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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS

THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff.	No. CV 99-0028 **UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The United States of America, Defendant and Counterclaim Plaintiff in this action, hereby submits this memorandum in reply to the January 31, 2003 memorandum filed by Plaintiff Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI") in opposition to the United States' cross motion for summary judgment filed on December 6, 2002. In its cross motion for summary judgment, the United States seeks dismissal of the CNMI's Quiet Title Act complaint requesting a decree from this Court declaring that the CNMI owns the lands underlying a 12-mile territorial sea abutting the CNMI (as measured from straight archipelagic baselines). The United States' December 6 motion also seeks summary judgment on its counterclaim for declaratory relief decreeing that the United States owns the submerged lands underlying a 12-mile territorial sea (as measured from the low water mark on the CNMI's shorelines). Pursuant to its counterclaim, the United States also seeks a decree that the CNMI's local "Submerged Lands Act," and "Marine Sovereignty Act" are preempted by federal law, because both local statutes conflict with the United States' ownership of the territorial sea and lands situated thereunder, as established by the federal paramountcy doctrine (which also occupies the field of regulation in the territorial sea unless Congress by statute conveys some interests in the marginal sea to subordinate governmental units), and because the local statutes conflict with at least six different federal statutes that specifically regulate various activities in the territorial sea abutting the NMI.

In its January 31 opposition brief, the CNMI argues that the federal paramountcy doctrine does not establish U.S. ownership of oceanic submerged lands, because that doctrine assertedly: 1) does not apply to the Commonwealth due to its unique relationship with the United States; 2) applies only to states admitted into the United States on equal footing with other states (and the CNMI is not a U.S. state); 3) has been overridden by Section 801 of the Covenant; and 4) cannot be applied to the Commonwealth pursuant to the supremacy clause (Section 102) of the Covenant or the Supremacy Clause of the U.S. Constitution. As we now explain, these arguments are wholly without substance.

ARGUMENT

I. GIVEN THE UNITED STATES' SOVEREIGNTY OVER THE CNMI, ANY UNIQUE FEATURES OF THE COVENANT BETWEEN THE CNMI AND THE UNITED STATES CANNOT DEFEAT THE UNITED STATES' PARAMOUNT RIGHTS TO THE SUBMERGED LANDS SEAWARD OF THE COMMONWEALTH'S LOW-WATER MARK

In opposing the United States' motion for summary judgment in this case, the Commonwealth argues that it is exempt from the federal paramountcy doctrine because it is "unique" among U.S. territories, i.e., no other "entity's relationship with the United States is governed by a document known as the 'Covenant' or similar document." CNMI Opp. Br. 4, 8. For this reason, the CNMI claims that it must be deemed the owner of the oceanic submerged lands off its shores as though it were an independent sovereign nation. As we now explain, while the Covenant may contain features that make CNMI's political relationship with the United States unique, exemption from the federal paramountcy doctrine is not one of them because the CNMI has vested complete national external sovereignty in the United States. [1/]

Under U.S. law, federal paramount rights in the territorial sea are an incident of national external sovereignty and are inextricably linked to the sovereign's responsibility for foreign affairs and defense. United States v. California, 332 U.S. 19, 33-35 (1947). Because of the need for this Nation to speak with one voice in the international and foreign diplomatic arenas, the Supreme Court has ruled that the United States, not its subordinate governmental entities, holds the paramount rights in the marginal sea abutting the coastlines of those entities. As the Supreme Court explained:

> But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations.

Id. at 35 (emphasis added). Consistent with that reasoning, the United States must be declared the owner of the oceanic submerged lands surrounding the Commonwealth because the United States has national external sovereignty over the CNMI (per Covenant § 101), because the federal government has sole and complete authority over the Commonwealth's foreign affairs, see Covenant § 104, and because the Covenant

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[1/] The United States is cognizant that Section 103 of the Covenant confers local self-government authority upon the CNMI. In this brief, we use the term "national sovereignty" and "national external sovereignty" interchangeably to reference all governmental rights, powers, and authorities that are beyond the sphere of the CNMI's Section 103 local self-governmental authority.

itself also denies the CNMI the authority to enter upon treaties with foreign nations. [2/]

As a separate matter, the United States must be deemed the owner of the submerged lands seaward of the CNMI's low-water mark, because the United States has complete responsibility for all matters relating to the CNMI's external security and defense needs. See id. Here again, the Supreme Court has explained that federal paramount rights go hand-in-hand with the sovereign's responsibility for national security and defense, stating:

> [A] government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts . . . . The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks.

332 U.S. at 35 (emphasis added). And, just three years after it decided United States v. California, the Supreme Court reiterated that the United States' national security and defense needs compel judicial recognition of U.S. paramount rights in the marginal sea, declaring:

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

United States v. Louisiana, 339 U.S. 699, 704 (1950); see also United States v. Maine, 420 U.S. 515, 522-23 (1975). If a state is "not equipped" to carry out the national defense and security interests of the United States, a fortiori, the CNMI, with powers less than that of a U.S. state, cannot do so, and thus cannot defend and secure the interests in the marginal sea for which it claims ownership.

In light of the foregoing principles, the paramount rights to the territorial sea abutting the Commonwealth's shorelines inheres in the United States because Section 101 of the Covenant expressly cedes sovereignty over the CNMI to the United States of America. To underscore the pervasiveness of this

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[2/] Section 104 of the Covenant is reinforced by Covenant § 501. As explained in the U.S. Opposition Brief (at 32 n. 19), Section 501 of the Covenant denies the Commonwealth the authority to enter upon treaties with foreign countries because it makes the provisions of Article 1, Section 10, clause 1, of the U.S. Constitution applicable to the CNMI, as though it were a state of the United States. As relevant here, U.S. Const. Art. I, sec. 10, cl. 1 provides: "No state shall enter into any treaty, alliance, or confederation." That constitutional provision goes on to state: "No state shall, without the consent of Congress . . . enter into any agreement or compact with . . . a foreign power."

grant of sovereignty to the U.S., the NMI government and people, in Section 104 of the Covenant, also expressly granted complete foreign affairs, international diplomatic relations, and defense authority to the United States. Thus, the United States, since November 4, 1986, has had complete national external sovereignty over the CNMI, just as it has with respect to all states and other U.S. territories. Because the federal paramountcy doctrine applies wherever the United States possesses national external sovereignty, and because the only thing that matters in this case is that the CNMI has conveyed such sovereignty to the United States, the "uniqueness" of any other features of the Covenant is simply irrelevant. [3/]

II. THE UNITED STATES' PARAMOUNT RIGHTS IN THE TERRITORIAL SEA SURROUNDING THE COMMONWEALTH ARISE SOLELY AS AN INCIDENT OF THE CNMI'S TRANSFER OF SOVEREIGNTY PURSUANT TO COVENANT § 101, AND DO NOT DERIVE, EVEN IN PART, FROM THE EQUAL FOOTING DOCTRINE

