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REPUBLIC OF THE MARSHALL ISLANDS

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

TO

RECEIVE TESTIMONY ON S. 1756, A BILL TO PROVIDE SUPPLEMENTAL EX GRATIA COMPENSATION TO THE REPUBLIC OF THE MARSHALL ISLANDS FOR IMPACTS OF THE NUCLEAR TESTING PROGRAM OF THE UNITED STATES, AND FOR OTHER PURPOSES; AND TO RECEIVE TESTIMONY ON THE IMPLEMENTATION OF THE COMPACT OF FREE ASSOCIATION BETWEEN THE UNITED STATES AND THE MARSHALL ISLANDS

SEPTEMBER 25, 2007

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REPUBLIC OF THE MARSHALL ISLANDS

TUESDAY, SEPTEMBER 25, 2007

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:01 a.m. in room SD–366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. OK, why don't we go ahead and get started. I'm told that Senator Murkowski will be here shortly, but asked that we go ahead without her, and I'll do that.

This morning the committee will receive testimony on S. 1756, which is the Marshall Islands Supplemental Nuclear Compensation Act, and on implementation of the Compact of Free Association between the United States and the Republic of the Marshall Islands.

Since the 1960s, this committee has worked with the Marshall Islands and the executive branch to respond to the legacy of the U.S. testing program. This collaboration resulted in the legal settlement included in the Compact in 1986 and other ex gratia appropriations and programs.

In 2005, the committee held a hearing on the RMI's Changed Circumstances Petition, seeking additional compensation. However the committee heard testimony in opposition based on several factors, including concerns about the policies and methodologies used to calculate damages and awards, the differing views over the extent of the test's effects, and also whether the request met the legal definition of "changed circumstances."

During that hearing, it appeared there may be an opportunity to address some of the RMI's specific requests by modifying existing Federal programs. Last May, President Note asked members of the committee to introduce legislation on a few of these proposals. I look forward to their consideration today.

Turning to the Compact implementation—the U.S. and RMI are 4 years into the 20-year term of Compact assistance. It provides about $70 million annually for priorities such as health, education, infrastructure, and for capitalizing a trust fund to provide support to the RMI after the U.S. annual grants end in 2023.

The new Compact has more rigorous accountability requirements than before and these have contributed to more effective use of funds. Nevertheless, it's clear that redoubled efforts are needed to

control payroll, to improve management capacity, and to enact key reforms if the Compact and the RMI are to achieve their potential.

I look forward to hearing from our witnesses today and we thank the representatives from the State, Energy, and Labor Departments for being available to answer questions. Before I call on and introduce our witnesses, let me call on Senator Murkowski for any comments that she has.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Chairman Bingaman. It's a pleasure to be here today to address, really a very broad array of issues regarding the legacy of the Nuclear Testing Program in the Marshall Islands, including issues such as healthcare and radiological monitoring.

I do appreciate your explanation of S. 1756 and the importance of our continued oversight of the Compact between the Republic of the Marshall Islands, RMI, and the United States.

It was earlier in this year that I, along with a few of my colleagues, wrote the President of RMI, President Note, about our shared interest in addressing this nuclear legacy, through several different avenues, through the monitoring of Runit Dome in Enewetak Atoll, clarifying the eligibility of former trust territory workers to participate in the Energy Employees Occupational Illness Compensation Program, also the options to continue supplemental healthcare assistance to the northern atoll communities affected by the testing program, and also U.S. Government assessment of the health impacts in the RMI, resulting from the test program.

I'm very pleased that these issues are addressed in the legislation that we have before us today. I look forward to the testimony of the witnesses regarding their perspective on the legislation and what other options might be available to address these very important issues.

With that, Mr. Chairman, I look forward to the testimony this morning.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA, ON S. 1756

I would like to thank Senator Bingaman for calling this hearing on supplemental compensation for the effects of U.S. nuclear testing on the people of the Marshall Islands. I am pleased that the Committee is revisiting this issue and am grateful to the representatives from the RMI for flying such a great distance to be here.

The people of the Marshall Islands have made enormous sacrifices to help this nation's national defense at a critical period of the Cold War. As an Alaskan from a State whose workers have been compensated for injuries they gained resulting from underground weapons testing at Amchitka Island in the Aleutian Chain almost immediately after the ending of weapons testing in the atmosphere over the Marshall Islands, it is impossible for me not to support aid for the Marshallese.

Accordingly, two years ago I introduced a bill that would have clarified that citizens of the former Trust Territory of the Pacific Islands are eligible for coverage and potential compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) if those workers developed radiogenic cancers and other ailments after working at the Pacific Test Site in the Marshall Islands. While the bill was never enacted into law, I am pleased that Senator Bingaman has included the provisions of that bill into his current bill, S. 1756, the Marshall Is-

lands Supplemental Nuclear Compensation Act, which is the subject of our hearing today.

S. 1756 contains four main provisions to provide supplemental compensation for the residents of the RMI.

Section 2 provides for continued radiological monitoring on Runit Island, the island on which a concrete nuclear storage facility was built to house 111,000 cubic yards of radioactive soil and debris from the nearby atolls. To ensure the safety of the islanders and to ensure that the Republic's government is adequately informed, it is imperative that the radiological conditions near the dome and the integrity of the dome itself continue to be monitored and tested.

Section 3 would allow Marshall Islander employees affected by the nuclear testing who were not US citizens to be compensated under the EEOICPA. It is estimated that up to 500 Marshall Islanders and other Micronesian workers may have been employed by the Department of Energy (or its predecessor agency) or subcontractors prior to 1986, the year the Trusteeship was terminated in the RMI. Both Bikini and Enewetak atolls were the sites for numerous nuclear and thermonuclear tests. Other atolls were affected by fallout from the Bravo hydrogen bomb test in March 1954.

In 2000, Congress approved a compensation program to provide aid and pay medical bills for those who suffered radiation-caused illnesses because of working on the nuclear weapons program. In 2004, Congress amended the act to speed payments of compensation, including funds for lost wages to workers or their heirs, to those who worked for the Department of Energy and its predecessor agency on nuclear weapons programs. The compensation from this program, though, still applies only to United States citizens and not to those who were not citizens but who lived and worked under United States administration during the Marshall Islands nuclear tests. Section 3 of S. 1257 would rectify this inequity.

Section 4 would provide money for the continuation of the Four Atoll Health Care program through 2023, but this time the $2 million per year will be inflation-adjusted. The Four Atoll Health Care Program has been funded at the same level for twenty years without inflation adjustment, meaning the value of the funding has effectively been cut in half since we began providing it. Congress should make it a priority to continue to provide for the health care for a people whose cancer rates are far higher than those in the United States due to nuclear testing.

Lastly, Section 5 would provide for a National Academy of Sciences assessment of the US nuclear testing program's health impacts on the residents of the RMI. The main purpose of this study would be to resolve a disagreement between the US government and the RMI and Nuclear Claims Tribunal over the extent of the area affected by the nuclear testing. The results of this study can provide the basis for Congress' decision whether or not to award additional ex gratia payments to the people of the RMI.

While Congress and the Administration continue to weigh additional aid to the Republic of the Marshall Islands, passage of this measure would be a sign of this nation's continued commitment to aid the islanders who in February 1946 followed the advice of Bikinian leader, King Juda, and agreed to leave the Bikini Atoll so America could use it for weapons testing, saying, "We will go believing that everything is in the hands of God."

I appreciate the understanding and the patience shown by the Marshalls Government and their citizens as we proceed to review the issues raised concerning the effects of the nuclear testing program and I hope the introduction of this legislation will be seen as an example of our commitment to see that those issues receive a full and fair review and discussion.

The CHAIRMAN. All right. Thank you very much.

Let me just introduce all of our witnesses and then we'll hear from them in this order.

First would be Mr. Tom Bussanich, who is the Director of Budget, Office of Insular Affairs, in the Department of Interior. He's accompanied by Mr. Steven McGann, Acting Deputy Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs in the Department of State; Mr. William Donald Jackson, who's the Marshall Islands Program Manager with the Office of Health, Safety, and Security in the Department of Energy; and Mr. Jeffrey Nesvet, who is the Associate Solicitor for Federal Employees' and

Energy Workers' Compensation in the Office of the Solicitor in the Department of Labor.

We also have three other witnesses here. The Honorable Witten T. Philippo, who is the Minister-in-Assistance-to-the-President from the Republic of the Marshall Islands. Thank you very much for being here.

Mr. David Gootnick, who is Director of International Affairs and Trade in the GAO and Mr. Jonathan Weisgall, who is the legal counsel for the people of Bikini, testifying on behalf of the Peoples of Bikini, Enewetak, Rongelap, and Utrik. Are those reasonably accurate pronunciations?

Thank you very much.

Mr. Bussanich, why don't you begin?

STATEMENT OF THOMAS BUSSANICH, ACTING DIRECTOR, OFFICE OF INSULAR AFFAIRS

Mr. BUSSANICH. Mr. Chairman, thank you for the opportunity to discuss the implementation of the amended Compact of Free Association with the Marshall Islands in S. 1756, dealing with Marshall Islands nuclear issues.

In 2003, the U.S. Government approved the amended Compact, providing a total of $1.5 billion in assistance from 2004 through 2023. The 20 years of grant assistance is intended to assist the RMI government to promote its economic advancement and budgetary self-reliance.

Under the Compact, U.S. grant funding that decreases annually is pared with increasing contributions to a trust fund. Earnings from the trust fund are intended to provide a source of revenue for the government of RMI when the grants expire in 2023.

The Compact targets funding to six sectors: education, health, the environment, public sector capacity building, private sector development, infrastructure, with priority given to education and health.

We believe the amended Compact of Free Association with the Republic of the Marshall Islands is a promising work in progress. The RMI leadership has made a determined effort to adhere both to the letter and spirit of the agreement. Since the implementation of the amended Compact in 2004, the RMI has focused its Compact resources on the three highest priorities, infrastructure, education, and healthcare. Over $52 million, approximately 39 percent of all sector grant funding, has been dedicated to improved infrastructure. The result is best seen in education, where fully one-third of RMI students will be in new classrooms at the end of the 2008 school year.

Since Fiscal Year 2004, the RMI has dedicated 34 percent of Compact funds to education and 21 percent to its healthcare system. The allocation of Compact funding has been appropriate in the short-term, however, the GAO has concluded that capacity limitations have affected the RMI's ability to ensure effective use of grant funds. The RMI has made strong efforts to institutionalize performance management in its government and is allocating $300,000 in Fiscal Year 2008 Compact funds to public sector capacity-building to effect this purpose.

The fiscal and economic futures of the RMI are issues of concern to the United States members of the Joint Economic Management and Financial Accountability Committee. The RMI economy is growing, but on a fragile basis of increased public sector spending, including a 23 percent increase in national government employment in the past 3 years. The increased employment, according to the RMI government, has not be accompanied by an increase in the effectiveness of government services. We hope that the RMI leadership will focus on the need to manage the public payroll in a manner that accounts for the coming decrements in Compact funding.

The Compact does not operate in a vacuum and its overall success will be greatly enhanced or diminished by the circumstances of the RMI economy. The opening of a new tuna loining plant in Majuro has the potential to create 600 private sector jobs. Japan airlines has begun a series of special charter flights.

Even with these successes, the RMI still has obstacles to economic development. It's geographic isolation, inadequate infrastructure, lack of a skilled work force, and an outdated business climate.

We believe that there is a need for the RMI to take action to improve the business climate, including tax, land, and foreign investment reforms. But the decisions to make these important changes lie with the Marshall Islands' government.

An important element of the United States financial assistance, under the Compact, is the trust fund established to contribute a source of revenue after 2023. As of June 30, 2007, the market value of total assets of the trust fund for the people of the Republic of the Marshall Islands, was $83.2 million. The return on assets during the current Fiscal Year is 10.3 percent. The Trust Fund Committee is also investigating whether securitization of future U.S. contributions to the trust fund would increase the ultimate 2023 value of the fund and has issued a request for proposal for a study of its potential benefits and risks.

The Joint Economic Management and Financial Accountability Committee met recently in Honolulu. The meetings were productive and resulted in the allocation of Compact funding for Fiscal Year 2008. In that year, the RMI will dedicate $11.3 million to education, $6.5 million to health, $11.8 million to infrastructure, $300,000 to public sector capacity building, and $5.6 million for assistance to Kwajalein Atoll communities.

In summary, the Republic of the Marshall Islands faces challenges, but we are pleased with the mutual respect and cooperative manner in which our countries are working to implement the Compact and address those challenges.

If I may, I'd like to have a few words about S. 1756, which deals with several issues that stem from the United States nuclear testing. Section 2 of the Bill would require the Department of Energy to survey radiological conditions on Runit Island every 4 years and report to the House and Senate Authorizing Committees.

The United States and the Republic of the Marshall Islands settled all claims related to the nuclear testing program. Section 177 of the Compact, relieved the United States of responsibility for controlling areas affected by nuclear testing program, and placed that responsibility solely with the Marshall Islands government. Never-

theless, Runit Dome has remained, for many years, a point of friction in the otherwise mutually agreeable bilateral relationship.

At present, the Department of Energy has a plan in place to conduct a visual engineering survey of the Runit Dome in May 2008. Such a survey is expected to become a routine part of DOE's field work. The Administration believes that these current and future plans for surveying Runit Dome are sufficient to monitor safety. The Administration, therefore, opposes enactment of Section 2 of S. 1756.

With regard to Section 3, clarification of eligibility under the EEOICPA, this deals with the eligibility of former citizens of the trust territory of the Pacific Islands for the Energy Employees Occupational Illness Compensation Program Act.

In the 1950s, the U.S. Government hired citizens of the trust territory and the United States to clean up ground-zero locations in Bikini and Enewetak Atolls. At present, the former trust territory citizens are being denied EEOICPA benefits, because the language of the statute does not overcome the presumption against extraterritorial application of American law.

Section 3 is intended to place the former trust territory citizen workers on an equal footing with the United States citizen workers. The Administration is still reviewing Section 3 of S. 1756 and its implication that compensation would be provided to a subset of DOE workers, even though Section 177 provided for the full and final resolution of all nuclear testing claims.

Section 4 deals with the Four Atoll Healthcare Program. Congress established the Four Atoll Healthcare Program for people who resided on Enewetak, Bikini, Rongelap, and Utrik. When the original Compact came into force in 1986, the program was funded for 15 years and ended in 2001 in accordance with the terms of that agreement. In both Fiscal Years 2005 and 2006, Congress added $1 million to the Interior Appropriations to continue the Four Atoll Program.

Section 4 would create a permanent 17-year appropriation for the program. It would fund the program annually at $2 million, inflation adjusted. The Administration does not support a permanent appropriation of $2 million for this program. The Administration determined in 2005 that there was no basis in the Compact, Section 177, subsidiary agreement for considering additional claims. Furthermore, the United States is committed to spend over $1.5 billion in direct assistance and trust fund contributions in the RMI, and the area remains eligible for a number of categorical and competitive public health grant programs administered by the Department of Health and Human Services.

Section 5 of the bill would mandate that the Secretary of Interior commission an assessment and report by the National Academy of Sciences of the health impacts of the United States nuclear testing conducted in the Marshall Islands. The Administration believes that this assessment is not necessary. The Administration believes that previous studies have adequately answered questions relating to the impacts of nuclear testing and does not support the commissioning of additional studies at this time.

Mr. Chairman, and members of the subcommittee, this completes my prepared statement. I'll be happy to respond to any questions you may have.

[The prepared statement of Mr. Bussanich follows:]

PREPARED STATEMENT OF THOMAS BUSSANICH, ACTING DIRECTOR, OFFICE OF INSULAR AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee on Energy and Natural Resources, thank you for the opportunity to discuss the implementation of the amended Compact of Free Association with the Republic of the Marshall Islands (RMI) and S. 1756 dealing with Marshall Islands nuclear issues.

IMPLEMENTATION OF THE RMI COMPACT OF FREE ASSOCIATION

In 2003, the U.S. Government approved the amended Compact with the Republic of the Marshall Islands, providing a total of $1.5 billion in assistance from 2004 through 2023. The amended Compact's 20 years of grant assistance is intended to assist the RMI government promote the economic advancement and budgetary self-reliance of its people. Under the amended Compact, U.S. grant funding decreases annually, paired with increasing contributions to a trust fund established for the RMI; earnings from the trust fund are intended to provide a source of revenue for the government of the RMI when the grants expire in 2023. In addition, the annual grant funding is partially adjusted for inflation. The amended Compact requires the RMI to target funding to six development sectors—education, health, the environment, public sector capacity building, private sector development, and infrastructure, with priority given to education and health. The amended Compact also provides for a Supplemental Education Grant, which takes the place of certain domestic grants once offered through the Department of Education, the Department of Health and Human Services and the Department of Labor.

The Office of Insular Affairs is responsible for administering and monitoring the grants. The amended Compact's subsidiary fiscal procedures agreement requires the RMI government to monitor the day-to-day operations of sector grants and activities, submit periodic performance reports and financial statements, and ensure annual financial and compliance audits. In addition, the Compact and fiscal procedures agreement require the U.S.-RMI Joint Economic Management and Financial Accountability Committee (JEMFAC) to (1) meet at least once annually to evaluate the progress of the RMI in achieving the objectives specified in their development plans; (2) approve grant allocations; (3) review required annual reports; (4) identify problems; and (5) recommend ways to increase the effectiveness of Compact grant assistance. The RMI is also required to conduct annual audits within the meaning of the Single Audit Act for an independent review of its financial position.

We believe that the amended Compact of Free Association with the Republic of the Marshall Islands is a promising work in progress. Although many challenges remain for the RMI government to grow its economy and to get better performance from the government services that are supported by the Compact, the RMI has been a solid partner with the United States in making the Compact work. The RMI leadership has made a determined effort to adhere both to the letter and the spirit of the agreement, and is committed to the success of the agreement it negotiated.

Since implementation of the amended Compact in fiscal year 2004, the RMI has focused its Compact resources on the three highest priorities, infrastructure, education and health care. Over $52.2 million, approximately 39% of all sector grant funding, has been dedicated to improved infrastructure. The result is best seen in education, where 82 new classrooms serving over 1,700 students are in use, and additional classrooms that will house a total of 4,000 students will be in use at the end of this year. Fully one third of RMI students will be in new classrooms at the end of the 2008 school year. In coming years, $5 million will be invested annually in physical improvements at the College of the Marshall Islands. These improvements will help the college retain its accreditation.

Since fiscal year 2004, the RMI has dedicated 34% of Compact funds to education and 21% to its health care system. The RMI has chosen to use only limited amounts of Compact funding for the environment, public sector capacity building and private sector development sectors. This allocation reflects the priorities of the RMI government and of the amended Compact; JEMFAC has concurred with this RMI decision. The allocations may change in any future year, although allocations to the infrastructure sector must be at least 30% of an annual Compact assistance and priority must be given to education and health care.

The allocation of Compact funding has been appropriate in the short term. However, growing gaps in the capacity of the RMI government suggest that it might be prudent to shift some Compact resources to public sector capacity building. The GAO has concluded that capacity limitations have affected the RMI's ability to ensure the effective use of grant funds. We agree with this conclusion. The RMI has made strong efforts to institutionalize performance management in its government, and is allocating $300,000 in fiscal year 2008 Compact funds to Public Sector Capacity Building. However, the RMI still lacks the capacity to adequately measure progress because education and health sector baseline data is not adequate and performance reporting is incomplete. Capacity restraints also affect the government's ability to collect and analyze economic data and plan for the future of declining Compact revenues.

The fiscal and economic futures of the RMI are issues of concern to the United States members of the JEMFAC. The RMI economy is growing, but on the fragile basis of increased public sector spending. There has been an unsustainable increase in government employment and its accompanying wage bill. The RMI reports a 23% increase in national government employment in the past three years. Payroll costs jumped from $26.4 million in fiscal year 2004 to $30.1 million in fiscal year 2006. This has taken place at the same time as the RMI has shown annual operating deficits in its general fund. The increase in employment, again according to the RMI government, has not been accompanied by an increase in the effectiveness of government services. The ability to make this internal assessment speaks well of the RMI government, but we hope that the RMI leadership will focus on the need to manage the public payroll in a manner that accounts for the coming decrements in Compact funding.

