FREDERICK A. BLACK
United States Attorney
EDWARD J. LYNCH
Special Assistant United States Attorney
GREGORY BAKA
Assistant United States Attorney
P.O. Box 500377
Saipan MP 96950-0377
(670) 236-2986

EDWARD S. GELDERMANN
Senior Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, DC 20044-0663
Tel: (202) 305-0242
FAX: (202) 305-0506

Attorneys for the United States

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' CROSS MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

The United States of America, defendant and counterclaimant herein, hereby moves for summary judgment seeking dismissal of the complaint filed by the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI"), as well as a judgment decreeing that, as of November 4, 1986, the CNMI "Submerged Lands Act," as amended, Pub. l. 6-13, 2 CMC § 1201 et seq., and the CNMI "Marine

Sovereignty Act of 1980," 2 CMC §§ 1101 et seq., are both null and void under the Supremacy Clause of the U.S. Constitution, Sections 101 and 102 of the "Covenant To Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" ("Covenant"), and Articles XI and XIV of the CNMI Constitution, because they purport to claim the CNMI's sovereignty, ownership, and exclusive right to control submerged lands and marine resources underlying a 12-mile territorial sea, as well as a 200-mile exclusive economic zone, as measured from straight archipelagic baselines. These local laws are preempted by federal law because they conflict with the United States' ownership and/or paramount right to control and regulate the submerged lands and marine resources seaward of the Commonwealth's low-water mark.

This motion is based on the following memorandum in support.

Respectfully submitted,

Dated: December 6, 2002

Edward S. Geldermann
Senior Trial Attorney

U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
Washington, D.C.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

A. Factual Background

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

1. The United States - Northern Mariana Island Negotiations Concerning The Future Political Status Of The NMI

In 1965, the people of Micronesia formed a Congress of Micronesia, with representatives from each of six administrative districts: the Northern Mariana Islands, Yap, Truk, Ponape, Palau, and the Marshall Islands ("TTPI districts"). In 1966, the TTPI districts petitioned the United States to establish a joint

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[1/] From 1920 to 1935, Japan governed Micronesia pursuant to a "Class C" Mandate from the former League of Nations. Saipan and Tinian were seized from the Japanese by the United States' military in 1944, during World War II.

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

commission to consider the future political alternatives for the TTPI. In1969, the Micronesian Congress began negotiations with the United States through a Joint Committee on Future Status. When the Congress of Micronesia rejected a U.S. proposal in May 1970 for all of the TTPI districts to enter into a "Commonwealth" relationship of "permanent association" with the United States, and elected instead to form a looser, more autonomous relationship of "free association," the Northern Mariana Islands ("NMI") broke ranks and sought separate negotiations directed toward a closer and more permanent political relationship with the United States. See generally U. S. ex rel. Richards v. De Leon Guerrero, 1992 WL 321010, *5 (D.N.M.I.). [3/]

In 1972, the United States agreed to hold separate negotiations with the NMI. Toward that end, the United States and the NMI commenced what proved to be several rounds of negotiations to determine the NMI's future political relationship with the U.S. See Exhibit Nos. 1 and 3-7 of the U.S. Exhibits In Support Of Motion For Summary Judgment ("U.S. Exh."). On May 10, 1973, prior to the second round of negotiations, James M. Wilson, U.S. Deputy Representative for Micronesian Status Negotiations, issued a memorandum in which he set forth the following United States' position concerning the future status of CNMI submerged lands after the Commonwealth's political relationship between the NMI and the United States had become established:

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

(U.S. Exh. 2 at 7.) The reports of the second round and subsequent rounds of negotiations between the United States and the NMI are silent on the subject of ownership and jurisdiction over oceanic submerged lands after the new political relationship between the United States and the NMI became effective. See U.S.

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

Exhs. 3-7. [4/]

2. The Department of the Interior's 1973 Land Return Policy Statement and Secretarial Order No. 2969

In the meantime, throughout 1972 and beyond, the United States continued to pursue negotiations separately with the remaining Micronesian districts about their future political status. In early 1973, representatives of Palau expressed unwillingness to participate in any further negotiations with the United States concerning its future political status while title to Palau land was still being held by the Trust Territory Government. (U.S. Exh. 8 at 1.) The Congress of Micronesia subsequently adopted a similar negotiating stance. Id. To remove this impediment to the political status negotiations, the Secretary of the Interior in November 1973 issued a policy statement, applicable to all of the Micronesian districts, concerning the return of public land to the districts. (U.S. Exh. 8.) [5/] In that statement, the Secretary stated:

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

Id. at 2.

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

[5/] According to the policy statement, at that time (late 1973), "over sixty percent of Micronesia's total land area [was] public land. The public land area in each of the districts [was]: Palau (68%); Yap (4%); Truk (17%); Ponape (66%); Marshall Islands (13%); and the Northern Mariana Islands (90%)." (U.S. Exh. 8 at 1.)

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

The land return policy statement called on the Congress of Micronesia to enact legislation enabling the transfer of TTPI public lands to the TTPI districts. (Id. at 2.) When the Congress of Micronesia had failed to do so by late 1974, the Interior Secretary proceeded to implement the public land return policy on his own initiative by issuing Secretarial Order No. 2969, 40 Fed. Reg. 811 (1974). (U.S. Exh. 9.) That order, which became effective on December 28, 1974, directed the High Commissioner of the Trust Territory to convey the Trust Territory's right, title, and interest, in public lands to district legal entities that had been empowered by their respective TTPI district legislatures to receive and hold such lands. Id.; 40 Fed. Reg. at 812. Consistent with the land return policy statement, Secretarial Order No. 2969 went on to prohibit the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for . . . reservation of the right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." Id.; 40 Fed. Reg. at 812. [6/]

3. The CNMI Covenant

On February 15, 1975, just six weeks after Secretarial Order No. 2969 became effective, representatives of the Northern Mariana Islands and the United States signed a Covenant to govern the future relationship between the NMI and the U.S. (U.S. Exh. 10.) The NMI legislature unanimously endorsed the Covenant, and the people of the NMI approved it by a seventy-eight percent majority vote on

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[6/] The Northern Marianas District Legislature did establish a Marianas Public Lands Corporation but it never became operational. (U.S. Exh. 15 at 142; see also p. 39, n. 35, infra.) The constitutional CNMI government later established a corporation by the same name, but, by that time, Secretarial Order No. 2989 (discussed infra) had already superseded Secretarial Order No. 2969.

June 17, 1975. Congress thereafter enacted the Covenant as law. See Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. § 1681 note.

The Covenant consists of ten articles that define the political relationship between the NMI and the United States. (U.S. Exh. 10.)[7/] Under the Covenant, upon termination of the U.N. Trusteeship Agreement, the CNMI would become a self-governing commonwealth in political union with, and under the sovereignty of, the United States of America. Covenant, § 101. (U.S. Exh. 10, at 5.)[8/] A Section-By-Section Analysis ("SBS Analysis"), dated February 15, 1975, that accompanied the Covenant describes this sovereignty concept as follows:

> [t]he United States will have sovereignty, that is, ultimate political authority, with respect to the Northern Mariana Islands. The United States has sovereignty with respect to every state, every 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.)[9/] Section 104 of the Covenant, which likewise did not become effective until termination of the Trusteeship, provides that the U.S. has complete responsibility for and authority with regard to foreign affairs and defense affecting the NMI. (U.S. Exh. 10, at 6.)

Section 102 of the Covenant, which became effective on January 9, 1978, states that the relations between the NMI and U.S. will be governed by the Covenant, which, together with the provisions of the Constitution, treaties and the laws of the United States applicable to the NMI, will be the supreme law of

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[7/] The authority of the United States towards the CNMI now arises solely under the Covenant. Hillblom v. U.S., 896 F.2d 426, 429 (9th Cir. 1990). Accordingly, the Covenant must be examined carefully to determine the precise nature of the Commonwealth's governance, and the CNMI's relationship to the United States. Fleming v. Department of Public Safety, 837 F.2d 401, 404 (9th Cir.), cert. denied, 488 U.S. 889 (1988).

[8/] Sovereignty was fully established as of 12:01 a.m., November 4, 1986, NMI time. Pres. Proc. 5564, Nov. 3, 1986, sec. 2; Smith v. Pangilinan, 651 F.2d 1320, 1321 (9th Cir. 1981); CNMI v. Atalig, 723 F.2d at 685.

[9/] The SBS Analysis has been declared authoritative by the Ninth Circuit. Fleming v. Department of Public Safety, 837 F.2d at 408.

the NMI. Id. at 5-6. As the SBS Analysis explained:

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

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

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

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

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

(U.S. Exh. 10, at 28.) Sections 802 and 803 of the Covenant provide that the CNMI will lease to the United States specified acreage on, inter alia, Tinian and Farallon de Medinilla Island (including "immediately adjacent" waters) for fifty years (with an option to renew for an additional 50 years) at specified U.S. dollar amounts. Id. at 29-30.

4. Secretarial Order No. 2989

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

Exh. 12.) [10/] Secretarial Order No. 2989 established a position of "Resident Commissioner" to oversee a broad range of executive and legislative responsibilities of the new civil administration in the Marianas. Id.; 41 Fed. Reg. at 15,893. With respect to TTPI public lands, Secretarial Order No. 2989 provided, in pertinent part:

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

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

5. The CNMI Constitution

As previously stated, Section 201 of the Covenant required the people of the Northern Mariana Islands ("NMI") to "formulate and approve a Constitution." (U.S. Exh. 10, at 7.) From October to December 1976, an NMI Constitutional Convention gathered, drafted, and approved a constitution to fulfill § 201's mandate. (U.S. Exh. 13.) On March 6, 1977, the CNMI Constitution was ratified by a 92% majority vote. The Constitution was deemed approved by Presidential Proclamation No. 4534 on October 4, 1977, see U.S. Exh. 14, and the constitutional government of the NMI became effective on January 9, 1978. [11/]

The drafters of the NMI Constitution adopted several constitutional provisions of particular importance to this case. Article XI, Section 1, of the NMI Constitution provides, in pertinent part, that "the

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

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

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.) Article XI, Section 2, provides that the "management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law." Id. Article XI, § 3, provides that "the management and disposition of public lands except those provided for by section 2 [i.e., submerged lands] shall be the responsibility of the Marianas Public Land Corporation" established by CNMI Const. Article XI, § 4. Id. at 19-20. Finally, Article XIV, § 1, of the CNMI Constitution provides that:

> The marine resources in waters off the coast of the Commonwealth over which the Commonwealth now or hereafter may have any jurisdiction under United States law shall be managed, controlled, protected, and preserved by the [Mariana] legislature for the benefit of the people.

