United States Department of State

Washington, D.C. 20520

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September 3, 1992

The Honorable Lou Gallegos
Special Representative to the Commonwealth
of the Northern Mariana Islands for the
902 Consultations
1520 Deborah Road - Suite M
Rio Rancho, New Mexico 87124

Dear Mr. Gallegos,

Following the Sante Fe round of §902 Consultations, the Office of the Legal Adviser has carefully reviewed the question of the CNMI's rights to submerged lands offshore each of its islands. That review, a copy of which is attached, confirms the position contained in Assistant Secretary Bohlen's letter to you of May 4, 1992 on this subject.

The review reflects the fact any claim to submerged lands deriving from Japanese law could be to no more than three nautical miles and that the records of the Covenant negotiations are silent on the subject of submerged lands, apart from one U.S. statement. In a preliminary statement made shortly before the commencement of the second round of negotiations, the United States representative said that vesting the submerged lands surrounding the Mariana Islands in the Marianas government under the Covenant was to occur in the same manner as in the case of the states of the United States and other territories, i.e., by act of Congress. The 1976 Marianas Constitution and the contemporary analysis thereof indicate the CNMI claimed only those submerged lands explicitly granted by the U.S. Congress to the CNMI. None had been explicitly granted by the U.S. Congress at that time, nor have any since. Our review also reveals that in 1985 the Northern Mariana Islands Commission on Federal Laws recommended that Congress enact legislation granting three geographical (nautical) miles of submerged lands to the CNMI. At the very least, this history calls into question the opposition expressed by the CNMI delegation at the recent Sante Fe consultations to a Congressional grant of submerged lands of three nautical miles.

The review has also identified two Marianas laws, the Marianas Marine Sovereignty Act of 1980 and Submerged Lands Act, that assert maritime claims as if CNMI were an independent nation, including a claim to submerged lands 200 nautical miles seaward. This legislation is plainly void as being in direct conflict with the Marianas Constitution, the Covenant and the Constitution of the United States. Consideration should be given to raising this issue in the §902 Consultations with a view to seeking repeal of these Acts or declaratory judgment as to their invalidity.

If you concur in these conclusions, you may wish to convey the enclosure to the Northern Marianas representatives prior to the next round of §902 consultations.

Sincerely,

Jamison M. Selby
Deputy Legal Adviser

Attachment

September 1, 1992

SUBMERGED LANDS SURROUNDING THE NORTHERN MARIANA ISLANDS

Background

At the Sante Fe Round of §902 Consultations between the Special Representatives of the President of the United States and the Governor of the Commonwealth of the Northern Mariana Islands, the United States stated that it would support federal legislation granting to the CNMI the submerged lands surrounding each of the Mariana Islands out to three nautical miles in the same manner as those lands were conveyed by the U.S. Congress to Guam, American Samoa and the U.S. Virgin Islands in 1974. At the conclusion of this round, on May 22, 1992, the CNMI Special Representative opposed the U.S. position on the grounds that the United States had purportedly promised during the Covenant negotiations to confirm the Commonwealth's title to those lands through administrative action.

Summary

The only time the subject of submerged lands arose during the period of the Covenant negotiations was when a U.S. representative said in May 1973, in informal talks prior to the commencement of the second round of negotiations with the Marianas delegation, that vesting the submerged lands surrounding the Mariana Islands in the Marianas government under the Covenant was to occur in the same manner **as in the case of the states of the United States and other territories.** We have carefully reviewed the reports of each of the rounds of the Marianas Political Status Negotiations, from December 1972 when formal separate negotiations began with the Marianas, and have found no other reference to any discussion explicitly addressing submerged lands. (In contrast, submerged lands were included in the November 1973 definition of Micronesian public lands to be returned.) The Covenant (signed February 15, 1975, and approved by the people of the Northern Marianas in a plebiscite held June 17, 1975), the four contemporaneous section-by-section analyses thereof prepared by the Marianas Political Status Commission, the Office of Micronesian Status Negotiations, the Joint Drafting Committee on the Negotiating History, and the Senate Interior Committee (Senate Report No. 94-433, October 22, 1975), as well as the explanation of the Covenant prepared by the Office of the Plebiscite Commissioner, are each silent on the question of submerged lands.