The Compact does not operate in a vacuum, and its overall success will be greatly enhanced or diminished by the circumstances of the RMI economy. The opening of a new tuna loining plant in Majuro has the potential to create 600 private sector jobs. Japan Air Lines has also begun a series of special charter flights that may have long-term benefits for the tourism sector. Even with these successes, the RMI still has obstacles to economic development: its geographic isolation, inadequate infrastructure, lack of a skilled workforce and an out-dated business climate. The theory of the Compact is that improvements in health and education will create a better workforce at home and more remittances from abroad, and that these factors, together with improved infrastructure, will provide a foundation for long-term private sector economic development. In the short term, we believe that there is a need for the RMI to take action to improve the business climate, including tax, land and foreign investment reforms. The United States intends to enhance our trade dialogue with the Republic of the Marshall Islands and other Pacific Island nations. Although the United States through its JEMFAC membership may inquire about and promote change, the decisions to make these important changes lie with the Marshall Islands government.

An important element of the United States financial assistance under the Compact is the trust fund established to contribute a source of revenue to the government for the RMI when annual sector grants cease after 2023, to be used for the same purposes as the annual sector grants were.

As of June 30, 2007, the market value of total assets of the Trust Fund for the People of the Republic of the Marshall Islands was $83.2 million. Of that amount, $64.3 million represented contributions of governments, including $31.8 million from the United States, $30 million from the RMI and $2.5 million from Taiwan. The return on assets during the current fiscal year is 10.3 percent.

Since Goldman Sachs began managing the Trust Fund assets as investment manager on November 14, 2005, the Fund's investments gained $12.0 million through June 30, 2007. The assets have been invested in a mix of United States public equity and realty funds, international equity funds, and fixed income funds.

The Trust Fund Committee is also investigating whether securitization of the future U.S. contributions to the Trust Fund would increase the ultimate 2023 value of the fund, and has issued an RFP for a study of its potential benefits and risks. Securitization would permit the Trust Fund to invest with a longer time horizon by bringing forward the United States contributions scheduled for later years. If deemed advantageous, a change in the Compact law would be necessary in order to permit implementation of a securitization program.

The Joint Economic Management and Financial Accountability Committee met recently in Honolulu. The meetings were productive and resulted in the allocation of Compact funding for fiscal year 2008. In the next fiscal year, the RMI will dedicate $11.3 million to education, $6.5 million to health, $11.8 million to infrastructure, $300 thousand to public sector capacity building and $5.6 million for assistance to Kwajalein atoll communities.

In summary, the Republic of the Marshalls Islands faces very serious challenges, but we are pleased with the mutual respect and cooperative manner is which our two countries are working to implement the Compact and address those challenges.

S. 1756

S. 1756 would deal with several issues that stem from United States nuclear testing that took place in the 1950s.

Section 2—Continued Monitoring on Runit Islands

Section 2 would require the Department of Energy to survey radiological conditions on Runit Island every four years, and report to the House and Senate authorizing committees.

The partial clean-up of Enewetak Atoll in the late 1970's resulted in the creation of an above-ground nuclear waste storage site, a dome, at Runit Island. Inside Runit dome are over one 110,000 cubic yards of radioactive material scraped from other parts of Enewetak Atoll.

The United States and the Republic of the Marshall Islands settled all claims, past, present and future of the Government, citizens and nationals of the Republic of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program. Article VII of the agreement subsidiary to section 177 of the 1986 Compact of Free Association relieved the United States of all responsibility for controlling "the utilization of areas in the Marshall Islands affected by the Nuclear Testing Program" and placed that responsibility solely with the Marshall Islands Government. Nevertheless, Runit dome has remained for many years a point of friction in the otherwise mutually agreeable, bilateral relationship between the governments of the Marshall Islands and United States. Representatives of the Marshall Islands have raised questions regarding Runit Island including (1) the safety of land, water and marine life, (2) the radiological condition of the northern part of the island, and (3) the structural integrity of the dome.

At present, the Department of Energy has a plan in place to conduct a visual engineering survey of Runit Dome in May of 2008. Such a survey is expected to become a routine part of DOE's field work.

Under the Compact of Free Association Act, DOE provides technical support in environmental measurement to four atolls (Enewetak, Bikini, Rongelap and Utrik) within the Republic of the Marshall Islands. The Marshallese, with their advisors, set all goals and conduct all remedial actions. DOE takes environmental measurements before and after remedial actions to see if goals were achieved. DOE may offer suggestions for remedial actions at the request of the Republic of the Marshall Islands. Current funding limits the scope of DOE work to resettlement activities; Runit Island will not be resettled and is off-limits to residents of the Marshall Islands.

The Administration believes that current and future plans for surveying Runit dome and aiding the Government of the Marshall Islands in its assessment of conditions at Runit Island are sufficient to monitor safety. The Administration, therefore, opposes enactment of section 2 of S. 1756.

Section 3—Clarification of Eligibility under EEOICPA

Section 3 deals with the eligibility of former citizens of the Trust Territory of the Pacific Islands for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). In the 1950s, the United States government hired citizens of the Trust Territory, which was administered by the United States, to clean up ground-zero locations in Bikini and Enewetak Atolls and to collect soil and other samples from contaminated areas in the Marshall Islands. These individuals cannot receive EEOICPA benefits because the language of the statute does not overcome the presumption against extraterritorial application of American law.

The United States used both United States citizens and Trust Territory citizens (who were under the aegis of the United States), for work that sustained a program that was crucial for national security. At present, the former Trust Territory citizen workers are being denied EEOICPA benefits because the language of the statute does not overcome the presumption against extraterritorial application of American law.

Section 3 is intended to place the former Trust Territory citizen workers on an equal footing with United States citizen workers. The Administration is still reviewing section 3 of S. 1756, and its implication that compensation would be provided to a subset of DOE workers even though section 177 of the Compact and its implementing agreement provided for the full and final resolution of all claims arising from the Marshall Islands nuclear testing program. In addition, the Department of

Labor notes that there are some drafting issues, particularly with respect to the bill's offset provisions.

Section 4—Four Atoll Health Care Program

Section 4 would appropriate funds for the Four Atoll Health Care Program. The Congress established the Four Atoll Health Care Program in the early 1970s to provide health care for people who resided on the nuclear-affected atolls of Enewetak, Bikini, Rongelap and Utrik. When the original Compact of Free Association came into force in 1986, the Four Atoll program was funded for fifteen years under the Compact section 177 subsidiary agreement and ended in 2001 in accordance with the terms of that agreement. In January of 2005, the State Department submitted the Administration's evaluation of RMI's submission of a request, among other things, for an enhanced primary, secondary and tertiary health care system to serve the entire RMI population for 50 years under Article IX of the agreement subsidiary to Section 177 on the basis of "changed circumstances." The Administration's report concluded that there was no legal basis for considering additional payments. In both fiscal years 2005 and 2006, Congress added $1 million in appropriations for the Four Atoll program.

Section 4 would create a permanent 17-year appropriation for the program (from 2007 through 2023). Additionally, it would fund the program annually at $2 million, inflation adjusted.

The Administration does not support a permanent appropriation of $2 million for this program. As noted previously, the Administration determined in 2005 that there was no basis in the Compact section 177 subsidiary agreement for considering additional claims. Furthermore, as previously noted in this testimony, the United States is currently committed to spend over $1.5 billion in direct assistance and trust fund contributions in the RMI over the next 20 years, and the area remains eligible for a number of categorical and competitive public health grant programs administered by the U.S. Department of Health and Human Services in the same way as U.S. states and territories.

Section 5—Assessment of Health Care Needs of the Marshall Islands.

Section 5 would mandate that the Secretary of the Interior commission an assessment and report by the National Academy of Sciences (NAS) of the health impacts of United States nuclear testing conducted in the Marshall Islands.

The Administration believes that this assessment is not necessary, given that on January 4, 2005, the State Department submitted the results of an Administration evaluation that carefully and methodically reviewed existing scientific studies of the impact of nuclear testing in the Marshall Islands. The Administration believes that previous studies have adequately answered questions relating to the impacts of nuclear testing as they relate to additional claims for damage resulting from the nuclear testing program, and does not support the commissioning of additional studies at this time.

Mr. Chairman and members of the subcommittee, this completes my prepared statement. I will be happy to respond to any questions you may have at this time.

The CHAIRMAN. Thank you very much.

Mr. Philippo, why don't you go right ahead, please?

STATEMENT OF WITTEN T. PHILIPPO, MINISTER-IN-ASSISTANCE-TO-THE-PRESIDENT, REPUBLIC OF THE MARSHALL ISLANDS

Mr. PHILIPPO. Thank you, Mr. Chairman, distinguished members of the committee, ladies and gentlemen. Thank you for the opportunity to appear before you today. I bring greetings from his Excellency, President Note, who's grateful to you Mr. Chairman, and members of the committee for introducing S. 1756.

There is no question that the U.S. Government's detonation of 67 atmospheric nuclear weapons in our country, created profound disruptions to human health, the environment, as well as our economy, culture, political system, and virtually every aspect of life. While the assistance contemplated in S. 1756 is a start, there's still extensive work that has to be done.

With specific regard to S. 1756, the RMI is pleased that Congress wants to provide long-term monitoring of the Runit Dome. We believe monitoring of the structure, as well as the lagoon and ocean sediments, and adjacent land is critical to the safety of the community relocated adjacent to the facility.

The RMI also appreciates the inclusion of trust territory citizens to participate in a Department of Labor healthcare and compensation program for DOE employees who contract cancer after exposure to occupational sources of radiation. The RMI believes that the actual number of Marshallese who would be eligible to participate in this program is very small.

S. 1756 also appropriates the sum of $2 million annually, as adjusted for inflation in accordance with the Section 218 of the Compact for purposes of providing primary healthcare to the Four Atoll communities. The RMI welcomes and supports, fully supports this measure and wishes to thank the Chairman for making this a permanent, rather than discretionary appropriation. Applying the medical care CPI in Hawaii, where most medical referral cases from the RMI are sent, would have resulted in $4.42 million annually, as of 2001.

Accordingly, the RMI requests that $4.5 million annually replace the amount of $2 million as the base amount for healthcare costs. As President Note mentioned in his letter of August 23, 2007 to you, Mr. Chairman, the RMI also believes that it is imperative for the U.S. healthcare programs to provide assistance to all Atoll populations, whose health was adversely impacted by the U.S. nuclear testing program.

I think there is not a person left in the world who could honestly say that the healthcare burdens and the Marshall Islands are geographically confined to the perimeter of the Four atolls. This is precisely why Marshallese citizens, determined to have radiogenic illnesses, people from Atolls throughout the RMI, must continue to eligible to participate in the 177 Healthcare Program. These people have nowhere else to turn, except the RMI. And the RMI public health system is not currently designed to address these illnesses.

Even if we assume that only the Bravo Event exposed the populations in the RMI to radiation, the total population of Rongelap and Utrik in 1954 was 226. Bikini and Enewetak had been relocated for the Bravo Event. The U.S. National Cancer Institute tells us that 532 excess cancers, cancers that would not have appeared if it weren't for the U.S. testing program, will occur in the RMI and more than half of these have yet to manifest.

If every resident of Rongelap and Utrik contracted cancer, NCI numbers tell us there are still 306 people on other Atolls that will or have contracted cancer. These people are not eligible to receive any healthcare from the United States. Furthermore, the September 2004 NCI report, requested by this committee, states that 227 of these excess cancers will occur in the Atoll populations of Ailuk, Mejit, Likiep, Wotho, Wotje, and Ujelang. The RMI government simply does not have the capacity to locate and treat these cancers. The RMI believes that the United States has an obligation to provide for healthcare to everyone in our country, whose health was adversely affected by the U.S. testing program.

S. 1756 makes provisions for the National Academy of Sciences to conduct an assessment of the health impacts of the nuclear testing program on the residents of the RMI. The RMI hopes that this study could consider all data analyses relating to those reconstructions, exposure pathways, and potential health outcomes. The RMI strongly supports this assessment, as it will look at the overall health impacts caused by the nuclear testing program and not cancer, the subject of the nuclear, or NCI's study.

The RMI would like to make it clear however, that the NCI and other data previously presented to this committee, provides the justification for taking action now to establish a cancer screening and treatment program, and to address the radiogenic healthcare needs of several communities beyond the Four atolls.

Mr. Chairman, I would also like to note, that absent from S. 1756, is any reference to the decisions and awards made by the nuclear, the Marshall Islands Nuclear Claims Tribunal. The administrative and adjudicative processes of the Tribunal over the past 19 years are an important, mutually agreed-to component of the Section 177 Agreement. We can not simply ignore the Tribunal's work and awards that it has made.

Understanding that there continues to be concerns in Congress, the RMI would support a further study of the decisionmaking processes of the Tribunal and its awards, by an appropriate organization. The RMI has presented a report on this subject, prepared by a former United States Attorney General, Richard Thornburgh, in January 2003. If questions or concerns exists, the RMI would also support a study by the GAO to make recommendations to Congress.

I would now like to briefly address some issues concerning implementation of the Compact, as amended. Overall, we have a great deal of progress with respect to implementing the Compact, as amended. The procedures we developed regarding the Joint Economic Management and Financial Accountability Committee, have worked well, through a process of requiring consensus between our two governments, on the allocation and division of Compact annual sector grant funding.

Specifically, we would ask that the committee consider the following: One, provision for a full inflation adjustment for Compact funds, so that the grant assistance and compensation provided by the Compact does not lose real value, and fully supports the Compact's mutual commitments. This is particularly important, given the rapidly rising costs of imported fuel, which is causing major problems with the provision of public utilities and inter-Island services for our widespread communities.

Rising fuel costs are also creating an overall inflationary effect that is putting a damper on our economic growth. We encourage that the Compact of Free Association Amendments Act of 2007 include an amendment to Section 107(J) of Public Law 108–188, to provide that full inflation could be made available in Fiscal Year 2010, instead of Fiscal Year 2014.

Two, the RMI is experiencing difficulties as a result of delays in receiving supplemental education grants, and a substantial shortfall in appropriated funds compared to the planned amount the RMI was to receive, a$712,000 shortfall. The SEG should be made

available as a permanent appropriation, in the same manner as other Compact financial assistance under Title 2 of the Compact, as amended.

Finally, the RMI is concerned about a difference in opinion about the purpose of the Compact Trust Fund. The RMI believes it would be fruitful for our governments to consider what can be done between now and Fiscal Year 2024 to maximize Trust Fund income, and to make it viable in the future.

Mr. Chairman, with your permission, I would like to include the statement of Dr. Neil A. Palfox in the hearing record.

The CHAIRMAN. We'll be glad to include that.

[The prepared statement of Dr. Palfox follows:]

PREPARED STATEMENT OF NEAL A. PALAFOX, MD MPH, CENTERS FOR DISEASE CONTROL AND PREVENTION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND NATIONAL CANCER INSTITUTE, NATIONAL INSTITUTES OF HEALTH

Mr. Chairman and members of the Committee of Energy and Natural Resources: Thank you for allowing my written comments and testimony on two issues relevant to this hearing. The testimony is in regards to: (1) Proposed National Academy of Science Study (NAS) under S. 1756 and, (2) Immediate Assistance for Cancer Services in the Republic of the Marshall Islands.

PROPOSED NAS STUDY UNDER S. 1756

S. 1756 makes a provision for the National Academy of Sciences to conduct an assessment of the health impacts of the nuclear testing program on the residents of the RMI. This provision is an important step in defining, understanding, and addressing the composite health consequences of the US nuclear weapons testing program in the Marshall Islands.

The predominant health focus from 52 years of nuclear testing in the RMI has been on health effects caused by ionizing radiation. The burden of human illness caused by acute high dose and chronic low dose exposure to ionizing radiation has been researched in several venues. The biological consequences of ionizing radiation on humans has been or is being addressed by research at the National Cancer Institute (NCI), Brookhaven Laboratories, and the BEIR VII committee.

There has been much less attention paid to the non-radiation related health consequences of nuclear testing. Non-radiogenic impacts include the health consequences of removing Marshallese from their ancestral homes (with associated cultural / social upheaval), post traumatic stress, and forced dietary changes. There were many lifestyle changes that were imposed on particular groups of Marshallese because of the US nuclear weapons testing program.

The NAS study through S. 1756 has been proposed to better understand the relationship of the lifestyle, cultural/social, and dietary changes associated with the nuclear testing to the adverse health outcomes of the affected Marshallese population. Understanding these relationships will assist with the development and design of specific interventions and programs which will make a positive difference in Marshallese health status.

Utilizing an analytical, qualitative approach to the NAS research can provide the information necessary to determine how to best mitigate the non-radiogenic health outcomes associated with the nuclear weapons testing program. There are existing frameworks for analysis that could be utilized by the NAS. One such framework is called the "socio-ecological model of health". The socio-ecological model is well described in health care literature and would serve as an appropriate tool to begin research.

The utility of using such an approach is:

1. No baseline quantitative data is required.
2. The study will have a qualitative and descriptive research design.
3. There is no need for a hypothesis driven research design and methodology.
4. A quantitative comparison of "before and after" health status of Marshallese is not necessary.
5. A feasibility study is not required.
6. This qualitative research design is less costly than quantitative, hypothesis driven research.

7. The socio-ecological framework takes comprehensive view of what affects individual health outcomes.

8. This research will yield what we need to know and will be the foundation for where we need to go.

A comprehensive description of the socio-ecological model for health and its research application is beyond the scope of this testimony. The basic concept is: the final outcome of an individual's health (physical, mental, social) is related to the specific genetics and behaviors of that individual, as well as an individuals social, ecological and economic environment. The ecological environment refers to the patient's physical environment.

The socio-ecological framework analysis will help answer the following questions:

1. How has the nuclear weapons testing program in the RMI affected the social, ecological, and economic environments of the Marshallese people at the present time?

2. What programs could be enhanced/developed/changed which would positively affect individuals who were adversely affected by the nuclear weapons testing program?

The socio-ecological model of health provides a tool to understand and objectively describe how nuclear weapons testing influences the parameters described by the socio-ecological model. This model begins with the understanding that major events, such as 12 years of nuclear testing, likely had an effect on the health of Marshallese people socially, ecologically, and economically. The model will allow the NAS, and this committee, to understand that relationship better and begin to discuss solutions and to design programs that could achieve better health outcomes for the Marshallese.

This framework is not meant to quantify illness burdens due to nuclear weapons testing. This framework will analyze and help describe the interrelationship of health outcomes of the affected population to nuclear testing. Notably, it is not necessary to quantify the illness burden caused by the nuclear weapons testing program to develop sound strategies and programs for the affected populations.

The Senate Committee on Energy and Natural Resources, the US, and RMI wish to better understand the health impacts of the nuclear weapons testing program—and how to affect a positive outcome. The proposed NAS research would be invaluable to this end.

I have included a reference which describes the socio-ecological model in greater detail.

CANCER BURDEN IN THE RMI

I am presently the Principal Investigator with several projects, for the Center for Disease Control (CDC) and the National Cancer Institute (NCI), which were designed to develop comprehensive cancer plans in the RMI and the other US Associated Pacific jurisdictions. The RMI has just completed a 5-year comprehensive cancer plan and submitted this plan to the CDC.

This 2007 RMI comprehensive cancer plan describes the cancer burden in the RMI, finds that cancer is now the second leading cause of death in the RMI and that the RMI infrastructure of cancer prevention, screening, treatment, cancer data tracking for Marshallese citizens is sorely lacking.

A 2004 NCI study determined that over 200 cancers are developing as we speak as result of the US Nuclear Weapons Testing program. The 200 cancers were generated from all parts of the RMI, albeit in greater proportions in the Northern atolls. There are at least 21 types of cancers (21 types) which may be caused by ionizing radiation from the US nuclear weapons testing. If one of the 21 cancers (e.g. Cancers of the mouth, lung, brain, colon, stomach, liver, or leukemia) develops in the Marshallese population there is no scientific method available to distinguish if that cancer was caused by radiation or not. The developing cancers are indistinguishable.

Many Marshallese continue to die annually from cancers which may be preventable and curable if they are screened/treated earlier. The health infrastructure of the RMI lacks basic modes of cancer prevention, screening, diagnosis, treatment, and cancer data tracking. It is imminent that the Marshall Islands' health system receive assistance for a cancer center/system from the US government and this Committee to address the heavy cancer burden in the RMI.

Marshallese are dying horrible deaths from cancer, many as a result from nuclear testing. US policy makers are trying to devise methods to determine how many cancers were really generated by the US nuclear weapons testing, and then how to figure out which individuals have those cancers. This is an impractical and impossible

task. A program must be put in place to find and to treat those who may have cancers from nuclear testing. Assistance for comprehensive cancer care for the RMI must be made now. It is the right thing to do.

Thank you.

Mr. PHILIPPO. Thank you, Mr. Chairman. This concludes my statement today. I would be most happy to answer any questions you may have.

