

AUG 7 2003

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

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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 COMMON-
WEALTH'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.* PRE-
EMPTED 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.

1 Plaintiff appeared by and through Commonwealth Assistant Attorneys General
2 Joseph L.G. Taijeron, Jr., who argued, and James D. Livingstone and Robin W.
3 Hutton on the memoranda; defendant appeared by and through Edward S.
4 Geldermann, Senior Trial Attorney, U.S. Department of Justice, who appeared
5 by telephone and argued, and Assistant U.S. Attorney Gregory Baka.
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8 THE COURT, having fully considered the voluminous filings of the
9 parties, and having further considered the oral argument presented, rules as
10 follows:
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12 Summary Judgment Standard 13

14 Rule 56 of the Federal Rules of Civil Procedure states, in part, that
15 judgment “shall be rendered forthwith if the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show
17 that there is no genuine issue as to any material fact and that the moving party is
18 entitled to judgment as a matter of law.”
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21 The party seeking summary judgment always bears the initial
22 responsibility of informing the court of the basis for its motion and identifying
23 those portions of the matters of record which it believes demonstrates the
24 absence of a genuine issue of material fact. Celotex Corporation v. Catrett, 477
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1 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986).

2 The non-moving party must set forth by affidavit or as otherwise
3 provided in Rule 56 specific facts showing that there is a genuine issue of
4 material fact for trial. Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793
5 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 107 S.Ct. 435 (1986). All that is
6 required from the non-moving party is that sufficient evidence supporting the
7 claimed factual dispute be shown to require a jury or judge to resolve the
8 parties' differing versions of truth at trial. First National Bank v. Cities Service
9 Co., 391 U.S. 253, 88 S.Ct. 1575, 1592 (1968). All inferences are drawn in favor
10 of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82
11 S.Ct. 993, 8 L.Ed.2d 176 (1962). There is no issue for trial unless there is
12 sufficient evidence favoring the non-moving party for a jury to return a verdict
13 for that party; if the evidence is merely colorable or is not significantly
14 probative, summary judgment may be granted. Anderson v. Liberty Lobby,
15 477 U.S. at 250-251.

16 A trial court may not weigh conflicting versions of fact on a motion for
17 summary judgment. "Rule 56 calls for the judge to determine whether there
18 exists a genuine issue for trial, not to weigh the evidence himself and determine
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1 the truth of the matter.” Baxter v. MCA, Inc., 812 F.2d 421, 424 (9th Cir.), *cert.*
2 *denied*, William v. Baxter, 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987),
3 *citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511,
4 91 L.Ed.2d 202 (1986). “[A] court can only enter a summary judgment if
5 *everything* in the record--- pleadings, depositions, interrogatories, affidavits, *etc.*---
6 demonstrates that no genuine issue of material fact exists.” Keiser v. Coliseum
7 Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980)(emphasis in original).
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Findings of Fact¹

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

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).

1 authority over the peoples of the TTPI. In that trustee capacity, the U.S. was
2 granted full powers of administration, legislation, and jurisdiction over the
3 Trust Territory to promote the development of the economic, social, political,
4 and educational well-being of the TTPI's inhabitants. Joint Resolution of July
5 18, 1947, ch. 271, 61 Stat. 397.²

8 2. In 1965, the people of Micronesia formed the Congress of Micronesia,
9 with representatives from each of six administrative districts: the Northern
10 Mariana Islands ("NMI"), Yap, Truk (Chuuk), Ponape (Pohnpei) (which then
11 included Kosrae (Kusaie)), Palau (Belau), and the Marshall Islands (hereinafter
12 "TTPI districts"). In 1966, the TTPI districts petitioned the United States to
13 establish a joint commission to consider the future political alternatives for the
14 TTPI. In 1969, the Micronesian Congress began negotiations with the U.S.

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20 ² Authority to administer the trusteeship was vested in the President of the
21 United States, who was authorized to delegate that responsibility through such
22 agency or agencies as the President directed. Section 1 of the Act of June 30,
23 1954, ch. 423, 68 Stat. 330 (48 U.S.C. § 1681(a)). Until 1962, the Navy
24 Department was responsible for the civil administration of the Northern
25 Mariana Islands (except Rota), while the Department of the Interior ("DOI")
26 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.

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

12 3. In 1972, the U.S. agreed to hold separate negotiations with the NMI.
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14 Toward that end, the U.S. and the NMI commenced several rounds of
15 negotiations to determine the NMI's future political relationship with the
16 United States. *See* Exhibit Nos. 1 and 3-7 of the U.S. Exhibits In Support Of
17 Motion For Summary Judgment ("U.S. Exh.") (For ease and uniformity of
18 reference, citations are to the U.S.' exhibits.)
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23 ³ "So strong was this desire for union that at one point the then Mariana
24 Islands District Legislature passed a resolution warning the Security Council and
25 Trusteeship Council of the United Nations that it was prepared to secede from
26 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).

1 4. On May 10, 1973, prior to the second round of negotiations, James M.
2 Wilson, U.S. Deputy Representative for Micronesian Status Negotiations, issued
3 a memorandum in which he set forth the United States' position concerning the
4 future status of CNMI submerged lands after the Commonwealth's political
5 relationship between the NMI and the U.S. had become established:
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7 So far as submerged lands are concerned, we feel that these should
8 vest in the future Marianas government under the new agreement,
9 as in the case of the states of the United States and other territories.
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11 (U.S. Exh. 2 at 7.)
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13 The reports of the second round and subsequent rounds of negotiations
14 between the U.S. and the NMI are silent on the subject of ownership and
15 jurisdiction over oceanic submerged lands after the new political relationship
16 between the U.S. and the NMI became effective. *See* U.S. Exhs. 3-7. ⁴
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18 5. Contemporaneously, throughout 1972 and beyond, the United States
19 continued to pursue negotiations separately with the remaining Micronesian
20 districts about their future political status.
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22 In early 1973, representatives of Palau expressed unwillingness to
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25 ⁴ As used herein, the term "oceanic submerged lands" is shorthand for
26 "lands seaward of the Commonwealth's coastlines." It does not include lands
underlying the Commonwealth's inland waters.

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

12 The United States Government, as administering authority in the
13 Trust Territory of the Pacific Islands, has always considered public
14 land in Micronesia to be property held in trust for the people of
15 Micronesia.... Recently requests have been made in Palau that
16 public land in that district be turned over now to its traditional
17 leaders to be held in trust for the people of Palau. This position has
18 received the support of the Palau District Legislature. Subsequently
19 it was formally endorsed by the Congress of Micronesia's Joint
20 Commission on Future Status and communicated to the United
21 States Government.... The United States has now completed an
22 extensive study of the problem in all districts.... As a result of that
23 study, the United States has now concluded that if it is the desire of
24 the people in a district that public lands in that district be turned
25 over to the district now before the termination of the Trusteeship
26 the U.S. is willing to accede [*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

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

3 *Id.* at 2.

4 Included among the limitations and safeguards established by the land
5 return policy statement were that public land still needed by the Trust Territory
6 Administration for defense purposes, and former public land conveyed to
7 individuals pursuant to a homestead program, would not be transferred to the
8 districts. In addition, the Trust Territory Government would “retain the right
9 to control activities” within “tidelands, filled lands, submerged lands and
10 lagoons” to the extent they “affect[ed] the public interest.” (*Id.* at 4.)
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12 The land return policy statement called on the Congress of Micronesia to
13 enact legislation enabling the transfer of TTPI public lands to the TTPI districts.
14 (*Id.* at 2.) When the Congress of Micronesia had failed to do so by late 1974, the
15 Interior Secretary proceeded to implement the public land return policy on his
16 own initiative by issuing Secretarial Order No. 2969, 40 Fed.Reg. 811 (1974).
17 (U.S. Exh. 9) That order, which became effective on December 28, 1974,
18 directed the High Commissioner of the Trust Territory to convey the Trust
19 Territory’s right, title, and interest in public lands to district legal entities that
20 had been empowered by their respective TTPI district legislatures to receive and
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1 hold such lands. *Id.*; 40 Fed.Reg. at 812. Consistent with the land return policy
2 statement, Secretarial Order No. 2969 went on to prohibit the High
3 Commissioner from transferring any submerged lands to a district until its
4 legislature enacted laws “providing for...reservation of the right of the central
5 government of the Trust Territory of the Pacific Islands to regulate all activities
6 affecting conservation, navigation, or commerce in and to the navigable waters
7 and tidelands, filled lands, submerged lands and lagoons.” *Id.*; 40 Fed.Reg. at
8 812.⁵

12 6. On February 15, 1975, just six weeks after Secretarial Order No. 2969
13 became effective, representatives of the Northern Mariana Islands and the
14 United States signed the Covenant to govern the future relationship between
15 the NMI and the United States. (U.S. Exh. 10) The NMI Legislature
16 unanimously endorsed the Covenant, and the people of the NMI approved it by
17 a 78% majority vote on June 17, 1975. The U.S. Congress thereafter enacted the
18 Covenant as law. See Joint Resolution of March 24, 1976, Pub. L. No. 94-241,
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23 ⁵ The Northern Marianas District Legislature did establish a Marianas
24 Public Lands Corporation but it never became operational. (U.S. Exh. 15 at
25 142) The constitutional CNMI government later established a corporation by
26 the same name but, by that time, Secretarial Order No. 2989 (discussed *infra*)
had already superseded Secretarial Order No. 2969.

