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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff and Counterclaim Defendant v. UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff	Civil Action No. 99-0028 ORDER DENYING COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT, GRANTING UNITED STATES' MOTION FOR SUMMARY JUDGMENT, and DECLARING 2 N.Mar.I. Code § 1101 *et seq.*, and 2 N.Mar.I. Code § 1201 *et seq.* PREEMPTED BY FEDERAL LAW

THIS MATTER came before the court on Wednesday, July 16, 2003, for hearing of plaintiff/counterclaim defendant Commonwealth of the Northern Mariana Islands' ("CNMI's") motion for summary judgment and defendant/counterclaim plaintiff United States' motion for summary judgment.

Plaintiff appeared by and through Commonwealth Assistant Attorneys General Joseph L.G. Taijeron, Jr., who argued, and James D. Livingstone and Robin W. Hutton on the memoranda; defendant appeared by and through Edward S. Geldermann, Senior Trial Attorney, U.S. Department of Justice, who appeared by telephone and argued, and Assistant U.S. Attorney Gregory Baka.

THE COURT, having fully considered the voluminous filings of the parties, and having further considered the oral argument presented, rules as follows:

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, in part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the matters of record which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corporation v. Catrett, 477

U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986).

The non-moving party must set forth by affidavit or as otherwise provided in Rule 56 specific facts showing that there is a genuine issue of material fact for trial. Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 107 S.Ct. 435 (1986). All that is required from the non-moving party is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of truth at trial. First National Bank v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 1592 (1968). All inferences are drawn in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, 477 U.S. at 250-251.

A trial court may not weigh conflicting versions of fact on a motion for summary judgment. "Rule 56 calls for the judge to determine whether there exists a genuine issue for trial, not to weigh the evidence himself and determine

the truth of the matter." Baxter v. MCA, Inc., 812 F.2d 421, 424 (9th Cir.), *cert. denied*, William v. Baxter, 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987), *citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). "[A] court can only enter a summary judgment if *everything* in the record--- pleadings, depositions, interrogatories, affidavits, *etc.*--- demonstrates that no genuine issue of material fact exists." Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980)(emphasis in original).

Findings of Fact[1]

1. The former Trust Territory of the Pacific Islands ("TTPI") encompassed a group of approximately 2,000 islands and atolls in the Western Pacific Ocean. Commonwealth of the Northern Mariana Islands v. Atalig, 723 F.2d 682, 685 n.3 (9th Cir. 1984). From the onset of World War I in 1914 until the defeat of Japan in World War II in 1945, these islands were under the control of Japan. *See* Gale v. Andrus, 643 F.2d 826, 828-30 (D.C.Cir.1980). Between 1944 and 1947, the island group was placed under the military control of the United States. On July 18, 1947, the United Nations Security Council entered into an agreement ("Trusteeship Agreement") with the United States as Trustee, pursuant to which the U.S. accepted a non-sovereign, oversight

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[1] The district court is not required to make findings of fact and conclusions of law on a motion for summary judgment, but such findings and conclusions are helpful to the reviewing court. *See e.g.* Underwager v. Channel 9 Australia, 69 F.3d 361, 366 n.4 (9th Cir. 1995) *citing* Gaines v. Haughton, 645 F.2d 761, 768 n.13 (9th Cir. 1981), *cert. denied* 454 U.S. 1145, 102 S.Ct. 1006 (1982). Of course, "findings of fact" on a summary judgment are not findings in the strict sense that the trial judge has weighed the evidence and resolved disputed factual issues; rather, they perform the narrow function of pinpointing for the reviewing court those facts which are undisputed and indicate the basis for summary judgment. All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645 (D.Haw. 1987), *reversed on other grounds*, 855 F.2d 860 (9th Cir. 1988).

authority over the peoples of the TTPI. In that trustee capacity, the U.S. was granted full powers of administration, legislation, and jurisdiction over the Trust Territory to promote the development of the economic, social, political, and educational well-being of the TTPI's inhabitants. Joint Resolution of July 18, 1947, ch. 271, 61 Stat. 397.[2]

2. In 1965, the people of Micronesia formed the Congress of Micronesia, with representatives from each of six administrative districts: the Northern Mariana Islands ("NMI"), Yap, Truk (Chuuk), Ponape (Pohnpei) (which then included Kosrae (Kusaie)), Palau (Belau), and the Marshall Islands (hereinafter "TTPI districts"). In 1966, the TTPI districts petitioned the United States to establish a joint commission to consider the future political alternatives for the TTPI. In1969, the Micronesian Congress began negotiations with the U.S.

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[2] Authority to administer the trusteeship was vested in the President of the United States, who was authorized to delegate that responsibility through such agency or agencies as the President directed. Section 1 of the Act of June 30, 1954, ch. 423, 68 Stat. 330 (48 U.S.C. § 1681(a)). Until 1962, the Navy Department was responsible for the civil administration of the Northern Mariana Islands (except Rota), while the Department of the Interior ("DOI") had administrative authority over the remainder of the Trust Territory Islands. Exec. Order No. 10470, July 17, 1953, 3 C.F.R. § 951 (1949-53 comp.). In 1962, civil administrative authority for the entire Trust Territory (including all of the Northern Mariana Islands) was consolidated in the Secretary of the Interior.

through a Joint Committee on Future Status. When the Congress of Micronesia rejected a U.S. proposal in May 1970 for all of the TTPI districts to enter into a "Commonwealth" relationship of "permanent association" with the United States, and elected instead to form a looser, more autonomous relationship of "free association," the Northern Mariana Islands instead sought separate negotiations directed toward a closer and more permanent political relationship with the United States. *See generally* U. S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, *5 (D.N.M.I.).[3]

3. In 1972, the U.S. agreed to hold separate negotiations with the NMI. Toward that end, the U.S. and the NMI commenced several rounds of negotiations to determine the NMI's future political relationship with the United States *See* Exhibit Nos. 1 and 3-7 of the U.S. Exhibits In Support Of Motion For Summary Judgment ("U.S. Exh.") (For ease and uniformity of reference, citations are to the U.S.' exhibits.)

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[3] "So strong was this desire for union that at one point the then Mariana Islands District Legislature passed a resolution warning the Security Council and Trusteeship Council of the United Nations that it was prepared to secede from the TTPI, 'by force of arms if necessary,' in order to pursue a closer relationship with the United States." U.S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, *38 (D.N.M.I. 1992).

4. On May 10, 1973, prior to the second round of negotiations, James M. Wilson, U.S. Deputy Representative for Micronesian Status Negotiations, issued a memorandum in which he set forth the United States' position concerning the future status of CNMI submerged lands after the Commonwealth's political relationship between the NMI and the U.S. had become established:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new agreement, as in the case of the states of the United States and other territories.

(U.S. Exh. 2 at 7.)

The reports of the second round and subsequent rounds of negotiations between the U.S. and the NMI are silent on the subject of ownership and jurisdiction over oceanic submerged lands after the new political relationship between the U.S. and the NMI became effective. *See* U.S. Exhs. 3-7. [4]

5. Contemporaneously, throughout 1972 and beyond, the United States continued to pursue negotiations separately with the remaining Micronesian districts about their future political status.

In early 1973, representatives of Palau expressed unwillingness to

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[4] As used herein, the term "oceanic submerged lands" is shorthand for "lands seaward of the Commonwealth's coastlines." It does not include lands underlying the Commonwealth's inland waters.

participate in any further negotiations with the U.S. concerning its future political status while title to Palau land was still being held by the Trust Territory Government. (U.S. Exh. 8 at 1.) The Congress of Micronesia subsequently adopted a similar negotiating stance. *Id.* To remove this impediment to the political status negotiations, the Secretary of the Interior in November 1973 issued a policy statement, applicable to all of the Micronesian districts, concerning the return of public land to the districts. (U.S. Exh. 8.) In that statement, the Secretary stated:

> The United States Government, as administering authority in the Trust Territory of the Pacific Islands, has always considered public land in Micronesia to be property held in trust for the people of Micronesia.... Recently requests have been made in Palau that public land in that district be turned over now to its traditional leaders to be held in trust for the people of Palau. This position has received the support of the Palau District Legislature. Subsequently it was formally endorsed by the Congress of Micronesia's Joint Commission on Future Status and communicated to the United States Government.... The United States has now completed an extensive study of the problem in all districts.... As a result of that study, the United States has now concluded that if it is the desire of the people in a district that public lands in that district be turned over to the district now before the termination of the Trusteeship the U.S. is willing to acceed [*sic*] to their wishes and to facilitate the transfer of title. This transfer, however, must be subject to certain limitations and safeguards...designed to protect those individuals who have acquired property interests in public lands under the trusteeship and to meet the continuing land needs of the Trust Territory Government for public use. These limitations and

> safeguards will apply until the Trusteeship ends, at which time the new government will be free to modify them as it chooses.

Id. at 2.

Included among the limitations and safeguards established by the land return policy statement were that public land still needed by the Trust Territory Administration for defense purposes, and former public land conveyed to individuals pursuant to a homestead program, would not be transferred to the districts. In addition, the Trust Territory Government would "retain the right to control activities" within "tidelands, filled lands, submerged lands and lagoons" to the extent they "affect[ed] the public interest." (*Id.* at 4.)