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

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

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

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

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

> This section provides that the marine resources found in waters off the coast of the

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

Id. at 181.

6. Regulatory Developments Affecting NMI-Related Submerged Lands And Oceanic Resources From January 1978 Until The End Of The U.N. Trusteeship In November 1986

Almost immediately after the NMI constitutional government became effective in January 1978, questions arose as to the NMI government's authority to regulate submerged lands and marine resources off the coast of the Commonwealth, at least until the end of the Trusteeship. Contributing to the uncertainty was the fact that Section 1003(b) of the Covenant (U.S. Exh. 10, at 39) implemented different sections of the Covenant in three phases. Thus, real property provisions of Sections 801 of the Covenant (calling for return of TTPI real property to the NMI government no later than termination of the Trusteeship) became effective at the beginning of the first phase, which commenced on March 24, 1976. The leasing provisions of Covenant §§ 802 and 803 became effective at the beginning of the second phase, on January 9, 1978. The sovereignty, foreign affairs, and defense provisions of Sections 101 and 104 of the Covenant, however, did not become effective until the third phase, which commenced when the Trusteeship terminated on November 4, 1986. See U.S. Exh. 10, at 39. Consequently, at least from January 1978 through November 1986, doubts and/or disagreements surfaced by and between representatives of the CNMI and the United States over the extent to which the CNMI was empowered to regulate submerged lands and marine resources off the coast of the Commonwealth.

a. The U.S. Government's Assertion Of Fishery Management Authority Over A 200-Mile Belt Seaward Of A Three-Mile Territorial Sea Surrounding The Commonwealth

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

b. The CNMI's June 1978 Request To The United States For Clarification Of Jurisdiction Over Submerged Lands And The U.S. Response

On June 9, 1978, five months after the CNMI Constitution became effective, Oscar C. Rasa, then Speaker of the NMI's House of Representatives wrote to Ruth Van Cleve, Director of DOI's Office of Territorial Affairs ("OTA"), explaining that several firms had recently contacted CNMI legislators seeking authorization to conduct preliminary exploration to determine the feasibility of extracting minerals from submerged lands abutting the NMI's shorelines. (U.S. Exh. 17.) According to Mr. Rasa's letter, the firms had "been advised informally that the [NMI] may not have exclusive jurisdiction over submerged lands off the coast of the [NMI]." Id. at 1. While asserting the NMI's legislature's position that the NMI owns the

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[12/] Section 502(a)(2) of the Covenant (U.S. Exh. 10, at 14-15) provides that the "laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands" to the extent that they are "applicable to Guam and which are of general application to the several States as they are applicable to the several states."

submerged lands and resources underlying the territorial sea, and could "manage and dispose of same by law," the Rasa letter nonetheless asked DOI's OTA for a legal opinion whether jurisdiction over submerged lands and ocean resources was vested exclusively in the Commonwealth. Id.

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

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

Id. at 2-3. Consistent with its conclusion that oceanic submerged lands abutting the NMI would belong to the Federal Government as soon as the NMI became a Commonwealth of the United States, Mr. Chapman's letter went on to suggest that it would be prudent for the NMI government to "accept the applicable limitations and exceptions contained in the 1974 amendments to the Territorial Submerged Lands Act . . . which are not inconsistent with its current legal status, in managing and disposing of its submerged lands and their resources." Id. at 3.

Mr. Chapman's June 29, 1978 letter was transmitted to the NMI legislature. See U.S. Exh. 20. According to a State Department press release dated July 25, 1978, Roger St. Pierre, a legal consultant to the NMI legislature, disputed Mr. Chapman's conclusions and was reported to have said that because the Marianas Constitution grants ownership of the submerged lands to the Commonwealth, and because the

United States approved the Constitution, the federal government has no jurisdiction over them. Id.

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

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

Id. at 2.

c. The NMI's Submerged Lands Act and Marine Sovereignty Act

Notwithstanding Articles XI, § 1, and XIV, § 1, of the CNMI Constitution and Mr. Chapman's legal opinions, the NMI legislature enacted two statutes during the 1979-1980 time frame, which purported to assert the NMI government's sovereignty and/or exclusive jurisdiction over submerged lands and marine resources off the coast of the Commonwealth. In the NMI "Submerged Lands Act," the NMI legislature asserted ownership of submerged lands "out to the ocean to a distance of two hundred nautical miles." (U.S. Exh. 22, at 141.) That legislation also assigned to the CNMI "Director of Natural Resources" the responsibility to issue exploration licenses and development leases for the oceanic submerged lands abutting the NMI. Id. at 142. In May 1980, the NMI legislature enacted a so-called "Marine Sovereignty Act of 1980." (U.S. Exh. 23.) That legislation purported to assert that the NMI government has sovereignty over a twelve-mile territorial sea, as measured from straight archipelagic baselines, as well as a 200-mile exclusive economic zone measured from the same baselines. Id. at 2-104 to 2-106. Neither the NMI Submerged Lands Act nor the Marine Sovereignty Act contained a sunset provision providing for expiration to coincide with the termination of the Trusteeship. To date, neither statute has been repealed.

d. The U.S. Department of Defense's January 1983 Lease Of Military Lands On Tinian and Farallon de Medinilla Island

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

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

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

(U.S. Exh. 10, at 29.) A separate "Technical Agreement," executed pursuant to Covenant § 803(c),[13/] provides that the United States would forfeit these leasing rights unless payment therefor was received by the NMI Government within five years after Section 802 became effective (a deadline which turned out to be January 9, 1983). (U.S. Exh. 24, at 2-3.)

To meet the five-year leasing deadline, the U.S. Department of Defense commenced negotiations with the CNMI over leasing the areas contemplated by Covenant § 802(a). Because the Marianas Public Land Corporation (established by Article XI, § 3, of the CNMI Constitution) possessed leasing authority concerning only surface lands, i.e., uplands, the NMI legislature enacted a statute authorizing the NMI Governor to execute a lease with the United States concerning the "waters immediately adjacent" to "the leased surface lands on Tinian and Farallon de Medinilla Islands," including the right "to facilitate access and egress to the leased surface areas and to construct reasonable port facilities." Commonwealth Code, § 1412; Pub. L. No. 3-40, § 2 (Jan. 1, 1983); see also U.S. Exh. 25. On January 6, 1983, the United States executed a single, integrated lease with the Mariana Public Lands Corporation for surface areas, and with the Governor for the waters immediately adjacent to the leased surface areas, on Tinian and Farallon de Medinilla ("FDM") Island. (U.S. Exh. 26.)

e. The U.S. Presidential Proclamation Asserting U.S. Sovereignty (Consistent With The Covenant and The U.N. Trusteeship Agreement) Over A 200-Mile Exclusive Economic Zone Seaward Of The Territorial Sea Surrounding The NMI

On March 10, 1983, more than three years before the U.N. Trusteeship terminated, President Ronald Reagan issued Proclamation No. 5030, 48 Fed. Reg. 10605 (1983), establishing an "exclusive economic zone" ("EEZ") confirming that the United States claims sovereign rights and control over the natural resources (living and non-living) of the seabed, subsoil, and superjacent waters beyond the territorial

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[13/] Section 803(c) provides, as relevant here: "A separate Technical Agreement Regarding Use of Land To Be Leased by the United States in the Northern Mariana Islands will be executed simultaneously with this Covenant. The terms of the lease to the United States will be in accordance with this Section and with the terms of the Technical Agreement." (U.S. Exh. 10, at 30-31.)

sea but within 200 nautical miles of United States' coasts. (U.S. Exh. 27, at 2-3.) The Proclamation expressly applied to the NMI (to the extent consistent with the Covenant and the U.N. Trusteeship Agreement). Id.; 48 Fed. Reg. at 10605.

f. The Second Interim Report of the Northern Mariana Islands Commission on Federal Laws

In August 1985, the "Northern Mariana Islands Commission on Federal Laws" ("Commission on Federal Laws") issued "Welcoming America's Newest Commonwealth," a report to the U.S. Congress pursuant to Section 504 of the Covenant. (U.S. Exh. 28).[14/] In that report, the Commission stated that "[u]ntil termination of the trusteeship, the United States has no claim to ownership of submerged lands in the [NMI]." Id. at 175. On the other hand, the Report conceded "that the Northern Mariana Islands is now the owner of the submerged lands adjacent to its shores does not mean its ownership will survive termination of the Trusteeship." Id. at 178. As the Commission explained, "[o]n termination of the Trusteeship, sovereignty over the Northern Mariana Islands will become vested in the United States. At that time, ownership of the submerged lands becomes uncertain." Id. at 177. Citing to two of the U.S. Supreme

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

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

(U.S. Exh.10 at 16-17; emphasis added.) In early 1980, President Carter appointed seven individuals to the Commission, a majority of whom, per § 504, were NMI residents. The Commission met on ten occasions between May 1980 and May 1985. See U.S. Exh.28 at 0434-35.

