United States General Accounting Office

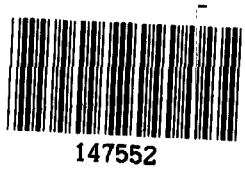
GAO

Report to Congressional Requesters

September 1992

MARSHALL ISLANDS

Status of the Nuclear Claims Trust Fund



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GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-248697

September 25, 1992

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate

The Honorable George Miller
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

The Honorable Ron de Lugo
Chairman, Subcommittee on Insular
and International Affairs
Committee on Interior and
Insular Affairs
House of Representatives

This report responds to your request that we review the status of the Marshall Islands' Nuclear Claims Trust Fund. Specifically, you asked that we determine whether the trust fund (1) was being distributed as required and (2) is adequate to meet the distribution requirements. You also requested that we provide information on the status of several related assistance programs and scientific surveys.

Background

Between 1946 and 1958, the United States used two atolls—Bikini and Enewetak—in the Marshall Islands as nuclear test sites.[1] In 1954, a shift in wind conditions spread radioactive fallout to two inhabited atolls—Rongelap and Utrik.

In 1986, the United States and the Republic of the Marshall Islands (RMI) entered into the Compact of Free Association, which recognized RMI as a sovereign nation. Section 177 of the Compact established a $150 million Nuclear Claims Trust Fund to compensate the Marshall Islands' people for medical and property damages caused by the U.S. nuclear testing program. The $150 million to establish the trust fund was provided to RMI on October 30, 1986, soon after the Compact took effect.

[1]The residents had been evacuated prior to the testing program.

A subsidiary agreement to section 177 specified how the trust funds should be administered and disbursed over a 15-year period—October 1986 to October 2001. These distribution requirements include regular allocations to pay claims awards and periodic disbursements to the four atolls most affected by the testing program—Bikini, Enewetak, Rongelap, and Utrik.

Results in Brief

Disbursements from the Nuclear Claims Trust Fund began in early 1987. Although initial claims awards were delayed, other disbursements were made as required. Through April 1992, $88.4 million had been distributed, with $67 million going to the four atolls most affected by the testing program. Other disbursements totaling $17.2 million were for a health care program, two scientific surveys, and certain administrative expenses. Only $3.2 million of the $16.5 million allocated for medical and property claims had been distributed because of delays in setting up adjudication procedures. These and related matters are discussed in more detail in appendix I.

With modest rates of return, the Nuclear Claims Trust Fund should be adequate to make the payments required by the section 177 agreement. However, the trust fund is not achieving the 12.5-percent investment returns expected when it was agreed on and may be nearly depleted when the 15-year term of required disbursements is completed. If the trust fund is depleted, medical and property claims awards could remain partially unpaid. Nonetheless, separate trust funds for each of the four atolls most affected by the testing program have been established with disbursements from the Nuclear Claims Trust Fund. The atolls' trust funds will continue to grow and could be worth a combined total of over $129 million by the year 2001. See appendix II for more information on the trust funds' potential value.

The section 177 agreement provided for or directed the continuation of several programs to assist the communities from the four atolls most affected by the nuclear testing program. Food assistance and medical care are being provided to the four atolls, and two scientific surveys have been initiated to help determine the extent of damage and the health risks associated with the lingering effects of radiation. These programs and surveys are discussed in more detail in appendix III.

Agency Comments

The Departments of Agriculture, Energy, the Interior, and State; the Republic of the Marshall Islands Ministry of Foreign Affairs and Nuclear Claims Tribunal; and an attorney representing the Rongelap Local Distribution Authority provided comments on this report. The Department of Agriculture said it had no comments on the report, and the State Department said that the report is factually accurate. The Department of Energy generally agreed with the information in the report, but orally suggested some minor technical modifications. The Department of the Interior also agreed with the accuracy of the report, but emphasized that the key to the section 177 agreement is the espousal provision that constitutes a full settlement of all claims past, present, and future resulting from the U.S. nuclear testing program. This matter is discussed in appendix I.

The Republic of the Marshall Islands Ministry of Foreign Affairs concurred with the report but provided amplification on several matters. The Nuclear Claims Tribunal stated that the report represented a fair summary of the history and financial picture of the Tribunal's activity but suggested that we more fully explain the problems it continues to face. The attorney representing the Rongelap Local Distribution Authority generally addressed matters that most immediately related to the authority, and raised several questions of technical accuracy. We have incorporated the various comments we received in the report where appropriate.

See appendix IV for a description of our objectives, scope, and methodology. The full text of all the written comments received are reprinted in appendixes V through X.

We are sending copies of this report to the Secretaries of Agriculture, Energy, the Interior, and State; the Director, Office of Management and Budget; cognizant officials in the Marshall Islands government and the Nuclear Claims Tribunal; the local distribution authorities for Bikini, Enewetak, Rongelap, and Utrik; and other interested congressional committees. Copies will also be made available to others on request.

Please contact me on (202) 275-5790 if you or your staff have any questions concerning this report. The major contributors to this report were A. H. Huntington, III, Assistant Director; Jerald N. Slaughter, Evaluator-in-Charge; and Ann L. Baker, Staff Evaluator.

Harold J. Johnson
Director, Foreign Economic
Assistance Issues

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Abbreviations

LDA	Local Distribution Authority
RMI	Republic of the Marshall Islands

Trust Fund Disbursements Were Made

Pursuant to section 177 of the Compact of Free Association, the United States accepted responsibility for compensating the Marshall Islands citizens for loss or damage to person or property resulting from the U.S. nuclear testing program and provided a $150 million trust fund to the Republic of the Marshall Islands (RMI) in settlement. The espousal clause of the section 177 agreement established the Nuclear Claims Trust Fund as full settlement of all past, present, and future claims against the United States.[1] It also required the termination of any related legal proceedings in U.S. and RMI courts.

A subsidiary section 177 agreement,[2] which was approved by the Congress along with the Compact of Free Association, outlined how the fund should be administered and distributed over 15 years. It required fixed amounts of funding to pay, among other things, (1) monetary claims for personal injury or medical claims and property damage and (2) disbursements to the four atoll communities most affected by the nuclear testing program.

The Effects of the Nuclear Testing Program Remain

The Marshall Islands consist of 34 low-lying atolls[3] and single islands in the Pacific Ocean, located about 2,100 miles southwest of Honolulu, Hawaii. (See fig. I.1.) Between 1946 and 1958, while the Marshall Islands were part of the U.S. administered, United Nations Trust Territory of the Pacific Islands, the United States used two atolls in the northern Marshal Islands—Bikini and Enewetak—as nuclear test sites. During the testing period, 66 nuclear bombs were detonated on or above the two atolls, destroying some of the land and leaving them contaminated with radioactivity.

In March 1954, the United States conducted one of the first hydrogen bomb tests, code-named "Bravo," on Bikini. Bravo was the largest nuclear device ever detonated in the atmosphere by the United States, producing a much more powerful explosion than expected. Because of a shift in wind

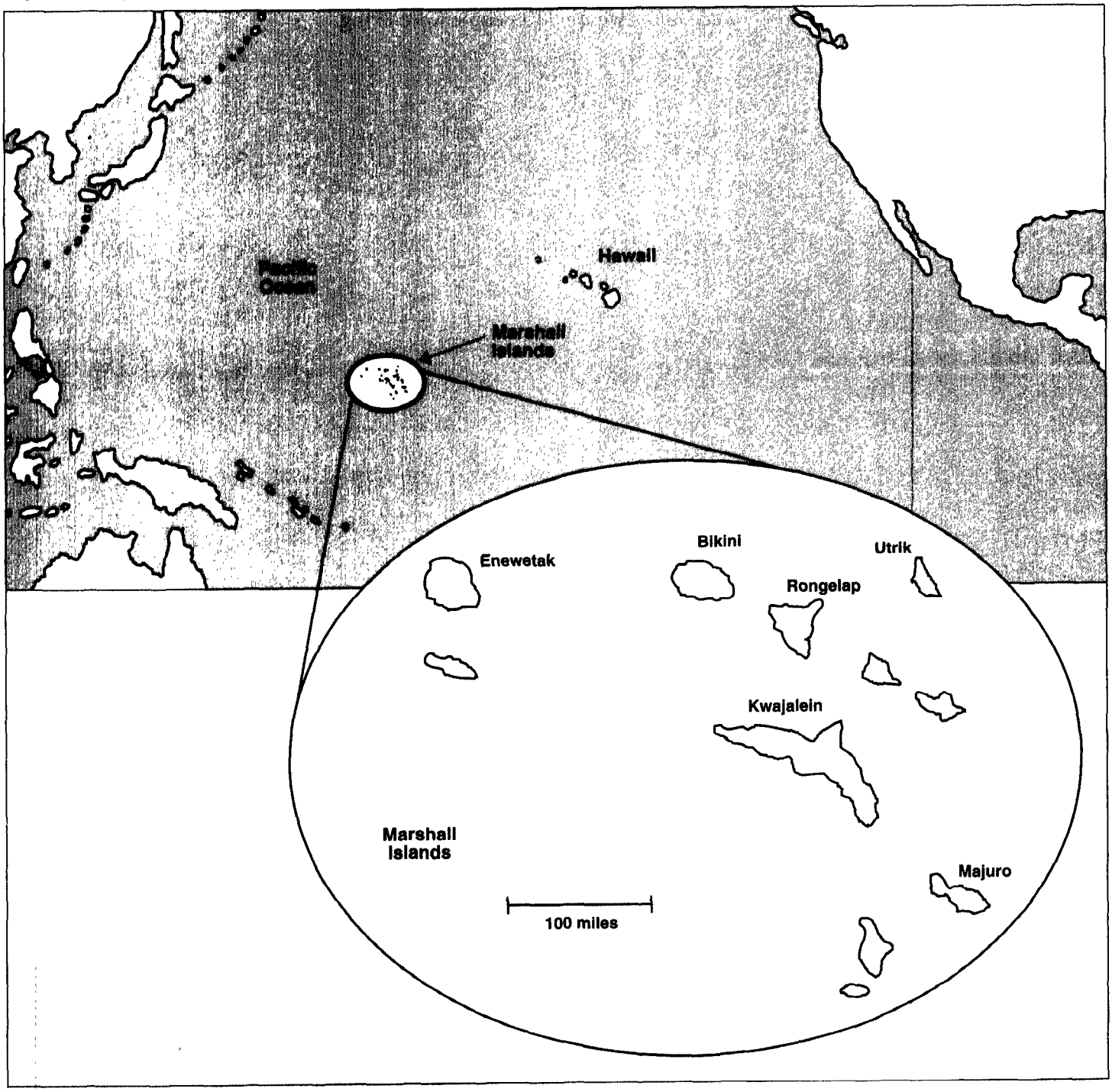
[1]In this context, espousal means the assumption by a government of the legal claims of its citizens against a foreign government. When the government of the Marshall Islands espoused and settled the claims of its citizens against the United States arising out of the nuclear testing program, the resulting settlement was legally binding on all of its citizens.

[2]Fourteen agreements were made between the United States and RMI pursuant to the Compact of Free Association, which was approved by the Congress in Public Law 99-239. Among these were agreements relating to the provision of federal programs, economic assistance, and military use and operating rights.

[3]Atolls are ring-shaped coral islands surrounding a lagoon.

conditions, radioactive fallout spread to two inhabited atolls—Rongelap and Utrik—where 239 people were living.

Figure I.1: Republic of the Marshall Islands



The residents of the four atolls are still suffering the consequences of the testing program. The inhabitants of Bikini and Enewetak were evacuated before the tests began and lived on other islands. Rongelap and Utrik were evacuated after the Bravo test. The Utrik residents returned to their atoll about 2 months later. Rongelap was resettled in 1957, but the residents were fearful for their health and moved to other islands in 1985. Portions of Enewetak were resettled in 1980, but the residents of Bikini have not permanently returned.[4]

The Nuclear Claims Tribunal Oversees the Trust Fund

As required by the section 177 agreement, the RMI government established a Nuclear Claims Tribunal in 1987 to administer the Nuclear Claims Trust Fund. The Marshall Islands Nuclear Claims Tribunal Act of 1987 specifically charged the Tribunal to

- provide awards for full compensation for specified injuries and loss of or damage to property with a fair and equitable distribution of payments among claimants;
- adjudicate claims for loss or damage to person or property that were caused by the nuclear testing program;
- oversee the distribution plans used by the four nuclear-affected atolls and adjudicate disputes challenging the fairness, equity, and administration of the plans; and
- oversee RMI administration of health care and radiological monitoring programs.

The Tribunal is independent of the legislative and executive branches of the RMI government, but Tribunal decisions and orders can be appealed to the RMI Supreme Court. The trust fund is managed by the RMI government with financial advice and assistance from Shearson Lehman Brothers. As required, the trust fund is invested in bonds, notes, and other financial instruments of U.S. nationality.