The land return policy statement called on the Congress of Micronesia to enact legislation enabling the transfer of TTPI public lands to the TTPI districts. (*Id.* at 2.) When the Congress of Micronesia had failed to do so by late 1974, the Interior Secretary proceeded to implement the public land return policy on his own initiative by issuing Secretarial Order No. 2969, 40 Fed.Reg. 811 (1974). (U.S. Exh. 9) That order, which became effective on December 28, 1974, directed the High Commissioner of the Trust Territory to convey the Trust Territory's right, title, and interest in public lands to district legal entities that had been empowered by their respective TTPI district legislatures to receive and

hold such lands. *Id.*; 40 Fed.Reg. at 812. Consistent with the land return policy statement, Secretarial Order No. 2969 went on to prohibit the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for...reservation of the right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." *Id.*; 40 Fed.Reg. at 812.[5]

6. On February 15, 1975, just six weeks after Secretarial Order No. 2969 became effective, representatives of the Northern Mariana Islands and the United States signed the Covenant to govern the future relationship between the NMI and the United States. (U.S. Exh. 10) The NMI Legislature unanimously endorsed the Covenant, and the people of the NMI approved it by a 78% majority vote on June 17, 1975. The U.S. Congress thereafter enacted the Covenant as law. *See* Joint Resolution of March 24, 1976, Pub. L. No. 94-241,

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[5] The Northern Marianas District Legislature did establish a Marianas Public Lands Corporation but it never became operational. (U.S. Exh. 15 at 142) The constitutional CNMI government later established a corporation by the same name but, by that time, Secretarial Order No. 2989 (discussed *infra*) had already superseded Secretarial Order No. 2969.

90 Stat. 263, reprinted in 48 U.S.C. § 1681 note.

7. The Covenant consists of ten articles that define the political relationship between the NMI and the U.S.. (U.S. Exh. 10.)[6] Under the Covenant, upon termination of the U.N. Trusteeship Agreement the CNMI became a self-governing commonwealth in political union with, and under the sovereignty of, the United States of America. Covenant § 101. (U.S. Exh. 10, at 5.)[7] The "Section-By-Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands"[8] ("Analysis") (Feb. 15, 1975), prepared by the Marianas Political Status Commission to accompany the Covenant, describes this sovereignty concept as follows:

> [t]he United States will have sovereignty, that is, ultimate political authority, with respect to the Northern Mariana Islands. The United States has sovereignty with respect to every state, every

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[6] The authority of the United States towards the CNMI now arises solely under the Covenant. Hillblom v. United States, 896 F.2d 426, 429 (9th Cir. 1990).

[7] United States sovereignty over the Commonwealth was fully established as of 12:01 a.m., November 4, 1986, NMI time and date. Pres. Proc. 5564, Nov. 3, 1986, sec. 2; Smith v. Pangilinan, 651 F.2d 1320, 1321 (9th Cir. 1981); CNMI v. Atalig, 723 F.2d at 685.

[8] The Section-by-Section Analysis of the Covenant has been declared authoritative by the Ninth Circuit. Fleming v. Department of Public Safety, 837 F.2d at 408.

> territory and the Commonwealth of Puerto Rico. United States sovereignty is an essential element of a close and enduring political relationship with the United States, whether in the form of statehood, in the traditional territorial form, or as a commonwealth.

(U.S. Exh. 11, at 7.)

8. Section 104 of the Covenant, which likewise did not become effective until termination of the Trusteeship in 1986, provides that the United States has complete responsibility for and authority with regard to foreign affairs and defense affecting the NMI. (U.S. Exh. 10, at 6.)

9. Section 102 of the Covenant, which became effective on January 9, 1978, states that the relations between the NMI and U.S. will be governed by the Covenant which, together with the provisions of the Constitution, treaties and the laws of the United States applicable to the NMI, will be the supreme law of the NMI. *Id.* at 5-6. As the Analysis explained:

> [Section 102] is similar to Article VI, clause 2 of the Constitution of the United States, which makes the Constitution, treaties and laws of the United States the supreme law in every state of the United States. This means that federal law will control in the case of a conflict between local law (even a state's constitution) and a valid federal law. Federal law is also supreme, of course, in the territories and the Commonwealth of Puerto Rico.

Analysis at 10; S. Rep. No. 94-433, 94th Cong. 1st Sess. 65, 66 (1975); 1975 U.S.

Code, Cong., & Admin. News 448. (U.S. Exh. 11, at 10.)

10. Section 103 of the Covenant, also effective January 9, 1978, guarantees the people of the NMI the "right of local self-government" and the right to govern themselves "with respect to internal affairs in accordance with a Constitution of their own adoption." (U.S. Exh. 10, at 6.) Complementing Covenant § 103, § 201 of the Covenant required the people of the Northern Mariana Islands to "formulate and approve a Constitution." *Id.* at 7.

11. Article VIII of the Covenant is entitled "Property." Section 801 of the Covenant provides, as relevant here:

> [a]ll right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

(U.S. Exh. 10, at 28.)

Sections 802 and 803 of the Covenant provided that the CNMI would lease to the United States specified acreage---including "immediately adjacent" waters---on, *inter alia*, Tinian and Farallon de Medinilla Islands for fifty years (with an option to renew for an additional 50 years) at specified U.S. dollar amounts. *Id.* at 29-30.

12. On the same day the Covenant became federal law, March 24, 1976, the Acting Secretary of the Interior issued Secretarial Order No. 2989, 41 Fed. Reg. 15,892 (1976), which established a separate civil administration for the Northern Marianas, wholly distinct from the Trust Territory governance of the other Micronesian districts, to be effective until such time as the President of the United States issued a Proclamation pursuant to Section 1003(b) of the Covenant. (U.S. Exh. 12.)[9]

Secretarial Order No. 2989 established for the Northern Marianas the position of "Resident Commissioner," whose task was to oversee the broad range of executive and legislative responsibilities of the new civil administration in the Marianas. *Id.*; 41 Fed. Reg. at 15,893.

With respect to TTPI public lands, Secretarial Order No. 2989 provided, in pertinent part:

Title to public lands of the Trust Territory of the Pacific Islands

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[9] Section 1003(b) of the Covenant provides that "Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 [of the Covenant] will become effective on a date to be determined and proclaimed by the President of the United States which will be not more than 180 days after this Covenant and the Constitution of the Northern Mariana Islands have both been approved." (U.S. Exh. 10, at 39.) That date turned out to be January 9, 1978.

> which are situated in the Northern Mariana Islands and which are actively used by the Trust Territory Government is hereby transferred to and vested in the Resident Commissioner subject to the continued use of such land by the Trust Territory Government until relocation of the capital of the Trust Territory of the Pacific Islands.... All other public lands situated in the Northern Mariana Islands title to which is now vested in the Trust Territory Government and which have not been transferred to the legal entity created by the Mariana Islands District Legislature according to Secretary of the Interior Order No. 2969 shall vest in the Resident Commissioner.

Id.; 41 Fed. Reg. at 15,895.

13. As noted above, Section 201 of the Covenant required the people of the Northern Mariana Islands to "formulate and approve a Constitution." (U.S. Exh. 10, at 7.) From October to December 1976, the NMI Constitutional Convention gathered, drafted, and approved a constitution, (U.S. Exh. 13.), which on March 6, 1977, was ratified by a 92% majority vote. The Constitution was deemed approved by Presidential Proclamation No. 4534 on October 4, 1977, *see* U.S. Exh. 14, and the constitutional government of the Northern Mariana Islands became effective on January 9, 1978.[10]

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[10] Pursuant to Sections 1003(b) and 1004(b) of the Covenant, the NMI Constitution and Section 502 of the Covenant were to become effective on a date specified by the President of the United States In Proclamation No. 4534 (U.S. Exh. 14, at 56,594), then President Carter designated January 9, 1978, as the date on which both the Constitution and Covenant § 502 would become

14. The drafters of the NMI Constitution adopted several constitutional provisions of particular importance to this case.

Article XI, § 1, of the NMI Constitution provides, in pertinent part, that "the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under U.S. law are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent." (U.S. Exh. 13, at 19.)

Article XI, § 2, provides that the "management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law." *Id.*

Article XI, § 3 provides that "the management and disposition of public lands except those provided for by § 2 [*i.e.*, submerged lands] shall be the responsibility of the Marianas Public Land Corporation" established by CNMI Const. Art. XI, § 4. *Id.* at 19-20.

Finally, Article XIV, § 1 of the CNMI Constitution provides that:

> The marine resources in waters off the coast of the Commonwealth over which the Commonwealth now or hereafter may have any

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effective.

> jurisdiction under United States law shall be managed, controlled, protected, and preserved by the [Marianas] legislature for the benefit of the people.

(U.S. Exh. 13, at 23.)

In an Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands ("CNMI Constitutional Analysis"), formally adopted by the NMI Constitutional Convention on December 6, 1976, the Northern Marianas framers explained the intent behind Article XI of the Constitution:

> [Article XI] Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provisions of the United States Constitution with respect to defense and foreign affairs. Under article 1, section 104 of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts. Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

(U.S. Exh. 15, at 144.)

15. Explaining the scope of Article XIV, § 1 of the CNMI Constitution, entitled "Marine Resources," the framers stated in the CNMI Constitutional Analysis:

> This section provides that the marine resources found in waters off the coast of the Commonwealth over which the Commonwealth has jurisdiction shall be managed, controlled, protected, and preserved by the legislature for the benefit of the people of the Commonwealth. Marine resources are those resources found in the water such as fish, dissolved minerals, plant life suspended in the water and other resources. Marine resources do not include resources found on or under submerged lands. Those resources are public lands and are provided for by Article XI, section 2.
>
> The jurisdiction of the Commonwealth over the waters off the coast is the same as that of the states. Currently the states have the power to regulate fisheries within territorial waters as part of the police powers. The power of the states extends only to what the United States claims as territorial waters. Depending on the claims asserted by the United States and United States law with respect to these waters, the jurisdiction of the Commonwealth might be extended. This section provides that the legislature has the power to control marine resources for whatever distance into the ocean is available under United States law.

