Draft - M. S. Helfer
June 20, 1974

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Dear Senator Pangelinan:

Enclosed is a memorandum which we have prepared concerning the public land legislation which the Congress of Micronesia is expected to consider at the upcoming special session. We have focused our comments on Senate Bill No. 296 as it is proposed to be amended by the Committee on Judiciary and Governmental Operations, since we understand that this will be the starting point of the Congress' consideration of the public land issue.

The memorandum is intended to explain the significant difficulties which the bill, as proposed to be amended, could create for the Marianas Public Land Corporation. The memorandum also describes what we have been able to learn about the positions the United States and the TTPI Administration will take with respect to the bill and gives you our views as to the effect of those positions on the Corporation.

If you have any questions or problems about the memorandum, or if you want our views on (presently unanticipated amendments to the public land legislation, we are, of course, available.

This letter and the enclosed memorandum are also being sent to Senator Borja and to Congressman Guerrero.

Sincerely,

Howard P. Willens

cc: James E. White, Esq.

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DRAFT

June 20, 1974

MEMORANDUM

Subject: Public Land Legislation in the Trust Territory

In connection with our work for the Marianas Public Land Corporation, we have reviewed Senate Bill No. 296 (5th Congress of Micronesia, 2d Regular Session, 1974), and the Report of the Committee on Judiciary and Governmental Operations which accompanied it (Standing Committee Report No. 221, March 1, 1974). The primary purpose of our review was to determine whether the Bill, as proposed to be amended by the Committee ("the Committee Bill"), could adversely affect the Marianas Public Land Corporation's anticipated programs and activities. A second purpose of our review was to determine which, if any, aspects of the Committee Bill might be so unacceptable to the Trust Territory Administration as to result in a veto. The results of our review are described in this memorandum.

CONCERNS OF THE MARIANAS PUBLIC LAND CORPORATION

Our general conclusion is that the bulk of the Committee Bill will not adversely affect the operations of the Corporation, and will, indeed, facilitate its work in many ways. In several specific respects, however, the wording of the Committee Bill could

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pose significant problems for the Corporation, and should be modified. These and related problems are discussed in this portion of the memorandum.

Section 4(1):

Section 4(1) of the Committee Bill reads as follows:*/

> "Each district legislature is hereby empowered to enact laws to:
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> (1) create or designate a legal entity or entities which shall have as its primary purpose to which all other powers and duties are subordinate the return of title to public lands transferred to it under the authority of this act to the rightful owners thereof, and to that end shall have the following powers and duties: . . . ."

This Section, read in conjunction with the rest of the Committee Bill, appears to be intended to assure both that the legal entity will grant to persons with valid and enforceable claims to public land the title which the legal entity itself receives from the central government, and that the public land to which there are no such claims will be held and administered by the legal entity in trust for the people of each district, "the rightful owners thereof", see Sections 2 and 4(1)(a). This is highly desirable policy and creates no problems for the Corporation. It is clear that persons with valid and enforceable claims to public land should be permitted to vindicate those

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*/ Committee amendments to the bill are underscored throughout this memorandum.

claims; and the return of title from the Trust Territory Government to the districts should in no way undermine the rights which individual citizens have to the land in question. Indeed, the United States has taken the same position in its Policy Statement.*/

Unfortunately, Section 4(1) of the Committee Bill is worded in a way which may well create unintended difficulties for the Corporation, for legal entities in other districts, and for the district legislatures. Since the "rightful owners" to which Section 4(1) of the Committee Bill seems to be addressed are individual citizens, the Section might be read to require the district entity to engage in an expensive and time-consuming legal action to quiet title to each and every piece of public land which it receives before it can administer or dispose of any land in the public interest. Indeed, the language might even be read to require the district entity to search out claims against the land which it receives. Moreover, the phrase "and to that end shall have the following powers" might be read to mean that once the district entity had returned title to individual rightful owners, it would have no further powers with respect to remaining public lands. Surely, none of these things were intended,

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*/ Memorandum, "Transfer of Title of Public Lands from the Trust Territory of the Pacific Islands Administration to the Districts: U.S. Policy and Necessary Implementing Courses of Action", Section III (B)(6) at page 3.

and none is necessary to protect the claims of individual citizens to land which will be transferred to the district entities. For there are already solid protections for persons with valid claims to public land in the Committee Bill, see Section 4(2) (dealing with adjudications of claims), and in the ordinary legal doctrine which will prevent the Trust Territory from transferring to a district any greater interest in land than it has, see Report at page 5. If further protections are desirable, they can be provided by the district legislatures to take into account the particular circumstances of each district.

The problems created by Section 4(1) of the Committee Bill could be eliminated, and yet the same policy considerations implemented, if the initial portion of Section 4 were revised to read as follows:

> "Each district legislature is hereby empowered to enact laws to:
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> (1) create or designate a legal entity which shall have following powers and duties:
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> (a) to return title to public lands transferred to it to the rightful owners thereof in accordance with this act, and to receive and hold title to public lands in trust for the people of the district, ..."

Alternatively, the entire Committee amendment to Section 4(1) could be eliminated and the bill left as it was when submitted to the Committee, on the ground that adequate protection for

persons with claims to public land is found in Section 4(2) of the Committtee Bill, and in recognized legal principles.