As explained in the United States' previous briefs, the federal paramountcy doctrine does not operate merely to defeat claims to ownership of the territorial sea by states; the doctrine also applies to all entities subject to U.S. sovereignty claiming title of oceanic submerged lands. Indeed, as the Ninth Circuit recently made clear, the federal paramountcy doctrine applies universally:

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

Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir. 1998) (emphasis added). Notwithstanding the Ninth Circuit's unequivocal holdings in Native Villages of Eyak that "the paramountcy doctrine is not limited merely to disputes between the national and state governments," the CNMI in its opposition brief (at 12) seeks to resurrect the argument that the federal paramountcy doctrine does not apply to non-states, such as the Commonwealth, that have not entered into a political union with the United States

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[3/] In any event, the CNMI appears to be exaggerating the significance of any features that make it unique from other states and territories. Thus, in the Section-By-Section Analysis, the Marianas Political Status Commission stated:

> In this case the [CNMI] will be in permanent political union with the United States. The commonwealth relationship is patterned after the relationship between the United States and Puerto Rico as well as the relationship between the United States and the Territory of Guam . . . . .

U.S. Exh. 11 at 2 [Bates 0216]. Guam and Puerto Rico, like the CNMI, are subject to U.S. sovereignty. Neither Guam nor Puerto Rico retained ownership of oceanic submerged lands when each became a U.S. territory. Rather, it took specific U.S. legislation to grant Guam and Puerto Rico ownership rights in the submerged lands underlying their respective territorial seas. See 48 U.S.C. § 749; 48 U.S.C. § 1705(a). Here, too, Congress must enact specific legislation before the Commonwealth will acquire any ownership in submerged lands seaward of the low-water mark.

on an equal footing with other U.S. states.

In support of that argument, the CNMI asserts that the United States has misinterpreted the Supreme Court's decision in United States v. Texas, 339 U.S. 707 (1950), as holding that federal paramount rights to the marginal sea are a function or incident of national sovereignty. (CNMI Opp. Br. 11-12.) The CNMI goes on to argue that United States v. Texas stands for a more limited proposition that the United States acquires federal paramount rights in the marginal sea only when territories are admitted to the union as states on an equal footing with other U.S. states. Id. at 11. CNMI leaps to this conclusion because Texas's admission as a state on an equal footing with other states was one of the factors the Supreme Court cited in declaring that the United States held paramount rights over Texas' offshore submerged lands. See 339 U.S. at 718. With all due respect, it is the CNMI's interpretation of United States v. Texas that does not survive scrutiny.

In Texas, the United States sued the State of Texas to establish federal ownership of the submerged lands off the shores of Texas in the Gulf of Mexico. Texas sought to avoid the application of the federal paramountcy doctrine by arguing that, when Texas was admitted as a state, she had retained certain "dominium" aspects of her external sovereignty (i.e., the ownership or proprietary rights in her offshore submerged lands), while ceding other "imperium" aspects of her external sovereignty (i.e., governmental powers of regulation and control of submerged lands in the Gulf) to the United States. The Supreme Court rejected Texas' arguments about her alleged retention of certain attributes of sovereignty over offshore submerged lands because, when Texas became a state, she was admitted to the Union on an equal footing with all other states, which of necessity triggered a complete transfer of Texas' sovereignty (both dominium and imperium) over offshore submerged lands to the United States. In that context, the Court explained:

> When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an 'equal footing' with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.

339 U.S. at 718 (emphasis added).

United States v. Texas is distinguishable from this case (and all other federal paramountcy doctrine cases) because, in United States v. Texas, the central question was whether Texas (which was an

independent sovereign before becoming a U.S. state) had transferred all of her national external sovereignty. (As explained above, transfer of national sovereignty alone is what conveys paramount rights in the territorial sea to the United States.) While the Supreme Court in United States v. Texas invoked the "equal footing" doctrine, it did so only in the context of determining whether the United States had acquired completely external sovereignty over Texas, and only as necessary to preclude Texas from arguing (and seeking to introduce supporting evidence) that it had transferred less than all of its national external sovereignty to the United States when it was admitted as a state to the union. In other words, because the equal footing doctrine requires all new states to surrender complete sovereignty to the national government at the time of their admission to the union, the Supreme Court did not need to adjudicate Texas's claim that she had transferred less than complete sovereignty over offshore lands to the United States. Thus, in the final analysis, it was Texas' complete transfer of external sovereignty to the United States, not Texas's status as a state subject to the equal footing doctrine, that triggered the Supreme Court's recognition of the United States' paramount rights to submerged lands offshore Texas.

Equal footing principles have no bearing on this case because there is no dispute that all aspects of the CNMI's national sovereignty have been transferred to the United States by the Covenant. Thus, as previously discussed, Section 101 of the Covenant clearly states that:

> The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands," in political union with and under the sovereignty of the United States of America.

(U.S. Exh. 10, at 5; emphasis added.) The Section-By-Section Analysis of the Covenant described the sovereignty conferred by Section 101 of the Covenant as coextensive with the comprehensive sovereignty that the United States enjoys over all U.S. states and all other U.S. territories, stating:

> [t]he United States will have sovereignty, that is, ultimate political authority, with respect to the Northern Mariana Islands. The United States has sovereignty with respect to every state, every territory and the Commonwealth of Puerto Rico. United States sovereignty is an essential element of a close and enduring political relationship with the United States, whether in the form of statehood, in the traditional territorial form, or as a commonwealth.

(U.S. Exh. 11, at 7; emphasis added.) Because there has been a transfer of national sovereignty to the U.S. effectuated by Section 101 of the Covenant, and because, under United States v. Texas, equal footing principles are simply irrelevant to the application of the federal paramountcy doctrine (unless a state seeks to argue that it did not cede complete sovereignty to the United States at the time of its admission to the

union), the CNMI's arguments about the equal footing doctrine and United States v. Texas are misguided and should be rejected.

III. APART FROM ITS DIRECT APPLICATION TO THE COMMONWEALTH PURSUANT TO COVENANT § 101, THE FEDERAL PARAMOUNTCY DOCTRINE ALSO APPLIES TO THE CNMI PURSUANT TO SECTION 502(a)(2) OF THE COVENANT

As shown above, equal footing doctrine principles are irrelevant to a contest over the applicability of the federal paramountcy doctrine in circumstances where, as here, there is no dispute that there has been a transfer of complete external sovereignty to the United States. But even assuming arguendo that inapplicability of the equal footing doctrine here could somehow preclude the United States from acquiring paramount rights in the territorial sea abutting the Commonwealth pursuant to Sections 101 and 104 of the Covenant, the United States nonetheless acquired paramount rights in the oceanic submerged lands surrounding the Commonwealth pursuant to Covenant § 502(a)(2).[4/] As relevant here, Section 502(a)(2) of the Covenant provides:

> The following laws of the United States in existence on [January 9, 1978] . . . will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> . . . .
>
> (2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States.