The Tribunal is made up of a chairman and two judges who serve for 3 years. The Nuclear Claims Tribunal Act provides for the chairman to appoint one of the judges as a special Tribunal to initially handle disputes related to the administration and management of distributions from the Nuclear Claims Trust Fund. Special Tribunal decisions can be appealed to the full Tribunal. To help the Tribunal carry out its responsibilities, the

[4]A small group of Bikini residents moved back in 1972, but they were subsequently evacuated in 1978 because the levels of radioactive elements found in their bodies were increasing.

Nuclear Claims Tribunal Act also created Offices of the Public Advocate, the Defender of the Fund, Mediation,[5] and Finance within the Tribunal. Tribunal offices are supported by a clerk and an administrative staff. The Tribunal has an annual budget of $500,000 from the trust fund.

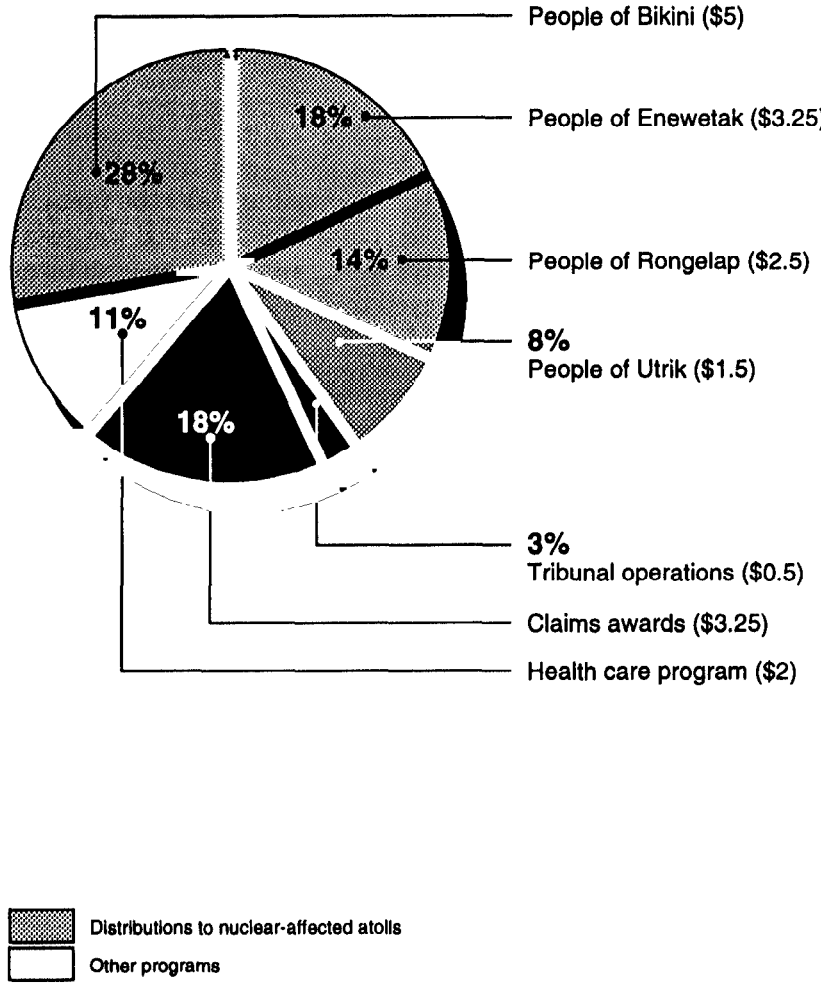
The Offices of the Public Advocate and the Defender of the Fund have primary roles in the administration of the claims awards. The Public Advocate is responsible for helping claimants file and prepare their claims and to represent claimants before the Tribunal where claimants elect not to retain private counsel. It has staff members located throughout the Marshall Islands for this purpose. The Defender of the Fund protects the trust fund from possibly invalid claims. In connection with this role, the Defender of the Fund makes the initial decisions about whether claims will be admitted to the Tribunal, denied, or sent back to the claimant for additional support. The Defender also reviews the atolls' government councils or Local Distribution Authorities' (LDA) distribution plans and may initiate complaints against LDAs or the RMI government in some cases.

Initial Claims Awards Were Delayed, but Other Trust Fund Disbursements Were Made

The first disbursements from the fund were made in early 1987 and totaled $88.4 million through April 1992. Except for claims awards, all required disbursements have been made. Disbursements for claims awards were delayed while procedures for how to adjudicate the claims were worked out. Figure I.2 shows the required annual distributions from the Nuclear Claims Trust Fund.

[5]The Office of Mediation is not currently staffed. The Tribunal has used temporary mediators when necessary.

Figure I.2: Annual Distributions From the Nuclear Claims Trust Fund in Millions of Dollars



Note:Total funds equal $18 million. The Tribunal was limited to $2.25 million a year for claims award payments for the first 3 years of the section 177 agreement. Thereafter, through the year 2001, $3.25 million a year is available for claims award payments. The $3 million difference ($1 million a year for 3 years) is being used to fund ongoing medical and radiological surveys.

Sixty-eight percent of the disbursements ($12.25 million annually) goes to the four atolls that were most affected by the testing program—Bikini, Enewetak, Rongelap, and Utrik. The minutes to the section 177 agreement

require 52 percent of these funds to be reinvested in separate trust funds for each atoll. The remainder may be distributed to the community members or used for the community's benefit by LDAs according to plans approved by each atoll.

Claims Awards Were Delayed While Rules and Procedures Were Developed

It took nearly 5 years from the time the trust funds were provided to RMI for the Tribunal to make the first claims awards. More than 1-1/2 years had passed before the Tribunal was established and judges appointed. Further delays were caused by the high turnover in Tribunal judges which, in turn, delayed the formulation of rules and procedures for how the claims would be adjudicated.

The RMI government began recruiting Tribunal members in late 1987, soon after it passed the Nuclear Claims Tribunal Act. A chairman arrived in May 1988, and two other Tribunal judges took up their posts later that year. The judges began developing procedures and a payment schedule for paying medical claims, but all three judges and one replacement judge quit before the work was completed.

While one of the original judges resigned after about 1 year to accept an appointment to the RMI High Court, the other three judges resigned because of what they interpreted as legislative interference with the independence of the Tribunal. The original chairman resigned in February 1990; another chairman was appointed in April 1990, but resigned 6 months later; and, in June 1990, the remaining original judge resigned. When they left, the work of developing procedures for adjudicating claims slowed until new judges could be appointed.

In August 1990, the RMI Cabinet appointed two new judges, one of whom later became the chairman. By the summer of 1991, the third position had been filled. The current judges recognize the Marshall Islands government's legislative authority to enact legislation that will affect how the Tribunal carries out its mandate. However, in the future, they could object to legislative proposals that infringe on the independence of the Tribunal. In August 1991, rules and procedures for processing claims for damages, resulting from the U.S. nuclear testing program, were approved.

The Medical Claims Compensation Program

Two categories of damage claims can be filed with the Tribunal: (1) medical claims, which link a specific medical condition to radiation exposure, including claims for both living and deceased individuals and (2) property claims for loss or damage of personal property or land due to radioactive contamination, destruction, or dispossession. Beginning with the first chairman, the Tribunal has focused its efforts on resolving medical claims for those who are still living.

In a 1988 report to the RMI legislature, the first chairman reported that the Nuclear Claims Tribunal Act was written so that every damage claim would become a court proceeding requiring proof that radiation exposure caused the claimant's problem and awarding full compensation for successful claims. According to the chairman, operating under such requirements would be time consuming and, in addition, paying full compensation would be impossible because there was a fixed and limited amount of funding available to pay awards.

The chairman sought to make the act "workable" by suggesting an amendment to the act, which provided for the Claims Tribunal to "establish tables and scales of benefits payable as awards for specific injuries and loss of or damage to property to the extent that a fair and equitable distribution may be achieved between claimants." Under such a compensation plan—similar to workman's compensation—if a claimant is diagnosed as having a particular medical condition, the claimant does not have to prove that radiation exposure caused the condition, only that the claimant resided in the Marshall Islands during the testing period. This approach would make claims processing an administrative procedure rather than judicial. The compensation scheme still permitted claimants to litigate claims for personal injuries without waiting for the Tribunal to act administratively on the specific medical condition approved by the Tribunal. In September 1988, the RMI legislature passed an amendment to the Nuclear Claims Tribunal Act adopting the chairman's recommendations.

To develop its medical claims compensation program, the Tribunal examined other programs, including a U.S. program for veterans exposed to nuclear radiation.[6] This program provides automatic compensation for

[6]The Tribunal reviewed, among other things, the Radiation-Exposed Veterans Compensation Act of 1988 (P.L. 100-321), U.S. regulations related to service-connected radiogenic diseases, the treatment of U.S. citizens affected by the U.S. domestic testing program at the Nevada Test Site, and past U.S. actions related to compensation to the Marshall Islands for radiogenic diseases.

former service members who develop 1 of 13 medical conditions presumed caused by exposure to nuclear radiation.

The U.S. list of "presumed" medical conditions was developed in 1988. Additional research has since indicated that other medical conditions are related to radiation exposure. Through consultation with a medical specialist from the National Cancer Institute, the Tribunal added 12 other conditions, making a total of 25 medical conditions that are presumed to result from exposure to nuclear radiation.

According to a judge, the Tribunal used the U.S. payment of $50,000 paid to U.S. citizens for nonrecurrent thyroid cancer caused by exposure to radiation from nuclear weapons tests conducted in the United States as a baseline. This amount was scaled up or down based on how the presumed conditions affected individuals. The Tribunal adopted six levels of compensation ranging from $12,500 to $125,000. Table I.1 shows the conditions[7] and compensation amounts developed by the Tribunal and adopted in August 1991. The Tribunal made its first medical claims awards that same month.

[7]The first 13 conditions are those compensated under the U.S. program.

Table I.1: Medical Conditions Presumed to Result From Exposure to Nuclear Radiation and Amount of Compensation

Medical conditions	Compensation
1. Leukemia (other than chronic lymphocytic leukemia)	$125,000
2. Cancer of the thyroid	
a. Recurrent or requires multiple surgical and or ablation	75,000
b. Nonrecurrent or does not require multiple treatment	50,000
3. Cancer of the breast	
a. Recurrent or requires mastectomy	100,000
b. Not recurrent or requires lumpectomy	75,000
4. Cancer of the pharynx	100,000
5. Cancer of the esophagus	125,000
6. Cancer of the stomach	125,000
7. Cancer of the small intestine	125,000
8. Cancer of the pancreas	125,000
9. Multiple myeloma	125,000
10. Lymphomas (except Hodgkin' disease)	100,000
11. Cancer of the bile ducts	125,000
12. Cancer of the gall bladder	125,000
13. Cancer of the liver (except if cirrhosis or hepatitis B is indicated)	125,000
14. Cancer of the colon (but not cancer of the rectum)	75,000
15. Cancer of the urinary bladder	75,000
16. Tumors of the salivary gland	
a. Malignant	50,000
b. Benign and requiring surgery	37,500
c. Benign and not requiring surgery	12,500
17. Nonmalignant thyroid nodular disease (unless limited to occult nodules)	
a. Requiring total thyroidectomy	50,000
b. Requiring partial thyroidectomy	37,500
c. Not requiring thyroidectomy	12,500
18. Cancer of the ovary	125,000
19. Unexplained hypothyroidism (unless thyroiditis indicated)	37,500
20. Severe growth retardation due to thyroid damage	100,000
21. Unexplained bone marrow failure	125,000
22. Meningioma	100,000
23. Radiation sickness diagnosed between June 30, 1946, and August 18, 1958, inclusive	12,500
24. Beta burns diagnosed between June 30, 1946, and August 18, 1958, inclusive	12,500
25. Severe mental retardation (provided born between May and September 1954, inclusive, and mother was present on Rongelap or Utrik Atolls at any time in March 1954)	100,000

Status of Claims Awards

In March 1992, the Tribunal reported that about 4,600 claimants had submitted claims related to medical or property damage. The Tribunal subdivided these into five groups (1) damage to person, (2) death, (3) damage to or loss of land, (4) damage to or loss of personal property, and (5) other damages. Many of the claimants reported more than one type of damage resulting in about 7,217 claims that must be individually processed. The Tribunal addressed damage to persons or medical claims first. It is beginning to address death claims, that is, claims for a medical condition on behalf of a deceased person. The Tribunal has not yet developed procedures for addressing property claims.

As of March 1992, the Tribunal had processed 2,266 medical claims and had approved 437 of them for 345 individuals, awarding a total of about $14.6 million.[8] The average award was about $33,400 for each claim. The Defender of the Fund had rejected 1,771 claims, and 58 were being held pending the receipt of additional medical information. Medical claims for existing conditions were to be accepted through August 1992. After that date, claimants will generally be required to file a claim within 1 year after a medical condition is diagnosed or within 1 year from the date a previously diagnosed condition is added to the Tribunal's list of presumed conditions. After that date, only claims for conditions not previously diagnosed will be accepted. The Tribunal also plans to hold hearings for claimants who want to provide further support for medical claims that were initially rejected.