1 90 Stat. 263, reprinted in 48 U.S.C. § 1681 note.

2 7. The Covenant consists of ten articles that define the political
3 relationship between the NMI and the U.S.. (U.S. Exh. 10.)⁶ Under the
4 Covenant, upon termination of the U.N. Trusteeship Agreement the CNMI
5 became a self-governing commonwealth in political union with, and under the
6 sovereignty of, the United States of America. Covenant § 101. (U.S. Exh. 10, at
7 5.)⁷ The “Section-By-Section Analysis of the Covenant to Establish A
8 Commonwealth of the Northern Mariana Islands”⁸ (“Analysis”) (Feb. 15, 1975),
9 prepared by the Marianas Political Status Commission to accompany the
10 Covenant, describes this sovereignty concept as follows:
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15 [t]he United States will have sovereignty, that is, ultimate political
16 authority, with respect to the Northern Mariana Islands. The
17 United States has sovereignty with respect to every state, every

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19 ⁶ The authority of the United States towards the CNMI now arises solely
20 under the Covenant. Hillblom v. United States, 896 F.2d 426, 429 (9th Cir.
21 1990).

22 ⁷ United States sovereignty over the Commonwealth was fully established
23 as of 12:01 a.m., November 4, 1986, NMI time and date. Pres. Proc. 5564, Nov.
24 3, 1986, sec. 2; Smith v. Pangilinan, 651 F.2d 1320, 1321 (9th Cir. 1981); CNMI
v. Atalig, 723 F.2d at 685.

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

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

5 (U.S. Exh. 11, at 7.)
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7 8. Section 104 of the Covenant, which likewise did not become effective
8 until termination of the Trusteeship in 1986, provides that the United States has
9 complete responsibility for and authority with regard to foreign affairs and
10 defense affecting the NMI. (U.S. Exh. 10, at 6.)
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12 9. Section 102 of the Covenant, which became effective on January 9,
13 1978, states that the relations between the NMI and U.S. will be governed by
14 the Covenant which, together with the provisions of the Constitution, treaties
15 and the laws of the United States applicable to the NMI, will be the supreme
16 law of the NMI. *Id.* at 5-6. As the Analysis explained:
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19 [Section 102] is similar to Article VI, clause 2 of the Constitution of
20 the United States, which makes the Constitution, treaties and laws
21 of the United States the supreme law in every state of the United
22 States. This means that federal law will control in the case of a
23 conflict between local law (even a state's constitution) and a valid
24 federal law. Federal law is also supreme, of course, in the territories
and the Commonwealth of Puerto Rico.

25 Analysis at 10; S. Rep. No. 94-433, 94th Cong. 1st Sess. 65, 66 (1975); 1975 U.S.
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1 Code, Cong., & Admin. News 448. (U.S. Exh. 11, at 10.)

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

8 11. Article VIII of the Covenant is entitled “Property.” Section 801 of
9 the Covenant provides, as relevant here:

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

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

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

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

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

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

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

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22 ⁹ Section 1003(b) of the Covenant provides that "Sections 102, 103, 204,
23 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-
24 805, 901 and 902 [of the Covenant] will become effective on a date to be
25 determined and proclaimed by the President of the United States which will be
26 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.

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

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

13 13. As noted above, Section 201 of the Covenant required the people of
14 the Northern Mariana Islands to "formulate and approve a Constitution." (U.S.
15 Exh. 10, at 7.) From October to December 1976, the NMI Constitutional
16 Convention gathered, drafted, and approved a constitution, (U.S. Exh. 13.),
17 which on March 6, 1977, was ratified by a 92% majority vote. The Constitution
18 was deemed approved by Presidential Proclamation No. 4534 on October 4,
19 1977, *see* U.S. Exh. 14, and the constitutional government of the Northern
20 Mariana Islands became effective on January 9, 1978.¹⁰

21 ¹⁰ Pursuant to Sections 1003(b) and 1004(b) of the Covenant, the NMI
22 Constitution and Section 502 of the Covenant were to become effective on a
23 date specified by the President of the United States. In Proclamation No. 4534
24 (U.S. Exh. 14, at 56,594), then President Carter designated January 9, 1978, as
25 the date on which both the Constitution and Covenant § 502 would become
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1 14. The drafters of the NMI Constitution adopted several constitutional
2 provisions of particular importance to this case.
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4 Article XI, § 1, of the NMI Constitution provides, in pertinent part, that
5 “the submerged lands off the coast of the Commonwealth to which the
6 Commonwealth now or hereafter may have a claim of ownership under U.S.
7 law are public lands and belong collectively to the people of the
8 Commonwealth who are of Northern Marianas descent.” (U.S. Exh. 13, at 19.)
9

10 Article XI, § 2, provides that the “management and disposition of
11 submerged lands off the coast of the Commonwealth shall be as provided by
12 law.” *Id.*
13

14 Article XI, § 3 provides that “the management and disposition of public
15 lands except those provided for by § 2 [*i.e.*, submerged lands] shall be the
16 responsibility of the Marianas Public Land Corporation” established by CNMI
17 Const. Art. XI, § 4. *Id.* at 19-20.
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19 Finally, Article XIV, § 1 of the CNMI Constitution provides that:
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21 The marine resources in waters off the coast of the Commonwealth
22 over which the Commonwealth now or hereafter may have any
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effective.

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

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

5 In an Analysis of the Constitution of the Commonwealth of the
6 Northern Mariana Islands ("CNMI Constitutional Analysis"), formally adopted
7 by the NMI Constitutional Convention on December 6, 1976, the Northern
8 Marianas framers explained the intent behind Article XI of the Constitution:
9

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

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

1 15. Explaining the scope of Article XIV, § 1 of the CNMI Constitution,
2
3 entitled "Marine Resources," the framers stated in the CNMI Constitutional

4 Analysis:

5 This section provides that the marine resources found in waters off
6 the coast of the Commonwealth over which the Commonwealth
7 has jurisdiction shall be managed, controlled, protected, and
8 preserved by the legislature for the benefit of the people of the
9 Commonwealth. Marine resources are those resources found in the
10 water such as fish, dissolved minerals, plant life suspended in the
11 water and other resources. Marine resources do not include
12 resources found on or under submerged lands. Those resources are
13 public lands and are provided for by Article XI, section 2.

14 The jurisdiction of the Commonwealth over the waters off the
15 coast is the same as that of the states. Currently the states have the
16 power to regulate fisheries within territorial waters as part of the
17 police powers. The power of the states extends only to what the
18 United States claims as territorial waters. Depending on the claims
19 asserted by the United States and United States law with respect to
20 these waters, the jurisdiction of the Commonwealth might be
21 extended. This section provides that the legislature has the power
22 to control marine resources for whatever distance into the ocean is
23 available under United States law.

24 *Id.* at 181.

25 16. Almost immediately after the NMI constitutional government
26 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

1 uncertainty was the fact that § 1003(b) of the Covenant (U.S. Exh. 10, at 39)
2 implemented different sections of the Covenant in three phases. Thus, real
3 property provisions of Sections 801 of the Covenant (calling for return of TTPI
4 real property to the NMI government no later than termination of the
5 Trusteeship) became effective at the beginning of the first phase, which
6 commenced on March 24, 1976. The leasing provisions of Covenant §§ 802 and
7 803 became effective at the beginning of the second phase, on January 9, 1978.
8 And the sovereignty, foreign affairs, and defense provisions of §§ 101 and 104 of
9 the Covenant became effective in the third phase, which began when the
10 Trusteeship ended on November 4, 1986. *See* U.S. Exh. 10, at 39.
11 Consequently, at least from January, 1978, through November, 1986, doubts
12 and/or disagreements surfaced by and between representatives of the CNMI and
13 the U.S. over the extent to which the CNMI was empowered to regulate
14 submerged lands and marine resources off the coast of the Commonwealth.
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21 17. On January 11, 1978, two days after the second phase of the
22 Covenant (including Covenant § 502(a)(2)) became effective,¹¹ the U.S.
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25 ¹¹ Section 502(a)(2) of the Covenant (U.S. Exh. 10, at 14-15) provides that
26 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

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

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25 Islands” to the extent that they are “applicable to Guam and which are of
26 general application to the several States as they are applicable to the several
States.”

