No. 97-17140

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GOVERNMENT OF GUAM, ex rel.,
GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Plaintiff-Appellant

v.

UNITED STATES, et al.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

BRIEF FOR THE FEDERAL APPELLEES

LOIS J. SCHIFFER
Assistant Attorney General

FREDERICK A. BLACK
United States Attorney

EDWARD J. LYNCH
Special Assistant United States Attorney
Districts of Guam and CNMI

ELIZABETH ANN PETERSON
ALLISON B. RUMSEY
MARGO D. MILLER
Attorneys, Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0449

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

CASES:

PAGE

CASES (continued):

PAGE

CASES (continued):

PAGE

STATUTES and RULES:

PAGE

STATUTES and RULES (continued):

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-17140

GOVERNMENT OF GUAM, ex rel.,
GUAM ECONOMIC DEVELOPMENT AUTHORITY,
Plaintiff-Appellant

v.

UNITED STATES, et al.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

BRIEF FOR APPELLEES UNITED STATES, ET AL.

JURISDICTION

Plaintiff-appellant's complaint invoked the district court's jurisdiction under 28 U.S.C. 1331 (federal question), 2201 (declaratory judgment), 1361 (mandamus), and asserted that the United States' sovereign immunity from this suit was waived by 5 U.S.C. 702.

The district court entered final judgment on October 22, 1997 (ER 137).[1/] That final judgment resolves all claims as to all parties. Appellant filed a timely amended notice of appeal on October 24, 1997 (ER 139). This Court's jurisdiction rests on 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether the district court correctly held that the Guam Organic Act does not require that the United States transfer to Guam title or control of land owned by the United States that is no longer needed for military purposes.

2. Whether the Territorial Submerged Lands Act requires the transfer of submerged lands whenever the adjacent uplands are transferred to Guam.

3. Whether the district court correctly held that the Guam Economic Development Authority (GEDA) is not entitled to an advisory opinion on whether an aboriginal right to these lands exists.

[1/] Citations to documents reproduced in appellant's Excerpts of Record will be to "ER __." Citations to documents reproduced in our Supplemental Excerpts of Record similarly will be to "Supp. ER __." References to appellant's opening brief will be to "Br. __." The texts of both the Guam Organic Act and the Territorial Submerged Lands Act are reproduced in their entirety in the Addendum.

STATEMENT

A. Nature of the case, and course of proceedings. — This appeal concerns the contention by plaintiff-appellant the territorial government of the island of Guam, ex rel. Guam Economic Development Authority (GEDA) that the United States has a clear, non-discretionary duty to transfer to the local government uplands owned by the United States, not needed for military purposes, and submerged lands adjacent to those uplands (ER 5-6, First Amended Cmpt. at 5-6). According to GEDA, this duty is required by section 28 of the Guam Organic Act and the Territorial Submerged Lands Act, or, alternatively, as a result of aboriginal title (Br. 1-2).

GEDA named as defendants federal agencies that administered the federal lands that GEDA claims should be transferred, at the time the complaint was filed in 1995. Specifically, GEDA asserts claims 1) to land declared excess by the Navy and transferred to the Fish and Wildlife Service to be administered as the Guam National Wildlife Refuge; 2) to submerged lands declared excess by the Navy that were being held by the General Services Administration at the time the case was filed; and 3) to land administered by the Air Force that the Department of Defense identified as "releaseable" in a document known as "Guam Land Use Plan: A Plan For Department of Defense Real Estate on Guam" ("GLUP94").

GEDA's complaint sought an order "[d]irecting the United States to transfer title or administrative control to the lands in suit to the government of Guam"(ER 7).

The United States moved for summary judgment, asserting several jurisdictional defenses, and also demonstrating on the merits both that section 28 of the Guam Organic Act does not, by its terms, require transfer of title or control of land, and that Guam does not have unextinguished aboriginal title to the parcels claimed (Supp. ER 1-3). GEDA cross-moved for summary judgment (ER 22-23).

On July 16, 1997, the district court (Honorable John S. Unpingco) granted the United States' Motion for Summary Judgment and denied GEDA's Cross-Motion for Summary Judgment (ER 97). The court ruled that it had jurisdiction both pursuant to 28 U.S.C. 1331, because the dispute involves an interpretation of the Guam Organic Act, a federal statute (ER 105) and pursuant to 28 U.S.C. 2409a because the case directly affects the United States' interest in real property (ER 107).

The district court held that the doctrine of aboriginal title has no bearing on the resolution of the case because, even if aboriginal title existed, that would not establish a mandatory duty to transfer title or control of the land from the United States to the local government of Guam (ER 111). The court also rejected GEDA's interpretation of section 28(b) of the Organic Act, concluding that "the

plain meaning of section 28(b) settles this case. * * * No mandatory, continuing duty to transfer was created by these words"(ER 115-16).

GEDA's Motion for Reconsideration (ER 129) was denied on August 29, 1997 (ER 132). The district court entered a final judgment on October 22, 1997 (ER 137). This appeal followed.

B. Relevant Factual and Legal Background. [2/] — In this action, GEDA seeks to divest the United States of its title to or control of approximately 20,000 acres of land that GEDA alleges is not needed for military purposes. The background is as follows.

1. The Guam Organic Act. — The island of Guam was ceded in 1898 to the United States by the Treaty of Paris, which concluded the Spanish-American War (ER 41, ¶1). Following the United States' acquisition of the island, the Department of the Navy was given responsibility for its administration (ER 42, ¶6). The island was governed by the Naval Government of Guam until 1950, when the Organic Act of Guam, 64 Stat. 384, 48 U.S.C. 1421 et seq., was enacted. Among other things, the Organic Act gave American citizenship to the Guamanians, created a 21-member unicameral legislature, provided for the

---

[2/]Every factual assertion made in this brief is supported by the Parties' Stipulated Facts. Because there are no disputed material facts, summary judgment was appropriate.

appointment of a Governor by the President (with the advice and consent of the Senate), transferred administrative responsibility for the unincorporated territory of Guam from the Department of the Navy to the Secretary of the Interior, and provided a mechanism by which the United States could decide which lands it wished to retain and which lands it would transfer to the new government of Guam. Id.

Under section 28(a) of the Organic Act, 48 U.S.C. 1421f(a), title to property "owned by the United States and employed by the Naval Government of Guam in the administration of the civil affairs of the inhabitants of Guam" was to be transferred to the government of Guam "within ninety days after August 1, 1950." 48 U.S.C. 1421f(a) (emphasis added). The United States identified and transferred this property by a deed executed on October 23, 1950, which was accepted by the government of Guam on October 31, 1950 (Supp. ER 4-5).

Section 28(b) of the Organic Act directs that all property owned by the United States and not employed by the Naval Government of Guam in the administration of the civil affairs of the inhabitants of Guam, and "not reserved by the President of the United States within ninety days after August 1, 1950," would be "placed under the control of the government of Guam * * *," and that the legislature of Guam would have authority to legislate with respect to such

property. 48 U.S.C. 1421f(b) (emphasis added). On October 31, 1950, within the 90-day period provided in section 28(b), President Truman reserved a number of properties that had not been transferred to Guam pursuant to section 28(a) of the Organic Act, including the cliff parcel in Claim One and all lands identified in Claim Three. Executive Order No. 10178.

Section 28(c) of the Organic Act provides that all land reserved pursuant to section 28(b) "is transferred to the administrative supervision of the head of the department or agency designated by the President under section 3, of this Act, except as the President may from time to time otherwise prescribe." 48 U.S.C. 1421f(c). Accordingly, President Truman designated the Secretary of the Navy as administrator of specific lands reserved to the United States for use by the Departments of Navy, Army, Air Force and Coast Guard. Executive Order No. 10178. In addition, President Truman ordered that the remaining lands reserved by the United States be administered by the Secretary of the Interior pursuant to section 28(c).[3/] Id.