The Tribunal has also begun processing medical claims for deceased persons. As of March 1992, the Tribunal had received about 1,100 such claims. Awards will be based on whether the deceased had a medical condition on the list of conditions presumed to have resulted from nuclear radiation exposure. The Defender of the Fund said that some claimants will have difficulty obtaining adequate documentation to substantiate their claims for deceased relatives. Many medical records for Marshall Islanders were destroyed in a hospital fire in 1987. Even if records exist, they may not show that the deceased had one of the presumed illnesses. Furthermore, since autopsies are not routinely performed in the Marshall Islands, a deceased person may have had one of the 25 presumed medical conditions, but it cannot be proved.

[8]These awards were offset by prior payments to the claimants. The awards after offsets total $12.9 million. As of March 1992, $3.2 million had been distributed.

About 2,200 property or land claims had been filed as of March 1992 and more are expected. According to the Tribunal, the RMI Courts will have to rule on land ownership in most cases before the Tribunal can make awards. Several different groups of people often have different, yet coexisting, rights to particular parcels of land. While this is in accordance with Marshall Islands' custom and practice, it poses problems in determining who and how much to compensate for damage caused by the nuclear testing program. Another factor complicating land claims is that market values for land are not available because land sales and leases rarely occur.

In addition, a Tribunal judge said that, without results from an ongoing nationwide radiological survey that will help define the nature and scope of damage to the land, determining individual award amounts and a timetable for addressing individual land claims is not possible. The nationwide survey is measuring radioactivity on all the atolls and islands and will help provide a measure of how much damage was done during the nuclear testing program. The survey is not scheduled to be completed until June 1993.

Some LDA Distribution Plans Have Been Challenged

The section 177 agreement designated the government councils for the four nuclear-affected atolls as LDAs. LDAs are responsible for receiving quarterly disbursements from the trust fund for their respective communities and investing and distributing the funds in accordance with the terms of the section 177 agreement, RMI law, and traditional practice. LDAs are subject to the regulation and oversight of the Nuclear Claims Tribunal. They are required to file distribution plans with the Tribunal, as well as quarterly and annual reports on fund distributions and expenditures. Through the year 2001, the four LDAs will receive about $183 million from the Nuclear Claims Trust Fund.

LDAs have some flexibility in determining how to fashion their own distribution plans, and each has developed its own plan for distributing trust funds it receives. The plans range from paying distributions only to those exposed to radiation or their survivors to complicated formulas that consider factors such as an individual's contribution to the community. Under some formulas, as the family grows so does the amount the family receives. Two of the four distribution plans have been challenged by community members. The Defender of the Fund and the RMI Auditor General have also had concerns over the use of and accounting for some of the LDAs' funds.

Community Members Challenge the Equity of Some Distribution Plans

The distribution plans for Rongelap and Utrik were challenged by community members who were not receiving funds from the LDAs' disbursements. In the Rongelap case, a formal complaint was filed with the Nuclear Claims Tribunal. A special Tribunal ruled that LDAs could limit compensation to individuals who suffered "damage . . . to person" and exclude those whose only claim was based on land rights. The Rongelap LDA subsequently modified the distribution plan to include some individuals with land rights on Rongelap Atoll, but only if they are determined to be "contributing" members of the community. Individuals with land rights who have not contributed to the community are not included as recipients.

Similarly, Utrik community members filed two complaints with the Tribunal charging that the Utrik LDA did not include everyone with land rights in its distribution plan. According to Tribunal documents, these complaints have been settled between the parties. The Utrik LDA has decided, after consultation with the community, to provide some compensation to those with land rights, even though they may not qualify as beneficiaries under Utrik's distribution plan. The LDA set aside $200,000 for these payments but, as of March 1992, had not begun making any disbursements because it had not developed a workable compensation system.

Rongelap LDA Has Been Challenged on Its Use of Funds

Members of the Rongelap community filed a complaint with the Tribunal against their LDA over the validity and intended uses of a $2.5 million loan obtained by assigning future proceeds from the Nuclear Claims Trust Fund. The section 177 agreement allows LDAs to use funds for the community's benefit and does not require that payments be made directly to community members. However, regulations adopted pursuant to the Nuclear Claims Tribunal Act requires that LDAs notify the community 75 days before making an assignment of future funds.

A special Tribunal reviewed the complaint and determined that the assignment of trust funds to secure the loan was invalid because the ordinance authorizing the assignment was improperly adopted by the Rongelap local government council. The special Tribunal also determined that the intended use of loan funds was inconsistent with the section 177 agreement. Specifically, it concluded that an exceptionally large portion of the loan was proposed to be used for council operations and legal and lobbying fees—uses of trust funds that did not appear to be within the scope of the section 177 agreement. The special Tribunal allowed the LDA

to use about $500,000 of the loan funds to pay certain bills and expenses. The remainder of the loan proceeds were ordered to be put in a special account held by Shearson Lehman Brothers and only to be used to retire the debt.

This decision was appealed to the full Tribunal. In early 1992, the Tribunal held that the LDA's assignment of disbursements of trust funds to secure the loan was invalid because the Rongelap LDA had not complied with the 75-day notice requirement. The full Tribunal ordered that the $2.5 million loan not be paid back with trust fund distributions until a valid future assignment of funds is agreed to, which would include a 75-day period of public notice. According to the Defender of the Fund, as of May 1992, the process to make a new assignment had begun and could be completed by July 1992.

In a related matter, an American Express Gold Card was issued to the Rongelap LDA on the enjoined loan funds being held by Shearson Lehman. The card was used by the atoll's Senator to obtain cash advances and purchase clothing items and lottery tickets, totaling $16,294. The Tribunal issued a show cause order that questioned the use of loan proceeds to cover charges made on the card and which required the Rongelap LDA to provide its justification, if any, for use of loan proceeds in this manner. Although, as of July 14, 1992, a formal ruling had not been issued by the Tribunal on this matter, according to the Senator's affidavit, he had repaid $4,969 of the disputed charges, and $3,063 had been repaid by other community members.

Auditor General Reports Highlight Accounting Problems at Two LDAs

In 1989, the RMI Auditor General reported that the Enewetak LDA had not established a distribution plan and that early distributions of its funds were made in cash, without adequate records of who received the funds. The Enewetak LDA was required to hire a qualified accountant to maintain its records.

The Auditor General also found that the Utrik LDA had no system to account for its disbursements. In July 1989, a Tribunal order suspended the Utrik LDA from making further distributions and charged the Marshall Islands Social Security Office with distribution responsibilities. The Social Security Office made distributions following an atoll approved distribution plan, and continued making the distributions until the Utrik government council hired an accountant and resumed making distributions in July 1991.

The Trust Fund Should Be Adequate to Meet the Requirements of the Section 177 Agreement

For the trust fund to meet the required disbursements and retain the original $150 million in principal, a 12.5-percent annual return would have been required.[1] According to Shearson Lehman Brothers, RMI's investment consultant, the trust fund has earned an average annual return of 10.66 percent since inception through December 31, 1991.[2] The Shearson Lehman consultant also said that a realistic estimate of the trust fund's average annual earnings rate until the year 2001 would be between 8 percent to 10 percent.

We estimate that an 8.07-percent average annual return on the trust fund is needed to make all required payments through the year 2001. This return would leave a near-zero principal balance. If the trust fund continues to earn at a rate of 10.66 percent, it will be able to make all required payments and have about $33.2 million left in the year 2001.

Projected Trust Fund Balance in the Year 2001

Because earnings have been lower than total payments, the trust fund's principal has been drawn on to make disbursements. As of December 31, 1991, the trust fund's market value was about $138 million. Its market value would be even lower if the full amount of required disbursements had been made according to schedule. However, because the Nuclear Claims Tribunal did not make any claim award until nearly 5 years after the trust fund was established, most of the funds allotted for awards during this time is still in the trust fund. As of March 1992, the Tribunal had distributed $3.2 million of the approximately $16.5 million available to it. The difference—$13.3 million—can be used by the Tribunal to pay claim awards at any time. However, to earn more interest income, the RMI government has discouraged the Tribunal from drawing on the allotted funds until they are needed.

Figure II.1 shows our estimate of what the trust fund could look like in the year 2001 at certain average annual earnings rates.[3] At 10 percent, the upper end of the Shearson Lehman estimate, $23.8 million would remain

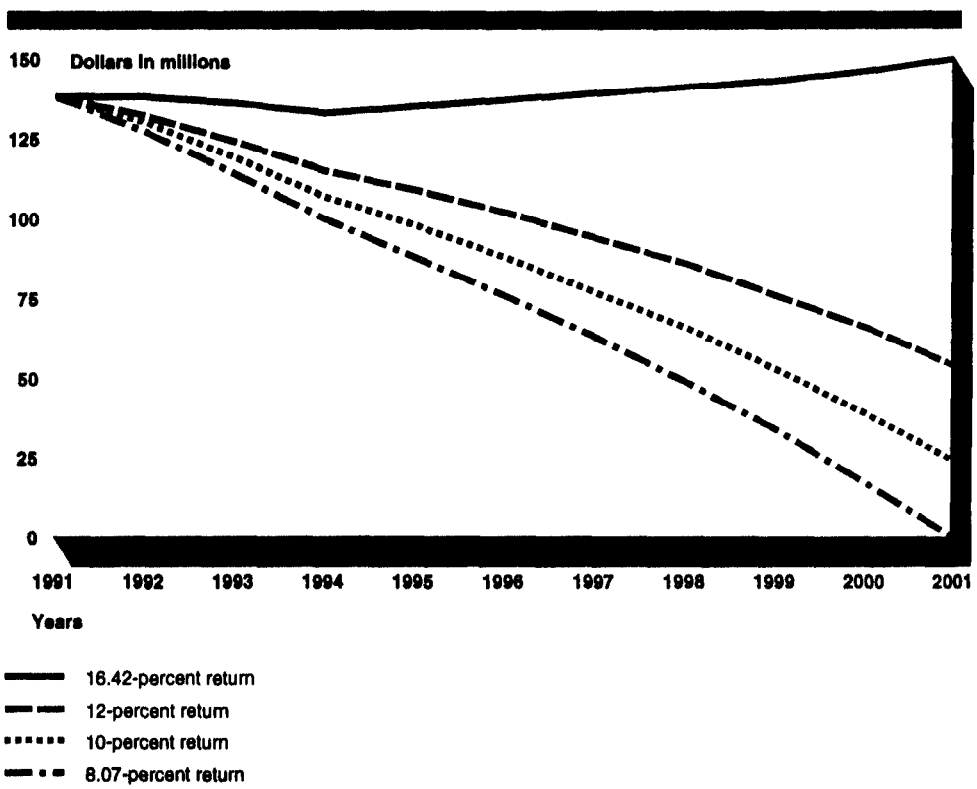
[1]We estimated that a 12.46-percent annual return would have been necessary from the start of the trust fund to achieve average annual earnings of about $18 million. This takes into account the disbursement schedule, which requires certain payments to be made quarterly, but does not include management fees.

[2]After estimated management and custodial fees have been deducted, the average return is about 10.2 percent a year.

[3]Our trust fund projections include disbursements for estimated management fees, the medical and radiological surveys, and the full amount allowed for claims awards.

after all required payments are made. At 12 percent, the rate originally expected for the trust fund, $54.5 million would remain in the trust fund. Average annual earnings of 16.42 percent would be required for the trust fund to be worth $150 million in the year 2001.

Figure II.1: Projected Value of the Nuclear Claims Trust Fund at Various Average Rates of Return



Cognizant U.S. and RMI government and investment firm officials said that a 12 percent or higher return was considered achievable in the early 1980s, when negotiations for the agreement were taking place. If the RMI government had been able to invest in no-risk, long-term U.S. government bonds in June 1982, immediately after an early version of the Compact was signed, the investment could have yielded 13.57-percent annually on average through 2001. However, the funds were not provided by the United States until 1986, when the average yield on long-term bonds had declined to 6.67-percent annually. Although the earnings potential was substantially lower in 1986 than during the time of negotiations, changing the section 177 agreement distribution requirements would have required renegotiation and approval by the Congress.

No Requirement for the Trust Fund's Principal to Remain

The section 177 agreement does not require any of the trust fund to survive beyond the 15-year term of required payments. The agreement explicitly provides for drawing on the trust fund's principal if annual proceeds are not sufficient to fulfill payment requirements. According to a "changed circumstances" provision in the 177 agreement, the RMI government may request the United States to provide more funding if personal injuries or property damage

- arise or are discovered after October 21, 1986, the effective date of the agreement;
- could not reasonably have been identified at that date; and
- render the provisions of the agreement "manifestly inadequate."

Even under these circumstances, however, the agreement does not require that the United States provide additional funding.

