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DEPARTMENT OF STATE

Washington, D.C. 20520

February 25, 1982

~~SECRET~~ (UNCLASSIFIED UPON REMOVAL OF ATTACHMENTS)

To: Distribution

Subject: Senior Interdepartmental Group Meeting on Micronesia

A Senior Interdepartmental Group meeting on Northern Marshall Islands Nuclear Claims will be convened on March 3 at 4:00 p.m., in the Deputy Secretary's Conference Room (Room 7219) at the Department of State. It will be chaired by Under Secretary Buckley. An Options Paper, the Report of the Nuclear Claims Working Group of the Interdepartmental Group on Micronesia, a proposed policy statement in the form of a SIG recommendation, a draft NSDD and related agency memoranda are attached for your consideration.

Please confirm the name of your representative to Shelia Lopez, 632-5804.

L. Paul Bremer, III
Executive Secretary

Attachments:

1. Options Paper
2. Report of Nuclear Claims Working Group of the Interdepartmental Group on Micronesia
3. Proposed SIG Recommendation
4. Proposed National Security Decision Directive
5. DOD Memorandum re Land Valuation in the Marshall Islands
6. DOE Memorandum re Medical Care Costs Under P.L. 95-134

Declassified/Released 9/6/95
under provisions of E.O. 12356
by D. Van Tassel, National Security Council
(F87-249)

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ATTACHMENT 1

OPTIONS PAPER: Northern Marshall Islands Nuclear Claims (U)

(S) Background

(S) NSDD-10 of September 21, 1981, provided that the issue of Northern Marshall Islands Nuclear Claims would be the subject of future study and discussion by the SIG. A Nuclear Claims Working Group of the Interdepartmental Group on Micronesia comprising representatives of the Departments of Defense, Interior, Justice, Energy, State, the Office of Management and Budget and the Office for Micronesian Status Negotiations has considered the issue for several months. Its report appears as Attachment 2 to the memorandum convening the SIG. A proposed SIG recommendation and a proposed NSDD reflecting the recommendations of the Report appear as Attachments 3 and 4.

(S) The Working Group has unanimously concluded that the United States should attempt to enter into an agreement with the Government of the Marshall Islands, subsidiary to Section 177 of the Compact of Free Association, which would settle all claims (pending and future) of the Government of the Marshall Islands and its citizens against the United States arising from the nuclear testing program of 1946 to 1958 in the Northern Marshall Islands. Such a political agreement will not create an adverse precedent for other cases brought before United States courts. Such agreement would result in dismissal, with prejudice, of the cases pending before the United States Court of Claims which allege damages totaling $4.85 billion and of related administrative claims amounting to $1.68 billion.

(S) The Working Group has further concluded, again unanimously, that the components of a settlement package should include: 1) payment for land claims; 2) establishment and maintenance of temporary and permanent communities for the peoples displaced by the testing program; 3) continuation of existing legislation (P.L. 95-134) which provides radiation-related medical care and compassionate compensation for a limited group of residents of Rongelap and Utirik who were exposed to significant levels of radiation; and 4) establishment of programs of general medical care and radiological surveillance in lieu of those now required under P.L. 96-205 (which has not yet been implemented).

(S) The Working Group used the four elements listed above to develop cost-figures for a negotiating package which would consist of grants and new or existing federal programs that would run directly or indirectly to damages alleged in the suits. As a first step, the Working Group projected the costs of programs already authorized by statute, including those not yet implemented. For the 15-year period commencing in 1983, the projected cost of medical treatment and radiological monitoring in P.L. 95-134 (October 1977) and P.L. 96-205 (March 1980) could

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run between $300 million to $550 million.1/ Continuation of subsistence programs for the Enewetakese and the Bikinans, coupled with resettlement and land claims payments, could add another $71 million, yielding a theoretical 15-year total between $371 million and $621 million. The Working Group concluded that such amounts were unacceptably high and sought means of reducing the cost of the statutory medical-care and radiological monitoring components of the package.

(U) Under the provisions of the initialed Compact, the United States would provide the Government of the Marshall Islands a maximum of $520 million over 15 years (at a 7% inflation rate per year), about $35 million per year on an annualized basis. Between 1977 and 1982, the United States will have obligated to expend approximately $150 million on nuclear testing-related problems, relocation, basic support, limited medical care and ex gratia payments.

(S) Agency Positions

(S) In late December the Working Group sought the views of IG-level principals of their respective departments and agencies with respect to the components of the package and the dollar-amounts assigned to each. The principals' views reflect some differences on the following points:

-- amounts of certain components which all agencies agree belong in the package;

-- when and how to earmark funding for resettlement programs intended to be effected in the distant future; and

-- negotiating tactics.

1/ -- The dollar projections were derived as follows:

It was assumed that existing legislation for medical treatment and radiological monitoring, P.L. 95-134 and P.L. 96-205, would remain effective over the next 15 years were the Trusteeship to continue. The Working Group assumed the broadest possible interpretation (the one sought by the Marshall Islands Government) of the still-unimplemented medical care program provided for by P.L. 96-205 and assumed also an end to related Department of Energy programs which would require that statutorily-mandated surveillance and monitoring programs for the Northern Marshall Islands be contracted out, at far greater cost than under present arrangements. The Working Group also calculated the cost to the United States assuming the most limited interpretation of the P.L. 96-205 medical program. With this restriction, the aggregate cost of continuing and implementing statutory programs could still approach $300 million. Costs were adjusted for inflation (7% per year)and, where applicable, for population growth.

