

Edward TEMENGIL, et al.
vs.
TRUST TERRITORY OF THE
PACIFIC ISLANDS, et al.

Civil Action No. 81-0006
District Court NMI

Decided February 4, 1985

1. Civil Procedure - Involuntary Dismissal - Subject Matter Jurisdiction

A motion to dismiss which relies on a defense of sovereign immunity is properly under Federal Rule 12(b)(1) as a motion to dismiss for lack of subject matter jurisdiction. Fed.R.Civ.P. 12 (b) (1).

2. Civil Procedure - Involuntary Dismissal - Subject Matter Jurisdiction

The defense of lack of subject matter jurisdiction is preserved against waiver.

3. Civil Procedure - Involuntary Dismissal - Subject Matter Jurisdiction

When a defendant by motion raises a question of subject matter jurisdiction in a manner otherwise untimely the motion as a "suggestion" of no jurisdiction permissible under Rule 12(h)(3). Fed.R. Civ.P. 12(h)(3)

4. Courts - Waiver of Issues

Court has the inherent power to consider certain legal issues as required by the interests of justice despite the failure of the parties to preserve them in a timely fashion.

5. Sovereign Immunity - Trust Territory

The Trust Territory is not a sovereign entity.

6. Sovereign Immunity

One government's claim of sovereign or governmental immunity need not be recognized by the courts of another government.

7. Sovereign Immunity - Trust Territory

The Trust Territory government is a subordinate and administrative separate entity in relation to the United States government and thus its claimed common law sovereign immunity does not extend into federal court.

8. Sovereign Immunity - Trust Territory

Any sovereign immunity which the Trust Territory may be entitled to claim does not insulate it from violation of Federal laws; specifically, the Trust Territory is subject to liability pursuant to federal civil for constitutional violations. 42 U.S.C. §1983.

9. Sovereign Immunity - Waiver

Claims of sovereign immunity cease to be operative once the government has answered the complaint.

10. Constitutional Law - Eleventh Amendment

The Eleventh Amendment embodies principles of sovereignty so far as that concept relates to the States and to the federal system created by the Constitution; however, Eleventh Amendment immunity and sovereign immunity remain separate independent doctrines. U.S. Const., Amend. 11.

11. Constitutional Law - Eleventh Amendment

The protection afforded by the Eleventh Amendment is available only to states. U.S. Const., Amend. 11.

12. Constitutional Law - Eleventh Amendment - Trust Territory

Even should the Trust Territory possess immunity in its own courts attributable to some degree of sovereignty, such immunity does not extend into federal court by way of the Eleventh Amendment. U.S. Const., Amend. 11.

13 Constitutional Law - Eleventh Amendment

The terms of the Eleventh Amendment are of no force and effect in the Commonwealth.

14. Sovereign Immunity - United States

In determining the effect of a judgment on the United States public treasury for sovereign immunity purposes, the court should look not to the heading on the complaint, but to the entity against whom relief is actually sought.

15. Sovereign Immunity - United States

An action against a federally funded entity is not barred by sovereign immunity where the entity's monies are severed from Treasury funds and Treasury control.

16. Trust Territory

The Trust Territory government is a subordinate and administratively separate entity in relation to the United States Government.

17. Trust Territory - Funding

Funds appropriated to the Department of the Interior as grants to the Trust Territory lose their character as federal funds when paid over and mingled with Trust Territory government local revenues.

18. Sovereign Immunity - Trust Territory

A money judgment sought against the Trust Territory government will not have a direct effect on the federal treasury and is therefore not an action against the United States, which would be barred by sovereign immunity.

19. Sovereign Immunity - United States - Agents

Principles of sovereign immunity do not bar an action for monetary relief against agents of the United States.

20. Trusteeship - United States

The Trusteeship Agreement imposes upon the United States fiduciary obligations and subjects the United States to monetary liability for the damages resulting from the breach of those duties.

21. Civil Rights - Damages - Punitive

Punitive damages may be assessed against individuals in actions brought under federal civil rights statute. 42 U.S.C. §§1981, §1983.

22. Civil Rights - Damages - Punitive

Punitive damages may not be assessed against municipalities in §1983 actions. 42 U.S.C. §1983.

23. Civil Rights - Damages - Punitive

The Trust Territory Government is not liable for punitive damages under §1983. 42 U.S.C. §1983.

24. Jury - Civil Actions

Remedies which are legal in nature but are incidental to equitable claims do not entitle a party to a jury trial.

25. Jury - Civil Actions

In employment discrimination action where plaintiffs prayed only for reinstatement and back pay, the relief was properly viewed as either equitable or as a legal remedy incidental to an equitable cause of action and accordingly not sufficient to create a right to jury trial.

FILED
Clerk
District Court

FEB 04 1984

1 UNITED STATES DISTRICT COURT ^{For The Northern Mariana Islands}
2 FOR THE By Mesump
3 NORTHERN MARIANA ISLANDS (Deputy Clerk)

4 EDWARD TEMENGIL, et.al.,) CIVIL NO. 81-0006
5)

6 Plaintiffs,)

7 vs.)

DECISION

8 TRUST TERRITORY OF THE PACIFIC)
9 ISLANDS, JANET McCOY, High)
10 Commissioner of the Trust)
11 Territory of the Pacific)
12 Islands, UNITED STATES DEPART-)
13 MENT OF THE INTERIOR, WILLIAM)
14 P. CLARK, JR.*, Secretary of)
15 the Interior, UNITED STATES OF)
16 AMERICA,)

17 Defendants.)
18)
19)
20)
21)
22)
23)
24)
25)
26)

14 The instant motions represent yet another series of
15 pretrial skirmishes in the employment discrimination class action
16 filed by current and former employees of the Trust Territory of
17 the Pacific Islands Government (hereinafter Trust Territory).
18 The background of the case is fully set forth in the Court's
19 prior decision filed March 22, 1983, Temengil v. Trust Territory
20 of the Pacific Islands, et. al., Civ. No. 81-0006 (D.N.M.I. 1983)
21 (hereinafter "Temengil I") and need not be repeated here. The
22 Trust Territory presently moves to: 1) dismiss the claims for
23 _____
24

25 *Pursuant to Federal Rule of Civil Procedure 25(d)(1), the Court
26 has substituted Secretary of the Interior William P. Clark, Jr.
in place of the original defendant official.

1 monetary damages; 2) strike the demand for punitive damages; and
2 3) strike the demand for jury trial. For the reasons stated
3 below, the Court grants the motions to strike the jury demand and
4 to strike the claim for punitive damages and denies the motion to
5 dismiss the monetary damages.

6
7 I. Motion to Dismiss

8 Plaintiffs initially raise a procedural challenge
9 regarding the propriety of this motion under Rule 12(g) of the
10 Federal Rules of Civil Procedure which reads:

11 A party who makes a motion under
12 this rule may join with it any
13 other motions herein provided for
14 and then available to him. If a
15 party makes a motion under this
16 rule but omits therefrom any
17 defense or objection then available
18 to him which this rule permits to
19 be raised by motion, he shall not
20 thereafter make a motion based on
21 the defense or objection so omit-
22 ted, except a motion as provided in
23 subdivision (h)(2) hereof on any of
24 the grounds there stated.