Id. at 181.

16. Almost immediately after the NMI constitutional government became effective in January, 1978, questions arose as to the NMI government's authority to regulate submerged lands and marine resources off the coast of the Commonwealth, at least until the end of the Trusteeship. Contributing to the

uncertainty was the fact that § 1003(b) of the Covenant (U.S. Exh. 10, at 39) implemented different sections of the Covenant in three phases. Thus, real property provisions of Sections 801 of the Covenant (calling for return of TTPI real property to the NMI government no later than termination of the Trusteeship) became effective at the beginning of the first phase, which commenced on March 24, 1976. The leasing provisions of Covenant §§ 802 and 803 became effective at the beginning of the second phase, on January 9, 1978. And the sovereignty, foreign affairs, and defense provisions of §§ 101 and 104 of the Covenant became effective in the third phase, which began when the Trusteeship ended on November 4, 1986. *See* U.S. Exh. 10, at 39. Consequently, at least from January, 1978, through November, 1986, doubts and/or disagreements surfaced by and between representatives of the CNMI and the U.S. over the extent to which the CNMI was empowered to regulate submerged lands and marine resources off the coast of the Commonwealth.

17. On January 11, 1978, two days after the second phase of the Covenant (including Covenant § 502(a)(2)) became effective,[11] the U.S.

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[11] Section 502(a)(2) of the Covenant (U.S. Exh. 10, at 14-15) provides that the "laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana

Department of State published a notice in the Federal Register, 43 Fed. Reg. 1658 (1978) (U.S. Exh. 16) declaring that the U.S. government had established a 200-mile fishery conservation zone near the NMI "within which the United States will exercise its exclusive fishery management authority as set forth in the Fishery Conservation and Management Act of 1976." (U.S. Exh. 16; 43 Fed.Reg. at 1658.) The Federal Register notice went on to state that "the seaward limit of the fishery conservation zone is 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, except that to the north of the Northern Mariana Islands, the limit of the fishery conservation zone shall be determined by straight lines" connecting geographical coordinates specified in the notice. *Id.* Although the NMI government shortly thereafter protested this assertion of fishery management jurisdiction by the United States, it was ultimately confirmed by the Ninth Circuit as a lawful exercise of United States authority under § 502(a)(2) of the Covenant. Hillblom v. United States of America, 896 F.2d 426, 431 n.3 (9th Cir. 1990).

Islands" to the extent that they are "applicable to Guam and which are of general application to the several States as they are applicable to the several States."

18. On June 9, 1978, five months after the CNMI Constitution became effective, Oscar C. Rasa, then Speaker of the NMI's House of Representatives wrote to Ruth G. Van Cleve, Director of the Department of Interior's ("DOI's") Office of Territorial Affairs ("OTA"), explaining that several firms had recently contacted CNMI legislators seeking authorization to conduct preliminary exploration to determine the feasibility of extracting minerals from submerged lands abutting the NMI's shorelines. (U.S. Exh. 17.) According to Mr. Rasa's letter, the firms had "been advised informally that the Commonwealth of the Northern Mariana Islands may not have exclusive jurisdiction over submerged lands off the coast of the Commonwealth." *Id.* at 1. While asserting the NMI legislature's position that the NMI owned the submerged lands and resources underlying the territorial sea, and could "manage and dispose of same by law," the Rasa letter nonetheless asked DOI's OTA for a legal opinion whether jurisdiction over submerged lands and ocean resources was vested exclusively in the Commonwealth. *Id.*

On June 22, 1978, Ms. Van Cleve referred the Speaker's letter to C. Brewster Chapman, Jr., Asst. Solicitor for DOI's Division of General Law - Territories. (U.S. Exh. 18.) By letter dated June 29, 1978 (U.S. Exh. 19), Mr.

Chapman responded that:

> [T]he Government of the Northern Mariana Islands probably has ownership of and exclusive jurisdiction over these submerged lands, at least at this time. But this is only a temporary title and jurisdiction. When the Northern Mariana Islands are proclaimed a Commonwealth and territory of the United States, the laws of the United States applicable to its territories will come into effect in the Northern Marianas. One of the rules...is that submerged lands around an island territory belong to the federal---not to the local---Government.
>
> By the 1974 amendments to the Territorial Submerged Lands Act..., the Congress has clearly indicated its intent that, subject to the limitations contained in that Act, title to the submerged lands surrounding our territories should be in the respective local governments, and there is absolutely no reason to believe that the Northern Mariana Islands will not eventually be included under the provisions of that Act. In fact, I would recommend seeking a legislative amendment to the Territorial Submerged Lands Act now but for one problem. That Act conveys all right, title, and interest of the United States in those submerged lands to the respective named territories. The United States does not now have any right, title or interest in the submerged lands of the Northern Mariana Islands and, therefore, has nothing to convey. Such right, title, or interest will only attach as an incidence of U.S. sovereignty when the Northern Marianas become a territory of the United States. At that time, then, the grant can be made.

Id. at 2-3.

Consistent with its conclusion that oceanic submerged lands abutting the NMI would belong to the Federal Government as soon as the NMI became a Commonwealth of the United States, Mr. Chapman's letter went on to suggest

that it would be prudent for the NMI government to "accept the applicable limitations and exceptions contained in the 1974 amendments to the Territorial Submerged Lands Act...which are not inconsistent with its current legal status, in managing and disposing of its submerged lands and their resources." *Id.* at 3.

Mr. Chapman's June 29, 1978 letter was transmitted to the NMI legislature. *See* U.S. Exh. 20. According to a State Department press release dated July 25, 1978, Roger St. Pierre, a legal consultant to the NMI legislature, disputed Mr. Chapman's conclusions and was reported to have said that because the Marianas Constitution granted ownership of the submerged lands to the Commonwealth, and because the United States approved the Constitution, the federal government had no jurisdiction over them. *Id.*

In a letter dated July 31, 1978 (U.S. Exh. 21), Mr. Chapman issued a rebuttal to the press reports of Mr. St. Pierre's position on submerged lands, reaffirming the United States' position that:

> When the Northern Marianas becomes a Commonwealth and a territory of the United States the submerged lands will belong to the United States by operation of law, and thereafter it will take an act of Congress, pursuant to its plenary authority under Article IV, Section 3, Clause 2, of the [U.S.] Constitution to convey title in them to the local government. It is a well settled rule that the United States cannot be divested of its title to property except by an Act of Congress.

Id. at 2.

19. Notwithstanding Articles XI, § 1 and XIV, § 1 of the CNMI Constitution, and Mr. Chapman's legal opinions, the NMI legislature enacted two statutes during the 1979-1980 time frame, which purported to assert the NMI government's sovereignty and/or exclusive jurisdiction over submerged lands and marine resources off the coast of the Commonwealth.

In the NMI "Submerged Lands Act," the NMI legislature asserted ownership of submerged lands "out to the ocean to a distance of two hundred nautical miles." (U.S. Exh. 22, at 141.) That legislation also assigned to the CNMI "Director of Natural Resources" the responsibility to issue exploration licenses and development leases for the oceanic submerged lands abutting the NMI. *Id.* at 142.

In May 1980, the NMI legislature enacted the "Marine Sovereignty Act of 1980." (U.S. Exh. 23.) That legislation purported to assert that the NMI government has sovereignty over a twelve-mile territorial sea, as measured from straight archipelagic baselines, as well as a 200-mile exclusive economic zone measured from the same baselines. *Id.* at 2-104 to 2-106. Neither the NMI "Submerged Lands Act" nor the "Marine Sovereignty Act" contained a sunset

provision providing for expiration to coincide with the termination of the Trusteeship. To date, neither statute has been repealed.

20. Section 802(a) of the Covenant provides that "[t]he following property will be made available to the Government of the United States by lease to enable it to carry out its defense responsibilities:

> (1) on Tinian Island, approximately 17,799 acres (7,203 hectares) and the waters immediately adjacent thereto; ...[and]
>
> (3) on Farallon de Medinilla Island, approximately 206 acres (83 hectares) encompassing the entire island, and the waters immediately adjacent thereto."

(U.S. Exh. 10, at 29.) A separate "Technical Agreement," executed pursuant to Covenant § 803(c), provided that the U.S. would forfeit its leasing rights unless payment therefor was received by the NMI Government within five years after Section 802 became effective: January 9, 1983. (U.S. Exh. 24, at 2-3.)

To meet the five-year leasing deadline, the U.S. Department of Defense commenced negotiations with the CNMI over leasing the areas described in Covenant § 802(a). Because the Marianas Public Land Corporation (established by Article XI, § 3, of the CNMI Constitution) possessed leasing authority concerning only surface lands, *i.e.*, uplands, the NMI legislature enacted a statute authorizing the NMI Governor to execute a lease with the United States

concerning the "waters immediately adjacent" to "the leased surface lands on Tinian and Farallon de Medinilla Islands," including the right "to facilitate access and egress to the leased surface areas and to construct reasonable port facilities." Commonwealth Code, § 1412; Pub.L. No. 3-40, § 2 (Jan. 1, 1983); U.S. Exh. 25. On January 6, 1983, the United States executed a single, integrated lease with the Mariana Public Lands Corporation for surface areas and with the Governor for the waters immediately adjacent to the leased surface areas on Tinian and Farallon de Medinilla Islands. (U.S. Exh. 26.)

