

19 September 1972

**MEMORANDUM FOR CAPT GORDON SCHULLER, USN
ISA/EA&PR****SUBJECT: Conforming the Micronesian Leases to the Compact.**

The language used in the Micronesian leases contain two provisions which are pertinent to the recommendations which follow:

1. A provision relating to review. A typical provision reads:

(B) Review of Need for Land Every Five Years. On or about a date which shall be five (5) years from the date of this instrument, and on a similar date each five year period thereafter, the Agency of the United States of America using and occupying said land hereunder, or the Department of the Navy as the representative thereof, and Grantor shall jointly review and determine the need for continuing the use and occupancy granted, conveyed and assigned hereby.

(C) Review by the President. In the event the review provided for in paragraph (B) does not result in agreement as to the need for continuing use and occupancy by the United States of America, the matter shall be presented to the President of the United States for final decision.

2. A provision relating to use and occupancy - generally associated with review - calling for "use to be consistent with the trusteeship agreement." A typical provision reads:

2. Conditions of Assignment. (A) Use to be Consistent With Trusteeship Agreement. The use to which the land

is put in by the United States of America hereunder shall be consistent with the provisions and purposes of the Trusteeship Agreement relating to the Administration of the Trust Territory of the Pacific Islands.

The Trusteeship Agreement.

The Trusteeship Agreement - referred to in the leases - was entered into by the United States and the Security Council of the United Nations (July 18, 1947) - 61 Stat. 3301 (copy is attached to this Memorandum). Without attempting an in depth analysis here, it is evident:

1. The acceptance of the proposed Compact by the United States and GOM will mean that the Trusteeship Agreement will no longer be in force.
2. Certain provisions of that Agreement which are no longer consistent with United States relationships with Micronesia will come to an end, but we shall also lose the valuable expressed authority set forth in Article 5 (see the attached Agreement). This "authority" should be preserved and should be the basis or framework for continuing our future relationship in terms of defense powers.
3. We shall therefore seek to impose in place of the authority which we had under the Agreement in Article 5 the authority and responsibility that we are seeking in the Compact.

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Recommendations.

Proposed here largely in terms of a working paper, are my preliminary recommendations. They are consecutive steps and must be read together:

1. Propose to the negotiators from Micronesia, engaged in negotiating the Compact, that we are satisfied with the present leases, except that we shall seek the aid of the new Government (and will need their exercise of powers) to substitute a new provision between the United States (as successor to the grantees of all leases) and the grantors.

2. Since the new Government will provide its aid to the United States through the exercise of what are referred to as "police powers" which are in turn powers inherent in those vested in a "sovereign" State, it may be necessary to provide expressly that Micronesia shall have them. One way is through Alternative A below, another through Alternative B.

Alternative A

"The Government of Micronesia shall have and adopt in its Constitution the full authority, competence and powers of a sovereign State, subject to the (overriding) undertakings of this Compact and further subject to the delegation of powers as herein provided." (Query term in parenthesis).

Alternative B

Add to the provisions relating to leases - in Section 303 - and if need be in Annex B - language reflecting the police power. This would mean the rewriting of Para. (b) to read:

"The Government of Micronesia shall in the exercise of its full power and authority assure the United States the rights and uses in the lands and waters specified in Annex B, which shall be an integral part of this Compact.

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Comment

Annex B includes all existing and future leases or at least determines their conditions. The Alternative B implies the police power, while Alternative A refers to its existence by indicating the "sovereign power" in Micronesia. A third alternative not added here might expressly refer to the police power. Both Alternative A and B imply the power of eminent domain as well.

3. With the above powers vested in the Government of Micronesia, the United States will call for a review of all existing leases pursuant to their terms (except for those leases relating to quarries which may remain unchanged, or except for duration, unaffected by the changes proposed here). The Government of Micronesia and the United States jointly will then consult with the grantors of each of the leases for the purpose of (a) deleting the provisions calling for use of the leased lands consistent with the Trusteeship Agreement and for (b) substituting a new provision to make them consistent with the Compact. Such review and consultation will be "necessitated" by the change of government, calling for a change in the leases. Recalcitrant grantors can if need be in extremis be subjected to the police powers of the Government of Micronesia to secure our objectives.

4. The new language to be added to the leases will continue as previously to provide for review - and therefore for implied consultation - regarding the use of the leased lands. Secondly, it will deal with the problem of succession - the Government of Micronesia will be accepted by the grantors as the successor government to the Trust Territory Government (if appropriate), and if not appropriate the Government of the United States will be accepted. (The leases vary in their language and objectives and both situations would appear to arise).

5. The new language to be added to each of the leases (apart from those dealing with quarries):

"The use and occupancy of the _____ Island by the United States for defense purposes shall be consistent with, subject to, and no less limited than the Compact between the Governments of the United States and Micronesia provides in Sections 301 through 304 and in Annex B."

5(a). The language just suggested above can be reinforced if need be by a reference to (a) unilateral ~~termination~~ and the survival of leases beyond unilateral termination and (b) termination generally. (I have not attempted language here to deal with that issue since these are matters still under consideration).

6. Additional new language may be needed in the event of disputes over title or ownership over leased lands. The Government of Micronesia should have - through the exercise of the police powers mentioned above - the power to seek the clearing of clouds on title, exercised through the authority of its executive and judicial officers. This is also a matter for our interagency discussion particularly if there are difficulties in expressing or vesting the police power in the Government of Micronesia in the first place.

SIGNED

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Office of Assistant General Counsel
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cc: Mr. Barringer, ISA

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Top paragraph of page 6: Rewrite.

The existing leases and all new leases to be entered into under the Compact are subject to the provisions of Title III. In other words the leases and the rights, authority and responsibility as well as the obligations of the United States and Micronesia relating to defense matters must be carried out in large measure through the use of bases and in particular the leased lands.

Although there are a number of matters to be taken up in this connection and we hope to take them up at this negotiating session, we will expect that the overriding force of the Compact will and must apply, and that the Government of Micronesia will assume sufficient authority and power under the Compact to make it effective and applicable.