[3/]All these lands "reserved to the United States and transferred to the administrative supervision of the Secretary of the Interior" were transferred by the Secretary of the Interior, pursuant to his discretion under section 28(c), to the government of Guam on February 26, 1952, for the consideration of one dollar. The transfer contained an automatic reversion to the United States if the lands are used for purposes other than "rehabilitation and resettlement" without prior

(continued...)

Section 28(c) also authorized the department or agency head to "lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes." Id. This is the only provision of the Organic Act that provided for future transfers of lands reserved pursuant to section 28(b). Id. It authorizes wholly discretionary, compensated, transfers of land not needed for public purposes. Id.

2. The lands at issue. — In its First Claim, GEDA challenges the United States' ownership of 371 acres of land administered by the Fish and Wildlife Service as a wildlife refuge on the northern tip of Guam (hereinafter "Ritidian Point"). The United States acquired Ritidian Point in two segments. Approximately 183.7 acres comprise the "cliff parcel" and 186.87 acres comprise the "beach parcel."

The cliff parcel was contained within the perimeter of condemnation proceeding Civil Case 16-50. [4/] On October 30, 1950, the cliff parcel was

---

[3/](...continued)
approval of the Secretary of the Interior. Supp. ER 6-17.

[4/]The Declaration of Taking for Civil Case 16-50, was filed on June 21, 1950, and states, in relevant part, that "[t]here is specifically excepted from the total land area all lands or interests therein owned by the United States of America (continued...)

included in the lands reserved by President Truman pursuant to section 28(b) of the Organic Act in Executive Order 10178.

In 1962, the United States condemned the land comprising the beach parcel (ER 50, ¶33).[5/] The condemned lands included 146.87 acres from private landowners, and approximately forty acres of lands originally ceded by Spain to the United States in the Treaty of Paris, which had been transferred to the government of Guam pursuant to section 28(b) of the Organic Act in 1950 (ER 50, ¶30). Through the condemnation, the United States received a quit claim deed to the forty acres of tidelands from the government of Guam. Id.

In 1992, pursuant to the procedures set forth in the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq., (Federal Property Act), the Navy declared the parcels comprising Ritidian Point "excess" to its needs (ER 52, ¶48). The Fish and Wildlife Service requested transfer of Ritidian Point

---

[4/](...continued)
or the Naval Government of Guam." Supp. ER 18-23. This provision expressed a recognition that the United States need not condemn those lands contained within the perimeter of this proceeding if those lands were already held by the United States. On July 31, 1950, the Naval Government of Guam quitclaimed "all right, title, interest, claim, or demand whatsoever" it had in the land within the perimeter.

[5/]The Organic Act provided for the evaluation of the United States' land holdings as they existed at the time of enactment. The Act did not address future United States land acquisitions.

for management as a National Wildlife Refuge. On July 6, 1993, in response to this request, and in accordance with the Federal Property Act and its implementing regulations, the General Services Administration authorized the transfer of Ritidian Point from the Navy to the Fish and Wildlife Service (ER 53, ¶51). The Fish and Wildlife Service accepted the property on October 1, 1993 (ER 53, ¶52).[6/]

In its Second Claim, GEDA challenges the United States' ownership of 15,571 acres of submerged lands adjacent to Ritidian Point.[7/] These lands were held by the Spanish Crown in 1898, and were ceded in fee simple to the United States. In 1992, the Navy declared these land excess to its needs, as defined by the Federal Property Act, and reported them to the General Services Administration (GSA). In 1994, the Fish and Wildlife Service requested transfer of the submerged lands up to the 30-meter isobath, the contour line lying at a constant depth of 30-meters (ER 54, ¶55). In 1996, in response to the Fish and Wildlife Service's request and in accordance with the Federal Property Act and

---

[6/]A more complete description of the events leading to the creation of the Guam National Wildlife Refuge can be found in the Stipulated Facts (ER 56-63, ¶¶65-93).

[7/]The Organic Act addressed only the title and administration of uplands. No lands beneath the territorial sea were transferred to Guam under section 28(a) or reserved by the President under section 28(b), nor were submerged lands addressed by the Act.

its implementing regulations, GSA authorized the transfer of these submerged lands from the Navy to the Fish and Wildlife Service. The submerged lands past the 30-meter isobath were declared "surplus," as defined by the Federal Property Act. Pursuant to the Federal Property Act, the Government of Guam had an opportunity to request those lands. See 40 U.S.C. 484. Guam did not request a transfer of the lands to it.

In its Third Claim, GEDA challenges the United States' ownership of 3,553 acres administered by the Air Force that the Department of Defense identified as "releaseable" in a document known as "Guam Land Use Plan: A Plan For Department of Defense Real Estate on Guam" ("GLUP94").[8/] These lands were contained within the perimeter of condemnation proceeding Civil Case 16-50, and were included in the land reserved by President Truman in Executive Order 10178.

[8/]GLUP94 was a non-binding long-term management analysis by which the Department of Defense evaluated its land and real property posture and attempted to forecast its future needs. GLUP94 was undertaken with the understanding that its forecasts constituted a "snapshot" picture of military needs and the assessments made therein were subject to change as necessitated by changing military circumstances. Identification of a property as "releaseable" was in no way a commitment to undertake the process discussed infra at n.9.

These lands are still held by the Air Force, which has no present plans to excess the property.[9/]

All lands at issue in this case are currently owned by the United States (ER 48, ¶¶28-29). Former private landowners whose lands were taken by condemnation either stipulated to the just compensation afforded or proceeded to a contested trial. Those who did not proceed to contested trial in the original condemnation proceedings were given another opportunity to seek damages and receive additional compensation from the federal government for these condemnations. Pursuant to the Omnibus Territories Act of 1977, Pub. L. 96-205, 94 Stat. 84, amended on March 12, 1980, Guamanians whose lands were acquired by the United States between July 21, 1944, and August 23, 1963, were afforded an opportunity to pursue claims for "fair compensation" if they alleged that they

---

[9/]GEDA alleges that military need for the lands in Claim Three ceased to exist in April 1995 when GLUP 94 was issued (Br. 8). The military, and all other federal agencies, must make any determinations that their land holdings are no longer needed for their agency missions in accordance with the provisions of 40 U.S.C. 472(e). Lands become excess when "property under the control" of that particular agency is expressly identified as "not required for its needs and the discharge of its responsibilities, as determined by the head thereof." Id. This "excess" determination is made by the executive branch agency that holds the lands and is uniquely qualified to assess its agency's need. In this case, the agency responsible for making any "excess" determination for the lands in Claim three would be the Air Force. No lands in Claim Three have been determined by the Air Force to be "excess" (See Edwards Decl.; Supp. ER 68-70).

had received less than fair market value as a result of "unfair, unjust and inequitable actions of the United States." To date, the United States government has paid more than $42 million in compensation to individual Guamanian landowners, in addition to the original compensation paid.

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment *de novo*. Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 670 (9th Cir. 1993).

SUMMARY OF ARGUMENT

GEDA seeks to divest the United States of title to, or control of, approximately 20,000 acres of land, on the grounds that the lands are no longer needed for military purposes. GEDA's action rests upon a novel, but unsound, interpretation of the Guam Organic Act and the Territorial Submerged Lands Act, and a flawed application of the doctrine of aboriginal title.