21. On March 10, 1983, three years before the U.N. Trusteeship ended, President Reagan issued Proclamation No. 5030, 48 Fed. Reg. 10605 (1983), establishing an "exclusive economic zone" ("EEZ") confirming that the U.S. claimed sovereign rights and control over the natural resources (living and non-living) of the seabed, subsoil, and superjacent waters beyond the territorial sea but within 200 nautical miles of United States' coasts. (U.S. Exh. 27, at 2-3.) The Proclamation expressly applied to the NMI to the extent consistent with the Covenant and the U.N. Trusteeship Agreement. *Id.*; 48 Fed. Reg. at 10605.

22. In August, 1985, the "Northern Mariana Islands Commission on Federal Laws" ("Commission on Federal Laws") issued "Welcoming America's

Newest Commonwealth," a report to the U.S. Congress prepared pursuant to § 504 of the Covenant. (U.S. Exh. 28).[12] In the Report, the Commission stated that "[u]ntil termination of the trusteeship, the United States has no claim to ownership of submerged lands in the Northern Mariana Islands." *Id.* at 175. On the other hand, the Report conceded that just because "the Northern Mariana Islands is now the owner of the submerged lands adjacent to its shores does not mean its ownership will survive termination of the Trusteeship." *Id.* at

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[12] Section 504 of the Covenant provides, as relevant here:

> The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands.

(U.S. Exh.10 at 16-17.) In early 1980, President Carter appointed the Commission members, a majority of whom, per § 504, were NMI residents. The Commission met on ten occasions between May 1980 and May 1985. *See* U.S. Exh.28 at 434-35.

178. As the Commission explained, "[o]n termination of the Trusteeship, sovereignty over the Northern Mariana Islands will become vested in the United States. At that time, ownership of the submerged lands becomes uncertain." *Id.* at 177. Citing to two of the United States Supreme Court's seminal "tidelands" cases, United States v. California, 332 U.S. 19, 34, 67 S.Ct. 1658 (1947) and United States v. Texas, 339 U.S. 707, 70 S.Ct. 918 (1950), *see id.* at 177-78, and noting that there were arguments both in favor of and against continued CNMI ownership of submerged lands after the Trusteeship terminated, *id.* at 177, the Commission recommended that the U.S. Congress enact legislation to "clarify" that the CNMI was the owner of "lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands." *Id.* at 172. According to the Report, "[t]he legislation here proposed thus follows the track already laid by Congress in conveying lands to the States and to other territories." *Id.* at 180 (referencing in a subsequent discussion, *id.* at 180-83, the federal Submerged Lands Act, 43 U.S.C. § 1301(a),(b), and the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a)).

23. In 1985, all remaining TTPI districts except Palau entered into Compacts of Free Association pursuant to which independent sovereignties would be formed. Compact of Free Association Act of 1985, Pub.L. No. 99-239, 99 Stat. 1770 (1986) (appearing at 48 U.S.C. § 1901 note (1994)). On November 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the U.N. Trusteeship was terminated with respect to the Marshall Islands, the Federated States of Micronesia, and the Northern Mariana Islands. (U.S. Exh. 29; 51 Fed. Reg. 40,399.)

Pursuant to § 1002 of the Covenant, the President proclaimed that Sections 101 and 104, among others, would become effective at 12:01 a.m. on November 4, 1986, and that, as of that date, "the Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America is fully established." *Id.*; 51 Fed. Reg. at 40,400.

24. On November 23, 1986, the CNMI requested formal consultations with a "special representative" of the President of the United States, pursuant to Section 902 of the Covenant, concerning the ownership of submerged lands and

marine resources. (U.S. Exh. 30.)[13] On March 30, 1987, the Special Representative of the CNMI's Governor prepared a position paper, stating that "[t]he jurisdiction of the Commonwealth over its oceans, submerged lands and the natural resources of the surrounding sea was not specified in the Covenant." (U.S. Exh. 31, at 4.) Despite the recommendations that the Commission on Federal Laws had made less than two years earlier (*i.e.*, that federal legislation be enacted to convey three miles of oceanic submerged lands to the CNMI), the CNMI's § 902 representative asserted that the Commonwealth should have the "same rights in the ocean and exclusive economic zone (EEZ) as are recognized for coastal states in the United Nations Convention on the Law of the Sea (UNCLOS), subject only to appropriate oversight by the Government of the United States in the areas of foreign affairs and defense." *Id.* at 6. Accordingly,

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[13] Section 902 of the Covenant specifies that

> The Government of the United States and the Government of the Northern Mariana Islands will consult regularly on all matters affecting the relationship between them. At the request of either Government, and not less frequently than every ten years, the President of the United States and the Governor of the Northern Mariana Islands will designate special representatives to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto.

the CNMI recommended that U.S. legislation be enacted that established the Commonwealth's right, on a permanent basis, to exercise exclusive jurisdiction over a 12-mile territorial sea as well as a 200-mile exclusive economic zone. *Id.* at 55-64.

25. On April 12, 1990, a special representative of the President of the United States, Timothy W. Glidden, executed a memorandum of agreement indicating that Mr. Glidden would personally support the Commonwealth's proposal that the CNMI's alleged sovereign right to ownership and jurisdiction of the waters and seabed surrounding the NMI be recognized and confirmed "to the full extent permitted by international law." (U.S. Exh. 32, at 1.) In that memorandum, Mr. Glidden also agreed to seek resolution of the issue within the Government of the United States consistent with the CNMI's proposal. *Id.* at 2.

On September 18, 1990, Mr. Glidden prepared a position paper detailing what proved to be his unsuccessful efforts to obtain support within the U.S. government for the Commonwealth's proposed resolution of the submerged lands and ocean resources issue. (U.S. Exh. 33.) According to Mr. Glidden's position paper, the U.S. government was of the view that exclusive jurisdiction

and control over the submerged lands and marine resources off the coast of the CNMI had passed to the U.S. when the U.S. acquired sovereignty over the CNMI in November 1986, and that there was no basis in law for the CNMI's claim of ownership and/or control over 200-mile exclusive economic zone. *Id.* at 3-4.

26. In 1992, and again in 1995 and 1996, the disagreement over the CNMI's claim to submerged lands and ocean resources became the subject of additional rounds of § 902 consultations. During this period, the special representatives of the CNMI Governors and of the President of the United States exchanged several more position papers, each adhering to their opposing positions on the issue of submerged lands and ocean resources. U.S. Exhs. 34 - 40. From 1987 to 1997, U.S. officials made several offers to sponsor legislation that would grant CNMI authority to control submerged lands and marine resources to a point three miles from shore. *See* U.S. Exhs. 61, at 0879; 63, at 0884; 64, at 0888; 65, and 66. The CNMI declined all such offers. (U.S. Exh. 38, at 0638; 63, at 0884; 64, at 0888.)

27. On August 21, 1995, the CNMI's Department of Land and Natural Resources executed a "Submerged Lands Lease Agreement" with the Marine

Revitalization Corporation ("MRC"), pursuant to which the MRC was to construct a 76-slip boat marina complex at American Memorial Park on Saipan. (U.S. Exh. 41.) That agreement made no reference to the United States' authority over the portion of the leased premises that consisted of submerged lands and did not expressly require the MRC to obtain U.S. approval.

During the spring of 1986, the U.S. Department of the Interior notified MRC of the United States' authority over the submerged lands aspect of the lease. *See* U.S. Exh. 42. Accordingly, the U.S. Park Service and MRC executed a separate concession agreement for Outer Cove Marina, which contained language acknowledging the dispute between the U.S. and the CNMI over the ownership of submerged lands, and stating that "neither the Commonwealth nor the United States waives or concedes any claim to ownership or control of the submerged lands...." (U.S. Exh. 43, at 0749.)

The CNMI's Quiet Title Act complaint followed.

Conclusions of Law

1. The Covenant controls the rights, responsibilities, and political relationship between the United States and the Commonwealth of the Northern Mariana Islands. Section 101 of the Covenant specifies that the CNMI is under the sovereignty of the United States. As an incident of external sovereignty, the United States, under U.S. law, acquired ownership and paramount rights in the submerged lands and marine resources seaward of the CNMI's low-water mark at the termination of the U.N. Trusteeship. Stated differently, the United States is the owner of, and has paramount authority over, the submerged lands lying seaward of the Commonwealth's coastlines and inland waters because the Commonwealth ceded authority over those submerged lands upon full implementation of the Covenant. In Covenant § 101, the Commonwealth entered into a relationship with the United States as sovereign, like every other U.S. State and Territory. That relationship became effective on November 4, 1986. Wherever a sovereignty relationship exists between the United States and a State or Territory abutting oceanic waters, the United States' paramount authority over submerged lands seaward of the low water mark attaches as an incident of that sovereignty.

Under federal constitutional law, paramount power over submerged lands is vested in the United States as a necessary element of national external sovereignty. In United States v. California, 332 U.S. 19, 34, 67 S.Ct. 1658 (1947), the Court rejected California's claim to ownership of the oceanic submerged lands within three miles of the coastline. The Court held that the protection and control of adjacent seas is a function of national external sovereignty which, under the constitutional system, requires that paramount rights over the submerged lands underlying adjacent oceanic waters and their natural resources be vested in the federal government. The Court also made clear that "the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies...the oil and other resources of the soil of the marginal sea...may be exploited." 332 U.S. at 29.[14]

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[14] In subsequent litigation, the Supreme Court extended the California doctrine from the three-mile limit to the outer continental shelf. In United States v. Louisiana, 339 U.S. 699, 704, 70 S.Ct. 918 (1950), the Court explained that, with respect to the outer continental shelf, "[t]he problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area."

