

**Lake v. Ohana Military Communities, LLC**—Federal court jurisdiction did not exist over suit alleging multiple statutory and torts claims under Hawaii law against company that operated military housing project

The United States Navy and Hawai‘i Military Communities, LLC formed Ohana Military Communities, LLC in 2004 as a public private venture in which, inter alia, the Ohana was assigned the rights and obligations to a 50-year ground lease subject to an operating agreement between the Navy and HMC. The agreement gave HMC “sole and exclusive management and control” over Ohana’s construction of military housing on the Marine Corps Base Hawaii (MCBH). Because of the land’s pesticide contamination, Ohana developed a pesticide soil management plan that provided for it to notify residents of potential contact with contaminated soil but failed to so inform existing or potential tenants. Its community handbook instead represented that families could safely work and play in their yards.

In 2016, seven residents sued Ohana and an associated management company in state court alleging 11 claims under Hawaii law. The defendants removed the case to federal court, alleging jurisdiction under 28 U.S.C. §§ 1331 and 1442(a)(2). The district court denied a motion to remand and eventually granted the defendants’ motions to dismiss and for summary judgment as to all but certain nuisance claims. *See, e.g., Lake v. Ohana Cmty., LLC*, Civ. No. 16-00555 LEK, 2019 WL 4794536 (D. Haw. Sept. 30, 2019). After the parties stipulated to those claims’ dismissal, the plaintiffs appealed. The Ninth Circuit reversed on subject-matter jurisdiction grounds, vacated all district court orders, and remanded with instructions to remand the case to state court. *Lake v. Ohana Military Cmty., LLC*, No. 19-17340, 2021 WL 4396693 (9th Cir. Sept. 27, 2021).

Of central importance to the panel’s decision as to the lack of § 1331 jurisdiction was the Hawaii Admission Act. Under it:

The United States reserved “the power of exclusive legislation, as provided by” the Enclave Clause of the U.S. Constitution, over “tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes. ... Before Hawaii’s admission, MCBH was both owned by the United States and used for military purposes. ... [¶] However, the Admission Act also granted Hawaii concurrent jurisdiction over these lands. Section 16(b) provided that the federal reservation of authority “shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent [Hawaii] from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority.” Congress then added a second proviso “[t]hat the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense.”

Neither Congress nor the President had taken any action to modify concurrent jurisdiction as to MCBH. The panel, “[c]onsidering the whole structure” of the Admission Act, held that Hawaii possessed concurrent jurisdiction—a conclusion that it deemed supported by judicial precedent and federal government practice. The panel further held that “[b]ecause Hawaii maintained broad and ongoing concurrent legislative jurisdiction over MCBH, there is no reason to treat the resulting

state laws as if they were assimilated into federal law.” It therefore rejected the defendants’ contention that “any event occurring on a federal military installation presents a federal question[,]” reasoning that “[t]he federalization of then-existing state-law rules upon the creation of a federal enclave rests on the premise that, precisely because Congress has excluded all exercise of state jurisdiction, the only laws that can apply are federal, and federal law will be deemed to incorporate existing state law in order to ensure ‘that no area however small will be left without a developed legal system for private rights.’”

Turning to federal officer or agency jurisdiction under § 1442, the panel found unpersuasive the defendants’ position that the Navy exercised significant control over the MCBH housing and thereby created a sufficient causal nexus between it and Ohana for “federal officer” purposes. The panel responded: “Defendants do not argue that the Navy had control over Ohana’s decision whether to disclose the pesticide contamination. Indeed, HMC (not the Navy) has ‘sole and exclusive management and control’ of Ohana. Thus, the ‘central issue’ in the causal nexus analysis—whether a federal officer directed the defendant to take the action challenged—is unmet.” Nor did the defendants establish Ohana’s status as a “federal agency” under the six-factor test for such status laid out in 28 U.S.C. § 451. This was so, the panel explained, since Ohana’s provision of on-base housing in itself was likely not a governmental function; the Navy’s involvement in Ohana’s management was limited; and no evidence indicated that the Navy financed Ohana’s operations.

Finally, the panel declined to apply *Gunn v. Minton*, 568 U.S. 251 (2013), under which “a special and small category’ of state law cases may be brought in federal court” simply “because Plaintiffs’ causes of action turn on the safety of military housing”:

[W]e have held a federal issue is not necessarily raised where the “actions are based entirely on [state] causes of action ..., each of which does not, on its face, turn on a federal issue.” ... For jurisdiction to exist under the *Gunn* test, a “‘right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action.’”

But here, “Defendants allege only that a policy interest—the safety of military housing—is implicated, and they point to no question of federal law.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/27/19-17340.pdf>