The Constitution of the Northern Mariana Islands, signed December 5, 1976, provides that the public lands of the CNMI include "the submerged lands off the coast of the Commonwealth

to which the Commonwealth now or hereafter may have a claim of **ownership under United States law**." An Analysis of this Constitution, provided to the Marianas people for consideration before the 1977 plebiscite that approved the Constitution, provides that the Constitution recognizes the United States "claim to the submerged lands off the coast of the Commonwealth" and that the Commonwealth is "entitled to the same interest in the submerged lands off its coast as the United States grants to the states with respect to the submerged lands off their coasts." Thereafter, in 1985, the Northern Mariana Islands Commission on Federal Laws recommended that "legislation ... be enacted to convey to the Northern Mariana Islands any property rights of the United States in lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands."

In any event, any claim to submerged lands deriving from Japanese law could be to no more than three nautical miles.

The Marianas Marine Sovereignty Act of 1980 and Submerged Lands Act assert maritime claims as if CNMI were an independent nation, including a claim to submerged lands 200 nautical miles seaward. This legislation is plainly void as being in direct conflict with the Marianas Constitution, the Covenant and the Constitution of the United States.

I.

Covenant Negotiations

CNMI now asserts ownership of the submerged lands on the basis of the policy announced by the United States during the Seventh (November 1973) Round of the **Micronesian** Status Negotiations, for the early (i.e., before conclusion of the Status Negotiations) transfer of title to public lands, including submerged lands, from the TTPI to the Districts. (Office for Micronesian Status Negotiations, Micronesian Status Negotiations: Seventh Round, November 14-November 21, 1973 at Department of the Interior, Washington, D.C., pp. 25, 28-29, 32.) It should be noted that the paper announcing this policy includes the term "submerged lands" without further definition or explanation.

While the new policy on early return of public lands was extensively discussed during the December 1973 round of the **Marianas** Political Status Negotiations, the record of that and later rounds makes no reference to submerged lands. The sole focus of those discussions was on return of lands being used for defense purposes. Even the Marianas Political Status

Commission position paper on the return of public lands to the people of the Marianas, dated December 13, 1973, makes no mention of submerged lands; it concentrates solely on dry land.

The CNMI position papers have not made reference to the one occasion when the question of submerged lands was explicitly raised, albeit briefly, prior to the opening of the second round of the Covenant negotiations, in a preliminary presentation of U.S. views by Mr. James M. Wilson, Jr., U.S. Deputy Representative for Micronesian Status Negotiations, in Saipan on May 10, 1973, following presentation of the preliminary position of the Marianas delegation. Mr. Wilson's seventeen page single spaced presentation focussed on political status, public lands, economic issues and transitional matters. In discussing the preliminary U.S. position on the return of public lands, Mr. Wilson, on page 7 of his presentation, briefly mentioned submerged lands in a way that showed he clearly recognized that return of submerged lands differed from return of dry land. He said the following:

> So far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, **as in the case of the states of the United States and other territories.**

As is developed below, this statement appears to have contemplated explicit Congressional action to vest submerged lands in the Marianas government, and then only those submerged lands out to three nautical miles from the low water line would be vested. (The remainder of Mr. Wilson's seven page discussion of public lands was directed exclusively to questions concerning the dry lands: return, alienation and military requirements.)

CNMI Constitution

The conclusion that the Covenant negotiators were not considering Marianas claims to submerged lands is confirmed by the CNMI Constitution and the Commission on Federal Laws.

While the CNMI position papers make no reference to the CNMI Constitution, we observe that the Constitution of the Northern Mariana Islands, drafted by Northern Mariana Islands Constitutional Convention (which consisted solely of representatives of the people of the Northern Marianas), and signed on December 5, 1976, explicitly addresses submerged lands, as follows:

ARTICLE XI: PUBLIC LANDS

Section 1: Public Lands. **[a]** The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the United States Secretary of the Interior on December 26, 1974, **[b]** the lands as to which right, title or interest have been vested in the Resident Commissioner under Secretarial Order 2989 promulgated by the United States Secretary of the Interior on March 24, 1976, **[c]** the lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Marianas Islands under article VIII of the Covenant, and **[d] the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership under United States law** are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent.