Similarly, in United States v. Texas, 339 U.S. 707, 70 S.Ct. 918 (1950), another submerged lands case, this one involving lands underlying the Gulf of Mexico, the Supreme Court concluded that even if Texas, prior to statehood, had full ownership and sovereignty over the adjacent seas and seabed, such ownership could not survive the State's admission to the Union:

> It is said that...the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it.... Yet,... once the low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign.... If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it.

339 U.S. at 719.[15]

2. The paramountcy doctrine applies to U.S. Territories to the same extent as to States; it extends to *all* cases in which *any* plaintiff asserts a claim of ownership in submerged lands underlying the ocean abutting an area over which the U.S. has sovereignty. *See e.g.* Village of Gambell v. Hodel, 869 F.2d

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[15] Later, in United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155 (1975), the Supreme Court rejected a claim by Atlantic Coast states that they had acquired rights to the seabed which had survived the formation of the Union, thereby reiterating the continued vitality of the paramountcy doctrine.

1273, 1276 (9th Cir. 1989) ("Gambell III") (In Gambell III, the Ninth Circuit rejected a contention that the principles enunciated in the Supreme Court's paramountcy cases did not apply in cases where plaintiff is not a U.S. state, holding that the fact that the paramountcy cases involved States rather than Alaskan natives was "a distinction without a difference....") Similarly, in Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir. 1998), the Ninth Circuit unequivocally declared:

> the paramountcy doctrine is not limited merely to disputes between the national and state governments. Any claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases.

As the court further explained:

> Whatever interests the states might have had in the [outer continental shelf] and marginal sea prior to statehood were lost upon ascension to the Union. The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea. This principle applies with equal force to *all* entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany. "National interests, national responsibilities, national concerns are involved" in all these cases.

Id. at 1096 (emphasis in original).

Because Covenant § 101 granted the United States full sovereignty over the NMI at the termination of the Trusteeship, and does not expressly reserve to the CNMI ownership of the submerged lands and marine resources underlying the oceanic waters off its coastlines, the United States, based on long-standing precedent, possesses the paramount rights in the marine resources and oceanic submerged lands abutting the Commonwealth, contrary to the CNMI's claim of ownership and assertions of sovereignty. On this basis alone, the United States could be and is granted summary judgment, and the court rejects the CNMI's quiet title complaint seeking a "judgment declaring that title to the submerged lands underlying the...archipelagic waters, and territorial waters adjacent to the Northern Mariana Islands is vested in the Commonwealth of the Northern Mariana Islands." (CNMI Compl. at 16).[16] For the same reason, the United States is granted the relief requested in its counterclaim, namely, a declaratory judgment decreeing that the United States possesses "paramount

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[16] In its complaint, the CNMI also seeks the same declaratory relief concerning its internal waters. Because the U.S. has not contested the Commonwealth's claim of ownership of or paramount rights to waters inland of the CNMI's low-water mark, there is no case or controversy that requires this court to exercise subject matter jurisdiction over the claim for declaratory relief concerning the CNMI's internal waters. For that reason the court does not address that aspect of the Commonwealth's complaint.

rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters." (U.S. Counterclaim, ¶ 44.)

3. In order for the Commonwealth to hold ownership of oceanic submerged lands in the face of the federal paramountcy doctrine, a clear, express and unequivocal Congressional enactment transferring such lands to the Commonwealth would be required. There has never been such a declaration. Neither the Covenant nor any other federal law expressly and unequivocally transfers control of any submerged lands to the Commonwealth. Thus, the federal paramountcy doctrine is dispositive of the United States' claim to the oceanic submerged lands abutting the Commonwealth.

In ¶ 34 of its complaint, the CNMI alleges that "in Section 801 [of the Covenant] Defendant United States agreed to transfer and Plaintiff Commonwealth agreed to receive 'all right, title, and interest of the Trust Territory of the Pacific Islands' in and to the submerged lands...no later than the termination of the Trusteeship Agreement."

Covenant § 801 did not constitute a conveyance of oceanic submerged lands and associated natural resources to the Commonwealth. Under U.S. law,

the United States cannot be divested of property subject to its sovereignty, ownership, and jurisdiction absent an *explicit* congressional grant or conveyance, which § 801 lacks. In United States v. Texas, *supra*, the Supreme Court declared that "[d]ominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged...." 339 U.S. at 717. It has long been the law that "disposals by the United States...are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55, 46 S.Ct. 197 (1926). Consequently, this Court's determination as to whether Congress intended to divest the United States, as sovereign, of its paramount interests in the oceanic submerged lands off the coasts of the CNMI must be analyzed in light of the bedrock principle that "land grants are construed favorably to the Government, that *nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.*" Watt v. Western Nuclear, Inc., 462 U.S. 36, 59, 103 S.Ct. 2218 (1983)(emphasis added); *see also* California ex rel. State Lands Comm. v. United States, 457 U.S. 273, 287, 102 S.Ct.2432 (1982);

United States v. Union Pac. R.R. Co., 353 U.S. 112, 116, 77 S.Ct. 685 (1957).

The principle---that it takes explicit federal legislative action to convey oceanic submerged lands to states and territories before the latter may own and/or regulate such lands---has been followed by the U.S. Congress since at least 1947. In 1953, in response to the Supreme Court's 1947-1950 "tidelands" cases, *supra*, Congress enacted the federal Submerged Lands Act, which generally grants to coastal States title and ownership of the lands beneath the navigable waters for a distance of three nautical miles seaward from their coasts. 43 U.S.C. §§ 1301, 1311(a). Similarly, in 1963 and 1974, Congress enacted the Territorial Submerged Lands legislation to convey to the governments of Guam, the Virgin Islands, and American Samoa, submerged lands within three geographical miles seaward of their coasts. *See* Pub. L. No. 183, 88th Cong. 1st Sess., 77 Stat. 338 (1963); *see also* 48 U.S.C. §§ 1705(a), (b).[17]

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[17] The 1963 Territorial Submerged Lands legislation, 77 Stat. 338 (1963), authorized the U.S. Department of the Interior to convey a three-mile belt of submerged lands to those U.S. Territories. The 1974 legislation, 48 U.S.C. §§ 1705(a), (b), conveyed those submerged lands to the specified U.S. Territories outright.

In the legislative history of the Territorial Submerged Lands Act (*i.e.*, the 1974 legislation), the U.S. Department of Justice reported to Congress about the 1958 decision (discussed *supra*) by the Solicitor of the Department of the

Thus, when Congress considered and approved the Covenant in 1976, it knew that no transfer or reservation of oceanic submerged lands to the Commonwealth would occur, unless Congress said so by explicit language in the Covenant or by separate legislation.

Section 801 reflects no congressional intention or agreement that ownership of oceanic submerged lands should vest in the Commonwealth.

As relevant here, § 801 provides:

> All right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to *real property* in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

(U.S. Exh. 10, at 28; emphasis added.)

Interior, 65 Int. Dec. 193 (1958), that "tidelands and submerged lands...were not transferred to the Government of Guam...in view of the general rule that such lands do not ordinarily pass under the general statutes but must be specified particularly." 1974 U.S. Code Cong. & Ad. News 5464, 5466 (1974). Consistent with that view, the Senate Report on the Territorial Submerged Lands Act declared, "the submerged lands of Guam, the Virgin Islands, and American Samoa are owned by the Federal Government and administered by the Department of the Interior." *Id.* at 5464-65.

The Section-By-Section Analysis of the Covenant explains the scope of § 801 as follows:

> Section 801 provides that all of the real property (including buildings and permanent fixtures) to which the Government of the Trust Territory of the Pacific Islands holds any right, title, or interest, will be transferred to the Government of the Northern Marianas. The transfer will take place no later than the time of the termination of the trusteeship. The Section applies to all land to which the Trust Territory Government has rights on the date that the Covenant is signed, or which it acquires thereafter in any manner whatsoever. The Section serves as a guarantee that all of the public land in the Northern Marianas will be returned to its rightful owners, the people of the Northern Marianas. It is expected that a very substantial amount of land will be returned far sooner than the termination of the Trusteeship. Under the U.S. Land Policy Statement and its implementing Secretarial Order, it is expected that much public land will be transferred as soon as a land entity is established by the Mariana Islands District Legislature to hold land in trust for the people of the Northern Marianas. This section assures all of the land will come back no later than termination, and that no land can be disposed of other than to the Government of the Northen Mariana Islands.

(U.S. Exh. 11, at 95-96.)

Because § 801 does not define "real property,"[18] and because the Analysis

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[18] In the absence of any definition of "real property" in the Covenant, this court must construe the "term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476, 114 S.Ct. 996 (1994) (*citing* Smith v. United States, 508 U.S. 223, 228, 113 S.Ct. 2050 (1993)). Black's Law Dictionary (5th Ed.) defines "real property" as "Land, and generally whatever is

does not make any reference to oceanic submerged lands as among the "public lands" which must be returned to the Commonwealth, there is no indication whatsoever that the drafters of the Covenant considered "real property" to mean anything other than "fast lands," *i.e.*, dry, above-surface lands. Certainly, it cannot be said that either Covenant § 801 or the Analysis contains an express reservation of oceanic submerged lands that would permit a divestiture from the United States of the paramount rights to those lands that the U.S. acquired as an incident of the sovereignty that became effective upon termination of the Trusteeship Agreement.