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(S) The issues submitted to the SIG for resolution derive from the following sets of components and proposed dollar-amounts (in millions):

	DOD, DOS, DOJ, DOE, DOI, OMSN	OMB
1. Payment for land claims	$17.62	$3.5
2. Establishment and maintenance of temporary and permanent communities		
a. Subsistence for Bikini and Enewetak	23.36	13.0
b. Eventual resettlement of Bikini (trust fund)	20.00	-0.0-
c. Eventual resettlement of Enjebi Island, Enewetak (trust fund)	10.00	-0.0-
3. Continuation of programs authorized by legislation relating to medical treatment		
a. P.L. 95-134	29.04	13.4
b. Grants in lieu of P.L. 96-205	60.00	60.0
4. Radiological Surveillance and monitoring	35.00	35.0
TOTALS	$195.02	$124.9

(S) Over-all Size of Package: The Departments of Defense, Interior, Justice, Energy and State and the Office for Micronesian Status Negotiations all favor recommending to the President that he authorize $195.02 million as a negotiating ceiling. They believe that a package of United States program assistance and grants, distributed generally in accordance with the indicative mix set forth above, stands a good chance of producing a settlement with the Marshallese parties. The Working Group's proposal envisions maximum expenditures of $195.02 million; however, the Working Group believes that the negotiator may be able to construct an acceptable offer for a somewhat lesser amount. The $195.02 includes $10 million for the eventual resettlement of Enjebi Island of Enewetak Atoll, proposed by Interior after the initial circulation of the Working Group report to IG-level principals and concurred in by the other departments and agencies mentioned above. (Originally, these agencies had favored an additional expenditure of $20.6 million for the immediate rehabilitation of Kili and Ejit Islands, where most Bikinians now live; however, this amount has been included in Interior's FY 1982 supplemental budget request and is considered virtually certain to win Congressional approval.) All agencies agree that the chief negotiator, in consultation with the Interdepartmental Group, should have the flexibility to shift funds from one indicative

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category to another, so long as the tradeoffs are consistent with his reaching a comprehensive settlement.

(S) The Office of Management and Budget, on the other hand, considers the $195.02 million figure too high and believes that the President should be asked to authorize its recommended figure of $125 million as a negotiating ceiling. OMB's specific variances from the majority recommendations appear below.

(S) Specific Components:

1. Payment for land claims: The Working Group majority advocates authorizing the chief negotiator to offer compensation of up to $5,000 per acre for taking-of-property claims relating to the 3,523 acres of Bikini, Enewetak and Rongelap Atolls damaged by the physical effects of nuclear detonations or rendered unfit for human habitation or exploitation over long periods. The $5,000 figure was developed in light of recent prices for the purchase or long-term rental of land elsewhere in the Marshall Islands, which have ranged from $3,115 per acre per year to $31,000 per acre. Normally, under United States law the criterion for compensating the taking of land is "fair market value" at the time of the taking. However, as set forth in Attachment 5, the Department of Defense has concluded that this standard would be extremely difficult to apply in this case because:

-- The concept of "land value" per se is not a part of the Marshallese culture.

-- The price of land depends upon whom it is sold to (family and friends pay a lower price) and the purpose for which the land is to be used (land used for schools and hospitals will cost less than land used for commercial or military purposes).

-- Land is generally not sold outright (in fee) but is alienated only for a period of years.

-- In the present situation, land which may have been legally "taken" some years ago would normally be compensated at rates prevailing at the time of the taking plus interest to the time of payment.

-- Land is considered "sacred" by the Marshallese because of its scarcity and life-supporting qualities.

Another factual problem is the considerable confusion concerning the time of the taking. It could be argued that it occured as early as 1946 when the nuclear testing began or, as alleged in the Bikini lawsuit, as late as 1979 when the United States returned legal title of Bikini Atoll to the plaintiffs. However, once the time of the taking has been established, interest must

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be computed from the date of taking until time of payment. Thus, the $5,000 per acre value is an attempt by the Working Group to take into account a number of different factors. Settlement at such a figure in the case of Bikini, for example, would amount to $7.425 million (1,485 acres at $5,000), versus the $300 million for land-takings claimed in the Bikinians' suit against the United States.

- OMB, by contrast, recommends a figure of $1,000 per acre, which it describes as representing 15 to 30 years' rent of much of the affected land for use during the 1940s and 1950s and permanent taking of the remainder, "generous at even today's prices."

2.a. Subsistence for Bikini and Enewetak: The Working Group unanimously concluded that the United States Government should reaffirm its long-standing obligation to augment the Enewetak and Bikini communities' maintenance to bring it to a subsistence level. The majority believes that maintenance should continue until local food production reaches a self-sustaining level (estimated at 10 years for Enewetak and at least 15 years for the Bikinians on Kili.)

The Working Group majority recommends continuation of these programs for 10 years for Enewetak, 15 years for the Bikinians. The 15-year cost would be $23.36 million, a maximum projection which employs the Compact's maximum inflation-adjustment factor of 7%.

OMB would straightline the proposed 1983 funding for subsistence ($500,000 for Bikini and $800,000 for Enewetak) for 10 years for both atolls, resulting in a total expenditure of $13 million ($5 million for Bikini and $8 million for Enewetak). This would result in a real decrease in subsistence each year until the 10th year, after which all assistance would cease. OMB believes that without such gradual reductions in assistance, it is highly unlikely the United States could ever terminate food support for these islands.

2.b. Eventual resettlement of Bikini: The Working Group majority -- conscious of pledges dating back at least to 1968 to resettle the people of Bikini on their home-atoll, the abortive resettlement that took place in the 1970s, and current scientific estimates that Bikini cannot be safely resettled for another 30 to 90 years -- advocates the establishment now of an irrevocable trust fund of $20 million or an equivalent concrete offer for this specific purpose. It believes that the trust fund is essential to a comprehensive settlement, especially in light of poor past performance by the United States.

OMB, on the other hand, believes that the establishment of a trust fund now for resettlement in the indefinite future is an inappropriate use of funds, because amounts in the trust fund at the time of resettlement might bear no resemblance to the actual

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costs for those who might at that time wish to resettle. Further, OMB believes that the Congress would be free at any time to alter the terms of the trust by legislation and direct that the funds be used for other purposes (e.g., current subsistence rather than eventual resettlement), so that by the time actual resettlement might occur, the United States could end up paying twice.