Section 2: Submerged Lands. The management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law.

ARTICLE XIV: NATURAL RESOURCES

Section 1: Marine Resources. The marine resources in waters off the coast of the Commonwealth over which the Commonwealth now or hereafter may have any **jurisdiction under United States law** shall be managed, controlled, protected and preserved by the legislature for the benefit of the people.

(Subparagraphs and emphasis added.)

Analysis of the CNMI Constitution

A careful reading of Article XI makes clear that the CNMI Constitution recognizes four distinct categories of public lands. While the first three do not explicitly include any submerged lands, the fourth does. As discussed more fully below, the first category could be read to incorporate submerged lands by the reference in the definition of "public lands" in Section 2(c)(1) of Secretarial Order 2696, and the second more indirectly, as also noted below. The third category is silent as Article VIII of the Covenant makes no reference to submerged lands. Only the fourth category refers explicitly to submerged lands, in a very circumscribed manner.

The Constitutional provision refers to those submerged lands "to which the Commonwealth now or hereafter may have a claim under United States law". Several points should be made about this clause. First, it refers only to those submerged lands to which the Commonwealth "may have a claim" as opposed to those lands to which it previously had, or later gained, title, a situation common to the other three categories of land mentioned in this article. Thus the CNMI Constitution asserts no preexisting title to submerged lands except that to which title is vested in the CNMI by the actions of the United States. Second, the clause refers only to those submerged lands to which a CNMI claim of ownership arises under "United States law," and not under some other law or source. This limitation is repeated in the Constitution's Article XIV reference to the CNMI's marine resources arising "under United States law".

This textual analysis is supported by the Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands prepared by the CNMI Constitutional Convention and approved on December 6, 1976. The Analysis begins by stating its purpose is to "explain each section of the Constitution" and to "summarize the intent of the Northern Marianas Constitutional Convention in approving each section." The Analysis was approved by the Convention "with the direction that it be available to the people along with the Constitution for their consideration before the referendum on the Constitution."

The Analysis of Article XI section 1 explicitly recognizes the four categories, and discusses each in turn. The Analysis of the first three categories makes no mention of submerged lands. Rather, the Analysis discusses submerged lands in the context of the fourth category, which includes "all submerged lands off any coast of the Commonwealth." The Analysis thus suggests that no submerged lands were included in the lands covered by the preceding three categories, notwithstanding the cross-reference to Title 67 of the Trust Territory Code. The Analysis discusses submerged lands (on page 144) as follows:

> Section 1 includes all submerged lands to which the Commonwealth now or at any time in the future may have any right, title or interest. The United States is the owner of submerged lands off the coasts of the states under territorial waters. The states have no rights in these lands beyond that transferred by the United States. The federal power over these lands is based on the provisions of the United States Constitution with respect to defense and foreign affairs. Under article 1, section 104, of the Covenant, **the United States** has defense and foreign affairs

> powers with respect to the Commonwealth and thus **has a claim to the submerged lands off the coast of the Commonwealth** as well. **Section 1 recognizes this claim and also recognizes that the Commonwealth is entitled to the same interest in the submerged lands off its coasts as the United States grants to the states with respect to the submerged lands off their coasts.** Under this section, any interest in the submerged lands granted to the states or to the Commonwealth in the future also will become part of the public lands of the Commonwealth.

It appears that the drafters of the CNMI Constitution believed then, contrary to the present position of the CNMI Special Representatives, that the submerged lands would belong to the United States and not to the CNMI until the U.S. Congress enacted legislation giving the CNMI an interest in them.

The Constitution was approved by the people of the Northern Marianas Islands in a 1977 referendum.