Court's seminal "tidelands" cases, United States v. California, 332 U.S. 19, 34 (1947) and United States v. Texas, 339 U.S. 707 (1950), see id. at 177-78, and noting that there were arguments both in favor and against continued CNMI ownership of submerged lands after the Trusteeship terminated, id. at 177, the Commission recommended that Congress enact legislation to "clarify" that the CNMI was the owner of "lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the [NMI]." Id. at 172. According to the Report, "[t]he legislation here proposed thus follows the track already laid by Congress in conveying lands to the States and to other territories." Id. at 180 (referencing in a subsequent discussion, id. at 180-83, the federal Submerged Lands Act, 43 U.S.C. § 1301(a),(b), and the Territorial Submerged Lands Act, 48 U.S.C. § 1705(a)).

7. The Termination Of The U.N. Trusteeship And The § 902 Consultations Between The Representatives Of The Governor Of The CNMI And The President Of The United States Over The Status Of Submerged Lands And Ocean Resources

In 1985, the remaining TTPI districts (other than Palau) entered into a Compact of Free Association pursuant to which independent sovereignties would be formed. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (which appears at 48 U.S.C. § 1901 note (1994)). On November 3, 1986, President Reagan issued Proclamation No. 5564, declaring that the U.N. Trusteeship was terminated with respect to the Marshall Islands, the Federated States of Micronesia, and the Northern Mariana Islands. (U.S. Exh. 29; 51 Fed. Reg. 40,399.) Pursuant to Section 1002 of the Covenant, the President proclaimed that Sections 101 and 104, among others, would become effective as of 12:01 a.m. on November 4, 1986, and that, as of that date, "the Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America is fully established." Id.; 51 Fed. Reg. at 40,400.

Soon thereafter, on November 23, 1986, the CNMI requested formal consultations with a "special representative" of the President of the United States, pursuant to Section 902 of the Covenant, concerning the ownership of submerged lands and marine resources. (U.S. Exh. 30.)[15/] On March 30, 1987, the Special

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[15/] Section 902 of the Covenant specifies that

(continued...)

Representative of the CNMI's Governor prepared a position paper, stating that "[t]he jurisdiction of the Commonwealth over its oceans, submerged lands and the natural resources of the surrounding sea was not specified in the Covenant." (U.S. Exh. 31, at 4.) Ignoring the recommendations of the Commission on Federal Laws made less than two years earlier (i.e., that U.S. legislation be enacted to convey three miles of oceanic submerged lands to the CNMI), the CNMI § 902 representative asserted that the Commonwealth should have the "same rights in the ocean and exclusive economic zone (EEZ) as are recognized for coastal states in the United Nations Convention on the Law of the Sea (UNCLOS), subject only to appropriate oversight by the Government of the United States in the areas of foreign affairs and defense." Id. at 6. Accordingly, the CNMI recommended that U.S. legislation be enacted that establishes the Commonwealth's right, on a permanent basis, to exercise exclusive jurisdiction over a 12-mile territorial sea as well as a 200-mile exclusive economic zone. Id. at 55-64.

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

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

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[15/](...continued)

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

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

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

8. The Dispute Between The United States And The CNMI Over The Authority To Enter Into A Concession Agreement With The Marine Revitalization Corporation For The Outer Cove Marina Project

On August 21, 1995, the CNMI's Department of Land and Natural Resources executed a "Submerged Lands Lease Agreement" with the Marine Revitalization Corporation ("MRC") pursuant to which the MRC was to construct a seventy-six boat marina complex at American Memorial Park in Saipan. (U.S. Exh. 41.) That agreement made no reference to the United States' authority over the portion of the leased premises that consisted of submerged lands, and did not expressly require the MRC to obtain U.S. approval. During the spring of 1986, the U.S. Department of the Interior notified MRC of the United States' authority over the submerged lands aspect of the lease. See U.S. Exh. 42. Accordingly, the Park Service and the MRC executed a separate concession agreement for the Outer Cove Marina, which contained language acknowledging the dispute between the United States and the CNMI over the ownership of submerged lands, and stating that "neither the Commonwealth nor the United States waives or concedes any claim to ownership or control of the submerged lands . . . ." (U.S. Exh. 43, at 0749.)

The CNMI's Quiet Title Act complaint followed.

ARGUMENT

I. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure authorizes a grant of summary judgment:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The core requirement of Rule 56 is that there be no genuine issue of material fact in dispute. De Leon v. Bristol-Myers Squibb Company Long Term Disability Plan, 203 F. Supp.2d 1181, 1184 (D. Or. 2001) (citing, inter alia, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247- 48 (1986) ("Anderson")). The initial burden is on the movant to establish that there are no genuine issues of material fact. Celotex v. Catrett, 477 U.S. 317, 322-24 (1986). Once the movant's burden has been discharged, the onus is upon the nonmovant to establish that there is a genuine issue of material fact. Id. at 324. To satisfy this burden, the nonmovant "may not rest upon the mere allegations or denials of [its] pleadings," but must instead "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex, 477 U.S. at 324. An issue of fact is material if, under the substantive law of the case, resolution of the factual dispute could affect the outcome of the case. Anderson, 477 U.S. at 248. Factual disputes are genuine if they "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. On the other hand, after a court has drawn all reasonable inferences in favor of the nonmoving party, if "the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

II. THE UNITED STATES CURRENTLY POSSESSES PARAMOUNT RIGHTS OVER THE SUBMERGED LANDS OFF THE COAST OF THE COMMONWEALTH

This Court should declare that 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 CNMI, in Covenant § 101, entered into a sovereignty relationship with the United States, like every other U.S. state and territory, and that relationship officially became effective on November 4, 1986. As we now explain, 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, as a matter of U.S. law, attaches as an incident of that sovereignty.

A. Pursuant to Section 101 of the Covenant, the United States Acquired the Paramount Rights to the Submerged Lands and Marine Resources Underlying the Oceanic Waters Surrounding the CNMI's Coastlines When the U.N. Trusteeship Agreement Terminated in November 1986

As previously stated, the Covenant controls the rights, responsibilities, and political relationship between the U.S. and the CNMI. Section 101 of the Covenant specifies that the United States is sovereign over the CNMI. 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.

Under federal constitutional law, paramount power over submerged lands is vested in the United States as a necessary element of national external sovereignty. In United States v. California, 332 U.S. 19 (1947), the Supreme Court rejected the State of California's claim to ownership of the oceanic submerged lands within three miles of the coastline. It went on to hold that the protection and control of adjacent seas is a function of national external sovereignty which, under the U.S. constitutional system, requires that paramount rights over the submerged lands underlying adjacent oceanic waters and their natural resources be vested in the federal government. 332 U.S. at 34. The Court also made clear that "the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies . . . the oil and other resources of the soil of the marginal sea . . . may be exploited." 332 U.S. at 29. [16/]

In United States v. Texas, 339 U.S. 707 (1950), a similar submerged lands case involving lands underlying the Gulf of Mexico, the Supreme Court concluded that even if Texas, prior to admission to statehood, had full ownership and sovereignty over the adjacent seas and seabed, such ownership could not

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

survive the State's admission to the Union:

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

339 U.S. at 719. [17/]

The paramountcy doctrine applies to U.S. territories to the same extent as to States. In 1958, long before the NMI representatives commenced negotiations with the United States over the NMI's future political status, the Solicitor of the U.S. Department of the Interior ("DOI") issued a legal opinion addressing the applicability of the paramount rights doctrine to unincorporated territories that, like the CNMI, are subject to U.S. sovereignty. In that opinion (see U.S. Exh. 44), [18/] the DOI Solicitor declared that 48 U.S.C. § 1421 et seq., a statute that transferred to the Government of Guam "all property, real or personal," previously used by the "naval government in Guam in the administration of the civil affairs of the inhabitants of Guam," and "all other property, real and personal, not reserved by the [U.S.] President," did not convey to the Guamanian government title to the oceanic submerged lands adjacent to Guam. Although acknowledging that the paramount rights doctrine had previously been applied in cases only involving states and incorporated territories, the Solicitor concluded that the doctrine must also apply to unincorporated territories such as Guam "since to hold otherwise would result in the granting to such a territory of powers or rights greater than those of the incorporated territories, which would be

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

[18/] "Rights Of Abutting Upland Property Owners To Claim Title To Reclaimed Land Produced by Filling On Tidelands And Submerged Lands Adjacent To The Territory Of Guam," 65 Int. Dec. 193 (1958). (U.S. Exh. 44.)

unreasonable." [19/]

Consistent with the Interior Solicitor's conclusions, the Ninth Circuit more recently made clear that the federal paramountcy doctrine is not confined to oceanic submerged land disputes between U.S. states and the Federal Government, but extends to all cases in which any Plaintiff asserts a claim of ownership in submerged lands underlying the ocean abutting an area over which the U.S. has sovereignty. Village of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989) ("Gambell III"). Indeed, in Gambell III, the Ninth Circuit rejected a contention that the principles enunciated in the Supreme Court's paramountcy cases did not apply in cases where the plaintiff is not a U.S. state, holding that the fact that the paramountcy cases involved States rather than Alaskan natives was "a distinction without a difference . . . ." 869 F.2d at 1276. Similarly, in Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), the Ninth Circuit unequivocally declared:

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

154 F.3d at 1095 (second emphasis added; citations omitted). As the Eyak court further expounded:

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

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[19/] Id. at 195; U.S. Exh. 44 at 0778.

The United States believes that the federal paramountcy doctrine, as a matter of U.S. law, bars the CNMI's claim of ownership of oceanic submerged lands, by virtue of the provisions of Covenant § 101 vesting sovereignty over the CNMI in the United States, as of November 4, 1986. But the applicability of the federal paramountcy doctrine to the CNMI's claim to oceanic submerged lands is also reinforced by Covenant § 502(a)(2) which makes applicable to the CNMI those "laws of the United States" which are "applicable to Guam and which are of general application to the several States as they are applicable to the several states." (U.S. Exh. 10, at 14-15.) Because, as explained above, the federal paramountcy doctrine is "applicable to Guam" (see U.S. Exh. 44, at 195), and is of "general application to the several states," it applies equally to the Commonwealth pursuant to Section 502(a)(2) of the Covenant.

interests, national responsibilities, national concerns are involved" in all these cases. Id. at 1096 (emphasis added; citations omitted).

