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TO: The Honorable Janet Maratita
Chair, Committee on Natural Resources
Fourteenth Northern Marianas Commonwealth Legislature

FROM: Jon M. Van Dyke

SUBJECT: Constitutional Issues Raised by the "Housing-Education-Health Fund Act of 2005"

Introduction.

This memorandum is written to address the constitutional issues raised by the proposed "Housing-Education-Health Fund Act of 2005." This bill, if enacted, would create a new Fund within the general revenues of the Commonwealth, to be called the Housing-Education-Health Fund, which would be administered by the Marianas Public Lands Authority (MPLA) and which would be used to support and provide housing, scholarships, and medical assistance to the people of the Commonwealth of Northern Marianas descent. The revenues going into this Fund would come from the interest generated by the principal administered by the Marianas Public Land Trust (MPLT) and by the moneys earned from the public lands administered by the MPLA that remain after the administrative and other expenses of the MPLA are taken from these moneys.

Is It Legitimate to Require that the Interest from the MPLT Principal Be Put into the Housing-Education-Health Fund?

Article XI, Section 1 of the Commonwealth Constitution confirms that the public lands of the Commonwealth belong "collectively to the people of the Commonwealth who are of Northern Marianas descent." *See also Govendo v. Marianas Public Land Corporation*, 1992 WL 62888, 2 N.M.I, 482, 487 n.2 (1992). Because the people of the Commonwealth who are of Northern Marianas descent are the owners of the public lands of the CNMI, they are entitled to the revenues generated by these lands, including the interest from the revenues administered by the MPLT. Any other result would constitute a taking of property in violation of the Fifth Amendment of the U.S. Constitution, which is applicable in the CNMI under Section 501(a) of the 1975 Covenant. To ensure that the persons of Northern Marianas descent receive the benefit from the lands they own, this Act establishes the Housing-Education-Health Fund, which will receive all the revenues generated by the lands and by the funds managed by the MPLT. This Act contains guidelines for governing expenditures from this Fund, and the Legislature and the MPLA can promulgate additional guidelines and regulations to govern the programs that will be established.

Is It Legitimate to Require that the Moneys Generated by the Public Lands Administered by the MPLA (after Subtracting Administrative and Other Expenses) Be Put into the Housing-Education-Health Fund?

Because, as explained above, the people of the Commonwealth of Northern Marianas descent own the public lands, it is altogether logical and appropriate that they receive the moneys generated by these lands. Any other result would constitute a taking of property in violation of the Fifth Amendment of the U.S. Constitution, which is applicable in the CNMI under Section 501(a) of the 1975 Covenant. To ensure that the persons of Northern Marianas descent receive the benefit

from the lands they own, this Act establishes the Housing-Education-Health Fund, which will receive all the revenues (after administrative and other expenses are subtracted) generated by the public lands managed by the MPLA.

It has occasionally been contended that MPLA is governed by the constitutional provisions that governed the Marianas Public Land Corporation (MPLC), found in Article XI, Sections 4 and 5. Article XI, Sec. 5(g) required that the moneys generated by the public lands that previously were managed by MPLC (after subtracting administrative and other expenses) to be transferred to the MPLT. Under this contention, the moneys generated by the lands now managed by MPLA (after subtracting expenses) must also be added to the principal managed by MPLT.

Article XI, Section 4(f), however, mandated that MPLC be "dissolved and its functions shall be transferred to the executive branch of government." This dissolution occurred in 1997, by Executive Order 94-3 and the responsibility for management of the public lands was transferred to the Department of Land and Natural Resources (DLNR). Public Law 10-57 then established the Devision of Public Lands and the Board of Public Lands under the DLNR. The governance of the public lands was further amended in Public Law 11-48 and Public Law 12-33, and then, later in 2000, the Legislature enacted Public Law 12-71, which established the the Marianas Public Land Authority (MPLA) as an independent public corporation within the executive branch and gave it responsibility for managing the public lands.

