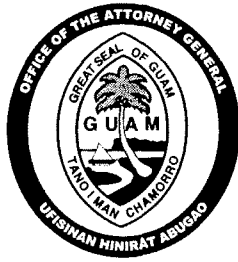


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June 3, 2009

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AM 10:34
KAWA

Honorable Judith T. Won Pat, Ed.D.
Speaker
30th Guam Legislature
Suite 201, 155 Hesler
Hagåtña, Guam 96910

Honorable Frank F. Blas, Jr.
Senator
30th Guam Legislature
Suite 907, DNA Building
238 Archbishop Flores Street
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Office of the Speaker
Judith T. Won Pat, Ed. D.
Date _____
Time _____
Received by _____
6/8/09
10:38
30-09-0668

RE: Status Report – Public Law 29-129

Honorable Speaker Won Pat and Senator Blas,

Public Law 29-129 estimates that the Government of Guam is owed in excess of \$400 Million from the United States Government as un-reimbursed costs attributable to the presence of citizens from the Freely Associated States (FAS) of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands resulting from the Compact of Free Association entered between the FAS and the United States Government. *See generally*, 48 U.S.C. §§ 1901 – 1912 and 48 U.S.C. § 1921

The theory of this claim is that Congress has stated its intention that Guam, the Commonwealth of the Northern Mariana Islands and the State of Hawaii shall not suffer adverse consequences as a result of the Compact of Free Association and that Congress itself has promised to “act sympathetically and expeditiously” to redress any adverse consequences occasioned by the Compact. *See* 48 U.S.C. § 1904(e)(1) (“In approving the compact, it is not the intent of the Congress to cause any adverse consequences for the United States territories and commonwealths or the State of Hawaii.”); and § 1904(e)(4) (“The Congress hereby declares that, if any adverse consequences to United States territories and commonwealths or the State of

Hawaii result from implementation of the Compact of Free Association, *the Congress will act sympathetically and expeditiously* to redress those adverse consequences.”) (emphasis added). Section 1904(e) is reproduced in its entirety following this memorandum.

Section 1 of Public Law 29-129 provides in its entirety:

Legislative Findings and Intent. *I Liheslaturan Guåhan* finds that under the Compact of Free Association between the Freely Associated States (FAS) of Micronesia and the U.S. Government, costs incurred by local governments for health care, education and other costs incurred by FAS citizens are calculated by local governments and reimbursed by the U.S. Government. *I Liheslaturan Guåhan* further finds that despite numerous administrative attempts to recoup such amounts Guam continues to be owed in excess of Four Hundred Million Dollars (\$400,000,000) in reimbursement costs attributed to the presence of FAS citizens utilizing public services. Therefore, it is the intent of *I Liheslaturan Guåhan* to pursue any and all legal actions necessary to compel reimbursements owed to the government of Guam for costs incurred relative to the Compacts of Free Association.

Public Law 29-129 appropriates the sum of \$200,000 to the Office of the Attorney General “to pursue any and all legal actions necessary to compel reimbursements owed to the government of Guam [from the United States Government] for costs incurred relative to the Compacts of Free Association,” and directs the Office of the Attorney General of Guam to submit monthly status reports to *I Liheslaturan Guåhan*.

Report of Expenditures and Progress

Since Public Law 29-129 was enacted, the Office of Attorney General has hired Robert M. Weinberg as an Assistant Attorney General. Due to his previous commitment to the Judiciary of Guam where he was serving as Interim Public Guardian, Mr. Weinberg was not brought on board until March 30, 2009. A licensed lawyer since 1985, Mr. Weinberg comes to the Office of the Attorney General with more than 24 years experience in the areas of state, local, territorial, and federal relations and, in particular, litigation in federal courts on behalf of state and local governments. He has served as an assistant attorney general or otherwise counsel to the State of Alabama; the city and county of Montgomery, Alabama; the Federated States of Micronesia; the Territory of Guam; and the Commonwealth of the Northern Mariana Islands. Mr. Weinberg has numerous reported decisions to his credit in which he was lead counsel or otherwise contributed substantially in a wide array of matters involving questions of constitutional law and federalism; civil trial and appellate pleading, practice and procedure; administrative law; civil rights of individuals; and institutional class actions. And, in addition to numerous briefs in the highest courts of the State of Alabama, Guam, and the FSM, Mr. Weinberg has personally argued or filed appellate arguments in the United States Courts of Appeal for the Eleventh and Ninth Circuits, and the United States Supreme Court.