The paramount rights doctrine is a federal law that applies to the Commonwealth in the same way it applies to U.S. states, because: 1) it is not one of laws described in Section 502(a)(1) of the Covenant; 2) it is applicable to Guam (see U.S. Exh. 44 at 0778); and 3) it is of general application to the several States. See United States v. Maine, 420 U.S. 515, 522-23 (1975). Section 502(a)(2) of the Covenant thus ensures that the federal paramountcy doctrine "will apply to the Northern Mariana Islands" as it is "applicable to the several States." In these circumstances, the net legal effect of Covenant § 502(a)(2) is to place the CNMI

[4/] In U.S. ex rel. Richards v. De Leon Guerrero, 4 F.3d 749, 756 (9th Cir. 1993), the Ninth Circuit determined that "Section 502 governs the application to the CNMI of federal laws existing prior to January 9, 1978, and that Section 105 governs the application of federal laws enacted after that date." Because the federal paramountcy doctrine over offshore submerged lands is a federal law that has been in effect since at least 1947, see United States v. California, 332 U.S. 19 (1947), Section 502 of the Covenant governs its application to the Commonwealth.

on an "equal footing" with U.S. states with respect to the federal paramountcy doctrine despite its status as a non-state. See Commonwealth of the Northern Mariana Islands v. United States, 279 F.3d 1070, 1073-74 (9th Cir. 2002).

In its opposition brief, the CNMI does not deny that the federal paramountcy doctrine is a federal law that is within the ambit of Covenant § 502(a)(2) generally. See Opp. Br. 9. It nonetheless argues that the escape clause in § 502 -- i.e., the "except as provided in this Covenant" language -- prevents the federal paramountcy doctrine from applying to the Commonwealth because, according to the CNMI, Section 801 of the Covenant provides for a conveyance of oceanic submerged lands to the Commonwealth government. See id. As we now explain, this claim has no merit because there is nothing in Section 801 of the Covenant that purports to convey oceanic submerged lands to the Commonwealth.

Section 801 provides that "[a]ll right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands." (Emphasis added.) As the United States has already explained at length in its initial and opposition briefs, see U.S. 1st Br. 25 and n.22; U.S. 2nd Br. at 5-9, nothing in the Covenant or its Section-By-Section Analysis defines or describes "real property" as including lands underlying the territorial sea. Moreover, such a construction of "real property" would, in any event, be unreasonable because it is inconsistent with the commonly understood meaning of those words. In these circumstances, Section 801 cannot be deemed to fit within the exception proviso of Covenant § 502(a)(2), and does not preclude the application of the federal paramountcy doctrine to the CNMI as it is "applicable to the several States" under Covenant § 502(a)(2).

IV. SECTION 801 OF THE COVENANT IS NOT A STATUTORY CONVEYANCE OF SUBMERGED LANDS AKIN TO THE FEDERAL SUBMERGED LANDS ACT, THE TERRITORIAL SUBMERGED LANDS ACT, AND COMMONWEALTH OF PUERTO RICO'S SUBMERGED LANDS STATUTE, 48 U.S.C. § 749

At Opp. Br. 10-11, the CNMI argues that the Commonwealth is excepted from the federal paramountcy doctrine because, according to the CNMI, Section 801 of the Covenant should be viewed as

a submerged lands statute analogous to the federal Submerged Lands Act, 43 U.S.C. § 1301-1315. Contrary to the CNMI's argument, Section 801 of the Covenant cannot be deemed a submerged lands statute akin to 43 U.S.C. § 1301-1315, because, unlike the federal Submerged Lands Act (and the other U.S. territorial submerged lands legislation, discussed below), Covenant § 801 does not contain any language even remotely suggesting that oceanic submerged lands falls within its coverage.

As the CNMI's argument here tacitly acknowledges, Congress knows how to draft statutory language expressly conveying ownership rights in the territorial sea to states and U.S. territories when it intends to do so. Thus, in the federal Submerged Lands Act (applicable to all U.S. states), Congress in 1953 explicitly declared that " title to and ownership of the lands beneath navigable waters within the boundaries of the respective States . . . [are] recognized, confirmed, established, and vested in and assigned to the respective States. 43 U.S.C. § 1311. And, in 43 U.S.C. § 1301, Congress expressly defined "lands beneath navigable waters" as used in 43 U.S.C. § 1311 to include "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State . . . ." (Emphasis added.) [5/]

Similarly, in 1974, Congress enacted the Territorial Submerged Lands Act, applicable to Guam, the Virgin Islands, and American Samoa, which provides that:

> all right, title, and interest of the United States in lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territories of Guam, the Virgin Islands, and American Samoa . . . are hereby conveyed to the governments of Guam, the Virgin Islands, and American Samoa . . .

48 U.S.C. § 1705 (emphasis added). Finally, in 1979, Congress enacted a statute explicitly conveying ownership rights in lands underlying the territorial sea to the Commonwealth of Puerto Rico. In that statute, 48 U.S.C. § 749, Congress provided that "[t]he harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and

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[5/] Congress also defined "lands beneath navigable waters to include all lands permanently or periodically covered by tidal waters up to "the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles." Under this latter proviso, the Supreme Court has determined that Florida's and Texas' ownership of submerged lands extend up to three marine leagues (or nine miles) into the Gulf of Mexico. 43 U.S.C. § 1301.

waters . . . are placed under the control of the government of Puerto Rico." After defining "control" to include "all right, title, and interest" (i.e., ownership), the Puerto Rico submerged lands statute goes on to define "navigable bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters" as "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide" that "extend from the coastline of the island of Puerto Rico and the adjacent islands . . . seaward to a distance of three marine leagues." 48 U.S.C. § 749 (emphasis added).

In each of the foregoing statutes expressly conveying lands underlying the territorial sea to U.S. states and other U.S. territories, Congress chose to use words such as "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide" to identify the starting point for ownership rights of offshore submerged lands, and then went on to specify in express language how far ownership rights would extend offshore. Section 801 of the Covenant differs greatly from the federal Submerged Lands Act, the Territorial Submerged Lands Act, and the Puerto Rico submerged lands legislation (48 U.S. C. § 749). Covenant § 801 contains no language suggesting defining "real property," no language suggesting that its reference to real property includes "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide," and no language specifying how far the CNMI's asserted ownership of submerged lands extends offshore.