OMB believes that a renewed United States Government commitment in principle to resettle the Bikinians on their atoll, at such time as it is safe to do so, would suffice for this purpose.

2.c. Eventual resettlement of Enjebi Island, Enewetak Atoll: The Working Group majority notes that the people of the southern islands of Enewetak Atoll, the dri-Enewetak, voted in 1974 to allow their neighbors from the northern island of Enjebi (the dri-Enjebi) to settle temporarily on southern islands of the atoll until such time as Enjebi itself is considered safe for resettlement. It is clear that the dri-Enjebi continue to desire eventual resettlement, and the United States intent eventually to resettle them on Enjebi is implicit in the fact that approximately half of the expense and effort of the 1977-80 clean-up program for Enewetak Atoll was devoted to Enjebi and other northern islands. The majority therefore recommends establishment now of an irrevocable trust fund of $10 million for such resettlement.

OMB, on the other hand, reiterates its arguments against trust funds generally and argues further that the United States has already spent an estimated $115 million for the clean-up of Enewetak and the construction of facilities, and that "there appears to be sufficient living space in the southern part of Enewetak for all returning Enjebis."

3.a. P.L. 95-134: The Working Group unanimously recommended the extension of this legislation into the post-Trusteeship period. Based on current Department of Energy operational costs, the Working Group majority believes that the cost ($1.24 million in FY 1981, exclusive of certain logistic support costs of approximately $500,000 which are funded separately through a related Energy account), when adjusted for inflation, would total $29.04 million over 15 years. The Department of Energy notes (see Attachment 6) that the remoteness of the areas served (Rongelap and Utirik Atolls) and the lack of a support structure there dictate substantial fixed costs and thus a high per capita figure. The Department of Energy currently provides general, though not comprehensive, care designed to treat radiation-related illnesses of the 130 surviving residents of the two atolls who have suffered significant radiation exposure. As dicated by medical ethics and humanitarian considerations, the Department of Energy has provided limited on-site medical care and treatment to other residents of the two atolls as well. The

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Working Group majority concurs in Energy's assessment that costs cannot be significantly reduced -- at least until the number of persons specifically covered by the program has diminished substantially -- without violating the statutory mandate of P.L. 95-134.

OMB, on the other hand, considers the annual per capita cost of the Working Group's projection and recommendation (approximately $11,000 for each of the 180 beneficiaries of the statute) unreasonably high and recommends using a first-year cost-figure of $500,000. With 7% inflation adjustment over 15 years, OMB's projection of the maximum exposure for the entire period is $13.4 million, or an annual cost of $5,000 per capita. OMB has not identified specific means of reducing the cost of this program but has suggested that some of the primary health care now afforded to the entire population of Rongelap and Utirik could be funded by the $4 million annual grant (paragraph 3.b.), and that the assumed improvement in the primary health care system in Rongelap and Utirik could permit a reduction in the number of visits by United States monitors.

3.b. P.L. 96-205: The Working Group unanimously agrees on the proposal of an annual grant of $4 million to the Marshall Islands Government for 15 years, without adjustment for inflation, in lieu of the medical program established by this legislation but not yet implemented.

4. Radiological surveillance and monitoring: The Working Group unanimously agrees on the proposed figure of $35 million over 15 years.

(S) Negotiating Tactics: The Working Group majority believes, as noted above, that it may be possible to achieve a comprehensive settlement within the framework of Compact Section 177 through the use of "package" approach combining United States grants and programs within a ceiling of $195 million. The majority believes also that OMB's proposed ceiling of $125 million is unrealistically low, given (a) the potential United States liability in the lawsuits and existing claims; (b) existing statutory requirements; and (c) United States moral obligations to continue subsistence and eventually to resettle the people of Bikini and Enjebi.

The Working Group majority envisions that the President's Personal Representative would approach the negotiations by discussing first the types of grants and programs within the package to determine whether they meet the main areas of interest of the Marshallese parties. If so, the President's Personal Representative would only then introduce dollar-amounts and would, of course, begin at significantly lower levels. Furthermore, while committed to follow the indicative figures for package-components within the $195 million ceiling, the President's Personal Representative would be authorized, in consultation with the Interdepartmental Group, to adjust the amounts for individual package-components upwards or downwards, consistent with the goal of obtaining a comprehensive settlement.

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In the event of failure to reach agreement with the Marshallese parties within the $195 million ceiling, the majority would recommend:

-- A delinking of the claims aspect from the Compact;

-- A Section 177 agreement with the Government of the Marshall Islands limited to medical care and radiological surveillance and monitoring; and

-- Litigation of the suits and claims, with any judgment against the United States to be paid from the claims and judgments budget account.

OMB, on the other hand, believes that the IG should make it clear that it seeks Presidential authority for either a going-in position only, telling the President that it would likely seek additional authority, or a maximum offer (possibly with a corresponding going-in position), telling the President that the interagency group does not intend to seek greater authority; and that de-linking should not even be considered unless an agency agrees in advance to absorb future court awards and attorneys' fees. The United States should be prepared for protracted talks over a series of rounds, with continuation of current-level monitoring, health care, and basic support.

OMB's rationale for this position is that the filing of claims totaling $6.5 billion indicates that the Marshallese will press for the absolute maximum. Consequently, any United States offer made now will undoubtedly be ratcheted upward in further negotiation. OMB concludes, therefore that the United States should go in low, especially if there is an expectation on the part of the IG that it may have to return to the President for additional authority.

OMB further recommends that $125 million be approved as a maximum amount, and not merely as a starting position. In OMB's judgment, this amount is reasonable and defensible because the United States has already undertaken obligations of over $150 million for resettlement, medical care, compassionate compensation, and basic support.

OMB opposes de-linking these claims from signature and implementation of the Compact because, in its judgment, the United States would be left facing virtually open-ended liabilities with no leverage on the Marshallese. Furthermore, OMB believes that the claims and judgments budget account should not be used as an open-ended tap on the Treasury. In OMB's judgment, agencies which want to offer more should include those offers in their own budgets.