Northern Mariana Islands Commission on Federal Laws

The foregoing conclusions are bolstered by the recommendations of the Northern Mariana Islands Commission on Federal Laws, appointed by the President in 1980 pursuant to Section 504 of the Covenant, to survey the laws of the United States and to make recommendations to the U.S. Congress as to what laws should be made applicable to the Northern Marianas. The Commission was headed by and contained a majority of Northern Marianas citizens, one of whom, Edward DLG Pangelinan, had previously been Chairman of the Marianas Political Status Commission, and another, Pedro A. Tenorio, Vice Chairman of the Commission, was a member of the Marianas Political Status Commission, both of whom signed the Covenant ten years earlier. The importance of the Commission's Reports is therefore significantly enhanced.

The issue of submerged lands was addressed in the Commission's Second Interim Report to Congress, August 1985, pages 172-188. The Commission recommended that:

> Legislation should be enacted to convey to the Northern Mariana Islands any property rights of the United States in lands permanently or periodically covered by tidal waters within three geographical miles of the coastlines of the Northern Mariana Islands.

(A nautical mile is also called a geographic mile, or 1,820 meters. A. Shalowitz, Shore and Sea Boundaries, vol. I, page 25 (1962).) The Commission noted that "The proposed

legislation is similar to laws already enacted to convey federal interests in submerged lands of the States of the Union, Guam, the Virgin Islands, and American Samoa." The Commission concluded its recommendation as follows:

> The legislation would be without prejudice to any claims the Northern Mariana Islands may have to submerged lands seaward of those conveyed by the legislation. The legislation would become effective on termination of the trusteeship, when sovereignty over the Northern Mariana Islands becomes vested in the United States.

Id. at 172. The recommendation is then followed by an extensive discussion of the rationale for the legislation, and sets forth some arguments for and against United States and CNMI ownership of the submerged lands.

With regard to the question of Federal ownership, the discussion notes that prior to termination of the Trusteeship the United States could have no claim of ownership. (On the other hand, the Analysis made no claim that the Northern Marianas had sovereignty over the submerged lands prior to termination of the Trusteeship.) The Analysis recites the terms of Secretarial Orders 2969 and 2989 and Covenant Section 801 (see below). The Analysis then turns (p.177) to the question of ownership following termination of the Trusteeship, as follows:

> On termination of the trusteeship, sovereignty over the Northern Mariana Islands will become vested in the United States. Covenant §§ 101, 1003(c). At that time, ownership of the submerged lands adjacent to the Northern Mariana Islands becomes uncertain. Substantial arguments favor the proposition that the Northern Mariana Islands will continue to be the owner of those submerged lands at that time. There is, however, respectable argument to the contrary, that the Federal Government and not the Northern Mariana Islands will be the owner at that time.

Before setting out those arguments, the Analysis notes that the proposed legislation "resolves the issue, as it has been resolved for all other permanently-inhabited jurisdictions under the American flag, by conveying any and all interests the United States may have to the Northern Mariana Islands on termination of the trusteeship."

In stating the case for United States ownership of the submerged lands on termination of the trusteeship, the Analysis recalls that Texas, an independent nation prior to admission to the union, relinquished her sovereignty and "by that

relinquishment, her proprietary claims to the submerged lands adjacent to her shores," citing United States v. Texas, 339 U.S. 707, 717-18 (1950). In a footnote on page 179, the Analysis states the argument that since "neither section 801 nor its negotiating history mentions submerged lands," section 801 transfers only fast lands. It responds by citing a 1958 Palau High Court trial division opinion that submerged lands are real property (Ngiraibiochel v. Trust Territory of the Pacific Islands, 1 Trust Territory Reports 485, 490 (which deals only with the beach between high and low tides and not with permanently submerged lands)), and noting the United States' obligation under section 802(a) of the Covenant to return "the waters immediately adjacent" to Tinian and Farallon de Medinilla Islands. The note concludes by making the counter-argument of necessity to lease these waters prior to termination of the trusteeship.

The Analysis makes the case for continued ownership by the Northern Mariana Islands of adjacent submerged lands after termination of the trusteeship by reliance on Section 801 of the Covenant and on Marianas law including submerged lands in public lands. The Analysis asserts it makes "little sense" for the United States to "agree in the Covenant that the government of the Trust Territory of the Pacific Islands should transfer title to the Northern Mariana Islands on or before termination of the trusteeship, only to have the title revert to the United States on that date under the doctrine of United States v. Texas". Inexplicably, the Analysis makes no reference to the provisions of the Marianas Constitution quoted above.