While we are not suggesting that the nearly uniform language used by Congress in the federal Submerged Lands Act, the Territorial Submerged Lands Act, and the Puerto Rico submerged lands enactment, to convey interests in oceanic submerged lands must always be used in every federal statute expressly conveying oceanic submerged lands to a U.S. state or territory, the near uniformity of the language chosen by Congress in those statutes illustrates that Congress has always employed explicit and unambiguous language when it has elected to convey lands underlying the territorial sea. [6/] In short, contrary to the CNMI's argument, Section 801 of the Covenant, which applies to "real property" only and

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[6/] Senate debate took place on the Joint Resolution approving the Covenant on February 24, 1976 (122 Cong Rec 4182-4232). During his introduction of the HJR, Senator Johnston, the Senate's Floor Manager, said: "There are no hidden traps in this covenant. Every provision is reflected in established policy." (122Cong Rec 4190 center column) (See Legislative History Addendum, attached, at 4, emphasis added.) This statement further suggests that the federal paramountcy doctrine (established policy) applied to the Commonwealth, nothing passed in the Covenant by implication (no hidden traps), and that specific legislation is necessary to convey oceanic submerged lands to the Commonwealth.

offers no hint that it might include a conveyance of oceanic submerged lands, cannot be deemed a submerged lands statute analogous to the enactments that have expressly conveyed oceanic submerged lands to all U.S. states, Guam, Virgin Islands, American Samoa, and Puerto Rico. [7/]

V. EVEN IF THE "REAL PROPERTY" REFERENCE IN SECTION 801 OF THE COVENANT WERE DEEMED AMBIGUOUS ON THE ISSUE OF WHETHER IT INCLUDES OCEANIC SUBMERGED LANDS, THE AMBIGUITY MUST BE RESOLVED IN FAVOR OF THE UNITED STATES

The CNMI next argues that even if Section 801 of the Covenant does not expressly convey oceanic submerged lands to the Commonwealth, its use of the term "real property" is sufficiently unclear on the question of whether it embraces oceanic submerged lands that the Court must declare it ambiguous, and then resolve the alleged ambiguity in the Commonwealth's favor. CNMI Opp. Br. 12, see also id. at 5-6. This argument has no substance because there is no ambiguity in either Section 101 of the Covenant (which establishes the United States' sovereignty and paramount rights over the territorial sea surrounding the Commonwealth) or in Section 801 of the Covenant (requiring the United States to transfer "real property" in the NMI to the CNMI government no later than termination of the trusteeship). The CNMI has not cited a single case or statute or even dictionary in which a court, legislature, or wordsmith has described or defined "real property" as land underlying the ocean. [8/]

As the United States has already explained at length in its initial summary judgment brief, and in its opposition brief, Section 801 is not ambiguous and does not convey title to oceanic submerged lands to the CNMI. See U.S. 1st br. 25 n.22; U.S. 2d br. 5-9. But even if Section 801's reference to "real property"

[7/] At Opp. Br. 26, the CNMI nonetheless argues that its claim to a 12-mile territorial sea and 200-mile exclusive economic zone ("EEZ") "are not unusual or inconsistent with what others received." As the CNMI goes on to assert:

> several states and Puerto Rico have title to submerged lands beyond the three-mile area to which most states have received title. Puerto Rico, a Commonwealth, has title to three marine leagues, or nine miles along its coastline. Florida and Texas also have title to nine miles of submerged lands. . . . . In fact, given its small landmass, it is logical that the CNMI would receive more, not less, than what other larger political entities received.

Id. The CNMI's argument should be rejected because it fails to acknowledge that Florida, Texas, and Puerto Rico own title to oceanic submerged lands beyond three miles from their respective shorelines only because Congress specifically granted it to them by legislation. The CNMI has always been free to lobby Congress for legislation conveying ownership of three marine leagues, the same treatment accorded Florida, Texas, and Puerto Rico, or even some greater distance. But unless and until Congress determines to do so, the CNMI's title to submerged lands ends at the low-water mark on its shorelines.

[8/] At Opp. Br. 7 n. 7, the CNMI cites Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281, 299 (5th Cir. 2000) for the asserted proposition that submerged lands constitute a "type of real property." A careful reading of that case reveals, however, that the Fifth Circuit did not characterize "submerged lands" as a type of "real property." The Court was simply restating a party's argument characterizing submerged lands as real property.

could reasonably be considered ambiguous on the question of whether it applies to oceanic submerged lands, such ambiguity could not be resolved simply by giving the benefit of the doubt to the Commonwealth. To the contrary, "the established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983), quoting United States v. Union Pacific R.R. Co., 353 U.S. 112, 116 (1957); see also Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130, 1136 (D. Utah 2001). Thus, the United States, which acquired ownership of the oceanic submerged lands by virtue of the CNMI's transfer of sovereignty pursuant to Section 101 of the Covenant, cannot be dispossessed of such lands by assertedly ambiguous language in Section 801 of the Covenant.

The CNMI nonetheless argues that the usual rule for resolving ambiguities in land grants by the United States -- i.e., in favor of the sovereign -- does not apply here because Congressman Philip Burton, floor manager of the House version of the Joint Resolution that ratified the Covenant -- caused a written statement to be placed into the Congressional Record to the effect that ambiguities in the Covenant should be resolved in favor of the NMI government and NMI people. See CNMI Opp. Br. 6. As we now explain, those remarks by Congressman Burton do not have the force of legislative history of the Covenant because "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

Mr. Burton's remarks must be discounted as legislative history also because they were entered into the Congressional Record AFTER the joint resolution ratifying the Covenant was approved by both Houses of Congress, and thus could not have been a manifestation of congressional intent when the Covenant was signed into U.S. law. Congressman Burton was the House floor manager when House J. Res. 549 (HJR) was first considered on July 21, 1975. See 121 Cong Rec 23,662-23,673 (1975); see also Legislative History Addendum, attached, at 1-2. At that time, Mr. Burton made no comments about ambiguities in the Covenant, and did not exercise his right to revise and extend his remarks during the five legislative days his remarks were open for revision and extension, i.e., from July 21 to July 28, 1975. See 121 Cong Rec 23,662-23,673 (1975). Congressman Burton also made no comment about any ambiguities in the Covenant when the House considered and gave final approval to the Senate amendments to the HJR on March 11, 1976. See 122 Cong Rec 6147-6149 (1976). It was not until March 18, 1976 -- one week after the HJR had

been passed by both Houses -- that Congressman Burton first raised the suggestion about how possible ambiguities in the Covenant should be resolved. See Legislative History Addendum, attached hereto, at 3, 10-11. [9/]

It is well-established that a floor manager's statements about a bill are accorded less weight when, as here, they were not made available to Congress before it took action on the bill. National Ass'n of Greeting Card Publishers v. U.S. Postal Service, 462 U.S. 810, 833 (1983) ("Greeting Card Publishers"). Indeed, the Supreme Court recognized that such post hoc statements are not considered as authoritative as reports by either House of Congress, or conference reports. Thus, in Greeting Card Publishers, the Court stated:

> The Second Circuit apparently believed that the Managers' Statement was the report of the entire conference committee. Were this the case, its definition would be due great weight. The Conference Report, however, contained only the text of the Act. There is no dispute that the House Managers' statements became available only after the Senate had completed its consideration of the Conference Report. Thus, while certainly significant, these statements do not have the status of a conference report, or even a report of a single House available to both Houses.