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(S) Issues for Decision

(S) The issues for decision by the SIG may be stated as follows:

1. Issue: What amount of financial assistance should the Chief Status Negotiator be authorized to offer?

Option 1 - A maximum of $195.02 million (recommended by the Working Group, concurred in by the Departments of Interior, Defense, Justice, Energy and State and the Office for Micronesian Status Negotiations).

Option 2 - A maximum of $125 million (recommended by OMB).

Option 3 - Limited negotiating authority of $125 million, which may be increased to an authorized maximum of $195.02 million only with the concurrence of the Interdepartmental Group.

2. Issue: What course of action should the United States adopt in the event of failure to reach comprehensive agreement within the ceiling determined by the President?

Option 1 - Attempt to de-link the claims aspect from the Compact negotiations; sign a limited Section 177 agreement covering only medical treatment and radiological surveillance and monitoring; and litigate the suits and claims, with any judgment against the United States to be paid from the claims and judgments budget account (recommended by the Working Group, concurred in by the Departments of Interior, Defense, Justice, Energy and State and the Office for Micronesian Status Negotiations).

Option 2 - Defer signature of the Compact until agreement is reached on a comprehensive settlement; or alternatively, de-link the claims aspect only if a specific Cabinet Department agrees in advance to meet the costs of any judgments out of its budget (recommended by OMB).

Option 3 - Defer decision until the progress of the negotiations can be evaluated in light of the political costs, at that time, of delaying termination of the Trusteeship.

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ATTACHMENT 2
February 1, 1982

Report of Nuclear Claims Working Group of the Interdepartmental Group on Micronesia

Northern Marshall Islands Nuclear Claims

(U) I. Background

The U.S. tested 66 nuclear weapons at Bikini and Enewetak Atolls in the Marshall Islands from 1946 to 1958. These islands sustained damage from the detonations as well as from radioactive contamination. Because the peoples of these two atolls were removed from their atolls in 1946 prior to the tests, they were not exposed to significant levels of radiation. The peoples of two neighboring atolls, Rongelap and Utirik, however, unexpectedly received acute exposure to radiation following the March 1, 1954 "BRAVO Test" on Bikini Atoll, with consequent health impacts. The Enewetak people were dislocated until April 1980, at which time people of the northern and southern islands were returned to the inhabitable southern islands. Due to concerns associated with the radiological status of the northern islands of the atoll, the residential island of Enjebi is not expected to be resettled for several decades. The Bikinians, relocated at a temporary site on the island of Kili, may not be able to resettle on Bikini for 20 to 90 more years. The people of Utirik and Rongelap were evacuated immediately after the BRAVO Test and returned in three months and three years, respectively. The Government of the Marshall Islands (MIG) has alleged that still other atolls and their inhabitants have suffered radiation-related injuries, but the USG is aware of no evidence to support these allegations.

Section 177 of the Compact of Free Association provides that a separate Agreement on three issues relating to the nuclear testing program will be negotiated and will come into effect simultaneously with the Compact:

(1) settlement of all Marshallese claims resulting from the testing program;

(2) continued administration of direct radiation-related medical treatment programs; and

(3) continued administration of radiological monitoring activities including those which will assist the MIG in its exercise of responsibility for enforcing limitations on the utilization of affected areas.

(U) II. Current Status of Negotiations

(U) A. Claims Settlement. The Department of Justice is currently defending 12 cases in the U.S. Court of Claims brought in 1981 by the people of 12 atolls in the Northern Marshall Islands (including Bikini, Rongelap and Utirik) alleging approximately $4.85 billion in injuries, and seeking medical relief and continued radiological monitoring. (See Table 1.) We believe

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that our potential liability is clearly well below the amounts claimed. In general, all 12 cases allege unconstitutional takings of property and breaches by the United States of its fiduciary duty under the United Nations Trusteeship Agreement. In separate and somewhat duplicative actions, a number of Northern Marshallese have lodged administrative tort claims against the USG totaling an additional $1.68 billion for alleged nuclear-related injuries.

The claims issues are extraordinarily complex and potentially costly to the United States and could have the effect of delaying signature and implementation of the Compact. Consequently, during the October 1981 round in Maui, the MIG stated that it wished to explore, in a "tentative and preliminary way", the possibility of delinking final resolution of personal injury and property damage claims from other portions of the Section 177 Agreement. The MIG recognized the potential for delay but stated that delinking would be possible only if an effective mechanism for claims resolution could be established. The MIG suggested two alternative mechanisms: (1) government-to-government claims negotiations; and (2) adjudication of claims by the U.S. courts. The Marshallese delegation emphasized the need for close consultations between the MIG and the affected peoples during any negotiations touching on nuclear testing issues.

Well before the filing of the lawsuits just mentioned, the Executive Branch had begun considering the types and sizes of programs which might meet our obligations as contemplated in Compact Section 177, and the Congress in the last few years has legislated relief for certain Marshallese affected by the testing program. We have attempted to identify the parameters of USG liability arising from the USG nuclear testing program in the Northern Marshall Islands, taking into account these executive and legislative approaches. We have thus identified, in Table 1, elements which both the USG and the MIG will recognize as potential components of a settlement package and which also run directly or indirectly to damages alleged in the pending suits. Implementation of all of the elements in this package could cost the USG as much as $642.355 million; however, we believe that an acceptable settlement offer can be developed which will reduce several elements significantly and will cost no more that $185.02 million in total. Provision of medical treatment, under paragraph B below, and surveillance, under paragraph C below, would also be part of the comprehensive settlement. This package is described in detail in paragraph III, below.