II.

The CNMI Special Representatives rely on Secretarial Orders 2969 and 2989, and Covenant Section 801, for their claim to submerged lands.

Department of the Interior Secretarial Order 2969

The 1973 U.S. policy on early return of public lands was implemented through Secretarial Order 2969, December 26, 1974, Transfer of Trust Territory Public Lands to District Control. Section 4 of that Order authorized and directed the High Commissioner, **upon formal request by a district legislature**, "to transfer and convey ... to each district legal entity all right, title and interest of the Government of the Trust Territory of the Pacific Islands in **public lands**, except Ujelang Atoll, within their respective districts." The CNMI argues that Order contemplates the transfer of submerged lands because the definition of "public lands" in Section 2(c)(1) of the Order refers to "those lands defined as public lands by Section 1 and 2, Title 67, of the Trust Territory Code".

Section 1 of Title 67 of the TTPI Code defines public lands -- without mentioning submerged lands -- "as being those lands situated within the Trust Territory which were owned or maintained by the Japanese government as government or public lands, and such other land as the government of the Trust Territory has acquired or may hereafter acquire for public purposes."

On the other hand, section 2, entitled "rights in areas below high water mark", explicitly refers to rights in "marine areas", as follows:

> (1) That portion of the law established during the Japanese administration of the area which is now the Trust Territory, that **all marine areas below the ordinary high watermark belong to the government**, is hereby confirmed as part of the law of the Trust Territory, with the following exceptions [not here relevant]".

This definition clearly includes tidal lands, i.e., those lands between the high and low water lines that uncover at low tide. It could also be read to extend to submerged lands, since the breadth of the territorial sea and submerged lands in international law is traditionally measured from the low water mark on shore.

Submerged Lands under Japanese Law

The TTPI Code, including sections 1 and 2 of Title 67 of the Trust Territory Code, does not define the seaward extent of the submerged lands appertaining to the Northern Mariana Islands, except by reference to Japanese law. Japan administered the Mariana Islands between World War I and World War II. During that time Japan claimed and recognized three nautical miles as the maximum breadth of its territorial sea. Prior to 1945 no state asserted rights over the resources of the continental shelf seaward of the territorial sea. Accordingly, sections 1 and 2 of Title 67 of the Trust Territory Code cannot be read to refer to submerged lands extending seaward more than three nautical miles from the low water line along the coast of each Mariana island.

Incidentally, in the years since 1945, Japan has not enacted any domestic law claiming a continental shelf or an exclusive economic zone, and is not a party to the 1958 Geneva Conventions on the Continental Shelf and on Fishing and Conservation of Living Resources of the High Seas. In 1974 Japan entered into a continental shelf boundary agreement with the Republic of Korea. In 1977 Japan claimed a 200 nautical mile exclusive fishing zone.

Submerged Lands under International Law

Prior to the 1980s, international law recognized three nautical miles as the maximum breadth of the territorial sea and continental shelf claims seaward of the territorial sea to a depth of 200 meters or beyond where the depth of the superjacent waters admits of the exploitation of the natural resources of seabed. The 200 meter isobath generally lies less than five nautical miles off shore of the Northern Mariana Islands.

Department of the Interior Secretarial Order 2989

Secretarial Order 2989, March 24, 1976, Government of the Northern Mariana Islands of the Trust Territory of the Pacific Islands, also did not explicitly mention submerged lands. Rather, Part VII, Section 1, of that Order vests in the Resident Commissioner title to "all other public lands ... title to which is now vested with the Trust Territory Government and which have not been transferred to the legal entity created by the Mariana Islands District Legislature according to Secretary of the Interior Order No. 2969." Assuming Secretarial Order 2969 contemplated submerged lands, if no submerged lands surrounding the Mariana Islands had been transferred pursuant to Secretarial Order 2969, then those submerged lands were vested by Secretarial Order 2989 in the Resident Commissioner.