Because the Covenant, in Section 101, grants the United States full sovereignty over the NMI at the termination of the Trusteeship, and does not expressly reserve to the CNMI ownership of the submerged lands and marine resources underlying the oceanic waters off its coastlines, the United States, based on long-standing precedent, possesses the paramount rights in the marine resources and oceanic submerged lands abutting the Commonwealth, contrary to the CNMI's claim of ownership and assertions of sovereignty. On this basis alone, the United States is entitled to summary judgment rejecting the CNMI's quiet title complaint seeking a "judgment declaring that title to the submerged lands underlying the . . . archipelagic waters, and territorial waters adjacent to the [NMI] is vested in the [CNMI]" (CNMI Comp. at p. 16). [20/] For the same reason, the United States is entitled to the relief requested in its counterclaim, namely, a declaratory judgment decreeing that the United States possesses "paramount rights in and powers over the waters extending seaward of the ordinary low water mark on the Commonwealth coast and the lands, minerals, and other things of value underlying such waters." (U.S. Counterclaim, ¶ 44.)

B. The CNMI's Allegations to the Contrary Are Without Merit

As we have shown above, the federal paramountcy doctrine is predicated on federal sovereignty and is a doctrine of Constitutional dimensions. In order for the Commonwealth to hold ownership of oceanic submerged lands in the face of the federal paramountcy doctrine, a clear, express and unequivocal Congressional enactment transferring such lands to the Commonwealth would be required. Neither the Covenant nor any other Federal law with which we are familiar expressly and unequivocally transfers control of any submerged lands to the Commonwealth. Thus, the federal paramountcy doctrine is dispositive of the United States' claim to the oceanic submerged lands abutting the Commonwealth.

In its complaint, the Commonwealth nonetheless raises a number of allegations and arguments

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[20/] At Comp. 16, the CNMI also seeks the same declaratory relief concerning its internal waters. Because the United States makes no claim of ownership of or paramount rights to waters inland of the CNMI's low-water mark, there is no case or controversy that would permit this Court to exercise subject matter jurisdiction over the claim for declaratory relief concerning the CNMI's internal waters. See also p. 30, n.27 infra.

calculated to avoid application of the federal paramountcy doctrine to its claim of ownership of oceanic submerged lands and a 200-mile EEZ. As explained below, none has merit.

1. The CNMI's Allegation That Section 801 Of The Covenant Constitutes A Conveyance Of Oceanic Submerged Lands And Associated Natural Resources To The Commonwealth Is Without Merit

In its complaint (at ¶ 34), the CNMI alleges that "in Section 801 [of the Covenant] Defendant United States agreed to transfer and Plaintiff Commonwealth agreed to receive 'all right, title, and interest of the Trust Territory of the Pacific Islands' in and to the submerged lands . . . no later than the termination of the Trusteeship Agreement." This claim must be rejected because, under U.S. law, the United States cannot be divested of property subject to its sovereignty, ownership, and jurisdiction absent an explicit congressional grant or conveyance, and because section 801 of the Covenant contains no clear and explicit grant or reservation of oceanic submerged lands to the Commonwealth.

In United States v. Texas, 339 U.S. 707 (1950), the Supreme Court declared that "[d]ominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged . . . ." Id. at 717 (emphasis added). Indeed, it has long been the law that "disposals by the United States . . . are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55 (1926) (emphasis added). Consequently, this Court's determination as to whether Congress intended to divest the United States, as sovereign, of its paramount interests in the oceanic submerged lands off the coasts of the CNMI must be analyzed in light of the bedrock principle that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983)(emphasis added); see also California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 287 (1982); United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957).

Since at least 1947, Congress has been aware that, in light of the federal paramountcy doctrine, it

takes explicit legislative action to convey oceanic submerged lands to U.S. states and territories before the latter may own and/or regulate such lands. In response to the Supreme Court's 1947-1950 "tidelands" cases, Congress in 1953 enacted the federal Submerged Lands Act, which grants to the U.S. coastal states, with some exceptions, title and ownership of the lands beneath the navigable waters three geographical (nautical) miles seaward of their coasts. 43 U.S.C. §§ 1301, 1311(a). Similarly, in 1963 and 1974, Congress enacted the Territorial Submerged Lands legislation to convey to the governments of Guam, the Virgin Islands, and American Samoa, submerged lands within three geographical miles seaward of their coasts. See Pub. L. No. 183, 88th Cong. 1st Sess., 77 Stat. 338 (1963); see also 48 U.S.C. §§ 1705(a), (b). [21/] Thus, in 1976, when Congress considered and approved the Covenant, it had no reason to expect that a transfer or reservation of oceanic submerged lands to a U.S. territory would occur, except by explicit language in the Covenant or by separate legislation.

The CNMI nonetheless has taken the position that it is unnecessary for Congress to enact legislation to convey submerged lands to the Commonwealth because Congress already vested the CNMI with ownership of those lands in Section 801 of the Covenant. See U.S. Exh. 38, at 0638. When the language of Section 801 of the Covenant is carefully parsed, however, the conclusion is inescapable that § 801 reflects no congressional agreement that ownership of oceanic submerged lands should vest in the Commonwealth.

Section 801 of the Covenant provides, as relevant here:

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

In the legislative history of the Territorial Submerged Lands Act (i.e., the 1974 legislation), the U.S. Department of Justice reported to Congress about the 1958 decision (discussed supra at p. 20) by the Solicitor of the Department of the Interior, 65 Int. Dec. 193 (1958), that "tidelands and submerged lands . . . were not transferred to the Government of Guam . . . in view of the general rule that such lands do not ordinarily pass under the general statutes but must be specified particularly." 1974 U.S. Code Cong. & Ad. News 5464, 5466 (1974). Consistent with that view, the Senate Report on the Territorial Submerged Lands Act declared, "the submerged lands of Guam, the Virgin Islands, and American Samoa are owned by the Federal Government and administered by the Department of the Interior." Id. at 5464-65.

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

(U.S. Exh. 10, at 28; emphasis added.) The Section-By-Section Analysis accompanying the Covenant explains the scope of Section 801 as follows:

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

(U.S. Exh. 11, at 95-96.) As Section 801 does not define "real property," [22/] and as the SBS Analysis does not make any reference to oceanic submerged lands as among the "public lands" which must be returned

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[22/] In the absence of any definition of "real property" in the Covenant, this Court must construe the "term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citing Smith v. United States, 508 U.S. 223, 228 (1993)). The Random House Unabridged Webster's Dictionary's sole definition of "real property" (CD-Rom Version) is:

> an estate or property consisting of lands and of all appurtenances to lands, as buildings, crops, or mineral rights (distinguished from personal property).

(U.S. Exh. 45.) The same dictionary's first definition of "land" as "any part of the earth's surface not covered by a body of water; the part of the earth's surface occupied by continents and islands." (U.S. Exh. 46.) Thus, the ordinary, plain meaning construction of "real property" would not include oceanic submerged lands within Covenant § 801's coverage.

to the Commonwealth, there is no indication that the drafters of the Covenant considered "real property" to mean anything other than "fast lands," i.e., dry, above-surface lands. At the very least, it cannot be said that either Covenant § 801 or the SBS Analysis contains an express reservation of oceanic submerged lands that would permit a divestiture from the United States of the paramount rights to those lands that the U.S. acquired as an incident of the sovereignty that became effective upon termination of the Trusteeship Agreement. [23/]

2. The CNMI Has Already Conceded That The Status Of Oceanic Submerged Lands And Marine Resources Was Not Addressed By The Covenant

The CNMI itself long ago conceded that Section 801 of the Covenant is not a clear expression by Congress of intent to vest title to submerged lands in the Commonwealth. In the Second Interim Report (August 1985), the Commission on Federal Laws, dominated by CNMI representatives, acknowledged that "[b]ecause neither Section 801 nor its negotiating history mentions submerged lands, it can be argued, with the Department of the Interior opinion as precedent, that section 801 [of the Covenant] transfers only fast lands." (U.S. Exh. 28, at 179 n*). [24/] For that reason, among others, the Commission recommended that:

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

Id. at 172.

The foregoing was not the only occasion on which CNMI officials conceded that Section 801 does

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[23/] As stated above, Section 801 refers to a U.S. obligation to return "all right, title and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands." (U.S. Exh. 10, at 28.) It says nothing about establishing or reserving to the Commonwealth a 200-mile economic zone. Thus, regardless of whatever one may think about the merits of the CNMI's oceanic submerged lands claim in relation to Covenant § 801, section 801 of the Covenant affords absolutely no support for the CNMI's claim to a 200-mile EEZ.

[24/] The Report was referencing the Interior Department's Guam submerged lands opinion discussed at p. 20, supra. See also U.S. Exh. 44.

not constitute an agreement to convey oceanic submerged lands to the CNMI. In subsequent position papers, the CNMI candidly admitted that "the Covenant is silent on the subject of ocean jurisdiction of the Northern Mariana Islands in general," and that "it is a curious blind spot in the Covenant that the jurisdiction of the Commonwealth over its oceans, submerged lands, and the natural resources was not specified."(U.S. Exh. 30, at 3; see also U.S. Exh. 31, at 4). [25/] In light of these concessions, the CNMI's allegation in ¶ 34 of its Complaint that Section 801 constitutes an "agreement" by the United States to "transfer" oceanic submerged lands to the Commonwealth cannot be sustained.