The Guam Organic Act contains no provision mandating that the United States transfer to Guam title or control of land owned by the United States that is or has been administered by the military and is no longer needed for military purposes. Similarly, the Territorial Submerged Lands Act contains no requirement that the United States transfer to Guam title or control of submerged lands when title or control of the adjacent uplands is transferred to Guam. Finally, the

doctrine of aboriginal title is not a mechanism by which the United States can be divested of title. Moreover, even if GEDA seeks to obtain something less than title to these lands, it has failed to establish aboriginal title to the lands claimed. Accordingly, this Court should affirm the district court's judgment.

ARGUMENT

I

THE GUAM ORGANIC ACT CREATES NO CONTINUING MANDATORY DUTY TO TRANSFER TITLE OR CONTROL OF LAND TO THE GOVERNMENT OF GUAM WHEN IT IS NO LONGER NEEDED FOR MILITARY PURPOSES

A. Section 28 is unambiguous and must be given its plain meaning. — In the Guam Organic Act, Congress provided a mechanism for the United States to evaluate its land holdings on Guam and determine which lands it wished to retain and which lands it would transfer to the new government of Guam.[10/] 48 U.S.C.

[10/] Section 28 of the Organic Act provided for the transfer of certain property owned by the United States:

> (a) The title to all property, real and personal, owned by the United States and employed by the naval government of Guam in the administration of the civil affairs of the inhabitants of Guam, including automotive and other equipment, tools and machinery, water and sewerage facilities, bus lines and other utilities, hospitals, schools, and other buildings, shall be transferred to the government of Guam within ninety days after August 1,

(continued...)

1421f. First, Congress declared that title to all land that was already used in the administration of the civil government would be transferred to the newly created local government. Id. at 1421f(a). With respect to federally-owned property not in use in the administration of civil affairs, Congress gave the President the

---

[10/](...continued)
1950.

> (b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after August 1, 1950, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam, and the legislature shall have authority, subject to such limitations as may be imposed upon its acts by this chapter or subsequent Act of Congress, to legislate with respect to such property, real and personal, in such manner as it may deem desirable.
>
> (c) All property owned by the United States in Guam, the title to which is not transferred to the government of Guam by subsection (a) of this section, or which is not placed under the control of the government of Guam by subsection (b) of this section, is transferred to the administrative supervision of the Secretary of the Interior, except as the President may from time to time otherwise prescribe: *Provided*, That the Secretary of the Interior shall be authorized to lease or to sell, on such terms as he may deem in the public interest, any property, real and personal, of the United States under his administrative supervision in Guam not needed for public purposes.

48 U.S.C. 1421f.

authority to identify, within 90 days, lands whose control would be reserved to the United States, and to determine which federal agency or department would administer any such lands. Id. at 1421f(b),(c). All federally-owned lands not reserved within 90 days would be placed under the administrative control of the government of Guam. Thus, within 90 days of the enactment of the Organic Act, the lands to be administered by the newly formed government, and the lands remaining in federal control, were identified.

GEDA now challenges the United States' retained control of lands reserved under section 28(b) and its condemnation of additional lands. Contrary to GEDA's claim, that challenge has no basis in section 28(b). Initially, in determining a question of statutory construction, the appropriate starting point is the language of the statute itself. Caminetti v. United States, 242 U.S. 470, 485 (1917); see also, Sacramento Regional County Sanitation Dist. v. Reilly, 905 F.2d 1262, 1268 (9th Cir. 1990); Robinson v. Shell Oil Co., 117 S. Ct. 843, 846 (1997) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)). Moreover, it is well-established that unambiguous statutes are given their plain meaning, because the statutory language is the "best evidence" of their purposes. West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98 (1991). The courts therefore do not look beyond the plain language in an unambiguous statute except

in rare and exceptional circumstances. Demarest v. Manspeaker, 498 U.S. 184, 187 (1991); see also, United States v. Valencia-Andrade, 72 F.3d. 770, 774 (9th Cir. 1995); Pavelic and Le Flore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Here, the language of the Guam Organic Act is not ambiguous. Section 28 of the Act authorized the President to reserve lands, and to provide for their administration as well as for their disposal if and when they became unnecessary for "public purposes." This Court need look no further than section 28 of the Act to affirm the district court's conclusion that the Act established no continuing duty to transfer control of federally-owned lands to the government of Guam.

B. The text of section 28 of the Guam Organic Act reveals no Congressional purpose that is frustrated by the plain meaning of its terms. — GEDA urges this Court to adopt a strained interpretation of section 28 of the Guam Organic Act, claiming (Br. 12) that its version should be "preferred" as the only interpretation consistent with the "stated purpose" of the provision. Although no "purpose" is "stated" in section 28, the statute's purpose was to establish a civil government on Guam, see 64 Stat. 384; A-17 (S. Rep. No. 2109, 81st Cong., 2nd Sess., at 2840 (1950)), and section 28 established the extent of the new government's control over land on the island that had previously been

administered by the Naval Government of Guam. The district court's conclusion that section 28(b) functioned to transfer control of property not required in the administration of the local government "at the discretion of the Executive Branch, to either an alternative federal agency or the local government" is fully consistent with the purpose and intent of the Act.

1. Section 28(b) reveals no intent to effect land control transfers more than 90 days after its enactment. — GEDA asserts (Br. 13) that section 28(b) was intended primarily to transfer land, and that the statute must be interpreted in the manner that best effectuates this supposed "intent." It therefore reads into the Organic Act a continuing obligation upon the federal government to transfer control to the government of Guam when land previously reserved under section 28, and land condemned in fee by the United States in 1962, is no longer needed for military purposes. But it is well established that "land grants [by the United States] are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957).

On it face, section 28(b) creates no continuing obligation, nor can any such obligation be impliedly read into it. Section 28(b) provided the United States with

a 90-day period within which to identify lands it intended to continue to administer, and stipulated that administration of any lands not so identified was to be turned over to the newly-formed government of Guam. The statute did not address future transfers of control of reserved lands beyond authorizing the President, in section 28(c), to determine the department or agency that would administer them, and authorizing the sale or lease of lands no longer needed for "public purposes." Accordingly, section 28 did not, by its terms, require transfer to Guam of any lands that had been reserved by the President under section 28.[11/]

The district court properly concluded that the general purpose of section 28 was to transfer land necessary to its administration to the new, local government of Guam from the prior, federal governing body (ER 127). Sections 28(b) and (c) addressed the transfer and administration of lands not needed by the new

---

[11/]Subsequent acts of Congress transferring federal land to Guam confirm that Congress did not intend that the Organic Act would create a continuing obligation to transfer land no longer needed for military purposes. For example, in 1980, pursuant to Pub. L. 103-339, the United States transferred approximately 500 acres to the government of Guam for the Southern High School, Northern High School, Guam Community College and Agana Springs Conservation Area. (ER 12, ¶ 44). In 1981, pursuant to Pub. L. 96-418, section 818(a), Congress authorized the transfer of 927 acres of land on Cabras Island from the United States to the government of Guam. Congress's enactment of these measures to effectuate transfers of federal land to Guam is inconsistent with GEDA's theory that section 28(b) was intended to have continuing force with respect to transfer of land.

government, and plainly vested discretion in the Executive Branch, without limitation, to reserve such lands and to administer and dispose of them. The plain language of these provisions is consonant both with section 28's apparent purpose of transferring necessary lands to the new government, and with the stated purpose of the Organic Act to "provide a civil government for the island of Guam" (see ER 126 & n.5).

