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PRIVILEGED AND CONFIDENTIAL

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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 Senate 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 would be so unacceptable to the United States as to risk a veto. The results of our review are described in this memorandum.

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*/ We have also reviewed briefly the House version of this legislation, S.B. 296, S.D.1, and the Report of the House Committee on Judiciary and Governmental Relations which accompanied it, Standing Committee Report No. 293 (March 4, 1974). That Report states (at 1) that the House Committee "generally concurs with the Senate's revisions to S.B. No. 296 and adopts Standing Committee Report No. [221] . . . as our statement of the legislative intent for the bill, except where amended . . . ." The few relevant differences between the House and Senate versions of the Bill are noted 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 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 portion of Section 4(1), read in conjunction with the rest of the Committee Bill, appears to have two purposes. First, it seems intended to assure that the legal

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

entity will grant to Micronesians with valid and enforceable claims to public land the title which the legal entity itself receives from the central government. Second, it seems intended to assure 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 claims. 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 and for legal entities in other districts. Since the "rightful owners" to which Section 4(1) of the Committee Bill seems to be addressed are individual

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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 IV(B)(6), at p. 3.

citizens, the Section might be read to require the legal 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 legal entity to search out claims against the land which it receives. As presently worded, the Section might be read to amend local law so as to require the legal entity to transfer title to a non-Micronesian with a claim against it. Moreover, the phrase "and to that end shall have the following powers" might be read to mean that once the legal 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 was intended, and none is necessary to protect the claims of individual citizens to land which will be transferred to the legal 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 Senate Standing Com. Rept. No. 221 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 persons otherwise eligible to own land under law who are 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 Committee 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 Senate Committee Report. In dealing with Section 4(1)(c), the Committee Report says (at p. 3):

> "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 language is open to a number of interpretations, two of which could create problems for the corporation and for other legal entities. First, it is possible to read this portion of the Report to mean that a legal entity 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 should be made clear in a new Committee Report or in debate that this language is not intended to prevent the district legislature or the legal entity from restricting the ownership or use of public land to persons in the district. Second, it is possible that this legislative history could be read to prevent the legal entity or district legislature from ever making an interest in public lands available without public bidding. Where the legal entity or district legislature wants to make land available to the district or municipal government for a public purpose,

or for economic development which will benefit the entire district, such a requirement would be inconsistent with the concept that the land is held in trust for the benefit of the people of the district. Accordingly, it should be made clear that the legal entity or the district legislature will be able to dispose of the land or interests in the land without public bidding, subject, of course, to the responsibilities placed upon it as a trustee for the people of the district. Here again, if additional safeguards are required, they are most appropriately imposed by the districts to take account of different circumstances.

Sections 4(1)(c)(second proviso) and (e):

Section 4(1)(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

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*/ The House version of this Section provides that lands may not be disposed of to the United States "except upon authority specifically granted by resolution of the district legislature" (emphasis supplied).

> 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 an 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 [between] 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

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*/ The House version is identical, except that it inserts the word "between" between "agreement" and "the Congress."

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 entering into an agreement with the United States with respect to the land to be made available to the United States under the Marianas status agreement.

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(1)(c) should be stricken in its entirety. Alternatively, the language of the House version of this proviso could be employed. Section 4(1)(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

sensitive 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 political 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[l] 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 Senate 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

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*/ The House version is identical except that the misspelling of "shall" is corrected.

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) is amended to require, before transfer, only that the district legislature "enact laws providing for":

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

CONCERNS OF THE UNITED STATES

We have held conversations with representatives of the Department of the Interior and the Office of Micronesia Status Negotiations to determine those aspects of the Committee Bill which are objectionable to the United States. In our discussions, these representatives emphasized that their comments were preliminary and subject to further review. The principle on which the United States is operating with respect to this legislation, however, is clear: any bill which contains provisions conflicting in a significant way with the Policy Statement is not acceptable and will be vetoed.