3. The CNMI's Argument That Section 801 of the Covenant Transferred Oceanic Submerged Lands To The Commonwealth Is Belied By The CNMI's Own Constitution

Apart from the CNMI's admissions that the Covenant is silent concerning oceanic submerged lands, there is an abundance of other evidence in the historical record negating the allegation in ¶ 34 of the Complaint that Section 801 of the Covenant conveyed oceanic submerged lands to the Commonwealth. As previously stated, the drafters of the CNMI Constitution demonstrated their understanding in late 1976 -- approximately nine months after Section 801 of the Covenant became effective -- that oceanic submerged lands would pass to the Commonwealth, if at all, pursuant to "United States law" and not Section 801 of the Covenant. Specifically, Article XI, Section 1, of the CNMI Constitution provides:

> Section 1: Public Lands.
>
> The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the 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

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

> 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). 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 these submerged lands in Article XI, § 1 separately from lands transferred to the CNMI "under Article VIII of the Covenant" pursuant to Art. XI, § 1 of the CNMI Constitution. Thus, 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 of the Covenant.

As a separate matter, it is highly significant that the framers in Art. XI, § 1 of the CNMI Constitution characterized any claim that the CNMI might have to ownership of submerged lands as governed by "United States law." Explaining this reference to "United States law" in Article XI, the CNMI Constitutional Analysis issued December 6, 1976, stated:

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

Commonwealth.

(U.S. Exh. 15, at 144; emphasis added.) The foregoing strongly suggests that the framers of the CNMI Constitution -- a mere nine months after Section 801 became effective -- did not believe that title to oceanic submerged lands had passed to, or was reserved to, the Commonwealth by virtue of Section 801 of the Covenant, but instead would pass to the CNMI in the same way title to oceanic submerged lands had passed to the states and other U.S. territories, i.e., by future U.S. legislation. [26/]

4. The CNMI's Allegation That The NMI's People's Right to Local Self-Government Includes Ownership of Submerged Lands Is Without Substance

In apparent reference to Section 103 of the Covenant, the CNMI alleges, in paragraph 31 of the complaint, that:

> The people of the Northern Mariana Islands have the right of self-government and the right to govern themselves with respect to internal affairs pursuant to their own Constitution. These rights include ownership of the public resources, including the submerged lands, of the Northern Mariana Islands.

(Emphasis added.) As we now explain, this claim cannot withstand analysis.

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

> The people of the Northern Mariana Islands will have the right of local self-

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[26/] Of course, in 1979 and 1980, CNMI legislators sought to take advantage of the fact that the sovereignty provisions of Covenant § 101 had not yet become effective, by enacting a local Submerged Lands Act and a local "Marine Sovereignty Act," without any sunset provisions or expiration dates set to coincide with the termination of the Trusteeship. See U.S. Exhs. 22, 23. Both enactments, which have never been repealed, collectively purport to proclaim CNMI sovereignty over, and the exclusive authority to regulate, a twelve-mile territorial sea (measured from straight archipelagic baselines), and a 200-mile EEZ. Although these enactments clearly set the stage for a future conflict with U.S. law, the United States could not claim any actual conflict with U.S. law until after November 4, 1986, when the Trusteeship terminated. As discussed infra (see pp. 44-47), however, because the Trusteeship has long since ended, those local statutes are now plainly null and void because they conflict with the Supremacy Clause of the U.S. Constitution, with Section 102 of the Covenant, and with Art. XI, § 1 and Art. XIV, § 1, of the CNMI Constitution.

> government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

(U.S. Exh. 10, at 6; emphasis added.) As the above language shows, nothing in Section 103 of the Covenant addresses the question of ownership of oceanic submerged lands, or intimates that the Commonwealth's authority to "govern themselves with respect to internal affairs pursuant to their own Constitution" extends to the ownership of such lands. To the contrary, insofar as Section 103 of the Covenant expressly subordinates the CNMI's local self-government authority to the CNMI Constitution, Covenant § 103 points to U.S. law as the basis upon which the CNMI's claims to submerged lands must be determined.

As previously explained, the CNMI Constitution, explicitly acknowledges that whatever claim the CNMI may have to ownership of oceanic submerged lands and resources would be governed by United States law, not Section 801 of the Covenant. See CNMI Const. Art. XI, § 1 and Art. XIV, § 1 (and corresponding sections CNMI Constitutional Analysis); U.S. Exh. 13, at pp. 19, 23; and U.S. Exh. 15, at pp. 144, 181. Under U. S. law, ownership of submerged lands seaward of the coastline is neither an incident of local self-government nor within the police powers of any U.S. state or territory. Rather, as the Supreme Court succinctly put it: "[i]f the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities." United States v. Texas, 339 U.S. at 719. Indeed, as the Court declared more emphatically in United States v. Louisiana:

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

339 U.S. at 704. Given that control of oceanic submerged lands, as a matter of U.S. law, is a "function of national external sovereignty," and given that the United States has acquired complete "national external sovereignty" over the Commonwealth pursuant to Section 101 of the Covenant, the CNMI's claim to ownership of submerged lands (see Complaint, ¶ 31) as a "right of self-government and the right to govern

themselves with respect to internal affairs" must be rejected. [27/]

5. The CNMI's Contention That It Owns The Oceanic Submerged Lands Abutting The Coast of The Commonwealth Because It Did Not Enter Into A Political Union With The United States On An "Equal Footing" With U.S. States Lacks Merit

In paragraph 32 of the complaint, the CNMI alleges that it owns the oceanic submerged lands abutting the Commonwealth because:

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

As we now explain, the "equal footing" doctrine has no legal bearing upon the United States' paramount rights to the submerged lands abutting the Commonwealth's shorelines.

Article IV, § 3, Cl. 1, of the U.S. Constitution provides for the admission of new States to the Union. In Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-229 (1845), the Supreme Court ruled that, under the U.S. Constitution, new States are admitted to the Union on an "equal footing" with the original thirteen colonies. As relevant here, "equal footing" means that a newly admitted State presumptively succeeds to the United States' ownership of tidelands (viz., coastal lands between high and low tide) and lands beneath inland navigable waters within the State's boundaries. Id.; see Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); Shively v. Bowlby, 152 U.S. 1, 26-31 (1894). The equal footing doctrine has no

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[27/] Despite the United States' position that Section 801 requires the transfer of only fast lands to the Commonwealth, the United States makes no claim to the bed and banks underlying the CNMI's internal waters, or to the CNMI's tidelands (i.e., the intermittently submerged lands between the high and low water marks on the CNMI's coasts. This is consistent with the May 1973 statement of U.S. negotiating position by James M. Wilson, Deputy Representative for the U.S. Office of Micronesian Status Negotiations wherein Mr. Wilson stated: "[s]o far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, as in the case of the states of the United States and other territories." (U.S. Exh. 2, at 7; emphasis added). Thus, even though (as explained infra at pp. 31-32,) the equal footing doctrine is inapplicable to the CNMI, it is the United States' position that the CNMI owns and may regulate pursuant to Covenant § 103 the bed and banks underlying internal waters, and the tidelands, i.e., the lands between the high and low water mark on the CNMI's seacoasts, just as U.S. States do under the equal footing doctrine.

application, however, to submerged lands seaward of the low-water mark. United States v. California, 332 U.S. 19 (1947). Because the submerged lands at issue in this case are neither "coastal lands between high and low tide" nor "lands beneath inland navigable waters" within the CNMI's boundaries, the equal footing doctrine is wholly irrelevant to this case.

The United States is not predicating any part of its claim to paramount rights over submerged lands off the coast of the CNMI on a notion that the CNMI has entered into a political union with the United States pursuant to pursuant to Art. IV, § 3, Cl. 1 of the U.S. Constitution or is otherwise on an equal footing with U.S. states. The CNMI nonetheless has argued in past position papers that the paramount rights doctrine is inapplicable where (as here) a U.S. territory has not entered into a political union on an equal footing with U.S. states. See, e.g., U.S. Exh. 39, at 39. This argument must be rejected because it is based on a distorted interpretation of the Supreme Court's tidelands cases. There is nothing in United States v. California or its progeny to suggest that federal paramountcy principles are not applicable when the claimant of oceanic submerged lands is not a U.S. state. To the contrary, after assessing a claim by Native Americans to oceanic submerged lands abutting Alaska in light of the Supreme Court's tidelands cases, the Ninth Circuit ruled:

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

Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d at 1090. In the same case, the court went on to declare that the federal paramountcy doctrine applies "with equal force to all entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany." Id. at 1096. [28/] Thus, contrary to the allegations in the Complaint, at ¶ 32, the equal footing doctrine has no

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[28/] In United States v. Texas, 339 U.S. at 715-20, the Supreme Court ruled that the State of Texas was precluded by the equal footing doctrine from seeking to introduce extrinsic evidence that, prior to the Republic of Texas' admission into statehood, United States "recognized Texas ownership of the three-league area claimed by Texas," i.e., that Texas would retain ownership of (continued...)

bearing on any issue in this case.

6. The CNMI'S Allegation That the United States' Lease of Commonwealth Lands and Adjacent Waters for Defense Purposes Pursuant to Covenant § 802 Constitutes A U.S. Acknowledgment That The CNMI Owns The Oceanic Submerged Lands Abutting The Commonwealth Is Groundless

As previously stated, on January 6, 1983, the CNMI and the United States executed a lease pursuant to Covenant § 802, which provides, in pertinent part:

> 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.)

In paragraph 38 of the complaint, the CNMI suggests that the foregoing lease language reflects a concession on the part of the United States that the CNMI was, at the time of the lease, the owner of the oceanic submerged lands adjacent to the leased surface lands on Tinian and Farallon de Medinilla Islands. As we now explain, nothing could be further from the truth.