[A related problem is raised not by the language of Section 4(1) but instead by the language of the Committee Report. In dealing with Section 4(1)(c), the Committee Report says:

> "Upon a determination that there is no rightful private owner, however, there is no objection to the alienation of land if the district entity so chooses; we read into this paragraph, however, the requirements of due process and equal protection of the laws so that the land may not be disposed of except in accordance with procedures granting all persons eligible to own or lease land the opportunity to participate in offers therefor on an equal footing with all others similarly situated. We intend that the law require no less."

[This legislative history poses two potential problems for the Corporation and other legal entities. First, it might be interpreted to mean that a legal entity or a district legislature could not restrict interests in public lands only to persons in the district, but would have to permit persons from any part of Micronesia to bid for public land in the district. Since the purpose of the land legislation is to return land to the districts, because the people thereof are the rightful owners, it seems that the legal entity or district legislature should be able to limit the use or ownership

of public land to persons in the district. Second, it is possible that this legislative history will be read to prevent the legal entity or district legislature from making public lands available to the district or municipal governments for public purposes without throwing the particular parcel open for public bidding. Such a requirement would be inconsistent with the concept of a legal entity holding the land trust for the benefit of the people of the district.

[The impact of legislative history like the portion of the Senate Report is difficult to assess, especially since the interpretation above is not the only possible interpretation of the Report. The Committee Bill itself does not pose the problems which the Report raises. Accordingly, we recommend that efforts be undertaken to clarify the intent of the legislative history either in a new Committee Report or during debate on the bill.]

Sections 4(l)(c) and (e):

Section 4(l)(c) provides that among the powers of a legal entity shall be the powers:

> "to sell, lease exchange, use, dedicate for public purposes, or make other disposition of such public lands pursuant to the laws of the district in which the land is located, ; PROVIDED, HOWEVER, that the laws of the Trust Territory regarding ownership of land shall apply in connection with any disposition of lands under this paragraph, and PROVIDED FURTHER,

> that no lands may be sold, leased, exchanged, or in any other way disposed of to the United States or any agency or political subdivision thereof except upon authority specifically granted by resolution of the Congress of Micronesia, ..."

This Section would prevent the Corporation or the Mariana Islands District Legislature from making agreement with the United States with respect to the use of public land in the Marianas for federal purposes without the specific approval of the Congress of Micronesia. It is apparent that this Section might well be used to prevent a separate status agreement for the Marianas from being concluded, or, even if concluded and approved by the people, from going into effect -- at least insofar as the status agreement makes land available to the United States. The potential for disruption and delay is significant.

Section 4(1)(e) creates similar problems. It provides that among the powers of a legal entity shall be the power:

> "to negotiate in good faith to meet the land requirements of the United States as designated under the terms of an agreement [sic] the Congress of Micronesia and the United States which has been ratified by the people of Micronesia; . . . ."

This section can be read to deny to the legal entity or even to the district legislature the power to conduct any negotiations which involve the use of land by the United States prior to the ratification of a single status agreement governing

all of Micronesia. This would prevent the Corporation from negotiating with the United States with respect to the land which the Marianas status agreement will provide will be made available to the United States.

It is possible that the problems raised by these Sections will be obviated by separate administration for the Mariana Islands District. However, neither the terms of separate administration nor the timing of separate administration is presently known. Accordingly, we recommend that the power given to the Congress of Micronesia by these Sections to prevent the successful conclusion of the negotiations between the Marianas Political Status Commission and the United States be eliminated. This could be done as follows. The second proviso to Section 4(l)(c) should be stricken in its entirety. Section 4(l)(e) could be revised to grant the legal entity the power

> "to make formal agreements or to negotiate in good faith to meet the land requirements of the United States as designated under the terms of a future status agreement."

This wording fully protects the legitimate interests of all concerned, and removes from the public land legislation the difficult issues relating to the future status of the various districts of the Trust Territory. It is undesirable from the point of view of the Corporation and from the point of view of

the people to entangle the public lands legislation with status issues.

Section 7(1):

Section 7(1) of the Committee Bill reads as follows:

> "Notwithstanding the provisions of Section 5 of this act, the High Commissioner shall not convey any right, title or interest in public land to any district legal entity or entities until the district legislature shal [sic] enact laws providing for:
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> (1) regulation of all activities affecting conservation, navigation, or commerce in and to tidelands, filled lands, submerged lands and lagoons;. . . ."

This Section is explained on page 6 of the Committee Report as being based on the Committee's view that matters of navigation, conservation, and commerce are "matters of district concern." The wording used in Section 7(1), however, prevents the transfer of land from the central government to the district legal entity until after the district legislature has enacted laws regulating "all activities affecting" these specific areas of concern. This may very well delay the transfer for a lengthy period. It seems very likely that this result was not intended. The policy reflected in the Committee Report can be implemented, and the delay avoided, if Section 7(1) were amended to require, before transfer, only that the district legislature "enact laws providing for":

"reservation of the right to regulate all activities affecting conservation, nevigation, or commerce in and to tide lands, filled lands, submerged lands and lagoons;. . . ."

CONCERNS OF THE UNITED STATES / TTPI ADMINISTRATION

[Military retention provisions; information on this and others to be obtained from Jim Berg.]