The Commonwealth previously conceded that the status of oceanic submerged lands and marine resources was not addressed in the Covenant. In the Commission on Federal Laws' Second Interim Report (August 1985), the CNMI representatives acknowledged that "[b]ecause neither Section 801 nor its negotiating history mentions submerged lands, it can be argued, with the Department of the Interior opinion as precedent, that section 801 transfers only

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erected or growing upon or affixed to land." The New Shorter Oxford English Dictionary's first definition of "land" is "the solid part of the earth's surface, as distinguished from the sea or water, or from the air." Thus, the ordinary, plain meaning construction of "real property" does not include oceanic submerged lands within Covenant § 801"s coverage.

fast lands." (U.S. Exh. 28, at 179). For that reason, among others, the Commission recommended that:

> Legislation should be enacted to convey to the Northern Mariana Islands any property rights of the United States in lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands. The proposed legislation is similar to laws already enacted to convey federal interests in submerged lands to the States of the Union, Guam, the Virgin Islands, and American Samoa.

Id. at 172.

In subsequent position papers, the CNMI repeatedly acknowledged that "the Covenant is silent on the subject of ocean jurisdiction of the Northern Mariana Islands in general," and that "it is a curious blind spot in the Covenant that the jurisdiction of the Commonwealth over its oceans, submerged lands, and the natural resources was not specified." (U.S. Exh. 30, at 3; *see also* U.S. Exh. 31, at 4).[19] In light of these concessions, the CNMI's allegation in ¶ 34 of its Complaint that § 801 constitutes an "agreement" by the United States to "transfer" oceanic submerged lands to the CNMI cannot be sustained.

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[19] *See also* U.S. Exh. 31, at 46, where the CNMI stated: "*Unlike the protections included for land*, the Covenant makes no specific provision for ownership, conservation or control of the oceans and marine resources." (Emphasis added)

4. Further, the CNMI's assertion that § 801 of the Covenant transferred oceanic submerged lands to the Commonwealth is belied by the CNMI Constitution.

As previously noted, the drafters of the CNMI Constitution demonstrated their understanding in late 1976---approximately nine months after Section 801 of the Covenant became effective---that oceanic submerged lands would only pass to the Commonwealth pursuant to "United States law" and not § 801 of the Covenant. Specifically, Article XI, Section 1, of the CNMI Constitution provides:

> Section 1: Public Lands.
> The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the U.S. Secretary of the Interior, on December 26, 1974,
>
> the lands as to which right, title or interest have been vested in the Resident Commissioner under Secretarial Order 2989 promulgated by the U.S. Secretary of the Interior on March 24, 1976,
>
> the lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Marianas Islands *under Article VIII of the Covenant, and*

> *the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under United States law* are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent.

(U.S. Exh. 13, at 19; emphases added).

There would have been no reason for the NMI Constitution's framers to describe these submerged lands in Constitution Art. XI, § 1 separately from lands transferred to the Commonwealth "under Article VIII of the Covenant" pursuant to Art. XI, § 1 of the Constitution if oceanic submerged lands abutting the Commonwealth were already subsumed as "real property" of the Trust Territory Government within the meaning of § 801 of the Covenant. By describing oceanic submerged lands separately from lands transferred pursuant to Article VIII of the Covenant, the framers in Art. XI, § 1 of the CNMI Constitution acknowledged and conceded that ownership and control of oceanic submerged lands would not pass to the Commonwealth pursuant to Article VIII of the Covenant.[20]

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[20] As a separate matter, it is highly probative that the framers in Art. XI, § 1 of the CNMI Constitution characterized any claim that the CNMI might have to ownership of submerged lands as governed by "United States law." Explaining this reference to "United States law" in Art. XI, the CNMI

5. The United States' exercise of paramount rights over the oceanic submerged lands abutting the Commonwealth does not infringe upon the CNMI's right of local self-government under Covenant § 103. That section

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Constitutional Analysis (Dec. 6, 1976, stated:

> Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The U.S. is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the U.S. The federal power over these lands is based on the provisions of the U.S. Constitution with respect to defense and foreign affairs. *Under article 1, section 104, of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.* Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

(U.S. Exh. 15, at 144; emphasis added.)

The foregoing strongly indicates that the framers of the CNMI Constitution, nine months after § 801 became effective, knew and understood that title to oceanic submerged lands had not passed to, nor was reserved to, the Commonwealth by virtue of § 801 of the Covenant, but instead would pass to the CNMI only in the same way title to oceanic submerged lands had passed to the States and other U.S. Territories, *i.e.*, by future U.S. legislation.

provides:

> The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to *internal* affairs *in accordance with a Constitution of their own adoption.*

(U.S. Exh. 10, at 6; emphasis added.)

As previously explained, the CNMI Constitution explicitly acknowledges that whatever claim the CNMI may have to ownership of oceanic submerged lands and resources would be governed by U.S. law, not § 801 of the Covenant. *See* CNMI Const. Art. XI, § 1 and Art. XIV, § 1 (and corresponding sections of the CNMI Constitutional Analysis); U.S. Exh. 13, at pp. 19, 23; and U.S. Exh. 15, at pp. 144, 181.

Under United States law, ownership of submerged lands seaward of the coastline is neither an incident of local self-government nor within the police powers of any U.S. State or Territory. Rather, as the Supreme Court succinctly put it: "[i]f the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities." United States v. Texas, 339 U.S. at 719. Indeed,

as the Court declared more emphatically in United States v. Louisiana:

> Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704.

Given that control of oceanic submerged lands, as a matter of U.S. law, is a function of national sovereignty, and given that the Commonwealth has ceded sovereignty to the United States pursuant to Section 101 of the Covenant, the CNMI's claim to ownership of submerged lands as a "right of self-government and the right to govern themselves with respect to internal affairs" must be and is rejected.

6. The Commonwealth's contention that it owns the oceanic submerged lands abutting the coast of the Commonwealth because it did not enter into political union with the United States on an "equal footing" with the other states of the United States is also rejected. In ¶ 32 of its complaint, the CNMI alleges that it owns the oceanic submerged lands abutting the Commonwealth because:

> [u]nder the Covenant, the Commonwealth is not incorporated into the United States, that is, it is not intended to eventually become a State of the United States. The Commonwealth is not on an equal footing with the States of the United States.

Article IV, § 3, cl. 1, of the U.S. Constitution provides for the admission of new States to the Union. In Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-229 (1845), the Supreme Court ruled that, under the U.S. Constitution, new States are admitted to the Union on an "equal footing" with the original thirteen colonies. As relevant here, "equal footing" means that a newly admitted State presumptively succeeds to the United States' ownership of tidelands (*viz.*, coastal lands between high and low tide) and lands beneath inland navigable waters within the State's boundaries. *Id.*; *see* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S.Ct. 791 (1988); Shively v. Bowlby, 152 U.S. 1, 26-31, 14 S.Ct. 548 (1894). In addition, Guam, the Virgin Islands, American Samoa, and Puerto Rico did not enter upon a political relationship with the United States on an equal footing with the States of the United States, yet the federal paramountcy doctrine necessitated that specific U.S. legislation—in the form of the Territorial Submerged Lands Act of 1974, 48 U.S.C. § 1705(a)---be enacted to convey ownership of oceanic submerged lands abutting those U.S.

territories.

The equal footing doctrine has no application, however, to submerged lands seaward of the low-water mark. United States v. California, 332 U.S. 19, 67 S.Ct. 1658 (1947). Because the submerged lands at issue in this case are neither "coastal lands between high and low tide" nor "lands beneath inland navigable waters" within the CNMI's boundaries, the equal footing doctrine has no application to this case.

7. The Commonwealth's argument that the United States' lease of Commonwealth lands and adjacent waters for defense purposes pursuant to Covenant § 802 constitutes an "acknowledgment" by the U.S. that the CNMI owns the oceanic submerged lands abutting the Commonwealth presents no genuine issue of material fact. As noted above, on January 6, 1983, the CNMI and the U.S. executed a lease pursuant to Covenant § 802,

which provides, in pertinent part:

> The Commonwealth does hereby grant, demise, and let unto the United States... and the United States does hereby accept and rent from the Commonwealth pursuant to Section 802 of the Covenant waters of the Commonwealth immediately adjacent to the leased surface lands on Tinian and Farallon de Medinilla Islands.... The United States shall have the right within the waters to facilitate

> access and egress to the leased surface lands and to construct reasonable port facilities; PROVIDED, that the United States shall disturb to the minimum extent possible the seabed and subsoil in exercising its right of construction. The Commonwealth retains the right, without undue interference to the rights of the United States under this Lease Agreement, to exploit the living and non-living resources of the waters immediately adjacent to the leased surface lands.

(U.S. Exh. 26, at 4.)

In ¶ 38 of its complaint, the CNMI argues that this lease language reflects a concession on the part of the United States that the Commonwealth was, at the time of the lease, the owner of the oceanic submerged lands adjacent to the leased surface lands on the islands of Tinian and Farallon de Medinilla. This claim does not withstand scrutiny.