Without making a concession that the CNMI owns oceanic submerged lands off the coast of the Commonwealth, the United States deemed it necessary to lease from the CNMI waters immediately adjacent to Tinian and FDM Islands because coastal tidelands (in this case, the CNMI's intermittently submerged

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[28/](...continued)
the submerged lands off the coast of Texas in the Gulf of Mexico after Texas was admitted into the Union. In this case, the CNMI has conducted massive discovery. And when all the extrinsic evidence is considered, it simply confirms that there was no intent that CNMI would hold ownership of the oceanic submerged lands abutting the shorelines.

lands between the high and low water mark, which the Defense Department must traverse to access and egress leased surface areas),[29/] and waters within port facilities such as harbors and harborworks, and other coast protective structures that facilitate access and egress to shorelines, such as artificial breakwaters, jetties, and groins, are considered internal waters not subject to the federal paramountcy doctrine. See United States v. Louisiana, 394 U.S. 11, 49-50 n. 64 (1969); see generally M. W. Reed, Shore and Sea Boundaries, Volume Three, U.S. Eh. 47, at 50-57 (U.S. Govt. Printing Office 2000). As previously stated, the United States makes no claim to the internal waters and tidelands of the CNMI, and those waters and intermittently submerged lands are not at issue in this case. See pp.30-31 n. 27, supra. Thus, the United States' lease of the waters "immediately adjacent" to Tinian and FDM Islands for the purposes of facilitating access and egress and constructing reasonable port facilities cannot reasonably be viewed as a concession by the United States that the CNMI owns the submerged lands seaward of the low water mark abutting the Commonwealth's coasts.

7. There Is No Substance To The CNMI's Allegations That The United States, In A Land Return Policy Statement, And In Secretarial Order Nos. 2969 and 2989, Promised To Convey Permanent Ownership Of Submerged Lands Off The Coast Of The Commonwealth To The CNMI

In paragraphs 26, 27, and 35 of the complaint, the Commonwealth seeks to portray a series of events aimed at returning public lands to the TTPI districts generally (a 1974 land return policy statement, and Secretarial Order No. 2969), and transferring civil administration of the NMI to a "Resident Commissioner" (Secretarial Order No. 2989), as evidence that the United States agreed to make a permanent conveyance of oceanic submerged lands to the Commonwealth. Specifically, the CNMI alleges that on November 4, 1973, the Secretary of the Interior and the President's Personal Representative for Micronesian Status

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[29/] Under United States law, the lands between the high and low water marks are not owned by the United States, but by the adjacent states themselves, in trust for their people. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The language in Section 802 of the Covenant that provides for the United States to lease waters "immediately adjacent" to leased surface areas reflects the United States' recognition that, as a matter of U.S. Government policy (not the equal footing doctrine), the rule of Pollard's Lessee applies within 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.

Negotiations issued a policy statement reflecting their agreement that the NMI oceanic submerged lands then being held by the TTPI government would be returned to the NMI people, permanently. Comp. ¶ 26. The Commonwealth complaint goes on to allege that, on December 28, 1974, the Interior Secretary issued Secretarial Order No. 2969 specifically to implement the alleged policy of returning oceanic submerged lands to the NMI people. Comp. ¶ 27. In paragraph 35 of the complaint, the CNMI alleges that on April 1, 1976, the Interior Secretary issued Secretarial Order No. 2989, to separate the administration of the NMI from the TTPI government's administration of the rest of Micronesia, and thereby vested in the Resident Commissioner (a U.S. government position established by Order No. 2989) title to all oceanic submerged lands. According to the Commonwealth, the NMI government "succeeded to all powers, rights, and authority of the Resident Commissioner, thereby receiving title to all submerged lands in the [NMI]," on January 9, 1978, i.e., when the NMI constitutional government superseded the civil administration established by Secretarial Order No. 2989. Comp. ¶ 35. As we now explain, the CNMI's reliance on the land return policy statement, and Secretarial Order Nos. 2969 and 2989, to show an alleged U.S. intent to make a permanent disposition of oceanic submerged lands to the Commonwealth, is misplaced.

a. The November 1973 Land Return Policy Did Not Contemplate A Transfer Of Unrestricted Control Over Oceanic Submerged Lands To The Northern Mariana Islands

There is no substance to the Commonwealth's assertion (Comp. ¶ 26) that the land return policy statement constituted a U.S. agreement to convey the U.S. interest in oceanic submerged lands abutting the Commonwealth. By its terms, the policy statement was finite in duration; it applied only to the status of public lands for the remaining life of the Trusteeship and did not purport to decide the legal status of such lands after termination of the Trusteeship. See U.S. Exh. 8 at 2 ("these limitations and safeguards will apply until the Trusteeship ends, at which time the new government will be free to modify them as it chooses"). More importantly, the land return policy did not alter the TTPI government's "quasi-sovereignty" over the TTPI districts, including the NMI. See Temengil v. Trust Territory, 881 F.2d 647, 652 (9th Cir.1989). [30/]

[30/] In Temengil, the Ninth Circuit stated:

(continued...)

Until termination of the Trusteeship, the Trust Territory government continued to act as a "quasi-sovereign" over all of the TTPI districts, including the NMI, and was still responsible for the defense of the Northern Mariana Islands until the Trusteeship ended. [31/] As an incident of that "quasi-sovereignty" and responsibility for NMI defense, the TTPI government continued to control submerged lands seaward of the low water mark on the CNMI coastlines between March 24, 1976, when the Covenant was enacted by Congress, and November 4, 1986, when the Trusteeship terminated. Anticipating that continued control, the land return policy statement in November 1973 expressly provided that any return to the TTPI districts of "tidelands, filled lands, submerged lands, and lagoons," was subject to the retained right of the TTPI government "to control activities within these areas affecting the public interest." (U.S. Exh. 8, at 4.)

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

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[30/](...continued)

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

881 F.2d at 650.

[31/] Article 5 of the Trusteeship Agreement provides:

> In discharging its obligations under Article 76(a) and Article 84 of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:
>
> 1. to establish naval, military and air bases and to erect fortifications in the Trust Territory; [and]
>
> 2. to station and employ armed forces in the territory . . . .

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

that round and all later rounds of negotiations makes no reference to submerged lands. See U.S. Exhs. 3-7. The sole focus of those discussions was the return of surface lands to be used for defense purposes. Similarly, a Marianas Political Status Commission paper addressing the return of public lands to the Marianas people, dated December 13, 1973 (just six weeks after the Land Return Policy Statement issued), makes no reference to submerged lands and is devoted entirely to the return of dry lands. See U.S. Exh. 50.

As a separate matter, there is no reasonable basis for inferring that the land return policy statement reflected U.S. intent permanently to convey oceanic submerged lands to the Commonwealth because such an inference would be at odds with the U.S. Office of Micronesian Status Negotiations' ("OMSN") public position on the status of these lands. In May 1973, just six months before the policy statement issued, James M. Wilson, Jr., U.S. Deputy Representative for the OMSN, presented the United States' position on a broad range of issues including political status, public lands, economic issues and transitional matters, prior to the opening of the second round of the Marianas future political status negotiations. (U.S. Exh. 2.) In discussing the U.S. position on the return of public lands, Mr. Wilson addressed submerged lands in a way that clearly differentiated them from dry lands, stating:

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

(U.S. Exh. 2 at 7.) This statement appears to have contemplated specific U.S. legislation expressly conveying submerged lands to the Commonwealth, which is the method by which oceanic submerged lands vested in "the states of the United States and other territories." [32/]

Although the CNMI might argue that there had been a shift in the United States' position with respect to the status of oceanic submerged lands between May 1973 and November 1973 (when the land return policy statement issued), there is no evidence in the historical record of any such shift. To the

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

contrary, the Analysis of the CNMI Constitution (approved in December 1976), see U.S. Exh. 15, at 144, addresses the legal status of oceanic submerged lands in a way that is perfectly consistent with the United States' May 1973 position. See U.S. Exh. 2, at 7. [33/] This negates any inference that the United States' position on the issue of oceanic submerged lands off the coast of the Marianas ever shifted between May and November 1973.

b. Secretarial Order No. 2969 Did Not Vest Ownership of Oceanic Submerged Lands In The Commonwealth

There is likewise no merit to the CNMI's allegation, in paragraph 27 of the complaint that Secretarial Order No. 2969 effectuated any transfer of oceanic submerged lands to the NMI government. Although the Order expressly applied to TTPI "public lands," defined by Sections 1 and 2 of Title 67 of the Trust Territory Code to include land below the ordinary high water mark (see U.S. Exh. 51), it expressly prohibited the High Commissioner from transferring any submerged lands to a district until its legislature enacted laws "providing for . . . reservation of the right of the central government of the Trust Territory of the Pacific Islands to regulate all activities affecting conservation, navigation, or commerce in and to the navigable waters and tidelands, filled lands, submerged lands and lagoons." (U.S. Exh. 9, at 0170 (rt. col.).) The pre-constitutional Marianas legislature enacted legislation reserving this right to the Trust Territory Government. See Marianas District Code § 15.12.020. (U.S. Exh. 48 at 131-2.) [34/] Thus, even if Secretarial

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[33/] Compare U.S. Exh. 2 at 7 (submerged lands "should vest in the future Marianas government under the new arrangement, as in the case of the states of the United States and other territories)" with U.S. Exh. 15 at 144 (under "[Article] 1, section 104, of the Covenant, the United States has defense and foreign affairs powers with respect to the Commonwealth and thus has a claim to the submerged lands off the coast of the Commonwealth as well. Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.")

[34/] Although the reservation in Marianas District Code § 15.12.020 of the right in the Trust Territory Government to regulate all activities affecting conservation, navigation, and commerce in "navigable waters" and "submerged lands" purported to be limited in duration "until separate administration or termination of the trusteeship whichever shall sooner occur," see U.S. Exh. 48 at 131-2, nothing in Secretarial Order No. 2969 authorized the Marianas legislature to terminate the

(continued...)

Order No. 2969 contemplated a transfer of oceanic submerged lands underlying the territorial sea to the Commonwealth, the transfer was always subject to the TTPI's paramount right to control "conservation, navigation, or commerce" on or over such lands. (U.S. Exh. 9, at 0170 (rt. col.).)