Id. (emphasis added). In any event, "[s]tray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill." In re Burns, 887 F.2d 1541, 1549 (11th Cir. 1989) (quoting In re Kelly, 841 F.2d 908, 912 n. 3 (9th Cir.1988)). Therefore, even assuming that Section 801 could reasonably be deemed ambiguous on the subject of ownership of the territorial sea (we say it could not), Congressman Burton's post hoc statements in the Congressional Record are no basis upon which to resolve the purported ambiguity in the CNMI's favor.

The CNMI nonetheless argues that, even if Mr. Burton's remarks do not entitle the CNMI to the benefit of the doubt, ambiguities in the Covenant must be resolved in its favor because, according to the CNMI, the Covenant is akin to a U.S. treaty with Native Americans, and, under Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1257 (9th Cir. 1983), "any doubtful expressions" in a treaty between Native Americans and the United States "should be resolved in favor of the Indians." CNMI Opp. Br. 6. The CNMI also cites Puyallup for the asserted proposition that "Congress has been found to have transferred submerged lands to the people (and not retained them) even where the lands were not explicitly transferred."

[9/] In any event, the ambiguities highlighted by Congressman Burton as requiring resolution in favor of the CNMI did not include offshore resources, particularly in the portion that discussed section 801 of the Covenant. (122 Cong Rec 7273(March 18, 1976)); see Legis. Hist. Addendum, attached, at 11.

CNMI Opp. Br. 12. These arguments must be rejected because they are based on a series of flawed premises.

Initially, the CNMI's characterization of the Covenant as a "treaty" is not accurate. A treaty is an international agreement, i.e., an agreement between sovereign nations governed by international law, [9/] and the CNMI is neither a sovereign currently, nor was it a sovereign when the Covenant was negotiated and ratified. Second, the CNMI government is not a Native American tribe. "The dominant ethnic group within the Northern Marianas population is the Chamorros, who are of the same origin as the indigenous Guamanians." Micronesian Telecommunications Corp. v. N.L.R.B., 820 F.2d 1097, 1098 (9th Cir. 1987). And, as the Ninth Circuit has also ruled, "[t]he government of Guam is neither a tribe nor a tribal member." Government of Guam, ex rel. Guam Economic Development Authority v. U.S., 179 F.3d 630, 640-41 (9th Cir. 1999). If the government of Guam is not an Indian Tribe, neither can the CNMI government be considered a tribe.

In any event, the CNMI's reliance on Puyallup for the asserted proposition that "Congress has been found to have transferred submerged lands to the people (and not retained them) even where the lands were not explicitly transferred" (see Opp. Br. 12 n. 34) is misplaced. In Puyallup, the lands at issue were not submerged lands underlying the territorial sea, as they are in this case; rather, they were originally lands underlying the Puyallup river (which are inland waters within the State of Washington), which, through avulsion, were transformed into dry lands abutting inland waters. The question of ownership of lands underlying internal waters is governed by an entirely different set of legal principles than ownership of lands underlying the territorial sea. Compare United States v. Holt State Bank, 270 U.S. 49, 54 (1926) and Shively v. Bowlby, 152 U. S. 1, 47 (1894), with United States v. California, 332 U.S. 19, 29 (1947). While the courts may have resolved ambiguities in treaties with Indians in their favor as to implicit congressional grants of submerged lands underlying inland waters, the courts have never done so (in any reported case of which we are aware) concerning lands underlying the territorial sea. And because federal paramountcy principles preclude claims by Indian Tribes to lands underlying the ocean, either under claims of sovereignty

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[9/] See Restatement (Third) of Foreign Relations § 301 (describing "treaty" as an "international agreement," and defining "international agreement" as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law." See also Restatement (Third) of Foreign Relations § 201 (describing a "State" under international law as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." And per Covenant § 501, the CNMI has no authority to conduct foreign relations with other countries. See page 2, note 3 supra.

or claims of aboriginal title, see Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 187 (D. Alaska 1982); Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir. 1998), there is no basis for applying Puyallup's Indian Treaty construction principle here -- i.e., resolving an ambiguity in a treaty in favor of an Indian Tribe -- to find an implicit conveyance of oceanic submerged lands to the Commonwealth in Covenant § 801.

VI. ARTICLE XI, § 1 OF THE CNMI CONSTITUTION UNDERSCORES THAT SECTION 801 OF THE COVENANT, SECRETARIAL ORDER NO. 2969, AND/OR SECRETARIAL ORDER NO. 2989, DID NOT CONVEY OWNERSHIP OF OCEANIC SUBMERGED LANDS TO THE CNMI

In its initial brief, the United States explained that the CNMI itself has already acknowledged that ownership of submerged lands off its coastlines would not pass to the Commonwealth pursuant to Section 801 of the Covenant, Secretarial Order No. 2969, or Secretarial Order No. 2989. See U.S. 1st Br. 7-9, 27-30, 39 n.36, and 41 n.38 Indeed, Article XI, § of the CNMI Constitution explicitly defines "public lands" subject to CNMI jurisdiction in the following manner:

> Section 1: Public Lands.
>
> The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the United States Secretary of the Interior, on December 26, 1974,
>
> the lands as to which right, title or interest have been vested in the Resident Commissioner under Secretarial Order 2989 promulgated by the United States Secretary of the Interior on March 24, 1976,
>
> the lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Marianas Islands under Article VIII of the Covenant, and
>
> the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under United States law
>
> are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent.

(U.S. Exh. 13, at 19; emphases and outline formatting supplied). In our initial brief, we also explained that if oceanic submerged lands abutting the Commonwealth were already subsumed within "real property" of the Trust Territory Government within the meaning of Section 801 of the Covenant, there would have been no reason for the NMI constitution's framers to describe those submerged lands in Article XI, § 1 separately from lands transferred to the CNMI "under Article VIII of the Covenant" in Art. XI, § 1 of the CNMI Constitution. U.S. 1st Br. 28. We also explained that, by describing oceanic submerged lands separately

from lands transferred pursuant to Article VIII of the Covenant, the framers in 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 Article VIII (i.e., Section 801) of the Covenant. Id.

In a futile effort to rescue its position, the Commonwealth attempts to argue that the CNMI Constitution's identification of "submerged lands off the coast of the Commonwealth" separate and apart from "lands . . . transferred to or by the government of the Northern Marianas Islands under Article VIII of the Covenant" does not undermine its claim of ownership of oceanic submerged lands pursuant to Section 801 of the Covenant because, according to the CNMI, "[e]ach statement of acquisition" listed in CNMI Const. Art. XI, § 1, was intended to be "duplicative of all others," and was simply an effort to ensure that no land, including submerged lands, "slipped through the cracks" figuratively speaking. CNMI Opp. Br. 17.

With all due respect, the CNMI's explanation of CNMI Art. XI, § 1, is simply not credible. The CNMI's position throughout this litigation is that the real property transfer obligations imposed on the United States by Section 801 of the Covenant were all-encompassing, and that Covenant § 801 included submerged lands off the coast of the Commonwealth within its coverage. See CNMI Initial Br. 24. Under the CNMI's current, seamless interpretation of Covenant § 801, there are (and were) no "cracks to fill."