Without conceding that the CNMI owned oceanic submerged lands off the coast of the Commonwealth, the United States deemed it necessary to lease from the CNMI waters immediately adjacent to Tinian and Farallon Islands. This was because coastal tidelands---that is, the CNMI's intermittently submerged lands between the high and low water mark---which the Defense

Department must traverse to access and egress leased surface areas),[21] and waters within port facilities such as harbors and harborworks, and other coast protective structures that facilitate access and egress to shorelines, such as artificial breakwaters, jetties, and groins, are considered *internal* waters not subject to the federal paramountcy doctrine. *See e.g.* United States v. Louisiana, 394 U.S. 43, 49-50 n.64, 89 S.Ct. 773 (19690; *see generally* M. W. Reed, Shore and Sea Boundaries, Volume Three, U.S. Exh. 47, at 50 - 57 (U.S. Govt. Printing Office 2000). The U.S. has made no claim to the internal waters and tidelands of the CNMI, and those waters and intermittently submerged lands are not at issue in this case. Thus, the United States' lease of the waters "immediately adjacent" to Tinian and Farallon de Medinilla for the purposes of facilitating access and egress and constructing reasonable port facilities cannot be viewed as a concession by the U.S. that the CNMI owns the submerged lands seaward of the

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[21] Under United States law, the lands between the high and low water marks are not owned by the United States, but by the adjacent states themselves, in trust for their people. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The language in § 802 of the Covenant that provides for the U.S. to lease waters "immediately adjacent" to leased surface areas reflects the United States' recognition that, as a matter of U.S. Government policy (not the equal footing doctrine), the rule of Pollard's Lessee applies within and to the CNMI, such that the CNMI has dominion over the tidelands (intermittently submerged lands) between the high and low water mark. *See* U.S. Exh. 3 at 7.

low water mark abutting the Commonwealth's coasts.

8. The Commonwealth's allegations that the United States' "collective words," in a land return policy statement, and in Secretarial Order Nos. 2969 and 2989, promised to convey permanent ownership of submerged lands off the coast of the Commonwealth to the CNMI government are not supported and do not raise a genuine issue of material fact.

In paragraphs 26, 27, and 35 of the complaint, the Commonwealth seeks to portray a series of events aimed at returning public lands to the TTPI districts generally (a 1974 land return policy statement, and Secretarial Order No. 2969), and transferring civil administration of the NMI to a "Resident Commissioner" (Secretarial Order No. 2989), as evidence that the U.S. agreed to make a permanent conveyance of oceanic submerged lands to the Commonwealth. Specifically, the CNMI alleges that on November 4, 1973, the Secretary of the Interior and the President's Personal Representative for Micronesian Status Negotiations issued a policy statement reflecting their agreement that the NMI oceanic submerged lands then being held by the TTPI government would be permanently returned to the NMI people. Comp. ¶ 26. The Commonwealth complaint goes on to allege that, on December 28, 1974, the Interior Secretary

issued Secretarial Order No. 2969 specifically to implement the alleged policy of returning oceanic submerged lands to the NMI people. Comp. ¶ 27. In paragraph 35 of the complaint, the CNMI alleges that on April 1, 1976, the Interior Secretary issued Secretarial Order No. 2989, to separate the administration of the NMI from the TTPI government's administration of the rest of Micronesia, and thereby vested in the Resident Commissioner (a U.S. government position established by Order No. 2989) title to all oceanic submerged lands. According to the Commonwealth, the NMI government "succeeded to all powers, rights, and authority of the Resident Commissioner, thereby receiving title to all submerged lands in the [NMI]," on January 9, 1978, *i.e.*, when the NMI constitutional government superseded the civil administration established by Secretarial Order No. 2989. Comp. ¶ 35.

a. The November, 1973, Land Return Policy Did Not Contemplate a Transfer of Unrestricted Control Over Oceanic Submerged Lands to the Northern Mariana Islands

There is no substance to the Commonwealth's assertion (Comp. ¶ 26) that the Land Return Policy Statement constituted an agreement by the United States to convey its interest in oceanic submerged lands abutting the Commonwealth. By its plain terms, the policy statement was finite in duration;

it applied only to the status of public lands for the remaining life of the Trusteeship and did not purport to decide the legal status of such lands after termination of the Trusteeship. *See* U.S. Exh. 8 at 2 ("these limitations and safeguards will apply until the Trusteeship ends, at which time the new government will be free to modify them as it chooses"). More importantly, the land return policy did not alter the TTPI government's "quasi-sovereignty" over the TTPI districts, including the NMI. *See* Temengil v. Trust Territory, 881 F.2d 647, 652 (9th Cir.1989).[22] Until termination of the Trusteeship, the Trust Territory government continued to act as a "quasi-sovereign" over all of the TTPI districts, including the NMI, and remained responsible for the defense of the Northern Mariana Islands until the Trusteeship ended.[23] As an incident of

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[22] In Temengil, the Ninth Circuit stated:

> [A]lthough the United States for the most part dealt with the Northern Mariana Islands as though it was a Commonwealth beginning in 1978, the area formally remained a part of the Trust Territory until the Trusteeship Agreement was dissolved in 1986.

881 F.2d at 650.

[23] Article 5 of the Trusteeship Agreement provides:

> In discharging its obligations under Article 76(a) and Article 84 of the Charter, the administering authority shall ensure that the trust

that "quasi-sovereignty" and responsibility for NMI defense, the TTPI government continued to control submerged lands seaward of the low water mark on the CNMI coastlines between March 24, 1976, when the Covenant was enacted by Congress, and November 4, 1986, when the Trusteeship ended. Anticipating that continued control, the land return policy statement issued in November, 1973, expressly provided that any return to the TTPI districts of "tidelands, filled lands, submerged lands, and lagoons," was subject to the retained right of the TTPI government "to control activities within these areas affecting the public interest." (U.S. Exh. 8, at 4.)

It is equally significant that, while the land return policy statement became the subject of extensive discussions during the December, 1973, round

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> territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:
>
> 1. to establish naval, military and air bases and to erect fortifications in the Trust Territory; [and]
>
> 2. to station and employ armed forces in the territory....

(U.S. Exh. 67, at 0896.)

of the Marianas Political Status Negotiations, neither the record of that round or any later round of negotiations makes reference to submerged lands. *See* U.S. Exhs. 3 - 7. The sole focus of those discussions was the return of surface lands to be used for defense purposes.

Similarly, a Marianas Political Status Commission paper, issued December 13, 1973 (six weeks after the Land Return Policy Statement issued), addressing the return of public lands to the Marianas people made no reference to submerged lands; it was devoted entirely to the return of dry lands. *See* U.S. Exh. 50.

Further, there is no genuine basis for inferring that the land return policy statement reflected the United States' intent to permanently convey oceanic submerged lands to the Commonwealth. Indeed, such an inference would be at odds with the U.S. Office of Micronesian Status Negotiations' ("OMSN") public position on the status of these lands. In May, 1973, just six months before the policy statement issued, James M. Wilson, Jr., U.S. Deputy Representative for the OMSN, set out the United States' position on a broad range of issues---including political status, public lands, economic issues, and transitional matters---prior to the opening of the second round of the Marianas future political status

negotiations. (U.S. Exh. 2.) In discussing the United States' position on the return of public lands, Mr. Wilson addressed submerged lands in a way that clearly differentiated them from dry lands, stating:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, *as in the case of the states of the United States and other territories.*

(U.S. Exh. 2 at 7.) This statement appears to have contemplated specific U.S. legislation expressly conveying submerged lands to the Commonwealth, which is the method by which oceanic submerged lands vested in "the states of the United States and other territories." [24] Also, the Analysis of the CNMI Constitution (approved in December 1976), U.S. Exh. 15, at 144, addresses the legal status of oceanic submerged lands in a way that is perfectly consistent with the United States' May, 1973, position. *See* U.S. Exh. 2, at 7.[25] There is no

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[24] Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.* (granting title to submerged lands beneath a 3-mile belt of the territorial sea to the several States of the U.S.); *see also* Pub.L. No. 183, 88th Cong. 1st Sess., 77 Stat. 338 (1963) (giving the Department of Interior authority to convey certain oceanic submerged lands to Guam, the Virgin Islands, and American Samoa).

[25] *Compare* U.S. Exh. 2 at 7 (submerged lands "should vest in the future Marianas government under the new arrangement, as in the case of the states of the United States and other territories)" with U.S. Exh. 15 at 144 (under "[Article] 1, section 104, of the Covenant, the United States has defense and

indication that the United States' position on the issue of oceanic submerged lands off the coast of the Marianas shifted between May and November of 1973.

b. Secretarial Order No. 2969 Did Not Vest Ownership of Oceanic Submerged Lands in the Commonwealth

There is likewise no support for the CNMI's allegation, in ¶ 27 of the complaint, that Secretarial Order No. 2969 effectuated any transfer of oceanic submerged lands to the NMI government. Although the Order expressly applied to TTPI "public lands," defined by Sections 1 and 2 of Title 67 of the Trust Territory Code to include land below the ordinary high water mark, U.S. Exh. 51, it expressly prohibited the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for...reservation of the right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." (U.S. Exh. 9, at 0170 (rt. col.)) The pre-constitutional

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foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.")

Marianas legislature enacted legislation reserving this right to the Trust Territory Government. *See* Marianas District Code § 15.12.020. (U.S. Exh. 48 at 131-2.) Thus, even had Secretarial Order No. 2969 contemplated a transfer of oceanic submerged lands underlying the territorial sea to the Commonwealth, the transfer would always have been subject to the TTPI's paramount right to control "conservation, navigation, or commerce" on or over such lands. (U.S. Exh. 9, at 0170 (rt. col.).)