2. The statute's statement that control of lands unreserved after 90 days "are hereby transferred" to the government of Guam does not create a continuing duty to transfer. — GEDA argues (Br. at 15) that the use of the present tense in section 28(b) to refer to action that was to take place within 90 days creates ambiguities. But GEDA attempts to create this ambiguity through rewriting the statute's terms, claiming that the phrase "is hereby placed" in section 28(b) should be rewritten as "'is hereby ordained to be placed,' when the appropriate circumstances arise." The district court properly recognized that no ambiguity arises from the provision's use of the present tense in this phrase: "While such use of the present tense may, arguably, be awkward it fails to render section 28(b) capable of being understood, by reasonable persons, to represent anything other than a single one-time duty. . . . [T]he present tense and the ninety-day delay are compatible" (ER 119).

GEDA claims that the State of Utah Enabling Act, Submerged Lands Act of 1953, and Territorial Submerged Lands Act of 1974, created land grants that are "indefinitely continuing," and that the choice of the present tense in section 28(b) indicates that the Guam Organic Act did the same. But the language of the Utah Enabling Act unambiguously promised specific sections of land to the newly created State of Utah for the purpose of supporting the public school system. 28 Stat. 109; Andrus v.Utah, 446 U.S. 500, 506-07 (1980). Because the State of Utah was not fully surveyed at the time of statehood, the State did not receive all the land immediately. Id. at 502-03. This fact did not create a continuing obligation. Rather there were one-time transfers that vested as the condition precedent — surveying — occurred.

Likewise, the Submerged Lands Act of 1953 effected a one-time transfer.[12/] GEDA mistakenly argues that because submerged lands are defined by ambulatory boundaries, the grant of submerged lands continues indefinitely (Br. 15-16). No case cited by GEDA holds that the grant itself continues indefinitely.

In United States v. California, 381 U.S. 139 (1965), the Supreme Court clarified that the grant of submerged land to the states is bounded on the

---

[12/]For a discussion of GEDA's inappropriate use of the Territorial Submerged Lands Act see infra at part II.

shoreward side by the present coastline, which is defined as the low water mark, and bounded on the seaward side three-miles from the coastline. 381 U.S. at 176-77. Due to the ambulatory nature of the coastline boundary, the specific lands change. Similarly, this Court has expressly acknowledged that the federal common law of reliction provides that "when a body of water serving as the boundary between two parcels of property gradually and imperceptibly recedes, the exposed land belongs to the upland owner." California ex rel. State Lands Commission v. United States, 805 F.2d 857, 860 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987). As the boundary changes, the precise lands change, but there is no future conveyance or condemnation by the United States because the title is defined by an ambulatory boundary, not by a precise piece of land.

Likewise, the Supreme Court confirmed in both United States v. Louisiana cases that "coastline" means the modern ambulatory coastline, even though that means ownership of minerals is affected by erosion and accretion. United States v. Louisiana, 394 U.S. 11, 32-34 (1969); United States v. Louisiana, 394 U.S. 1, 4-5 (1969). GEDA has identified no provision for future grants of submerged lands under these provisions. The Submerged Lands Act of 1953 provides that such submerged lands "are hereby * * * vested in * * * the respective States. . .," 43 U.S.C. 1311(a), which does not, by its terms, authorize any future land grants.

Likewise, "is hereby" in section 28(b) maintains its plain meaning and does not mandate any future transfers.

3. **Section 28(b) was not intended to limit the United States' use of reserved lands.** — GEDA asserts that the district court erroneously interpreted section 28(b) to allow the conversion of lands contained within reservations made pursuant to section 28(b) to non-military use, and that the statute provides for the automatic transfer to Guam of reserved lands when they are no longer needed by the military (Br. 11-12, 18-20). GEDA argues from the premise that, because section 28(a) required the transfer of all land used in the civil administration of Guam, section 28(b) authorized reservation only for "non-civilian, *i.e.* military uses" (Br. 19). It further argues that, if the statute prohibited the President from reserving lands for non-military use, it also prohibited the future non-military use of any lands reserved for military purposes, because the President could not "by subsequent order, accomplish what was not originally within his power" (Br. 20).

This interpretation of the statute is also not supported by the language of the statute itself. Nothing in the statute's terms limits the President's authority with respect to use of reserved federal lands, and the statute's clear terms vest the President with discretion to determine which federal agency should administer the lands. The statute further vests the designated agency head with discretion to

dispose of the lands by sale or lease when they are no longer needed for "public purposes." GEDA acknowledges (Br. 19) that lands in fact were reserved under section 28(b) and transferred pursuant to section 28(c) for resettlement of the local population, but inexplicably dismisses this clear inconsistency with its theory as a "special situation involving only a temporary reservation" (Br. 19).

Contrary to GEDA's assertion (Br. 19-20) that section 28(b) limited the President's reservation authority to lands intended for military use, section 28(b) does not provide that "the President may only reserve property for a military purpose." Instead, like the referenced statutes cited by GEDA , section 28(b) places no limits upon the uses to which reserved lands may be put.

In short, because section 28 is unambiguous and does not frustrate the congressional purpose, the statute's text ends the inquiry as to its meaning. The statute's clear and unambiguous terms provide for a one-time transfer of federal land to the government of Guam, and does not limit the use of land that was retained under that Act by the United States.

C. Even if section 28 were ambiguous, applicable canons of statutory construction would require a narrow interpretation of its provisions regarding control of federal lands. — GEDA further defends its creative interpretation of the Act by claiming support in a canon of statutory construction

requiring that statutes be interpreted to avoid rendering portions of their language absurd or ineffective, as well as a canon requiring liberal construction of statutes in favor of Indians. Neither canon applies here, even if section 28 were ambiguous. Moreover, application of the canon of construction that would be relevant — which dictates that federal land grants must be construed narrowly in favor of the United States — would require a contrary result.

1. **The exercise of the President's discretion to reserve control of lands pursuant to section 28(b) did not render the provision "surplusage."** -- GEDA argues that some of the statute's language is rendered superfluous by the district court's construction, and that this construction therefore violates the principle that courts should "avoid an interpretation of a statute that 'renders some words altogether redundant.'" United States v. Alaska, 117 S. Ct. 1888, 1918 (1997)(citing Gustafson v. Alloyd, 513 U.S. 561, 574 (1995)). (Br. 13). Initially, GEDA premises this contention on the incorrect assumption that section 28(b)'s fundamental purpose was to transfer land. See supra at part I.B. Moreover, although the provision contemplated the possibility of a transfer of control of federally owned lands, section 28 did not require that control of the land be transferred. The language used by Congress provided that, unless the President acted within 90 days, control of all land owned by the United States on Guam

would be transferred. But because the President acted to reserve land within 90 days, the transfer that could have occurred in 1950 did not.[13/] This exercise of the authority granted by Congress in the statute neither converted section 28 into an "empty promise to the Guamanian people" (Br. 14), nor rendered the provision, which would otherwise have transferred control of the reserved parcels to Guam, "surplusage."[14/]

To be sure, the Supreme Court has held, in cases such as Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) — where the statute provided for actions that a literal reading of the statute rendered impossible — that the provision's plain meaning was not a reasonable interpretation of the statutory language. In United States v. Alaska, 117 S. Ct. 1888 (1997), addressing whether certain land was "withdrawn or otherwise set

---

[13/]At least forty acres of land were transferred to Guam pursuant to 28(b). Those are the tidelands that were condemned by the United States in 1962. See supra at Statement, part B. Even GEDA acknowledges this fact, as it carefully states that "no dry land has in fact been transferred under 28(b)" (Br. 14)(emphasis added).

[14/]The district court properly disposed of GEDA's "absurd results" theory, noting that the literal meaning of the statute does not produce "absurd and unjust results" because section 28(b) never required the transfer of land, but only provided a deadline by which the President had to affirmatively reserve land, and that only the plain meaning of section 28(b) is consistent with the purpose of the statute (ER 117-18).

apart as refuges" within the meaning of the Alaska Statehood Act, the Court held that land "otherwise set apart" referred to uncompleted reservations, so as "to avoid an interpretation of a statute that 'renders some words altogether redundant.'" Id.