Transfer of Submerged Lands under Secretarial Orders

We find no evidence that any submerged lands seaward of the low water line were transferred pursuant to Secretarial Order 2969. We similarly find no evidence of any action by the Resident Commissioner to transfer submerged lands surrounding the Mariana Islands.

Submerged Lands, Public Lands and Tidelands under Federal Law

600, 1959-63 Comp.), which vested in the Secretary of the Interior "responsibility for the administration of civil government in all of the trust territory, and all executive, legislative and judicial authority necessary for that administration", and from 48 U.S.C. §1681(a) which provided that "all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize."

Consequently, although the Secretary of the Interior, the High Commissioner and the Resident Commissioner may arguably have had the authority to transfer title to the submerged lands out to three nautical miles surrounding the Mariana Islands, none of them so acted prior to termination of the Trusteeship with respect to the Northern Mariana Islands, on November 3, 1986, and the Islands coming under the sovereignty of the United States as of 12:01 a.m., November 4, 1986. (Presidential Proclamation 5564, Nov. 3, 1986, 3 C.F.R. 146 (1986 Comp.).)

Federal property (including submerged lands) cannot be conveyed or disposed of except as authorized by Act of Congress. Under Article IV, section 3, clause 2, of the U.S. Constitution, only the Congress can "dispose" of the property of the United States. An officer of the United States cannot do so by administrative action, unless authorized by U.S. law. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). Hence, upon termination of the trusteeship in 1986, when the United States acquired title to submerged lands as an attribute of its sovereignty over the Northern Mariana Islands under the Covenant, United States v. California, 332 U.S. 19 (1947), and United States v. Texas, 339 U.S. 707 (1950), only an act of Congress could serve to divest the United States of title to the submerged lands. No U.S. law expressly addressing submerged lands around the Northern Marianas existed at the moment of trusteeship termination, and none has since. So whatever effect that Orders 2969 and 2989 might have had in authorizing conveyance of submerged lands before termination ceased at the moment of termination.

The CNMI may argue that Section 801 of the Covenant, being a Joint Resolution, Pub.L. 94-241, is such an act. However, Section 801 speaks of "real property" and makes no mention of submerged lands. In the context of the Covenant negotiations, "real property" refers to public lands. Under federal law, public lands do not include tide lands, i.e., land that is covered and uncovered by the ebb and flow of the tide. Baer v. Moran Brothers Co., 153 U.S. 718 (1894) (mud flats of Puget

Sound); Mann v. Tacoma Land Co., 153 U.S. 714 (Commencement Bay, Tacoma, Washington); Borax, Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935); Hynes v. Grimes Packing Co., 337 U.S. 86, 114-15 (1949); Phillips Petroleum et al. v. Mississippi and Saga Petroleum U.S., Inc., 484 U.S. 469, 479-80 (1988). Consequently, as a general rule a provision dealing with the conveyance of public lands does not include permanently submerged lands. Montana v. United States, 450 U.S. 544, 550-57 (1981). Congress has not enacted a definition of "real property" or "public lands" of general applicability; rather the terms are differently defined in several statutes, none of which include submerged lands. Of particular significance is the fact that neither term is used in the 1953 Submerged Lands Act, 43 U.S.C. §§1301-1315, which vested "title and ownership of the lands beneath the navigable waters within the boundaries of the several States". 43 U.S.C. §1311(a).

III.

Congressional Action

The United States Congress has not yet acted to convey any submerged lands to the CNMI, as it has done for other U.S. territories: Guam, American Samoa and the U.S. Virgin Islands in 1974 (by 48 U.S.C. §1705), and Puerto Rico in 1917 and 1980 (control and administration only, by 48 U.S.C. §749).