19 Rule 12(h)(2) provides in relevant part:

20 A defense of failure to state a
21 claim upon which relief can be
22 granted... may be made in any
23 pleading permitted or ordered under
24 Rule 7(a), or by motion for judg-
25 ment on the pleadings, or at the
26 trial on the merits.

24 Under these sections, the plaintiffs argue that the Trust Terri-
25 tory's current 12(b)(6) motion should have been consolidated with
26 its previous 12(b)(6) motion and the failure to so do bars the

1 current motion.

2 [1-3] The Trust Territory's motion, though phrased as one
3 under 12(b)(6), is more properly brought under 12(b)(1) to
4 dismiss for lack of subject matter jurisdiction as it raises a
5 defense of sovereign immunity. See 5 C. Wright and A. Miller,
6 Federal Practice and Procedure § 1350 at 139 (1983 supp.) (here-
7 after "Wright and Miller"). See also Leonhard v. Mitchell, 72
8 F.2d 709, 712 (2nd Cir. 1973), cert. denied, 42 U.S. 949, 93
9 S.Ct. 3011, 37 L.Ed.2d 1002 (1973). Accordingly, the motion is
10 treated as if brought pursuant to 12(b)(1). See Bauer v. McCoy,
11 Civ.No. 81-0019 (D.N.M.I. Jan. 22, 1982) at 18-19. Rule 12(h)(3)
12 provides:

13 Whenever it appears by suggestion
14 of the parties or otherwise that
15 the court lacks jurisdiction of the
subject matter, the court shall
dismiss the action.

16 Thus, the defense of absence of subject matter jurisdiction is
17 preserved against waiver. Fed.R.Civ.Pro. 12(h)(3) advisory
18 committee note; Augustine v. United States, 704 F.2d 1074, 1077
19 (9th Cir. 1983). When a defendant by motion raises a question of
20 subject matter jurisdiction in a manner otherwise untimely under
21 Rule 12, courts will treat the motion as a "suggestion" of no
22 jurisdiction permissible under Rule 12(h)(3). Kantor v. Comet
23 Press Books, 187 F.Supp. 321, 322 (S.D.N.Y. 1960); 5 Wright and
24 Miller § 1350 at 544-547.

25 What troubles plaintiffs here is not that the Trust
26 Territory now brings a 12(b)(1) motion subsequent to earlier Rule

1 12 motions, but that the Trust Territory is renewing a subject
2 matter challenge on grounds which could have been raised in the
3 earlier motion. There is authority to support the proposition
4 that such challenges may be renewed where it appears in the
5 course of litigation that the court is without jurisdiction.
6 See, e.g., Abdelnour v. Coggeshall & Hicks, 287 F.Supp. 135, 137
7 (S.D.N.Y. 1968). However, there is also case authority on
8 12(b)(6) motions, also unwaivable, that all supporting theories
9 must be asserted in the first motion. See, e.g., Randolph
10 Engineering v. Fredenhagen Kommandit, 476 F.Supp. 1355, 1358
11 (W.D.Penn. 1979)(the defendant should argue in the alternative in
12 support of his or her motion as "the Federal Rules do not allow a
13 party to delay a case by asserting its arguments seriatim"). The
14 Court here is torn between the desire to promote judicial economy
15 and prevent delay or dilatory tactics on the one hand and the
16 need to address important issues on the other.

17 [4] In a case such as this, the Court has broad discretion
18 to consider the issue. A court has the "inherent power... to
19 consider certain legal issues as required by the interests of
20 justice despite the failure of the parties to preserve them in a
21 timely fashion." Weaver v. Bowers, 657 F.2d 1356, 1361 (3rd Cir.
22 1981)(en banc), cert. denied, 455 U.S. 942, 102 S.Ct. 1435, 71
23 L.Ed.2d 653 (1982). The purpose of the consolidation requirement
24 is to avoid delay at the pleading stage. "Simply stated, the
25 objective of the rule is to eliminate unnecessary delay.... [A
26 party] cannot delay the filing of a responsive pleading by inter-

1 posing... defenses and objections in a piecemeal fashion." 5
2 Wright and Miller § 1384 at 837. See also Fed.R.Civ.Proc. 12(g)
3 advisory committee notes (rule intended to avoid "piecemeal
4 consideration of a case"). Courts in the past have shown reluctance
5 to dispose of significant issues on the basis of procedural
6 delinquencies. See, e.g. Printing Plate Supply Co. v. Curtis
7 Publishing Co., 278 F.Supp. 642, 645 (E.D.Penn. 1968). "This is
8 particularly the case when the... tardiness has caused... no
9 prejudice, and when the merits of the... motion have been fully
10 argued." Id.

11 The potential delay here has already occurred. The
12 plaintiffs raised their objection to the motion at the hearing,
13 eleven weeks after the motion was filed. As that matter was
14 taken under advisement, the merits of the motion have now been
15 fully briefed and argued. The court's decision now to address
16 the merits of the motion will result only in minimal additional
17 delay. In addition the timing of the motion has minimized the
18 resultant delay. The parties are conducting discovery under a
19 court approved timetable developed before the filing of the
20 motion and appear to be adhering to the schedule in good faith.
21 Thus, although the motion has undoubtedly slowed somewhat the
22 progress of the case, it has not altogether stopped the proceedings.
23

24 The Court is concerned and annoyed with the procedural
25 decisions made by the Trust Territory in renewing this motion on
26 grounds available at the time of the previous motion and warns

1 that such practices are greatly discouraged and will not be
2 tolerated in the future. However, under the circumstances of
3 this case and in the interests of expedience and justice, the
4 Court will address the Trust Territory's renewed motion.

5 The Trust Territory's motion to dismiss rests essen-
6 tially on three grounds. First, the Trust Territory argues that
7 as a territorial government, it possesses a common law sovereign
8 immunity which shields it from unconsented suits for monetary
9 damages. Alternatively, the Trust Territory argues that the
10 Eleventh Amendment to the United States Constitution prevents the
11 federal judiciary from deciding actions against the Trust Terri-
12 tory. Lastly, it is argued that even should this Court have
13 jurisdiction over the Trust Territory on the asserted claims, any
14 judgment cannot include monetary relief as such a judgment would
15 necessarily be paid out of the United States Treasury and is ac-
16 cordingly barred by the sovereign immunity of the United States.

17 18 A. Common Law Immunity

19 The Trust Territory argues that it possesses an immuni-
20 ty from suit as an inherent attribute of its governmental status.
21 This position is supported essentially by analogy. The Trust
22 Territory directs the Court's attention to decisions of territo-
23 rial courts which have recognized the sovereign immunity of such
24 possessions and territories as Puerto Rico, the Virgin Islands
25 and Guam. It follows, according to the argument, that the Trust
26 Territory as well possesses some inherent immunity.

1 [5] The Trust Territory's position is significantly weak-
2 ened by its failure to discuss prior statements by this Court and
3 by the Ninth Circuit regarding the nature and status of the Trust
4 Territory Government. As an initial matter, this Court has not
5 recognized in the Government of the Trust Territory a sovereign
6 status which approaches that possessed by a state of the union.
7 "Whatever sovereignty is, prior decisions leave no doubt that it
8 is something to which the Trust Territory's inchoate legal status
9 and authority do not amount." Sablan Construction Co. v. Govern-
10 ment of the Trust Territory of the Pacific Islands, 526 F.Supp.
11 135, 140 (D.N.M.I.(App.Div.)1981). However, more important than
12 the degree to which the Trust Territory can be considered sover-
13 eign is the relevance and effect of such attributes on this
14 action.