But GEDA incorrectly asserts that a literal reading of the statute — which allows control of all lands potentially transferrable by the provision instead to be reserved — renders the entire provision surplusage. Unlike the provisions at issue in Santa Ana and Alaska, the literal reading of the language challenged here grants discretionary authority. It was the exercise of the discretion by the President pursuant to the statute, and not the operation of the statute itself, that caused control of the lands to be unavailable for transfer. Had the President exercised his discretion to reserve control of some, but not all, of the land, there would have been both a reservation and transfer pursuant to section 28(b). A literal reading of the statue, therefore, does not render the transfer provision "surplusage," even if it permits transfer to be avoided.

2. **The canon of construction requiring resolution of ambiguities in favor of Indian Tribes is inapplicable because the Guam Organic Act is not Indian legislation.** — GEDA argues that the canon of construction governing ambiguities in statutes enacted for the benefit of Native Americans should be

applied (Br. 22-29), and that the statute must be read in light of the Land Transfer Act, the Land Acquisition Act, and the report of a Congressional subcommittee visit to Guam (Br. 29-37). That argument is also without merit.

First, the government of Guam is not entitled to the canon of favorable construction that applies to Native Americans to whom the United States owes a general trust obligation. Congress has never passed legislation entitling Guamanians to treatment as Indians,[15/] nor have Guamanians been the subject of

---

[15/] Implicit in GEDA's theory is the assumption that the federal government's exercise of plenary power over a non-autonomous native people should establish trust responsibilities, which would, in turn, inform the Court's construction of the Organic Act. In a series of decisions arising out of the federal government's internment of Japanese-Americans during World War II, the courts found that extensive control alone is insufficient to establish the federal government's fiduciary relationship. See Hohri v. United States, 586 F. Supp. 769, 792 (D.D.C. 1984), aff'd, 782 F.2d 227 (D.C. Cir. 1986), vacated for lack of jurisdiction and remanded to the Federal Circuit, 482 U.S. 64 (1987), aff'd, 847 F.2d 779 (Fed. Cir. 1988) cert. denied 488 U.S. 925 (1988). Certain Japanese-American internees sued the United States to recover the value of the Japanese-American property confiscated by the United States. They contended that there was a fiduciary relationship between the Japanese-American internees and the federal government, relying by analogy on the relationship between the United States and American Indians. The federal courts rejected that argument, noting that the Japanese-Americans had established nothing analogous to the "historic relationship between the United States and American Indians, created by treaty, judicial doctrine and elaborate legislation." See Hohri 586 F. Supp. at 792. That district court stressed: "No act of Congress evidences an intent to create a fiduciary relationship between plaintiffs and defendant." Id. Thus, the award of reparations to Japanese-Americans does not support Guam's reliance on an analogy to federal Indian law.

their own trust legislation. Nothing in the Organic Act suggests the existence of such a relationship.

Likewise, GEDA erroneously asserts (Br. 27) that Carino v. Insular Government of the Philippines, 212 U.S. 449 (1909), extended the canon applicable to Indian legislation to matters involving Pacific islanders. Carino did not involve the canon governing ambiguities in statutes enacted for the benefit of native Americans or, indeed, any statutory construction questions at all. Rather, the Carino Court reviewed the history of land title in the Philippines and the specific facts relevant to the claimants' ownership of the land at issue. The Court concluded that Carino's ancient claim to the lands had not been extinguished by the Spanish conquest of the Philippines, and that title to the land in question, therefore, could not be assumed to have passed to the United States when it acquired the Philippines from Spain.

Here, the canon of construction requiring that statutory ambiguities are resolved to the benefit of Indians has no application, in the absence of Indian legislation or any evidence of a trust relationship. That canon, moreover, "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986).

GEDA's reliance on the canon of construction requiring resolution of ambiguities in favor of Indian Tribes is wholly misplaced in these circumstances. The provisions at issue are not ambiguous and, as GEDA acknowledges, even statutes written for the benefit of Native Americans are given their plain meaning in this situation (Br. 24).

3. The Land Transfer Act, the Land Acquisition Act, and the legislative history of the Organic Act have no bearing on the interpretation of section 28. — GEDA urges the Court to read the Organic Act in light of the Guam Land Transfer Act of November 15, 1945, and the Guam Land Acquisition Act of August 2, 1946. GEDA concedes that these Acts only "authorized," but did not require, the transfer of land (Br. 33). Indeed, the Land Transfer Act authorized the Secretary of the Navy, at his discretion, to transfer lands not needed for military or navy purposes.[16/] See 59 Stat. 584, c. 485. Despite the discretionary nature of the Acts, GEDA claims that this authorization is a "clear Congressional endorsement of the proposition that any surplus land should be transferred to

---

[16/] The Land Acquisition Act also provided the Secretary of the Navy with discretion to transfer lands to the Naval Government of Guam in 1945. It merely provided authorization and funding for the Navy to acquire additional land on Guam for a number of purposes including those set out in the Land Transfer Act. 60 Stat. 803, c. 738.

Guamanians, not needlessly retained by the military or passed on to another federal agency." (Br. 33)(emphasis added).

Even assuming that Congress "endorsed" GEDA's proposition in 1945, that endorsement cannot be read into the actions of subsequent Congresses. The Congresses of 1950 and 1974, in enacting the Organic Act and the Territorial Submerged Lands Act, did not include any requirement that land not needed for military purposes be transferred to Guam. Furthermore, GEDA admits that the Organic Act superseded the Land Transfer Act, and courts may not read the purported Congressional intent of a superseded statute into clear, unambiguous, subsequent legislation. United States v. Great Northern Ry. Co., 343 U.S. 562, 575 (1952)("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.").

Neither the Land Transfer Act nor the Land Acquisition Act is "in pari materia" with the Organic Act because the statutes do not share a common purpose. The purpose of the Land Transfer Act was to assist in the rehabilitation and resettlement of the people of Guam following World War II. See 59 Stat. 584, c. 485. The Land Acquisition Act merely provided funding to allow for the acquisition of lands in furtherance of the Land Transfer Act. See 60 Stat. 803, c. 738.

Moreover, even if the statutes were "in pari materia," the cases cited by GEDA are of no avail because there is no conflict between the Guam Organic Act and either the Land Transfer Act or the Land Acquisition Act, see Watt v. Alaska, 451 U.S. 259 (1981)(Because there was a direct conflict between the Wildlife Refuge Revenue Sharing Act of 1964 and the Mineral Leasing Act of 1920 and there was no Congressional intent to repeal the 1920 Act, the statutes had to be read to give meaning to both so as to avoid repeal by implication), and the acts were enacted by different Congresses, see Menominee Tribe v. United States, 391 U.S. 404 (1968). Accordingly, even if the Organic Act were ambiguous, the Land Transfer Act and the Land Acquisition Act would have no bearing on its interpretation.

GEDA further attempts (Br. 34-36) to support its theory that land not needed for military purposes must be transferred to Guam by relying on language from a Congressional subcommittee site visit report. However, that report does not support GEDA's contention but, rather, suggests that such land be returned to private ownership and use. A-11 (H.R. Rep. No. 1677, 81st Cong., 2d Sess. (1950), Appendix No. 3 at 11). Moreover, after these statements were made, most of the land at issue in this lawsuit was condemned, Condemnation Proceedings, Civil Actions 16-50, 26-50, 27-50, 33-50, 34-50, and included in military

reservations. After those condemnations, Congress enacted the Guam Organic Act and made no mention of a continuing obligation on the part of the United States to reassess the military need for lands owned by the United States.

