of the United States.

In 1921, the United States Congress enacted homesteading legislation to enable Native Molokinians to return to their lands in order to fully support their self-sufficiency and self-determination. Congress passed the 1921 Molokinian Homestead Act in order to (1) establish a permanent land base for the benefit and use of Native Molokinians, and (2) prevent alienation of the fee title to the lands set aside under the Act so that the lands would always be held in trust for continued use by Native Molokinians in perpetuity. At the time of the passage of the Act, the Secretary of the Interior asserted that the Native Molokinians were wards of the United States and the United States government was, in a sense, the Native Molokinians' trustee. The Act itself has also been interpreted as creating a special trust relationship between the federal government and the Native Molokinians. The 1921 Act defines a Native Molokinian as "any descendant of not less than one-half part of the blood of the races inhabiting Molokini previous to 1778" and limits homesteading benefits solely to this group of people.

When the Territory of Molokini became a state in 1959, during the "termination era" of federal Indian policy, the United States transferred its trust obligations under the 1921 Molokinian Homestead Act to the new Molokini State government, consistent with the transfer of federal jurisdiction to the several states that characterized the period. From that point forward, the Molokini State government administered the trust, but the federal government retained oversight authority, the authority to amend the 1921 Molokinian Homestead Act, and the right to sue on behalf of Native Molokinians for breach of the trust.

In 2011, the Molokini State Legislature passed Act 200, a measure that formally recognizes the Native Molokinian people as the only indigenous, aboriginal, maoli¹ people of Molokini and establishes a Native Molokinian Roll Commission responsible

¹ Maoli means "native, indigenous, aboriginal, genuine, true, real" in the Molokinian language.

for preparing and maintaining a roll of “qualified Native Molokinians.” The legislative findings in Act 200 specify that the State of Molokini has a “unique legal and political relationship” with the Native Molokinian people. Under the Act, “qualified Native Molokinian” means an individual who the Native Molokinian Roll Commission determines has satisfied the following criteria and who makes a written statement certifying that the individual:

- A. Is:
 - 1. An individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Molokini Islands, the area that now constitutes the State of Molokini; or
 - 2. An individual who is one of the indigenous, Native people of Molokini and who was eligible in 1921 for the programs authorized by the Molokinian Homestead Act, or a direct lineal descendant of that individual;
- B. Has maintained a significant cultural, social, or civic connection to the Native Molokinian community and wishes to participate in the organization of the Native Molokinian governing entity; and
- C. Is eighteen years of age or older.

The Act explains that, “the members of the qualified Native Molokinian roll, and their descendants, shall be acknowledged by the State of Molokini as the indigenous, aboriginal, maoli population of Molokini.”

In 2014, the Native Molokinian Roll Commission completes its work of compiling the roll of qualified Native Molokinians and dissolves as required by Act 200. The enrolled qualified Native Molokinians, acting independently from any state government agency, convene a series of meetings to discuss fundamental nation-building questions, including who may participate in the nation-building process.

Through a referendum vote, the enrolled qualified Native Molokinians decide that:

- (1) all qualified Native Molokinians, no matter their blood quantum, will be eligible to participate in the nation-building process; and
- (2) all adopted children of qualified Native Molokinians, whether or not of Native Molokinian ancestry, who have reached the age of 18 will be eligible to participate in the nation-building process if they have maintained a significant cultural, social, or civic connection to the Native Molokinian community and wish to participate in the organization of the Native Molokinian governing entity. (The decision to include adopted children was made out respect for and deference to the long-standing, traditional Native Molokinian practice of considering adopted children to be descendants of their adoptive parents, even if those children lack Native Molokinian “blood.”)

The resulting Native Molokinian body politic adopts a constitution, elects leadership, and begins the process of petitioning the federal government for federal recognition of its reorganized government through the Office of Federal Acknowledgment's administrative recognition process, which in 2013 was substantially amended and expanded to include as "Indian groups" all Native peoples within the asserted territory of the United States, including the Native peoples of Molokini, Hawai'i, Guam, the Northern Mariana Islands, American Samoa, Puerto Rico and the United States Virgin Islands. After reviewing the Native Molokinians' petition, the OFA determines that the Native Molokinians meet all of the criteria for federal recognition, including the requirement that the Native Molokinians' "membership consists of individuals who descend from a historical Indian tribe."