15 [6,7] It is now settled that one government's claim of
16 sovereign or governmental immunity need not be recognized by the
17 courts of another government. In Nevada v. Hall, 440 U.S. 410,
18 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), the Supreme Court held that
19 the State of Nevada could not claim immunity from an action by a
20 California resident in a California court for tort damages. The
21 Court, quoting Justice Holmes, found that the doctrine of sover-
22 eign immunity is founded "on the logical and practical ground
23 that there can be no legal right as against the authority that
24 makes the law on which the right depends." 99 S.Ct. at 1186,
25 quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct.
26 526, 527, 51 L.Ed. 834 (1907). The Court concluded that "[t]his

1 explanation adequately supports the conclusion that no sovereign
2 may be sued in its own courts without its consent, but it affords
3 no support for a claim of immunity in another sovereign's
4 courts." 99 S.Ct. at 1186. Based on this, this Court has
5 already concluded that Nevada v. Hall precludes the assertion of
6 sovereign immunity defenses by the Trust Territory in this Court.
7 The "Trust Territory government is a subordinate and administra-
8 tively separate entity in relation to the United States govern-
9 ment" and thus its claimed common law sovereign immunity does not
10 extend into federal court. Temengil I at 36. See also Bauer v.
11 McCoy, supra p.3, at 24 n.49. The Trust Territory's attempt to
12 limit the rational of Nevada v. Hall to state courts is without
13 foundation and unpersuasive.

14 [8] Moreover, this Court has already held that a claimed
15 governmental immunity cannot insulate the Trust Territory from
16 violations of federal laws. Temengil I at 36. See also People
17 of Saipan v. United States Department of the Interior, 356
18 F.Supp. 645, 658-659 (D.Haw. 1973), aff'd, 502 F.2d 90 (9th Cir.
19 1974), cert. denied, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761
20 (1975). (Trust Territory's sovereign immunity "cannot be
21 extended to include suits under a statute of the United States
22 applicable in the Trust Territory. Such statutes confer rights
23 which are not dependent on local authority--indeed, they super-
24 sede local law"). Specifically, this Court has found the Trust
25 Territory subject to liability for violations of § 1983. "The
26 Trust Territory government clearly is a "body politic" and

1 it does not possess any federal constitutional or statutory
2 immunity from § 1983 claims. Therefore, under Monell's [Monell
3 v. Department of Social Services of City of New York, 436 U.S.
4 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] rationale both the
5 Trust Territory government and the High Commissioner must be
6 considered to be "persons" against whom § 1983 actions may lie."
7 Temengil I at 82. Accordingly, the Trust Territory's common law
8 sovereign immunity claims are rejected.^{1/}

9
10 B. Eleventh Amendment Immunity

11 The Trust Territory argues that the Eleventh Amendment
12 to the United States Constitution prohibits the exercise of
13 federal jurisdiction over plaintiffs' monetary claims. The
14 Amendment reads:

15 The Judicial power of the
16 United States shall not be
17 construed to extend to any suit in law
18 or equity, commenced or prosecuted
19 against one of the United States by
20 Citizens of another State, or by
21 Citizens or Subjects of any Foreign
22 State.

21 [9]

22 ^{1/} The Trust Territory's position is also rejected on a procedural
23 basis. Claims of sovereign immunity cease to be operative once
24 the government has answered the complaint. Richardson v.
25 Fajardo Sugar Co., 241 U.S. 44, 47, 36 S.Ct. 476, 477, 60 L.Ed.
26 879, 880 (1916). See also People of Porto Rico v. Ramos, 232
U.S. 627, 631, 34 S.Ct. 461, 462, 58 L.Ed. 763, 765 (1914)
(immunity disappears where territorial attorney general
petitioned to be added as a third-party defendant). The Trust
Territory filed its answer on October 15, 1982.

1 There has been considerable confusion regarding the
2 nature and scope of the Eleventh Amendment since its ratification
3 nearly 200 years ago. Article III of the United States Constitu-
4 tion defines the federal judicial power to extend to enumerated
5 cases and controversies, among which are included "controversies
6 between a State and Citizens of another State." In Chisolm v.
7 Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), two citizens
8 of South Carolina brought an action against the State of Georgia
9 for alleged acts in contravention of the "contracts clause" of
10 the United States Constitution. The Supreme Court, per Justice
11 Marshall, held that Article III allowed the exercise of federal
12 jurisdiction where a state was a defendant as well as where it
13 was a plaintiff. The response of the states to the Chisolm
14 decision was immediate and uniform: the federal judicial power
15 was not to extend to cases where a State was made a defendant.
16 See L. Tribe, American Constitutional Law at 130 (1977). Within
17 five years, the Eleventh Amendment, embodying those sentiments,
18 was passed by Congress and ratified by the States.

19 The Eleventh Amendment has not been accorded a strict
20 or literal interpretation. Its effects extend well beyond the
21 plain meaning of its language. Civil Actions Against State
22 Government at 163 (Shepard's/McGraw-Hill 1982)). Thus, despite
23 its language which appears to limit federal judicial power only
24 where the action is commenced by citizens of another state or of
25 a foreign state, the amendment has been read to preclude federal
26 suits against states by citizens of the same state, Hans v. State

1 of Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), by a
2 foreign state, Principality of Monaco v. State of Mississippi,
3 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934) and by federal
4 corporations. Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919, 44
5 L.Ed. 1140 (1900).

6 The Trust Territory, in light of this historic trend of
7 expansive interpretation, would have this Court read the Amend-
8 ment to embody the "broader and more ancient doctrine of sover-
9 eign immunity." Trust Territory Memorandum in Support of Motions
10 at 13 (hereinafter Trust Territory Memorandum). Reiterating its
11 earlier arguments of inherent sovereign immunity, the Trust
12 Territory suggests that the Eleventh Amendment be interpreted to
13 protect the Trust Territory from suit in federal court. This
14 strained reading proves too much.

15 [10] The Eleventh Amendment embodies principles of sover-
16 eignty so far as that concept relates to the States and to the
17 federal system created by the Constitution; however, Eleventh
18 Amendment immunity and sovereign immunity remain separate,
19 independent doctrines. See L. Wolcher, Sovereign Immunity and the
20 Supremacy Clause: Damages Against States in Their Own Courts for
21 Constitutional Violations, 69 Cal.L.Rev. 189, 236 (1981). In
22 attempting to understand the Amendment, it is important to
23 remember the historical evolution of the Union government.
24 Originally, the States were viewed as independent sovereigns,
25 each possessing attributes of sovereignty. W. Fletcher, A
26 Historical Interpretation of the Eleventh Amendment: A Narrow

1 Construction of an Affirmative Grant of Jurisdiction Rather than
2 a Prohibition Against Jurisdiction, 35 Stan.L.Rev. 1033, 1065
3 (1983). In fact, so firm was this belief that some states went
4 so far as to conduct their own foreign affairs. Fletcher, supra,
5 at 1068 note 156. When the Constitution was adopted, a new
6 political entity had been created. The new union was vested with
7 the attributes of a sovereign for many purposes such as the
8 conduct of war and foreign relations, the regulation of commerce
9 among the states and the maintenance of a national treasury.
10 Necessarily, this sovereignty was derived from that which previ-
11 ously had been attributed to the states. Whether one views the
12 constitutional process as the voluntary relinquishment by the
13 states of certain aspects of their sovereignty or an act by the
14 people revoking grants of power originally given the States and
15 then vesting the same in the federal government, the result is
16 the same: the federal government possessed attributes of sover-
17 eignty which had previously belonged to the States. See Tribe,
18 supra p.10, at 130-131 (states surrendered sovereignty to a
19 limited but certain extent); Fletcher, supra p.11, at 1065-1069
20 (people revoked authority given to the states and conferred same
21 on the federal government).

