

Continental Gets Go-Ahead

Excerpts From Micro Ruling

1. Status of TT unclear, but it's not a foreign country.
2. A Congressional act provides that governments of territories are excluded from judicial review.
3. The Department of Interior was not involved in this matter.

Following are excerpts from the decision in Honolulu yesterday by Federal Judge Samuel P. King in the suit brought by Saipanese residents against Continental Airlines. Reporters in Honolulu, who obtained copies of the 32-page decision while complete texts were unavailable on Guam and Saipan last night, cautioned that the full text was highly complex and that portions of it, out of context, might be misleading.

But the following excerpts offer portions of the judge's argument on several key points, particularly relating to the status of the Trust Territory.

...it is my opinion that the United States exercises a maximum degree of control which is inconsistent with the assertion that the Trust Territory is a foreign country. My decision is reinforced by the fact that there does not appear to be any significant delegation of authority to the citizens of the Trust Territory. The United States, acting through the Secretary of the Interior, controls the High Commissioner and retains an absolute veto over all legislation enacted by the Congress of Micronesia. Accordingly, without determining exactly what status the Trust Territory occupies, I hold that it is not a foreign country entitled to immunity from suits in United States courts.

"While avoiding the Trust Territory government's claim of sovereign immunity as the government of a foreign country, plaintiffs cannot also avoid the Administrative Procedures Act's exclusion of 'the governments of the territories, or possessions of the United States' from judicial review....admittedly, the Trust Territory is technically not a territory or possession because the United States does not have sovereignty. This distinction is immaterial, however, because the legislative history of the APA makes it clear that Congress intended to exclude from judicial review all governments created pursuant to the authority of Congress."

"Having concluded that the Trust Territory government is except from judicial review under the APA, it follows that it is also immune under the provisions of NEPA (National Environmental Protection Act.) No reason is apparent—and plaintiffs cite none—why the same rules on the scope or review should not be applied. Accordingly, the action of High Commissioner Johnson approving and executing the lease agreement is not "Federal" action within the meaning of NEPA."

A footnote: "On the basis of affidavits submitted by the parties and testimony at the hearing on the motion for a temporary restraining order and again at the hearing on the motions to dismiss, it is clear that plaintiffs' allegations that the decision to approve the lease agreement was made or dictated by officials in the Department of the Interior are without foundation. The lease approval was a "local" decision of the High Commissioner acting within the scope of his duties as

chief executive of the Trust Territory government. The officials of the Interior Department did not negotiate, counsel, advise or participate in the decision. Nor was the lease ever sent to the department for approval or concurrence in any form. Because unwarranted inferences of fact may not preclude dismissal...this allegation has not been admitted for the purposes of these motions."

"Defendants claim that the action against High

Trust Territory and is therefore barred by sovereign immunity. To the extent that this claim is based on their previous argument that the Trust Territory is a foreign country, it has already been rejected. However, defendants also argue that the Trust Territory possesses attributes of sovereignty equivalent to a state government....

"It appears to be clear that there are degrees or attributes of sovereignty, and that a government may be entitled to an enjoy some of these attributes without necessarily having all of them."

"As previously discussed, the trusteeship agreement gives the United States full powers of legislation in the Trust Territory. With respect to local matters, this power has been delegated to the Congress of Micronesia along the lines followed in organizing the territories and possessions of the United States. On the basis of the principles outlined in Kawanakoa, I believe that this delegation of local legislative power gave the Trust Territory which has been referred to as "quasi-sovereignty", carrying with it the attribute of immunity from suit without its own consent.

This immunity, however, cannot be extended to include suits under a statute of the United States applicable in the Trust Territory. Such statutes confer rights which are not dependent on local authority—indeed, they supersede local law—and thus are not within the rule set out in Kawanakoa.

"Plaintiffs allege that under the trusteeship agreement, particularly Article 5(2) which states that 'the administering authority shall protect the inhabitants against the loss of their lands and resources', the United States undertook a "sacred trust" which requires compliance with NEPA in all major actions affecting the environment....

I conclude with Judge Keech in Pauling McElroy...that "Administration of territories whose people yet attained a full measure of self-government... the principle that the interests of the inhabitants of self-government recognize the principle

paramount, and accept as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants of these territories...

The provisions of the...trusteeship agreement for the Trust Territory of the Pacific Islands...are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.

* * *

"After extensive consideration, it is my reluctant conclusion that (1) the Trust Territory government is not a Federal agency subject to judicial review under the APA or NEPA, and (2) the trusteeship agreement does not vest plaintiffs with individual legal rights which they may assert in this court. For these reasons, jurisdiction is lacking and the motions to dismiss are granted. The other grounds urged in support of dismissal are without merit and are rejected."