We have concluded that it is in the interest of the USG to make an offer to the MIG to settle all pending and future nuclear-related suits and claims through the agreement subsidiary to Section 177 of the Compact. If our offer is rejected, or if further negotiations on claims threaten to delay execution of the Compact, we should then seek to delink these Section 177 negotiations from the Compact as suggested by the MIG. (Claims negotiations delinked from the Compact negotiations could be conducted by a negotiator who would operate under the aegis of the Interdepart-

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mental Group on Micronesia.) We plan in any event to seek to stay all litigation during the conduct of any claims negotiations.

(S) B. Medical Treatment. Medical treatment programs in the Marshall Islands are set forth in two public laws:

-- Section 104 of P.L. 95-134 of October 15, 1977, entitles the affected people of Utirik and Rongelap Atolls, of whom approximately 180 now survive, to medical treatment and compassionate compensation by virtue of their acute radiation exposure from the BRAVO Test. P.L. 95-134 has been and continues to be implemented. Compensation has been provided to most, if not all, who are entitled to it, and a program of medical care continues.

-- Section 102 of P.L. 96-205 of March 12, 1980, provides for a program of comprehensive medical care and treatment for the people of Rongelap, Utirik, Bikini and Enewetak and perhaps of other atolls. Section 102 of P.L. 96-205 is still under study by the Administration and has not yet been implemented.

During the Maui Round in October, the MIG attached great importance to the USG's provision of comprehensive medical care to those who the MIG alleged were affected by the nuclear testing program. Furthermore, the MIG stated that the simplest and most cost-effective program would be one covering the entire population of the Marshalls. The MIG tactically attempted to establish an explicit link between the provision of medical care and U.S. use and operating rights for the Kwajalein Missile Range so as to provide a "driving force" to get the medical care issue resolved, although the U.S. managed to keep the two issues separate in official sessions. Although concerned that nuclear issues not delay termination, the MIG insisted that it cannot allow its desire for early termination to compromise the health care of its population.

The working group is convinced that post-termination extension of Section 104 of P.L. 95-134 is both needed and justified. However, the lack of an Administration position on the meaning and scope of P.L. 96-205 and the consequent nonimplementation threatens to delay the negotiations and makes it awkward to discuss its substance with the MIG. The first initialing of Compact Section 177 predated P.L. 96-205, but P.L. 96-205 had been enacted by the date of the second initialing. Therefore, although Section 177 contemplates the continued administration of medical treatment programs, it is arguable whether the parties intended that P.L. 96-205 be carried forward post-termination. The working group believes that resolution of this issue is a prerequisite to successful conclusion of the negotiations. We have concluded that the Administration should offer a health care program assistance package in context of the Section 177 agreement. The annual cost of this package ($4M) is approximately equivalent to the estimated first year cost of a U.S. "hands on" health care program, but, being unadjusted for inflation in subsequent years, would be

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significantly less costly than a continuing, separate USG health care program as contemplated in P.L. 96-205. Furthermore, it would be more consistent with the preamble and the principles of the Compact of Free Association by fostering the growth of self-sufficiency and self-reliance.

If we are to avoid considerable delay in the negotiating process and to show evidence of good faith, the Administration needs either to make a prompt policy determination to implement P.L. 96-205 or preferably to develop a health care program assistance package independent of P.L. 96-205. Congressional consultations on this sensitive issue are essential.

C. Surveillance. In certain areas -- essentially all of Bikini Atoll and certain of the northern islands of Enewetak and Rongelap Atolls -- residual radioactive contaminants exist in concentrations which could lead to significant levels of exposure to persons who may reinhabit those islands. Consistent with the principle of keeping exposures as low as reasonably achievable, it is prudent for the USG, which has the unique technical capability, to offer to continue its surveillance of the environment and to convey to the MIG relevant information derived from such surveillance.

The Department of Energy has conducted periodic radiological surveillance of the "four named atolls" during and subsequent to the testing program. In addition, a comprehensive survey of 13 atolls in the Northern Marshall Islands was conducted during 1978. Section 102 of P.L. 96-205 requires periodic comprehensive surveys and analyses of the radiological status of the Marshallese atolls and dose assessments not less than once every five years.

We have concluded that the Chief Status Negotiator should be authorized to negotiate with the Marshall Islands Government the general nature, scope and extent of the radiological surveillance and monitoring activities which the United States will conduct. He should also be authorized to commit the United States to report the resultant data to the Marshall Islands Government.

The cost to the United States of conducting radiological monitoring and surveillance of course depends upon specific programs set forth in the Agreement. We assume, however, that the two governments will agree on a technically sound approach to the long-term program which allows for adjustment as surveillance results become available. We estimate that the incremental costs, adjusted for inflation, of such a program administered by the Department of Energy would be $12.5 M for the first five years and $16.5 M for the second five years. The estimate for the third five years is more speculative, but we feel confident that there would be a rapid reduction of most aspects of the program in the 11th through 15th years and a correspondingly reduced cost of about $6.5 M. Thus, for budget forecasting purposes, a maximum 15-year total of $35 M would seem entirely reasonable.

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The Chief Negotiator should be alert to the distinction between the cost to the United States of such a program and the value of the program to the Government of the Marshall Islands. Although the program would cost the United States no more than $35 M if administered by the Department of Energy, its cost could be as much as $120 M if it were conducted by an independent contractor. Furthermore, we believe that the governments could quite reasonably agree on radiological surveillance and monitoring programs of a reduced scope, which would be less costly yet still adequate and technically sound.

Finally, it should be noted that the reporting of the data to the Marshall Islands Government would represent the limit of United States responsibility; although the data may include radiation dose-estimates for areas mutually identified by the two governments, the Marshall Islands Government would have sole responsibility for establishing and enforcing restrictions on land use in, and access to, such areas.

(S) III. Recommendations/Request for Negotiating Instructions.

We propose that the USG offer a comprehensive settlement package, including lump-sum payments and an agreement to continue medical assistance and radiological surveillance. We would ask the Government of the Marshall Islands to accept the package as full settlement of all claims arising from United States nuclear testing program of 1946 to 1958. All pending cases would thereafter be dismissed with prejudice, and no further cases could be brought successfully.