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

22 On June 22, 1978, Ms. Van Cleve referred the Speaker's letter to C.
23 Brewster Chapman, Jr., Asst. Solicitor for DOI's Division of General Law -
24 Territories. (U.S. Exh. 18.) By letter dated June 29, 1978 (U.S. Exh. 19), Mr.
25
26

1 Chapman responded that:

2 [T]he Government of the Northern Mariana Islands probably has
3 ownership of and exclusive jurisdiction over these submerged lands,
4 at least at this time. But this is only a temporary title and
5 jurisdiction. When the Northern Mariana Islands are proclaimed a
6 Commonwealth and territory of the United States, the laws of the
7 United States applicable to its territories will come into effect in the
8 Northern Marianas. One of the rules...is that submerged lands
around an island territory belong to the federal---not to the local---
Government.

9
10 By the 1974 amendments to the Territorial Submerged Lands Act...,
11 the Congress has clearly indicated its intent that, subject to the
12 limitations contained in that Act, title to the submerged lands
surrounding our territories should be in the respective local
13 governments, and there is absolutely no reason to believe that the
14 Northern Mariana Islands will not eventually be included under the
provisions of that Act. In fact, I would recommend seeking a
15 legislative amendment to the Territorial Submerged Lands Act now
but for one problem. That Act conveys all right, title, and interest
16 of the United States in those submerged lands to the respective
named territories. The United States does not now have any right,
17 title or interest in the submerged lands of the Northern Mariana
18 Islands and, therefore, has nothing to convey. Such right, title, or
19 interest will only attach as an incidence of U.S. sovereignty when
the Northern Marianas become a territory of the United States. At
20 that time, then, the grant can be made.

21
22 *Id.* at 2-3.

23 Consistent with its conclusion that oceanic submerged lands abutting the
24 NMI would belong to the Federal Government as soon as the NMI became a
25 Commonwealth of the United States, Mr. Chapman's letter went on to suggest
26

1 that it would be prudent for the NMI government to "accept the applicable
2 limitations and exceptions contained in the 1974 amendments to the Territorial
3 Submerged Lands Act...which are not inconsistent with its current legal status,
4 in managing and disposing of its submerged lands and their resources." *Id.* at 3.
5

6
7 Mr. Chapman's June 29, 1978 letter was transmitted to the NMI
8 legislature. *See* U.S. Exh. 20. According to a State Department press release
9 dated July 25, 1978, Roger St. Pierre, a legal consultant to the NMI legislature,
10 disputed Mr. Chapman's conclusions and was reported to have said that because
11 the Marianas Constitution granted ownership of the submerged lands to the
12 Commonwealth, and because the United States approved the Constitution, the
13 federal government had no jurisdiction over them. *Id.*
14
15

16
17 In a letter dated July 31, 1978 (U.S. Exh. 21), Mr. Chapman issued a
18 rebuttal to the press reports of Mr. St. Pierre's position on submerged lands,
19 reaffirming the United States' position that:
20

21 When the Northern Marianas becomes a Commonwealth and a
22 territory of the United States the submerged lands will belong to
23 the United States by operation of law, and thereafter it will take an
24 act of Congress, pursuant to its plenary authority under Article IV,
25 Section 3, Clause 2, of the [U.S.] Constitution to convey title in
26 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.

1 *Id.* at 2.

2 19. Notwithstanding Articles XI, § 1 and XIV, § 1 of the CNMI
3 Constitution, and Mr. Chapman's legal opinions, the NMI legislature enacted
4 two statutes during the 1979-1980 time frame, which purported to assert the
5 NMI government's sovereignty and/or exclusive jurisdiction over submerged
6 lands and marine resources off the coast of the Commonwealth.
7

8
9 In the NMI "Submerged Lands Act," the NMI legislature asserted
10 ownership of submerged lands "out to the ocean to a distance of two hundred
11 nautical miles." (U.S. Exh. 22, at 141.) That legislation also assigned to the
12 CNMI "Director of Natural Resources" the responsibility to issue exploration
13 licenses and development leases for the oceanic submerged lands abutting the
14 NMI. *Id.* at 142.
15
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18 In May 1980, the NMI legislature enacted the "Marine Sovereignty Act of
19 1980." (U.S. Exh. 23.) That legislation purported to assert that the NMI
20 government has sovereignty over a twelve-mile territorial sea, as measured from
21 straight archipelagic baselines, as well as a 200-mile exclusive economic zone
22 measured from the same baselines. *Id.* at 2-104 to 2-106. Neither the NMI
23 "Submerged Lands Act" nor the "Marine Sovereignty Act" contained a sunset
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1 provision providing for expiration to coincide with the termination of the
2 Trusteeship. To date, neither statute has been repealed.

3
4 20. Section 802(a) of the Covenant provides that "[t]he following
5 property will be made available to the Government of the United States by lease
6 to enable it to carry out its defense responsibilities:
7

8 (1) on Tinian Island, approximately 17,799 acres (7,203 hectares)
9 and the waters immediately adjacent thereto; ...[and]

10 (3) on Farallon de Medinilla Island, approximately 206 acres (83
11 hectares) encompassing the entire island, and the waters
12 immediately adjacent thereto."

13 (U.S. Exh. 10, at 29.) A separate "Technical Agreement," executed pursuant to
14 Covenant § 803(c), provided that the U.S. would forfeit its leasing rights unless
15 payment therefor was received by the NMI Government within five years after
16 Section 802 became effective: January 9, 1983. (U.S. Exh. 24, at 2-3.)
17

18
19 To meet the five-year leasing deadline, the U.S. Department of Defense
20 commenced negotiations with the CNMI over leasing the areas described in
21 Covenant § 802(a). Because the Marianas Public Land Corporation (established
22 by Article XI, § 3, of the CNMI Constitution) possessed leasing authority
23 concerning only surface lands, *i.e.*, uplands, the NMI legislature enacted a statute
24 authorizing the NMI Governor to execute a lease with the United States
25
26

1 concerning the “waters immediately adjacent” to “the leased surface lands on
2 Tinian and Farallon de Medinilla Islands,” including the right “to facilitate access
3 and egress to the leased surface areas and to construct reasonable port facilities.”
4 Commonwealth Code, § 1412; Pub.L. No. 3-40, § 2 (Jan. 1, 1983); U.S. Exh. 25.
5 On January 6, 1983, the United States executed a single, integrated lease with
6 the Mariana Public Lands Corporation for surface areas and with the Governor
7 for the waters immediately adjacent to the leased surface areas on Tinian and
8 Farallon de Medinilla Islands. (U.S. Exh. 26.)
9

10
11
12 21. On March 10, 1983, three years before the U.N. Trusteeship ended,
13 President Reagan issued Proclamation No. 5030, 48 Fed. Reg. 10605 (1983),
14 establishing an “exclusive economic zone” (“EEZ”) confirming that the U.S.
15 claimed sovereign rights and control over the natural resources (living and non-
16 living) of the seabed, subsoil, and superjacent waters beyond the territorial sea
17 but within 200 nautical miles of United States’ coasts. (U.S. Exh. 27, at 2-3.)
18

19
20 The Proclamation expressly applied to the NMI to the extent consistent with
21 the Covenant and the U.N. Trusteeship Agreement. *Id.*; 48 Fed. Reg. at 10605.
22

23
24 22. In August, 1985, the “Northern Mariana Islands Commission on
25 Federal Laws” (“Commission on Federal Laws”) issued “Welcoming America’s
26

1 Newest Commonwealth,” a report to the U.S. Congress prepared pursuant to §
2 504 of the Covenant. (U.S. Exh. 28).¹² In the Report, the Commission stated
3 that “[u]ntil termination of the trusteeship, the United States has no claim to
4 ownership of submerged lands in the Northern Mariana Islands.” *Id.* at 175.
5
6 On the other hand, the Report conceded that just because “the Northern
7 Mariana Islands is now the owner of the submerged lands adjacent to its shores
8 does not mean its ownership will survive termination of the Trusteeship.” *Id.* at
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11

12 ¹² Section 504 of the Covenant provides, as relevant here:
13

14 The President will appoint a Commission on Federal Laws to
15 survey the laws of the United States and to make recommendations
16 to the United States Congress as to which laws of the United States
17 not applicable to the Northern Mariana Islands should be made
18 applicable and to what extent and in what manner, and which
19 applicable laws should be made inapplicable and to what extent and
20 in what manner. The Commission will consist of seven persons (at
21 least four of whom will be citizens of the Trust Territory of the
22 Pacific Islands who are and have been for at least five years
23 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.

