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September 10, 1969

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Micronesia Political Status Bill

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RECOMMENDATION

You have asked this Division to comment on sections 101(d), 150, 151, and 152 of a draft bill which would confer on the Territory of the Pacific Islands a status similar to that of an unincorporated territory. Whether this proposed bill should be enacted involves policy considerations as to which the Land and Natural Resources Division makes no recommendation. However, we are of the view that if it is to be enacted, it should be modified in certain respects and further consideration should be given to a possible constitutional question.

SUMMARY OF PROPOSED BILL

The sections of the bill that we have been asked to comment on are those that define Micronesia and that relate to the disposition of real property, and of adjacent tidal areas. Section 101(d) defines Micronesia as "the six presently existing districts and the territorial seas." Section 150(a) conveys all property rights held by the Government of the Trust Territory to the Government of Micronesia except those rights held in the tidelands, submerged lands, and filled lands between the line of mean high tide and the limit of the territorial sea. These rights are conveyed to the United States. This section also makes the Territorial Submerged Lands Act, 77 Stat. 338, applicable to Micronesia. Section 150(b) preserves existing land use retention agreements with the United States. Section 150(c) grants the United States the power to condemn real estate under a specified procedure. Section 150(d) restricts the power of landowners to convey to non-residents of the islands. Section 151 makes applicable to the Territory all United States laws and treaties that apply to the tidal waters as well as limiting the size of the territorial sea of Micronesia to the width claimed by the United States. Section 152 provides that the Public Land Laws are not to apply to the Territory and provides for enactment of special laws as a substitute.

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EFFECT ON EXISTING LAW

The proposed bill will not affect existing property laws of the United States except to the extent that it specifically makes the Territorial Submerged Lands Act, 77 Stat. 338, applicable to Micronesia.

DISCUSSION

The present draft defines Micronesia as "the six presently existing districts and the territorial seas." The districts are defined by geographical lines that are drawn well into the high seas. Since the territory does not extend beyond the normal territorial seas of the islands the present language may be construed as making an extravagant claim to areas of high seas. Although this is an unlikely construction, we recommend, to eliminate any possibility of confusion, that section 101(d) be redrafted to state:

"Micronesia shall consist of the islands within the six presently existing districts and their territorial seas."

Section 150(e) would cede to the United States "whatever right, title, or interest the Trust Territory has in particular tracts of tidelands, submerged lands, or filled lands" within three miles of the coast line. The use of the term "particular tracts" appears to be derived from its use in the Territorial Submerged Lands Act, 77 Stat. 338. It was used in that act to prevent a wholesale transfer by the Secretary of the Interior of the area covered by the statute. Since this section seeks to provide for such a wholesale transfer, the use of the phrase is improper. As drafted, the section would provide for the transfer of only areas that have been designated by a metes and bounds description. Since this was not intended, we recommend that this phrase be eliminated.

The provision in section 150(e) that the "tidelands, submerged lands and filled lands" as defined in the Territorial Submerged Lands Act, 77 Stat. 338, that are conveyed to the United States should be administered in the same way that the Territorial Submerged Lands Act provides, duplicates the provision that the Territorial Submerged Lands Act is amended to apply to Micronesia. It is better to state simply that the Territorial Submerged Lands Act is made applicable.

The last phrase of section 150(a) seeks to prevent the bill from being construed as divesting private persons of any property rights they now hold. Its actual effect is to prevent the United States from obtaining any publicly held right to an area where there is some privately or communally held right, even if the publicly held right is consistent with the private or communally held right. As drafted the bill protects the rights held communally and privately by limiting the conveyance to "whatever right, title, or interest the Government of Micronesia has * * *". Thus, the phrase "but shall not include any such lands which by local or customary laws or rights are currently held in private or communal ownership," could be eliminated. However, it is very important that it is clear that no portion of this bill damages, in any way, rights that are not held by the trust territory. We suggest that the last phrase be eliminated and that the following sentence be added: "The transfer of rights by this section shall not be construed as in any way disparaging or transferring any right, title, or interest that is currently held in private or communal ownership by local, or customary laws or otherwise."

It is highly probable that there are submerged lands beyond the three-mile belt around the islands that are considered part of the continental shelf of the islands under international law, though not considered as continental shelf by geologists. The Trust Territory has rights over these adjacent areas. Section 150(a) would cause these rights to be conveyed to the Government of Micronesia while conveying much of the submerged lands within three miles of the coast line to the United States. We can perceive of no argument in support of this arrangement where the United States' control over the submerged lands under the territorial sea would be sandwiched between the rights of the Government of Micronesia over the dry land and the continental shelf. Since we cannot think of any reasons for changing the policy of retaining the rights over the continental shelf in the federal government which has been carried out in the Outer Continental Shelf Lands Act, 43 U.S.C. sec. 1331 et seq., we recommend that the Micronesia Political Status Bill convey these rights to the United States. This can be accomplished by inserting the words "continental shelf" before the word "tidelands" in section 150(a) wherever it appears.