22 In Article III, then, the sovereign immunity enjoyed by
23 the States was diminished to the enumerated extent. The notes of
24 the Constitutional Convention, see Hans v. Louisiana, 10 S.Ct. at
25 506, and the reaction to Chisolm make it fairly clear that the
26 states and the people did not intend Article III to give the

1 federal courts jurisdiction over the states as defendants.
2 "Eleventh Amendment jurisprudence has left no doubt that the
3 amendment not only reversed Chisolm, but also countermanded any
4 judicial inclination to interpret Article III as a self-executing
5 abrogation of state immunity from suit, thereby reinstating the
6 original understanding that the states surrendered sovereign
7 immunity only to the extent inherent 'in the acceptance of the
8 constitutional plan.'" Tribe, supra p.10, at 130-131, quoting
9 Monaco v. Mississippi, 54 S.Ct. at 751. Thus, the Eleventh
10 Amendment simply reaffirmed the principles of the federal system
11 and the integrity of state sovereignty. "It is therefore not
12 surprising that the Supreme Court... has focused not on the
13 language of the Eleventh Amendment, but on the concept of sover-
14 eign immunity of which it is a reminder." Tribe, at 131.

15 The Supreme Court, in its discussions of sovereign
16 immunity under the Eleventh Amendment has limited its decisions
17 to that sovereignty maintained by the States under the federal
18 system. See, e.g., Hans v. Louisiana, 10 S.Ct. at 506-507 (the
19 Court looked behind the Amendment to the Constitutional Conven-
20 tion debates for illumination of the principles supporting
21 federal judicial power over the states). In Monaco v. Missis-
22 issippi, Chief Justice Hughes wrote that behind the Amendment "are
23 postulates which limit and control." 54 S.Ct. at 748. The Trust
24 Territory reads this language to encompass all forms of sovereign
25 immunity. However, the opinion was not so broad, but limited
26 itself to the sovereignty enjoyed by the States. "There is also

1 the postulate that States of the Union, still possessing attri-
2 butes of sovereignty, [footnote omitted] shall be immune from
3 suits, without their consent, save where there has been 'a
4 surrender of this immunity in the plan of the convention.'" Id.,
5 quoting The Federalist No. 81. Most recently, in Pennhurst State
6 School and Hospital v. Halderman, ___ U.S. ___, 104 S.Ct. 900,
7 79 L.Ed.2d 67 (1984), a case also cited by the movants in support
8 of their liberal reading of the Eleventh Amendment, the Supreme
9 Court reiterated its previous pronouncements that discussions of
10 sovereignty and immunity as they relate to the Eleventh Amendment
11 are necessarily restricted to the States. "Our reluctance to
12 infer that a State's immunity from suit in federal court has been
13 negated stems from recognition of the vital role of sovereign
14 immunity in our federal system." 104 S.Ct. at 907. "Accordingly,"
15 the Court concluded, "in deciding this case we must be guided by
16 '[t]he principles of federalism that inform Eleventh Amendment
17 doctrine.'" 104 S.Ct. at 908, quoting Hutto v. Finney, 437 U.S.
18 678, 691, 98 S.Ct. 2565, 2573-2574, 57 L.Ed.2d 522 (1978) (empha-
19 sis added).

20 || It is clear then, that, contrary to the assertions of
21 the Trust Territory, Eleventh Amendment doctrine is not triggered
22 every time a political body summoned into federal court claims
23 sovereignty and its accompanying immunity. Rather, the Supreme
24 Court has consistently looked to the "principles of federalism"
25 behind the constitutional system of government. The Court has
26 refused to extend, for example, eleventh amendment protection to

1 political subdivisions of a state. Mt. Healthy City School
2 District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568,
3 50 L.Ed.2d 471 (1977). And in the most recent case presenting an
4 opportunity to extend Eleventh Amendment immunity beyond bona
5 fide states, the Supreme Court refused, rejecting the petition-
6 ers' "expansive reading of the Amendment." Lake Country Estates
7 v. Tahoe Regional Planning Agency, 440 U.S. 391, 400, 99 S.Ct.
8 1171, 1177, 59 L.Ed.2d 401, 410, (1979). "By its terms," Justice
9 Stevens concluded for the majority, "the protection afforded by
10 that Amendment is only available to 'one of the several States.'" Id.

12 [12] In conclusion, even should the Trust Territory possess
13 immunity in its own courts attributable to some degree of sover-
14 eignty, such immunity does not extend into this Court by way of
15 the Eleventh Amendment.^{2/}

16 [13] There exists as well another basis which independently
17 supports today's decision rejecting the Trust Territory's Elev-
18 enth Amendment claims. This Court has held previously that as
19 the drafters of the Covenant omitted the Eleventh Amendment from
20 Section 501, the terms of the Amendment are of no force and

22
23 ^{2/}This conclusion comports with that reached by the Appellate
24 Division in Sablan Construction in which Judge Soll stated that
25 "[t]he Trust Territory's qualified sovereignty lacks the
26 constitutional protection and autonomy of state government
sovereignty." 526 F.Supp. at 140 n.18. See also Meaamaile v.
American Samoa, 550 F.Supp 1227, 1231 n.5 (D.Haw 1982) ("the
Eleventh Amendment... protects only states, not territories").

1 effect in the Commonwealth. Thus, the Commonwealth of the
2 Northern Mariana Islands is unable to challenge the court's
3 jurisdiction based on the Amendment. Island Aviation, Inc. v.
4 Mariana Islands Airport Authority, Civ.No. 81-0069 (D.N.M.I.
5 Memorandum Opinion filed May 26, 1983). Likewise, a State of the
6 Union is similarly prevented from successfully asserting the
7 Eleventh Amendment as a jurisdictional bar in this Court.
8 Kumagai v. Commonwealth of the Northern Mariana Islands, et. al,
9 Civ.No. 81-0039 (D.N.M.I. Memorandum Opinion filed July 8,
10 1983)(State of Hawaii's motion to dismiss based on Eleventh
11 Amendment denied). It follows under the reasoning of these
12 decisions that similar arguments advanced by the Trust Territory
13 must be rejected.

14 15 16 C. Monetary Damages

17 1. Character of Trust Territory Funds

18 The Trust Territory also attempts to raise as a bar to
19 plaintiffs' claims for monetary damages the sovereign immunity of
20 the United States. The Trust Territory argues that a significant
21 damage award against the Trust Territory Government would require
22 a supplemental request for funds from the United States, and
23 would thus have a "direct effect on the federal treasury." Trust
24 Territory Memorandum at 20. Such an impact on the federal
25 treasury, the Trust Territory concludes, renders the action one
26 against the United States which is barred by absence of consent.