In any event, Secretarial Order No. 2969 did not, in fact, precipitate a transfer of any public lands---fast lands or submerged lands---to the NMI government. By its own terms, Secretarial Order No. 2969 required that before any lands could be transferred by the TTPI government, a government agency would have to be created by the district legislature to receive the lands transferred pursuant to the Secretarial Order. (U.S. Exh. 9, at 0170 (rt. col.); 40 Fed. Reg. at 812.) As the CNMI constitution's framers conceded, although the Marianas district legislature established a land corporation to receive land transfers pursuant to Secretarial Order No. 2969, the corporation did not become operational before Secretarial Order No. 2989 superseded Secretarial

Order No. 2969. *See* U.S. Exh. 15, at 142.[26] Thus, insofar as the Northern Marianas were concerned, Secretarial Order No. 2969 was a nullity because it was never formally implemented according to its plain terms.[27]

c. Secretarial Order No. 2989 Did Not Vest Title to Oceanic Submerged Lands in the Commonwealth

The CNMI's claim that Secretarial Order No. 2989 vested title to oceanic

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[26] In the December 1976 CNMI Constitutional Analysis, the CNMI framers acknowledged that:

> The Marianas District Legislature passed a statute, Mariana Islands District Code title 15, chapter 15.12, Act 100-75, establishing the Marianas Public Land Corporation and designating it as the legal entity under [Secretarial] Order No. 2969. *The formation of the Corporation was not complete, however, by the time [Secretarial] Order 2989 established a separate administration for the Marianas district and vested title to the public lands in the Resident Commissioner.*

(U.S. Exh. 15, at 142; emphasis added.)

[27] If oceanic submerged lands abutting the Commonwealth were already included as TTPI "public lands" for the purposes of Secretarial Order No. 2969, there would have been no reason for the CNMI constitution drafters to describe oceanic submerged lands in Article XI, § 1 separately from lands transferred to the CNMI "under Secretarial Order 2969, promulgated by the U.S. Secretary of the Interior on December 26, 1974" in the same article and section of the CNMI Constitution. *See* U.S. Exh. 13, at 19. By describing oceanic submerged lands separately from lands transferred to the CNMI under Secretarial Order 2969, the framers of Article XI, § 1 of the CNMI Constitution effectively conceded that ownership and control of oceanic submerged lands would not pass to the Commonwealth pursuant to Secretarial Order No. 2969.

submerged lands in the Commonwealth is also without merit. The Order did vest title to all TTPI "public lands" situated in the Northern Mariana Islands in the "U.S. Resident Commissioner," *see* U.S. Exh. 12 at 0288 (rt. col.), but it did not define "public lands" and made no reference whatsoever to submerged lands. Secretarial Order No. 2989 was simply an administrative vehicle chosen by the Department of the Interior to transfer the civil administration of all TTPI government functions from the TTPI's High Commissioner to a U.S. Resident Commissioner. The Order was not directed to management of public lands any more than it focused on any other civil administrative function. *See* U.S. Exh. 12. The Order did not purport to implement § 801 of the Covenant, and did not authorize the Resident Commissioner to transfer title to any lands to the Commonwealth. *Id.*[28] In short, Secretarial Order No. 2989 was not the vehicle

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[28] Secretarial Order No. 2989 remained in effect only until January 9, 1978, when the NMI's constitutional government became effective. On or about February 5, 1979, Brewster Chapman, DOI Assistant Solicitor for Territories, wrote a memorandum to the Director of DOI's Office of Territorial Affairs explaining that Secretarial Order No. 2989 was not self-executing, and did not convey any TTPI public lands to the NMI government. (U.S. Exh. 49.) Mr. Chapman concluded that an actual transfer of legal title by the Trust Territory government was required before title could vest in the Northern Marianas government. *Id.* No party has brought to the court's attention any instance in which the TTPI, after Order No. 2989, transferred any title to any real property to the Commonwealth pursuant to § 801 of the Covenant.

through which the United States implemented § 801 of the Covenant, much less the vehicle through which oceanic submerged lands not contemplated by § 801 were transferred to the Commonwealth.

Finally, Secretarial Order No. 2989 became effective on April 1, 1976, one week after the Covenant was enacted into law. By that date, § 1003(b) had already vested in the United States a fully protected *future* interest in the oceanic submerged lands off the coast of the Commonwealth that, pursuant to sovereignty provision of Covenant § 101, would become a fully vested *present* interest upon termination of the Trusteeship. As already explained, § 801 of the Covenant did not authorize the Secretary of the Interior to convey or reserve to the Commonwealth ownership of oceanic submerged lands, and there is no other U.S. legislation explicitly authorizing the Secretary to convey oceanic submerged lands to the NMI government. Thus, even if Secretarial Order No. 2989 could somehow be construed as conveying to the Commonwealth the United States' future property interest in oceanic submerged lands established by Covenant § 1003(b), the court concludes that it would have been null and void as an *ultra vires* administrative action conveying an interest in United States property without explicit congressional authorization.

9. The Commonwealth's "Submerged Lands Act" and "Marine Sovereignty Act of 1980" are declared null and void under the Supremacy Clause of the U.S. Constitution, Covenant Sections 101 and 102, and Article XI, § 1, Article XIV, § 1, of the Commonwealth Constitution.

A local law is preempted by federal law when the latter is intended to occupy the field, and/or when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. Hines v. Davidowitz, 312 U.S. 52, 66-67, 61 S.Ct. 399 (1941); *see also*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210 (1963). The United States possesses paramount rights to submerged lands because under Covenant § 101 the CNMI ceded sovereignty to the United States, and the Supreme Court has ruled that paramount rights to such submerged lands are an incident of U.S. sovereignty. There is no merit to the CNMI's allegations that the U.S. agreed to CNMI ownership and control of oceanic submerged lands, either in Covenant § 801, in Secretarial Order No. 2969, or in Secretarial Order No. 2989. That being the case, the CNMI's

"Marine Sovereignty Act," 2 N.Mar.I. Code § 1101 *et seq.*,[29] and its "Submerged Lands Act," 2 N.Mar.I. Code § 1201 *et seq.*, U.S. Exhs. 22 and 23, including amendments thereto, are preempted because the federal paramountcy doctrine, since November 4, 1986, has "occupied the field" of regulation of the CNMI's territorial sea and exclusive economic zone ["EEZ"], and because, together, the CNMI statutes purport---in direct conflict with federal statutes---to vest sovereignty, ownership, and exclusive jurisdiction concerning submerged lands underlying a 12-mile territorial sea (as delineated by straight archipelagic baselines), as well as a 200-mile EEZ.

Under the paramountcy doctrine, federal law has "occupied the field" of regulation of submerged lands seaward of the Commonwealth's low-water mark

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[29] The CNMI Marine Sovereignty Act declares that the Commonwealth is sovereign with exclusive jurisdiction over a 12-mile territorial sea, and an additional 200-mile exclusive economic zone as measured from straight archipelagic baselines. That statute bases the CNMI's claim to archipelagic status on a proposed "Revised Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea" ("ICNT"), which contemplated treating non-self-governing territories as sovereign states for the purposes of claims to a territorial sea and related marine resources. Although, at the time the Marine Sovereignty Act was enacted, the ICNT was still under consideration, it was opposed by the United States, among other countries. It ultimately was not formally adopted by the United Nations Convention on the Law of the Sea. *See* U.S. Exh. 60, at 0860-61.

ever since the sovereignty provisions of Covenant § 101 became effective in November, 1986. As the Supreme Court recognized in 1947:

> That the political agencies of this nation...claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. And this assertion of national dominion over the three-mile belt is binding upon this Court.... Not only has acquisition, as it were, of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty.

United States v. California, 332 U.S. at 33-34 (citations and footnotes omitted). Thus, absent congressional legislation specifically conveying control over oceanic submerged lands and associated natural resources, the Supreme Court has concluded that local governments have no authority to legislate and/or regulate concerning the territorial sea. *Id.* at 35 ("The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks"). Simply put, the Commonwealth's Marine Sovereignty Act and Submerged Lands Act are preempted because the federal paramountcy doctrine (and any U.S. legislation enacted pursuant to the United States' paramount rights to waters seaward of the low-water mark) "occupy the field" of legislation in this geographical area.

As an additional ground, the CNMI Submerged Lands Act and Marine Sovereignty Act are preempted because they are in direct conflict with, and/or stand as obstacles to, the accomplishment of the purposes of several specific federal laws. Such federal laws include, among others, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.*; the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1453 *et seq.*; the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*; the National Marine Protection, Research and Sanctuaries Act ("Marine Sanctuaries Act"), 16 U.S.C. § 1431 *et seq.*; the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Each of these laws expressly applies to the CNMI and regulates different activities in the territorial sea abutting the Commonwealth. In many of these laws, Congress chose to regulate expressly to the full extent of a 200-mile EEZ.[30] If enforceable,

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[30] *See* Magnuson Act, 16 U.S.C. § 1802 (11) ("The term 'exclusive economic zone' means the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this chapter, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States."); *see also* Marine Sanctuaries Act, 16 U.S.C. §§ 1432 (3), (9) (same); Oil Pollution Act, 33 U.S.C. § 2701(8) (same).

the CNMI statutes' assertions of sovereignty over a twelve-mile territorial sea, and over a 200-mile EEZ, would nullify these federal laws as they pertain to the Commonwealth. Because the CNMI "Submerged Lands Act" and "Marine Sovereignty Act" conflict with, and stand as obstacles to, the accomplishment of the full objectives of these federal laws, both CNMI statutes are declared preempted under Section 102 of the Covenant and Art. VI, cl. 2, of the U.S. Constitution.

FOR THE FOREGOING REASONS, which show that there is no genuine issue as to any material fact which would preclude entry of summary judgment, the Commonwealth's complaint to quiet title in waters seaward of the low-water mark is dismissed with prejudice, and the United States' counterclaim for a declaratory judgment decreeing: 1) that the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters;" and 2) that the CNMI "Marine Sovereignty Act" and "Submerged Lands Act" are preempted by

federal law, is granted.

IT IS SO ORDERED.

DATED this 7th day of August, 2003.

ALEX R. MUNSON
Judge