The creation of the MPLA and the assignment of responsibilities to it was an action taken by the Legislature, and the Legislature certainly has the power to make further adjustments and clarifications regarding the public lands and the MPLA. Because, by the explicit terms of the Constitution itself, MPLC had to be dissolved after 12 years, the other Constitutional provisions

governing MPLC have no further force or effect. Although the Legislature would be free to require the moneys generated by the lands managed by MPLA to go to MPLT, it certainly is not obliged by the Constitution to do so. The present proposed bill would require that these moneys go instead to the Housing-Education-Health Fund so that they can be put to use for the benefit of the people of the Commonwealth of Northern Marianas descent who need assistance with their housing, education, and health requirements.

Is It Constitutional to Require that the Revenues in the Housing-Education-Health Fund Be Used Exclusively for the Benefit of the People of the Commonwealth of Northern Marianas Descent?

It has been established that the Commonwealth of the Northern Mariana Islands (CNMI) can restrict land ownership to the people of the Commonwealth of Northern Marianas descent, and it follows that the revenues from these lands can also be restricted to those same people, who are the owners of the land. Section 805 of the 1975 Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America authorizes the Government of the Northern Mariana Islands to restrict acquisition of any lands in the Northern Mariana Islands to persons of Northern Mariana descent, and this provision has been approved by the U.S. Court of Appeals for the Ninth Circuit in *Wabol v. Villacrusis,* 958 F.2d 1450, 1462 (9th Cir. 1992), *cert. denied*, 506 U.S. 1027 (1992); *see also Diamond Hotel Co., Ltd. v. Matsunaga*, 99 F.3d 296 (9th Cir. 1996) (citing *Wabol* for the proposition that "Article XII of the Commonwealth Constitution does not violate the equal protection clause of the United States Constitution").

It is clear that the CNMI has a unique political status within the American political community. *See, e.g., Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n. 28 (9th Cir. 1984) ("there is merit to the argument that the NMI is different from areas

previously treated as unincorporated territories"); *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988) (explaining that "Guam's relation to the United States is entirely different" from that of the CNMI).

Section 501 of the 1975 Covenant says that the Equal Protection Clause of the Fourteenth Amendment applies in the CNMI. *See also Charfauros v. Board of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) ("the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments – including the government of CNMI"). But it is also clear that the Clause applies differently in the CNMI because of language in the Covenant between the United States and the CNMI. This conclusion was reached by the U.S. Court of Appeals for the Ninth Circuit in *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), which upheld Article XII of the CNMI Constitution (which implements Section 805 of the 1975 Covenant establishing the Commonwealth). The *Wabol* decision concluded that the prohibition on the alienation of permanent and long-term interests in real property to persons other than those of Northern Mariana Islands descent was constitutional. In reaching this decision, the court ruled that only those rights that are "fundamental in the international sense," *i.e.*, rights that are "the basis of all free government," 958 F.2d at 1460, apply to the Commonwealth.

Because Congress's power to legislate for the territories stems from the Territory Clause of the Constitution, Article IV, Section 3, the applicability of rights deemed to be "fundamental" under the usual interpretations of the Equal Protection Clause will be different when applied to areas outside the 50 states. In particular, the *Wabol* opinion explains, the application of constitutional principles must be designed "to incorporate the shared beliefs of diverse cultures," 898 F.2d at 1390, and must not be interpreted in such a way as "to operate as a genocide pact for diverse native

cultures....Its bold purpose was to protect minority rights, not to enforce homogeneity." *Id.* at 1392.

This approach has been reaffirmed more recently in the case of *Rayphand v. Sablan*, 1999 WL 1327223 (D.N.M.I. 1999), *aff'd sub nom. Torres v. Sablan*, 120 S.Ct. 928 (2000). Utilizing the same "basis of all free government" test, the *Rayphand/Torres* case upheld the apportionment of the Commonwealth's Senate, which does not meet the "one-person/one-vote" test because Rota, Saipan, and Tinian each have three senators, as authorized by Section 203(c) of the Covenant, even though their populations differ dramatically. *Wabol* and *Rayphand/Torres* are sometimes described as unique, because they upheld provisions of the 1975 Covenant, which established the basic relationship between the CNMI and the United States, but they certainly indicate that decisions regarding matters in the CNMI may not always be the same as decisions regarding the same matters in the 50 states, particularly on subjects addressed in the Covenant.