(S) A. We recommend the continuation of those essential on-going nuclear test-related programs which would in all probability continue if the Trusteeship were not to be terminated. These include (15-year totals, except where noted, and inflation-adjusted, from Table 4):

-- Extension of P.L. 95-134 for 15 years. 15-year total, $29.04 M.

-- Provision of an annual grant to the Bikini people to provide necessary subsistance support for 15 years. 15-year total, $10.76 M.

-- Provision of an annual grant to the Enewetak people to provide necessary subsistance support for not more than 10 years. 10-year total, $12.60 M.

-- Continuation of our undertaking to provide radiological monitoring, including surveillance and dose assessment for 15 years. 15-year total, $35.0 M.

TOTAL 15-year cost, $87.4 M maximum.

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(S) B. In addition, we recommend that the following negotiating offers be authorized:

-- To settle land taking claims, a one-time payment not to exceed $17.615 M.

-- In lieu of P.L. 96-205, a grant to the MIG of $4 M per year (not adjusted for inflation) for 15 years to advance local development of a MIG health care system. 15-year total $60 M.

-- An undertaking to establish a permanent community for the Bikinians either when they return to Bikini (30-90 years) or when they select an alternative permanent location; or in the alternative to establish a $20 M trust fund for this purpose.1/

TOTAL 15-year cost $97.615 M maximum.

C. We would propose to request a total, not to exceed $185.015 million, to cover such an offer. This 15-year cost (A plus B) includes the fallback offer of $20.0 M for the proposed Bikini trust fund. We believe that agreement might be obtained for a lesser amount.

D. The Working Group considered including in the package the sum of $20.6 M for community development on Kili and Ejit Islands. However, the situation on those islands has been described as critical, and the Department of the Interior has sought and obtained OMB approval for this amount in its FY 1982 supplemental appropriation. This request is considered virtually certain to obtain Congressional approval, and we consider that the delay which might be caused by incorporating this issue in the comprehensive settlement package would be detrimental to the negotiating atmosphere.

E. Proposed options and fallbacks are set forth in Table 1.

(C) IV. Action

A proposed draft SIG recommendation paper and a proposed draft NSDD are attached.

1/ The Enjebi people, who inhabited the northern section of Enewetak Atoll before their removal in 1947, view their current residence on the southern islands of Enewetak as temporary and have consistently expressed a firm desire to return to Enjebi. DOI has determined that radiation levels on Enjebi have not subsided sufficiently to permit resettlement at this time. Construction of a permanent settlement may cost up to $10 M. This issue may have to be addressed either in the negotiations or by other Administration action.

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TABLE 1
NEGOTIATING POSITION
(Figures in FY'82 $; 15-year figures inflated by 7%/year)

NEGOTIATING OBJECTIVES	CURRENT SITUATION (Level of Maximum Exposure FY'82 $)	PREFERRED NEGOTIATING POSITION	OPTIONS TO CONSIDER
A. Settlement of all Marshallese claims resulting from Nuclear testing program.	Courts open to MIG and Marshalls citizens pending claims cases $4.85 B (SEE TABLE 2) ($6.53 B with pending administrative claims added on)	U.S. moves in Court of Claims to place all on-going litigation in abeyance. USG offers to settle all claims in context of over-all § 177 negotiations	Failing quick settlement, USG offers to establish alternative claims regime delinked from § 177; or to have all claims settled in U.S. courts
Components of Settlement:			
1. Land Claims	Maximum settlement $17.615 M (SEE TABLE 3 para A.1)	USG agrees in principle to settle land claims. Maximum cost $17.615 M (SEE TABLE 3 para A.1)	
2. Temporary community facilities Maintenance			
(a) Temporary community facilities on Kili/Ejit	Temporary community to be established; cost $20.6 M (SEE TABLE 3 para A.2(a))	NONE; assumed to be funded in DOI supplemental appropriation for FY 1982.	
(b) Bikini maintenance	USG will need to provide $610 K per year to supplement subsistence. (SEE TABLE 3 para A.2(b)) 15-year costs $10.76 M	USG offers to provide $610 K per year (adjusted) for 15 years: cost $10.76 M (SEE TABLE 4)	
(c) Enewetak maintenance	USG will need to provide $1.04 M per year or until at least 1992 to supplement subsistence (SEE TABLE 3 para A.2(c)) 15-year costs $12.60 M	USG offers to provide $1.04 M per year (adjusted) until 1992. Cost $12.60 M (SEE TABLE 4)	USG falls back to automatic review of providing these funds in 1991 with potential for extension for agreed on duration
3. Eventual resettlement			
(a) Bikini	Eventual resettlement of Bikini cost $20 M - $25 M in FY'82 (SEE TABLE 3 para A.3(a) one time cost $20 M	USG offers to establish community at such time MIG (or MIG and USG) consider Bikini suitable for rehabilitation	USG falls back to establish $20 M trust fund to resettle Bikinians permanently. Maximum cost $20 M
(b) Enjebi	Eventual resettlement of the Northern island of Enewetak. Cost $10 M (SEE TABLE 3 para A.3(b))	USG makes no initial offer on Enjebi resettlement (rationale: USG has already provided living space for all Enewetakese, although not all on home islands)	USG offers to establish community at such time MIG (or MIG and USG) considers Enjebi suitfor rehabilitation USG falls back to establish $10 M trust fund now to establish permanent community.