Moreover, there is nothing in the CNMI's section-by-section "Analysis of the Constitution" that would support the CNMI's current "duplicative," "redundant," and "crack-filling" description of CNMI Const. Art. XI, § 1. The Analysis of CNMI Const. Art. XI, § 1, states:

> The definition [of "public lands"] includes four categories: 1) the lands transferred under Secretarial Order No. 2969; (2) the lands transferred under Secretarial Order No. 2989; (3) the lands transferred under the Covenant; and (4) all submerged lands off any coast of the Commonwealth.

U.S. Exh. 15 at 141 (emphasis added). Contrary to the CNMI's assertions, there is nothing in that Analysis to suggest that there was any duplication among the categories of lands enumerated in Art. XI, § 1. Indeed, the use of the word "all" in category No. 4 eviscerates the CNMI's "duplication" argument.

In addition, the Commonwealth's separate enumeration of "submerged lands off the coast of the Commonwealth" in Art. XI, § 1, is especially significant because it is the only category of lands that was not the subject of a definite claim of CNMI ownership in late 1976. Article XI, § 1 of the CNMI

Constitution did not equivocate with respect to dry, above-surface lands because it describes those lands as having been transferred to or vested in the Commonwealth pursuant to Secretarial Order No. 2969, Article VIII of the Covenant, and Secretarial Order No. 2989. When discussing "submerged lands off the coast of the Commonwealth," however, Art. XI, § 1 does not assert any definite claim of ownership; it only acknowledges that the CNMI may have a claim to those lands under U.S. law "now or hereafter." (Emphasis added.) If the CNMI had actually claimed title to oceanic submerged lands pursuant to Secretarial Order No. 2969, Secretarial Order No. 2989, or Section 801 of the Covenant, why the need for Category No. 4 (submerged lands off any coast of the Commonwealth)? And why, in 1976, characterize the CNMI's potential claim to oceanic submerged lands in terms of "may"?

The CNMI showed similar equivocation in the Constitution's "Analysis," where the CNMI acknowledged that, given the United States' foreign affairs and defense authority over the Commonwealth (per Covenant § 104), the United States "has a claim to the submerged lands off the coast of the Commonwealth." (U.S. Exh. 15, at 144.) According to the Analysis, CNMI Const. Art. XI, § 1

> recognizes this [United States] claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts. Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

Id. (Emphasis added.) As already explained, under current U.S. law (and under the U.S. law that was in effect when the CNMI Constitution was ratified in December 1976), the United States does not grant interests to states in "submerged lands off their coasts," except by U.S. legislation specifically conveying such interests. Thus, the last category of lands enumerated in Art. XI, § 1, must be interpreted as an attempt by the CNMI constitution's drafters to specify that oceanic submerged lands would belong to the NMI people at such future point in time as they are granted legislatively to the Commonwealth.

Finally, Art. XI, § 1 of the CNMI Constitution acknowledges that any possible claim that the CNMI "may" have to "submerged lands off the coast of the Commonwealth" would arise under "United States law." This negates the CNMI's assertions in this case that its claim to oceanic submerged lands arises under the Section 801 of the Covenant, Secretarial Order No. 2969, and/or Secretarial Order No. 2989.

The uncertainty with which the CNMI approached the subject of oceanic submerged lands in its Constitution in December 1976 is fundamentally at odds with its breezy assertions today that title to oceanic

submerged lands had been conveyed to the Commonwealth by the "collective words" of Secretarial Order No. 2969, Secretarial Order No. 2989, and Section 801 of the Covenant. The CNMI's publicly acknowledged doubts concerning the CNMI's title to oceanic submerged lands, candidly expressed by its constitutional framers in 1976, fatally undermines the CNMI's change of position, expressed here, that the Covenant conveys title to oceanic submerged lands to the CNMI.

VII. THE PROVISIONS OF COVENANT § 802, CONTEMPLATING A LEASE BY THE UNITED STATES OF TINIAN AND FARALLON DE MEDINILLA ISLANDS, AND WATERS "IMMEDIATELY ADJACENT" THERETO, DO NOT IMPLY CNMI OWNERSHIP OF LANDS UNDERLYING THE TERRITORIAL SEA

In its initial brief, the United States explained that the reference in Section 802 to the United States' need to lease waters "immediately adjacent" to Tinian and Farallon de Medinilla Islands grew out of the need for the United States to traverse the CNMI's tidelands (intermittently submerged lands above the low-water mark on Tinian's and FDM Island's coastlines) for access and egress purposes concerning the surface land it leased on Tinian and FDM Island, and to construct harborworks at some of those locations. U.S. 1st Br. 13, 33-34. As we also explained, under U.S. law, both tidelands and harborworks are considered to be the internal waters not subject to United States's ownership under the federal paramountcy doctrine. Id. at 33-34. In its opposition brief, the CNMI claims that there is no "support for the proposition" that the United States "only leased internal waters and no other property." CNMI Opp. Br. 20. As we now explain, this claim is not sustainable.

This Court need look no further than the lease itself for the scope of the Defense Department's rights to use waters immediately adjacent to Tinian and FDM Islands pursuant to Section 802 and 803 of the Covenant. The lease states that:

> The Commonwealth does hereby . . . [lease to] the United States . . . and the United States does hereby accept and rent from the Commonwealth pursuant to Section 802 of the Covenant waters of the [CNMI] immediately adjacent to the leased surface lands on Tinian and Farallon de Medinilla Islands . . . . The United States shall have the right within the waters to facilitate access and egress to the leased surface lands and to construct reasonable port facilities; PROVIDED, that the United States shall disturb to the minimum extent possible the seabed and subsoil in exercising its right of construction. The Commonwealth retains the right, without undue interference to the rights of the United States under this Lease Agreement to exploit the living and non-living resources of the waters immediately adjacent to the leased surface lands.

(Exh. 26, at 4.) Thus, the lease itself specifies the type of rights the United States has leased pursuant to

Covenant § 802 in waters immediately adjacent to Tinian and FDM Islands, i.e., the rights to "facilitate access and egress to the leased surface lands," and to "construct reasonable port facilities." Because access and egress from leased surface lands implicates traversing tidelands, and because both tidelands and port facilities are deemed inland waters, M. W. Reed, Shore and Sea Boundaries, Volume Three, U.S. Exh. 47, at 50-57 (U.S. Govt. Printing Office 2000), "waters immediately adjacent" to Tinian and FDM Islands, as referenced in Section 802 of the Covenant implicates the CNMI's internal waters only, and not the marginal sea.