Even if the legislative decision to limit the programs generated by the Housing-Education-Health Fund to the people of the Commonwealth of Northern Marianas descent were to be analyzed under the more classic method of judicial review used in the 50 states of the United States, it would, in my professional judgment, still be viewed as a constitutional decision. Under the law applicable in the 50 states, this decision might be viewed as a "racial" classification, or it might be viewed as "political" classification, but under either approach, it would be constitutional.

If the Allocation of Funds from the Housing-Education-Health Fund Were Viewed as a Racial Classification, This Allocation Would Meet the Strict Scrutiny Test, Because It Is Narrowly Tailored to Serve a Compelling Governmental Interest.

Some might argue that this decision creates a "racial" classification, which, under *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), would require the government to demonstrate that it

has a compelling reason for utilizing this classification, and has used the least restrictive alternative to achieve its goal. This "strict scrutiny" level of judicial review imposes a heavy burden on a government that is trying to meet it, but there are occasions when the standard has been met. *See, e.g., Sherbrooke Turf, Inc. v. Minnesota Dept. of Transportation,* 345 F.3d 964 (8th Cir. 2003) (upholding the use of race in governmentally funded construction contracts because of Congressional findings of discrimination in the construction industry); *Comfort v. Lynn School Committee,* 418 F.3d 1 (1st Cir *en banc* 2005) (ruling that a school district could used race to determine who could transfer out of their neighborhood schools and could deny transfers if they would further segregate the school). In my professional judgment, the CNMI could meet the strict scrutiny standard based on the relevant language in the 1975 Covenant, the CNMI Constitution, and the governing caselaw, as explained in the paragraphs that follow.

The starting point for this analysis must be to recognize again that the public lands that generated the revenues managed by the MPLT and the public lands managed by the MPLA are the collective property of the residents of the Commonwealth who are of Northern Marianas descent. *See* Article XI, Section 1 of the CNMI Constitution, which says that the lands transferred from the Trust Territory of the Pacific Islands to the Commonwealth of the Northern Mariana Islands "are public lands belonging collectively to the people of the Commonwealth who are of Northern Marianas descent." Property owners are, of course, allowed to use the proceeds of their property for their personal benefit, and can normally exclude others from sharing in that benefit.

Because the public lands in the CNMI are owned by persons of Northern Marianas descent, it would constitute a "taking" of property in violation of the Fifth Amendment of the U.S. Constitution for revenues generated by these lands to be transferred to others without compensating

the owners. Such a transfer appears to be occurring under the present situation, whereby revenues from the public lands are put into the CNMI general fund and from there distributed to the population at large. (Section 501 of the 1975 Covenant between the CNMI and the United States makes it clear that the Fifth Amendment of the U.S. Constitution – which prohibits "takings" without just compensation and a public purpose – applies in the CNMI.) The goal of avoiding a takings challenge by the owners of the lands – persons of Northern Marianas descent – would appear a constitutionally-appropriate "*compelling*" interest, and indeed the *only* way to avoid such a challenge (*i.e.*, the "*least drastic alternative*") is to limit the benefit of the revenues generated by the lands to those who own the land.

This argument is strengthened by the recognition in Section 805 of the Covenant "of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands" and also by Congress's goals of protecting "them against exploitation and...promot[ing] their economic advancement and self-sufficiency." Pursuant to these goals, the Congress explicitly authorized the CNMI to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent." This language was insisted upon by the U.S. Congress as a continuation of the U.S. policy in Micronesia which had prohibited alienation of similar long-term interests in land to non-Micronesians without the approval of the High Commissioner of the Trust Territory. *See* Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting,* 65 Geo. L. J. 1373, 1406 (1977); *see also* Arnold Leibowitz, *The Marianas Covenant Negotiations,* 4 Fordham Int'l L.J. 19, 70 (1981).