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

1 178. As the Commission explained, “[o]n termination of the Trusteeship,
2 sovereignty over the Northern Mariana Islands will become vested in the
3 United States. At that time, ownership of the submerged lands becomes
4 uncertain.” *Id.* at 177. Citing to two of the United States Supreme Court’s
5 seminal “tidelands” cases, United States v. California, 332 U.S. 19, 34, 67 S.Ct.
6 1658 (1947) and United States v. Texas, 339 U.S. 707, 70 S.Ct. 918 (1950), *see id.*
7 at 177-78, and noting that there were arguments both in favor of and against
8 continued CNMI ownership of submerged lands after the Trusteeship
9 terminated, *id.* at 177, the Commission recommended that the U.S. Congress
10 enact legislation to “clarify” that the CNMI was the owner of “lands
11 permanently or periodically covered by tidal waters within three geographical
12 miles of the coastlines of the Northern Mariana Islands.” *Id.* at 172. According
13 to the Report, “[t]he legislation here proposed thus follows the track already
14 laid by Congress in conveying lands to the States and to other territories.” *Id.* at
15 180 (referencing in a subsequent discussion, *id.* at 180-83, the federal Submerged
16 Lands Act, 43 U.S.C. § 1301(a),(b), and the Territorial Submerged Lands Act, 48
17 U.S.C. § 1705(a)).
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1 23. In 1985, all remaining TTPI districts except Palau entered into
2 Compacts of Free Association pursuant to which independent sovereignties
3
4 would be formed. Compact of Free Association Act of 1985, Pub.L. No. 99-239,
5 99 Stat. 1770 (1986) (appearing at 48 U.S.C. § 1901 note (1994)). On November
6
7 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the U.N.
8 Trusteeship was terminated with respect to the Marshall Islands, the Federated
9 States of Micronesia, and the Northern Mariana Islands. (U.S. Exh. 29; 51 Fed.
10 Reg. 40,399.)
11

12 Pursuant to § 1002 of the Covenant, the President proclaimed that
13
14 Sections 101 and 104, among others, would become effective at 12:01 a.m. on
15 November 4, 1986, and that, as of that date, "the Commonwealth of the
16 Northern Mariana Islands in political union with and under the sovereignty of
17 the United States of America is fully established." *Id.*; 51 Fed. Reg. at 40,400.
18

19 24. On November 23, 1986, the CNMI requested formal consultations
20
21 with a "special representative" of the President of the United States, pursuant to
22 Section 902 of the Covenant, concerning the ownership of submerged lands and
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1 marine resources. (U.S. Exh. 30.)¹³ On March 30, 1987, the Special
2 Representative of the CNMI's Governor prepared a position paper, stating that
3 "[t]he jurisdiction of the Commonwealth over its oceans, submerged lands and
4 the natural resources of the surrounding sea was not specified in the Covenant."
5 (U.S. Exh. 31, at 4.) Despite the recommendations that the Commission on
6 Federal Laws had made less than two years earlier (*i.e.*, that federal legislation be
7 enacted to convey three miles of oceanic submerged lands to the CNMI), the
8 CNMI's § 902 representative asserted that the Commonwealth should have the
9 "same rights in the ocean and exclusive economic zone (EEZ) as are recognized
10 for coastal states in the United Nations Convention on the Law of the Sea
11 (UNCLOS), subject only to appropriate oversight by the Government of the
12 United States in the areas of foreign affairs and defense." *Id.* at 6. Accordingly,
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19 ¹³ Section 902 of the Covenant specifies that

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21 The Government of the United States and the Government of the
22 Northern Mariana Islands will consult regularly on all matters affecting
23 the relationship between them. At the request of either Government, and
24 not less frequently than every ten years, the President of the United States
25 and the Governor of the Northern Mariana Islands will designate special
26 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.

1 the CNMI recommended that U.S. legislation be enacted that established the
2 Commonwealth's right, on a permanent basis, to exercise exclusive jurisdiction
3 over a 12-mile territorial sea as well as a 200-mile exclusive economic zone. *Id.*
4 at 55-64.
5

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7 25. On April 12, 1990, a special representative of the President of the
8 United States, Timothy W. Glidden, executed a memorandum of agreement
9 indicating that Mr. Glidden would personally support the Commonwealth's
10 proposal that the CNMI's alleged sovereign right to ownership and jurisdiction
11 of the waters and seabed surrounding the NMI be recognized and confirmed "to
12 the full extent permitted by international law." (U.S. Exh. 32, at 1.) In that
13 memorandum, Mr. Glidden also agreed to seek resolution of the issue within
14 the Government of the United States consistent with the CNMI's proposal. *Id.*
15 at 2.
16

17
18 On September 18, 1990, Mr. Glidden prepared a position paper detailing
19 what proved to be his unsuccessful efforts to obtain support within the U.S.
20 government for the Commonwealth's proposed resolution of the submerged
21 lands and ocean resources issue. (U.S. Exh. 33.) According to Mr. Glidden's
22 position paper, the U.S. government was of the view that exclusive jurisdiction
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1 and control over the submerged lands and marine resources off the coast of the
2 CNMI had passed to the U.S. when the U.S. acquired sovereignty over the
3 CNMI in November 1986, and that there was no basis in law for the CNMI's
4 claim of ownership and/or control over 200-mile exclusive economic zone. *Id.*
5 at 3-4.
6

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8 26. In 1992, and again in 1995 and 1996, the disagreement over the
9 CNMI's claim to submerged lands and ocean resources became the subject of
10 additional rounds of § 902 consultations. During this period, the special
11 representatives of the CNMI Governors and of the President of the United
12 States exchanged several more position papers, each adhering to their opposing
13 positions on the issue of submerged lands and ocean resources. U.S. Exhs. 34 -
14 40. From 1987 to 1997, U.S. officials made several offers to sponsor legislation
15 that would grant CNMI authority to control submerged lands and marine
16 resources to a point three miles from shore. *See* U.S. Exhs. 61, at 0879; 63, at
17 0884; 64, at 0888; 65, and 66. The CNMI declined all such offers. (U.S. Exh. 38,
18 at 0638; 63, at 0884; 64, at 0888.)
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24 27. On August 21, 1995, the CNMI's Department of Land and Natural
25 Resources executed a "Submerged Lands Lease Agreement" with the Marine
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1 Revitalization Corporation (“MRC”), pursuant to which the MRC was to
2 construct a 76-slip boat marina complex at American Memorial Park on Saipan.
3 (U.S. Exh. 41.) That agreement made no reference to the United States’
4 authority over the portion of the leased premises that consisted of submerged
5 lands and did not expressly require the MRC to obtain U.S. approval.
6
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8 During the spring of 1986, the U.S. Department of the Interior notified
9 MRC of the United States’ authority over the submerged lands aspect of the
10 lease. *See* U.S. Exh. 42. Accordingly, the U.S. Park Service and MRC executed
11 a separate concession agreement for Outer Cove Marina, which contained
12 language acknowledging the dispute between the U.S. and the CNMI over the
13 ownership of submerged lands, and stating that “neither the Commonwealth
14 nor the United States waives or concedes any claim to ownership or control of
15 the submerged lands....” (U.S. Exh. 43, at 0749.)
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20 The CNMI’s Quiet Title Act complaint followed.
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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.

1 Under federal constitutional law, paramount power over submerged lands
2 is vested in the United States as a necessary element of national external
3 sovereignty. In United States v. California, 332 U.S. 19, 34, 67 S.Ct. 1658
4 (1947), the Court rejected California's claim to ownership of the oceanic
5 submerged lands within three miles of the coastline. The Court held that the
6 protection and control of adjacent seas is a function of national external
7 sovereignty which, under the constitutional system, requires that paramount
8 rights over the submerged lands underlying adjacent oceanic waters and their
9 natural resources be vested in the federal government. The Court also made
10 clear that "the Federal Government has the paramount right and power to
11 determine in the first instance when, how, and by what agencies...the oil and
12 other resources of the soil of the marginal sea...may be exploited." 332 U.S. at
13 29.¹⁴

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

1 Similarly, in United States v. Texas, 339 U.S. 707, 70 S.Ct. 918 (1950),
2 another submerged lands case, this one involving lands underlying the Gulf of
3 Mexico, the Supreme Court concluded that even if Texas, prior to statehood,
4 had full ownership and sovereignty over the adjacent seas and seabed, such
5 ownership could not survive the State's admission to the Union:
6

7
8 It is said that...the sovereignty of the sea can be complete and
9 unimpaired no matter if Texas owns the oil underlying it.... Yet,...
10 once the low-water mark is passed the international domain is
11 reached. Property rights must then be so subordinated to political
12 rights as in substance to coalesce and unite in the national
13 sovereign.... If the property, whatever it may be, lies seaward of the
14 low-water mark, its use, disposition, management, and control
involve national interests and national responsibilities. That is the
source of national rights in it.