Awards by the Tribunal Could Remain Partly Unpaid in the Year 2001

The medical claims compensation plan adopted by the Tribunal could result in awards greater than the $45.75 million[4] provided in the section 177 agreement to pay both medical and property claims. As approved in the RMI law, the Tribunal is making full-compensation awards based on the list of medical conditions presumed to be caused by exposure to radiation from the U.S. nuclear testing program. (See table I.1.) Therefore, the total amount awarded depends on the number of successful claims and the award amount designated for each type of claim—not on the amount of funding available.

The section 177 agreement provides that beginning on the 15th anniversary of the agreement (October 2001), at least 75 percent of the annual proceeds of the trust fund shall be available for payment of awards by the Tribunal, if needed.[5] However, if the trust fund is depleted by the year 2001—which is possible if average earnings are less than 8.07 percent—awards will not be paid in full. The section 177 agreement and the RMI law only require that the Tribunal make prorated payments of awards based on the annual funds available. For its first medical claims awards, the Tribunal made an initial payment of 20 percent of the total

[4]The $45.75 million consists of 15 annual disbursements from the Nuclear Claims Trust Fund—3 years at up to $2.25 million and 12 years at up to $3.25 million.

[5]Currently, 18 percent of $3.25 million of the annual disbursements is available for claims awards.

award to each claimant. It plans to prorate future annual payments based on the total number of successful claims and the availability of funds.

The Tribunal does not know how many total awards it will make or their value. One Tribunal officer estimated that a total of 500 medical and death claims would eventually be approved. If these continue to average about $33,400 per award, $29 million would be available for property claims and future medical claims.

However, an actuary hired by the Tribunal made a preliminary projection that, based on U.S. rates of incidence for most of the 25 presumed medical conditions,[6] nearly 2,300 medical claims would eventually be approved for a total of over $153 million—more than three times the amount of funds available for medical and property claims. The actuary acknowledges that (1) the projections do not account for individuals not being able to provide the necessary proof for a successful claim (especially for deceased persons) and (2) the incidence rates he used may be different than what has been experienced in the Marshall Islands.

The Tribunal's actual experience suggests a lower estimate may be more realistic. As of June 11, 1992, the Tribunal had made awards to 379 claimants, but reviews of medical records for deceased persons and development of a property claims compensation plan had yet to be completed. The chairman of the Tribunal said that personal injury and property claims together are likely to exceed the $45.75 million available.

Atoll Trust Funds Could Be Worth Over $129 Million in the Year 2001

Each of the four nuclear-affected atolls have individual trust funds, separate from the Nuclear Claims Trust Fund, that could be worth a combined total of over $129 million in the year 2001. The amount depends on how much the atolls withdraw from their trusts and the investment returns achieved.

Like the Nuclear Claims Trust Fund, LDAs are required to appoint a U.S. trustee and invest only in bonds, notes, and other financial instruments of U.S. nationality. As noted in appendix I, LDAs are required to invest 52 percent of their receipts from the Nuclear Claims Trust Fund in their separate trust funds. The 52-percent investment requirement results in

[6]Certain adjustments were made for female medical conditions and some others that were appearing at obviously higher rates, such as thyroid cancer and beta burns. The actuary then applied these incidence rates to the population of the Marshall Islands affected by the testing program.

regular quarterly additions of about $1.6 million to the trusts. As of December 31, 1991, the atoll trust funds were worth a combined total of $39 million.

The atoll communities have only limited access to the trust funds, ensuring that the bulk of the funds will survive as a perpetual source of income and continue to increase. The section 177 agreement limits withdrawals before the year 2001 to 35 percent of the annual earnings. Three percent of the total principal can be withdrawn to prevent hardship to the community after a natural disaster or similar circumstance and then just once every 3 years.

Representatives of the four atolls told us they have withdrawn about 35 percent of their earnings to supplement their disbursements to their respective communities. In addition, three of the atolls—Bikini, Rongelap, and Utrik—have withdrawn from the principal amount on at least one occasion. Most recently, Bikini Atoll withdrew funds to repair damage after a typhoon hit the Marshall Islands in January 1992. Rongelap Atoll withdrew 3 percent of its funds in August 1990 to finance a community-wide meeting. The Auditor General has reported that both Rongelap and Utrik had withdrawn $30,000 or less from their trust funds in earlier years. However, the atolls redeposited those funds at the urging of the Auditor General and the Defender of the Fund.

A Shearson Lehman consultant, who advises three of the four atolls on trust fund investments, said the atolls could expect the same average earnings on their trust funds as the Nuclear Claims Trust Fund—from 8 percent to 10 percent a year—between now and the year 2001. If the trust funds earn 8-percent annually and the maximum withdrawals are taken, that is, regular withdrawals of 35 percent of earnings and one withdrawal of 3 percent of the principal every 3 years, the four trust funds could be worth $129 million. With earnings of 10-percent annually and no withdrawals between now and the year 2001, the funds could be worth $197 million.

According to the RMI Under Secretary for Compact Implementation, a more likely scenario is that the atolls will continue to withdraw 35 percent of earnings but not draw on the principal. Assuming these conditions, table II.1 shows our projections of the atoll trust funds' value in the year 2001 at 8-percent and 10-percent return rates.

Table II.1: Projected Value of Atoll Trust Funds in the Year 2001 at 8-Percent and 10-Percent Return Rates

(Dollars in millions)

Atoll	8 percent	10 percent
Bikini	$56.6	$62.0
Enewetak	37.5	41.1
Rongelap	28.2	30.9
Utrik	17.7	19.4
Total	**$140.0**	**$153.4**

The Shearson Lehman consultant said LDAs can use bolder investment strategies than the Nuclear Claims Trust Fund because they have no regular payout requirements that necessitate an assured income. Greater investment risks might lead to higher returns over time. In the past, however, each of the atoll trust funds have had different average earnings rates. Bikini has earned on average 9.3-percent annually since mid-1989; Enewetak, 8.4 percent since early 1987; Rongelap, 12.3 percent since early 1988; and Utrik, 11.7 percent since early 1987.[7]

Beginning in the year 2002, the atolls will be allowed to increase their trust fund withdrawals to 70 percent of earnings. Initially, these could amount to between $7.2 million to $13.8 million a year, based on the projected values of $129 million and $197 million, respectively. Because at least 30 percent of the earnings must be reinvested, the amount available for withdrawals will continue to increase if the principal is not drawn down. Essentially, these withdrawals will replace the current annual total payments of $12.25 million to the atolls from the Nuclear Claims Trust Fund.

[7]The time periods vary because several of the atolls have changed fund managers. The present fund managers only calculated earnings rates for the time that they have managed the trust funds.

Status of Related Assistance Programs to the Marshall Islands

The U.S. legislation approving the Compact of Free Association and the section 177 agreement provided for or directed the continuation of several programs to assist the communities on the four atolls most affected by the nuclear testing program. The Departments of Agriculture, Energy, and the Interior have programs to provide food assistance and medical and environmental monitoring. In fiscal year 1992, these programs totaled about $6.7 million. In addition, the Nuclear Claims Trust Fund is funding a health care program ($2 million a year) and the two scientific surveys to help determine the extent of damage and the health risks associated with the lingering effects of radiation (totaling $3 million). Following is a description of each major on-going program or survey and its current status.

Department of Agriculture Food Assistance Program

Before 1986, the Department of Agriculture provided food assistance to all the islands in the Trust Territory. With approval of the Compact of Free Association, the Department of Agriculture was directed to continue, without reimbursement, food support to Bikini and Enewetak for a period of 5 years. The program was extended to the Rongelap and Utrik communities in later legislation. The program was extended for 5 more years beginning in fiscal year 1992.[1]

The food program was initiated to supplement the food needs of the people displaced from Bikini, Enewetak, Rongelap, and Utrik. Bikini and Rongelap Atolls are still not resettled. RMI government nutritionists select the food stuffs from those Agriculture has available. Agriculture ships the food to the Marshall Islands' capital city—Majuro, and the RMI government, in turn, ships the food to the four atolls.

These communities live on small islands where the food crops are reportedly too sparse for the current number of residents. Although the Enewetak Atoll has been resettled and replanted under a separate program, food-bearing plants are not yet adequate to support the community, according to the Enewetak government council. Similarly, while Utrik was resettled within a year of being evacuated, it is still receiving supplemental foods because the locally grown foods are not considered adequate by the government council.

[1]Public Laws 99-239, 100-446, and 102-247 established or amended the program.

Since 1988, the program has totaled $2.1 million, with $418,000 being provided in fiscal year 1992. This level of funding currently provides food assistance for 2,875 members of the four communities.

Department of the Interior Enewetak Support Program

The natural vegetation of Enewetak Atoll was largely destroyed during World War II and during subsequent nuclear testing and cleanup operations by the United States. When Enewetak was resettled following the cleanup there were insufficient food-bearing trees and crops. In 1980, the Enewetak Support Program was implemented to provide supplemental foods for the community, replant the vegetation of the inhabited islands, provide agriculture maintenance training, and transport the food purchases.

From its beginning, this program was intended to be an interim program. It was designed to provide the population with adequate food until the replanted trees and crops reached maturity and began bearing fruit. According to the Department of the Interior, the vegetation has been replanted to prenuclear testing period levels (which supported a population of about 145 people) and sufficient quantities of locally grown food exist. The main thrust of the program now is crop maintenance.

For fiscal year 1992, Interior recommended that U.S. funding for the Enewetak Support Program be terminated. However, the Enewetak government council maintained that the quantity of new crops was less than anticipated and could not support the current population of about 795. The community asked that the program be continued until sufficient food can be grown.

For fiscal year 1992, the Congress provided the Interior Department with $1.1 million to allow the Enewetak food and agricultural support program to continue, although control of the program was to be turned over to the Enewetak government council. From fiscal year 1980 through fiscal year 1991, the program cost $14.6 million.

Department of Energy Monitoring Programs

Within days after the "Bravo" test in March 1954, the Atomic Energy Commission[2] initiated a medical monitoring program for the people directly exposed to the radioactive fallout on Rongelap and Utrik atolls and an environmental evaluation program of Rongelap. The medical monitoring

[2]A predecessor agency to the Department of Energy.

program has continued without interruption, while the environmental program operated on a sporadic basis until about 1975, when it was formally tasked with finding methods to mitigate the effects of radiation from the Bravo test. Logistical support for both programs, that is, a vessel, field station support, and transportation of equipment, supplies, and samples, is provided through the Department of Energy's Pacific Area Support Office, which was provided about $1.8 million for these efforts in fiscal year 1992.

Medical and Bioassay Programs

Soon after the Bravo test, U.S. health care professionals from the Navy and the Atomic Energy Commission were sent to the Marshall Islands to begin medical monitoring of the Rongelap and Utrik people exposed to radiation. This medical monitoring has continued without interruption. In 1975, the program was formalized and assigned to the Brookhaven National Laboratory.

Brookhaven National Laboratory's doctors make two visits a year to the Marshall Islands to provide medical surveillance and treatment for the exposed population. These people, which now number 160 out of the original 239, are considered at increased risk for malignant diseases as late complications of radiation exposure. Medical care for other inhabitants is provided on a humanitarian basis, as resources permit.

In addition to providing basic medical care, the laboratory conducts a bioassay program. This program includes taking whole body counts of radioactivity in the organs and tissues of the exposed population, a comparison group, and others who wish to participate. Urine bioassays are also conducted to determine the presence of radioactive substances.

Funding for this program is provided through Department of Energy appropriations. Department of Energy records showing cumulative costs were not readily available. However, since fiscal year 1988, about $6.7 million has been expended on the program. In fiscal year 1992, about $1.6 million was appropriated.

Environmental Evaluation Program

In March 1954, the University of Washington, on contract with the Atomic Energy Commission, began monitoring radioactivity levels on Rongelap. The other three atolls—Bikini, Enewetak, and Utrik—were also surveyed and monitoring continued on a sporadic basis until 1972 when the Lawrence Livermore Laboratory assumed the monitoring and survey

functions. In 1975, a formal program was approved by the Atomic Energy Commission to determine the levels of residual radioactivity on the four affected atolls. This new emphasis marked the beginning of the Livermore program as it exists today.

About 6 years ago, the program also began exploring ways to reduce the absorption of radioactive substances in plants and local foods. Scientists have been investigating the effects of putting compounds on contaminated ground to block plants from absorbing radioactive elements. The Energy Department says work in this area is important because the atolls will eventually be resettled and the primary risk to radioactivity will be through the locally grown foods. The laboratory is also examining the effects of rain and other factors in dissipating radioactivity.

Department of Energy records showing cumulative program costs were not readily available. However, since fiscal year 1988, about $5.8 million has been expended on the program. In fiscal year 1992, the program was funded at $1.6 million.