The United States shares the concerns already expressed regarding Section 4(1), regarding the legislative history found on page 3 of the Senate Committee Report,

regarding Section 4(1)(c) (second proviso), and regarding Section 4(1)(e). The United States representatives also agreed that there was reason to be concerned about the present wording of Section 7(1). However, it appears that their position will be that the Senate Committee amendment which causes the technical problem to which we have referred should be rejected and the original language of the Bill retained. Under the original language of the Bill, the action called for on the part of the district legislature -- enacting a law providing for the reservation of the right of the central government to regulate activities affecting conservation, navigation or commerce in and to tidelands, filled lands, submerged lands and lagoons -- seems to us sufficiently straightforward that it would entail no serious delay in the transfer of title. Accordingly, we do not think there is any reason from the perspective of the Corporation to object to the United States' position on this matter.

In addition to the points already discussed, the United States brought to our attention the following serious problems it has with the legislation.

Section 3(3)(a):

The Committee Bill deletes language which exempts from the definition of public land "those lands designated

as military retention lands leased by the United States and not returned to the public domain." Aside from the provisions relating to the control of the Congress of Micronesia over status negotiations (Sections 4(1)(c) and (e)), this is the most serious problem the United States has with the Committee Bill. Apparently, there is no significant amount of military retention land anywhere in the Trust Territory except the Marianas. And, it was pointed out, the United States has now committed itself to return all military retention land in the Marianas which will not be made available to it under the terms of the new status agreement. For this reason, and because a Marianas status agreement is expected within six months, the situation is different from that which existed when the amendment was introduced, the United States argued. Indeed, they said, the amendment is now contrary to the interest of the Marianas, for, taken in conjunction with other parts of the Committee Bill, it requires that military retention land be returned to the district, and then not made available to the United States without permission of the Congress of Micronesia. The point seems to us well-taken, and, especially since the Bill will surely be vetoed otherwise, we urge that military retention lands be excluded from the Bill by returning to the original language of Section 3(3)(a).

Section 4(1)(c), first proviso:

This proviso states that "the laws of the Trust Territory regarding ownership of land shall apply in connection with any disposition of lands" by the legal entity. The United States is concerned about this provision apparently because of a fear that it would continue the prohibition against the United States owning land in the Trust Territory. The United States was not swayed by our argument that the laws of the Trust Territory regarding ownership of land would apply in any event unless amended. We have no recommendation with respect to this Section.

Section 4(2):

The United States opposes that portion of this Section of the Committee Bill which permits the redetermination of claims to land previously passed upon. This portion is inconsistent with the Policy Statement. Questioned whether the impact of permitting a reopening of claims would be serious in the Marianas, the United States' representatives indicated that they thought it would not be. Apparently the only disputed claims which might be reopened under such a provision would be claims which grew out of an exchange of lands undertaken when the military retention lands were accumulated. It is, we were told,

a serious problem elsewhere. We have no recommendation with respect to this Section.

Section 10(2)(1):

This Section restricts the right of the Trust Territory Government to exercise eminent domain. As written, it is unacceptable to the United States. The United States is apparently willing to share the power of eminent domain with the districts, and to give the districts an opportunity to condemn land first when needed for Trust Territory activities. But the United States will not accept a provision which requires it to wait for one year after requesting the district to act before it can exercise its own power of eminent domain. The House version of this Section of the Bill denies the power of eminent domain to the central government under all circumstances. There is force to the United States' argument that the central government of the Trust Territory should not be left wholly without the power of eminent domain.

Other Provisions:

The United States has many other less significant problems with other provisions of the Committee Bill. Those which were brought to our attention include the following: Section 6(1) (the absence of a method of determining the "cessation of active use" is bothersome); Section 6(2)

(the United States wants to be able to withhold lands in addition to those needed for capital improvement projects); Section 8 (as a practical matter, the Trust Territory needs 120 days after the District Legislature has complied with the Act to transfer the land); Section 9 (though such a list is being compiled, the United States would rather see this entire Section eliminated; and if it is not eliminated, the United States says it needs at least 90 days to produce the information).

We expect to be in further contact with the United States with respect to this legislation to gain the benefit of their further consideration.

Wilmer, Cutler & Pickering

July 1, 1974