1 [4] The "effects test" is considered a corollary to the
2 doctrine of sovereign immunity. A court has no jurisdiction if
3 the judgment sought would expend itself on the public treasury or
4 interfere with public administration. Land v. Dollar, 330 U.S.
5 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); Dugan v. Rank, 372 U.S.
6 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). In addressing this
7 issue, the court should look not to the heading on the complaint,
8 but to the entity against whom relief is actually sought. Larson
9 v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct.
10 1457, 93 L.Ed. 1628 (1949). The Trust Territory argues that since
11 "virtually all of [its] funding consists of direct United States
12 appropriations and obligated grant funds" any judgment in this
13 matter would necessarily need be satisfied out of federal funds
14 depriving this Court of jurisdiction to adjudicate plaintiffs'
15 monetary claims. Trust Territory Memorandum at 19-20.

16 [5] The Trust Territory's analysis is oversimplified. The
17 mere fact that an agency's funds were originally derived from the
18 federal treasury is not conclusive. Where there are funds within
19 the "possession and control" of the agency out of which a judg-
20 ment can be satisfied the suit is against the federal defendant,
21 and not the United States. Marcus Garvey Square, Inc. v. Winston
22 Burnett Construction Co., 595 F.2d 1126, 1131 (9th Cir. 1979);
23 S.S. Silberblatt, Inc. v. East Harlem Pilot Black, 608 F.2d 28,
24 36 (2nd Cir. 1979). See also Manufacturers National Bank of
25 Detroit v. Brownstown Square Apartments, 491 F.Supp 206, 210
26 (E.D.Mich. 1980). In other words, an action against a federally

1 funded entity is not barred by sovereign immunity where the
2 entity's monies are "severed from Treasury funds and Treasury
3 control." Industrial Indemnity Inc. v. Landrieu, 615 F.2d 644,
4 646 (5th Cir. 1980).

5 On this issue, additional guidance is found in the
6 decisions of the Supreme Court regarding the tax immunity doc-
7 trine. That doctrine developed in response to attempts by the
8 states to tax the operations of the federal government. The
9 purpose of the doctrine is to avoid "clashing sovereignty" by
10 preventing the States from imposing tax liability directly on the
11 federal government. McCulloch v. State of Maryland, 4 Wheat.
12 316, 430, 4 L.Ed. 579 (1819). As with the "effects test" doc-
13 trine, questions have arisen in the tax immunity cases as to the
14 propriety of taxing federal agents or contractors. The central
15 question under each doctrine is the same: under what circum-
16 stances can it reasonably be said that the financial burden
17 impermissibly falls on the federal government? Under the tax
18 cases, "immunity may not be conferred simply because the tax has
19 an effect on the United States, or even because the Federal
20 Government shoulders the entire economic burden of the levy."
21 United States v. New Mexico, 455 U.S. 720, 734, 102 S.Ct. 1373,
22 1382, 71 L.Ed.2d 580, 591 (1982). Thus, it is "constitutionally
23 irrelevant" that the federal government reimburses in full a
24 federal contractor for expenditures which include monies paid to
25 cover a state imposed tax. Id. The Court in New Mexico went on
26 to conclude that "tax immunity is appropriate in only one circum-

1 stance: when the levy falls on the United States itself, or on an
2 agency or instrumentality so closely connected to the Government
3 that the two cannot realistically be viewed as separate enti-
4 ties." 102 S.Ct. at 1383. See also, e.g., South Carolina v.
5 Regan, ___ U.S. ___, ___, 104 S.Ct. 1107, 1133 n.11, 79 L.Ed.2d
6 372, 404 n.11 (1984) (Stevens, J., concurring in part and
7 dissenting in part)(collecting cases where immunity is found only
8 where government entity itself is legally obligated to bear the
9 costs of the tax). See generally L. Tribe, Intergovernmental
10 Immunities in Litigation, Taxation and, Regulation: Separation of
11 Powers Issues in Controversies About Federalism, 89 Harv.L.Rev.
12 682, 703-709 (1976).

13 [6] The Trust Territory cannot be considered an agency or
14 instrumentality "so closely connected" to the United States that
15 it cannot be viewed as a separate entity. The Trust Territory
16 government "is a subordinate and administratively separate entity
17 in relation to the United States Government." Temengil I at 36.
18 The Trust Territory itself concedes that "the Trust Territory
19 Government and the United States Government are legally separate
20 and distinct." Trust Territory Memorandum at 21. Thus, the
21 critical query in the immunity analysis must focus on whether or
22 not the funds of the Trust Territory are sufficiently within its
23 "possession and control" so as to be subject to a judgment levy.

24 [17,18] The Trust Territory makes much of the fact that all of
25 its funds trace their source to the federal treasury. However,
26 as discussed above, the original source of the funds is not

1 relevant, the physical possession and control is. As this Court
2 noted in its previous decision in this case, in the opinion of
3 the Trust Territory Attorney General, it is a "well-known rule"
4 that "funds appropriated to the Department of the Interior as
5 grants to the Trust Territory lose their character as federal
6 funds when paid over and mingled with Trust Territory Government
7 local revenues." Trust Territory Attorney General's Opinion 67-2
8 (Nov. 1, 1967) at 3, cited in Temengil I at note 65. The opinion
9 of the Trust Territory Attorney General comports with the pro-
10 nouncements of the United States Comptroller General who, as
11 early as 1957, expressed the opinion that federal treasury funds
12 paid over to the Trust Territory Government "lose their character
13 as public funds." United States Comptroller General's Opinion
14 B-131569 (June 11, 1957). See also United States Comptroller
15 General's Opinion B-173589 (Sept. 30, 1971)(applying "well-
16 settled rule" that grant funds became the property of the trans-
17 feree); United States Comptroller General's Opinion B-157179, 52
18 Com.Gen. 558 (1973)(grants paid over to the territories and
19 comingled with local revenues lose their character as federal
20 funds). Cf. United States v. Gibbs, 704 F.2d 464, 466 (9th Cir.
21 1983)(under federal embezzlement statute, 18 U.S.C. 641, when
22 federal and non-federal funds have been comingled, the critical
23 factor in determining federal character is supervision and
24 control of funds). Accord United States v. Eden, 659 F.2d 1376,
25 1380 (9th Cir. 1981), cert. denied, 455 U.S. 949, 102 S.Ct. 1450,
26 71 L.Ed.2d 663 (1982); United States v. Johnson, 596 F.2d 842,

1 846 (9th Cir. 1979).

2 For these reasons, the Court declines to adopt the
3 Trust Territory's interpretation of the sovereign immunity
4 doctrine and the accompanying "effects test." The grant funds
5 made available to the Trust Territory by the United States have
6 lost their character as federal funds upon transfer and are
7 available to satisfy a judgment in this matter.^{3/}

8
9 2. Fiduciary Obligations of the United States

10 [19.20] The Court also finds an alternative and equally compel-
11 ling reason which supports its decision denying the motion to
12 dismiss plaintiffs' monetary claims. It is now settled that the
13 United States is liable in money damages for the breach of its
14 fiduciary responsibilities. United States v. Mitchell ___ U.S.
15 ___, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)(Mitchell II). Such a
16 breach is alleged by plaintiffs here, and if found, subjects to
17 the United States to liability for the resulting damages. Sover-
18 eign immunity is not an issue as the judgment is not sought
19 against the United States, but against its agent, over which this

20
21 _____
22
23 ^{3/}While the Trust Territory complains that it has insufficient
24 assets to satisfy a "major money judgment," the Interior Budget
25 shows grants of \$112.1 million in Fiscal Year 1984 and \$96.1
26 million in Fiscal Year 1985, amounts well in excess of the
demands made by plaintiffs. United States Department of the
Interior, The Interior Budget in Brief: Fiscal Year 1985
Highlights (Feb. 1, 1984) at 10.