15 339 U.S. at 719.¹⁵
16

17 2. The paramountcy doctrine applies to U.S. Territories to the same
18 extent as to States; it extends to *all* cases in which *any* plaintiff asserts a claim of
19 ownership in submerged lands underlying the ocean abutting an area over
20 which the U.S. has sovereignty. *See e.g. Village of Gambell v. Hodel*, 869 F.2d
21
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24 ¹⁵ Later, in United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155 (1975), the
25 Supreme Court rejected a claim by Atlantic Coast states that they had acquired
26 rights to the seabed which had survived the formation of the Union, thereby
reiterating the continued vitality of the paramountcy doctrine.

1 1273, 1276 (9th Cir. 1989) (“Gambell III”) (In Gambell III, the Ninth Circuit
2 rejected a contention that the principles enunciated in the Supreme Court’s
3 paramountcy cases did not apply in cases where plaintiff is not a U.S. state,
4 holding that the fact that the paramountcy cases involved States rather than
5 Alaskan natives was “a distinction without a difference....”) Similarly, in Native
6 Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir.
7 1998), the Ninth Circuit unequivocally declared:

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

13 As the court further explained:

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

25 *Id.* at 1096 (emphasis in original).
26

1 Because Covenant § 101 granted the United States full sovereignty over
2 the NMI at the termination of the Trusteeship, and does not expressly reserve
3 to the CNMI ownership of the submerged lands and marine resources
4 underlying the oceanic waters off its coastlines, the United States, based on long-
5 standing precedent, possesses the paramount rights in the marine resources and
6 oceanic submerged lands abutting the Commonwealth, contrary to the CNMI's
7 claim of ownership and assertions of sovereignty. On this basis alone, the
8 United States could be and is granted summary judgment, and the court rejects
9 the CNMI's quiet title complaint seeking a "judgment declaring that title to the
10 submerged lands underlying the...archipelagic waters, and territorial waters
11 adjacent to the Northern Mariana Islands is vested in the Commonwealth of the
12 Northern Mariana Islands." (CNMI Compl. at 16).¹⁶ For the same reason, the
13 United States is granted the relief requested in its counterclaim, namely, a
14 declaratory judgment decreeing that the United States possesses "paramount
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22 ¹⁶ In its complaint, the CNMI also seeks the same declaratory relief
23 concerning its internal waters. Because the U.S. has not contested the
24 Commonwealth's claim of ownership of or paramount rights to waters inland
25 of the CNMI's low-water mark, there is no case or controversy that requires
26 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.

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

4
5 3. In order for the Commonwealth to hold ownership of oceanic
6 submerged lands in the face of the federal paramountcy doctrine, a clear, express
7 and unequivocal Congressional enactment transferring such lands to the
8 Commonwealth would be required. There has never been such a declaration.
9 Neither the Covenant nor any other federal law expressly and unequivocally
10 transfers control of any submerged lands to the Commonwealth. Thus, the
11 federal paramountcy doctrine is dispositive of the United States’ claim to the
12 oceanic submerged lands abutting the Commonwealth.
13

14
15 In ¶ 34 of its complaint, the CNMI alleges that “in Section 801 [of the
16 Covenant] Defendant United States agreed to transfer and Plaintiff
17 Commonwealth agreed to receive ‘all right, title, and interest of the Trust
18 Territory of the Pacific Islands’ in and to the submerged lands...no later than
19 the termination of the Trusteeship Agreement.”
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22
23 Covenant § 801 did not constitute a conveyance of oceanic submerged
24 lands and associated natural resources to the Commonwealth. Under U.S. law,
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1 the United States cannot be divested of property subject to its sovereignty,
2 ownership, and jurisdiction absent an *explicit* congressional grant or
3 conveyance, which § 801 lacks. In United States v. Texas, *supra*, the Supreme
4 Court declared that “[d]ominion over navigable waters and property in the soil
5 under them are so identified with the sovereign power of government that a
6 presumption against their separation from sovereignty must be indulged....” 339
7 U.S. at 717. It has long been the law that “disposals by the United States...are
8 not lightly to be inferred, and should not be regarded as intended unless the
9 intention was definitely declared or otherwise made very plain.” United States
10 v. Holt State Bank, 270 U.S. 49, 55, 46 S.Ct. 197 (1926). Consequently, this
11 Court’s determination as to whether Congress intended to divest the United
12 States, as sovereign, of its paramount interests in the oceanic submerged lands
13 off the coasts of the CNMI must be analyzed in light of the bedrock principle
14 that “land grants are construed favorably to the Government, that *nothing passes*
15 *except what is conveyed in clear language, and that if there are doubts they are*
16 *resolved for the Government, not against it.*” Watt v. Western Nuclear, Inc., 462
17 U.S. 36, 59, 103 S.Ct. 2218 (1983)(emphasis added); *see also* California ex rel.
18 State Lands Comm. v. United States, 457 U.S. 273, 287, 102 S.Ct.2432 (1982);
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1 United States v. Union Pac. R.R. Co., 353 U.S. 112, 116, 77 S.Ct. 685 (1957).

2
3 The principle---that it takes explicit federal legislative action to convey
4 oceanic submerged lands to states and territories before the latter may own
5 and/or regulate such lands---has been followed by the U.S. Congress since at
6 least 1947. In 1953, in response to the Supreme Court's 1947-1950 "tidelands"
7 cases, *supra*, Congress enacted the federal Submerged Lands Act, which generally
8 grants to coastal States title and ownership of the lands beneath the navigable
9 waters for a distance of three nautical miles seaward from their coasts. 43
10 U.S.C. §§ 1301, 1311(a). Similarly, in 1963 and 1974, Congress enacted the
11 Territorial Submerged Lands legislation to convey to the governments of Guam,
12 the Virgin Islands, and American Samoa, submerged lands within three
13 geographical miles seaward of their coasts. See Pub. L. No. 183, 88th Cong. 1st
14 Sess., 77 Stat. 338 (1963); see also 48 U.S.C. §§ 1705(a), (b).¹⁷
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20 ¹⁷ The 1963 Territorial Submerged Lands legislation, 77 Stat. 338 (1963),
21 authorized the U.S. Department of the Interior to convey a three-mile belt of
22 submerged lands to those U.S. Territories. The 1974 legislation, 48 U.S.C.
23 §§ 1705(a), (b), conveyed those submerged lands to the specified U.S. Territories
24 outright.

25 In the legislative history of the Territorial Submerged Lands Act (*i.e.*, the
26 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

1 Thus, when Congress considered and approved the Covenant in 1976, it
2 knew that no transfer or reservation of oceanic submerged lands to the
3 Commonwealth would occur, unless Congress said so by explicit language in
4 the Covenant or by separate legislation.
5

6
7 Section 801 reflects no congressional intention or agreement that
8 ownership of oceanic submerged lands should vest in the Commonwealth.
9

10 As relevant here, § 801 provides:

11
12 All right, title and interest of the Government of the Trust
13 Territory of the Pacific Islands in and to *real property* in the
14 Northern Mariana Islands on the date of the signing of this
15 Covenant or thereafter acquired in any manner whatsoever will, no
16 later than upon the termination of the Trusteeship Agreement, be
17 transferred to the Government of the Northern Mariana Islands.

18 (U.S. Exh. 10, at 28; emphasis added.)
19
20

21 Interior, 65 Int. Dec. 193 (1958), that “tidelands and submerged lands...were not
22 transferred to the Government of Guam...in view of the general rule that such
23 lands do not ordinarily pass under the general statutes but must be specified
24 particularly.” 1974 U.S. Code Cong. & Ad. News 5464, 5466 (1974).
25 Consistent with that view, the Senate Report on the Territorial Submerged
26 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.