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B. Continued administration of direct radiation-related medical treatment programs Components of settlement			
1. Extension of P.L. 95-134	(FY'82 cost only) $1.09 M annual Medical component $ .08 M decreasing fund (SEE TABLE 3 para B.1) 15-year cost $29.04 M	USG extends P.L.95-134 for 15 years. Maximum cost $27.01 M (SEE TABLE 4)	
2. Extension of P.L. 96-205	Legislation passed in 1980, not yet executed. Estimated costs over 15 years adjusted for inflation and population increase a) $10.9 M extended $171.74 M b) $10.6 M extended $170.69 M c) $ 9.0 M extended $331.71 M d) $ 4.0 M extended $147.43 M	USG provides $4 M per year to MIG for 15 years, not adjusted for inflation. May be used for all Marshalls or four Atolls only at option of MIG; P.L.96-205 lapses. Cost $60 M	USG extends P.L.96-205 and administers it at lowest estimated cost ($4 M, 1st year). Maximum cost $147.43 M USG provides more than $4 M but less than $10.9 M (for 15 years) not adjusted for inflation; P.L. 96-205 lapses. Maximum cost (10.9x15) $163.5 M
C. Continued administration of radiological monitoring activities	P.L.96-205 mandates this program. Cost, taking into account end of related on-going DOE Marshall Islands programs, $4.77 M (adjusted for inflation). Projected 15-year cost $120.0 M (See table 3)	USG offers a continuous environmental program for 15 years, with dose assessments every 5 years. (See text para. II.C; table 4) Projected 15-year cost $35.00 M	
TOTAL COSTS	Maximum 15-year cost exposure (a) $4.85 M alleged in pending cases. (b) $142.355 M maximum exposure, programs and one-time costs.	Maximum 15-year negotiation costs $165.01 M (with Bikini fallback) $185.02 M	Additional cost for fallback positions $20 M for Bikini (recommended); $10 M for Enjebi (not recommended) $57.43 M to $103.5 M for medical program alternatives (not recommended)

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Table 2

PENDING CASES/TORT CLAIMS

I. A.	Bikini class-action petition before Court of Claims	
	Alleged Taking MAR 7, 1946 - JAN 24, 1979	$150 M
	Alleged Taking JAN 24, 1979 - next 20-60 Yrs.	$150 M
	Breaches of fiduciary duty	$150 M
	SUBTOTAL BIKINI CASES	$450 M
B.	Petitions by eleven other Marshallese Atolls before Court of Claims	
	Alleged unconstitutional taking ($200 M each)	$2.20 B
	Alleged breaches of fiduciary duty ($200 M each)	$2.20 B
	SUBTOTAL 11 OTHER ATOLLS CASES	$4.40 B
	TOTAL	$4.85 B
II.	Administrative tort claims lodged with DOE (as lead agency) by Northern Marshallese claimants. (These claims are distinct from but related to I.A and B above).	$1.68 B
	TOTAL OF SUITS AND ADMINISTRATIVE TORT CLAIMS	$6.53 B

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Table 3

ESTIMATED COSTS OF U.S. GOVERNMENT COMPENSATION, PROGRAMS AND TRUST FUNDS
(all base amounts in FY'82 $)
(7% annual inflation assumed)

A. Settlement of all Marshallese claims resulting from nuclear testing program:

1. Land Claims:

Compensation for taking-of-property claims related to land damaged by physical effects of nuclear detonations and land rendered unfit for human habitation or exploitation. 3,523 acres at $5,000 per acre (Bikini, Enewetak, and Rongelap only).	$17.615 M

2. Dislocation and Maintenance:

(a) For the development of community facilities on Kili and Ejit for 30 to 90 years until Bikini can be resettled. One-time expenditure. In DOI FY 1982 supplemental budget-request.	$20.6 M
(b) Kili/ Ejit do not have self-sustaining economies. Estimate of funds required for Bikini people: $400 K per year for 15 years, inflation-adjusted.	$10.76 M (15-year total)
(c) Enewetak will not have self-sustaining economy until approximately 1992. Estimate of funds required for Enewetak people: $600 K per year until 1992, inflation-adjusted.	$12.60 M (10-year total)

3. Eventual resettlement:

(a) The Bikinians will not be able to return to Bikini for 30 - 90 years; past Administrations have promised eventual return. Trust fund for Bikini resettlement.	$20 M
(b) Although the Enewetakese have returned to the southern islands of their atoll, the northern islands cannot be resettled for the indefinite future. Trust fund for Enjebi resettlement	$10 M

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B. Continued administration of direct radiation-related medical treatment programs:

1. P.L. 95-134:

Health care and compassionate compensation for exposed members of Rongelap and Utirik communities:	$29.04 M

2. P.L. 96-205, Medical Care:

Broadest interpretation;	
Comprehensive medical care (primary, secondary and tertiary) for entire population of the Marshall Islands	$10.9 M for 1982 $401.74 M (for 15 years)
More limited interpretation;	
Comprehensive medical care, as above, for persons originating on the four named atolls, wherever they now reside	$10.6 M for 1982 $390.68 M (for 15 years)
Most limited interpretation:	
Comprehensive medical care, as above, for current residents of the four named atolls (including Bikinians now resident on Kili, but not elsewhere)	$4 M for 1982 (Interior estimate) Maximum amount suggested on contract $147.43 M for 15 years $9 M for 1st year (Energy estimate, based in part on experience of implementing earlier legislation for 174 victims of acute exposure resident on Rongelap and Utirik atolls) $331.71 M for 15 years

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C. Continued administration of radiological monitoring activities:

The Environmental Monitoring, Research, and Dose Assessment Program, prepared for Interior by Energy, contemplates for each of the four named atolls the carrying out of comprehensive surveys and analyses of the radiological status of the atolls at appropriate intervals, but not less frequently than once every five years. The estimated cost of this program for the first full year would be $2.20 million if it were carried out in conjunction with on-going DOE Marshall Islands programs. The cost would increase to $4.77 million for the first year if the program were conducted by individuals or organizations that functioned independently of current DOE Marshall Islands programs (1982 dollars).	$4.77 M $120.0 M for 15 years

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TABLE 4

OVERALL UNITED STATES OBLIGATIONS AND ADDITIONAL NEGOTIATING OPTIONS

15-YEAR COST PROJECTIONS*

($ in Millions)