At bottom, GEDA would have the Court impermissibly "construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated." Doski v. M. Goldseker Co., 539 F.2d 1326, 1332 (4th Cir. 1976)(citing United States v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926, 929 (4th Cir. 1975)). Even if this statute were ambiguous, applicable canons of construction simply would not allow reliance on the subcommittee site visit report. And, in any event, the report lends no support to GEDA's contention that the property at issue is to be transferred to the Government of Guam rather than for private ownership and use. In sum, none of the extrinsic evidence of Congress's intent offered by GEDA provides a basis for altering the statute's plain meaning.

II
THE TERRITORIAL SUBMERGED LANDS ACT DOES NOT REQUIRE THE UNITED STATES TO TRANSFER FEDERALLY OWNED SUBMERGED LANDS WHEN ADJACENT UPLANDS ARE TRANSFERRED TO GUAM.

In 1974, Congress enacted the Territorial Submerged Lands Act, 48 U.S.C. 1705, which granted territories title to submerged lands beneath the territorial sea.

See Marx v. Government of Guam, 866 F.2d 294, 300 (9th Cir. 1989).[17/] However, the statute expressly excepted submerged lands adjacent to federal uplands from its grant of submerged lands to territories:

> There are excepted from the transfer * * * all submerged lands adjacent to property owned by the United States above the line of mean high tide.

48 U.S.C. 1705(b)(ii). Thus, the United States retained submerged lands adjacent to federal uplands.

GEDA acknowledges that in 1974 the United States owned the uplands adjacent to the submerged lands at issue, and does not dispute that these lands therefore were not granted to Guam in 1974 by the passage of the Territorial Submerged Lands Act (ER 5-6, First Amended Cmpt. at ¶ 13-15). GEDA argues, however, that the 1974 Statute created a "continuing obligation" to transfer submerged lands if and when the adjacent uplands are no longer owned by the United States (Id.). GEDA — assuming that it is entitled under its first claim to title to the Ritidian Point uplands — argues that it therefore also has title to the submerged lands. Id. That contention, too, is wrong.

[17/]The Submerged lands Act of 1954 effectuated the same grant of title to States. 43 U.S.C. 1301 et seq..

There is no basis in the statute for GEDA's assumption that the grant language of 48 U.S.C. 1705(a) creates a continuing obligation to transfer land. Unlike the Organic Act, the Territorial Submerged Lands Act did not authorize a transfer from the Executive Branch in the first instance. Congress itself made the grant in 1974, and its grant was complete at that time. Congress made no provision in that Act for future transfers as uplands fell out of federal (or military) ownership. By the same token, Congress did not provide that submerged lands adjacent to any later-acquired uplands should return to the federal government.[18/]

Instead, Congress provided a process for future conveyances of the submerged lands reserved in 1974. 48 U.S.C. 1705(b) authorizes the Secretary of the Interior, upon the request of the Governor of Guam, to convey submerged lands to the territory following concurrence of the agency with custody and an opportunity for Congressional review. 48 U.S.C. 1705(c).

[18/] Such an exception was included for one specifically described federal project, Section 1705(b)(iii), and could have been included as a general proposition had Congress intended permanently to wed upland and submerged lands rights. The Territorial Submerged Lands Act clearly states that all submerged lands are transferred except for "all submerged lands adjacent to property owned by the United States above the line of mean high tide;" 48 U.S.C. 1705(b)(ii). Nowhere does it state, as GEDA wishes, "for so long as the acreage continues to be 'adjacent to property owned by the United States.'" (Br. 16, n.9).

Significantly, Congress provided that the Secretary may convey such lands. Congress did not make a grant which, by operation of law, affected title to submerged lands with subsequent changes in the status of uplands. Rather, it made a one-time grant, and authorized the Secretary to consider future grants with Congressional oversight.

GEDA's claim to the submerged lands therefore fails for several reasons. First, the submerged lands at issue here were not the subject of the Organic Act's transfer provisions. One must therefore look to subsequent Congressional action to determine the status of those lands. Second, as discussed supra at part I, section 28 of the Organic Act does not create a continuing obligation to transfer federal lands. Finally, the lands at issue were excepted from transfer through the Territorial Submerged Lands Act. That Act did not create a separate "continuing obligation" to transfer submerged lands to the territory (or vice versa) as uplands changed hands, but rather created a process for future transfers. The submerged lands therefore remain the property of the United States unless and until Congressionally-mandated procedures are followed for their disposition.

III

THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT IS REQUESTING AN ADVISORY OPINION REGARDING WHETHER THERE EXISTS ANY FIDUCIARY RELATIONSHIP BETWEEN THE UNITED STATES AND THE PEOPLE OF GUAM.[19/]

GEDA urges that, even if the Organic Act of 1950 does not require transfer of title of all of these lands to Guam, it has aboriginal title to at least some of these lands[20/] (Br. 37). Under this theory, GEDA does not challenge the United States' right to use these lands for military and national security purposes (Br. 38 -9 & nn. 25, 27). GEDA contends, however, that the United States held these lands in trust for native Guamanians and had a fiduciary duty to return the land after the military use ended (Br. 43). By transferring these lands to other federal agencies for non-military purposes, GEDA contends (Br. 43) that the United States thereby breached a fiduciary duty owed to unidentified native Guamanians.

A. <u>The United States' trust relationship with American Indian tribes and Alaskans has never been extended to Pacific islanders</u>. — GEDA's

---

[19/]The factual background section upon which GEDA relies to add color to its aboriginal claim contains many controverted facts (<u>See</u> Supp. ER 58-67, Defendants' Statement of Genuine Issues).

[20/]GEDA asserts (Br. 10-11 & n.7) an aboriginal claim to the cliff parcel and the 40 acres of tidelands included in the beach parcel in Claim 1; the submerged land underlying the lagoon and the offshore reefs adjacent to Ritidian Point, approximately 170 of the 15,571 acres in Claim 2; and all of the lands in Claim 3.

assertion that there is any such trust relationship is mistaken for several reasons. The United States' trust relationship with American Indian tribes arose in a specific historical context that does not apply to Pacific Islanders, including native Hawaiians and native Guamanians. The United States' trust relationship with American Indian tribes arises from the Constitution, statutes, regulations, agreements, and executive orders wholly inapplicable here. See United States v. Mitchell, 463 U.S. 206, 225-26 (1983); Morton v. Mancari, 417 U.S. 535, 551-555 (1974).

Moreover, neither Congress nor the judiciary has ever treated native Hawaiians, or natives Guamanians, as Indians.[21/] Although Congress has extended the benefits of a number of statutes to native Hawaiians, none of these statutes purports to create a trust obligation toward native Hawaiians, any more than they do toward other groups that are benefitted, such as "the elderly, women, handicapped individuals, and families of drug abusers." See, e.g., Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. 1177(d). Indeed, this Court noted in Price v. Hawaii, 764 F.2d 623, 626 (9th Cir. 1985), cert. denied,

---

[21/] By contrast, Alaskan Natives, including Eskimos and Aleuts, have long been considered to have the same special relationship with the federal government as other Indians. See Pence v. Kleppe, 529 F.2d 135, 138 n.5 (9th Cir. 1976); Hynes v. Grimes Packing Co., 165 F.2d 323, 326 (9th Cir. 1948); F. Cohen, Handbook of Federal Indian Law 739 (1982).