It may be noted that in enacting S.858, the Abandoned Shipwreck Act of 1987, Pub.L. 100-298, 102 Stat. 422, 43 U.S.C. §§2101-2106, approved April 28, 1988, Congress defined "submerged lands", **for the purposes of that act only**, to include the lands "of the Commonwealth of the Northern Mariana Islands, as described in section 801 of [the Covenant] Public Law 94-241 (48 U.S.C. 1681)". 43 U.S.C. §2102(f)(4). While the Senate Report on S.858, No. 100-241, December 9, 1987, is silent on this point, both House Reports on this bill state "for the purposes of this Act, the submerged lands of the Commonwealth of the Northern Marianas include those lands three **geographical** miles seaward from the coastline of the Northern Mariana Islands." House Interior and Insular Affairs Committee Report No. 100-514(I), March 14, 1988, at 2; House Merchant Marine and Fisheries Committee Report No. 100-514(II), March 28, 1988, at 5. The purpose of this definition is made clear by the first House report when it notes that "the definition of 'submerged lands' as set forth in Section 3(f) provides **geographical** references regarding the shipwrecks that are covered by the bill." Ibid. Both House reports state that the term "submerged lands" was not intended to constitute an assertion of U.S. sovereignty under international law beyond the then U.S. territorial sea of three nautical miles. Ibid.

Consequently, it would be improper to infer from this legislation that "Congress has subsequently confirmed that the submerged lands described in Section 801 of the Covenant belong to the Commonwealth of the Northern Mariana Islands", as was asserted by Governor Guerrero on page 18 of his prepared statement delivered February 4, 1992, to the House Merchant Marine and Fisheries Committee on H.R. 3842, The Territorial Sea and Contiguous Zone Extension and Enforcement Act of 1991, reprinted in the Hearing on this bill before the House Merchant Marine and Fisheries Committee, 102d Cong., 2d Sess., Ser. No. 102-62, at 304.

IV.

CNMI Marine Sovereignty Act of 1980 and Submerged Lands Act

From the foregoing it is apparent that in 1985 the Commission on Federal Laws had to deal with conflicting views of the ownership and seaward extent of the submerged lands. This situation arose in part because of two public laws enacted by the Marianas Legislature in 1979 and 1980 (one of which was reenacted in 1988).

The Marianas Marine Sovereignty Act of 1980, Public Law 2-7, 2 CMC §1101 et seq., asserted a number of maritime claims as if the CNMI were an independent nation entitled to archipelagic status, with a 12 mile territorial sea surrounding archipelagic waters enclosed by archipelagic straight baselines, a 24 mile contiguous zone, and a 200 mile exclusive economic zone. This act also recognized certain rights of other nations in its "sovereign waters" such as innocent passage, archipelagic sea lanes passage, existing submarine cables and navigational freedoms in its exclusive economic zone.

The Marianas Submerged Lands Act, Public Law 6-13, 2 CMC §1201 et seq., effective January 3, 1988, replaced in its entirety the Submerged Lands Act, Marianas Public Law 1-23, as amended by Marianas Public Law 2-7. Both laws claimed the "submerged lands" 200 miles seaward, as follows:

> all lands below the ordinary high water mark extending seaward to the outer limit of the exclusive economic zone established pursuant to the Marine Sovereignty Act of 1980 ... or to any line of delimitation between such zone and a similar zone of any adjacent State.

This legislation also purports to assign to the Marianas Director of Natural Resources the responsibility for the management, use and disposition of the submerged lands of the Commonwealth, including exploration licenses, development

leases and permits for the extraction of petroleum or mineral deposits, as well as granting him significant enforcement powers of arrest and detention of foreign flag vessels, as well as other civil and criminal penalties.

This legislation is plainly void as being in direct conflict with the Marianas Constitution, the Covenant and the Constitution of the United States. Under Section 102 of the Covenant, the Covenant, together with the applicable provisions of the U.S. Constitution, treaties and laws of the United States, are the supreme law of the Northern Mariana Islands. As noted in the Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, prepared by the Marianas Political Status Commission, and issued February 15, 1975:

> In this respect Section 102 is similar to Article VI, Clause 2 of the Constitution of the United States, which makes the Constitution, treaties and laws of the United States the supreme law in every state of the United States. This means that federal law will control in the case of a conflict between local law (even a state's constitution) and a valid federal law.

Conclusions

The United States Government owns the submerged lands out to 200 nautical miles surrounding the Northern Mariana Islands unless and until Congress says otherwise. The Covenant and its negotiating history, as well as the CNMI Constitution and related documents, support this conclusion. CNMI actions to the contrary are void.