1 The Section-By-Section Analysis of the Covenant explains the scope of
2 § 801 as follows:
3

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

19 (U.S. Exh. 11, at 95-96.)
20

21 Because § 801 does not define “real property,”¹⁸ and because the Analysis
22

23 ¹⁸ In the absence of any definition of “real property” in the Covenant, this
24 court must construe the “term in accordance with its ordinary or natural
25 meaning.” FDIC v. Meyer, 510 U.S. 471, 476, 114 S.Ct. 996 (1994) (*citing Smith*
26 *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

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

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

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

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

3
4 Legislation should be enacted to convey to the Northern Mariana
5 Islands any property rights of the United States in lands
6 permanently or periodically covered by tidal waters within three
7 geographical miles of the coastlines of the Northern Mariana
8 Islands. The proposed legislation is similar to laws already enacted
9 to convey federal interests in submerged lands to the States of the
10 Union, Guam, the Virgin Islands, and American Samoa.

11 *Id.* at 172.

12 In subsequent position papers, the CNMI repeatedly acknowledged that
13 “the Covenant is silent on the subject of ocean jurisdiction of the Northern
14 Mariana Islands in general,” and that “it is a curious blind spot in the Covenant
15 that the jurisdiction of the Commonwealth over its oceans, submerged lands,
16 and the natural resources was not specified.” (U.S. Exh. 30, at 3; *see also* U.S.
17 Exh. 31, at 4).¹⁹ In light of these concessions, the CNMI’s allegation in ¶ 34 of
18 its Complaint that § 801 constitutes an “agreement” by the United States to
19 “transfer” oceanic submerged lands to the CNMI cannot be sustained.
20
21

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23
24 ¹⁹ See also U.S. Exh. 31, at 46, where the CNMI stated: “*Unlike the*
25 *protections included for land*, the Covenant makes no specific provision for
26 ownership, conservation or control of the oceans and marine resources.”
(Emphasis added)

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

5 As previously noted, the drafters of the CNMI Constitution
6 demonstrated their understanding in late 1976---approximately nine months
7 after Section 801 of the Covenant became effective---that oceanic submerged
8 lands would only pass to the Commonwealth pursuant to "United States law"
9 and not § 801 of the Covenant. Specifically, Article XI, Section 1, of the CNMI
10 Constitution provides:
11
12
13

14 Section 1: Public Lands.

15 The lands as to which right, title or interest have been or hereafter
16 are transferred from the Trust Territory of the Pacific Islands to
17 any legal entity in the Commonwealth under Secretarial Order
18 2969 promulgated by the U.S. Secretary of the Interior, on
19 December 26, 1974,

20 the lands as to which right, title or interest have been vested in the
21 Resident Commissioner under Secretarial Order 2989 promulgated
22 by the U.S. Secretary of the Interior on March 24, 1976,

23 the lands as to which right, title or interest have been or hereafter
24 are transferred to or by the government of the Northern Marianas
25 Islands *under Article VIII of the Covenant, and*
26

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

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

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

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

1 5. The United States' exercise of paramount rights over the oceanic
2 submerged lands abutting the Commonwealth does not infringe upon the
3
4 CNMI's right of local self-government under Covenant § 103. That section
5

6
7 Constitutional Analysis (Dec. 6, 1976, stated:

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

25 (U.S. Exh. 15, at 144; emphasis added.)
26

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

1 provides:

2
3 The people of the Northern Mariana Islands will have the right of
4 local self-government and will govern themselves with respect to
5 *internal affairs in accordance with a Constitution of their own*
6 *adoption.*

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

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

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

2
3 Protection and control of the area are indeed functions of national
4 external sovereignty. The marginal sea is a national, not a state
5 concern. National interests, national responsibilities, national
6 concerns are involved. The problems of commerce, national
7 defense, relations with other powers, war and peace focus there.
8 National rights must therefore be paramount in that area.

9
10 339 U.S. at 704.

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

17
18 6. The Commonwealth's contention that it owns the oceanic submerged
19 lands abutting the coast of the Commonwealth because it did not enter into
20 political union with the United States on an "equal footing" with the other
21 states of the United States is also rejected. In ¶ 32 of its complaint, the CNMI
22 alleges that it owns the oceanic submerged lands abutting the Commonwealth
23 because:
24
25
26

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

5 Article IV, § 3, cl. 1, of the U.S. Constitution provides for the admission
6 of new States to the Union. In Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212,
7 228-229 (1845), the Supreme Court ruled that, under the U.S. Constitution, new
8 States are admitted to the Union on an "equal footing" with the original thirteen
9 colonies. As relevant here, "equal footing" means that a newly admitted State
10 presumptively succeeds to the United States' ownership of tidelands (*viz.*,
11 coastal lands between high and low tide) and lands beneath inland navigable
12 waters within the State's boundaries. *Id.*; see Phillips Petroleum Co. v.
13 Mississippi, 484 U.S. 469, 108 S.Ct. 791 (1988); Shively v. Bowlby, 152 U.S. 1,
14 26-31, 14 S.Ct. 548 (1894). In addition, Guam, the Virgin Islands, American
15 Samoa, and Puerto Rico did not enter upon a political relationship with the
16 United States on an equal footing with the States of the United States, yet the
17 federal paramountcy doctrine necessitated that specific U.S. legislation—in the
18 form of the Territorial Submerged Lands Act of 1974, 48 U.S.C. § 1705(a)—be
19 enacted to convey ownership of oceanic submerged lands abutting those U.S.
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1 territories.

2
3 The equal footing doctrine has no application, however, to submerged
4 lands seaward of the low-water mark. United States v. California, 332 U.S. 19,
5 67 S.Ct. 1658 (1947). Because the submerged lands at issue in this case are
6 neither “coastal lands between high and low tide” nor “lands beneath inland
7 navigable waters” within the CNMI's boundaries, the equal footing doctrine has
8 no application to this case.
9
10

11 7. The Commonwealth’s argument that the United States’ lease of
12 Commonwealth lands and adjacent waters for defense purposes pursuant to
13 Covenant § 802 constitutes an “acknowledgment” by the U.S. that the CNMI
14 owns the oceanic submerged lands abutting the Commonwealth presents no
15 genuine issue of material fact. As noted above, on January 6, 1983, the CNMI
16 and the U.S. executed a lease pursuant to Covenant § 802,
17 which provides, in pertinent part:
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22 The Commonwealth does hereby grant, demise, and let unto the
23 United States... and the United States does hereby accept and rent
24 from the Commonwealth pursuant to Section 802 of the Covenant
25 waters of the Commonwealth immediately adjacent to the leased
26 surface lands on Tinian and Farallon de Medinilla Islands.... The
United States shall have the right within the waters to facilitate

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

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

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

15 Without conceding that the CNMI owned oceanic submerged lands off
16 the coast of the Commonwealth, the United States deemed it necessary to lease
17 from the CNMI waters immediately adjacent to Tinian and Farallon Islands.
18 This was because coastal tidelands---that is, the CNMI's intermittently
19 submerged lands between the high and low water mark---which the Defense
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1 Department must traverse to access and egress leased surface areas),²¹ and waters
2 within port facilities such as harbors and harborworks, and other coast
3 protective structures that facilitate access and egress to shorelines, such as
4 artificial breakwaters, jetties, and groins, are considered *internal* waters not
5 subject to the federal paramountcy doctrine. *See e.g. United States v. Louisiana*,
6 394 U.S. 43, 49-50 n.64, 89 S.Ct. 773 (1969); *see generally* M. W. Reed, Shore and
7 Sea Boundaries, Volume Three, U.S. Exh. 47, at 50 - 57 (U.S. Govt. Printing
8 Office 2000). The U.S. has made no claim to the internal waters and tidelands of
9 the CNMI, and those waters and intermittently submerged lands are not at issue
10 in this case. Thus, the United States' lease of the waters "immediately adjacent"
11 to Tinian and Farallon de Medinilla for the purposes of facilitating access and
12 egress and constructing reasonable port facilities cannot be viewed as a
13 concession by the U.S. that the CNMI owns the submerged lands seaward of the

20 ²¹ Under United States law, the lands between the high and low water marks
21 are not owned by the United States, but by the adjacent states themselves, in
22 trust for their people. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).
23 The language in § 802 of the Covenant that provides for the U.S. to lease waters
24 "immediately adjacent" to leased surface areas reflects the United States'
25 recognition that, as a matter of U.S. Government policy (not the equal footing
26 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.

1 low water mark abutting the Commonwealth's coasts.