In any event, Order No. 2969 did not, in fact, precipitate a transfer of any public lands (fast lands or submerged lands) to the NMI government. By its own terms, before any lands could be transferred by the TTPI government, Secretarial Order No. 2969 required that a government agency be created by the district legislatures to receive the lands transferred pursuant to its provisions. (U.S. Exh. 9, at 0170 (rt. col.); 40 Fed. Reg. at 812.) As the CNMI constitution framers conceded, although the Marianas district legislature established a land corporation to receive Order No. 2969 land transfers, the corporation never became operational before Order No. 2989 displaced Order No. 2969. See U.S. Exh. 15, at 142. [35/] Thus, insofar as the Northern Marianas were concerned, Secretarial Order No. 2969 was a nullity because it was never formally implemented according to its terms. [36/]

[34/](...continued)
Trust Territory Government's reserved rights to control oceanic submerged lands any time before termination of the trusteeship. See U.S. Exh. 9, at 0170 (rt. col.).

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

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

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

[36/] If oceanic submerged lands abutting the Commonwealth were already subsumed within the meaning of TTPI "public lands" for the purposes of Secretarial Order No. 2969, there would have been no reason for the CNMI constitution framers to describe oceanic submerged lands in Article XI, § 1 separately from lands transferred to the CNMI "under Secretarial Order 2969, promulgated by the United States Secretary of the Interior on December 26, 1974" in the same article and section of the CNMI Constitution. See U.S. Eh. 13, at 19. Thus, by describing oceanic submerged lands separately from lands transferred to the CNMI under Secretarial Order 2969, the framers in Article

(continued...)

c. Secretarial Order No. 2989 Did Not Vest Title To Oceanic Submerged Lands In The Commonwealth

The CNMI's claim, in paragraph 35 of the complaint, that Secretarial Order No. 2989 vested title to oceanic submerged lands in the Commonwealth is equally without merit. Although the Order did vest title to all TTPI "public lands" situated in the Northern Mariana Islands in the "United States Resident Commissioner," see U.S. Exh. 12 at 0288 (rt. col.), the Order does not define "public lands" and makes no reference to submerged lands.

More to the point, Secretarial Order No. 2989 was simply an administrative vehicle chosen by the Department of the Interior to transfer the civil administration of all TTPI government functions, from the TTPI's High Commissioner to a U.S. Resident Commissioner. Order No. 2989 was not focused on management of public lands any more than any other civil administrative function. See U.S. Exh. 12. It did not purport to implement Section 801 of the Covenant, and did not authorize the Resident Commissioner to transfer title to any lands to the Commonwealth. Id. [37/] In short, Order No. 2989 was not an administrative vehicle through which the United States implemented Section 801 of the Covenant, much less a vehicle through which oceanic submerged lands not contemplated by Section 801 were transferred to the Commonwealth.

In addition, Order No. 2989 became effective on April 1, 1976, one week after the Covenant was enacted into law. By that time, Section 1003(b) had already vested in the United States a fully protected

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[36/](...continued)
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.

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

future interest in the oceanic submerged lands off the coast of the Commonwealth that would become a fully vested present interest upon termination of the Trusteeship pursuant to Covenant § 101. As already explained (see pp. 23-29, supra), Section 801 of the Covenant did not authorize the Secretary of the Interior to convey or reserve to the Commonwealth ownership of oceanic submerged lands, and there is no other U.S. legislation explicitly authorizing the Secretary to convey oceanic submerged lands to the NMI government. Thus, even if Secretarial Order No. 2989 could somehow be construed as conveying to the Commonwealth the United States' future property interest in oceanic submerged lands established by Covenant § 1003(b), it would have been null and void as an ultra vires administrative action conveying an interest in U.S. property without explicit congressional authorization. [38/]

8. Even If Section 801 of the Covenant And/Or Secretarial Order Nos. 2969 and 2989 Were Deemed To Convey Ownership Of Oceanic Submerged Lands To The Commonwealth, The Lands Conveyed Would Not Exceed Three Nautical Miles From The CNMI's Shorelines

As explained above, there is no merit to the CNMI's assertion that Section 801 of the Covenant, and/or Secretarial Order Nos. 2969 or 2989, vested ownership of oceanic submerged lands in the Commonwealth. But even assuming arguendo that a permanent transfer of the TTPI's interest in oceanic submerged lands to the Commonwealth was contemplated by Section 801 of the Covenant and/or Secretarial Order Nos. 2969 or 2989, such a transfer would have conveyed submerged lands underlying, at most, a three-mile belt seaward of the CNMI shorelines, and not the twelve mile territorial sea (as measured from archipelagic baselines) as claimed in the Complaint (see Comp.,¶ 37, and Comp. at pp.15-16).

As previously explained, the Section-By-Section Analysis of the Covenant describes Section 801 of the Covenant in these terms:

> Section 801 provides that all of the real property (including buildings and permanent fixtures) to which the Government of the Trust Territory of the Pacific Islands will be

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[38/] The CNMI Constitution expressly differentiates from submerged lands from lands "vested in the Resident Commissioner under Secretarial Order 2989." See CNMI Const. Art. XI, § 1; U.S. Eh. 13, at 19. If, as the CNMI now contends, submerged lands off the coast of the Commonwealth were already subsumed within "lands . . . vested in the Resident Commissioner under Secretarial Order 2989," there would have been no reason for the framers to describe oceanic submerged lands separately in Article XI, §1 of the CNMI Constitution.

> transferred to the Government of the Northern Marianas . . . . The Section applies to all land to which the Trust Territory Government has rights on the date that the Covenant is signed, or which it acquires thereafter in any manner whatsoever. The Section serves as a guarantee that all of the public land in the Northern Marianas will be returned to its rightful owners, the people of the Northern Marianas.

(U.S. Exh. 7, at 95; emphasis added.) The foregoing description of Section 801's scope does not reference submerged lands, but does expressly apply to "public land" and "all land to which the Trust Territory Government has rights." As we now explain, even if it assumed that the terms "public land" and "all land to which the Trust Territory Government has rights" could reasonably be construed to encompass oceanic submerged lands, the reference must be limited to the those lands that are situated within three nautical miles seaward of the low-water mark on the CNMI's shorelines.

Section 1 of Title 67 of the Trust Territory Code defines "public lands" as "those lands situated within the Trust territory which were owned or maintained by the Japanese government as government or public lands . . . ." (U.S. Exh. 51, at 1.) TTPI Code section 32 of the Trust Territory Code provides that:

> That portion of the law established during the Japanese Administration of the area which is now the Trust territory of the Pacific Islands is hereby confirmed, that all marine areas below the high water mark belong to the government, is hereby confirmed as part of the law of the Trust Territory . . . .

(U.S. Exh. 52, at 0821.) Accordingly, the Trust Territory Code does not define the seaward extent of submerged lands appertaining to the NMI, except by reference to Japanese law.

Japan administered the Mariana Islands pursuant to a mandate from the League of Nations between World War I and World War II. During that time, Japan claimed and recognized three nautical miles as the maximum breadth of its territorial sea. (U.S. Exh. 55 at 0836.) That also appears to have been the limit of the territorial sea from the shoreline under international law as of 1947, when the United States assumed the Trusteeship over Micronesia. (U.S. Exh. 56 at 0839; U.S. Exh. 57, at 0843.) Thus, assuming that the term "public land" as used in the SBS Analysis (see U.S. Exh. 11, at 95), expands the definition of "real property" as used in Section 801 of the Covenant to include oceanic submerged lands, the maximum area

of submerged lands that could possibly have been conveyed by Section 801 of the Covenant, when it became effective in January 1978, was three miles seaward of the low water mark on the CNMI's shores. [39/] In these circumstances, the CNMI's claim to a twelve-mile territorial sea, and a 200-mile EEZ, must be rejected because it is at odds with the Trust Territory Code's definition of "public lands." [40/]

The CNMI's claim to archipelagic baselines (see Comp. at 16) as the demarcation points upon which to differentiate its claim to ownership of submerged lands underlying inland waters from its claim of ownership of submerged lands underlying a 12-mile territorial sea is equally defective. That claim derives from the CNMI's local "Marine Sovereignty Act of 1980," which purports to establish the CNMI's right to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the purported archipelago. (U.S. Exh. 18.) Nothing in the Trust Territory Code provided for the drawing of straight archipelagic baselines to differentiate the Commonwealth's internal waters from the territorial sea, and there is no evidence that, during its League of Nations Mandate over what would become the TTPI,

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[39/] Such an interpretation that Section 801 could convey no more than three nautical miles of oceanic submerged lands (as determined from the low water mark on the CNMI's coasts) would be consistent with Congress's definition of "submerged lands" in the Abandoned Shipwreck Act of 1987, Pub. L. No. 298, 100th Cong. 2d Sess., 102 Stat. 432, wherein Congress defined the term "submerged lands" in the CNMI, for the purposes of that Act only, as "the lands of the [CNMI] as described in section 801 of the Pub. L. 94-241 (48 U.S.C. § 1681) [i.e., the Covenant]." (See U.S. Exh. 45.) In the legislative history of that Act, Congress made clear that it did not consider Section 801 of the Covenant to include submerged lands situated more than"three miles distant from the coastline of the Northern Mariana Islands." 1988 U.S. Code Cong. & Ad. News (Leg. Hist. 366). See U.S. Exh. 46. As for the definition of "submerged lands" in that Act, i.e., as lands described in section 801 of the Covenant, it is unclear why Congress defined "submerged lands" in this manner in light of the Department of the Interior's contemporaneous advice that the CNMI Covenant does not refer to submerged lands, and that the status of submerged lands had not yet been determined by federal law." See U.S. Exh. 59.