[The prepared statement of Mr. Philippo follows:]

PREPARED STATEMENT OF WITTEN T. PHILIPPO, MINISTER-IN-ASSISTANCE-TO-THE-PRESIDENT, ON S. 1756

Mr. Chairman, Distinguished Members of the Senate Committee on Energy and Natural Resources, Ladies and Gentlemen:

Thank you for the opportunity to appear before you today. His Excellency President Kessai H. Note once again takes this opportunity to personally thank you Chairman Bingamon for introducing S. 1756, the Republic of the Marshall Islands Supplemental Nuclear Compensation Act of 2007, and for convening this hearing so that we may present our views on this most important and historic legislation, and on implementation of the Compact, as amended.

I would also like to take this opportunity to recognize other members of our delegation present here today, and to thank them for their presence and contributions.

S.1756, REPUBLIC OF THE MARSHALL ISLANDS SUPPLEMENTAL NUCLEAR COMPENSATION ACT OF 2007.

There is no question that the U.S. Government's detonation of sixty-seven atmospheric nuclear weapons in our county created profound disruptions to human health, the environment, as well as our economy, culture, political system, and virtually every aspect of life. The U.S. nuclear weapons testing program was the marking period of our modern history; the trajectory of our people, our islands, and our institutions reflect the chaos and problems caused by extensive contamination, public health crises, and the upheaval and repeated relocation of several populations.

A small country with seventy square miles of land and a population one tenth the size of Washington, D.C. does not have the financial, human, or institutional capacity to respond to and address the magnitude of problems caused by the nuclear weapons testing program—problems which continue to plague our nation to this day.

The RMI Government appreciates all the assistance the U.S. Government has given to the RMI to date to address some of the needs related to the testing program. The health programs, the environmental monitoring, and the food support programs for the atolls most impacted by the testing program are perhaps the most important programs that the U.S. provides to the RMI, particularly from a symbolic perspective as they demonstrate a U.S. interest in taking responsibility for the damages and injuries caused by U.S. testing. However, the RMI Government and the atoll leaders have been telling the U.S. Government continuously over many decades and through multiple administrations that the needs are much greater than the U.S. is taking responsibility for.

Mr. Chairman, as President Note stated in his letter to you of 23 August 2007, concerning S. 1756: "This bill represents the first serious and substantive attempt to deal with the consequences of the U.S. Nuclear Testing Program in the Marshall Islands since the Section 177 Agreement went into effect almost twenty-one years ago. We see the introduction of this legislation as historic and providing an important step in the right direction. S. 1756 will allow us to engage with the U.S. Congress in continuing to work on addressing the damages resulting from the nuclear testing; damages and injuries far worse than either country originally understood. Mr. Chairman, we are most grateful to you for this opportunity."

Today, I would like to discuss some of the issues addressed in S 1756, as well as those issues that need to be further considered and acted upon by our governments to fully address the consequences of the U.S. Nuclear testing program in the Marshall Islands.

Runit Dome

We are most pleased to note the inclusion of provisions to address the monitoring of the Runit Dome at Enewetak Atoll.

The partial cleanup of Enewetak Atoll in the late 1970's resulted in the creation of an above ground nuclear waste storage site on Runit Island that has come to be

known as the Runit Dome. Inside the Runit Dome is over 110,000 cubic yards of radioactive material scraped from other parts of Enewetak Atoll. The Runit Dome is of concrete construction and the material inside is radioactive for 24,000 years. This type of nuclear waste storage facility would not have been permitted in the US because it would not have been considered to be adequately protective of human health and the environment.

In addition, there is an area on Runit Island where particles of plutonium were dispersed on not cleaned up. The particles remain on the island covered by a few inches of dirt.

We all know that monitoring of Runit Dome and other parts of Runit Island needs to be done as part of a long-term stewardship program. Neither my government nor the Enewetak people have the expertise or resources to conduct such monitoring. The Runit Dome and the surrounding contaminated land and marine area should be monitored and treated as any nuclear storage site in the US in order to provide the same level of protection to the Enewetak people as US citizens receive. That means that the monitoring needs to be part of a long-term stewardship program under the direction and responsibility of the DOE or other appropriate US agency.

This has always been a major issue of concern for the people of Enewetak who live in the immediate area of Runit, and consume fish and other seafood from the reef area adjoining Runit. Accordingly, we ask the Committee to remain engaged in the oversight of the Department of Energy's survey reports regarding the radiological conditions at Runit, and to see to it that these surveys are adequately and consistently funded to allow the Department of Energy to carry out the surveys in a complete and timely manner, and to take immediate action if a problem is discovered.

Eligibility for Energy Employees Occupational Illness Compensation Program

The inclusion of citizens of the Trust Territory of the Pacific Islands for coverage under the Energy Employees Occupational Illness Compensation Program Act of 2000 is also most welcomed by the RMI. Approximately 50 Marshallese worked for the United States or its contractors in the Marshall Islands during this period in efforts to clean-up or monitor these severely contaminated sites, but unlike their U.S. citizen co-workers, have been denied access to health care to address the health consequences of their very hazardous work.

Section 177 Healthcare

S. 1756 also appropriates the sum of $2 million annually, as adjusted for inflation in accordance with the Section 218 of the RMI-U.S. Compact for purposes of providing primary health care to the four atoll communities. The RMI welcomes and fully supports this measure and wishes to thank the Chairman for making this a permanent rather than discretionary appropriation; an issue that has caused significant problems in other Compact assistance.

Section 1(a) of Article II of the Section 177 Agreement provided that $2 million annually be made available to address the health consequences of the nuclear testing program. This amount was never subject to an inflation adjustment, despite the fact that health care cost inflation rates have always been substantially higher in the U.S. than overall inflation rates. Applying the Medical Care CPI in Hawaii, where most medical referral cases from the RMI were sent during the period in question, the adjusted rate would have been $4.42 million annually as of 2001. An analysis showing the declining value of the Section 177 Health Care funds over time; the additional costs to the RMI; and what sums should have been provided in order for these funds to maintain their value is attached to this statement.

As stated in the August 23 letter from President Note to Chairman Bingaman, the scope of 177 Health Care Program needs to be examined, especially in light of the September 2004 NCI report prepared at the specific request of the Senate Committee on Energy and Natural Resources. In addition to stating that more than half of the estimated 532 excess cancers had "yet to develop or be diagnosed" (page 14), the report also indicates that more than half of those excess cancers will occur in populations that were at atolls other than the four included in the 177 Health Care Program. Table 3 on page 20 of the report provides more than adequate justification for including in the program the populations of the "Other Northern Atolls" of Ailuk, Mejit, Likiep, Wotho, Wotje, and Ujelang. That table indicates 227 estimated excess cancers among the 2005 people who were living at those atolls during the testing period, an amount representing more than 11% of those populations. It could also be argued that there should be an active and ongoing medical diagnostic program carried out across the RMI, specifically including the outer islands, in order to diagnose the excess cancers so that they can be treated at the earliest possible stage.

The 4 Atoll Health Care Program (formerly the 177 Health Care Program) has been operating on borrowed time and resources since its beginnings. We have continued to watch medical and pharmaceuticals, supplies, and logistical costs increase year after year while our financial support stayed flat. After the first 17 years of the Compact, with medical costs at an all time high, we faced the challenge of trying to continue the program with a 50% cut in our already seriously inadequate budget.

What are the challenges we face?

We need a commitment for longer term funding.

We need adequate and reliable water supply systems.

We need affordable and reliable power supply systems.

We need reliable transportation services for patients and medical supplies.

Our clinic buildings and equipment are 10-15 years old and have had minimal repairs. Although we have upgraded some of the medical equipment this year we have barely scratched the surface. We are without some very basic equipment and are limited in what equipment can be provided because we lack the necessary support systems. Also, we do not have a budget that allows for a repair technician or a preventive maintenance program.

We lack autoclaves because these sterilizers require a continuing supply of distilled water to operate. Other sterilization supplies such as Formalin can only be transported by boat and are difficult to ship into the Marshall Islands. This means we do without basic minor surgery equipment unless we use cost-prohibitive disposable sets and supplies.

None of our clinics have basic laboratory setups for simple diagnostics and many of the one step lab tests are either too costly or require cool storage. We have extremely limited diagnostic equipment and much of it has to be shared on a rotating basis. We have no proctoscopes, we cannot do PSA's. Both of these would be needed for cancer screenings. In addition, we lack reliable cold storage.

Facing these limits, we have been very lucky to recruit physicians from third world countries with strong clinical skills, experience relative to our diseases, and a willingness to work under these difficult circumstances. These doctors continue to live and work in our outer atolls despite limitations in supplies, equipment, and logistical support. Hiring these doctors has also been a matter of necessity as neither our previous or current budget would have supported hiring physicians with greater salary expectations. The recruiting and relocation costs for these doctors can be relatively high. This expense is compounded as we deal with year to year funding. Lack of secured funding prevents us from recruiting and hiring on longer term contracts and seriously impacts the program's continuity and the related recruiting costs.

NAS Study

S.1756 makes provision for the National Academy of Sciences to conduct an assessment of the health impacts of the nuclear testing program on the residents of the RMI. The RMI strongly supports this assessment as it will look at the overall health impacts caused by the Nuclear Testing Program rather than focusing on just one aspect of those impacts. The RMI would like to make it clear, however, that the NCI and other data previously presented to this Committee provides the justification for taking action now to establish a cancer screening and treatment program, and to address the radiogenic healthcare needs of several communities beyond the 4 atolls.

The proposed National Academy of Sciences assessment of the health impacts of the nuclear program on the residents of the Marshall Islands should consider all data and analyses relating to dose reconstructions, exposure pathways, and potential health outcomes. In particular, two reports prepared for the Centers for Disease Control by S. Cohen & Associates and dated May, 2007, should be reviewed as part of the assessment and the authors of the reports should be given an opportunity to meet with the NAS experts to discuss their findings. The two reports are: "Historical Dose Estimates to the GI Tract of Marshall Islanders Exposed to BRAVO Fallout"(Contract No. 200-2002-00367, Task Order No. 9) and "An Assessment of Thyroid Dose Models Used for Dose Reconstruction," Vols. I and II (Contract No. 200-2002-00367 ,Task Order No. 10).

Assessment of the Marshall Islands Nuclear Claims Tribunal

Absent from the S.1756 is any reference to the decisions and awards made by the Marshall Islands Nuclear Claims Tribunal. The administrative and adjudicative processes of the Tribunal over the past 19 years are an important mutually agreed to component of the Section 177 Agreement and its implementation to resolve claims for damage to person and property arising as a result of the nuclear testing program. We cannot simply ignore the Tribunal's work and awards that it has made.

Understanding that there continues to be concerns in Congress, we would support a further study of the decision-making processes of the Marshall Islands Nuclear Claims Tribunal and its awards by an appropriate organization. The RMI has presented a Report on this subject prepared by former United States Attorney General Richard Thornburgh in January, 2003, however, issues and concerns apparently continue. We should move forward and resolve any remaining issues and concerns regarding the Tribunal and its work. We would therefore respectfully suggest that the GAO may be appropriate to undertake such a study and provide recommendations to the Congress.

COMPACT IMPLEMENTATION

Overall, we have made a great deal of progress with respect to implementing the Compact, as amended. The procedures we developed regarding the Joint Economic Management and Financial Accountability Committee (JEMFAC) have worked well through a process of requiring consensus between our two governments on the allocation and division of Compact annual sector grant funding.

During the past three years, the RMI Government has invested heavily in the Education, Health, and Public Infrastructure sectors in terms of allocating available annual grant funding—in fact, the Public Infrastructure grant allocations have been mostly for improving education and health facilities. The Health and Education sectors are identified within the body of the Compact as priority sectors. The RMI Government intends to remain fully committed and focused on improving our education and health outcomes.

Our Government has also done much to improve the groundwork for more robust private sector development with enactment of further changes to our land registration laws, enactment of a secured transactions law, and other reforms to create an environment conducive to the private sector growth.

We believe that implementation of the accountability provisions in the amended Compact in respect to annual sector grant funding has to date, been largely a success for the RMI. We must, however, continue to improve on our performance and see positive and measurable results that will encourage greater ownership of the new system within our government, and to the Marshallese people who are the real beneficiaries of better accountability and good governance.

As we have endeavored to usher in an era of greater accountability, we are cognizant that such efforts must start from the top. As we move forward and better enforce our own laws, we are aware that problems with local capacity remain, and must be resolved if we are to institutionalize the changes we are undertaking.

The RMI has also moved forward over the past three years with taking measures to implement the Compact, as amended, and adopting a system of performance based budgeting within the government. We started this program with the core sectors of Health and Education. We are now moving to a performance based budget system within other sectors of the government that are not funded from the Compact.

The reporting obligations of the new Compact are the key to monitoring this progress. Our capacity is growing to meet these many requirements and the most critical among these is the annual report to the President of the United States on the progress of the Compact implementation. I think it is true to say that both sides recognize that the present timing for the preparation of this report is unrealistic and I would suggest that this issue needs to be addressed and changed to a more realistic timeframe if we are to best reflect the Compact's progress. This is also true of the timing for submission of audits under the Fiscal Procedures Agreement.

We also see the need for the foreseeable future to coordinate Compact activities within the Government through a viable framework that focuses only on matters related to the Compact. In this respect, I am pleased to announce that our Cabinet has recently approved the formal creation of an Office of Compact Implementation that will oversee all aspects of Compact implementation on behalf of the RMI.

Full Inflation Adjustment

The issue of full inflation continues to be problematic for the RMI in terms of the Government maintaining fiscal stability as annual grant assistance declines over the years as was predicted by the RMI four years ago. The GAO also dedicated an entire report to dealing with the long term effect of declining grant assistance under the amended Compact. In the RMI's comments to the GAO Report in November, 2006, we noted:

> One of the major challenges regarding social and economic stability remains the size of the annual decrement of the Compact Title Two Section 211 sector grant funding ($500,000) and the only partial inflation adjustment. The resulting significant annual decline in the nominal and real

value of this funding will place pressure on providing adequate social services and fiscal stability as well as impact private sector performance. This is despite the changes the RMI is making in focusing amended Compact funding mainly on health, education and infrastructure development and maintenance.

Recently, this situation has been further exacerbated by rapidly rising costs of imported fuel, which is causing major problems with the provision of public utilities and inter-island services for our widespread communities and creating an overall inflationary effect that is putting a damper on our economic growth.

Although annual decrements of $500,000 are a major improvement over the original Compact with decreases of $4 million every four years, these decrements over time may result in the same problems that plagued the RMI under the original Compact that cannot be overcome through reducing essential government services or changing the tax structure. Full inflation adjustment to amounts provided under Article II of the amended Compact remains an important issue, and one if not addressed in the short term, will cause significant fiscal problems in the long term.

Supplemental Education Grants

U.S. Public Law 108-188 provides for a supplemental education grant (SEG) of $6.1 million annually, to be adjusted for inflation which was to allow the RMI Government to design and implement education programs to replace those lost through the termination of certain federal programs. These funds were to be made available to the RMI within 60 days after the date of appropriation.

Unfortunately, these appropriations have taken place well into the fiscal year, and delays in the RMI receiving the funds have been in excess of six months as opposed to 60 days as required by law. In addition, rather than adjusting the $6.1 million for inflation, the RMI has seen this amount decrease over the years as it has been subject to across the board budget cuts. For example, over the past two fiscal years there has been a $712,000 shortfall between the planned SEG amounts, and the actual amounts appropriated. There is now a real danger of creating a de facto ceiling for the SEG that is below the authorized amount, and does not include inflation.

These problems arise as a result of the fact that SEG funding is an annual discretionary appropriation under the U.S. Compact of Free Association Amendments Act 2003. This has caused tremendous problems for our Ministry of Education in developing and implementing crucial education programs supplementing the Education sector grant in the Compact. In addition, the lower amount will impact education sector performance by limiting the scope and depth of sector operational, development and reform activities.

This issue is of such great importance to the RMI that on March 8, 2006, President Note wrote a letter to Secretary Spelling asking that the SEG be made available as a permanent appropriation in the same manner as other Compact assistance.

I would now ask the Administration and Congress once again to make provision that the SEG be made available to the RMI as a permanent appropriation and adjusted for inflation in the same manner as other financial assistance under the Compact. This will be crucial for the success of efforts to improve the educational outcomes for the Marshallese people.

Compact Trust Fund

The Compact of Free Association, as amended, also includes provision for a Trust Fund which will build up until 2023, at which time income from the Trust Fund will be made available to the RMI to coincide with the end of annual grant assistance.

As we noted in our comments to the last GAO Report, we agree with their findings questioning the adequacy of the Trust Fund in 2023 to fulfill its purpose. What became clear in the U.S. agency comments to the GAO Report is that there are differences of opinion as to the purposes of the Compact Trust Fund.

References are made to the negotiations history of the Trust Fund Agreement (TFA), and in particular to Article 3 of the TFA which states that the Fund is to provide an annual source of revenue after 2023.

This provision and others were hotly debated during the negotiations, but Article 3 cannot be viewed as a stand-alone provision. Rather, the TFA must be read as a whole, and when one does that, it is clear that the goal established in the Agreement is to provide for a smooth transition between the end of annual economic assistance, and income from the Trust Fund. The TFA also provides that starting in FY 2024, the RMI may receive an amount equal to the annual grant assistance in 2023 plus full inflation. The Agreement does not say "up to" that amount or any other amount, and the negotiating history will show that the reason the word "may"

appears rather than "shall" is that the disbursement of the funds would be based on RMI compliance with whatever rules are in place at that time governing their use. Since this reference is the only reference in the TFA to amounts available starting in FY 2024, and thereafter, we believe that this is the benchmark that we should be striving to achieve in the future.

We point this out not for the reason of engaging in another protracted debate on the purpose of the Trust Fund, but to point out that the Fund should have goals other than simply saying that it will produce revenues starting in FY 2024. Our discussion should center around what can be done between now and then to maximize Trust Fund income and to make it viable in the future.

There are many ways in which future viability of the Trust Fund can be achieved. Over the past year, the TFC has considered the possibility of securitizing future U.S. contributions to the Trust Fund. This could permit investment of larger amounts in the early years allowing the corpus and income producing potential of the Fund to substantially increase over current projections. The RMI Government looks forward to receiving a report on the advisability and risk of securitizing future U.S. contributions, but urges that this be done as quickly as possible since this is a time sensitive concept. If feasible, we would strongly support securitization of future Trust Fund contributions.

A second way to improve the long-term viability of the Fund would be to extend the term of annual grant assistance for at least another two years before distributing income from the Trust Fund. This would be consistent with the intent of both governments when the Trust Fund was originally negotiated, and it was anticipated that the Fund would be invested for a full 20 years before it would be expected to produce annual income. This did not happen due to the delay in approving and implementing the Compact, and the wording of Section 216(b) of the amended Compact.

Another way to improve the Trust Fund's viability would be to attract additional subsequent contributors to the Fund. The RMI is most pleased that it was able to bring Taiwan in as a subsequent contributor to the Fund, and looks forward to participation by other Subsequent Contributors. In this respect, we would encourage the U.S. Government to actively seek additional contributions from other sources as the RMI has done over the past three years.

Finally, we were anticipating that a technical amendment would be included in HR 2705, the Compacts of Free Association Amendments Act of 2007, which would allow the RMI and U.S. Governments to make certain technical amendments to the Trust Fund Agreement regarding the Fund custodian and sub-custodian in order to facilitate investments by the Investment Advisor, Goldman Sachs, and to streamline the cumbersome process noted by the GAO in their report. It is our understanding that the Administration had submitted such an amendment, but it does not seem to have been included in the current version of HR 2705.

The good news about problems concerning the future adequacy and viability of the Trust Fund is that there is time to take measures to address these concerns. The RMI believes, however, that these measures need to be taken as quickly as possible. Already there is concern among the Marshallese people that the Trust Fund will not be a viable and sustainable source of revenue in the future. This belief was further supported by the findings of the GAO in their Report. As time passes, this will lead to increased migration as people will lack confidence in the future of their nation.

Both Governments have a strong interest in seeing to it that the Trust Fund is successful, and fulfills its purpose.

Mr. Chairman, this concludes my testimony here today regarding S. 1756, and Compact implementation. I would be most pleased to answer any questions at this time.

The CHAIRMAN. Thank you very much.

Next, let's hear from Mr. David Gootnick, who's with the GAO.

STATEMENT OF DAVID B. GOOTNICK, DIRECTOR, INTERNATIONAL AFFAIRS AND TRADE, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. GOOTNICK. Thank you, Mr. Chairman.