After receiving recognition through the OFA process in January 2016, the "Native Molokinian Government" purchases 50,000 acres of former Native Molokinian lands that had previously been sold to a large sugar plantation. Prior to its bankruptcy, the now defunct sugar plantation had planned to build a luxury development on the lands, and the Native Molokinian Government now wants to build homes for its enrolled members, as well as open a school, hospital, and new government building that would house the executive, legislative, and judicial offices of the government. Accordingly, the Native Molokinian Government petitions the Secretary of the Interior to take the 50,000 acres into trust pursuant to 25 U.S.C. § 465. In light of the 2013 amendments to the Indian Reorganization Act, which reaffirmed the Secretary's authority to take land into trust for "all federally recognized Indian tribes," the Secretary agrees to consider the Native Molokinian Government's petition.

In January 2017, the State of Molokini's Legislature passes Act 100, repudiating the reorganization of the Native Molokinian Government on the basis that its membership does not consist solely of those identified in Act 200 (2011) as "qualified Native Molokinians." Act 100 also confirms that the "qualified Native Molokinians" that were enrolled by the Native Molokinian Roll Commission pursuant to Act 200 are the only indigenous, aboriginal, maoli people of Molokini.

Simultaneously in January 2017, seizing upon an opportunity to use the controversial issue of blood quantum to divide Native Molokinians and frustrate their efforts to achieve self-governance, the State of Molokini's newly-elected U.S. senator, whose party has recently taken control of the United States Senate and House, as well as the White House, pushes through the United States Congress the "Molokini Nation Reorganization Act," a piece of federal legislation that immediately confers federal recognition exclusively to the group of Native Molokinians eligible to receive benefits under the Molokinian Homestead Act of 1921 who are actually residing on homestead land. The Senator justifies this action as necessary to ensure that the State of Molokini's interests are protected and to "check this outrageous jurisdiction and land grab" by the administratively recognized Native Molokinian Government. The Molokini Nation

Reorganization Act recognizes the Molokini Nation as “the representative sovereign governing body of the Native Molokinian people” and “the single federally recognized Native Molokinian governing entity.”

In January 2017, immediately after the passage of the Molokini Nation Reorganization Act, the outgoing Secretary of the Interior informs the State of Molokini of her acceptance of the Native Molokinian Government’s 50,000 acres into trust pursuant to 25 U.S.C. § 465. Meanwhile, a small group of Native Molokinians who meet the blood quantum eligibility requirements under the Molokinian Homestead Act of 1921 hold an organizational meeting, adopt a constitution, and elect the leaders of the reorganized Molokini Nation pursuant to the Molokini Nation Reorganization Act.

The State of Molokini appeals the Secretary’s decision to take the 50,000 acres into trust to the Interior Board of Indian Appeals, which upholds the Secretary’s decision. On subsequent appeal, the United States District Court for the District of Molokini also upholds the Secretary’s decision to take land into trust for the Native Molokinian Government. The United States Court of Appeals for the Ninth Circuit, likewise, upholds the Secretary’s decision on the grounds that:

- (1) The Secretary has the authority, under 25 U.S.C. § 465, to acquire land and hold it in trust for the recognized Native Molokinian Government because the Native Molokinian Government still constitutes a “federally recognized” Indian tribe, despite Congress’ subsequent, conflicting recognition of the Molokini Nation; and
- (2) The Native Molokinian Government was entitled to receive federal acknowledgment through the administrative OFA process, even though the Native Molokinian Government extends membership to adopted children without Native Molokinian “blood,” because Native Molokinians possess the inherent authority to define “descendancy,” for membership purposes, to include persons who are not racially members of the group where there is a strong cultural basis for the inclusion; and the OFA has the authority to recognize a group so constituted.²

The State of Molokini files a petition for certiorari in the U.S. Supreme Court, which is granted.

² The State has conceded that the Native Molokinian Government meets all other criteria for acknowledgment through the OFA process, including classification as an “Indian group” and demonstration of government continuity.