Upon initial review, Mr. Weinberg advises that the legislative mandate “to pursue any and all legal actions necessary to compel reimbursements owed to the government of Guam

[from the United States Government] for costs incurred relative to the Compact of Free Association” is an undertaking that both legally and factually may require considerable resources to develop into a coherent case. In terms of a legal review of the status of the Compact of Free Association to redress any adverse consequences resulting from the Compact, Mr. Weinberg reports his analysis is focused initially on questions of sovereign immunity; whether the federal courts have jurisdiction of such claims; the justiciability of such claims; the appropriate venue to bring such claims; statutory construction and interpretation of the Compact of Free Association provisions including what precisely Congress meant when it promised to “act sympathetically and expeditiously”; and whether a legal cause of action exists from Congressional pronouncements of its stated intent not “to cause any adverse consequences for the United States territories and commonwealths or the State of Hawaii.” It is also important to conduct a legal review of the historical perspective leading up to the passage of the Compact of Free Association, and a legal analysis of federal and territorial relations dating back to the Insular Cases at the turn of the last century when Guam first became a territory.

Research and analysis of potential legal causes of action and theories of recovery is but one half of the equation. Proving actual damages in a lawsuit or the costs to which Guam may arguably be entitled to recover is the other half. The question of legal liability aside, providing damages would require specific data and documentation to substantiate and justify the \$400,000,000 figure mentioned in Public Law 29-129 in order to convince a court of competent jurisdiction that the figure is economically as well as legally justified. It is unclear precisely how the \$400 million has been calculated. Mr. Weinberg is in the process of compiling and analyzing information from the following documents:

	DOCUMENT DESCRIPTION	AUTHOR	DATE OF DOCUMENT
1	Audit Report – Report No. 93-I-1195	U.S. Department of Interior Office of Inspector General	06/28/1993
2	Reply to Gov. J.F. Ada’s 04/21/94 Letter re: Reports on the impact of the Compact of Free Association	U.S. Department of Interior Leslie M. Turner, Asst. Secretary	06/10/1994
3	Pacific Immigration Impact Effects of P.L. 99-239 on the Island of Guam (FY 1989 to FY 1995)	Office of the Governor Government of Guam	08/1996
4	Report to Congressional Requestors (Foreign Relations-Migration from Micronesia Nations Has Had a Significant Impact on Guam, Hawaii, and The CNMI)	U.S. General Accounting Office	10/2001
5	Compact Impact Reconciliation (Guam’s Unreimbursed Costs of the Compact of Free Association Fiscal Years 1987 to 2003 Data Tables (DRAFT))	Office of the Governor Government of Guam	04/2004
6	Compact Impact Reconciliation	Office of the Governor	04/2004

	(Guam's Unreimbursed Costs of the Compact of Free Association Fiscal Years 1987 to 2003 Independent Accountant's Report on Applying Agreed-Upon Procedures)	Government of Guam	
7	Report of Unreimbursed Expenses to Immigration from the Freely Associated States (Fiscal Years 2001-2003)	Governor Juan N. Babauta CNMI	04/15/04
8	Compact Impact Debt Relief (Guam's Request for Debt-relief to Offset Unreimbursed Costs of the Compacts of Free Association)	Office of the Governor Government of Guam	08/2004
9	Senate Resolution No. 43 (Supporting Federal Financial Assistance for Persons Present In the U.S. Under the Compacts Of Free Association)	The Senate, 24 th Legislature State of Hawaii	02/28/08
10	Report: Impact of Compact of Free Association on Guam (FY 2004 through FY 2009)	Office of the Governor Governor of Guam	01/2009
11	Letter to the Honorable Ken Salazar, U.S. Department of Interior, Washington, DC Re: 2 nd Request for Information pursuant to Freedom of Information Act	Senator Frank F. Blas, Jr 30 th Legislature, Guam	04/30/09
12	Letter to Nicolau I. Pula, Jr, Acting Deputy Assistant Secretary for Insular Affairs-U.S. Department of Interior, Washington, DC Re: Freedom of Information Act Request	Senator Frank F. Blas, Jr 30 th Legislature, Guam	05/04/09
13	House Resolution No. 110 H.D. 1 (Supporting Assistance for Persons Present In the U.S. Under the Compacts Of Free Association)	House of Representatives, 24 th Legislature State of Hawaii	No introduction/ passing date specified. Printed from www on 05/08/09
14	Letter to Nicolau I. Pula, Jr, Acting Deputy Assistant Secretary for Insular Affairs-U.S. Department of Interior, Washington, DC	Michael W. Cruz, M.D. Lieutenant Governor of Guam	05/09/09