Mr. Chairman, Senator Murkowski, members of the committee, I am pleased to discuss GAO's recent work on the Compact of Free Association with the RMI.

As has been stated, the amended compact provides for decreasing grant assistance, paired with increasing trust fund contributions intended to assist the RMI toward economic advancement, and budgetary self-reliance. The amended compact also strengthens planning, reporting and accountability over grant funds.

Congress has directed GAO to report on the use and effectiveness of U.S. assistance under the amended compact, and today, drawing on this work, I will discuss three issues: RMI's economic prospects, implementation of the amended Compact, and potential trust fund earnings.

RMI has limited prospects for economic development, and progress and policy reforms necessary to stimulate private sector growth has been slow. The RMI economy depends heavily on foreign assistance. At present, the public sector represents roughly 60 percent of GEP, two-thirds of which is U.S. assistance.

The industries with the greatest growth potential—fisheries and tourism—face significant barriers to expansion, including geographic isolation, poor infrastructure, poor business environments, and public sector wages that are twice the private sector level.

Although a stated priority for the Government, progress in implementing policy reforms on tax, land, foreign investment and the public sector has been limited. On taxes, although the Government has focused on improved administration and collections, fundamental tax reform has not progressed through the legislation.

On land, the RMI has established land registration offices, but registration is voluntary, and a very small number of parcels are being registered. Continued disputes, and uncertainty over ownership and land values, particularly on Ebeye, limits the use of land as an asset, and for development.

On the public sector, after some downsizing in the late 1990s, as has been said, government payroll nearly doubled between 2000 and 2005.

Regarding the implementation of grants—the RMI has allocated funds to prioritize infrastructure, education and health. Progress in building classrooms that was alluded to by Mr. Bussanich has been demonstrated, in particular. Future infrastructure plans call for development in the College of the Marshall Islands, and Majuro Hospital.

Several factors hamper the Compact grant funds used to meet long-term development goals. First, continued disputes over land rights, particularly on Ebeye, have hampered several infrastructure projects, and may significantly delay future infrastructure development, a key priority.

Second, again on Ebeye, an impasse with the landowners over the management of Compact special needs grants significantly delayed the use of funds there. This has hampered the provision of basic services such as power and water.

Third, capacity limitations constrain the government's ability to monitor progress on a day-to-day basis.

Fourth, we project that per capita grant assistance will decline in real terms, from over $600 per person today, to roughly $300 in 2023. Full inflation adjustment would have only a marginal impact on that decrement.

Finally, regarding the Trust Fund. As you know, in addition to the U.S. and RMI contributions, the Fund will also receive a $40 million contribution from Taiwan. However, under different projections of market volatility and investment strategy, we found increasing probability that in some years, the fund will not disburse the maximum level allowed, or over the long-term, be able to disburse any income.

The Trust Fund could be supplemented from several sources, but each has limitations. Tax revenue, or remittances, if bolstered, could supplement the Fund's income. At present, emigrants are not a source of remittances, in fact, according to recent data, almost half of the Marshallese living in Hawaii, CNMI, and Guam, live in poverty. Also, the option of securitization entails risk, it has not yet been fully analyzed—although as Mr. Bussanich said, that effort is underway.

We have recommended that the Department of Interior work with the RMI Government to ensure that the Compact Management Committees address the limited progress in implementing economic reforms, develop plans to improve RMI's capacity to monitor and proactively manage the decrement, and three, ensure that the Trust Fund Committee's report on the Fund's likely status as a source of revenue after 2023 is completed.

Interior generally agrees with our recommendations, and has already taken steps to address some of them. Hawaii has been active, and committed to the success of the amended Compact, and likewise, the RMI is constructively engaged in pursuing its health, education and infrastructure goals.

However, success will require ongoing resources, diligence, and some very difficult choices.

Mr. Chairman, this concludes my statement, I'm happy to answer your questions.

[The prepared statement of Mr. Gootnick follows:]

PREPARED STATEMENT OF DAVID B. GOOTNICK, DIRECTOR, INTERNATIONAL AFFAIRS AND TRADE, GOVERNMENT ACCOUNTABILITY OFFICE

COMPACT OF FREE ASSOCIATION

Implementation Activities Have Progressed, but the Marshall Islands Faces Challenges to Achieving Long-Term Compact Goals

WHY GAO DID THIS STUDY

In 2003, the U.S. government extended its economic assistance to the Republic of the Marshall Islands (RMI) through an Amended Compact of Free Association. From 2004 to 2023, the United States will provide an estimated $1.5 billion to the RMI, with annually decreasing grants as well as increasing contributions to a trust fund. The assistance, targeting six sectors, is aimed at assisting the country's efforts to promote economic advancement and budgetary self-reliance. The trust fund is to be invested and provide income for the RMI after compact grants end. The Department of the Interior (Interior) administers and oversees this assistance. Drawing on prior GAO reports (GAO-05-633, GAO-06-590, GAO-07-163, GAO-07-513, GAO-07-514R), this testimony discusses (1) the RMI's economic prospects, (2) implementation of the amended compact to meet long-term goals, and (3) potential trust fund earnings. In conducting its prior work, GAO visited the RMI, reviewed reports, interviewed officials and experts, and used a simulation model to project the trust fund's income.

Prior GAO reports recommended, among other things, that Interior work with the RMI to address lack of progress in implementing reforms; plan for declining grants;

reliably measure progress; and ensure timely reporting on the fund's likely status as a source of revenue after 2023. Interior agreed with GAO's recommendations.

What GAO Found

The RMI has limited prospects for achieving its long-term development goals and has not enacted policy reforms needed to achieve economic growth. The RMI economy depends on public sector spending of foreign assistance rather than on private sector or remittance income. At the same time, the two private sector industries identified as having growth potential—fisheries and tourism—face significant barriers to expansion because of a costly business environment. RMI emigrants also lack marketable skills needed to increase revenue from remittances. Despite declining grants under the compact, RMI progress in implementing key policy reforms to improve the private sector environment, such as tax or land reform, has been slow. In August 2006, the RMI's compact management committee began to address the country's slow progress in implementing reforms.

Although the RMI has made progress in implementing compact assistance, it faces several challenges in allocating and using this assistance to support its long-term development goals. RMI grant allocations have reflected compact priorities by targeting health, education, and infrastructure. However, political disagreement over land use in Kwajalein Atoll, where the United States has a missile testing facility, and over management of public entities has negatively affected infrastructure projects. The RMI also has not planned for long-term sustainability of services that takes into account declining compact assistance. Inadequate baseline data and incomplete performance reports have further limited the RMI's ability to adequately measure progress. Although single-audit reporting has been timely, insufficient staff and skills have limited the RMI's ability to monitor day-to-day sector grant operations. Interior's Office of Insular Affairs (OIA) has conducted administrative oversight of the sector grants but has been constrained by competing oversight priorities.

The RMI trust fund may not provide sustainable income for the country after compact grants end. Market volatility and the choice of investment strategy could cause the RMI trust fund balance to vary widely, and there is increasing probability that in some years the trust fund will not reach the maximum disbursement level allowed—an amount equal to the inflation-adjusted compact grants in 2023—or be able to disburse any income. In addition, although the RMI has supplemented its trust fund income with a contribution from Taiwan, other sources of income are uncertain or entail risk. Trust fund management processes have also been problematic; as of June 2007, the RMI trust fund committee had not appointed an independent auditor or a money manager to invest the fund according to the proposed investment strategy.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss GAO's recent work regarding the Compact of Free Association between the United States and the Republic of the Marshall Islands (RMI). From 1987 through 2003,[1] the United States provided more than $2 billion in economic assistance to the Federated States of Micronesia (FSM) and the RMI under a Compact of Free Association;[2] approximately $579 million of this economic assistance went to the RMI. In 2003, the U.S. government approved an amended compact with the RMI that provides an additional 20 years of assistance, totaling about $1.5 billion from 2004 through 2023.[3] The Department of the Interior's Office of Insular Affairs (OIA) is responsible for administering and monitoring this U.S. assistance.

The amended compact with the RMI identifies the additional 20 years of grant assistance as intended to assist the RMI government in its efforts to promote the economic advancement and budgetary self-reliance of its people. The assistance is provided in the form of annually decreasing grants that prioritize health and education, paired with annually increasing contributions to trust funds intended as a source of revenue for the country after the grants end in 2023. The amended compact targets certain funds to address needs in Kwajalein Atoll, where the United States maintains a missile testing facility. The amended compact also contains several new funding and accountability provisions that strengthen reporting and bilateral interaction. These provisions include requiring the establishment of a joint eco-

[1] In this testimony, all annual references refer to the fiscal year rather than the calendar year.

[2] In 2000, we reviewed assistance under the compact and determined that the U.S. and RMI governments had provided limited accountability over spending and that U.S. assistance had resulted in little impact on economic development in the RMI. See GAO, Foreign Assistance: U.S. funds to Two Micronesian Nations Had Little Impact on Economic Development, GAO/NSIAD-00-216 (Washington, D.C.: Sept. 22, 2000).

[3] This figure is based on a Department of Interior projection as of July, 2007.

nomic management committee and a trust fund committee to, respectively, among other things, review the RMI's progress toward compact objectives and to assess the trust fund's effectiveness in contributing to the country's long-term economic advancement and budgetary self-reliance. In 2003, we testified that these provisions could improve accountability over assistance but that successful implementation will require appropriate resources and sustained commitment from both the United States and the RMI.[4]

Today, drawing on several reports that we have published since 2005,[5] I will discuss the RMI's economic prospects, implementation of the amended compact to meet its long-term goals, and potential trust fund earnings.

SUMMARY

The RMI has limited prospects for achieving its long-term development objectives and has not enacted policy reforms needed to enable economic growth. The RMI depends on public sector spending of foreign assistance rather than on private sector or remittance income; public sector expenditure accounts for more than half of its gross domestic product (GDP). The RMI government budget largely depends on foreign assistance and, despite annual decrements in compact funding to support budgetary expenditures, is characterized by a growing wage bill. Meanwhile, the two private sector industries identified as having growth potential—fisheries and tourism—face significant barriers to expansion because of the RMI's remote geographic location, inadequate infrastructure, and poor business environment. In addition, RMI emigrants lack marketable skills that are needed to increase revenue from remittances. Moreover, progress in implementing key policy reforms necessary to improve the private sector environment has been slow. For example, although economic experts describe the RMI's current tax system as complex and regressive, the RMI government has not implemented fundamental tax reform. Further, although the RMI has established land registration offices, continued uncertainties over land ownership and land values hamper the use of land as an asset. Foreign investment regulations remain burdensome, and RMI government involvement in commercial activities continues to hinder private sector development. Moreover, at the time of our 2006 report, the RMI's compact management committee had not addressed the country's slow progress in implementing reforms.

The RMI has made progress in implementing compact assistance, but it faces several challenges in allocating and using this assistance to support its long-term development goals. RMI grant allocations have reflected compact priorities by targeting health, education, and infrastructure—for example, funding construction of nine new schools. However, in the case of Kwajalein Atoll, political disagreement over management of public entities and government use of leased land has negatively affected the construction of schools and the use of compact funds set aside for Ebeye special needs.[6] The RMI also has not planned for long-term sustainability of services that takes into account the annual funding decrement. Capacity limitations have further affected its ability to ensure the effective use of grant funds. The RMI currently lacks the capacity to adequately measure progress, owing to inadequate baseline data and incomplete performance reports. Moreover, although accountability—as measured by timeliness in single audit reporting and corrective action plans to single audit findings—has improved, insufficient staff and skills have limited the RMI's ability to monitor day-to-day sector grant operations as the compacts require. Inadequate communication about grant implementation may further

[4] GAO, Compact of Free Association: An Assessment of the Amended Compacts and Related Agreements, GAO-03-988T (Washington, D.C.: June 18, 2003), testimony before the Committee on Resources, House of Representatives.

[5] The amended compacts' implementing legislation instructs GAO to report 3 years following the enactment of the legislation and every 5 years thereafter on the RMI's use and effectiveness of U.S. financial, program, and technical assistance as well as the effectiveness of administrative oversight by the United States. See GAO, Compacts of Free Association: Implementation of New Funding and Accountability Requirements is Well Under Way, but Planning Challenges Remain, GAO-05-633 (Washington, D.C.: July 11, 2005); GAO, Compacts of Free Association: Development Prospects Remain Limited for the Micronesia and the Marshall Islands, GAO-06-590 (Washington, D.C.: June 27, 2006); GAO, Compacts of Free Association: Micronesia and the Marshall Islands Face Challenges in Planning for Sustainability, Measuring Progress, and Ensuring Accountability, GAO-07-163 (Washington, D.C.: Dec. 15, 2006); GAO, Compacts of Free Association: Trust Funds for Micronesia and the Marshall Islands May Not Provide Sustainable Income, GAO-07-513 (Washington, D.C.: July 15, 2007); and GAO, Compact of Free Association: Micronesia and the Marshall Island's Use of Sector Grants, GAO-07-514R (Washington, D.C.: May 25, 2007).

[6] Kwajalein Atoll is the RMI's second most populated atoll, where many residents were displaced to provide space for U.S. missile testing. Many of these residents now reside on Ebeye Island.

hinder the U.S. and RMI governments from ensuring the grants' effective use. Although Interior's Office of Insular Affairs (OIA) has conducted administrative oversight of the sector grants, its oversight has similarly been constrained by staffing challenges and the need to assist the FSM with its compact implementation activities.

The RMI trust fund may not provide sustainable income for the country after compact grants end, potential sources for supplementing trust fund income have limitations, and the trust fund committee has experienced management challenges. Market volatility and the choice of investment strategy could cause the RMI trust fund balance to vary widely, and there is increasing probability that in some years the trust fund will not reach the maximum disbursement level allowed—an amount equal to the inflation-adjusted compact grants in 2023—or be able to disburse any income. The trust fund committee's reporting has not analyzed the fund's potential effectiveness in helping the RMI achieve its long-term economic goals. Although the RMI has supplemented its trust fund income with a contribution from Taiwan, other sources of income are uncertain or entail risk. For example, the RMI's limited development prospects constrain its ability to raise tax revenues to supplement the fund's income, and options such as securitization—issuing bonds against future U.S. contributions—include the risk of lower fund balances and reduced income. Furthermore, according to U.S. government officials, trust fund management processes have been problematic. As of June 2007, for example, the RMI trust fund committee had not appointed an independent auditor or a money manager to invest the fund according to the proposed investment strategy.

Our previous reports on the amended compacts recommended, among other things, that Interior's Deputy Assistant Secretary for Insular Affairs ensure that the compact management committee address the RMI's lack of progress in implementing economic reforms; work with the RMI to develop plans for minimizing the impact of the declining grants; work with the RMI to fully develop a reliable mechanism for measuring progress toward compact goals; and ensure the trust fund committee's timely reporting on the fund's likely status as a source of revenue after 2023. Interior generally concurred with our recommendations and has taken some actions in response to several of them.

BACKGROUND

Compact of Free Association: 1986–2003

In 1986, the United States, the FSM, and the RMI entered into the original Compact of Free Association. The compact provided a framework for the United States to work toward achieving its three main goals: (1) to secure self-government for the FSM and the RMI, (2) to ensure certain national security rights for all of the parties, and (3) to assist the FSM and the RMI in their efforts to advance economic development and self-sufficiency. Under the original compact, the FSM and RMI also benefited from numerous U.S. federal programs, while citizens of both nations exercised their right under the compact to live and work in the United States as "nonimmigrants" and to stay for long periods of time.

Although the first and second goals of the original compact were met, economic self-sufficiency was not achieved under the first compact. The FSM and the RMI became independent nations in 1978 and 1979, respectively, and the three countries established key defense rights, including securing U.S. access to military facilities on Kwajalein Atoll in the RMI through 2016. The compact's third goal was to be accomplished primarily through U.S. direct financial assistance to the FSM and the RMI that totaled $2.1 billion from 1987 through 2003.[7] However, estimated FSM and RMI per capita GDP levels at the close of the compact did not exceed, in real terms, those in the early 1990s,[8] although U.S. assistance had maintained income levels that were higher than the two countries could have achieved without support. In addition, we found that the U.S., FSM, and RMI governments provided little accountability over compact expenditures and that many compact-funded projects ex-

[7] This estimate is based on Interior data and represents total nominal outlays. It does not include payments for compact-authorized federal services or U.S. military use of Kwajalein Atoll land, nor does it include investment development funds provided under section 111 of Public Law 99-239.

[8] Estimated FSM per capita GDP, in fiscal year 2003 U.S. dollars, was $2,151 in 2003 compared with an average of $2,093 from 1990 to 1995. Estimated RMI per capita GDP, in fiscal year 2003 U.S. dollars, was $2,247 in 2003 compared with an average of $2,336 from 1990 to 1995.

perienced problems because of poor planning and management, inadequate construction and maintenance, or misuse of funds.[9]

Amended Compacts of Free Association: 2004–2023

In 2003, the United States approved separate amended compacts with the FSM and RMI that (1) continue the defense relationship, including a new agreement providing U.S. military access to Kwajalein Atoll in the RMI through 2086; (2) strengthen immigration provisions; and (3) provide an estimated $3.6 billion in financial assistance to both nations from 2004 through 2023, including about $1.5 billion to the RMI (see app. I).[10] The amended compacts identify the additional 20 years of grant assistance as intended to assist the FSM and RMI governments in their efforts to promote the economic advancement and budgetary self-reliance of their people. Financial assistance is provided in the form of annual sector grants and contributions to each nation's trust fund. The amended compacts and their subsidiary agreements, along with the countries' development plans, target the grant assistance to six sectors—education, health, public infrastructure, the environment, public sector capacity building, and private sector development—prioritizing two sectors, education and health.[11] Further, the amended compact stipulates that certain funding be made available to address the population's needs on Kwajalein Atoll. To provide increasing U.S. contributions to the FSM's and the RMI's trust funds, grant funding decreases annually and will likely result in falling per capita grant assistance over the funding period and relative to the original compact (*see fig. 1).[12] For example, in 2004 U.S. dollar terms, FSM per capita grant assistance will fall from around $1,352 in 1987 to around $562 in 2023, and RMI per capita assistance will fall from around $1,170 in 1987 to around $317 in 2023.

Under the amended compacts, annual grant assistance is to be made available in accordance with an implementation framework that has several components (see app. II). For example, prior to the annual awarding of compact funds, the countries must submit development plans that identify goals and performance objectives for each sector. The FSM and RMI governments are also required to monitor day-to-day operations of sector grants and activities, submit periodic financial and performance reports for the tracking of progress against goals and objectives, and ensure annual financial and compliance audits. In addition, the U.S. and FSM Joint Economic Management Committee (JEMCO) and the U.S. and RMI Joint Economic Management and Financial Accountability Committee (JEMFAC) are to approve annual sector grants and evaluate the countries' management of the grants and their progress toward compact goals. The amended compacts also provide for the formation of FSM and RMI trust fund committees to, among other things, hire money managers, oversee the respective funds' operation and investment, and provide annual reports on the effectiveness of the funds.

Current Development Prospects Remain Limited for the RMI

The RMI economy shows limited potential for developing sustainable income sources other than foreign assistance to offset the annual decline in U.S. compact grant assistance. In addition, the RMI has not enacted economic policy reforms needed to improve its growth prospects.

The RMI's economy shows continued dependence on government spending of foreign assistance and limited potential for expanded private sector and remittance income.

- Since 2000, the estimated public sector share of GDP has grown, with public sector expenditure in 2005—about two-thirds of which is funded by external grants—accounting for about 60 percent of GDP.
- The RMI's government budget is characterized by limited tax revenue paired with growing government payrolls. For example, RMI taxes have consistently provided less than 30 percent of total government revenue; however, payroll expenditures have roughly doubled, from around $17 million in 2000 to around $30 million in 2005.

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[9] GAO/NSIAD-00-216.

[10] The RMI and FSM amended compacts went into effect on May 1, 2004, and June 25, 2004, respectively. The $1.5 billion in assistance to the RMI includes (1) compact grants; (2) trust fund contributions; (3) lease payments; and (5) inflation adjustments.

[11] 1AThe RMI compact requires its infrastructure grant to be 30 to 50 percent of its total annual sector grants. Additionally, the RMI must target grant funding to Ebeye and other Marshallese communities within Kwajalein Atoll.

[12] U.S. contributions to trust funds were conditioned on the FSM and the RMI making their own required contribution. The RMI made its required initial contribution of $30 million to its trust fund on June 1, 2004.

* Figures 1–3, and Appendixes I-III have been retained in committee files.