Contrary to the CNMI's suggestion (CNMI Opp. Br. 20), nothing in the lease purports to grant the United States rights to use the territorial sea, which is not surprising because, during the Covenant negotiations, there was no contemplation that the CNMI would own the territorial sea unless and until granted ownership rights by U.S. legislation. See U.S. Exh. 2 at 7 ("So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, as in the case of the states of the United States and other territories"). Accordingly, the CNMI's assertion (Opp. Br. 20) that the United States has "not provided any evidence showing . . . how the lease addressed only internal waters" cannot be sustained.

Nonetheless, at CNMI Opp. Br. 21, the CNMI seeks to find significance in the fact that when Congress by statute, in 1979, finally granted the Commonwealth of Puerto Rico ownership rights in lands underlying a three marine league area surrounding its coastlines it assertedly used the words "adjacent waters" to describe that offshore area. Id. (citing 48 U.S.C. § 749). The CNMI goes on to argue that based on the similarity of the word "adjacent" in the Puerto Rico statute with the words "immediately adjacent" as used in Section 802 of the Covenant, the reference in Section 802 to "waters immediately adjacent" must similarly be construed to include the territorial sea.

There are several fatal defects with this line of argument. First of all, Congress did not use the words "adjacent waters" in 48 U.S.C. § 749, Puerto Rico's submerged lands statute; it used the words "adjacent islands and waters." Second, as explained previously, Congress specifically defined "navigable bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters" as an area "extending from the coastline of the island of Puerto Rico and the adjacent islands . . . seaward to a distance of three marine leagues." There is no comparable definition of

"waters immediately adjacent" to Tinian and FDM Islands in Section 802 or any other provision of the Covenant. Third, unlike 48 U.S.C. § 749, Covenant § 802 uses the word "immediately" to modify "adjacent," which, in comparison to the Puerto Rico statute, severely circumscribes the areas to be leased by the United States in Tinian and FDM Islands. Finally, even if the wording of Section 802 of the Covenant and 48 U.S.C. § 749 could reasonably be deemed similar (and we maintain that it is not similar), the Covenant was signed in 1975, four years before Congress enacted 48 U.S.C. § 749. It is well-established that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Waterman S.S. Corp. v. United States, 381 U.S. 252, 269 (1965)); United States v. Price, 361 U.S. 304, 313 (1960) (same); United States v. Philadelphia National Bank, 374 U.S. 321, 348-349 (1963) (same). Thus, even assuming that a similarity exists between Section 802 of the Covenant and 48 U.S.C. § 749, it may not be inferred that an earlier Congress, when it ratified the Covenant in March 1976, embraced a later Congress's concept of "adjacent" when the latter Congress enacted Puerto Rico's submerged lands statute.

VIII. THE CNMI'S LOCAL "SUBMERGED LANDS ACT" AND "MARINE SOVEREIGNTY ACT" ARE PREEMPTED BY SECTION 102 OF THE COVENANT AND THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

In its initial brief, the United States argued that the CNMI's local Submerged Lands Act and Marine Sovereignty Act are preempted under Section 102 of the Covenant, the Supremacy Clause of the United States Constitution, as well as Articles XI and XIV of the CNMI Constitution because the federal paramountcy doctrine occupies the field of ownership and regulation of lands underlying the territorial sea surrounding the Commonwealth, and because the CNMI's local statutes conflict with at least six federal statutes that expressly regulate activities in that territorial sea. [10/] In its opposition brief, the CNMI does not take issue with the merits of the United States' "field preemption" arguments or its "conflict preemption" arguments -- i.e., that the CNMI submerged lands legislation and Marine Sovereignty Act should be declared invalid because they cannot coexist with the United States' paramount rights in the marginal sea surrounding the Commonwealth, and/or with the six federal statutes which regulate the same subject matter

[10/] The CNMI's local Submerged Lands Act and Marine Sovereignty Act conflict with Art. XI, § 1, and Art. XIV, § 1 of the CNMI Constitution because both constitutional provisions recognize that the CNMI's interests, if any, in submerged lands and marines resources off the coast of the Commonwealth, are governed by United States law, and the CNMI's statutes which purport to regulate these matters as an incident of local self-government authority under Covenant § 103 violate United States law, i.e., the federal paramountcy doctrine.

purportedly regulated by the local statutes. Accordingly, summary judgment should be granted in favor of the United States, and the local submerged lands and marine sovereignty legislation should be declared preempted by federal law.

In response to the United States' preemption counterclaim, the CNMI raises only two limited defenses, to wit: 1) that there can be no federal preemption of the CNMI's territorial sea/submerged lands laws because the Supremacy Clause of the U.S. Constitution does not apply to the Commonwealth; and 2) the CNMI's local Submerged Lands Act and Marine Sovereignty Act represent a valid exercise of the CNMI's local government authority pursuant to Section 103 of the Covenant. Neither defense is valid.

As a threshold matter, the CNMI's argument that the United States' federal preemption claim must fail because the U.S. Constitution Supremacy Clause assertedly does not apply to the Commonwealth is invalid because it overlooks the United States' reliance on Covenant § 102 as primary authority for its preemption counterclaim.[11/] Section 102 of the Covenant provides:

> The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

As this Court has already ruled:

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

Olopai v. Guerrero, 1993 WL 384960, *11 (D. N. Mar. I.) (citing Perez v. Campbell, 402 U.S. 637 (1971) ("[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."); see also Ahmed v. Goldberg, 2001 WL 1842390, at * 7 (D. N. Mar. I.) (the CNMI is not free, by way of local legislation, to override or preempt a "law of the United States" applicable to the CNMI (citing Hines v. Davidowitz, 312 U.S. 52, 61 (1941)). Thus, even if the U.S. Supremacy Clause were deemed not to apply to the CNMI because it is not among the U.S. constitutional provisions enumerated in

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[11/] In its counterclaim, the United States alleged that "the supremacy clause of the Covenant, section 102, provides that the Covenant, together with the applicable provisions of the U.S. Constitution, treaties and laws of the United States, are the supreme law of the Northern Mariana Islands," U.S. Counterclaim at ¶ 49, and that "[t]he Marine Sovereignty Act, 2 CMC §§1101 et seq., and the Submerged Lands Act, 2 CMC § 1201 et seq., are invalid because they violate and conflict with, inter alia, the Covenant. Id. at ¶ 50.

Covenant § 501, Section 102 of the Covenant supplies the same preemptive force as the U.S. Supremacy Clause when federal law applicable to the CNMI occupies the field of regulation, or conflicts with CNMI local regulation. [12/]

Covenant § 102 makes the federal paramountcy doctrine the "supreme law of the Northern Mariana Islands." As already explained, the federal paramountcy doctrine is a law of the United States that is applicable to the Northern Mariana Islands of its own force because Covenant § 101 is "supreme law," and under U.S. law, federal paramount rights in the territorial sea are incidents of the national sovereignty that the CNMI transferred to the United States pursuant to Covenant § 101. As a separate matter, under Covenant § 502(a)(2), the federal paramountcy doctrine applies to the Northern Mariana Islands, as it applies to U.S. states, because the paramountcy doctrine constitutes a U.S. law that is not mentioned in Covenant § 502(a)(1), that is applicable to Guam, and that is also of general application to the several states. In these circumstances, the federal paramountcy doctrine should be declared "supreme law" in the Northern Mariana Islands that "occupies the field" of regulation of the territorial sea abutting the Commonwealth.