Although the Covenant does not explicitly define the phrase "persons of Northern Mariana

Islands descent," this term is defined in the Article XII, Section 4 of the CNMI Constitution as "a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years." This language was approved by the U.S. Congress pursuant to Section 202 of the 1975 Covenant. This language and these goals have also been approved by the U.S. Court of Appeals for the Ninth Circuit in *Wabol v. Villacrusis, supra,* where the court explained that "our international obligations" required the United States to maintain indigenous control over land in the Northern Marianas. 898 F.2d at 1392 ("The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.")

It would appear, therefore, that the CNMI could demonstrate a "compelling" justification for limiting the programs funded with MPLT revenues to persons of Northern Marianas descent, and that such a limit would be viewed as the least drastic alternative, thus meeting the high standards of the strict scrutiny level of judicial review.

The Allocation of Revenues from the Housing-Education-Health Fund to the People of the Commonwealth of Northern Marianas Descent Can Be Viewed as a Program for the Indigenous People of the CNMI and Thus Would Be Scrutinized Under the Rational Basis Test, Which It Clearly Could Meet.

But the "strict scrutiny" approach does not generally apply to programs established for native peoples which are evaluated under the more deferential "rational basis" level of judicial scrutiny because of the unique "political" relationship that has existed between the United States government and the native people living in the United States. At the time the U.S. Constitution was

drafted, Indian tribes were viewed as separate nations – truly "nations within a nation" – and the relationship between the federal government and the tribes was formal in nature. Indians were not permitted to be citizens during the early years of our nation, even if they left their tribe or their tribal lands. The early decisions of the U.S. Supreme Court confirmed this formal relationship, and stated that state governments could not regulate activities on tribal lands and that state officials could not even enter such lands without invitation. *See, e.g.*, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

More recently, the Supreme Court has ruled in *Morton v. Mancari,* 417 U.S. 535 (1974), and in a series of subsequent cases state that preferences for native peoples should be viewed as "political" rather than "racial" classifications, and are to be evaluated under a "rational-basis" rather than a "compelling-state-interest" or "strict-scrutiny" test. The *Mancari* case upheld a hiring preference for Indians in federally-recognized tribes for positions in the Bureau of Indian Affairs (BIA), which had been legislatively mandated in 25 U.S.C. sec. 472. In an opinion written by Justice Harry Blackmun, the Court viewed this hiring preference not as a "racial" preference but as "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." *Id.* at 554.

Some questions about the applicability of the *Mancari* "rational-basis" level of review to programs designed for native groups that are not formally "recognized" by the U.S. Congress or by the Bureau of Indian Affairs have been raised because of the recent case of *Rice v. Cayetano*, 528 U.S. 495 (2000), in which the U.S. Supreme Court struck down a provision in Hawai`i's

Constitution that had limited the right to vote in elections for the Trustees of the Office of Hawaiian Affairs to those persons who are of Native Hawaiian ancestry. Relying on the Fifteenth Amendment, which prohibits racial discrimination in voting, the Court ruled that the definition of Native Hawaiians, which relied upon ancestry, was a proxy for race and was thus unconstitutional. But the Court carefully avoided addressing the applicability of the Fourteenth Amendment, which requires states to guarantee to all persons the "equal protection of the laws" and did not question the underlying trusts that had been established to assist the Native Hawaiian People.

Conclusion

It is unlikely that the *Rice* decision would have any direct impact to the CNMI situation, because it is clear that the CNMI has its own unique governance, under the Covenant, which has been affirmed by the Ninth Circuit in *Wabol* and *Diamond Motors, supra.* These cases rule that the CNMI is able to reserve its property to its native people, and that position is consistent with *Mancari, supra,* which recognizes the special political status of native peoples and says that programs for their benefit should be viewed as constitutional if they are rationally related to the self-determination or self-sufficiency of the native group in question. Even if the exclusive allocation of the funds in the Housing-Education-Health Fund to the people of the Commonwealth of Northern Marianas descent were forced to meet the strict-scrutiny level of judicial review, it would be able to do so because of the compelling interest in allocating the benefits of property (the public lands) to the owners of that property (the people of the Commonwealth of Northern Mariana descent). For these reasons, it seems clear that this exclusive allocation would be found to be constitutional.