- The RMI development plan identifies fishing and tourism as key potential private sector growth industries. However, the two industries combined currently provide less than 5 percent of employment,[13] and both industries face significant constraints to growth that stem from structural barriers and a costly business environment. According to economic experts, growth in these industries is limited by factors such as geographic isolation, lack of tourism infrastructure, inadequate interisland shipping, a limited pool of skilled labor, and a growing threat of overfishing.
- Although remittances from emigrants could provide increasing monetary support to the RMI, evidence suggests that RMI emigrants are currently limited in their income-earning opportunities abroad owing to inadequate education and vocational skills. For example, the 2003 U.S. census of RMI migrants in Hawaii, Guam, and the Commonwealth of the Northern Marianas Islands reveals that only 7 percent of those 25 years and older had a college degree and almost half of RMI emigrants lived below the poverty line.[14]

Although the RMI has undertaken efforts aimed at economic policy reform,[15] it has made limited progress in implementing key tax, land, foreign investment, and public sector reforms that are needed to improve its growth prospects. For example:

- The RMI government and economic experts have recognized for several years that the RMI tax system is complex and regressive, taxing on a gross rather than net basis and having weak collection and administrative capacity. Although the RMI has focused on improving tax administration and has raised some penalties and tax levels, legislation for income tax reform has failed and needed changes in government import tax exemptions have not been addressed.
- In attempts to modernize a complex land tenure system, the RMI has established land registration offices. However, such offices have lacked a systematic method for registering parcels, instead waiting for landowners to voluntarily initiate the process. For example, only five parcels of land in the RMI had been, or were currently being, registered as of June 2006. Continued uncertainties over land ownership and land values create costly disputes, disincentives for investment, and problems regarding the use of land as an asset.
- Economic experts and private sector representatives describe the overall climate for foreign investment in the RMI as complex and nontransparent. Despite attempts to streamline the process, foreign investment regulations remain relatively burdensome, with reported administrative delays and difficulties in obtaining permits for foreign workers.
- The RMI government has endorsed public sector reform; however, efforts to reduce public sector employment have generally failed, and the government continues to conduct a wide array of commercial enterprises that require subsidies and compete with private enterprises. As of June 2006, the RMI had not prepared a comprehensive policy for public sector enterprise reform.

Although the RMI development plan includes objectives for economic reform, until August 2006—two years into the amended compact—JEMFAC did not address the country's slow progress in implementing these reforms.

The RMI Faces Challenges to Effectively Implementing Compact Assistance for Its Long-Term Development Goals

The RMI has allocated funds to priority sectors, although several factors have hindered its use of the funds to meet long-term development needs. Further, despite actions taken to effectively implement compact grants, administrative challenges have limited its ability to ensure use of the grants for its long-term goals. In addition, although OIA has monitored early compact activities, it has also faced capacity constraints.

The RMI allocated compact funds largely to priority sectors for 2004-2006. The RMI allocated about 33 percent, 40 percent, and 20 percent of funds to education,

[13] Employment in the RMI fishing industry grew from 2000 to 2004 with the opening of a tuna processing plant. The commercial viability of this plant was never established, however, and the RMI lost around 600 private sector jobs when the plant closed in 2005. Recent foreign investment in a new tuna processing plant is projected to return employment levels to those when the original plant closed.

[14] See GAO-06-590. However, a preliminary survey of RMI emigrants in Springdale, Arkansas suggests that the emigrant population there has higher education levels and lower poverty levels relative to the emigrant population in Hawaii, Guam, and the CNMI.

[15] For example, the Asian Development Bank has recently assisted the RMI in holding "Dialogue for Action" retreats that enable public and private sector representatives to develop a common vision for sustainable development through economic reform.

infrastructure, and health, respectively (see fig. 2). The education allocation included funding for nine new school construction projects, initiated in October 2003 through July 2006. However, various factors, such as land use issues and inadequate needs assessments, have limited the government's use of compact funds to meet long-term development needs. For example:

- **Management and land use issues in Ebeye.**—The RMI government and Kwajalein landowners have been disputing the management of public entities and government use of leased land on the atoll. Such tensions have negatively affected the construction of schools and other community development initiatives.[16] For example, the government and landowners disagreed about the management of the entity designated to use the compact funds set aside for Ebeye special needs; consequently, about $3.3 million of the $5.8 million allocated for this purpose had not been released for the community's benefit until after September 2006.[17] In addition, although the RMI has completed some infrastructure projects where land titles were clear and long-term leases were available, continuing uncertainty regarding land titles may delay future projects.
- **Lack of planning for declining U.S. assistance.**—Despite the goal of budgetary self-reliance, the RMI lacks concrete plans for addressing the annual decrement in compact funding, which could limit its ability to sustain current levels of government services in the future. RMI officials told us that they can compensate for the decrement in various ways, such as through the yearly partial adjustment for inflation provided for in the amended compacts or through improved tax collection. However, the partial nature of the adjustment causes the value of the grant to fall in real terms, independent of the decrement, thereby reducing the government's ability to pay over time for imports, such as energy, pharmaceutical products, and medical equipment. Additionally, the RMI's slow progress in implementing tax reform will limit its ability to augment tax revenues.

The RMI has taken steps to effectively implement compact assistance, but administrative challenges have hindered its ability to ensure use of the funds for its long-term development goals. The RMI established development plans that include strategic goals and objectives for the sectors receiving compact funds.[18] Further, in addition to establishing JEMFAC, the RMI designated the Ministry of Foreign Affairs as its official contact point for compact policy and grant implementation issues.[19] However, data deficiencies, report shortcomings, capacity constraints, and inadequate communication have limited the RMI and U.S. governments' ability to consistently ensure the effective use of grant funds to measure progress, and monitor day-to-day activities.

- **Data deficiencies.**—Although the RMI established performance measurement indicators, a lack of complete and reliable data has prevented the use of these indicators to assess progress. For example, the RMI submitted data to JEMFAC for only 15 of the 20 required education performance indicators in 2005, repeating the submission in 2006 without updating the data. Also, in 2005, the RMI government reported difficulty in comparing the health ministry's 2004 and 2005 performance owing to gaps in reported data—for instance, limited data were available in 2004 for the outer island health care system.

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[16] In addition to these examples, land issues remain an issue for U.S. access to Kwajalein Atoll through the defense provisions of the amended compact. The RMI government is bound by an agreement with the U.S. government that allows for U.S. access to Kwajalein Atoll until 2086. To date, the RMI government has not reached an agreement with Kwajalein Atoll landowners (who own the land under use by the U.S. government) that allows for this long-term access.

[17] The funds were supposed to be allocated to the Kwajalein Atoll Development Authority, which experienced problems in effectively and efficiently using funds in the past. In early 2005, RMI legislation stipulated the authority's restructuring; however, the law was subsequently repealed by the RMI government. Kwajalein landowners are challenging this decision in court.

[18] The RMI's development plan consists of three documents: Vision 2018, Meto 2000, and the Medium Term Budget and Investment Framework. In addition, the annual portfolio submissions include strategic goals and indicators for each of the sectors. We refer collectively to all of these RMI documents as "the development plan."

[19] Prior to designating the Ministry of Foreign Affairs as a compact implementation unit, the RMI had identified the Office of the Chief Secretary as the official point of contact for all communication and correspondence with the U.S. government concerning compact sector grant assistance. The RMI's Economic Policy, Planning, and Statistics Office also works with the ministries receiving grants to prepare the annual budget proposals, quarterly reports, and annual monitoring and evaluation reports.

- **Report shortcomings.**—The usefulness of the RMI's quarterly performance reports has also been limited by incomplete and inaccurate information. For example, the RMI Ministry of Health's 2005 fourth-quarter report contained incorrect outpatient numbers for the first three quarters, according to a hospital administrator. Additionally, we found several errors in basic statistics in the RMI quarterly reports for education, and RMI Ministry of Education officials and officials in other sectors told us that they had not been given the opportunity to review the final performance reports compiled by the statistics office prior to submission.
- **Capacity constraints.**—Staff and skill limitations have constrained the RMI's ability to provide day-to-day monitoring of sector grant operations. However, the RMI has submitted its single audits on time. In addition, although the single audit reports for 2004 and 2005 indicated weaknesses in the RMI's financial statements and compliance with requirements of major federal programs, the government has developed corrective action plans to address the 2005 findings related to such compliance.
- **Lack of communication.**—Our interviews with U.S. and RMI department officials, private sector representatives, NGOs, and economic experts revealed a lack of communication and dissemination of information by the U.S. and RMI governments on issues such as JEMFAC decisions, departmental budgets, economic reforms, legislative decisions, and fiscal positions of public enterprises. Such lack of information about government activities creates uncertainty for public, private, and community leaders, which can inhibit grant performance and improvement of social and economic conditions.

As administrator of the amended compact grants, OIA monitored sector grant and fiscal performance, assessed RMI compliance with compact conditions, and took action to correct persistent shortcomings. For example, since 2004, OIA has provided technical advice and assistance to help the RMI improve the quality of its financial statements and develop controls to resolve audit findings and prevent recurrences. However, OIA has been constrained in its oversight role owing to staffing challenges and time-consuming demands associated with early compact implementation challenges in the FSM.

RMI Trust Fund May Not Provide Sustainable Income After Compact Grants End

Market volatility and choice of investment strategy could lead to a wide range of RMI trust fund balances in 2023 (see app. III) and potentially prevent trust fund disbursements in some years. Although the RMI has supplemented its trust fund balance with additional contributions, other sources of income are uncertain or entail risks. Furthermore, the RMI's trust fund committee has faced challenges in effectively managing the fund's investment.

Market volatility and investment strategy could have a considerable impact on projected trust fund balances in 2023. Our analysis indicates that, under various scenarios, the RMI's trust fund could fall short of the maximum allowed disbursement level[20]—an amount equal to the inflation-adjusted compact grants in 2023—after compact grants end, with the probability of shortfalls increasing over time (see fig. 3).[21] For example, under a moderate investment strategy, the fund's income is only around 10 percent likely to fall short of the maximum distribution by 2031. However, this probability rises to almost 40 percent by 2050. Additionally, our analysis indicates a positive probability that the fund will yield no disbursement in some years; under a moderate investment strategy the probability is around 10 percent by 2050. Despite the impact of market volatility and investment strategy, the trust fund committee's reports have not yet assessed the fund's potential adequacy for meeting the RMI's longterm economic goals.

RMI trust fund income could be supplemented from several sources, although this potential is uncertain. For example, the RMI received a commitment from Taiwan to contribute $40 million over 20 years to the RMI trust fund, which improved the RMI fund's likely capacity for disbursements after 2023. However, the RMI's limited development prospects constrain its ability to raise tax revenues to supplement the

[20] The trust fund agreements specify that in 2024 and thereafter, the RMI trust fund committee may disburse amounts up to the annual grant assistance in 2023, fully adjusted for inflation, provided that funds are available in the B account to reach such a level.

[21] Our methodology for projecting trust fund income is base on a technique known as Monte Carlo simulation. We built a Monte Carlo simulation model—based on the trust fund agreements, contributions to date, and historical returns of the market—to project the trust funds' likely income levels given market volatility as well as historical returns of various asset classes, including large company stocks, treasury bills, and international stocks from 1970 to 2005. See GAO-07-513.

fund's income. Securitization—issuing bonds against future U.S. contributions—could increase the fund's earning potential by raising its balances through bond sales. However, securitization could also lead to lower balances and reduced fund income if interest owed on the bonds exceeds investment returns.[22]

The RMI trust fund committee has experienced management challenges in establishing the trust fund to maximize earnings. Contributions to the trust fund were initially placed in a low-interest savings account and were not invested until 16 months after the initial contribution.[23] As of June 2007, the RMI trust fund committee had not appointed an independent auditor or a money manager to invest the fund according to the proposed investment strategy. U.S. government officials suggested that contractual delays and committee processes for reaching consensus and obtaining administrative support contributed to the time taken to establish and invest funds. As of May 2007, the committee had not yet taken steps to improve these processes.

Conclusions

Since enactment of the amended compacts, the U.S. and RMI governments have made efforts to meet new requirements for implementation, performance measurement, and oversight. However, the RMI faces significant challenges in working toward the compact goals of economic advancement and budgetary self-reliance as the compact grants decrease. Largely dependent on government spending of foreign aid, the RMI has limited potential for private sector growth, and its government has made little progress in implementing reforms needed to increase investment opportunities and tax income. In addition, JEMFAC did not address the pace of reform during the first 2 years of compact implementation. Further, both the U.S. and RMI governments have faced significant capacity constraints in ensuring effective implementation of grant funding. The RMI government and JEMFAC have also shown limited commitment to strategically planning for the long-term, effective use of grant assistance or for the budgetary pressure the government will face as compact grants decline. Because the trust fund's earnings are intended as a main source of U.S. assistance to the RMI after compact grants end, the fund's potential inadequacy to provide sustainable income in some years could impact the RMI's ability to provide government services. However, the RMI trust fund committee has not assessed the potential status of the fund as an ongoing source of revenue after compact grants end in 2023.

Prior Recommendations

Our prior reports on the amended compacts[24] include recommendations that the Secretary of the Interior direct the Deputy Assistant Secretary for Insular Affairs, as chair of the RMI management and trust fund committees, to, among other things,

- ensure that JEMFAC address the lack of RMI progress in implementing reforms to increase investment and tax income;
- coordinate with other U.S. agencies on JEMFAC to work with the the RMI to establish plans to minimize the impact of declining assistance;
- coordinate with other U.S. agencies on JEMFAC to work with the RMI to fully develop a reliable mechanism for measuring progress toward compact goals; and
- ensure the RMI trust fund committee's assessment and timely reporting of the fund's likely status as a source of revenue after 2023.

Interior generally concurred with our recommendations and has taken actions in response to several of them. For example, in August 2006, JEMFAC discussed the RMI's slow progress in implementing economic reforms. Additionally, the trust fund committee decided in June 2007 to create a position for handling the administrative duties of the fund. Regarding planning for declining assistance and measuring progress toward compact goals, JEMFAC has not held an annual meeting since the December 2006 publication of the report containing those recommendations.[25]

Mr. Chairman and members of the subcommittee, this completes my prepared statement. I would be happy to respond to any questions you may have at this time.

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[22] According to Interior officials, the trust fund committees are reviewing this option but have not initiated an independent study to objectively evaluate its potential risks.

[23] For the months before the investment of the RMI trust fund's approximately $49 million in October 2005, the fund earned a return of approximately 3 percent, compared with a stock market return of about 4 percent. Given the small difference in returns, as well as the fees that the fund would have paid if invested in the stock market, we estimate that this delay reduced the fund's earnings by approximately $51,000.

[24] GAO-05-633, GAO-06-590, GAO-07-163, GAO-07-513, GAO-07-514R.

[25] GAO-07-163, p. 50.

The CHAIRMAN. Thank you very much.

Mr. Jonathon Weisgall, we're glad to have you here, go right ahead.

STATEMENT OF JONATHAN M. WEISGALL, ESQUIRE, LEGAL COUNSEL FOR THE PEOPLE OF BIKINI

Mr. WEISGALL. Thank you, Mr. Chairman, I have a longer written statement that I'd like to be made part of the record.

The CHAIRMAN. We'll include the entire statement.

Mr. WEISGALL. Thank you.

Mr. Chairman, Senator Murkowski, I've served as legal counsel for the People of Bikini for some 34 years, but to facilitate this hearing, I'm testifying on behalf of the four nuclear-effected atolls of Bikini, Enewetak, Rongelap, and Utrik.

Let me first raise one issue on behalf of Utrik. As explained in more detail in my written statement, they requested language be added to S. 1756 directing DOE to construct a whole-body counting facility on Utrik Atoll with an adequate power supply.

As to the provisions of S. 1756, the four atoll groups are in support. On Runit, the U.S. should certainly monitor that dome in the surrounding area, as it would any nuclear test site in the United States. My written statement contains a very detailed proposal with specific bill or report language on what the program should encompass. Just as Mr. Bussanich said, that this is on DOE's plan, no reason not to legislate the need to make this more permanent, because DOE can change its mind, Congress can direct DOE to continue this monitoring.

Section 3 would permit Marshallese who worked on—as DOE contract employees of Bikini and Enewetak—to qualify for eligibility under the Energy Employees Occupational Illness Compensation Act Program. Just like Section 2 would treat Runit like a U.S. nuclear waste site, Section 3 would give Marshallese the same benefits that eligible U.S. citizens enjoy under that Act. Makes sense.

The four atolls also support section 4, which authorizes $2 million annually for the Four Atoll Healthcare Program. That program has been stuck at $2 million annually for the last 21 years, with no increases for inflation. So, with due respect to the executive branch, we would urge you to fund this at a higher level. The $4 million figure, the one proposed by the Marshall Islands government certainly makes sense. That program has been run on a shoestring. They do great work, but the number of effected people with population alone has obviously increased.

As to Section 5, the National Academy of Sciences assessment, we defer to the RMI, this is a national issue. I would just observe, there have been numerous studies on this question. U.S. Government labs, the IAEA, just 2 years ago, the National Cancer Institute—as you heard from Minister Philippo—if there's a problem, I'm not sure there's a need to study it over and over, I would say one should act on the problem. And I think one knows the magnitude of the problem.

Which leads to what is missing from the bill. The bill ignores the skunk at the garden party, and that's the failure of the U.S. to provide funding for the Nuclear Claims Tribunal to pay the awards that it made to the four atolls.

When you pass the Compact of Free Association Act in 1986, Marshallese plaintiffs had lawsuits pending at the time in the U.S. Court of Federal Claims for the takings of their land, and for other damages. The Compact states that the U.S. accepts responsibility for compensation resulting from the nuclear weapons testing program, it established the Nuclear Claims Tribunal as an alternative mechanism to determine just compensation, so those claims were dismissed—pursuant to the Compact—which states also that it constitutes the full settlement of all claims, and provides for the dismissal of these lawsuits.

The Marshallese challenged this scheme in U.S. court, arguing that this limited funding to the Tribunal, and cutting off a full court review is simply unconstitutional, when it comes to the question of Fifth Amendment just compensation. What did the courts rule? They said, "We can't decide this issue, it's premature to rule on your Constitutional questions. You must exhaust your remedies before the Tribunal." After all, nobody knew in 1986 if there would be just compensation.

So, for the next 19 years, Marshallese plaintiffs brought their claims before the tribunal, it has issued its awards for the four atolls of over $2 billion, and it has awarded exactly $3.9 million—that is less than two-tenths of 1 percent of the awards.

Bikini and Enewetak, therefore, went back to U.S. court last year, to raise the same Constitutional questions from 20 years ago, which is: Can the Government cut off a just compensation claim under the Fifth Amendment?

Where does the U.S. Government stand on this request for additional funding? To be blunt about it, there's a shell game going on. Mr. Chairman, you yourself said, more than 7 years ago, the Marshall Islands presented your committee with a Changed Circumstances Petition, filed under 177 agreement, specifically asking for funding to pay for these unpaid property claims, based on new EPA, radiation standards. Seven years later, no action has occurred on that petition.

Meanwhile, the RMI Government sought to engage the executive branch on this question, during the re-negotiation of the Compact. Their answer, "Can't do it." They stated in writing, "This issue is before Congress on a Changed Circumstances Petition." So, the executive branch simply refused to negotiate the question of additional claims, because of the Changed Circumstances Petition sent to your committee.

The Judicial Branch has also failed to act, at least while the ball is in your court. On August 2 of this year, Judge Miller of the U.S. Court of Federal Claims, ruled that the litigation of these constitutional questions is still premature, and I'll quote, "Because Congress has failed to act on the Changed Circumstances Request," is what she called it. She went on, "Congress has made no final determination on plaintiff's petition, and the apparent lack of action cannot establish a taking, until plaintiffs can show that Congress is no longer considering their petition." Continuing the quote, "The Court is in no position to find that the Tribunal procedure has run its course. Congress must consider the Changed Circumstances Request, and take such action as it deems appropriate."

So, what can you do? The four atolls ask you to break this Gordian knot. The requested action would be that you move forward on the Changed Circumstances Petition. If you decide not to—and you did examine this 2 years ago—if you determine that the request falls outside of the criteria of the Changed Circumstances Petition, state that in your report language on this bill, together with the fact that the issue is now up to the courts. That, I think, would break the Gordian knot.