The Four Atoll Health Care Program

In accordance with section 103(j) of the Compact of Free Association Act, the section 177 agreement provided funding for a health care program for the citizens of the four atolls—Bikini, Enewetak, Rongelap, and Utrik—most affected by nuclear radiation. Originally begun in 1983 with a one-time appropriation of $4 million, the program was established to provide "an integrated, comprehensive, health care program including primary, secondary, and tertiary care" to address the health needs of individuals exposed to radiation from the nuclear testing program.

The number of enrollees in the Four Atoll Health Care Program has increased significantly and is stressing the program's resources. When the section 177 agreement was approved, the health care contractor estimated that about 3,000 individuals would be served. However, each atoll's government council is allowed to determine who is eligible for the program and thousands of people have been added. As of September 1991, the number of eligible enrollees approved by the local governments totaled 9,544. (See table III.1.)

Table III.1: Four Atoll Health Care Program Enrollees

Atoll	Enrollees
Rongelap	3,111
Utrik	3,405
Enewetak	1,245
Bikini	1,783
Total	**9,544**

Funding for the health care program comes from the Nuclear Claims Trust Fund and is fixed at $2 million a year. Because of the large number of participants, the program has run short of funds for patients needing specialized medical services not available in the Marshall Islands. Patients needing such assistance are generally referred to hospitals in Hawaii, with the travel and health care expenses paid for by the program. In recent years, these services have been suspended for up to 6 months at a time because of the lack of funds.

In addition, the Nuclear Claims Tribunal is authorizing successful claimants to join the program if they were not already members. So far the Tribunal has added about 50 to 60 new enrollees who, by definition, have already been diagnosed as having one of the 25 illnesses presumed to have been caused by radiation. These individuals will probably require specialized medical services not locally available and will further burden the health care program.

A national health care program designed to provide medical care to all Marshall Islands residents was initiated in October 1991 and may affect the Four Atoll Health Care Program. This program is funded through a tax on workers' income and an employer contribution. Enrollees in the Four Atoll Health Care Program are also eligible for services under the new program. While officials from the four atolls want the two programs to remain separate, the RMI Minister of Health Services would prefer integrating the Four Atoll Program with the national plan. This decision remains to be made; however, the two programs will remain separate until the current contract with the health care provider runs out at the end of fiscal year 1992.

A National Medical Survey

A National Medical Survey Program was established under the section 177 agreement to assess and diagnose the health and medical condition of Marshall Islands citizens who filed medical claims with the Tribunal. The survey's diagnosticians work closely with the Public Advocate, who refers claimants for examination and their reports will provide crucial evidence in the medical claims adjudication process.

The survey's diagnosticians had evaluated 1,731 claimants as of September 1991. By the time the survey concludes, every inhabited atoll in the Marshall Islands will have been visited and over 2,500 patients will have been evaluated. The program has been active since April 1990 and was originally planned to be completed by the end of 1992. However, because of the large number of claimants and the difficulty in traveling to some atolls, the program may be extended to the summer of 1993.

Originally, the Tribunal chairman projected that the medical survey would cost approximately $400,000. However, because the program was extended to 1993, costs are now expected to total about $1 million. In March 1992, the Tribunal took direct responsibility for the program and will fund its future expenses out of funds for claims awards.

A Nationwide Radiological Survey

The purpose of the Marshall Islands Nationwide Radiological Survey, as provided for in the section 177 agreement, is to prepare a radiological profile of the major atolls in the Marshall Islands. The scope of the survey was originally to determine past and present levels of radiation throughout the nation by collecting and analyzing soil and vegetation samples from the major atolls. A sampling plan was developed and according to the RMI Under Secretary for Compact Implementation, sampling of southern atolls has been completed. Two factors could affect the survey's cost and timing. One is the high costs of transporting teams of scientists and their equipment to the atolls where samples need to be collected. The other is the added requirement for a more detailed study of the Rongelap atoll, which will address whether the atoll is inhabitable.

Transportation costs for the survey will be high because some of the atolls are hundreds of miles apart and are not served by regular public transportation. Initially, the RMI government made its patrol vessels available to transport the scientists and their equipment; however, because of the small size of the vessels, they could only carry enough equipment to support a trip of about 8-days duration—about the amount of time needed to sample one small atoll. Some of the trips to the larger atolls may take

several weeks. As of April 1992, an adequately sized vessel had not been located and the scientific team was leasing local vessels as they were needed.

The Rongelap government council lobbied the U.S. Congress to fund a separate radiological study of its atoll that would answer the question about habitability of Rongelap. Although the Nationwide Radiological Survey originally included an evaluation of Rongelap, the focus of this study was aimed at providing the Nuclear Claims Tribunal data they needed to evaluate land damage claims. The Rongelap government council claimed the nationwide study was not comprehensive enough to assure the community that the atoll was safe for resettlement. The survey's budget had not anticipated the type of study the Rongelap community wanted.

Congress appropriated additional funds for a Rongelap radiological study and its resettlement in fiscal year 1992. But, rather than funding two separate studies of the atoll, the nationwide survey's resident scientist agreed to collect more samples of the Rongelap atoll's soil and vegetation than the nationwide study called for. The data obtained from these samples will serve both the Tribunal's needs and address the Rongelap community's questions about habitability of their atoll. In November 1991, the Congress appropriated $1,975,000 for resettlement of the Rongelap atoll and earmarked an additional $987,400 for the expanded Nationwide Radiological Survey.

Objectives, Scope, and Methodology

Our objectives in reviewing the status of the Marshall Islands' Nuclear Claims Trust Fund were to determine whether the fund (1) was being distributed as required and (2) is adequate to meet distribution requirements. We also provide information on the status of several related assistance programs and scientific surveys.

To accomplish our objectives, we reviewed reports and documentation related to the Marshall Islands Nuclear Claims Trust Fund and related programs and interviewed cognizant officials at the Departments of Agriculture, Defense, Energy, the Interior, and State in Washington, D.C.; former U.S. negotiators for the Compact of Free Association; and representatives of Shearson Lehman Brothers, the investment consulting firm that advises the RMI government on performance of the Nuclear Claims Trust Fund.

We conducted fieldwork in the Marshall Islands and Honolulu, Hawaii, in September and October 1991. In the Marshall Islands, we reviewed program documents and reports, records maintained by LDAs, Claims Tribunal files and correspondence, and audit reports by the RMI Auditor General. We also interviewed officials from the RMI Ministries of Foreign Affairs, Health Services, and Social Services; the RMI Auditor General; former RMI negotiators for the Compact of Free Association; officials and judges of the Nuclear Claims Tribunal; LDA officials and legislators from the four nuclear-affected atolls; and contractor personnel for the Four Atoll Health Care Program. In Hawaii, we interviewed Department of Energy officials and a former member of the Nuclear Claims Tribunal.

To determine whether trust fund earnings are adequate to meet section 177 distribution requirements, we projected the trust fund's balance through October 2001 based on (1) its market value as of December 31, 1991, as reported by Shearson Lehman; (2) required quarterly disbursements; (3) estimates of administrative fees for investing and managing the trust fund; and (4) various annual earnings rates. Projections for the future balances of the four atoll trust funds were performed in a similar way, including regular quarterly additions to the trust funds as prescribed in the minutes to the section 177 agreement. We did not verify the accuracy of Shearson Lehman's financial data.

We conducted our review between March 1991 and July 1992 in accordance with generally accepted government auditing standards.

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

July 7, 1992

Mr. Frank C. Conahan
Assistant Comptroller General
General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

Thank you for the opportunity to comment on your draft report entitled Marshall Islands: Status of the Nuclear Claims Trust Fund (GAO code 472250), transmitted by your letter of June 5, 1992.

The draft report reviews the operation of the Marshall Islands' Nuclear Claims (Section 177) Trust Fund since its inception in November 1986. The Department found the content of this report to be both informative and accurate in reviewing the history of a very complex legal arrangement involving multi-level units of the Marshall Islands' government in the administration of these trust funds. However, there are some minor inaccuracies, therefore we recommend the following revisions to the draft report.

See comment 1.

It is the Department's view that the key to the Section 177 agreement is the espousal provision, Article X, Section 1, which constituted a full settlement of all claims, past, present and future, resulting from the nuclear testing program of the United States. Rather than the United States simply accepting responsibility as suggested by the opening sentence of Appendix I, the negotiators representing the United States and the Marshall Islands determined that a negotiated political settlement, rather than continued litigation, provided the best means for the United States to fulfill its obligation to compensate those affected by the testing program.

Now on p. 10.

Therefore, the Department recommends revising the opening paragraph of Appendix I (Page 8 of draft) to read:

> Pursuant to section 177 of the Compact of Free Association, the United States and the Republic of the Marshall Islands (RMI) employed the internationally recognized procedure of espousal of claims to address complex political and legal concerns associated with compensating RMI citizens for loss or damage to person or property resulting from the U.S. nuclear testing program.

The United States provided $150 million for the establishment of the Nuclear Claims Trust Funds as full settlement of all past, present and future claims against the United States. The Marshall Islands Nuclear Claims Tribunal was established with funding and authority to adjudicate and pay claims not otherwise compensated under the provisions of the section 177 agreement. The agreement also required the termination of any related legal proceedings in U.S. and RMI courts.

Now on p. 18.

See comment 2.

On page 17, the draft states the Nuclear Claims Tribunal "...used the U.S. payment of $50,000 for nonrecurrent thyroid cancer as a baseline..." for determining the level of compensation to be provided under section 177 nuclear claims program. However, under Public Law 95-134, the Trust Territory government had previously provided a payment of up to $25,000 for a radiation-related malignancy. To avoid confusion, this draft should clarify the identity of the source of the $50,000 figure cited. We have reason to believe the $50,000 is based on payments by the U.S. Veterans Administration.

Now on p. 33.

See comment 3.

On page 42, the draft states "[a]bout 6 years ago, the program also began exploring ways to reduce the absorption of radioactive substances in plants and local foods." However, documentation in our files (Report of Bikini Atoll Rehabilitation Committee - November 23, 1983) indicates that such studies were underway in 1982 and emphasized "field trials should be run to determine their feasibility or limitations before deciding on the design of the cleanup program." These field trials began in 1984. Therefore, we recommend changing the figure 6 to 10.

Now on p. 36.

See comment 4.

On Page 49 of the draft, we recommend revising the last sentence to read: "In October 1991, the Congress appropriated $1,975,000 to establish the Rongelap Resettlement Trust Fund and earmarked $987,400 of OTIA technical assistance funds for the Rongelap portion of the expanded nationwide Radiological Survey."

We feel the documentation contained in your report will be a useful historical resource to those officials in the governments of the United States and the Marshall Islands charged with oversight and the administration of these funds.

Sincerely,

Stella Guerra
Assistant Secretary
Territorial and International Affairs

The following are GAO's comments on the Department of the Interior's letter dated July 7, 1992.

1. This matter is discussed in appendix I. We agree that the espousal provision allows the section 177 agreement funding ($150 million) to constitute full settlement of all claims, and that legal proceedings in the courts of the Marshall Islands against the United States would terminate. However, another clause in the section 177 agreement allows for the Marshal Islands government to request additional funding from the Congress "if loss or damage to property and person of the citizens of the Marshall Islands . . . is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement." This clause does not require the United States to authorize and appropriate additional funds.

2. Clarification of this matter was added in the final report.

3. According to the Director, Office of Health Physics and Industrial Hygiene, Department of Energy, the Lawrence Livermore Laboratory program to investigate ways to reduce the absorption of radioactive substances in plants and local foods began 6 years ago. Earlier work may have taken place on Bikini Atoll; however, not as a separately funded program.

4. Suggested change was made in the final report.

Comments From the Department of State

United States Department of State

Washington, D.C. 20520

30 June 1992

TO: Eileen L. Gower
GAO Liaison
Room 7701, SA-15
FAX No. (703) 875-4802

Jerry Slaughter
GAO
FAX No. (703) 235-3378

FROM: William H. Barkell WHB
EAP/FAS
Department of State
FAX No. (202) 647-0118

SUBJECT: GAO DRAFT REPORT: "Marshall Islands: Status of the Nuclear Claims Trust Fund," GAO/NSIAD-92-231, GAO Job Code 472250

We have reviewed the subject report. It appears to be factually accurate, and it comes to the correct (in our view) conclusion that there is enough money to make the payments required by Section 177 of the Compact of Free Association.

Comments From the Department of Agriculture

United States Department of Agriculture

Food and Nutrition Service

3101 Park Center Drive
Alexandria, VA 22302

JUL 07 1992

SUBJECT: U.S. General Accounting Office Draft Report NSAID-92-231, "Marshall Islands: Status of the Nuclear Claims Trust Fund"

TO: Frank C. Conahan
Assistant Comptroller General
National Security and
International Affairs Division

The Food and Nutrition Service (FNS) has been designated as the lead agency in the Department of Agriculture for the coordination and preparation of comments pertaining to the above referenced draft audit. We have received no comments from any of the other agencies and an internal review of the audit within FNS has yielded a similar response.