474 U.S. 1055 (1986), that the statutes which govern the formal organization and incorporation of Indian tribes, 25 U.S.C. 476-477, do not apply to Hawaii. See also Han v. Department of Justice, 824 F. Supp. 1480, 1486 (D. Hawai'i 1993), aff'd, 45 F.3d 333 (9th Cir. 1995) (federal government has no trust responsibility to native Hawaiians where the relevant statutory language does not explicitly indicate a fiduciary duty). The district court in Han v. Department of Justice, 824 F. Supp 1480, 1486 fn. 2 (D. Hawai'i 1993), aff'd 45 F.3d 333 (9th Cir. 1995), correctly recognized that no such relationship extends to native Hawaiians:

> The question before the court today is not whether the United States has a moral obligation to native Hawaiians as a result of acts committed by representatives of the United States or those acting in concert with them at some previous time. The issue here is whether the United States is under a legally enforceable statutory duty to act as suggested by the plaintiffs.

Id. Likewise, no such trust relationship extends to Guamanians.

B. The undisputed facts here establish that GEDA does not have unextinguished aboriginal title to any of the lands at issue. — Guam also challenges the "continued retention" of these lands by the United States, and requests that the court enter an order of mandamus against the United States, based on a claim of aborginal title to the lands (ER 2-3, First Amended Complaint at

¶¶ 1, 2). The doctrine of aboriginal title should not be applied to Guamanians, for the same reason that Courts have not imported the trust relationship outside the continent and Alaska

The district court properly declined to evaluate whether GEDA possesses a valid aboriginal right to these lands because, even if such a right existed, GEDA conceded that the doctrine of aboriginal right does not entitle it to the remedy sought — title to, or possession of, the disputed lands. As against the United States, an aboriginal title holder has no superior possessory right. Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661, 667 (1974).

Moreover, aboriginal title describes an Indian possessory interest in land which Indians have inhabited since time immemorial. County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). This permissive right of occupancy is granted by the federal government, United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir.), cert. denied, 429 U.S. 982 (1976) , and may be extinguished by the federal government at any time, although extinguishment will not be taken lightly. Id. Under the doctrine of aboriginal title, a tribe with proven aboriginal title is entitled to "occupancy and use" of the lands; "aboriginal title" is an equitable possessory interest but not a property interest assertable against the United States. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823); County

of Oneida, New York v. Indian Nation of New York State, 470 U.S. 226, 234 (1985). The holder of this equitable possessory interest does not have a right superior to that possessed by the United States, the actual title holder. M'Intosh, 21 U.S. at 592; Oneida Indian Nation of New York State, 414 U.S. at 667 (Aboriginal title is good against all but the sovereign).

Accordingly, short of finding that Guam is entitled to fee title, the Court in any event cannot take "possession and control" of these lands from the United States. There is no legal basis for holding that, merely because the federal military use of these lands has ended, the United States cannot put its land to an alternate use and must cede control and possession to Guam. U.S. Const., art. IV, § 3, cl. 2.

This Court's decision in United States v. Dann, 873 F.2d 1189 (9th Cir.) cert. denied, 493 U.S. 890 (1989), requires no different result. As GEDA correctly states, under Dann a tribe may bring an action to assert aboriginal title where an executive official or agency attempts to extinguish aboriginal title without Congressional authorization. But no executive official or agency extinguished aboriginal title. And, to the extent aboriginal title ever existed, it was extinguished by numerous acts of Congress. See infra part III.B.3.

In addition, GEDA seeks more than mere recognition of its aboriginal title — it seeks to oust the United States and to confer upon Guam control of these

federal lands.[22/] Aboriginal title, even if proven, cannot entitle GEDA to this relief. Accordingly, the district court correctly concluded that a ruling on the existence of aboriginal title would be tantamount to offering an advisory opinion, which is beyond the competence of the judiciary. U.S. Const. art. III, § 2 (requiring a justiciable case or controversy); FCC v. Pacifica Foundation, 438 U.S. 726, 734-35, reh. denied, 439 U.S. 883 (1978); Coalition For A Healthy California v. FCC, 87 F.3d 383, 384-85 (9th Cir. 1996).

Significantly, too, GEDA has demonstrated no unextinguished aboriginal title to any of the lands at issue. To establish its claim of aboriginal title, GEDA must prove: (1) that its claim is based on a tribal or ancestral relationship to the land (2) that it, or its ancestors, had "actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land," and, (3) that its aboriginal title has not been extinguished. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (quoting Confederated Tribes of Warm Springs Reservation of Oregon v. United States, 177 Ct. Cl. 184, 194 (1966)). The burden of proving these essential elements of tribal aboriginal right

---

[22/]Even if GEDA is seeking no more than mere confirmation of its aboriginal title in the face of the transfer of these lands to the Fish and Wildlife Service, Dann stands only for the proposition that Guam may sue an executive official or agency. GEDA still must establish a valid legal challenge to the transfer of the property pursuant to the Federal Property Act, 40 U.S.C. 483(a)(2).

to these lands rests with GEDA. Id.; United States v. Santa Fe Pacific Railroad, 314 U.S. 339, 345, 359 (1941). Proof of these elements involves factual questions. Pueblo of San Ildefonso, 513 F.2d at 1394. The facts with regard to these questions, however, are in dispute.

1. GEDA has no tribal or ancestral relationship to the lands at issue. — Initially, GEDA has not identified the entity allegedly possessing the aboriginal title. Northern Paiute Nation, et al. v. United States, 7 Ind. Cl. Comm. 322, 406-20 (1959). The government of Guam seeks possession and control not on behalf of any tribe or individual aboriginal person, but for itself (See ER 2-7, First Amended Cmpt. at ¶ 1, 2, 6, 12, 15, 19, Prayer For Relief (title to be transferred to Government of Guam)). Even assuming, therefore, that an aboriginal claim could oust the United States from the lands, the government of Guam, which represents all citizens of Guam and has no special trust relationship to any aboriginal group, can assert no such claim to the land.

GEDA contends that, although the United States used these lands for military purposes, it actually held them in trust for the absent natives. According to GEDA , the United States breached a fiduciary duty to native Guamanians by retaining the lands rather than transferring them to Guam. But GEDA's theory

that the United States acted as trustee for absent native beneficial title holders is entirely unsubstantiated.[23/]

GEDA has offered no authority for the proposition that the United States intended, or had any duty, to hold these lands in trust for the native Chamorro, or for transferring the property once its military use is complete. Similarly, GEDA's contention that it is legally empowered to "act as substitute trustee or representative of the native owners" is completely without legal support or any evidence that the "native owners" have empowered them to represent their interests. GEDA rests its claim to represent aboriginal claimants on evidence that the United States has treated the government of Guam as the proper "party to pursue the land interests of the local people" (Br. 43). GEDA, however, improperly assumes that the land interests of the local people of Guam are the same as those of the indigenous people. Such an identity cannot be assumed. See United States v. Kagama, 118 U.S. 384 (1885). Likewise, in the absence of evidence that the territorial government of Guam has a special relationship to its aboriginal people justifying such a finding, the government of Guam cannot be entitled to recover aboriginal lands on behalf of their aboriginal owners.

[23/]Indeed, there is no basis for finding a fiduciary relationship between the United States and native Guamanians. See supra at part III.A.