We ask you to remove, or resolve, this issue, one way or the other. This legacy goes back 61 years, to 1946, when the U.S. Navy moved the Bikinians off their atoll to facilitate the nuclear testing program. One branch of government should honor this Constitutional and statutory—and at least, moral—obligation to the people it damaged, and others who—with no real options—gave up their lands to help the United States win the cold war.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Weisgall follows:]

PREPARED STATEMENT OF JONATHAN M. WEISGALL, LEGAL COUNSEL FOR THE PEOPLE OF BIKINI

Thank you, Mr. Chairman. I am Jonathan Weisgall, and I have served as legal counsel for the people of Bikini for 34 years. In order to best use the committee's time this morning, you have asked to hear from one representative from the four nuclear affected atolls in the Marshall Islands, so I am testifying today on behalf of those four atolls: Bikini and Enewetak—which were Ground Zero for the 67 atomic and hydrogen bombs tests that the United States conducted in the Marshall Islands—as well as Rongelap and Utrik—whose inhabitants and islands were showered with fallout from the U.S. nuclear weapons tests, most notably the infamous March 1, 1954 Bravo shot, the largest nuclear test ever conducted by the United States.

The four atoll groups support S. 1756. Let me share their specific views on the four provisions of the bill and then request a modification to address what we believe is missing from it.

First, though, I want to raise an issue that concerns the people of Utrik. In 2003, the Department of Energy established a Whole Body Counting (WBC) facility for radiological testing of the people of Utrik. Due to insufficient power supply on Utrik Atoll, the Department of Energy located the Utrik WBC on Majuro. As a result, the people who live on Utrik Atoll must travel to Majuro, which is approximately 250 miles away, in order to be tested at the WBC facility. The significant cost of air transportation and inconvenience to travel to Majuro from Utrik has led to infrequent and sporadic WBC testing of the inhabitants of Utrik. Congress acknowledged this problem when it passed legislation in 2004 to transfer a decommissioned NOAA vessel to Utrik Atoll for the purpose of helping to alleviate this transportation issue. While Utrik supported and welcomed that Congressional gesture, a professional analysis showed that if Utrik took possession of the vessel it would be a heavy financial burden, so unfortunately the NOAA vessel was not the solution.

So today, with only a portion of the Utrik community being tested, many are left unexamined. This is extremely problematic because recent WBC data gathered by Lawrence Livermore Laboratory has demonstrated that the people living on Utrik have received the highest body burdens of radionuclides of any group in the Marshall Islands. The people of Utirk strongly feel that relocating the WBC facility to Utrik is the right solution and is long overdue. They therefore request that language be added to S. 1756 that grants the Department of Energy the authority and funding necessary to construct a WBC facility with an adequate power supply on Utrik Atoll. While the people of Utrik do not have an exact cost estimate at this time, they believe this can be achieved with a relatively modest expenditure.

Let me now turn to the four provisions in S. 1756. With regard to Section 2, the four atolls strongly support a long-term U.S. program to monitor the dome at Runit Island, which was created as an above-ground nuclear waste storage site during the radiological cleanup of Enewetak Atoll in the 1970s and now houses more than 100,000 cubic yards of radioactive material, including plutonium, scraped from other parts of the atoll. The United States should monitor and treat the Runit dome and

surrounding area as it would any nuclear waste storage site in the United States. We would therefore urge you to specify in report language, or in the statute itself, that this monitoring should cover the following:

- Monitoring of the land and water around the Runit dome, including soil around the dome.
- Gathering and analysis of the marine life in the proximity to the dome.
- Collection and analysis of groundwater from monitoring wells around the dome.
- A re-suspension study of air and soil samples in the Fig/Quince area of Runit Island. This is where plutonium particles were dispersed, left in place, covered with a few inches of dirt in the late 1970s, and never cleaned up.
- Monitoring the dome to assure its structural integrity and to determine the extent of leaching. The radioactive isotopes in that dome will last for thousands of years; the dome won't.
- Placement of signs and fencing to warn of danger and prevent access to contaminated areas.

The peoples of the four atolls support Section 3, which would close the loophole under the Energy Employees Occupational Illness Compensation Program Act and thus permit Marshallese citizens who worked as Department of Energy contract employees at Bikini and Enewetak Atolls to qualify for eligibility under the Department of Labor's compensation and medical care program established pursuant to the Act. Just as Section 2 would treat Runit like a U.S. nuclear waste site, Section 3 would give these eligible Marshallese workers the same access and benefits that eligible U.S. citizens and nationals currently enjoy.

The peoples of the four atolls also support Section 4, which authorizes the appropriation of $2 million annually through fiscal year 2023 to fund the four-atoll health care program, which has provided health care on a shoestring budget since the Compact first came into effect 20 years ago. We would urge you, though, to make the following changes in this section:

- Using the committee's logic of adjusting the $2 million for inflation, we urge you to start with a significantly higher number, such as the $4.5 million figure proposed by the Marshall Islands Government, because this program has been stuck at $2 million for 21 years, since the Compact first went into effect in 1987. In light of population growth and inflation over the last two decades, that program cannot accomplish the same goals today that it was intended to accomplish. To put it bluntly, funding for this program is embarrassingly low. A more realistic number will also help ensure that these Marshall Islanders do not become a burden on public health services in the United States.
- We urge you to split these funds evenly among the four atoll communities.
- We urge you to add language that would permit each atoll, at its discretion, to use its funds for tertiary care.

The last provision of this bill, Section 5, authorizes a National Academy of Sciences assessment of the health impacts in the Marshall Islands of the U.S. nuclear testing program. The four atolls do not oppose this provision, but instead defer to the Marshall Islands Government, because this is a national rather than a four-atoll issue. We would merely observe that numerous studies have been conducted on this question, ranging from a nationwide radiological survey to reports prepared by private contractors, U.S. government laboratories, the International Atomic Energy Agency, and, most recently, the National Cancer Institute, which just prepared a report for this committee in September 2004 estimating the number of incremental cancers to be expected in the Marshalls as a result of the testing program. If you know there is a problem—and everyone knows there is—why study it over and over? Why not act on it?

Which leads me to what is missing from this bill. We commend you for addressing part of the nuclear legacy, but this bill ignores the skunk at the garden party, which is the failure of the U.S. Government to provide the Nuclear Claims Tribunal with the funding needed to pay the awards it made to the peoples of the four atolls.

Let me briefly walk you through the process: At the time Congress passed the Compact of Free Association Act in 1986, Marshallese plaintiffs had numerous lawsuits pending against the United States in what is now the U.S. Court of Federal Claims for the takings of their lands and other damages. The Compact states that the United States accepts its responsibility for compensating the Marshallese for damages resulting from nuclear weapons testing, and its sets up an alternative mechanism for adjudicating damages claims, the Nuclear Claims Tribunal. The pending claims were dismissed pursuant to the Compact Act—specifically the Section 177 Agreement—which established a trust fund to pay compensation. That agreement also states that it constitutes the full settlement of all nuclear claims

against the United States and further provides for the dismissal of all such claims pending in U.S. courts.

The Marshallese plaintiffs challenged this scheme in U.S. courts, arguing that giving limited funding to the Tribunal and cutting off federal court review of the adequacy of just compensation was unconstitutional. The court, however, ruled that it was premature to decide these questions until the plaintiffs had exhausted their remedies under the Tribunal.

The Marshallese plaintiffs spent most of the next 19 years litigating their claims before the Nuclear Claims Tribunal, which has issued awards for the four atolls totaling more than $2.2 billion. However, because of its limited funding, the Tribunal was only able to pay out $3.9 million, which represents less than 2/10 of one percent of its awards.

Having exhausted their remedies and having received such small awards, the people of Bikini and Enewetak returned to the Court of Federal Claims in 2006 raising the same constitutional questions from 20 years ago.

Where does the U.S. Government stand on providing the Nuclear Claims Tribunal with the funding needed to pay the awards it made to the peoples of the four atolls? The Compact says the United States accepts its responsibility to pay compensation, and the Fifth Amendment on its own requires just compensation. Yet just compensation has not been paid. To put it bluntly, all three branches have played a shell game on this issue. More than seven years ago, the Marshall Islands Government presented this committee with a petition filed under the "Changed Circumstances" provisions of Article IX of the Section 177 Agreement that specifically requested Congress to appropriate additional funds to cover unpaid Nuclear Claims Tribunal property claims based on new radiation standards adopted by the U.S. Environmental Protection Agency. Seven years later, you have yet to act on that petition.

Meanwhile, as the 15-year Compact expired in 2001, the Marshall Islands Government sought to engage the executive branch in negotiations over this issue, but that branch also failed to act, using as an excuse the fact that the issue was pending before Congress. As the U.S. Compact negotiator wrote to the Marshall Islands Government in 2002: "We cannot address requests for any additional assistance related to the Nuclear Testing Program since this issue is on a separate track. It is now before Congress via the [RMI Government's] request submitted under the changed circumstances provision" of the Section 177 Agreement.

The judicial branch has also failed to act—at least while the ball is in the legislative branch's court. As part of her ruling on August 2, 2007, dismissing the Bikini and Enewetak lawsuits without prejudice, Judge Miller of the U.S. Court of Federal Claims found that "litigation on this issue is still premature because Congress has failed to act on the Changed Circumstances Request." She went on: "Congress has made no final determination on plaintiffs' petition, and the apparent lack of action cannot establish a taking until plaintiffs can show that Congress no longer is considering their petition." In finding that "Congress has not yet exercised its option" under the changed circumstances petition, she ruled that "the court is in no position to find that the [Nuclear Claims Tribunal] procedure as run its course. Congress must consider the Changed Circumstances Request and take such action as it deems appropriate." A more complete excerpt from Judge Miller's ruling on this issue is included at the end of this statement.

What can this committee do? The peoples of the four atolls ask you to break this Gordian Knot. Of course, they would like you to act on the petition and move forward with an authorization to pay these claims. However, if you determine that this request falls outside the criteria of the changed circumstances provisions, please state this in your report language on this bill together with the fact that this issue is now up to the courts to resolve.

It's time for Congress to resolve this issue—one way or the other. The Tribunal has completed its review of the largest claims, and the true extent of the compensation due can now be determined. This legacy goes back 61 years—to 1946, when the U.S. Navy moved the people of Bikini off their atoll to facilitate the nuclear testing program. One branch of the U.S. Government should honor the constitutional, statutory and moral obligations to the people it damaged and the others who, with no real options, gave up their lands to help the United States win the Cold War. Thank you.

EXCERPT FROM JUDGE CHRISTINE ODELL COOK MILLER'S AUGUST 2, 2007 RULING IN THE PEOPLE OF BIKINI V. THE UNITED STATES DOCKET NO. 96-288C (U.S. COURT OF FEDERAL CLAIMS) PP. 30–37

In Count I of their Amended Complaint, plaintiffs allege that defendant's "failure and refusal to fund adequately the award issued" by the NCT constitutes a Fifth Amendment taking of plaintiffs' claims before the NCT for public use. Am. Compl.¶ 104. Framed another way, plaintiffs allege that the Government took their claims in violation of their Fifth Amendment right to just compensation because Congress has failed to act on the Changed Circumstances Request. A report to Congress does not constitute a governmental action that could be considered a taking of any interest. A report merely supplies Congress with information that may justify or prompt further action. Congress has made no final determination on plaintiffs' petition, and the apparent lack of action after two years cannot establish a taking until plaintiffs can show that Congress no longer is considering their petition. Therefore, the court finds that no government act has taken place within the last six-years that relates to the asserted taking of plaintiffs' private property interest.

In Count II of their Amended Complaint, plaintiffs allege that "[d]efendant's failure and refusal adequately to fund the award issued by the Nuclear Claims Tribunal on March 5, 2001 constitutes a breach of the fiduciary obligations imposed upon it in 1946 by the creation of a contract implied in fact between defendant and plaintiffs." Am. Compl. ¶ 112. As in Count I, plaintiffs have not alleged any action on the part of the United States Government occurring within the last six years that could be considered a breach of plaintiffs' claimed implied-in-fact contract with the United States. While Congress has not yet acted on the Changed Circumstances Request, that circumstance does not constitute an action on the part of the Government sufficient to meet the requirements of the statute of limitations.

Counts III and IV of the Amended Complaint allege that the United States breached the implied duties and covenants of their implied-in-fact contract and the implied duties and covenants owed to plaintiffs as third-party beneficiaries by

> (a) failing or refusing to seek from Congress additional funds for the Nuclear Claims Tribunal sufficient to satisfy the March 5, 2001 award; (b) interfering with plaintiffs' efforts to secure additional funds for the Tribunal to satisfy that award; and (c) failing and refusing to fund adequately the award issued by the Nuclear Claims Tribunal on March 5, 2001.

Am. Compl. ¶ 116; Am Compl. ¶ 120 (same). On both counts, plaintiffs do not allege government action within the last six years that meets the requirements of the six-year statute of limitations. If the implied-in-fact contract or duties or covenants under a third-party beneficiary theory were breached, that event would have occurred in 1986 when the Act became effective. Nothing has changed since 1986 when all of the events occurred to fix the alleged liability of the Government.

Although, plaintiffs argue that their "first four causes of action are based on the failure of the alternative claims procedure to provide adequate compensation for the loss of their lands [and that] [t]his failure was unknowable until after March 5, 2001, the date of the NCT decision," Pls.' Br. filed Dec. 18, 2006, at 36, plaintiffs have not shown that the claims differ substantively from the breach of contract claims in Juda I and Juda II. The susbstance of plaintiffs' dispute with the United States has been the same for the last twenty-one years: plaintiffs seek additional compensation for damages caused by the Nuclear Testing Program. The amounts specified in the settlement agreement also were known to plaintiffs in 1986. The terms and conditions of the Changed Circumstances provision were known to plaintiffs in 1986. The court cannot find now—twenty-one years after the Compact was entered into—that plaintiffs' claims are timely.

In Count V plaintiffs allege a takings claim for the use and occupation of Bikini Atoll by the Government based on the passage of the Compact in 1986 and the failure adequately to fund the NCT. In Juda II Judge Harkins held open the possibility of future litigation on the adequacy of the alternative remedy provided for in Compact Act:

Whether the compensation, in the alternative procedures provided by Congress in the Compact Act, is adequate is dependent upon the amount and type of compensation that ultimately is provided through those procedures. Congress has recognized and protected plaintiffs' right to just compensation for takings and for breach of contract. The settlement procedure, as effectuated through the Section 177 Agreement, provides a "reasonable" and "certain" means for obtaining compensation. Whether the settlement provides "adequate" compensation cannot be determined at this time.

Juda II at 689. The Federal Circuit endorsed this analysis in People of Enewetak, again acknowledging a possibility of future litigation on plaintiffs' Fifth Amendment takings claims. 864 F.2d at 136 ("[W]e are unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate.").

Plaintiffs maintain that these takings claims are now ripe for litigation because they have exhausted the alternative procedure mandated in the Compact Act. "Having obtained the dismissal of the Juda case as premature, the government cannot invoke the statute of limitations now. Alliance of Texas Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994) is inapposite, because plaintiffs in that case were not told that their claims were premature and to return to court after exhausting an alternative remedy." Pls.' Br. filed Dec. 18, 2006, at 36. The court finds that litigation on this issue is still premature. The alternative procedure in the Compact Act and in Article IX of the Section 177 Agreement included a Changed Circumstances provision, which allocated to Congress the option to "authorize and appropriate funds" in the event that "loss or damage to property and person of the citizens of the Marshall Islands, resulting from the nuclear testing program arises or is discovered after the effective date" of the Compact Act and Changed Circumstances provision.

Congress has not yet exercised its option to "authorize and appropriate funds" for the Marshall Islands. The court is in no position to find that the alternative procedure, as contemplated by the Compact Act, has run its course. Congress must consider the Changed Circumstances Request and take such action as it deems appropriate. That Congress has not acted in the seven years after the Changed Circumstances Request was first submitted would not warrant a finding of either futility or de facto rejection, given the court's alternate ruling on the political question that this matter presents.

Finally, in Count VI plaintiffs allege that the Compact constituted a breach of fiduciary duties created by an implied-in-fact contract. "This cause of action did not first accrue, or the applicable statute of limitations was equitably tolled, until defendant, on January 24, 2005, refused to adequately fund the award issued by the Nuclear Claims Tribunal on March 5, 2001." Am. Compl. ¶ 128. Submission of the Report from the United States State Department to Congress without further action by the Government or Congress is insufficient to trigger the statute of limitations. Plaintiffs have not alleged any Government action within the last six years that would be actionable as a breach of the Government's alleged fiduciary duties.

1. Equitable estoppel

Plaintiffs would estop defendant from arguing that the statute of limitations bars their claims. They insist that (1) a dismissal based on the statute of limitations would be an unconstitutional "bait and switch," because the court in Juda II dismissed plaintiffs' claims as premature, and (2) the Government cannot invoke the statute of limitations now that the alternative procedure has run its course. Pls.' Br. filed Dec. 18, 2006, at 36.

"Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." Heckler v. Cmty. Health Servs., 467 U.S. 51, 59 (1984). To succeed on the grounds of equitable estoppel, generally a plaintiff must show that it "relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." Id. (footnotes omitted). This general rule, however, is not applicable against the Government: "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." Id.

Although the Supreme Court has not adopted a per se rule prohibiting the application of equitable estoppel against the government under any circumstances,

> . . . the Court has suggested that if equitable estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel. While the Supreme Court has not squarely held that affirmative misconduct is a prerequisite for invoking equitable estoppel against the government, this court has done so.

Zacharin v. United States, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (internal citations omitted); see also Frazer v. United States, 288 F.3d 1347, 1352-53 (Fed. Cir. 2002); Tefel v. Reno, 180 F.3d 1286, 1303 (11th Cir. 1999); Henry v. United States, 870 F.2d 634, 637 (Fed. Cir. 1989).

Plaintiffs contend that "the government cannot consistent with due process argue that it is premature to challenge the adequacy of the [NCT's] process and then declare that such a challenge necessarily comes too late." Pls.' Br. filed Dec. 18, 2006, at 36 (citing Reich v. Collins, 513 U.S. 106, 108 (1994)).

> Had plaintiffs done what the government now suggests—sue based on the Compact itself and challenge the alternative remedy before the NCT had issued its award—this Court would have found, as did the courts in Juda II, 13 Cl. Ct. at 689, and People of Enewetak, 864 F.2d at 136, that the alternative procedure could not be challenged until it had run its course. That is precisely what the Supreme Court concluded in [Dames & Moore v. Regan, 453 U.S. 654 (1981)], when it held out the prospect of later adjudication of takings claims in this Court. Having obtained the dismissal of the Juda case as premature, the government cannot invoke the statute of limitations now. Alliance of Texas Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994)is inapposite, because plaintiffs in that case were not told that their claims were premature and to return to court after exhausting an alternative remedy.

Pls.' Br. filed Dec. 18, 2006, at 36.

During oral argument and in their first supplemental brief, plaintiffs argued that defendant misled plaintiffs, and presumably the Federal Circuit, by assuring the Federal Circuit in 1988 during argument in People of Enewetak that, "'should changed circumstances arise which would prevent the program from functioning as planned, Congress would need to consider possible additional funding.'" Pls.' Br. filed May 23, 2007, at 16. "In contrast to its earlier assurances, despite evidence of substantial uncompensated and unforeseen harm, the government told Congress that 'the facts . . . do not support a funding request under the 'changed circumstances' provision . . . '" Id. (quoting 2005 Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America).

Review of the Consolidated Brief of Appellee the United States, People of Enewetak v. United States, Nos. 88-1206, -1207 & -1208 (Fed. Cir. June 24, 1988) (the "Appellee Brief"), shows that, while he served as Assistant Attorney General of the Lands and Natural Resources Division of the United States Department of Justice, Roger J. Marzulla advocated on behalf of the United States that plaintiffs might avail themselves of the Changed Circumstances provision in these circumstances.[6]

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[6] For example, the Government stated in the Appellee Brief: "The Section 177 Agreement, signed in conjunction with the Compact on June 25, 1983, has creaed a comprehensive, integraed compensation plan 'to provide, in perpetuity, a means to address past, present and future consequences of the nuclear Testing Program' (App. 332)." Appellee Brief at 9. The Government elaborated upon this argument in Section III.A of the Appellee Brief, discussing the limited nature of the Changed Circumstances provision of the Section 177 Agreement: "The objective of the Agreement is "to create and maintain in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims" (App. 331, emphasis supplied). As the cornerstone funding, the United States on October 30, 1986, immediately after the Compact took effect, paid $150 million to the Marshall Islands government to create the compensation Fund established by Article 1 (App. 1241). The Agreement requires, however, that the Fund be permanently invested, with an investment goal of at least $18 million per year (App. 332), and with all distributions for compensation programs and claims adjudication to come from the proceeds (App. 332). The Fund's principal may be drawn only if proceeds will not meet annual distribution schedules (App. 336). The Section 177 Agreement's funding structure is thus designed to operate as long as necessary until all consequences of the nuclear testing program are addressed. The United States and Marshall Islands drafted the Agreement to provide continuous funding to resolve, not avoid, those consequences. It is, of course, conceivable that the Fund could become depleted because of radical long-term investment difficulties, or substantial unforeseen damages. The Agreement expressly provides as to "Changed Circumstances," however, that (App. 341-342): If loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds. In any case, it was the best judgment of the United States and Marshall Islands government that the compensation plan as structured in the Agreement will equitably address all consequences of the nuclear testing program. The Agreement is designed to operate "in perpetuity," is currently operating effectively to address long-term needs, and fulfills the intent that complex problems stemming from the testing program be resolved on a permanent basis. Appellee Brief at 34-35 (emphasis added; footnotes omitted). Thus, defendant told the appeals court that long-term investment difficulties might occur to render the Agreement's provisions "manifestly inadequate," but then quotes the language of the provision that requires that changed circumstances had to be unforeseeable. Note 33 of the Appellee Brief appears to assuage concerns regarding the adequacy of funding: As appellants note (Br.