Mr. Weinberg reports, from his initial review of the documents provided from the Office of the Governor, the Bureau of Statistics and Plans, and other documents publicly available,

including documents from the U.S. General Accounting Office and Department of the Interior, that the information provided appears conclusory in terms of its utility to prove actual damages in a court of law. In order to convince a court of the accuracy of the amount of un-reimbursed costs to be claimed in any kind of lawsuit, and in particular the methodologies employed in arriving at the claimed totals, source data will need to be examined, and interviews with those persons involved at the Bureau of Statistics and Plans and Bureau of Budget & Management Research will need to be conducted. In addition to the unknown methodologies employed in arriving at the \$400 million total, which will most certainly be closely cross-examined were litigation to be filed, there are unanswered discrepancies in tabulations between claimed reimbursable costs and those costs deemed by the Secretary of the Interior to be allowable under the Secretary's interpretation of the relevant statutes. Such discrepancies need to be reconciled before a court would be satisfied that a justiciable or redressible cause of action exists. It is also anticipated that one or more expert witnesses in economics may need to be consulted and retained in order to validate or if need be recalculate allowable expenses incurred by the government of Guam as reimbursable costs attributable to adverse consequences occasioned by the Compact of Free Association as envisioned by Congress.



J. PATRICK MASON
Deputy Attorney General
Civil Division

ADDENDUM

Title 48 U.S.C. § 1904(e) provides in its entirety:

Impact of Compact on U.S. areas

(1) Statement of congressional intent

In approving the Compact, it is not the intent of the Congress to cause any adverse consequences for the United States territories and commonwealths or the State of Hawaii.

(2) Annual reports and recommendations

One year after January 14, 1986, and at one year intervals thereafter, the Governor of any of the United States territories or commonwealths or the State of Hawaii may report to the Secretary of the Interior by February 1 of each year with respect to the impacts of the Compact of Free Association on the Governor's respective jurisdiction. The Secretary of the Interior shall review and forward any such reports to the Congress with the comments of the Administration. The Secretary of the Interior shall, either directly or, subject to available technical assistance funds, through a grant to the affected jurisdiction, provide for a census of Micronesians at intervals no greater than 5 years from each decennial United States census using generally acceptable statistical methodologies for each of the impact jurisdictions where the Governor requests such assistance, except that the total expenditures to carry out this sentence may not exceed \$300,000 in any year. Reports submitted pursuant to this paragraph (hereafter in this subsection referred to as "reports") shall identify any adverse consequences resulting from the Compact and shall make recommendations for corrective action to eliminate those consequences. The reports shall pay particular attention to matters relating to trade, taxation, immigration, labor laws, minimum wages, social systems and infrastructure, and environmental regulation. With regard to immigration, the reports shall include statistics concerning the number of persons availing themselves of the rights described in section 141(a) of the Compact during the year covered by each report. With regard to trade, the reports shall include an analysis of the impact on the economy of American Samoa resulting from imports of canned tuna into the United States from the Federated States of Micronesia and the Marshall Islands.

(3) Other views

In preparing the reports, the President shall request the views of the Government of the State of Hawaii, and the governments of each of the United States territories and commonwealths, the Federated States of Micronesia, the Marshall Islands, and Palau, and shall transmit the full text of any such views to the Congress as part of such reports.

(4) Commitment of Congress to redress adverse consequences

The Congress hereby declares that, if any adverse consequences to United States territories and commonwealths or the State of Hawaii result from implementation of the Compact of Free Association, the Congress will act sympathetically and expeditiously to redress those adverse consequences.

(5) “United States territories and commonwealths” defined

As used in this subsection, the term “United States territories and commonwealths” means the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(6) Impact costs

There are hereby authorized to be appropriated for fiscal years beginning after September 30, 1985, such sums as may be necessary to cover the costs, if any, incurred by the State of Hawaii, the territories of Guam and American Samoa, and the Commonwealth of the Northern Mariana Islands resulting from any increased demands placed on educational and social services by immigrants from the Marshall Islands and the Federated States of Micronesia.