2. **GEDA has not had "actual exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land."** — GEDA additionally could not have had "actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." Pueblo of San Ildefonso, 513 F.2d at 1394 (quoting Confederated Tribes, 177 Ct. Cl. at 194). See also The Lummi Tribe of Indians v. United States, 181 Ct. Cl. 753, 759 (1967) (citing Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 315 F.2d 896, cert. denied, 375 U.S. 921 (1963)). The continuous occupancy necessary to establish aboriginal title is a question of fact, Santa Fe, 314 U.S. at 359, and the "tribe" must provide evidence regarding its way of life, habits, customs, and usages of the land. Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835). GEDA's speculative discourse on the history of Guam and land usage suggests none of the evidence needed to establish exclusive and continuous use and occupancy.[24/]

3. **Any purported aboriginal title to the lands has been extinguished.** — Finally, even if Guam could meet its burden to establish an aboriginal right, Congress long ago took actions that would have extinguished any purported

---

[24/]Indeed, no Chamorro, either individually or as a clan, came forward claiming aboriginal title to any of the lands at issue in this lawsuit during the registration process instituted by the Naval Government in the early 1900's. See discussion infra at part III.B.3. Thus, GEDA could not show actual, exclusive and continuous use of these lands in the 1900's, let alone in 1998.

aboriginal title to these lands. "Congress' power to extinguish aboriginal title is supreme, 'whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.'" Santa Fe, 314 U.S. at 347; Havasupai Tribe v. United States, 752 F. Supp. 1471, 1478 (D.Ariz.1990), aff'd, 943 F.2d 32 (9th Cir.1991), cert. denied, 503 U.S. 959 (1992). GEDA correctly asserts that extinguishment of title should not be lightly implied; but here there is clear and unequivocal extinguishment of title.

Spain established a system of recording titles and mortgages in 1863, and by 1893 the enactment of the Mortgage Law of 1893 established this system in the overseas colonies.[25/] Following cession of Guam to the United States, 30 Stat. 1756, the Naval Government established its own system of registering land title

---

[25/]The law system of registration of titles and mortgages was established in Spain in 1863. Ley de 8 de febrero de 1862. Sancionada entro en vigencia el dia 1 de enero de 1863. Alcubilla, Marcelo. Diccionairo de la Administracion Espanola. Madrid 1887, Vol. V, p. 648. With the enactment of the mortgage law in 1893, the system was established in the overseas colonies. On December 26, 1884, King Alfonso XII and his Minister of Ultramar issued Royal Order No. 1119. Gaceta de Manila, No. 60, March 20, 1885, p. 335 (Supp. ER 53-55). This royal order was implemented in the Marianas by Governor Francisco Olive, who issued the executive order of July 29, 1885 (Supp. ER 56-57). The executive order establishes the regulations for the recordings of rural properties in the registry office of the provincial government. By means of possessory information, individuals on Guam claimed title to rural lands. The Treaty of Paris turned over these records to the United States. 30 Stat. 1754.

and provided the Guamanians another opportunity to register their land. General Order 15 issued on March 13, 1900 states:

> All owners or claimants of land are hereby warned that in order that their ownership be recognized, they must acquire legal titles to the said land and have it registered according to the law in the office of the registrar of lands in Agana before May 15, 1900.

(Supp. ER 24).

The Guamanians' failure to record title to the lands with the Naval Authority by the established date extinguished any aboriginal title they may have held (Supp. ER 24).[26/] See also Supp. ER 25-52 (select General Orders relating to land). See Chunie v. Ringrose, 788 F.2d 638, 646 (9th Cir. 1986) (aboriginal title extinguished by failure of the Chumash Indians to present a claim for the disputed land with the board of commissioners pursuant to the Act of 1851); Pai 'Ohana v. United States, 875 F. Supp. 680, 697 (D. Hawai'i 1995), aff'd, 76 F.3d 280 (9th Cir. 1996)(any aboriginal title of Pai 'Ohana was extinguished when their ancestors failed to present a claim for fee title to the Land Commission for the lands at issue within the allotted time period).

[26/]Not only were native Guamanians presented with the opportunity, but the federal government went to great lengths to ensure that the native population had the opportunity to hold land. See generally, Thompson, Guam and Its People 115-117 (1947); Souder, "Guam: Land Tenure in a Fortress," in Land Tenure in the Pacific 213-214 (1987).

Further, even if aboriginal title was not extinguished by the failure to register title to the lands in question, the Organic Act of 1950 and the creation of the military reserve provides clear and convincing evidence that Congress intended to extinguish all aboriginal rights that might exist to these lands. The "exercise of complete dominion adverse to the right of occupancy" is sufficient to demonstrate the sovereign's specific intent to terminate aboriginal rights. Lipan Apache v. United States, 180 Ct. Cl. 487, 492 (1967). See also Quapaw Tribe v. United States, 128 Ct. Cl. 45, 49, 120 F. Supp. 283, 286 (1954), overruled on other grounds, United States v. Kiowa, 143 Ct. Cl. 545, cert. denied, 359 U.S. 934 (1959). Extinguishment need not be accomplished by treaty or voluntary cession, because the "relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights, not whether the revocation was effected by permissible means." United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir.), cert. denied, 429 U.S. 982 (1976).

In Gemmill, the forced expulsion of Indians followed by government use of the land extinguished Indian title. In Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768, 788 (1993), the Court of Federal Claims held that "the creation, occupation, and Indian departure from the lands encompassed in the Fort Douglas reserve, extinguished any aboriginal title to the subject land." Extinguishment has

been found in the issuance of Spanish land grants to non-Indians (Jicarilla Apache Tribe v. United States, 17 Ind. Cl. Comm. 338, 410 (1966)), the inclusion of aboriginal title lands in a Taylor Act grazing district (United States v. Pueblo of San Ildefonso, 206 Ct. Cl. 649, 663, 513 F.2d 1383, 1391 (1975)), and the inclusion of such land within the boundaries of a national forest (id. at 662-63, 513 F.2d at 1391); see also, e.g., Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 467-468, 147 Ct. Cl. 315 (1959).

Similarly here, the military reservation of these lands in 1950 and the exclusion of any Guamanians from the area extinguished any existing claim to aboriginal title to these lands. Executive Order 10178. The United States obtained fee title to the crown lands and exercised dominion and control over those lands, as well as the lands identified in GEDA's Claims for Relief which were contained within the boundaries of Condemnation Proceedings 16-50, 26-50, 27-50, 33-50, 34-50 and 29-62. Therefore, even if GEDA could oust the United States and assume possession and control of the lands on the basis of its claim of aboriginal title — which it could not — the undisputed facts establish that any aboriginal title that may have existed has been extinguished.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General

FREDERICK A. BLACK
United States Attorney
EDWARD J. LYNCH
Special Assistant United States Attorney
Districts of Guam and CNMI

ELIZABETH ANN PETERSON
ALLISON B. RUMSEY
MARGO D. MILLER
Attorneys, Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0449

MARCH 1998
90-1-1-2930

STATEMENT PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that this brief is printed in a proportional typeface of 14 points or more and contains fewer than 14,000 words.

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases in this Court.

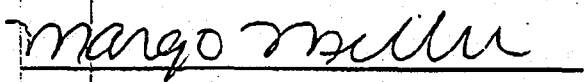
Margo Miller
Attorney
Environment & Natural Resources Division
U.S. Department of Justice
601 Pennsylvania Ave., NW
Washington, DC 20044-0663
(202) 305-0449

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 1998, two copies of the Brief for the Federal Appellees and one copy of the Supplemental Excerpts of Record were sent by Federal Express to counsel for the appellant at the following address:

Louis F. Claiborne
John Briscoe
Michael K. Pignato
Washburn, Briscoe & McCarthy
A Professional Corporation
55 Francisco Street, Suite 600
San Francisco, California 94133
(415) 421-3200

Andrew M. Gayle
Gayle & Teker
A Professional Corporation
330 Hernan Cortez Avenue
Agana, Guam 96910-5018
(671) 447-9891



Margo D. Miller
Attorney
Environment & Natural Resources Division
U.S. Department of Justice
601 Pennsylvania Ave., NW
Washington, DC 20044-0663
(202) 305-0449