In its brief filed nineteen years ago, defendant argues that the financial vagaries in the investment program—arguably including mismanagement—could qualify as a separate changed circumstance, apart from loss or damage. That is because the Appellee Brief acknowledges depletion of the Fund due to "long-term investment difficulties, or substantial unforeseen damages." Appellee Brief at 34; see note 6 supra. Nonetheless, the shift in defendant's position does not merit its proscription as affirmative misconduct.

The argument in the Appellee Brief certainly includes statements that could be construed as assurances of the availability of future funding should the $150 million trust fund not prove sufficient. Yet, defendant did not misrepresent the Compact or the Section 177 Agreement. References to a "permanent alternative remedy," see Appellee Brief at 14, are accompanied by citations, either general or specific, to the language of the Section 177 Agreement. The language of the Changed Circumstances provision of Section 177 is not a blanket guarantee of future funding for the people of the Marshall Islands. The Changed Circumstances provision provides relief conditioned upon 1) the discovery of loss or damage to property after the effective date of the Agreement, 2) an unforeseeable qualifying event and 3) approval of Congress. While defendant did not misrepresent the terms of the Compact, the Federal Circuit was persuaded by defendant's argument and arguably overstated the breadth of the Changed Circumstances provision. See People of Enewetak, 864 F.2d at 135–36.

In any event, this rationale was not the predicate for the appeals court's affirmance of the Claims Court. Even if defendant was not forthcoming in its argument, invocation of equitable estoppel is not warranted. The Compact, in plain language, required a dual showing, not an alternative one; defendant quoted the Compact accurately; defendant argued that the Trust Fund was structured to be renewable in perpetuity. Plaintiffs were well aware of the terms of the Changed Circumstances provision and had ample opportunity to argue to the Federal Circuit that the clause did not allow recourse to the courts should the Claims Tribunal render an award that could not be funded.[7]

The CHAIRMAN. Thank you very much for your testimony.

Let me ask a few questions, I'm sure Senator Murkowski will have questions as well.

Mr. Bussanich, let me start with you, regarding S. 1756. As to Section 2 of that legislation, the monitoring of Runit Island, the testimony states, "Current and future plans for surveying Runit Dome, and aiding the government of the Marshall Islands in its assessment of conditions at Runit Island are sufficient to monitor safety." Do you not agree that these plans should be codified somewhere? For example, is the Department of Energy willing to amend its Memorandum of Agreement with the Enewetak government to include these plans?

Mr. BUSSANICH. Mr. Chairman, if I may refer that question to Mr. Jackson, of the Department of Energy?

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44 n.47), disbursements were made from the Fund during its initial year in light of the recent stock market "correction" affecting all investors. That disbursement in no way impairs, nor do appellants suggest that it impairs, the long-term performance and viability of the Fund. Indeed, prior to the stock market disruption, the Fund was achieving an annual return of 20 percent. The amounts disbursed have since been partially restored, and it is anticipated will be fully restored in the near future. The Fund continues to operate as a long-term investment program, providing "a perpetual means of addressing the special and unique circumstances" arising from the nuclear testing program. (App. 332). Id. at 34 n.33. Among the "changed circumstances" identified by counsel for plaintiffs in People of Bikini, No. 06-288C, was the ambitious, if not unrealistic, assumption that the Trust Fund had to generate a return of 12% per year to finance the $18 million earmarked for the various programs and specific financial commitments for each listed in the Compact, only one of which was the NCT. Counsel reasonably speculated that "[i]t was pretty hard when you've got to throw off 12 percent a year to make that corpus grow." Transcript of Proceedings at 146, People of Bikini v. United States, No. 06-288C, and John v. United States, No. 06-289L (Fed. Cl. Apr. 23, 2007).

[7] Implicit in plaintiffs' reliance on defendant's advocacy is their objection that the RMI did not represent the inhabitants of the Marshall Islands, because the RMI had no power or right to accede to the Compact until the RMI became a recognized governmental entity. Judge Harkins in Juda II ruled that the validity of the espousal in Article X did not impact the withdrawal of claims effected by Article XII. See Juda II at 686-89; see also People of Entewetak, 864 F.2d at 137 (adopting Judge Harkins's "more extensive analysis.").

The CHAIRMAN. That's fine, Mr. Jackson, please?

Mr. JACKSON. Thank you, Mr. Chairman.

We had a Memorandum of Understanding with the People of Enewetak that allowed us to do a series of work over the years. More recently, as that MOU expired, we've been doing annual work plans, including work at various atolls in which we study these questions. Currently we have a plan in place to do a visual engineering survey of Runit Dome in the summer mission to Enewetak, along with some other radiological monitoring activities, and we can continue to work with the Enewetak community, and the government of the Marshall Islands, the committee, sister Federal agencies to do such work on this annual work plan basis.

The CHAIRMAN. You think it's adequate to just do an annual work plan, instead of having something more long-term, agreed to in a Memorandum of Agreement with the government?

Mr. JACKSON. Given our existing resources, we have a series of commitments, or discussions with the various atolls on a work plan for the environmental and radiological monitoring, and so in each given year, there are a series of things we can do, with the existing resources, anything of a larger dimension, more tasking would require us to consult with all parties to see what additional resources would be to execute a longer-term plan and commitment.

The CHAIRMAN. As I understand, Mr. Bussanich, your position was on behalf of the Administration; you were opposed to Section 2 of this legislation being included, is that correct?

Mr. BUSSANICH. That's correct.

The CHAIRMAN. So, you think it should be deleted entirely?

Mr. BUSSANICH. We believe that the Department of Energy's plan is sufficient to achieve the purpose of that section.

The CHAIRMAN. Let me ask about Section 3. The testimony states the Administration is still reviewing Section 3, regarding the eligibility of trust territory citizens for the Energy Employees Compensation Program. I take that to mean that the Administration is keeping an open mind on that provision. U.S. citizens and trust territory citizens worked together during the cleanup, and it would seem clear to me that the trust territory citizens should be considered for equal compensation.

I guess the question to you, Mr. Bussanich is, would you be willing to meet with the Joint Committee staff to resolve drafting issues, if that's the problem with this section? Maybe that's not the problem with this section, but if it is, maybe you could address that?

Mr. BUSSANICH. Mr. Chairman, if I may ask for the opinion of my colleague from the Department of Labor.

Mr. NESVET. The Supreme Court, in cases such Aramco, has established a presumption against extraterritorial application of American law, unless the affirmative intention of Congress is clearly expressed. When the Department of Labor received claims from citizens of the Marshall Islands, we found no such affirmative intention clearly expressed in the law.

The Pacific Proving Grounds, which the Marshall Islands is part of, is clearly a Department of Energy facility. That merely qualifies an otherwise-entitled worker, who worked or had exposure at the Pacific Proving Grounds for compensation. In fact, the Department

of Labor has paid compensation to over 100 workers or their eligible survivors, who did have employment exposure in the Pacific Proving Grounds.

In terms of the legislative provision, the Department of Labor does have some concerns about the drafting, and we'd be happy to meet with committee staff to explain our concerns, and to try to work out an acceptable language. In terms of the Administration position, I defer to Mr. Bussanich, in regard to that.

The CHAIRMAN. All right. I think if you would be willing to make clear to staff and work with staff on what the specific drafting problems are as you see it, that would be useful.

Mr. NESVET. We'd be happy to.

The CHAIRMAN. All right.

Regarding Section 4, the Four Atoll Healthcare Program. The testimony states the Administration does not support appropriations because "The Administration's report concluded that there was no legal basis for considering additional payments." The program was established in the 1970s. It was reestablished under the Compact in 1986, because of the people, these four atolls were at increased risk of radiogenic illnesses. Mr. Bussanich, let me ask you again. Isn't it true that there is still a medical basis for continuing this program?

Mr. BUSSANICH. Mr. Chairman, I'm not a doctor or a health professional, but as I look at the program and what it attempts to achieve, just looking at the purposes for which the Department of Interior has given grants for the last couple of years. The basic program is for primary healthcare services. It provides a variety of services on these atolls, which I believe are, certainly meet the needs of the people that live there.

But, however, that—those programs are also part of the Compact of Free Association funding that is provided to the Marshall Islands, which also provides different services. So, certainly this, that program provides for a higher level of services for the people of those four atolls.

The CHAIRMAN. All right. I have some additional questions, but let me defer to Senator Murkowski for her questions.

Senator MURKOWSKI. Thank you, Mr. Chairman. In listening to the responses from the Administration, it doesn't sound very encouraging to me. I think it's important that we work together to advance what is set out in S. 1756, to make good on the commitment and make good on the promises to the people of RMI.

I appreciate, Mr. Weisgall, your testimony I thought was a very concise analysis of the situation that we have in front of us. And to use your terms, let's talk about the skunk at the garden party here, and how we ensure that a level of compensation is provided.

I want to ask you a little bit more, Mr. Weisgall, you've kind of suggested that this issue has been punted from the Executive to the Judicial to the Congressional branch and now it's sitting with us. Your suggestion is that we either need to act on it or if we feel that it's not within our domain, to make clear that it needs to be resolved to the courts.

This has been kind of simmering out there for years and years now. If we here in Congress should say it goes back to the courts, is that the best place for resolve? You know, around here things

don't move as quickly as either we or those constituents that we are serving would like. What's the best answer here?

Mr. WEISGALL. The first choice, Senator. First of all, your analysis is absolutely correct. A court decision is, it's a crap shoot. You don't know what a court's going to say. In fact, in oral argument on this case, the judge—a very knowledgeable judge—pointed out legalistic differences between the Bikini and Enewetak cases. Even she said, "I mean, if I follow some of these rulings, this could be bizarre. I mean, Bikini could get funding and Enewetak might not, or it might come out the other way."

During oral argument, I would say on three separate occasions, she said, "This cries out for a settlement," and using that literal language. The transcript is available. In fact, I'd be delighted to supplement my testimony with some of her statements. She was sending as strong a signal as she could to the Executive branch, to say, "Look, wrap this up. We don't want to go back talking about vaporized atolls at this point in our history."

Interestingly enough Senator, the other problems here, it's one of judicial restraint. It's avoiding this Constitutional question of whether, either the executive branch or Congress can say, "Well, here's the amount of the damage, you know. Here's a trust fund, that's it." That is a job that is exclusively reserved for the courts, determining just compensation. That's why the earlier decisions of the U.S. courts in the 1980s, talked about this original trust fund as an initial sum. That is a direct quote from the—from the Court of Appeals for the Federal Circuit, in saying, "Go exhaust your remedies."

Because no court wants to rule that something is unconstitutional. That's the other skunk here, which is the question of whether the executive branch or the legislative branch can effectively end-run the 5th Amendment, by saying, "OK, here's a problem. We're going to pay x number of dollars for it."

The ideal solution would be a full airing of the issue before Congress with real facts. The original Compact——

Senator MURKOWSKI. Which is the Changed Circumstances Petition?

Mr. WEISGALL. Yes. Yes, exactly, under that. I mean, there have been changes in radiation protection standards, there have been changes in knowledge of damages. Secretary O'Leary, back in 1993, began declassifying documents. There's been a whole lot of history since 1986. That would be far the first choice.

The fall-back position would be, if you, in your wisdom, determined that it's something that Congress is not willing to go through, then I would simply make that clear, to send a clear signal to the Judicial Branch, that says, "Okay. It is in your court, don't you duck the issue." Then the crap-shoot continues.

Senator MURKOWSKI. But is it not correct that the Changed Circumstance Petition is a petition that is reviewed by the Congress?

Mr. WEISGALL. Absolutely. The terms of that say that the Marshall Island's government may submit a petition to the Congress and that the Congress does not have to act on it, but it is a—it is a petition, like the old fashioned days, before we had lobbyists and all that, in the early days of the Republic. People would bring peti-

tions to Congress and Congress would either grant them or deny them.

Senator MURKOWSKI. Let me ask one more question, before I turn it back to the Chairman, here. Several of you, Mr. Bussanich, Mr. Philippo, Mr. Gootnick, you've all mentioned the capacity limitations that have affected RMI's ability to ensure effective use of the grant funds. You know, the Compact anticipated that this was going to be a problem, providing for grant-building capacity. Are we not using this tool effectively? What can we do better to provide more of that capacity expansion? I toss it out to any of you gentlemen.

Mr. BUSSANICH. Thank you. The issue of capacity building, it is true that capacity building is one of the six sectors that is eligible for funding under the Compact of Free Association. It is not one of the highest priority sectors, which are education, health, and infrastructure, but it is there to ensure that those sectors can function adequately.

Looking at the record of the Marshall Islands to date, we do think that the Marshall's has acted in a manner that has adequately protected our interests. They're certainly managing the financial accountability, they're making progress in certain areas. But in the long run, what we're concerned about, and I didn't know that the Marshall Islands as well, is it's own ability with it's limited resources and people, to make sure that it does have sufficient expertise and being able to analyze its economic and democratic data and be able to implement that into, or to integrate that into policy changes.

One of the things we've done—a couple of things we've done this year in concert with the Marshall Islands, because all of these agreements are, all these allocations of funds are on a consensus basis, is the Marshalls has, is allocating $300,000 to continue consultancy to improve its performance management techniques, so that it sets goals and is able to gather data about its performance in health and education, and throughout the rest of its government.

In addition, the government is providing, is performing a personnel audit on the—on the use of, on its education sector, to make sure that the numbers of people there are represented correctly and that there's an appropriate level of parties.

Senator MURKOWSKI. Mr. Gootnick? Mr. Philippo?

Mr. GOOTNICK. Let me add just a couple of quick points. If you look at the oversight, the management, and reporting of sector grants, I think you see a pretty clear distinction between what has happened in the infrastructure sector grant, where there has been, I think, real good oversight, program monitoring, accountability, and actually progress demonstrated. In some of the other sectors, the capacity may be somewhat more limited.

Two issues to mention in that regard. The first is that the Office of Compact Implementation—this really goes to the issue of accountability and progress monitoring from the top—the Office of Compact Implementation in the RMI government has moved around a bit, and at this point is a bit in a, in an uncertain position, where it reports, in part, through the Office of the Chief Secretary and the Office of the Foreign Secretary, in a way that's prob-

ably not ideal. That needs, I think, to be sorted out and resourced as soon as possible.

The second thing is the GEMFAC process. If you look at the annual meetings where the U.S. and the RMI officials convened to discuss the allocation of resources and results accountability, GEMFAC's functions are multiple, to meet, to evaluate progress, to prove grant allocation, to review annual reporting, to identify problems, to recommend ways to increase effectiveness of Compact Grant Assistance. They've done pretty darn well at grant allocation, but a lot of the rest of it, which really is more an ongoing process, has not been as fully resourced as I think it could be. Those are two areas for improvement.

Mr. PHILIPPO. Thank you, Senator. On the question of the capacity building. We approach this issue on a more broader-based approach. The reason and the purpose, well the reason why our government has prioritized education, we see that the capacity building is part of the need to educate our people. The more educated the people and persons we get in the Marshall Islands, I think we will address through this longer-term progress, a lot of the issues here.

On the shorter term, in response to some of the concerns raised by Mr. Gootnick, the Compact Implementation Office has been squarely placed under the Ministry of Foreign Affairs, to report directly to the Secretary of Foreign Affairs. As Mr. Bussanich had mentioned, we allocated $300,000 in a Compact capacity-building grants for capacity building with the idea that the Compact Implementation Office would oversee this responsibility to providea more direct approach to the issues of capacity building.

In addition, and aside from, funds that are provided under the Compact for capacity building, the Marshall Islands also makes a, has access and makes use of funds that are available to it for capacity building—for capacity building, such as funds that are provided, the technical grants that are provided through ADB, for capacity building.

So yes, it is an issue that is in the forefront of the minds of the leadership and we are trying to address that issue to the best possible extent that we can.

Thank you.

Senator MURKOWSKI. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Let me ask about one other issue. This is on Section 5.

Mr. Bussanich, Section 5 would direct the Department of Interior to commission an assessment by the National Academy of Sciences on the health impacts of the testing program. The testimony states this is not necessary, given the Administration's January 4, 2005 review of all existing scientific studies. However, as I understand it, the July 2005 National Cancer Institute studies were not included in that review. Is that accurate, as you understand things?

Mr. BUSSANICH. Mr. Chairman, I really do not know the answer to that question.

The CHAIRMAN. Could you run that down and maybe get back to us with a response?

Mr. BUSSANICH. Yes, sir.

The CHAIRMAN. That would be helpful. There are several other questions that I will submit for responses in writing.

Senator Murkowski, did you have additional questions?

Senator MURKOWSKI. Thank you, Mr. Chairman.

I just have one more that I would like to ask and then any additional ones, I too, will submit for the record.

But, to you Mr. Philippo, you've heard the testimony from the Administration here today. What is your reaction?

Mr. PHILIPPO. I thank you, Senator, Mr. Chairman.

The RMI respects the Administration's authority and responsibility to adopt a position on S. 1756. We are profoundly disappointed by the Administration's positions regarding the very humble requests in S. 1756, however.

The provisions of this bill were meant to modest, first steps to address existing programs under the Compact—under the Compact related to U.S. nuclear weapons testing. The provisions are all ex gratia and require no amendments to the Compact. The RMI is asking for realistic measures to sustain critically important programs. Given the Administration positions taken today, the RMI asks that Congress exerts its authority to—authority to address the measures in this bill.

As I said in my statement, the health of our people and our lands have been compromised by U.S. activities, and the RMI looks to the Congress to take action on the items in S. 1756.

Thank you.

Senator MURKOWSKI. Thank you. I appreciate that response.

Mr. Weisgall, on behalf of the four atolls that you represent, would you care to add anything in response to the Administration's testimony today?

Mr. WEISGALL. I would merely second, I, profound disappointment is a pretty good description. I would add only this, and I'm speaking here as a citizen. I'm struck by the fact that this is a country, the Marshall Islands, that has got soldiers standing shoulder to shoulder with our men and women in Iraq and Afghanistan. This is a country that is standing shoulder to shoulder with the United States at the United Nations. These are pretty significant areas, this means, this should mean a lot to our country. Here we are talking about $1 million or $2 million for a healthcare program.

This was set up 1 week after the Bravo shot. It was set up on March 10, 1954. The Atomic Energy Commission realized that a horrible accident had occurred and that over 200 Marshallese had been exposed. Then it was expanded under the Congress in 1978. I think it was Public Law 96206, to have a healthcare program for the four atolls. It's been part of the system.

I guess the only other factor I would add, Senator, is I'm not surprised by what I'm hearing, because since the 1970s at least, certainly in my 34 years, it has been the Congress, both the House and the Senate historically, that have acted on these issues. It has rarely been the executive branch that has come up to Capitol Hill and has said, "We've got to do something." Yes, the Compact was certainly, that was a major exception, but one could argue that the Compact was the result of a tremendous amount of political pressure, both in the courts and on Capitol Hill.

So, I'm not surprised at what I hear, but I put the challenge to you and your colleagues on the other side of Capitol Hill to continue handling this legacy. That's why the Changed Circumstances Petition was added. There was a recognition that Congress sometimes has to pick up the cudgel here when it's—when it's either difficult, embarrassing, or otherwise conflicting, if you would, for the executive branch to come up here and say, "We've got a, we still have a pretty tough legacy on our hands."