Thank you for the opportunity to review and comment on the draft audit.

for Betty Jo Nelsen
Administrator

Comments From the Republic of the Marshall Islands Ministry of Foreign Affairs

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

MINISTRY OF FOREIGN AFFAIRS
REPUBLIC OF THE MARSHALL ISLANDS
MAJURO, MARSHALL ISLANDS 96960

June 30, 1992

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and International Affairs Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Conahan:

I am writing in response to your letter of June 5 requesting review comments on the draft report entitled Marshall Islands: Status of the Nuclear Claims Trust Fund (GAO code 472250).

There are several topics in the report for which I would recommend elaboration or clarification. These are described below.

Scientific Projects

Now on pp. 2, 35, and 36. See comment 1.

References are made on pages 3 and 37 of the draft report to "two scientific surveys" that have been undertaken by the Government of the Republic of the Marshall Islands (RMI) utilizing a portion of $3.0 million made available pursuant to Article II, Section 1(e) of the Section 177 Agreement "for the purpose of conducting medical surveillance and radiological monitoring activities." The "two scientific surveys" addressed by the draft report are described in Appendix III: one of the projects has consisted of confirmatory diagnostic physical examinations of individuals who have submitted claims of physical injury to the Nuclear Claims Tribunal; the second project has been a survey of radiological conditions throughout the Marshall Islands.

In addition to these two major projects, it should be pointed out that other important scientific work was funded with the Article II, Section 1(e) moneys. The foremost of these projects was the Rongelap Reassessment Project undertaken in accordance with Title I, Section 103(i) of the Compact of Free Association Act of 1985 (U.S. Public Law 99-239). Because of the strong interest of the U.S. Congress in evaluating the habitability of Rongelap Atoll, the RMI Government initiated work on this project soon after the Compact of Free Association came into effect. The report of the Rongelap Reassessment Project was presented to the U.S. Congress in July 1988. The recommendations of this report

telephone 3181 telex: 0927 FRN AFS fax: 692 3685 & 692 3649

Now on p. 18.

See p. 17.

See comment 2.

served as the basis for the Rongelap Resettlement Project that was established by the U.S. Congress in U.S. Public Law 102-154.

At the request of the Nuclear Claims Tribunal, the Article II, Section 1(e) moneys also financed several smaller scientific and medical projects, including the consultation with the epidemiologist from the National Cancer Institute described on page 17 of the draft report.

Presumed Compensable Medical Conditions

On page 17 the draft report erroneously credits the first Chairman of the Nuclear Claims Tribunal with originating the conceptual framework by which Marshallese claimants presenting the Tribunal with evidence of certain medical conditions could be awarded compensation without the complication of a court proceeding. It is important to note that this procedure had been incorporated from the outset in the legislation establishing the Nuclear Claims Tribunal, many months before the selection of Tribunal officers and personnel. The "Marshall Islands Nuclear Claims Tribunal Act 1987" (Public Law 1987-24), passed by the Nitijela on September 27, 1987, made the following provisions for personal injury compensation tables:

(i) In order to facilitate efficient and uniform payments of compensation, the Tribunal shall issue regulations establishing:

(A) A list of medical conditions which are irrebuttably presumed to be the result of the Nuclear Testing Program;

(B) The total amount of compensation due [to a]n individual upon proof of the existence of a listed medical condition, determined by relevant factors including age; and

(C) The simplest and least expensive method of adequately proving the existence of a listed medical condition.

(ii) To aid in determining the list of medical conditions referred to in paragraph (A), above, the Tribunal shall conduct public hearings and solicit the views of the people and the elected leaders of the Marshall Islands. The said list shall not become effective until upon approval by the Cabinet.

(iii) The list shall be reconsidered in light of decisions made pursuant to Paragraph (b), below [on the subject of "Medical conditions not listed"], and other relevant data, at least once per year.

Utrik Distributions

Now on p. 23.

The paragraph at the top of page 26 states that, in July 1989, a Tribunal order suspended the Utrik Local Distribution Authority from making further distributions and that Utrik has since hired an accountant and resumed making distributions in July 1991. In order that a reader of the report not be left with the mistaken impression that the quarterly disbursements to Utrik were discontinued during this two year period, it should be pointed out that, while the Utrik Local Distribution Authority was developing its administrative capabilities, distributions to members of the Utrik community were administered by the RMI Social Security administration. The quarterly disbursements for Utrik were deposited in a bank account under the control of the Social Security administration and distributed to eligible beneficiaries in accordance with the distribution schedule developed by the Utrik Local Government Council in its capacity as the Utrik Local Distribution Authority.

Four Atoll Health Care Program

Now on p. 33.

I would offer several corrections of the section of the draft report, beginning on page 43, that discusses the Four Atoll Health Care Program.

The first sentence of the section mistakenly asserts that the perpetuation of this program was mandated by the Section 177 Agreement. The legislative record will show that the U.S. Congress made provision for the continuation of the program a year-and-a-half after the Section 177 Agreement was concluded. The fifteen-year continuation was incorporated by the U.S. Congress as Title I, Section 103(j) of the Compact of Free Association Act of 1985.

It should be emphasized that the magnitude of the total enrollment in the Four Atoll Health Care Program was a legacy of the original program administered by the U.S. Department of the Interior. It was the U.S. Department of the Interior that originally decided to allow each of the four beneficiary communities to determine its own criteria for eligibility in the program. As a result, a precedent was established for providing comprehensive health care to the four communities with no direct control of the enrollment of individuals into the program. By

the time this medical program was conveyed to the RMI Government, it had already been established as a provider of extensive medical services to a large number of people.

See comment 3.

A serious omission of the draft report is its failure to describe the extent of the Four Atoll Health Care Program before it was taken over by the RMI Government. It is especially misleading to state without elaboration that, "[w]hen the section 177 agreement was approved, the health care contractor estimated that about 3,000 individuals would be served." Without further explanation, this statement creates the mistaken impression that a large expansion of the program was allowed to take place under the sponsorship of the RMI Government. However, by the time the RMI Government assumed administration of the program in early 1987, the program was already serving in excess of 7,000 enrollees. (A December 8, 1986, document presented to the RMI Government by the administrators of the Interior-contracted Four Atoll Health Care Program draws attention to "a 150% increase in the service population above original estimates" and an enrollment of "over 7,000 eligible patients".) It would be a mistake to equate the contractor's early estimate of the number of potential beneficiaries with the number of people it actually permitted to enroll in the program.

See comment 4.

Finally, the report should make it clear that the overseas medical referrals by the RMI-administered successor to the Four Atoll Health Care Program have been made to medical providers in Hawaii, and not to more distant hospitals. To clarify this point, I would recommend revising two sentences at the middle of page 44 to read:

Now on p. 34.

> Patients needing such assistance are generally referred to hospitals in Hawaii, with the travel and health care expenses paid for by the program. In recent years, these overseas referral services have been suspended for up to 6 months because of the lack of funds.

I am not aware of any instances in which the program paid for a referral beyond Hawaii.

I trust that the corrections I have pointed out will be taken into account in the edition of the report that is eventually submitted to the U.S. Congress.

Sincerely yours,

Peter N. Oliver
Undersecretary
for Compact Implementation

The following are GAO's comments on the Republic of the Marshall Islands Ministry of Foreign Affairs letter dated June 30, 1992.

1. We agree that additional scientific work and advisory services have been funded with the $3 million of section 177 agreement funds set aside for the purpose of conducting medical surveillance and radiological monitoring. This report was not intended to provide an all inclusive report on prior studies, but rather it highlights two major on-going studies.

2. The final report has been modified to incorporate this comment.

3. The current magnitude of the enrollment in the Four Atoll Health Care Program is not a direct result of the Department of the Interior's administration of a precursor medical program. The Department of the Interior did allow the individual atoll governments to establish enrollment criteria for recipients of a four atoll health care program they managed, thereby causing a significant increase in enrollment from a planning level of about 3,000 to about 7,300 enrollees by 1987. However, the Compact of Free Association does not prohibit the Marshall Islands government from establishing its own enrollment policies. It chose not to restructure the program's enrollment criteria. Continued enrollment growth that includes an increasing portion of the general population would not be contrary to the stated position of the Marshall islands government that "all of the people of the Marshalls were 'exposed to radiation from the nuclear weapons testing program,' and that health care benefits under the act must be provided to all Marshallese citizens." Since the Marshall Islands government took over the program, enrollment has increased by 2,244 individuals from about 7,300 to the current level of 9,544.

4. Overseas medical referrals generally have been made to medical providers in Hawaii. However, on a few occasions referrals beyond Hawaii have occurred. For example, according to an official of Mercy International Health Services, in 1988, a patient that had been referred to Queen's Hospital in Hawaii was further referred to a hospital in California for specialized treatment. Transportation, per diem, and medical expenses were paid with section 177 health care funds.

Comments From the Nuclear Claims Tribunal

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

Nuclear Claims Tribunal

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July 14, 1992

VIA FACSIMILE TRANSMISSION
ORIGINAL MAILED

Harold J. Johnson, Director
Foreign Economic Assistance Issues
U.S. General Accounting Office
Washington, D.C. 20548

SUBJECT: COMMENTS ON DRAFT REPORT OF JUNE 5, 1992

Dear Mr. Johnson:

On June 5, 1992, your office issued a draft report titled "MARSHALL ISLANDS: Status of the Nuclear Claims Trust Fund." Copies of that draft report were provided to me while I was in Washington D.C. in June, and the report has been shared with the senior officers of the Tribunal. We appreciate the opportunity to provide formal comments on the above draft prior to its issuance in final form.

We note that the draft report generally addresses two subjects: (1) the distribution of Trust Fund monies, and (2) the adequacy of the Trust Fund corpus to satisfy distribution requirements. Except for the impact on the amount of funds ultimately available for compensation payments, the Tribunal has no direct involvement in either determining the adequacy of the Trust Fund corpus or the investment of that corpus. Rather, as indicated in the draft report, the Tribunal's focus is on the quarterly distributions from the Trust Fund.

Except for minor factual errors noted below, the draft report represents, in our view, a generally fair summary of the history and financial picture of the Tribunal's activities. However, we believe that several matters summarized in the body of the draft report fail to adequately explain the scope and nature of the challenges that confronted and, in large measure, continue to confront the Tribunal. In addition, some of the draft report findings, particularly with respect to the amounts of compensation awarded by the Tribunal, convey the difficult policy and legal decisions underlying the Tribunal's activities. Rather than attempt to respond to the generalized findings contained in the draft report, we elect to direct our specific comments to those portions of the several appendices upon which the draft report findings are based.

Page 1 of 7

Comments on Appendix I

Now on p. 13.
See comment 1.

Page 10: *Tribunal Responsibility*. The specification of the Tribunal's authority with respect to oversight of LDA re-distributions of Trust Fund Quarterly distributions should more clearly indicate that it has the *dual* responsibility of first monitoring the actions of LDA's, and second adjudicating any disputes arising from those actions. The failure to grasp the different power and authority of the Tribunal when it exercises either of these two responsibilities led, in our view, to some of the difficulties that characterized the initial years of the Tribunal's existence.

Now on pp. 13 and 14.
See comment 1.

Page 11: *Tribunal Offices*. While Sections 15-18 of the Nuclear Claims Tribunal Act do create Offices of the Public Advocate, Defender of the Fund, Mediation and Finance, the decision to staff and fund any or all of these offices is left to the Tribunal under Section 6(4)(c) of the Act, subject to approval of the Cabinet of the Republic. To date, the Tribunal has elected to forego the creation of a permanent Office of Mediation, preferring to use temporary *ad hoc* mediators when necessary.

Now on p. 14.
See comment 1.

Page 11: *Public Advocate*. The responsibilities of the Public Advocate include, in addition to those listed, the responsibility of representing claimants in individual or consolidated/class claim adjudications before the Tribunal where the claimant(s) elect not to retain private counsel.

Now on p. 14.
See comment 1.

Page 12: *Defender of the Fund*. Under the Tribunal's compensation program, the Defender of the Fund does not "decide" whether a claim for compensation is valid. As suggested by the language of Section 23 of the Act, only a Special Tribunal can determine the validity of a claim for compensation. The Defender is to review each claim for compensation (including all relevant documentation) to determine whether, consistent with Section 18(1)(a), any valid defense exists. Where the Defender believes that a claim and the accompanying documentation satisfies the Tribunal's requirements for compensation, the Defender "admits" the claim, essentially giving notice that no objection will be raised to a grant of compensation. In all cases, however, including those in which the Defender has "admitted" the claim, the final decision to grant or deny compensation is one made solely by a Special Tribunal after an independent review the entire claim file. The regulations of the Tribunal, drafted before adoption of the current compensation program, which suggest otherwise are currently being amended to conform with the intended role of the Special Tribunal and the actual compensation procedure used by the Tribunal.

Now on pp. 15 and 16.
See comment 2.