1 Court has jurisdiction to award monetary relief. See Keifer &
2 Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 389, 59
3 S.Ct. 516, 517, 83 L.Ed. 784 (1939)("The government does not
4 become the conduit of its immunity in suits against its agents or
5 instrumentalities merely because they do its work"). See also,
6 e.g., Sloan Shipyards Corp. v. United States Shipping Board
7 Corp., 258 U.S. 549, 566-567, 42 S.Ct. 386, 388, 66 L.Ed. 762,
8 768 (1922)("[T]he general rule is that any person within the
9 jurisdiction is always amenable to the law... An instrumentality
10 of Government he might be... but the agent, because he is agent,
11 does not cease to be answerable for his acts.")

12 Mitchell II, involving the United States' fiduciary
13 duties to the American Indian, is an important case and of rele-
14 vance to the peoples of Micronesia as it is the clearest decision
15 to date regarding the liability of the United States for breaches
16 of its fiduciary obligations. Both the trial and appellate
17 divisions of this Court have recognized the similarities in the
18 United States-Indian and United States-Micronesian relationships.
19 See, e.g., People of Saipan v. Department of the Interior, supra
20 p.8, 356 F.Supp. at 660 (the Micronesia Trusteeship is a trust
21 relationship to which the Indian analogy is "apt"); Palacios v.
22 Commonwealth of the Northern Mariana Islands, Civ.App.No. 81-9017
23 (D.N.M.I.(App.Div.) June 27, 1983) at 10 ("[t]he very purposes
24 which engendered the judicially created Indian fiduciary doctrine
25 apply a fortiori to the Micronesian-U.S. relationship").

26 The facts of Mitchell II center around the Indians of

1 the Quinault reservation situated on the Washington coast. The
2 Quinault and Quileute tribes have lived on the reservation since
3 the 1860's. In 1905, the federal government began allotting
4 parcels of the reservation in trust to individual members of the
5 tribes under the General Allotment Act of 1887. By 1935, the
6 entire reservation had been divided and allotted. The conifer
7 forests, which cover the vast bulk of the reservation, had long
8 been managed on behalf of the allottees by the Department of the
9 Interior. The proceeds of all sales of timber are required by
10 statute to be used for the benefit of the Indians or given
11 directly to the Indian owner.

12 In 1971, several of the allottees filed suit against
13 the United States for pervasive waste and mismanagement of the
14 timber reserves in breach of their fiduciary obligations. The
15 United States moved to dismiss arguing that the Court of Claims
16 had no jurisdiction over claims based upon a breach of trust.
17 The Supreme Court found initially that the General Allotment Act
18 created only a "limited trust relationship" and did not impose
19 upon the United States any obligation to manage timber resources.
20 United States v. Mitchell, 445 U.S. 535, 100 S.Ct. 1349, 63
21 L.Ed.2d 607 (1980)(Mitchell I). After a remand, the issue again
22 was before the Supreme Court.

23 The Court quickly disposed of the sovereign immunity
24 argument finding that the Tucker Act, 28 U.S.C. § 1491, and its
25 counterpart for Indian claims, 28 U.S.C. § 1505, "supplies a
26 waiver of immunity." Mitchell II, 102 S.Ct. at 2969. Those

1 statutes, however, did not provide substantive claims; thus,
2 plaintiffs would have to point elsewhere for a remedy. The
3 allottees asserted that several statutes and regulations, read
4 together, created a fiduciary obligation on the part of the
5 United States, the breach of which would subject to United States
6 to liability for damages. The Supreme Court was then put to
7 task to establish a test to determine when a statute imposed such
8 an obligation on the United States. The Court placed the burden
9 on the claimant to "demonstrate that the source of substantive
10 law... relie[d] upon 'can fairly be interpreted as mandating
11 compensation by the Federal Government for the damages sus-
12 tained.'" 103 S.Ct. at 2968, quoting Eastpart S.S. Corp. v.
13 United States, 178 Ct.Cl. 599,- 607, 372 F.2d 1002, 1009 (1967).

14 Applying this test, the Supreme Court found that the
15 laws and regulations set forth by the allottees "establish
16 comprehensive responsibilities of the Federal Government" with
17 regard to the management of the Indians resources. 103 S.Ct. at
18 2971. These laws, when set against the historic nature of the
19 trust relationship between the United States and the Indian
20 people

21 clearly establish fiduciary obliga-
22 tions of the Government in the
23 management and operation of Indian
24 lands and resources [and] they can
25 fairly be interpreted as mandating
26 compensation by the Federal Govern-
ment for damages sustained. Given
the existence of a trust relation-
ship, it naturally follows that the
Government should be liable in
damages for the breach of its
fiduciary duties.

1 103 S.Ct. at 2972-2973. In conclusion, the Supreme Court noted
2 that "[t]his Court and several other federal courts have consis-
3 tently recognized that the existence of a trust relationship
4 between the United States and an Indian or Indian tribe includes
5 as a fundamental incident the right of an injured beneficiary to
6 sue the trustee for damages resulting from a breach of the
7 trust." 103 S.Ct. at 2973.

8 The underlying rationale of Mitchell II is of signifi-
9 cant guidance here. The Court must determine whether the plain-
10 tiffs have demonstrated that the Trusteeship Agreement clearly
11 establishes fiduciary obligations of the United States with
12 respect to the administration of the Trust Territory and if so
13 whether the Agreement can "fairly be interpreted as mandating
14 compensation by the Federal Government for damages sustained" by
15 a breach of these obligations. The Court finds these questions
16 readily answered in the affirmative.

17 The fiduciary nature of the Trusteeship is well recog-
18 nized. This Court has previously held that "[t]he relationship
19 between the United States and the Trust Territory's people is 'a
20 fiduciary one... [in which] the interests of the inhabitants of
21 the territory become paramount." Temengil I at 10 (quoting
22 Liebowitz, The Marianas Covenant Negotiations, 4 Fordham Int'l.
23 L.J. 19, 79 n.236 (1980)), 42-43, 56, and notes 17 and 107. The
24 appellate division of this Court has concurred. Palacios v.
25 Commonwealth of the Northern Mariana Islands, supra p.22, at 14
26 ("we find that the TTPI stands in a fiduciary relationship as

1 trustee to the peoples of the Trust Territory"). See also Juda
2 v. United States, No.172-81L (Ct.Cl. Memorandum Decision filed
3 Oct. 5, 1984) at 23-24 (the sovereignty of the Trust Territory is
4 held in trust for the inhabitants by the United States). More-
5 over, the Trust Territory itself has conceded its trusteeship
6 status in relation to the Micronesian people. See Temengil I at
7 42.