	19	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	TOTAL
I. U.S. Obligations																	
a. P.L. 95-134		1.15	1.24	1.32	1.42	1.51	1.62	1.73	1.86	1.99	2.12	2.27	2.43	2.62	2.78	2.98	29.04
b. Surveillance		2.20	2.37	2.34	2.52	3.10	3.04	3.05	3.26	3.30	3.49	1.92	1.65	1.32	.94	.50	35.00
c. Support Costs																	
1. Bikini		.43	.46	.49	.52	.56	.60	.64	.69	.74	.79	.84	.90	.96	1.03	1.11	10.76
2. Enewetak		.91	.98	1.04	1.12	1.19	1.28	1.37	1.46	1.57	1.68						12.60
Subtotal (a.+b.+c.)		4.29	5.05	5.19	5.58	6.36	6.54	6.79	7.27	7.60	8.06	5.03	4.98	4.90	4.75	4.59	87.4
II. Additional Options																	
a. Land Claims		17.62															17.62
b. Bikini Resettlement		20.00															20.00
c. Marshalls Health Care Support		4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	60.00
Subtotal (a.+b.+c.)		41.62	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	97.62
Grand Total		40.31	9.05	9.19	9.58	10.36	10.54	10.79	11.27	11.60	12.08	9.03	8.90	8.90	8.75	8.59	185.02

*All base amounts in FY'82 $. 7% annual inflation adjustment included.

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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301

ATTACHMENT 5

3 FEB 1982

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MEMORANDUM FOR THE NUCLEAR CLAIMS WORKING GROUP

SUBJECT: Land Valuation in the Marshall Islands

The following is an attempt to provide additional rationale to the process of establishing a negotiating ceiling for land claims.

Under US law the criteria for compensating the taking of land is "fair market value" at the time of the taking. U.S. v. Miller, 317 U.S. 369 (1942). This standard is extremely difficult to apply in the case of land in the Marshall Islands affected by radiation from U.S. nuclear testing for a number of reasons. In summary:

- the concept of "land value" per se is not a part of the Marshallese culture.
- Price as regards land is dependent upon who it is sold to (family and friends paying a lower price) and what the land is to be used for (land used for schools and hospitals will cost less than land used for commercial or military purposes).
- Land is generally not sold outright (in fee) but is alienated only for a period of years.
- In the present situation, land which may have been legally "taken" some years ago would normally be compensated at rates prevailing at the time of the taking plus interest to the time of payment.
- Land is considered "sacred" by the Marshallese because of its scarcity and life-supporting qualities.

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Under provisions of E.O. 12356
by D. Van Tassel, National Security Council
(F87-249)

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As stated, land is generally compensated at the time of the taking. In the present case the taking can be argued to have occurred as early as 1946 (when nuclear testing began) regarding some parcels. Testing ceased in 1958 but subsequent events (ex. the return and subsequent removal of persons from Bikini) further confuse the issue of the time of taking. Once the time of taking is established for a parcel of land as well as its value at the time of taking, interest must be computed from the date of taking until the time of payment.

For example, a number of TTPI judicial condemnation actions were accomplished 1959-1960. The U.S. nuclear testing ended in 1958. Thus values set for these condemned parcels should be comparable to the value of land taken at the close of the U.S. testing. (Actually, land used for testing in 1958 was taken some years before for previous tests, but condemnation records are not available before 1959. Land taken prior to 1958 would presumably have a lower base price but would require additional interest payments). One-time prices of $500 per acre were paid under the condemnation actions for use periods of 25 years to 99 years. Interest of only 6% on that sum (compounded) from 1958 to the present gives a figure of approximatley $2025 per acre.

The total number of acres whose use was foreclosed due to U.S. nuclear testing is currently being calculated by the Defense Nuclear Agency. A rough estimate, however, would be 3500 acres. Assuming uniform damage to all parcels and a use loss period comparable to the condemnation cases mentioned above (25-99 years) produces a present cost estimate of $7,087,500.

Another method of valuation, one that would most likely be advocated by the Marshall Islands Government, is to look to land acquisitions and appraisals in the recent past in the Marshall Islands. For example

- 1979 TTPI court condemnation of 29.6 acres at $4600/acre for a 16-year term.
- 1978 Cowell and Co., Inc. real estate appraisal of small lots in downtown Majuro accessible to utilities and air transportation, $31,000/acre.
- 1974 private lease to commercial firm, Dalap Is., $3,115/acre per year for 4.5-year term.
- 1974 private lease to commercial firm, Bikedit Is., $3,425/acre per year for 25-year term.
- 1972 private lease to commercial firm, Uliga Is., $11,204/acre per year for 25-year term.

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- 1970, fifteen separate purchases by the TTPI of tracts on Rairok Isle at $4000/acre for a 25-year term.

Again, because of the multitude of factors involved, it is difficult to derive a common valuation criteria from the above figures. Some of the recent prices are relatively high such as the $31,000/acre land in downtown Majuro and the yearly payments of $11,204, $3,425 and $3,115 on other islands. For negotiation purposes, the amount of $4600/acre for a 16-year term derived from the 1979 TTPI court condemnation of the islands of Omelek, Gellinam and Eniwetak serves as a recent valuation that is in line with past Department of the Navy appraisals. However that figure is subject to at least two caveats. The compensation was not for an outright taking (as is the case with "permanently" irradiated islands) but for what the judge termed "exclusive use." Presumably more would have to be paid for permanently damaged land where no residual use rights exist. Secondly, the exclusive use was for only 16 years whereas use of some land has currently been denied due to U.S. testing for over twice that time.

Using the figure established by the court in 1979 for the value of an acre of land ($4600) and multiplying it times the (estimated) acres of land whose use was or is restricted (3500) gives a figure of $16,100,000.

The foregoing discussion is put forth for illustrative purposes. Neither of the two methods for calculating the value of the land for which a claim may be expected is precise to any significant degree but both are defensible and should be taken into account in formulating a negotiating position on this issue.

M.J. Cirrinc
Office of the Assistant
General Counsel (International)