Page 13: *Section 177 Minutes*. Only the reinvestment agreements of Bikini and Enewetak Atolls appears as minutes to the Section 177 Agreement. The reinvestment agreements of Rongelap and Utirik Atolls, while required by the Section 177 Agreement, are separate documents negotiated after the Section 177 Agreement between these latter atolls and the Republic of the Marshall Islands.

Now on p. 16.
See comment 1.

Page 15: *Adoption of Regulations*. In August 1991, the regulations of the Tribunal setting out its compensation program were formally adopted, approved and made

effective. Prior to that time, the rules and procedures of the Tribunal and the identification of radiogenic diseases had been under active development. In addition, it should be stressed that the Section 177 Agreement, the Nuclear Claims Tribunal Act 1987 and the Tribunal's regulations all contemplate injuries from "the U.S. testing program" rather than solely from "exposures to radiation." It is only the presumed medical conditions which are linked to assumed "exposures."

Now on p. 16.
See comment 1.

Page 15: *Legislative Interference*. The draft report notes that several prior Tribunal members resigned due to concerns over interference by the Marshall Islands Nitijela affecting the independence of the Tribunal. The draft then notes that "[the current] judges [do] not express the same concerns over legislative interference." This statement may be misunderstood. The current members of the Tribunal have and will in the future make appropriate objections to proposals which, in our view, infringe on the necessary adjudicatory independence of the Tribunal, or in some other way are inconsistent with the provisions of the underlying Section 177 Agreement. However, as is the case with respect to independent agencies of the United States Federal Government, the legislative branch always has the authority to consider and enact legislation affecting how an administrative agency applies the law in resolving future cases. This is particularly so when the legislative amendments are directed at an agency's discharge of its quasi-legislative authority. Regardless of individual member's personal views as to the advisability of, or motivations behind, amendments to our Act, the Tribunal recognizes that otherwise legitimate exercises of the Nitijela's legislative authority are entitled to full and faithful implementation.

Now on p. 17.

See comment 1.

Page 16: *Basis For Administrative Compensation Scheme*. The draft report fails to identify two of the more important bases for the administrative personal injury compensation scheme adopted by the Tribunal. First, funds intended for claimant compensation are to the maximum extent possible retained for that purpose and are not dissipated on expensive, time-consuming and contentious litigation of complex issues at the cutting edge of scientific and medical research. In these types of cases which have been resolved through the classic adjudicative mechanism, the experience has been that transactional costs can far exceed the ultimate award, if any, to the claimant. Second, eligible claimants before the Tribunal are not penalized for the absence of detailed, event-specific scientific and medical evidence and individual dose estimates. Through no fault of claimants, such information has been and remains essentially unavailable to citizens of the Marshall Islands.

We note, however, that the compensation scheme adopted by the Tribunal does permit claimants to litigate claims for "non-presumed" personal injuries using the traditional adjudicatory model.

Now on p. 18.
See comment 1.

Page 16: *Presumed Medical Conditions*. In addition to the Radiation-Exposed Veterans Compensation Act of 1988, the Tribunal also looked to regulations of the Department of Veterans Affairs regarding service-connected radiogenic diseases, the treatment of U.S. citizens affected by the U.S. domestic testing program at the

Nevada Test Site, and the past actions of the United States in identifying and paying compensation in the Marshall Islands for radiogenic diseases. For example, while the U.S. does not treat thyroid nodular disease as a compensable radiogenic disease under its domestic compensation legislation, it has historically made compensation payments for this condition here in the Marshall Islands.

Now on p. 18.

Page 17: *Compensation Amounts*. In developing its administrative compensation program, the Tribunal concluded that amounts of compensation had to be both externally and internally fair and equitable. For the purpose of external fairness, the Tribunal decided that the amount of compensation awarded to a Marshallese claimant would in no case be lower than the amount of compensation awarded by the United States Government to a U.S. citizen affected by its domestic weapons testing program. Thus, the $50,000 payment specified in the U.S. legislation providing compensation to U.S. citizens under its domestic compensation legislation. Thus, the $50,000 payment specified in the U.S. legislation providing compensation to U.S. citizens affected by the U.S. domestic testing program at the Nevada Test Site became the Tribunal's baseline.

In addition, the U.S. legislation providing compensation for U.S. citizens affected by its domestic testing program treated all types of radiogenic conditions as identical for the purposes of amounts of compensation. For the purpose of internal fairness, the Tribunal rejected this approach in favor of scaling compensation amounts based on the relative impact of a radiogenic condition on the quality of a claimant's life. See also Section 23(14) of the Act. Among the scaling approaches considered, the Tribunal gave great weight on the Relative Detriment Scale developed by the International Commission on Radiological Protection (ICRP). Using a 0.0-1.0 range, the ICRP scale, for example, lists thyroid cancer as having a .19 relative detriment while leukemia has a 1.0 relative detriment.

Now on p. 20.
See comment 1.

Page 20: *Deadline for Claims*. After August 9, 1992, claimants will generally be required to file a claim for compensation within one year after a medical condition first manifests itself, or within one year from the date on which a previously diagnosed condition is added to the Tribunal's list of administratively presumed radiogenic conditions.

Now on p. 20.

Page 20: *Compensation Awarded/Paid*. The draft report should make clear the difference between compensation awarded and compensation paid. Under the Nuclear Claims Tribunal Act, the Tribunal is obligated to make full compensation awards. As of March 1992, just seven months after beginning its personal injury award process and before any consideration of land compensation claims, the Tribunal had already committed approximately $14.6 million of the $45.75 million available to it under the Section 177 Agreement. However, the Act also obligates the Tribunal to make equitable payments to all claimants. Because the Tribunal will receive its $45.75 million for compensation in incremental installments until October 2000, and because the number of successful claimants cannot at the present time be estimated with any degree of confidence, the Tribunal currently pays an initial payment of 25% of the total compensation awarded. Additional amounts are paid

annually at the end of each October based on then-current projections of future awards. Thus, while essentially all of the approximately $16.5.0 million currently available to the Tribunal as of October 1991 for all types of compensation awards has already been committed for personal injury awards alone, only $3.2 million has actually been paid to claimants. The difference between the total amount awarded and the total amount paid reflects the Tribunal's policy of ensuring that future successful claimants are reasonably assured of receiving compensation payments substantially equal to those paid to current claimants.

Now on p. 21.

Page 21: *Land Ownership.* It may be confusing to characterize multiple claims to land as in accordance with Marshallese custom and practice. Some could interpret this language to mean that land disputes are common in the Marshall Islands. While land disputes do occur, the point should be that the traditional Marshallese land tenure system recognizes that various groups of people have different yet co-existing rights to enjoy the benefits of particular parcels of land.

We recommend the following alternative language:

See comment 1

> Land tenure in the Marshall Islands is characterized by co-existing multiple levels of interests in the land held by members of a lineage in common, rather than by individual ownership. In many instances, these interests are subject to dispute. This poses problems in determining who and how much to compensate for damage caused to land over time by the nuclear testing program...

Now on p. 21.
See comment 1.

Page 21: *Land Payment Procedures.* As a factual or legal matter, adoption of land payment procedures and a compensation schedule is not impossible in the absence of completion of the on-going radiological survey being conducted by the Republic of the Marshall Islands. Indeed, the Tribunal is currently working on these issues in the context of scheduling the class action land compensation claim of Enewetak Atoll. However, until the nature and scope of damage (including lost use) to land is determined, a determination of actual award amounts is impossible.

Now on p. 22.
See comment 3.

Page 23: *Rongelap Distribution Plan.* The draft report states that the Rongelap distribution plan has not been modified to include persons having only land rights in the atoll. This is in error. In January 1990, the Rongelap LDA amended its distribution plan to provide that an individual may qualify for recipient status on the basis of holding land rights in Rongelap Atoll and either residing on Mejatto or determined to be "a contributing member of the community." See Rongelap Local Council Resolution No. 90-3, adopted January 21, 1990.

Now on p. 22.

Page 25: *Rongelap Assignment of Future Distributions.* In its February 1992 decision on the validity of the Rongelap assignment of future Section 177 distributions as payments on a $2.5 million loan from the American Security Bank, the Tribunal concluded that the failure to comply with the minimum 75 day notice period rendered the prior assignment void. Because of this, no Section 177 funds could be used to secure or repay the loan. The Tribunal did note, however, that

Rongelap was not precluded from executing a new assignment of future distributions to secure a new loan so long as all notice and other requirements were strictly observed. Subsequent to the Tribunal's February decision, Rongelap has published notice of an intent to re-negotiate the American Security loan and assign future distributions in payment of the new loan.

Now on p. 23.
See comment 1.

Page 25: *Gold Card Expenditures.* The Tribunal has not ruled that any or all the expenditures made by agents of the Rongelap local government using an American Express Gold Card are, in fact, inappropriate or impermissible. Rather, it has issued a Show Cause Order indicating that a reasonable basis exists to believe that some expenditures may have been improper and/or unauthorized. Representatives of the Rongelap local government have responded to the Show Cause Order with documents and affidavits detailing questioned expenditures, and the Tribunal has made professional accounting services available to Rongelap to assist it in reconstructing and justifying its financial records. At the present time, the financial records of the Rongelap LDA render any judgment as to the exact amounts, purpose and propriety of many expenditures impossible.

Comments on Appendix II

Now on p. 24.
See comment 1.

Page 28: *Funds Currently Available to Tribunal.* The draft report concludes that $14.0 million is currently available to the Tribunal for use in making compensation payments. However, while the Trust Fund was not created until 1987, under the Section 177 Agreement, beneficiaries of the Trust Fund were entitled to make their first withdrawals in October 1986. Thus, as of October 1991, a total of $16.5 million was available to the Tribunal.

Now on p. 26.

Page 30: *Changed Circumstances.* As noted at the beginning of our comments, the Tribunal has no direct involvement in determining the adequacy of the Trust Fund corpus. Nonetheless, the Tribunal has taken the position that (1) the current amount of funds available to it for personal and property compensation payments will likely be inadequate to satisfy all expected claims, and (2) advances in medical understandings regarding the nature and scope of radiogenic diseases constitutes "changed circumstances" within the meaning of the Section 177 Agreement.

Now on p. 27.
See comment 1.

Page 32: *Number of Existing Claims.* The estimate of 500 medical and death claims should be viewed as low. As of June 11, 1992, the Tribunal had already made awards to 379 claimants, with reviews of medical records for deceased persons in whose name claims have been filed by relatives yet to be completed.

Now on p. 27.
See comment 1.

Page 33: *Property Claim Amounts.* It is true that the Tribunal cannot estimate with any precision how much might be awarded or actually paid for injuries to land. In its class action claim, Enewetak has declined to specify a total amount because of the difficulty in make any reasonable estimate in the absence of current radiological data and reclamation cost estimates. Taking a different approach, the Rongelap class action claim, patterned after the Agnatic claim, seeks $100 million. However, given the environmental considerations favoring cleanup of contaminated lands, the

absence of substitute or replacement land in the Marshall Islands and rising costs experienced in the United States to reclaim contaminated land, it is not unreasonable to project that land compensation payments will likely exceed the funds available to the Tribunal after personal injury payments are subtracted from the $45.75 million compensation fund.

Now on p. 28.

Page 34: *Rongelap Withdrawal of 3% of Corpus*. Based on information highlighted by GAO personnel, Rongelap's 1990 3% withdrawal was brought to the attention of the Defender of the Fund. This withdrawal was not specifically reported to the Tribunal by Rongelap as part of its Annual Report of Expenditures for 1990 or 1991. Questions have been raised whether the purported need for a community meeting justified the extraordinary withdrawal. In addition, based on information provided to date, it is unclear whether, as required by applicable agreements and the Rongelap Local Council Resolution authorizing the withdrawal, the entire 3% withdrawn from the Rongelap Trust Account was spent solely on the November 1990 community meeting.

Now on p. 34.
See comment 1.

Page 45: *Eligibility for RMI Health Plan*. The draft report suggests that employed Marshallese citizens otherwise entitled to health care under the Section 177 Agreement should be eligible for coverage under the Marshall Islands National Health Insurance Program. Under the terms of the relevant legislation, all Marshallese citizens, regardless of their employment status, are entitled to health care under the National Health Insurance program.

Again, we appreciate the opportunity to provide our comments and observations on the issues highlighted in the draft report. I close by noting that the professionalism and insight of the GAO personnel assigned to conduct the audit contributed greatly to the overall quality of the draft report.

Sincerely,

C. Sebastian Aloot
Chairman

Page 7 of 7

The following are GAO's comments on the letter dated July 14, 1992, from the Nuclear Claims Tribunal.

1. Suggested change was made in the final report.

2. The "understandings" between the people of Rongelap and Utrik and the government of the Marshall Islands are part of the minutes of the section 177 agreement. Although these understandings were negotiated after the section 177 agreement was concluded, under the provisions of article II of the minutes, and section 8, article II of the section 177 agreement, the understandings reached between the people of Rongelap and Utrik ". . . will be appended to this Agreement as Agreed Minutes."