Senator MURKOWSKI. I appreciate it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Thank you all. Thanks to all the witnesses. There are a few additional questions that we'll submit to you and hope that you could get a response back to us in the near future. But I think this has been useful and helps give us a good legislative record that we can use in moving forward here. So, thank you very much.

The hearing is adjourned.

[Whereupon, at 11:04 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

DEPARTMENT OF ENERGY,
OFFICE OF CONGRESSIONAL AND LEGISLATIVE AFFAIRS,
Washington, DC, October 25, 2007.

Hon. JEFF BINGAMAN,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: On September 25, 2007, the Senate Energy and Natural Resources Committee held a hearing regarding Marshall Islands Nuclear Testing, Compact of Free Association.

Enclosed are the answers to four questions submitted by you to complete the hearing record.

If we can be of further assistance, please have your staff contact our Congressional Hearing Coordinator, Lillian Owen, at (202586-2031.

Sincerely,

LISA E. EPIFANI,
Assistant Secretary.

[Enclosures]

RESPONSES TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. What would be the estimated cost of establishing and operating a whole-body counting facility in Utrik mirroring the facility in Enewetak? Please provide a rough breakdown of construction and operating costs.

Answer. The estimated cost to establish and operate a dedicated, stand-alone whole body-counting facility on Utrok Atoll that would include the capability to conduct urine bioassay analysis, to perform sample collections and preparations. and to support radiological field monitoring that mirrors the DOE Enewetak Atoll Radiological Laboratory is:

Construction:	$ 850,000
Operation (annual):	$ 210,000
Total Cost (first year):	$ 1,060,000

Question 2a. In his testimony regarding Utrik Atoll, Mr. Weisgall states that "recent whole-body counting data gathered by Lawrence Livermore Laboratory has demonstrated that the people living on Utrik have received the highest body burdens of radionuclides of any group in the Marshall Islands." Is this correct?

Answer. Yes. Since DOE's establishment of permanent whole body-counting facilities on Majuro, Enewetak, and Rongelap, the Utrõk Atoll resident population group has acquired the highest levels of internally deposited cesium-137 in comparison with other population groups in the Marshall Islands that DOE has tested. The levels of internally deposited plutonium acquired by Utrõk Atoll residents are very low and are consistent with data developed for other atolls.

Question 2b. How do these burdens compare with other areas?

Answer. The population average dose on Utrak in calendar years 2005-2006 from internally deposited cesium-137 is around 3.5 mrem per year. This dose level may be compared with a population average dose of 0.7 mrem per year for residents of Emewetak Atoll, 1.6 mrem per year for resettlement workers living on Rongelap Atoll, and less than 0.1 and 1.6 mrem per year for people living on the southern (including Maj tiro) and other northern atolls, respectively.

Question 2c. What are the predicted health effects of these body burdens?

Answer. The levels of radiation exposure as documented under the DOE Marshall Islands Program are not likely to have any measurable or discernible impact on human health. Moreover, individual doses for Marshallese volunteers participating in the whole body-counting program on Utrõk Atoll are all below the cleanup (radiological safety) standard of 15 mrem per year as adopted by the Marshall Islands Nuclear Claims Tribunal.

Question 3. Are there cost-effective measures that can be taken to reduce the risks of radiogenic illness in Utrik? For example, what are the costs and benefits of doing potassium treatments at Utrik?

Answer. Risks of radiogenic illness from low-level chronic exposure to residual litllout contamination on Utrõk Atoll are already very low. The application of potassium fertilizer on the agricultural areas will produce no measurable health benefit to the people Utrok Atoll. However, it will provide assurances to the local population that actions have been taken to limit radiation exposure on the island.

The answer is based on extensive scientific experience and knowledge of cesium-137 and its behavior in the environment of various atolls in the northern Marshall Islands. Our experience indicates that adding potassium fertilizer to soils where cesium-137 concentrations are already very low produces smaller reductions in cesium levels in food crops grown in those soils.

As such, there appears to be no clear radiological benefit to adding potassium fertilizer to agricultural areas on Utrõk. The value of potassium treatment under these circumstances should he considered as addressing people's perception of risk.

Question 4. Please describe the health risks to the people or Enewetak Atoll from contamination in the Fig/Quince area, what monitoring is currently done, and what the estimated cost and benefits of such monitoring would be?

Answer. The health risks posed by plutonium contamination in the Fig/Quince area for Enewetak Atoll residents arc linked to land-use, on the plutonium concentration in—and re-suspension potential of surface soils as well as how long a person visits Runit Island. Based on available knowledge about the use of Runit Island and measurement data on plutonium in soils, the health risks to the people of Enewetak Atoll from exposure to plutonium in the Fig/Quince area are likely to be well below the risk set in U.S. regulatory guidelines for cleanup of radioactively contaminated sites.

Runit Island is known to contain elevated levels of plutonium contamination especially in the vicinity of the Fitt/Quince area. The main pathway for human exposure to plutonium on Runit Island is through inhalation of re-suspended soil (contaminated dust) particles in the air that people breathe when visiting the island.

Plutonium in air: Scientists from the Lawrence Livermore National Laboratory have on numerous occasions conducted plutonium re-suspension studies on Runit Island in the vicinity of the Fig/Quince area. These data show that the concentration of plutonium in air in the vicinity or the Fig/Quince area is below the U.S. Environmental Protection Agency (EPA) guidelines for cleanup of radioactively contaminated sites.

Plutonium in soil: The level of plutonium in surface soils around the Fig/Quince area has also been well documented and, although detailed knowledge about the depth distribution of plutonium is lacking, the frequency distribution of hot particles in surface soils is sufficiently low that standard techniques for removing hot particles may not he applicable and will not necessarily reduce the risks from inhalation exposure to plutonium.

Plutonium in Enewetak Islanders: Plutonium bioassay tests performed on the Enewetak population over the past 5 years clearly demonstrate that the level of internally deposited plutonium acquired by Enewetak residents, including people who visit to Runit Island, is very low and cannot easily be distinguished from backg round levels normally attributable to exposure to world-wide fallout contamination in the Northern Hemisphere.

Currently there is no radiological monitoring program for Runit Island. A radiological monitoring program would consist of a permanent air monitoring system on Runit Island to collect data every 6 to 8 weeks over the year. The monitoring program would generate a small number of samples (20–25 samples) for analyses of plutonium each year.

A technically feasible and sound scientific approach to directly monitor the situation on Runit Island is to install a permanent weather station and air monitoring equipment. The air monitoring, system would be used to assess the long-term. ambient concentration of plutonium in air in the vicinity of the Fig/Quince area in comparison to a control station located on Enewetak Island. This recommendation is experience-based on previous monitoring of plutonium re-suspension in air on Runit Island using short-term measurements. Our knowledge of re-suspension is limited because previous monitoring was mostly in the dry season; there is little data for the rainy season. Re-suspension is different across the different seasons.

Supplemental plutonium bioassay measurements in Enewetak Atoll residents would also be performed under the Runit monitoring, program every 4 to 5 years to help verify and document plutonium exposure conditions on Enewetak Atoll. It should be expected that exposures, in general, will remain at or below levels that could potentially impact human health. Every effort would be made to identify community residents that traveled to Runit Island in the previous 4 years for inclusion in the bioassay campaign.

Estimated Cost: All estimates are in 2007 dollars and include logistical support costs.*

First year cost to establish monitoring program for Runit Island:	$150,000
Annual recurring monitoring program cost (year two and beyond) for transportation, labor, and laboratory services:	$100,000
Plutonium bioassay campaign (in addition to the above monitoring program) every 5th year for 50 volunteer Enewetak residents	$175,000

*Funding for the activity is not provided for in the 2008 Budget.

Benefits: The monitoring program would provide added assurances that radiological conditions on Runit Island do not pose a significant threat to the health of the people of Enewetak Atoll and, perhaps most importantly, would provide a more direct, accurate and reliable basis for assessing doses to potential "maximum exposed individuals" who may occasionally visit Runit Island. Maximum exposed individuals are those with the highest food consumption, occupancy, and other usage of the Fig/Quince area. This reality-based approach would educate people about their risk when visiting Runit Island and manage perceptions of risk.

RESPONSES OF STEVEN MCGANN TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. Economic development is an important goal of the Compact relationship with the RMI, but there are also important political and security goals. Would you please outline the State Department's views on these aspects of the relationship?

Answer. The U.S. is responsible for defending the RMI from attack or threats of attack as the United States defends itself and U.S. citizens. The United States has the option to foreclose access to or use of the RMI by military personnel or for the military purposes of any third country ("strategic denial"). The RMI is also obligated to refrain from actions that the United States determines, after appropriate consultation, to be incompatible with its authority and responsibility for security and defense matters in or relating to the RMI ("defense veto".)

The RMI maintains its own foreign policy, which is, in nearly all cases, consistent with U.S. goals and aims. RMI citizens serve in the U.S. armed forces. There are approximately 90 RMI citizens in the U.S. Armed Forces, 23 of whom serve in Operation Iraqi Freedom.

The RMI regularly stands up to the G-77 and other groups, siding with the U.S. on major foreign policy issues such as Cuba, the Middle East, and most recently the war in Iraq.

The RMI has worked closely with the U.S. to strengthen its ability to detect and combat international crime and terror. The RMI has signed and ratified four of the five UN counter-terrorism conventions. The current government cancelled the previous RMI government's citizenship-for-sale program well before 9/11.

Question 2. The nature of the security threat has changed significantly in the past several years. Security is now seen not only a DOD responsibility, but also of DHS. Would it be appropriate to review the Compact security agreements and procedures in light of the changing security environment?

Answer. We consider security to be a top priority for the region. We work with the Department of Homeland Security (DHS) and other interested agencies to contribute to this effort. For example, we are presently coordinating with DHS on a Top Officials Exercise which will be held in Guam in mid-October. The State Department will send a representative to this exercise to serve as a regional specialist and as a coordinator among government agencies and high-level Pacific Island officials, including those from the RMI. This simulated disaster response exercise is designed to strengthen capacity to prevent, protect against, respond to, and recover from large-scale terrorist attacks in the United States and internationally.

[Responses to the following questions were not received at the time the hearing went to press:]

QUESTIONS FOR WITTEN T. PHILIPPO FROM SENATOR MURKOWSKI

Question 1. Minister Philippo, I first want to acknowledge the significant progress that you and your Administration have made in implementing the requirements of the Compact, particularly in the Health and Education sectors. I am also encouraged to hear of the new Office of Compact Implementation and expect that this will bring about even more positive progress. I am wondering, though, what prospects do you see for the RMI to be able to be economically self-sufficient after Covenant grants cease in 2023?Given the constraints in terms of natural resources and land area, how is your Administration and the private sector doing in encouraging and establishing a stable economic base for the RMI past 2023?

Question 2. Minister Philippo and/or Mr. Weisgall, Do you have good data on the number of workers who may actually qualify for nuclear worker compensation? I had trouble winning approval for the Employee Occupational Illness Compensation provision of this bill in 2005 partially because of differing estimates for how much it would cost.

APPENDIX II

Additional Material Submitted for the Record

SUPPLEMENTAL STATEMENT OF JONATHAN M. WEISGALL, LEGAL COUNSEL FOR THE PEOPLE OF BIKINI

During questioning at the September 25 hearing, Senator Murkowski asked several questions about what she agreed was "the skunk at the garden party—the failure of the U.S. to provide the Nuclear Claims Tribunal with the funding needed to pay the awards it made to the four atolls." She specifically asked about the advantages and disadvantages of seeking to have this question resolved by the courts.

In response, I explained that at oral argument on April 23, 2007 in the Bikini and Enewetak cases, Judge Miller of the U.S. Court of Federal Claims raised the prospect that further litigation might lead to a recovery by one group of nuclear victims but not another, based solely on the legal and factual circumstances of the various cases, ignoring the fact that both groups of plaintiffs—one from Bikini and one from Enewetak—are Marshallese victims of the U.S. nuclear testing program. It was for this reason, I explained, that Judge Miller strongly—and repeatedly—urged the parties to discuss settling the litigation. In response to further questioning from Senator Murkowski, I said that I would supplement my testimony with excerpts of Judge Miller's comments from the transcript of the oral argument in these cases in which she urged the parties to seek a settlement.

The following are excerpts from the 182-page transcript of the April 23 oral argument on the U.S. Government's motion to dismiss the plaintiffs' complaints in Ismael John, et al., v. United States (Docket No. 06-289L) and People of Bikini v. United States (Docket No. 06-299C), with the Honorable Christine Odell Cook Miller presiding. Judge Miller had earlier ruled that the U.S. Government's motions to dismiss the two cases should be briefed, argued, and decided together.

Unless otherwise noted, all of the excerpted material quoted below was spoken by Judge Miller. In trying to put her remarks in the proper context, I have taken the liberty of underlining some of her comments to emphasize the point I made to Senator Murkowski—that Judge Miller repeatedly urged the parties to discuss settlement because of the vagaries and uncertainties of further trial and the potential for reversal on appeal:

Page 26:

[T]he Compact itself provided for what you do in Article 9 with changed circumstances, and the remission of the claim is to Congress, and that is where the parties are. They went to Congress when they received their awards, and Congress to date has done nothing, although having been apprised that the awards entered—I shouldn't say entered. I mean by the tribunal.

In 2000 to 2001 respectively, however, there were Senate and House hearings in the 2005 timeframe, and nothing has been done since.

Page 28:

The State Department made a report that it didn't believe in 2005 . . . that under the changed circumstances clause that recommended against any additional payments, and I know that the representative of the State Department is here. It would be very helpful to the Court if Congress would give a signal that it is making a final determination.

Pages 78–80:

One of the things I wanted to do today was to urge caution on both sides . . . . My purview is to take the Federal Circuit's decision and do what it says, and that's what I'm going to do because, as a trial court, that's my job.

Now what does that mean for both sides? It means that you may be in for protracted proceedings, and this always suggests that a resolution between yourselves is the way to get around this.

First you avoid any precedent that's difficult for either side to deal with, and second, you get that final resolution that everyone wanted to get in the first instance but didn't draft the appropriate agreements, and the answer is a settlement . . .

But I think that the idea of continuing the litigation on does pose a downside for both Plaintiffs and the government . . .

This is not a satisfactory approach from either Plaintiffs' perspective or the government's. This is a case that cries out for a settlement because no one expected it to unwind and have to be replayed here (emphasis added).

Page 81:

Both sides will have to assess the Supreme Court's views because this is a case that clearly is headed in that direction. In other words, relief is a long time coming, and so the better course, especially because I know we have representatives of agencies here, is to use this opportunity to perhaps set up a meeting to see what can be explored that's within the grounds of reasonableness . . .

Page 82:

So I caution the parties that the Court can do what it can do with the limited tools that it's given, the first of which at the trial level is to follow the directions of the Appellate Court, and then secondly is looking at the law as a whole to determine exactly where you stand. And that will be the first step if that's the course this litigation takes, and that is determining the adequacy of the tribunal.

And then we would get into the motions practice of the sufficiency of your claims or lack thereof, and then we would get into a trial, which [from the] point of view of the John Plaintiffs could be extremely limited or nonexistent, which brings up the issue of why have a lack of symmetry between the treatments of these two groups and that instead of arguing to open the door for the John Plaintiffs to me says it's in everyone's interest to sit down and work out a settlement. Legally, the government is in a stronger case against the John Plaintiffs. Why treat them differently? It doesn't make sense, but that isn't my job.

Pages 87–88:

Did Applegate create a sea change? No, it didn't. Am I troubled with the lack of similar treatment of the two categories of Plaintiff? I am, which is another reason the government should get serious about settling these claims, because I've seen this happen before.

Pages 89–90:

I think that you should approach the government representatives with an offer that is appropriately modest in the circumstances while the rest of this case plays out. And I think the government is not interested in retrying these issues in a judicial forum. It doesn't look good no matter how they're resolved.

The idea that this is leftover business this many years later is just not a credit to the U.S. Government, and even if it has to do with drafting of agreements, it's not a credit to the U.S. Government. The fact that we have Courts look at these things is a credit to the U.S. Government, but having to review the consequences of nuclear activities that vaporize islands is not. That's the business we don't want to be in right now, and when I say appropriately modest, I mean it.

Page 96:

And most of those contracts were always express. I don't know what it means if it's an implied-in-fact contract. It's a risk you don't want to run because your best suit of course is the takings for monetary reasons. And I see the basis of a settlement, but a settlement that is reached that has nothing to do with the ultimate figures that were awarded because they're way out of line. They are the best-case scenario, and when you get into litigation, you're never aiming for the best-case scenario.

Page 97:

MR. VAN DYKE [lawyer for People of Enewetak]: The figures awarded by the Claims Tribunal seem large to some, but they're actually quite modest compared to other expenditures that our government has spent.

THE COURT: Well, you can argue that to somebody else, but that isn't appropriate to me. I mean, I know that we're in the midst of a war that has more zeros after it than I can imagine in my lifetime, but that isn't how these decisions are made. You want to go for it? Fine. But I can't tell you that based on all my experi-

ence and all the reading of the precedents and seeing what happens when these cases get up on appeal that you don't run the risk of an ultimate disappointment. And I think that now is the time to be reasonable.

What do you really need? What can this generation use? How can you make lives better now with a reasonable sum of money that the government might be willing to entertain as the basis for settlement? If not, you're in for the long haul, or if the Court dismisses the case, you're in for the short haul of an appeal and take your chances there. But as you can tell from what I've been saying, I'm not leaning towards dismissal.

Pages 98–99:

So I urge all parties here to understand that a short term final resolution is in everyone's interest, and a Court is not suited to rectify all the difficulties that have arisen after such many years' passage of time.

Pages 175–76:

That is one of the reasons the government should look seriously at settlement. On the other hand, Plaintiffs know that nothing requires me to do this. It is absolutely not required. It's something that you do if the Judge feels there has really not been a correct decision, and it's a problem that arises every time you get a new Judge in the case.

Pages 176–77:

So, when you're dealing with protracted litigation, which in this case is nobody's fault, understand there are real risks. If you think you have a victory, it could be very short-lived, and I'm not even talking about what could happen on appeal, because if we have misread in any material way what the Federal Circuit is telling us, if Plaintiffs have read too much into it and I've read too much into it, and if it's entitled to the construction that the government has given it, then in fact everything will have been a waste, and certainly we wasted the government's time, which, as I say, is another reason it should be settled.

But apart from ultimately prevailing, the government has to decide whether or not it wants these claims replayed at this time in a Court. I don't really know about the difficulties involved, but in terms of the repercussions, those are yours to judge. I'm only interested in the legal aspects. I don't make these other policy decisions and stay away from them.

Don't give up that ability to talk to each other while this process is ongoing. There's significant risks in continuing for both sides. The only thing I can do is try to take cognizance of everything you've said. And it has been very helpful, and keep an open mind.

Pages 179–82:

MR. WEISGALL: On the settlement point, I just want to thank you for pushing. You're knocking heads here is what you're doing a little bit. I mean, you're knocking us and you're knocking them. I think that's very helpful. My clients are not getting any younger. They would certainly and have always been amenable to settling this.

Take my head off for what I'm about to say, but I will be presumptuous. I think the best way you can force us to talk would be to say in your written opinion some of the things you've said here in the courtroom. I think it would help the process, and I think it's a good process. I apologize if that's——

THE COURT: Well, I will take that under advisement. One of the reasons we have arguments like this is to get out the thoughts as they occur, send messages hopefully but not put them into the written domain as part of a decision where I'm supposed to be focusing on the narrow question and giving a narrow ruling. And I try not to speak ex cathedra, but it happens sometimes, and sometimes it's called for.

Usually I make the remarks that I made today actually off the record. I became emboldened to make them on the record because I want the parties and everybody who is involved here to understand this is potentially a long term proposition. Remember, if we take the most efficient route, which is to enter a ruling for the government, have it appealed, and a year later be back here on something related thereto, that would clear the air.

But I am not going to rule for the government to clear the air, and that means that the government's position is not going to be appealable until we enter a final judgment. And if I've been wrong and your counsel has fortified me too much and I have not been the logical Judge that Professor Van Dyke wants, Plaintiffs will pay the price at the end of the day.

So a lot of what I say should stay in this posture because it's understanding the litigation process. It's the best process we've got, but it has its pitfalls . . .

So the system is the best we can have, but when you see the possibility of losing short term gains in the long run, you've got to factor that in. So I want the government to be willing to talk to Plaintiffs. You can talk to them and say that we won't entertain anything unless it's in the range of X or we won't entertain anything at all, but let them know where you stand. Do talk to them. Let them know where you stand because unless I'm held off, this opinion is coming out when I said it would. So thank you very much.

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