2
3 8. The Commonwealth's allegations that the United States' "collective
4 words," in a land return policy statement, and in Secretarial Order Nos. 2969
5 and 2989, promised to convey permanent ownership of submerged lands off the
6 coast of the Commonwealth to the CNMI government are not supported and
7 do not raise a genuine issue of material fact.
8

9
10 In paragraphs 26, 27, and 35 of the complaint, the Commonwealth seeks
11 to portray a series of events aimed at returning public lands to the TTPI districts
12 generally (a 1974 land return policy statement, and Secretarial Order No. 2969),
13 and transferring civil administration of the NMI to a "Resident Commissioner"
14 (Secretarial Order No. 2989), as evidence that the U.S. agreed to make a
15 permanent conveyance of oceanic submerged lands to the Commonwealth.
16
17 Specifically, the CNMI alleges that on November 4, 1973, the Secretary of the
18 Interior and the President's Personal Representative for Micronesian Status
19 Negotiations issued a policy statement reflecting their agreement that the NMI
20 oceanic submerged lands then being held by the TTPI government would be
21 permanently returned to the NMI people. Comp. ¶ 26. The Commonwealth
22 complaint goes on to allege that, on December 28, 1974, the Interior Secretary
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1 issued Secretarial Order No. 2969 specifically to implement the alleged policy of
2 returning oceanic submerged lands to the NMI people. Comp. ¶ 27. In
3 paragraph 35 of the complaint, the CNMI alleges that on April 1, 1976, the
4 Interior Secretary issued Secretarial Order No. 2989, to separate the
5 administration of the NMI from the TTPI government's administration of the
6 rest of Micronesia, and thereby vested in the Resident Commissioner (a U.S.
7 government position established by Order No. 2989) title to all oceanic
8 submerged lands. According to the Commonwealth, the NMI government
9 "succeeded to all powers, rights, and authority of the Resident Commissioner,
10 thereby receiving title to all submerged lands in the [NMI]," on January 9, 1978,
11 *i.e.*, when the NMI constitutional government superseded the civil
12 administration established by Secretarial Order No. 2989. Comp. ¶ 35.

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

21
22 There is no substance to the Commonwealth's assertion (Comp. ¶ 26)
23 that the Land Return Policy Statement constituted an agreement by the United
24 States to convey its interest in oceanic submerged lands abutting the
25 Commonwealth. By its plain terms, the policy statement was finite in duration;
26

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

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

23 881 F.2d at 650.

24 ²³ Article 5 of the Trusteeship Agreement provides:

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

1 that "quasi-sovereignty" and responsibility for NMI defense, the TTPI
2 government continued to control submerged lands seaward of the low water
3 mark on the CNMI coastlines between March 24, 1976, when the Covenant was
4 enacted by Congress, and November 4, 1986, when the Trusteeship ended.
5
6 Anticipating that continued control, the land return policy statement issued in
7 November, 1973, expressly provided that any return to the TTPI districts of
8 "tidelands, filled lands, submerged lands, and lagoons," was subject to the
9 retained right of the TTPI government "to control activities within these areas
10 affecting the public interest." (U.S. Exh. 8, at 4.)
11
12

13
14 It is equally significant that, while the land return policy statement
15 became the subject of extensive discussions during the December, 1973, round
16

17
18 territory shall play its part, in accordance with the Charter of the
19 United Nations, in the maintenance of international peace and
20 security. To this end the administering authority shall be entitled:

- 21 1. to establish naval, military and air bases and
22 to erect fortifications in the Trust Territory;
23 [and]
24 2. to station and employ armed forces in the
25 territory....

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

1 of the Marianas Political Status Negotiations, neither the record of that round
2 or any later round of negotiations makes reference to submerged lands. *See* U.S.
3 Exhs. 3 - 7. The sole focus of those discussions was the return of surface lands to
4 be used for defense purposes.
5

6
7 Similarly, a Marianas Political Status Commission paper, issued December
8 13, 1973 (six weeks after the Land Return Policy Statement issued), addressing
9 the return of public lands to the Marianas people made no reference to
10 submerged lands; it was devoted entirely to the return of dry lands. *See* U.S.
11 Exh. 50.
12

13
14 Further, there is no genuine basis for inferring that the land return policy
15 statement reflected the United States' intent to permanently convey oceanic
16 submerged lands to the Commonwealth. Indeed, such an inference would be at
17 odds with the U.S. Office of Micronesian Status Negotiations' ("OMSN") public
18 position on the status of these lands. In May, 1973, just six months before the
19 policy statement issued, James M. Wilson, Jr., U.S. Deputy Representative for
20 the OMSN, set out the United States' position on a broad range of issues---
21 including political status, public lands, economic issues, and transitional matters-
22 --prior to the opening of the second round of the Marianas future political status
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1 negotiations. (U.S. Exh. 2.) In discussing the United States' position on the
2 return of public lands, Mr. Wilson addressed submerged lands in a way that
3 clearly differentiated them from dry lands, stating:
4

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

9 (U.S. Exh. 2 at 7.) This statement appears to have contemplated specific U.S.
10 legislation expressly conveying submerged lands to the Commonwealth, which
11 is the method by which oceanic submerged lands vested in "the states of the
12 United States and other territories."²⁴ Also, the Analysis of the CNMI
13 Constitution (approved in December 1976), U.S. Exh. 15, at 144, addresses the
14 legal status of oceanic submerged lands in a way that is perfectly consistent with
15 the United States' May, 1973, position. See U.S. Exh. 2, at 7.²⁵ There is no
16
17
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19

20 ²⁴ Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.* (granting title
21 to submerged lands beneath a 3-mile belt of the territorial sea to the several
22 States of the U.S.); *see also* Pub.L. No. 183, 88th Cong. 1st Sess., 77 Stat. 338
23 (1963) (giving the Department of Interior authority to convey certain oceanic
submerged lands to Guam, the Virgin Islands, and American Samoa).

24 ²⁵ Compare U.S. Exh. 2 at 7 (submerged lands "should vest in the future
25 Marianas government under the new arrangement, as in the case of the states of
26 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

1 indication that the United States' position on the issue of oceanic submerged
2 lands off the coast of the Marianas shifted between May and November of 1973.
3

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

6 There is likewise no support for the CNMI's allegation, in ¶ 27 of the
7 complaint, that Secretarial Order No. 2969 effectuated any transfer of oceanic
8 submerged lands to the NMI government. Although the Order expressly
9 applied to TTPI "public lands," defined by Sections 1 and 2 of Title 67 of the
10 Trust Territory Code to include land below the ordinary high water mark, U.S.
11 Exh. 51, it expressly prohibited the High Commissioner from transferring any
12 submerged lands to a district until its legislature enacted laws "providing
13 for...reservation of the right of the central government of the Trust Territory of
14 the Pacific Islands to regulate all activities affecting conservation, navigation, or
15 commerce in and to the navigable waters and tidelands, filled lands, submerged
16 lands and lagoons." (U.S. Exh. 9, at 0170 (rt. col.)) The pre-constitutional
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24 foreign affairs powers with respect to the Commonwealth and thus has a claim
25 to the submerged lands off the coast of the Commonwealth as well. Section 1
26 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.")

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

8
9
10
11 In any event, Secretarial Order No. 2969 did not, in fact, precipitate a
12 transfer of any public lands---fast lands or submerged lands---to the NMI
13 government. By its own terms, Secretarial Order No. 2969 required that before
14 any lands could be transferred by the TTPI government, a government agency
15 would have to be created by the district legislature to receive the lands
16 transferred pursuant to the Secretarial Order. (U.S. Exh. 9, at 0170 (rt. col.); 40
17 Fed. Reg. at 812.) As the CNMI constitution's framers conceded, although the
18 Marianas district legislature established a land corporation to receive land
19 transfers pursuant to Secretarial Order No. 2969, the corporation did not
20 become operational before Secretarial Order No. 2989 superseded Secretarial
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1 Order No. 2969. See U.S. Exh. 15, at 142.²⁶ Thus, insofar as the Northern
2 Marianas were concerned, Secretarial Order No. 2969 was a nullity because it
3 was never formally implemented according to its plain terms.²⁷
4

5 c. Secretarial Order No. 2989 Did Not Vest Title to Oceanic
6 Submerged Lands in the Commonwealth
7

8 The CNMI's claim that Secretarial Order No. 2989 vested title to oceanic
9

10 ²⁶ In the December 1976 CNMI Constitutional Analysis, the CNMI framers
11 acknowledged that:

12 The Marianas District Legislature passed a statute, Mariana Islands
13 District Code title 15, chapter 15.12, Act 100-75, establishing the
14 Marianas Public Land Corporation and designating it as the legal
15 entity under [Secretarial] Order No. 2969. *The formation of the*
16 *Corporation was not complete, however, by the time [Secretarial] Order*
17 *2989 established a separate administration for the Marianas district and*
18 *vested title to the public lands in the Resident Commissioner.*

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

20 ²⁷ If oceanic submerged lands abutting the Commonwealth were already
21 included as TTPI "public lands" for the purposes of Secretarial Order No. 2969,
22 there would have been no reason for the CNMI constitution drafters to describe
23 oceanic submerged lands in Article XI, § 1 separately from lands transferred to
24 the CNMI "under Secretarial Order 2969, promulgated by the U.S. Secretary of
25 the Interior on December 26, 1974" in the same article and section of the CNMI
26 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.