3. Our report is not in error. The Rongelap LDA did amended its distribution plan in 1990 to include those individuals with land rights who have never lived on Rongelap, but who have since moved into the primary Rongelap community (now living at Mejatto) and are contributing members of the community. However, land rights in itself is still not included in the distribution plan as a basis for receiving quarterly benefits.

Comments From an Attorney Representing Rongelap Local Distribution Authority

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

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August 11, 1992

Mr. Harold J. Johnson
Director, Foreign Economic Assistance Issues
National Security & International Affairs
General Accounting Office
441 G Street, NW
Washington, D.C. 20548

Re: GAO's Draft Report on the Marshall Islands: Status of the Nuclear Claims Trust Fund

Dear Mr. Johnson:

These comments are submitted on the behalf of the Rongelap Local Distribution Authority. We appreciate this opportunity.

Although the draft report has been reviewed in its entirety, Rongelap's comments are limited to those matters to which the draft refers that most immediately relate to the Rongelap Distribution Authority.

Appendix I

See comment 1.
Now on p. 22.

In the section entitled "Community Members Challenge the Equity of Some Distribution Plans" (pages 23 et seq.), the draft report states that the Special Tribunal ruled that LDA's could limit compensation to individuals who suffered "damage to the person and exclude those whose only claim was based on land rights". By itself this statement is misleading. It is important to also note the underlying rationale of the Special Tribunal in reaching its conclusion: that the LDA's have considerable latitude in determining how to utilize distributions to meet the needs of the community. As the presiding Special Tribunal there stated:

> "In light of the flexibility given to the LDAs in dealing with the allocated funds, it seems reasonably clear that the provisions of the [177] agreement are intended to give local elected officials sufficient flexibility to fashion remedies which will fit the unique circumstances of each of the four atolls."

Ruling of November 3, 1989, at pages 12-13, Samson et al v. Rongelap LDA.

The further statement of the GAO that, "supported by this decision, the Rongelap LDA has not modified its distribution plan", is also inaccurate. As noted by the full Tribunal in its February 3, 1992 decision (in its denial of review of the

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initial ruling a full two years after the claimants petitioned the full Tribunal for reconsideration), the full Tribunal determined that the quarterly distribution scheme adopted subsequent to the Special Tribunal's ruling by the Rongelap LDA "specifically provides that an individual may qualify for recipient statute [sic] on the basis of holding land rights in Rongelap." (A copy of the February 3rd decision is enclosed.)[1]

See comment 2.
Now on p. 22.

In the second section entitled "The Rongelap LDA Has Been Challenged on Its Use of Funds" (Appendix 1, pp. 24 et seq.) there are several misstatements and errors. For one, the description of the proceedings before the Tribunal is not correct. The charge raised by the complainants who brought the action exclusively focused upon whether the proposed use of the loan funds was consistent with the Section 177 Agreement. (A copy of the complaint is attached.) The Special Tribunal initially ruled that the underlying loan ordinance of the Rongelap Council was improperly adopted, and further (in contradiction to the earlier ruling of the Special Tribunal in Samson v. Rongelap, mentioned previously) that the proposed uses of the funds, with the exception of direct distributions to community members, was not consistent with the Section 177 Agreement. The Special Tribunal's decision did not turn on the amounts of loan funds being used for lobbying and legal fees or Council operations, but rather the purposes to which those funds were utilized in terms of program objectives as opposed to direct distributions to individuals -- which was the only proper use of these funds according to this Special Tribunal.

On appeal, the full Tribunal reversed the Special Tribunal on both of the foregoing issues. The full Tribunal nevertheless held sua sponte (on its own initiative) that the LDA's assignment of section 177 quarterly distribution funds in order to secure the loan was invalid, as the LDA had failed to comply with the public notice provision of the Nuclear Claims Tribunal Act which requires 75 days notice prior to entering into the assignment agreement.

See comment 3.

In discussion of this action against the Rongelap LDA, the GAO also incorrectly states that the "Tribunal has ruled that . . . funds have been used inappropriately" in relation to charges incurred by Rongelap's Senator on an American Express Gold Card

[1] This action, which was pursued by the claimants through the Public Advocate's Office of the Nuclear Claims Tribunal, was successfully defended by the Rongelap LDA at considerable legal cost. A request for reimbursement of attorneys fees and costs was initiated on behalf of the LDA following the full Tribunal's final decision in 1991 but, as yet, there has been no response to this request.

issued to the Rongelap LDA. So too is the GAO's reference to the repayment of these funds contained in this paragraph wrong.

In April of 1991, the Tribunal, by way of an "Order to Show Cause", requested the Rongelap LDA to justify the use of certain funds related to a loan previously obtained by the Rongelap LDA. The Rongelap LDA, its Senator, treasurer, and legal counsel submitted responses under oath to the Tribunal. It has now been **over one year since the submission of these responses** to the full Tribunal. During this entire time, **the Tribunal has not made any formal findings, rulings or determinations with respect to whether the funds in question were inappropriately used.** The full Tribunal declined to rule on the matter, making only the briefest of comments on the subject at the time of its final decision disposing of the case in chief:

> "Although appellant subsequently filed a withdrawal of the proposed waiver of oral argument . . . the interest of justice is served in issuing the opinion without further delay. Appellant may still avail itself of hearing procedures in the matter of the Show Cause Order before the Special Tribunal to whom that matter has been remanded."

"Decision and Order" of Feb. 3, 1992, page 4 n.2, Defender of the Fund, Riklon et al v. Rongelap LDA, #27-001 (emphasis added).

Thus, contrary to the GAO's assertion, as of the date of this submission **the Tribunal has not "ruled that these funds had been used inappropriately".**

In any event, the evidence submitted by the Rongelap LDA in response to the "Order to Show Cause" demonstrated that charges made using the American Express Gold Card of a personal nature were repaid in full prior to the initiation of the Tribunal's inquiry.[2] Moreover, the Senator's response to the Order to Show Cause demonstrated that since the inception of the Compact in 1986, he had utilized personal funds for the benefit of the Rongelap community in excess of $38,000, of which he has been reimbursed $9,269 by the Rongelap local government.

---

[2] The affidavit of the Rongelap Senator, as corroborated by the affidavit and submissions of the Rongelap LDA/Council's treasurer, indicates that of the $16,294 in cash advances, $11,530 was utilized for community-related business. In addition, $4,969 was repaid by the Rongelap Senator (for personal advances and other personal charges), and $3,063 was repaid by other community members. (A copy of the Senator's affidavit is enclosed.)

See comment 1.
Now on p. 27.

Appendix II

In the section entitled "Atoll Trust Fund Could be Worth over $129 Million in the Year 2001" (pages 33 et seq.), the GAO notes that the Rongelap LDA withdrew 3% of its trust fund corpus in 1990 to finance a community-wide meeting. However, the GAO's statement that the purpose of this meeting was "to discuss problems related to the loan proceeds that were frozen by the Tribunal" is incomplete and highly misleading.

As evidenced in the documentation previously provided the GAO on this subject, the community-wide meeting constituted a traditional meeting called by the Alabs of Rongelap, which was subsequently endorsed by both the Iroijlaplap for Rongelap and the Rongelap Council/LDA. In calling the meeting, no mention was made of the loan cited by the GAO, but rather "the many problems facing the Rongelap community [arising out of] the nuclear testing program [which] have created special needs and resulted in unique circumstances for the Rongelap people, particularly for those now living on Mejatto." Correspondence of the Rongelap Alabs to the Rongelap LDA dated August 3, 1990. See also Council/LDA Resolution No. 90-13, adopted August 18, 1990.

Appendix III

See comment 4.
Now on p. 33.

In the section entitled "The Four Atoll Health Care Program" (pages 43 et seq.), the GAO correctly notes that the 177 Health Care Program's resources have been stretched beyond its limits. The GAO is correct to note that a major reason for this is the overwhelming number of people now enrolled in the program. However, the number of enrollees is by no means the only reason. Questions have been repeatedly raised by the LDAs concerning the management and administration of the program, as well as the quality of the health care that is provided. Absent at least acknowledgement of these additional problems, the GAO report on the subject of health care is incomplete.

See comment 1.
Now on p. 35.

Finally, in the section entitled "A Nationwide Radiological Survey" (pages 46 et seq.), it is stated that the survey of Rongelap Atoll is a component of the RMI Nationwide Radiological Survey. This is not so. The radiological survey of Rongelap Atoll is being pursued under the auspices of the Rongelap Resettlement Project, which is an entity separate and distinct from the RMI Nationwide Radiological Survey. The Rongelap Resettlement Project is a joint Rongelap/RMI undertaking established pursuant to a "Memorandum of Understanding" between the U.S. Departments of Energy and Interior, the Rongelap Atoll Local Government, and the Republic of the Marshall Islands.

This does not mean that the Nationwide Radiological Survey will not play a key role in the Rongelap study. To the

contrary, it is anticipated that the Nationwide program, through its resident scientist and by way of "in kind" resource commitments, will make a major contribution to the Rongelap study. Moreover, the final results of the Rongelap study will be made available to the Nationwide Radiological Study for use for its own purposes.

Overall, the draft report is a prodigious document. Our criticisms are not meant to detract from this fact, but hopefully will be viewed in the manner by which they are offered: as a constructive comment toward ensuring a comprehensive and credible final report.

In closing it is noted that in March of 1991, Senator John Glenn and Congressmen George Miller and Ron De Lugo requested the General Accounting Office to examine the following issues:

(1) Whether the beneficiaries of the Fund have been and will continue to be only those individuals in the Marshalls who suffered losses due to nuclear testing?

(2) Why the Nuclear Claims Tribunal established to determine compensation has made no awards or even determinations to date?

(3) Whether the Trust Fund has been properly invested and managed to ensure that it benefits nuclear testing victims to the greatest extent possible?

(4) Whether the four local government councils which distribute Fund earnings have put the earnings to proper uses?

(5) Whether the health, food, agricultural, and radiological programs funded pursuant to the bilateral agreement under Section 177 have been properly implemented and maintained?

(6) Whether the independence of the Marshall Islands' new national radiological study has been adequately assured?

(7) Whether the Claims Tribunal, or its officers, have abused or otherwise exceeded their authority and jurisdiction, and allocated and expended funds properly?

(8) Whether there has been improper interference in the jurisdiction of the Claims Tribunal by the Government of the Marshall Islands?

(9) Whether the Marshall Islands Nuclear Claims Tribunal Act of 1987 conforms in all respects to the Compact Act, Section 177, and the Section 177 Agreement?

(10) Whether the amount of the 177 fund is adequate for addressing the "past, present and future consequences of the Nuclear Testing Program", as it is intended to by the Agreement?

The Rongelap LDA appreciates the fact that the focus of the GAO's review was subsequently narrowed, with the concurrence of the Congressional requestors, to a determination of: (1) whether the trust fund was being distributed as required, (2) whether the trust fund is adequate to meet the distribution requirements, and (3) in order to provide information on the status of related Section 177 assistance programs and scientific surveys. (Draft Report, pg. 1.) Even so, we believe that many of the issues originally raised by Senator Glenn and Congressmen Miller and De Lugo remain valid concerns deserving of investigation.

See p. 1.

Sincerely yours,

E. Cooper Brown
On behalf of the Rongelap
Local Distribution Authority

enclosures

cc: Rongelap Mayor and Council/LDA Members
Senator Jeton Anjain
Peter Oliver, RMI Undersecretary for Compact Implementation

The following are GAO's comments on E. Cooper Brown's letter dated August 11, 1992.

1. Suggested change made in the final report.

2. The complaint filed against the Rongelap LDA did not charge that the "public notice" requirement had not been met but rather focused on the uses of the funds. However, when the special Tribunal reviewed the complaint, it determined that the Rongelap government ordinance authorizing the assignment of trust funds was invalid and also determined that the intended use of the funds was inconsistent with the section 177 agreement. The appeal decision of the full Tribunal found that ratification of the ordinance by the Rongelap local government validated the assignment of funds but that there had not been adequate public notice prior to making the assignment; therefore, the assignment was ruled invalid. Because of this finding, the Tribunal did not address the question of whether the funds were used consistent with the section 177 agreement.

3. The Tribunal has not ruled that the funds had been used inappropriately and that some time has passed since the Tribunal issued a show cause order on this matter; however, the passage of time is irrelevant and does not diminish the fact that the Gold Card was issued against enjoined funds. In the Tribunal's response to our draft report the chairman pointed out that the Tribunal had issued a show cause order asking for an accounting of charges made on the card. He states that issuing the order indicates ". . . that a reasonable basis exists to believe that some expenditures may have been improper and/or unauthorized."

4. Questions about management and administration of the health care program were not within the scope of our review. However, we did address the status of the health care program, and took note of the fact that the health care contract with Mercy International was renewed during the time of our review. Additionally, the Republic of the Marshall Islands government representatives we interviewed did not raise questions about the management and administration of the program.

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