[40/] On December 27, 1988, President Ronald Reagan issued a Proclamation No. 5928, extending the U.S. territorial sea from three-to-twelve nautical miles for international purposes. (U.S. Exh. 47; 54 Fed. Reg. 777 (1988).) To prevent the proclamation from expanding state jurisdiction, President Reagan included a proviso stating that " nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . ." Id. The CNMI's claim of sovereignty over a 12-mile territorial sea is not only contrary to the paramount rights doctrine, it also clashes with Proclamation No. 5928, pursuant to which the President of the United States has asserted a conflicting claim of ownership of a 12-mile territorial sea.

the Japanese Administration differentiated the Trust Territory's inland waters from the territorial sea on that basis. [41/] Accordingly, Section 801 of the Covenant could not have transferred submerged lands to the CNMI on the basis of straight archipelagic baselines.

Apart from Covenant § 801, there is no other basis upon which the CNMI could lawfully assert the right to submerged lands underlying inland waters and a territorial sea, as determined by straight archipelagic baselines. The Law of the Sea did not recognize the right of countries to differentiate their internal waters from the territorial sea on the basis of straight archipelagic baselines until 1982, two years after the Marine Sovereignty Act was enacted and six years after Congress ratified the Covenant. See U.S. Exh. 54. Moreover, the right to draw straight archipelagic baselines is enjoyed only by "Coastal States," i.e., independent sovereign nations. See id. The CNMI has never been an independent sovereign nation and thus is ineligible, of its own authority, to differentiate its internal waters from the territorial sea on this basis. [42/]

III. THE COMMONWEALTH'S SUBMERGED LANDS ACT AND ITS "MARINE SOVEREIGNTY ACT OF 1980" SHOULD BE DECLARED NULL AND VOID UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, SECTIONS 101 AND 102 OF THE COVENANT, AND ARTICLE XI, § 1, AND ARTICLE XIV, § 1, OF THE CNMI CONSTITUTION

As explained above, the United States possesses paramount rights to submerged lands because Section 101 of the Covenant vests sovereignty over the CNMI in the United States, and the Supreme Court has ruled that paramount rights to such lands are an incident of U.S. sovereignty. And we have also shown above, there is no merit to the CNMI's allegations that the United States agreed to CNMI ownership and

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[41/] Even if the Japanese Administration had made a claim to archipelagic baselines for the NMI, the claim would have violated international law. The drawing of straight archipelagic baselines did not become an accepted norm of international law until 1982, four years after Section 801 of the Covenant became effective, and 37 years after the Japanese control of the islands had terminated. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, A/ Conf. 62/122, reprinted in 21 I.L.M. 1261 (1982) (U.S. Exh.54.)

[42/] From 1978 to 1986, the CNMI's foreign affairs, defense, and external sovereignty was subject to control of the U.N. Trust Territory Government. Since 1986, the CNMI has been a commonwealth in political union with and under the sovereignty of the United States. Covenant § 101. As such, the CNMI is not now, nor has ever been, a "Coastal State" entitled to establish straight archipelagic baselines under the Law of the Sea.

control of oceanic submerged lands, either in Section 801 of the Covenant, in Secretarial Order No. 2969, or in Secretarial Order No. 2989. That being the case, the CNMI's "Marine Sovereignty Act," 2 CMC §§ 1101 et seq., [43/] and its "Submerged Lands Act," 2 CMC §§ 1201 et seq., U.S. Exhs. 22 and 23, including amendments thereto, [44/] are preempted because the federal paramountcy doctrine, since November 4, 1986, has "occupied the field" of regulation of CNMI's territorial sea and EEZ, and because, collectively speaking, the CNMI statutes purport to vest sovereignty, ownership, and exclusive jurisdiction concerning submerged lands underlying a 12-mile territorial sea (as delineated by straight archipelagic baselines), as well as a 200-mile EEZ, in direct conflict with at least six different federal statutes.

It is well-established that a local law is preempted by federal law when the latter is intended to occupy the field, and/or when the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941); see also, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143d 248 (1963). As we now explain, the CNMI Marine Sovereignty Act and Submerged Lands Act are preempted on both of the foregoing grounds.

Under the paramountcy doctrine, federal law has "occupied the field" of regulation of submerged lands seaward of the Commonwealth's low-water mark ever since the sovereignty provisions of Covenant § 101 became effective in November 1986. As the Supreme Court recognized in 1947:

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

[44/] In an amendment to the CNMI Submerged Lands Act, effective January 3, 1988, the CNMI legislature claimed ownership and control of submerged "lands below the ordinary high water mark extending seaward to the outer limit of the [EEZ] established pursuant to the Marine Sovereignty Act of 1980 . . . or to any line of delimitation between such zone and a similar zone of any adjacent State." CNMI Public Law 6-13, 2 CMC § 1201 et seq.

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

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

As a separate matter, the CNMI Submerged Lands Act and Marine Sovereignty Act are preempted because they are in direct conflict with, and/or stand as obstacles to, the accomplishment of the purposes of several specific federal laws. Such federal laws include, among others, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 et seq.;[45/] the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1453 et seq.;[46/] the Marine Mammal Protection Act ("MMPA"),

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[45/] The Magnuson Act established nine regional Fishery Management Councils, which make recommendations to the Secretary of Commerce for regulation of fishing in a 200-mile fisheries conservation zone. The Magnuson Act provides no mechanism for direct State management of fisheries conducted in the fisheries conservation zone offshore its coast.

[46/] For those states and territories that elect to participate, the CZMA requires approval of a state or territory's coastal management plan by the U.S. Department of Commerce's National Ocean Service. 16 U.S.C. § 1455. Participating states and territories are eligible to receive financial aid. The CNMI already has an approved CZMA coastal management plan and has received federal funding. Approved coastal programs are subject to ongoing National Oceanic and Atmospheric Administration ("NOAA") review of the state's or territory's implementation of the plan. NOAA may withdraw plan approval or suspend federal funding under certain circumstances.

16 U.S.C. § 1361 et seq.; [47/] the National Marine Protection, Research and Sanctuaries Act ("Marine Sanctuaries Act"), 16 U.S.C. § 1431 et seq.; [48/] the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 et seq.,[49/] and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"). [50/] Each one of these laws expressly applies to the CNMI and regulates different activities in the territorial sea abutting the Commonwealth. In many of these laws, Congress chose to regulate expressly to the full extent of a 200-mile EEZ. [51/] 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. Because the CNMI Submerged Lands Act and Marine Sovereignty Act conflict with, and stand as obstacles to the accomplishment of the full objectives of, these laws, both CNMI statutes must be declared preempted under Section 102 of the Covenant and Art. VI, cl. 2, of the U.S.

[47/] Depending on the species, the MMPA is administered by the National Marine Fisheries Service or by the U.S. Fish and Wildlife Service, and imposes a moratorium on the "taking" of marine mammals (with certain exceptions). It includes a regime to regulate and authorize limited taking in conjunction with scientific research. 16 U.S.C. § 1371(a)(1).

[48/] The Marine Sanctuaries Act governs the designation and management of federally protected marine areas of special significance. It was enacted in response to the increasing degradation of marine habitats and in recognition of the need to protect marine ecosystems. See S.Rep. No. 100-595, 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387. The Act confers authority for the designation and management of marine sanctuaries on the Secretary of Commerce, 16 U.S.C. §§ 1433, 1434, who has delegated these responsibilities to the NOAA. See generally United States v. Great Lakes Dredge & Dock Co., 259 F.3d 1300, 1304 (11th Cir. 2001). The Marine Sanctuaries Act imposes civil liability on "any person who destroys, causes the loss of or injures any sanctuary resource." 16 U.S.C. § 1443.

[49/] The OPA regulates the clean up of oil spills, and imposes strict liability on owners and operators of vessels that discharge oil into, among other things, the territorial sea and a 200-mile EEZ surrounding the CNMI. 33 U.S.C. §§ 2701(8),(21), (35), (36), and § 2702.

[50/] CERCLA regulates the clean up of hazardous substances, and imposes liability on any persons for the clean up of hazardous wastes released into, among other things, the territorial sea surrounding the CNMI. 42 U.S.C. §§ 9601 (30), 9604, 9607.

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

Constitution. [52/]

Finally, this case is not about whether the CNMI should have the right to regulate the submerged lands lying seaward of the CNMI's low water mark. It is a dispute over the means by which the CNMI acquires the right. Already, United States' officials have, on several occasions, proposed to introduce legislation to grant the CNMI the same interest in submerged lands and marine resources that most states and U.S. territories currently enjoy under the Submerged Lands Act and Territorial Submerged Lands Act. See U.S. Exhs. 61, at 0879; 63, at 0884; 64, at 0888; 65, and 66. The CNMI Government has steadfastly refused to support such legislation, see U.S. Exh. 38, at 0638; 63, at 0884; 64, at 0888, on the ground that it has a right to a 12-mile territorial sea and a 200-mile EEZ based on the misguided view that it should be treated like an independent sovereign and is entitled to enjoy the same rights as a Coastal State under UNCLOS III. Because the CNMI is subject to U.S. sovereignty per Covenant § 101, however, 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 an independent sovereign nation would be entitled to under the 1982 convention of the Law of the Sea.

[52/] This Court should also declare the CNMI Submerged Lands Act and the CNMI Marine Sovereignty in violation of the CNMI Constitution. As previously explained, Art. XI, § 1 and Art. XIV, § 1, of the CNMI Constitution collectively provide that the CNMI's interests in submerged lands and marine resources, if any, shall be determined by reference to "United States law."

CONCLUSION

For the foregoing reasons, the Commonwealth's complaint to quiet title in waters 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 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
Edward S. Geldermann
Senior Trial Attorney

U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
Washington, D.C.

OF COUNSEL:

Ashley J. Roach
U.S. Department of State

Robin Friedman
U.S. Department of the Interior

Judson Feder
U.S. Department of Commerce

Robert Easton
U.S. Department of Defense