As we explained in the United States' previous briefs, because the CNMI is subject to U.S. sovereignty per Covenant § 101, it cannot lawfully claim the right to a 12-mile territorial sea, the right to draw straight archipelagic baselines, and the right to its own 200-mile EEZ, as if it were an independent sovereign nation exercising rights under international law reflected in the 1982 Convention on the Law of the Sea. And because the CNMI's Submerged Lands Act and Marine Sovereignty Act purport to reserve to the CNMI ownership of a 12-mile territorial sea (as measured from straight archipelagic baselines) and sovereignty over a 200-mile EEZ, in direct conflict with Covenant § 101, the federal paramountcy doctrine and the United States' ownership of paramount rights in the territorial sea and superior rights in the EEZ, they are preempted, and should be declared null and void.

[12/] The CNMI also asserts that the federal preemption doctrine does not apply at all in the Commonwealth because it originates from the [U.S.] Supremacy Clause, and thus all arguments based on federal preemption principles must fail. Opp. Br. 23. This argument is invalid in light of Olapai, 1993 WL 384960 at *11, which recognizes that Covenant § 102 adopts the preemption principles developed under the U.S. Supremacy Clause. If the Court deems the preemptive force of Section 102 of the Covenant to be coextensive with the U.S. Supremacy Clause, and if the Court deems Section 102 of the Covenant to be sufficient, in and of itself, to nullify the CNMI's local submerged lands and marine sovereignty legislation, it is unnecessary for the Court to address whether the Supremacy Clause of the U.S. Constitution itself applies to invalidate the CNMI's local statutes. However, if the Court were to find Covenant § 102 insufficient to preempt the local territorial sea legislation in this case, the United States would argue that the U.S. Supremacy Clause is "applicable of [its] own force" to the Commonwealth in this case within the meaning of Section 501 of the Covenant because application of the Supremacy Clause of the U.S. Constitution "of its own force" would be necessary to ensure that federal laws that are applicable to the CNMI are deemed supreme, and preempt conflicting CNMI enactments.

As a separate matter, the six federal statutes identified in the United States' initial brief that expressly regulate various activities in the territorial sea surrounding the Commonwealth are "supreme law" in the Northern Mariana Islands because each law applies to the Commonwealth pursuant to Covenant § 105. Section 105 of the Covenant provides that:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

By operation of Covenant § 105, if the federal "Act is expressly made applicable not only to the CNMI but to the several States as well, and nothing in the Act is violative of the provisions of Section 105 of the Covenant, the Act constitutes part of the supreme law of the CNMI and necessarily overrides any inconsistent local law." A & E Pacific Const. Co. v. Saipan Stevedore Co., Inc., 888 F.2d 68, 71 (9th Cir. 1989).

The six federal statutes regulating activities in the territorial sea abutting the NMI are all applicable to the CNMI pursuant to Covenant § 105 because each statute is applicable to the several states, and each specifically references the Northern Mariana Islands by name. [13/] The six federal statutes are thus "supreme law" in the Northern Mariana Islands pursuant to Covenant § 102 that nullify the CNMI submerged lands act and CNMI marine sovereignty act. The Marine Sovereignty Act of 1980, Public Law 2-7, 2 CMC §§ 1101 et seq. , is preempted because it declares the sovereignty of the Commonwealth to the territorial sea including air space, seabed and subsoil, and further declares Commonwealth sovereignty and jurisdiction over a 200 mile exclusive economic zone. The CNMI Submerged Lands Act, Public Law 6-13, 2 CMC § 1201 et seq., is preempted because it asserts a CNMI claim of ownership and control of submerged lands 200 miles seaward, and purports to assign to the Marianas Director of Natural Resources responsibility for the management, use and disposition of the submerged lands of the Commonwealth, including exploration

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[13/] See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq.; Coastal Zone Management Act, 16 U.S.C. § 1453 et seq.; Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq.; National Marine Protection, Research and Sanctuaries Act, 16 U.S.C. § 1431 et seq.; Oil Pollution Act, 33 U.S.C. § 2701 et seq., and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq..

licenses, development leases and permits for the extraction of petroleum or mineral deposits, as well as granting him significant enforcement powers of arrest and detention of foreign flag vessels, as well as other civil and criminal penalties. If enforceable, the CNMI statutes' assertions of sovereignty over a twelve-mile territorial sea, and over a 200-mile EEZ, would nullify these federal laws as they pertain to the Commonwealth, and interfere with the United States's enforcement of its laws applicable to the territorial sea.

In its opposition brief, the CNMI does not dispute that the CNMI Submerged Lands Act and the CNMI Marine Sovereignty Act are fundamentally in conflict with the six federal statutes regulating the territorial sea in proximity to the Commonwealth. Its only defense is that its local enactments represent a valid exercise of the CNMI's local self-government authority established under Covenant § 103. See CNMI Opp. Br. 25 ("[n]othing could be more local in nature than defining the parameters of the actual locale" of the CNMI). This claim is wholly devoid of merit.

As the Supreme Court has made clear on many occasions, regulation of the territorial sea is not a function of local self-government by any subordinate political unit of the United States. See United States v. Louisiana, 339 U.S. at 704 ("The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved"); United States v. California, 332 U.S. at 35 ("whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units"); id. ("[t]he state is not equipped in our constitutional system with the powers or the facilities for exercising [these] responsibilities"); United States v. Maine, 420 U.S. at 522-23 ("the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States"). This disposes of the CNMI's arguments that its local government authority preempts the federal paramountcy doctrine and the six federal statutes regulating the territorial sea abutting the CNMI. [14/]

[14/] In Olopai v. Guerrero, 1993 WL 384960 (D.N.Mar.I.), this Court stated: "where it is claimed that a piece of legislation infringes the CNMI's right to self-government, it is 'appropriate to balance the federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI.'" Id. at *12 (quoting U.S. ex rel. Richards v. De Leon Guerrero, 4 F.3d 749, 755 (9th Cir. 1993). There is no need to undertake such a balancing approach here because the federal paramountcy doctrine and the various federal statutes regulating activities in the territorial sea near the Commonwealth do not intrude at all into the internal affairs of the CNMI. Per United States v. California and its progeny, the territorial sea is the province of the national government, not local governments.

CONCLUSION

For the foregoing reasons, the Commonwealth's complaint to quiet title in submerged lands seaward of the low-water mark should be dismissed with prejudice, and the United States' counterclaim for a declaratory judgment, decreeing that: 1) the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters;" and that 2) the CNMI Marine Sovereignty Act and Submerged Lands Act are preempted by federal law, should be granted.

Respectfully submitted,

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s/ Edward S. Geldermann

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