8 The Trusteeship Agreement is clear regarding the duties
9 and obligations of the United States toward the people of the
10 islands of Micronesia; this is especially so regarding the
11 covenants against discrimination. The granted powers of adminis-
12 tration are subject to the provisions of the agreement. Art.4.
13 Article 6(3) is direct in its command that the United States
14 "shall protect the rights and fundamental freedoms of all ele-
15 ments of the population without discrimination." (Emphasis
16 added). Furthermore, the United States, under Article 4, is
17 bound to act in accordance with the Charter of the United Nations
18 in which are contained additional references regarding the funda-
19 mental right to be free from race or national origin oriented
20 discrimination. See, e.g., Charter of the United Nations, Art.
21 1(3)(purposes of United Nations include "encouraging respect for
22 human rights and for fundamental freedoms for all without dis-
23 tinction as to race"); Charter, Articles 55 and 56 (all nations
24 pledge themselves to take action for the achievement of universal
25 respect for, and observance of, human rights and fundamental
26 freedoms for all without distinction as to race). See generally

1 L. Goodrich, E. Hambro and P. Simons, Charter of the United
2 Nations, Commentary and Documents at 377-382 (1969).

3 This Court, as well as other federal courts have
4 recognized the clarity, specificity and enforceability of the
5 obligations imposed under the Trusteeship Agreement. In the
6 earlier decision in this case, this Court characterized the
7 rights created by the Agreement as "unprecedented among trustee-
8 ship agreements in their detail, precision and scope." Temengil
9 I at 14. The Ninth Circuit has also had an opportunity to
10 discuss the obligations of the Agreement. In People of Saipan v.
11 Department of the Interior, supra p.8, the panel considered
12 assertions that the Agreement created substantive, enforceable
13 rights. The opinion stated that the answer to the question must
14 be determined by reference to many contextual factors including
15 the purpose of the treaty, the existence of domestic institutions
16 appropriate for direct implementation, the availability of
17 alternative forums and the immediate and long-range consequences
18 of self-execution. After a thorough review of these factors, the
19 court concluded that "[t]he preponderance of features in this
20 Trusteeship Agreement suggests the intention to establish direct,
21 affirmative, and judicially enforceable rights." 502 F.2d at 97.
22 The Trusteeship Agreement creates for the islanders "substantive
23 rights that are judicially enforceable." 502 F.2d at 96.

24 In reaching this conclusion, the Ninth Circuit agreed
25 that while the rights may not be "precisely defined", they are
26 not "too vague for judicial enforcement." 502 F.2d 99. The

1 missing terms and definitions can come from the "relevant princi-
2 ples of international law... which have achieved a substantial
3 degree of codification and consensus." Id. A well-recognized
4 and leading document of such principles is the Universal Declara-
5 tion of Human Rights, Gen.Assembly Res. 217 A(III)(Dec. 10,
6 1948). Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2nd Cir.
7 1980). See also Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201
8 n.13 (9th Cir. 1975)(Declaration is evidence of "law of
9 nations"); Fernandez v. Wilkinson, 505 F.Supp. 787, 796 (D.Kan.
10 1980) aff'd, 654 F.2d 1382 (10th Cir. 1981)(international law is
11 exemplified by Universal Declaration). The Declaration was
12 passed by a vote of 48-0 with only eight abstentions. Goodrich,
13 Hambro and Simons at 377. The Declaration, the Preamble of which
14 expressly applies the stated principles to trust territories, was
15 adopted by the United States in 1948, within a year of the
16 commencement of the Trusteeship Agreement. Human Rights Docu-
17 ments, Committee on Foreign Relations, U.S. House of Representa-
18 tives (Sept. 1983). The Declaration is clear regarding equal
19 protection and freedom from discrimination on the job.

20 Article 2 provides:

21 Everyone is entitled to all
22 the rights and freedoms set forth
23 in this Declaration, without
24 distinction of any kind, such as
25 race, colour, sex, language, reli-
26 gion, political or other opinion,
 national or social origin, proper-
 ty, birth or other status.

Article 7 reads:

1
2 All are equal before the law
3 and are entitled without any dis-
4 crimination to equal protection of
5 the law. All are entitled to equal
6 protection against any discrimina-
7 tion in violation of this Declara-
8 tion and against any incitement to
9 such discrimination.

10 Article 23(2) provides elaboration regarding equality in employ-
11 ment:

12 Everyone, without any dis-
13 crimination, has the right to equal
14 pay for equal work.

15 The Court is of the opinion that the Trusteeship
16 Agreement and the relationship it created meet the test set forth
17 in Mitchell II. The Agreement establishes a fiduciary relation-
18 ship in which the duties and obligations of the United States are
19 clear, especially with respect to the rights of the islanders to
20 be free from discrimination.^{4/} These rights are enforceable in
21 domestic courts of law. As this Court wrote in its previous de-
22 cision, Micronesia "is a U.S. Trust Territory, and if the United
23 States has fulfilled its trust to the inhabitants badly, then
24 those responsible for this condition ought to also be responsible
25 for its remedy." Temengil I at 43, quoting S.Rep.No. 223, 90th
26 Cong. 1st Sess. 8 (1967).

27 ^{4/}The absence of an express enforcement scheme is not determina-
28 tive. "[T]he substantive source of law may grant the claimant
29 a right to recover damages either 'expressly or by implica-
30 tion.'" Mitchell II, 103 S.Ct. 2968 n.16, quoting Eastport
31 S.S.Corp. v. United States, 178 S.Ct.Cl. 599, 605, 372 F.2d
32 1002, 1007 (1967).

1 The Court concludes, and sets forth as an alternative
2 holding, that the Trusteeship Agreement imposes upon the United
3 States fiduciary obligations and subjects the United States to
4 monetary liability for the damages resulting from the breach of
5 those duties. Thus, plaintiffs claims for monetary damages
6 relief against the Trust Territory are not barred.

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8
9 II. PUNITIVE DAMAGES

10 A. Trust Territory Government

11 [21] The Trust Territory also moves to strike the demand for
12 punitive damages raised in the complaint in intervention. As a
13 general matter, punitive damages may be assessed against indi-
14 viduals in actions brought under § 1981 and § 1983. Johnson v.
15 Railway Express Agency Inc., 421 U.S. 454, 95 S.Ct. 1716, 44
16 L.Ed.2d 295 (1975); Smith v. Wade, ___ U.S. ___, 103 S.Ct. 1625,
17 ___ L.Ed.2d ___ (1983). In 1977, the Supreme Court opened the
18 courthouse door to § 1983 actions against municipal corporations
19 by finding such defendants suable "persons" within the meaning of
20 the statute. Whether punitive damages could be assessed against
21 municipalities remained an open question.

22 [22] In City of Newport v. Fact Concerts, Inc., 453 U.S.
23 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), the Supreme Court
24 reversed a decision of the First Circuit which had allowed a
25 punitive damage award against the defendant city to stand.
26 Applying the two-part test set forth in Owen v. City of Indepen-

1 dence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the
2 Court first examined the history of punitive damage immunity at
3 common law and under § 1983. The Court found it "not open to
4 serious question", that "municipality immunity was well estab-
5 lished at common law"; the Court unearthed "no evidence that
6 Congress intended to disturb the settled common law immunity."
7 101 S.Ct. at 2756, 2759. The inquiry did not end here, however,
8 for as the Civil Rights Act of 1871 "was designed to expose state
9 and local officials to a new form of liability, it would defeat
10 the promise of the statute to recognize any pre-existing immunity
11 without determining both the policies that it serves and its
12 compatibility with the purposes of § 1983." 101 S.Ct. at 2755.
13 Thus, the Court examined the objectives underlying punitive
14 damages and their relationship with the goals of § 1983.