1 submerged lands in the Commonwealth is also without merit. The Order did
2 vest title to all TTPI "public lands" situated in the Northern Mariana Islands in
3 the "U.S. Resident Commissioner," *see* U.S. Exh. 12 at 0288 (rt. col.), but it did
4 not define "public lands" and made no reference whatsoever to submerged lands.
5 Secretarial Order No. 2989 was simply an administrative vehicle chosen by the
6 Department of the Interior to transfer the civil administration of all TTPI
7 government functions from the TTPI's High Commissioner to a U.S. Resident
8 Commissioner. The Order was not directed to management of public lands any
9 more than it focused on any other civil administrative function. *See* U.S. Exh.
10 12. The Order did not purport to implement § 801 of the Covenant, and did
11 not authorize the Resident Commissioner to transfer title to any lands to the
12 Commonwealth. *Id.*²⁸ In short, Secretarial Order No. 2989 was not the vehicle
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19 ²⁸ Secretarial Order No. 2989 remained in effect only until January 9, 1978,
20 when the NMI's constitutional government became effective. On or about
21 February 5, 1979, Brewster Chapman, DOI Assistant Solicitor for Territories,
22 wrote a memorandum to the Director of DOI's Office of Territorial Affairs
23 explaining that Secretarial Order No. 2989 was not self-executing, and did not
24 convey any TTPI public lands to the NMI government. (U.S. Exh. 49.) Mr.
25 Chapman concluded that an actual transfer of legal title by the Trust Territory
26 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.

1 through which the United States implemented § 801 of the Covenant, much less
2 the vehicle through which oceanic submerged lands not contemplated by § 801
3 were transferred to the Commonwealth.
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5 Finally, Secretarial Order No. 2989 became effective on April 1, 1976, one
6 week after the Covenant was enacted into law. By that date, § 1003(b) had
7 already vested in the United States a fully protected *future* interest in the oceanic
8 submerged lands off the coast of the Commonwealth that, pursuant to
9 sovereignty provision of Covenant § 101, would become a fully vested *present*
10 interest upon termination of the Trusteeship. As already explained, § 801 of the
11 Covenant did not authorize the Secretary of the Interior to convey or reserve to
12 the Commonwealth ownership of oceanic submerged lands, and there is no
13 other U.S. legislation explicitly authorizing the Secretary to convey oceanic
14 submerged lands to the NMI government. Thus, even if Secretarial Order No.
15 2989 could somehow be construed as conveying to the Commonwealth the
16 United States' future property interest in oceanic submerged lands established
17 by Covenant § 1003(b), the court concludes that it would have been null and
18 void as an *ultra vires* administrative action conveying an interest in United
19 States property without explicit congressional authorization.
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1 9. The Commonwealth's "Submerged Lands Act" and "Marine
2 Sovereignty Act of 1980" are declared null and void under the Supremacy
3 Clause of the U.S. Constitution, Covenant Sections 101 and 102, and Article XI,
4 § 1, Article XIV, § 1, of the Commonwealth Constitution.
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7 A local law is preempted by federal law when the latter is intended to
8 occupy the field, and/or when the local law "stands as an obstacle to the
9 accomplishment and execution of the full purposes and objectives" of federal
10 law. Hines v. Davidowitz, 312 U.S. 52, 66-67, 61 S.Ct. 399 (1941); *see also*,
11 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct.
12 1210 (1963). The United States possesses paramount rights to submerged lands
13 because under Covenant § 101 the CNMI ceded sovereignty to the United
14 States, and the Supreme Court has ruled that paramount rights to such
15 submerged lands are an incident of U.S. sovereignty. There is no merit to the
16 CNMI's allegations that the U.S. agreed to CNMI ownership and control of
17 oceanic submerged lands, either in Covenant § 801, in Secretarial Order No.
18 2969, or in Secretarial Order No. 2989. That being the case, the CNMI's
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1 “Marine Sovereignty Act,” 2 N.Mar.I. Code § 1101 *et seq.*,²⁹ and its “Submerged
2 Lands Act,” 2 N.Mar.I. Code § 1201 *et seq.*, U.S. Exhs. 22 and 23, including
3 amendments thereto, are preempted because the federal paramountcy doctrine,
4 since November 4, 1986, has “occupied the field” of regulation of the CNMI’s
5 territorial sea and exclusive economic zone [“EEZ”], and because, together, the
6 CNMI statutes purport—in direct conflict with federal statutes—to vest
7 sovereignty, ownership, and exclusive jurisdiction concerning submerged lands
8 underlying a 12-mile territorial sea (as delineated by straight archipelagic
9 baselines), as well as a 200-mile EEZ.

14 Under the paramountcy doctrine, federal law has “occupied the field” of
15 regulation of submerged lands seaward of the Commonwealth’s low-water mark
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18 ²⁹ The CNMI Marine Sovereignty Act declares that the Commonwealth is
19 sovereign with exclusive jurisdiction over a 12-mile territorial sea, and an
20 additional 200-mile exclusive economic zone as measured from straight
21 archipelagic baselines. That statute bases the CNMI’s claim to archipelagic
22 status on a proposed “Revised Informal Composite Negotiating Text of the
23 United Nations Conference on the Law of the Sea” (“ICNT”), which
24 contemplated treating non-self-governing territories as sovereign states for the
25 purposes of claims to a territorial sea and related marine resources. Although, at
26 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.

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

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

10 United States v. California, 332 U.S. at 33-34 (citations and footnotes omitted).

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12 Thus, absent congressional legislation specifically conveying control over
13 oceanic submerged lands and associated natural resources, the Supreme Court
14 has concluded that local governments have no authority to legislate and/or
15 regulate concerning the territorial sea. *Id.* at 35 (“The state is not equipped in
16 our constitutional system with the powers or the facilities for exercising the
17 responsibilities which would be concomitant with the dominion which it
18 seeks”). Simply put, the Commonwealth’s Marine Sovereignty Act and
19 Submerged Lands Act are preempted because the federal paramountcy doctrine
20 (and any U.S. legislation enacted pursuant to the United States’ paramount
21 rights to waters seaward of the low-water mark) “occupy the field” of legislation
22 in this geographical area.
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1 As an additional ground, the CNMI Submerged Lands Act and Marine
2 Sovereignty Act are preempted because they are in direct conflict with, and/or
3 stand as obstacles to, the accomplishment of the purposes of several specific
4 federal laws. Such federal laws include, among others, the Magnuson-Stevens
5 Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. §
6 1801 *et seq.*; the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1453 *et*
7 *seq.*; the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*;
8 the National Marine Protection, Research and Sanctuaries Act ("Marine
9 Sanctuaries Act"), 16 U.S.C. § 1431 *et seq.*; the Oil Pollution Act ("OPA"), 33
10 U.S.C. § 2701 *et seq.*, and the Comprehensive Environmental Response,
11 Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Each of
12 these laws expressly applies to the CNMI and regulates different activities in the
13 territorial sea abutting the Commonwealth. In many of these laws, Congress
14 chose to regulate expressly to the full extent of a 200-mile EEZ.³⁰ If enforceable,

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23 ³⁰ See Magnuson Act, 16 U.S.C. § 1802 (11) ("The term 'exclusive economic
24 zone' means the zone established by Proclamation Numbered 5030, dated
25 March 10, 1983. For purposes of applying this chapter, the inner boundary of
26 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).

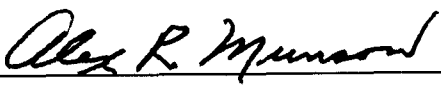
1 the CNMI statutes' assertions of sovereignty over a twelve-mile territorial sea,
2 and over a 200-mile EEZ, would nullify these federal laws as they pertain to the
3 Commonwealth. Because the CNMI "Submerged Lands Act" and "Marine
4 Sovereignty Act" conflict with, and stand as obstacles to, the accomplishment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

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

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3 IT IS SO ORDERED.

4 DATED this 7th day of August, 2003.
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9 ALEX R. MUNSON
10 Judge
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