Upon establishment of Micronesia as a territory of the United States, the federal government assumes the responsibility of carrying out certain sovereign functions. These are now being conducted by the United States in the name of the trust territory. Most of these operations would require the continuing presence of federal facilities on the islands. Section 150(a) would cause the rights to the property that is now being used for these purposes to be given to the Government of Micronesia, leaving the United States the alternative of either condemning property for the use or obtaining it by gift from the territory. It would seem just that when the duties of governing the islands are divided the property that is particularly devoted to the execution of these duties should be divided correspondingly. Since it would require much negotiation to decide on a division, we suggest that the President designate, within 90 days of creation of the territory, those tracts that are so used. Thus, we recommend that the phrase, "Except as provided in subsection (e) of this section," be added at the beginning of section 150(a) and that a new subsection (e) be adopted that states:

(e) All right, title and interest held by the Government of the Trust Territory to particular tracts of lands that the President of the United States, within 90 days of the creation of the Territory, certifies are being presently and actually occupied by the United States or the Government of the Trust Territory and are being used primarily for a governmental activity which the United States is required by this statute to conduct are hereby transferred to the United States.

This provision is analogous to the act that created the Territory of Guam, 48 U.S.C. sec. 1421f and that which created the Territory of Hawaii, 48 U.S.C. sec. 511.

We also believe that section 150(a) could be slightly shortened without loss of substance.

In sum we recommend that section 150(a) be redrafted to state:

Except as provided in subsection (e) of this section, all interest in and title to all property, real, and personal, owned or held by the Government of the Trust Territory, is hereby transferred to the Government of Micronesia, except whatever right,

title, or interest the Government of the Trust Territory has in the continental shelf, tidelands, submerged lands, or filled lands in or adjacent to the island or Micronesia are hereby conveyed to the United States. The term "tidelands, submerged lands, or filled lands" shall have the meaning ascribed to it in section 1(a) of Public Law 88-193 (77 Stat. 338). Public Law 88-193 (77 Stat. 338) is hereby amended to include where appropriate "Micronesia" in order to make said Act applicable to Micronesia. The transfer of rights by this section shall not be construed as in any way disparaging or transferring any right, title, or interest that is currently held in private or communal ownership by local or customary laws, or otherwise.

Section 150(c) provides for federal condemnation of real property in the Territory of Micronesia. There is no comparable provision for condemnation of personal property. To avoid a negative inference we recommend that the section provide for condemnation of personal property. We do not believe that a review by a commission should be required for condemnation of personal property.

The provision for the commission should be revised in two respects. The section provides for the review by the commission of the need for the condemnation and, in the absence of an affirmative determination in a "reasonable time," the referral of the question to the President. We believe that the provision for a reasonable time is administratively impractical. A time limitation should be stated to protect all interests. We suggest that a three-month waiting period before the President is consulted should be provided. In addition, the section is not clear as to what the commission must or must not do before the President can be consulted. Thus, we recommend that the section be redrafted as follows:

(c) The United States Government shall have the right to take real and personal property or any interest therein, including any temporary use, for public purposes in Micronesia in accordance with condemnation procedures established under the United States Federal

laws. Except in cases of urgency as determined by the President of the United States, these procedures shall not be used with respect to real property until the need for such use of the realty has first been reviewed by a commission established for that purpose in accordance with the laws of Micronesia. In the event that the commission disapproves the need for the taking by the United States or does not report a decision to the conceding agency within three months, the Attorney General of the United States may then submit, together with the adverse views of the commission, if any, the proposed taking to the President of the United States for final determination.

Section 150(d) forbids the alienation of real property to non-residents of Micronesia for a term in excess of ten years without the approval of a commission. This provision may constitute a taking under the Fifth Amendment to the Constitution which would subject the United States to liability for the value of the interest taken. However, since the cases on the subject are not definitive and there are important policies in favor of this provision, we only point this problem out. Furthermore, the section does not specifically state whether or not real property may pass by descent or devise to non-residents. We believe that this prohibition should not apply to descent and devise. This can be accomplished by adding "except by descent or devise" after "Micronesia" and before "unless" in the fifth line. Failure to allow such transfer would result in many problems such as deciding to whom the title to the property would be transferred and what the heir should receive in lieu of property rights. In addition, the policy in favor of the restriction on alienation would not be greatly sacrificed by the occasional descent or devise to a non-resident.