15 The Court found the two underlying purposes of punitive
16 damages to be punishment and deterrence. Regarding punishment,
17 the Court concluded that imposing punitive damages against a
18 municipality would not significantly further the retributive pur-
19 poses. First, the punishment does not fall on the wrongdoer, but
20 on "blameless or unknowing" taxpayers who will likely suffer "an
21 increase in taxes or a reduction in public services...for footing
22 the bill." 101 S.Ct. at 2760. Also, the Court noted that a
23 municipal government can have no malice independent of the malice
24 of its officers and agents, and therefore it is the officer who
25 acts knowingly and maliciously who is the "appropriate object of
26 the community's vindictive sentiments." Id. Thus, damages

1 imposed for punishment "are not sensibly assessed against the
2 governmental entity itself." Id. Moreover, the underlying
3 principles of § 1983 did not alter the Court's analysis, for the
4 Court "never has suggested that punishment is as prominent a
5 purpose under the statute as are compensation and deterrence."
6 Id. Continuing on to discuss deterrence, the Court did not find
7 the imposition of punitive damages on municipalities to signifi-
8 cantly further the goal of preventing future misconduct. Not
9 only would the threat of large damage awards against the city not
10 likely deter wrongful conduct of the officials, but in the
11 majority's opinion, a finding of malicious conduct would set the
12 political process in motion expelling the wrongdoer from the
13 government ranks. 101 S.Ct. at 2761. Also, the assessment of
14 punitives against the responsible official is a more effective
15 means of deterrence. Lastly, the majority concluded that the
16 potential threats posed to the fiscal integrity of municipal
17 governments outweighed the benefits, which were of "doubtful
18 character", of assessing punitive damages against cities. Id. In
19 sum, the Court found that considerations of history and policy
20 dictated that municipalities be immune from punitive damages
21 under 42 U.S.C. § 1983.

22 [23] The Trust Territory urges the application of City of
23 Newport to the case at bar. Although the holding of that case is
24 limited to municipalities, the underlying rationale would apply
25 to all "bodies politic" subject to liability under § 1983. In
26 fact, the Supreme Court even discussed the potential serious

1 impact of punitive liability on municipalities "and other units
2 of state and local government." 101 S.Ct. at 2761. The concerns
3 expressed by the Court regarding the punitive effect on the
4 blameless citizenry, the questionable deterrence value and the
5 threat to the financial integrity of government bodies are
6 applicable as well to the Trust Territory. Thus, although this
7 Court finds appeal in the suggestion by the dissent that while a
8 body politic should not be liable for punitive damages as respon-
9 deat superior, punitive liability is not so unreasonable when the
10 unconstitutional and malicious acts were part of established
11 official policy, the Court is bound by the majority's decision.
12 The Trust Territory's motion to strike is granted.^{5/}

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19 ^{5/}The immunity from punitive damage liability is not an immunity
20 of which the Trust Territory is stripped in the court of
21 another sovereign under Nevada v. Hall. Common law government
22 tort immunities developed separately in the field of torts and
23 within the doctrine of sovereign immunity. See Owen v. City of
24 Independence, 100 S.Ct. at 1410-1415. Under Nevada, it is only
25 those immunities attributable to sovereignty that need not be
26 recognized in another sovereign's courts. As the punitive
damage immunity appears to have developed as a matter of public
policy within the law of torts, it may still be asserted by the
Trust Territory here. See, e.g., D. Dobbs, Law of Remedies at
217-218 (1973); E. McQuillan, 18 The Law of Municipal Corporations
§ 53.18a (3rd Ed., 1984 rev. vol.). See also, e.g.,
Annot., Recovery of Exemplary or Punitive Damages from
Municipal Corporation, 1 ALR 4th 448 (1930).

1 B. High Commissioner

2 [24.25] The complaint in intervention raised for the first time
3 a demand for punitive damages against the High Commissioner.^{6/}
4 As noted above, it is well established that punitive damages may
5 be awarded against individual government officials. Smith v.
6 Wade, supra p.30. However, there has been confusion in this case
7 as to whether the High Commissioner was sued in his/her^{7/} indi-
8 vidual or official capacity or both. In its earlier decision in
9 this case, the Court noted this confusion and concluded that "the
10 plaintiffs sue the defendant officers only in their official
11 capacities." Temengil I at note 5. The complaint in interven-
12 tion adopts the defendant allegations as pleaded in the amended
13 complaint; no new allegations as to individual capacity are
14 added. Thus, the Court adheres to its earlier conclusion that
15 the defendant High Commissioners are before this Court in their
16 official capacities only. Should the plaintiffs desire to seek
17 punitive damages against the High Commissioners individually,
18 they must so allege and must satisfy venue and process service
19 requirements.

20 ^{6/} Although the complaint does not specifically state that puni-
21 tive damages are sought against the High Commissioner indi-
22 vidualy, plaintiffs Memo in Opposition makes it clear that the
23 intent is to hold the High Commissioner "personally liable."
Memo in Opposition to TTPI's Motion at 12.

24 ^{7/} On Jan. 16, 1981, when the initial complaint was filed, it
25 named then High Commissioner Adrian Winkel. On March 22, 1983,
26 pursuant to Federal Rule of Civil Procedure 25(d)(1) the Court
substituted High Commissioner Janet McCoy in place of the
original defendant. Thus, when referring to the High Commis-
sioner in this section, the Court will use the his/her pronoun.

1 III. JURY TRIAL

2 The complaint in intervention raises also for the first
3 time a demand for a jury trial. Plaintiffs amended complaint
4 prayed for declaratory and injunctive relief and for an award of
5 back pay; no other damages were sought. Thus, the class was
6 certified by this Court under (b)(2) of Federal Rule of Civil
7 Procedure 23. In Williams v. Owens-Illinois, Inc., 665 F.2d 918,
8 (9th Cir. 1987), cert. denied 459 U.S. 971, 103 S.Ct. 302, 74
9 L.Ed.2d 283 (1982), the Ninth Circuit squarely addressed the
10 availability of a jury trial as to such issues:

11 [T]he only requested remedy
12 other than injunctive relief which
13 was before the court was back pay.
14 That relief, however, was properly
15 viewed as either equitable or as a
16 legal remedy incidental to an
equitable cause of action [footnote
omitted] and accordingly not
sufficient to create a right to
jury trial.

17 665 F.2d at 929. Remedies which are legal in nature but are
18 incidental to equitable claims do not entitle a party to a jury
19 trial. Id. at note 10, citing Beacon Theatre, Inc. v. Westover,
20 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). By the terms
21 of Williams, the Court must deny the plaintiffs' jury demands and
22 grants the Trust Territory's motion to strike.

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IV. CONCLUSION

For the reasons stated above, the Court denies the Trust Territory's motion to dismiss and grants the motions to strike the demand for jury trial and to strike the claim for punitive damages.

Feb. 4, 1985

Date

Alfred Laureta

JUDGE ALFRED LAURETA