MEMORANDUM FORM TT-570c

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TRUST TERRITORY OF THE PACIFIC ISLANDS *Office of the High Commissioner, Saipan*

TO : Chief, Lands and Surveys

DATE: April 16, 1974
Serial: LS13571
File: 178.17.12

FROM : Land Law Examiner

SUBJECT: DOTA request number P 081902Z Apr 74, relative to Micronesian Development Company activity on Tinian Island

Pursuant to your instruction I have made a study of Micronesian Development Company (Ken Jones) activity on Tinian Island for purposes of answering DOTA request number P 081902Z Apr 74. I would suggest that a copy be transmitted to Ambassador Williams of the Office of Micronesian Status Negotiations, Department of the Interior, Washington, D.C.

A summary of my findings and opinion follows which incorporates all information given to Ambassador Williams recently in Honolulu. The summary makes numerous references to an attached appendix of pertinent documents.

History

Micronesian Development Company, Inc. was granted a corporate charter on May 27, 1965, to do business in the Trust Territory (appendix p. 19) pursuant to Articles of Incorporation dated May 7, 1965. (Appendix p. 12). Original incorporators were Jones and Guerrero Company, Inc., a Guam Corporation, Edward M. Calvo, and J.C. Arriola. Directors were Kenneth T. Jones, Jr., J.C. Arriola, Paul M. Calvo, Edward M. Calvo, and S.C. McIntosh. Kenneth T. Jones, Jr. was appointed president with the other directors occupying the other offices. Corporation purposes and powers (appendix p. 12) were "To breed, raise, import, export, and deal in cattle and livestock, and to carry on a general cattle grazing and agricultural business, land development and feed products." Other powers incidental thereto include acquisition of interests in realty, acquisition of interests in similar businesses, borrowing money, lending money, making contracts, acquisition of securities and other stocks, issuance of debentures and other evidences of debts, the guarantee of dividend payments and doing all other acts incidental thereto. The Articles of Incorporation were amended October 30, 1970, which amendment was approved November 17, 1970 (appendix p. 29). The amendment changed the capital structure to 250,000 shares $10 par value each for a total capitalization of $2,500,000.00.

On June 11, 1965, the Corporation leased 7,500 acres on Tinian from the Trust Territory Government (appendix, p. 21). An amendment was executed on June 11, 1965 (appendix, p. 26).

The majority of the outstanding shares of stock of the company are owned by Jones and Guerrero Company, Inc., a parent corporation principally owned and controlled by Kenneth T. Jones, Jr. Micronesian Development Company, Inc., owns the majority of outstanding shares in the Townhouse on Saipan. Jones and Guerrero Company, Inc. owns the controlling interest in the Royal Taga Hotel, Saipan.

Operations on Tinian

Micronesian Development Company, Inc. leases approximately 7,500 acres from the Trust Territory Government on Tinian Island. (Appendix, p. 21). Part of this acreage is government land and part is military retention government land as shown by "Key Map-Tinian Land Use as of January, 1973." (Appendix, p. 2, envelope).

On June 30, 1972, the company had 3,065 cows and 1,144 hogs. (Appendix, p. 106). Recently 716 dairy cows, 5 sheep, 9 horses, 15 hogs, 3 dogs, and a quantity of additional equipment and machinery were imported from New Zealand. (Appendix, pps. 54,55,56).

Mr. Jones proposes to implement a dairy operation on the Island which will sell dairy products and dairy breeding stock in the Trust Territory, Guam, and general Pacific area.

Government Revenue from Operations

Pursuant to lease provisions the Government should receive 1% of gross receipt of the company for the first five years and should receive 2% of gross receipts for the second five years. Thereafter lease payments are to be negotiated in an amount not to exceed 3% of gross receipts.

The Department of Finance, Trust Territory Headquarters, reports gross receipts as shown on page 136 of the attached appendix. Information acquired from the Revenue Division reflects:

> 1971 Gross Revenue subject to tax $100,311.98 with taxes paid $973.12; 1972 Gross Revenue subject to tax $134,680.75 with taxes paid $1,286.80; 1973 Gross Revenue subject to tax $157,341.85 with taxes paid $1,513.42.

This is inconsistent with the amounts shown on page 136, appendix. Considerable effort failed to produce any better information.

Enabling Instruments

(Articles of Incorporation, Charter, Lease)

Articles of Incorporation. (Appendix, p. 12 et seq). The purposes and powers of the corporation are broad and somewhat lacking in specific limitations.

Charter. (Appendix, p. 19). The Corporate Charter contains little more in the nature of restrictions than do the Articles of Incorporation.

Lease. (Appendix, p. 21 et seq). (1) The land lease is for 20 years (June 11, 1965, to June 10, 1985) with a option to renew for an additional ten years. (2) Rental payments are as follows:

(a) 1% of Gross Receipts for first five years.
(b) 2% of Gross Receipts for second five years.
(c) A negotiated amount not to exceed 3% of gross receipts for the balance of the lease.

(3) The corporation has full authority to mortgage and/or otherwise encumber the premises. (4) Provision is made for government cancellation after 15 years. Two years notice and purchase of all physical assets in the Mariana Islands at fair market value are required for cancellation. (5) Approximately one-third of the total acreage is military retention land. This was leased without a license or permission from the U.S. Government. A license for use by the Trust Territory was obtained June 18, 1970. This license has not been incorporated into the Jones lease nor is there an indication that he has actual notice thereof. (Appendix, pps. 84 et seq).

Issues Presented

(1) Does the corporation possess a valid permit to do business in the Trust Territory?

At the time the Charter was approved a charter was considered to be a permit to do business. 33 T.T.C. 3 requiring business permits was passed in 1970 and is ex post facto as to this issue. The Attorney General has opined that such pre-existing corporations need not "apply for a business permit.....before January 1, 1971", as stated in 33 T.T.C. 3, as their charters constitute valid permits.

(2) Can the Corporation begin dairy operations without obtaining a specific business permit for this purposes?

Currently significant deviations from the scope of the original permit require new, specific permits. An official opinion of the

Attorney General is necessary to resolve the matter in question. A dairy operation could well fall within the scope of "for the purpose of breeding, raising, importing, exporting and dealing in cattle and livestock and to carry on a general cattle grazing and agricultural business." (Cf. Introductory paragraph two of lease, appendix, p. 21; article IV, articles of Incorporation, appendix, p. 12; Introductory paragraph two, Corporate Charter, appendix, p. 19).

If a dairy operation is without the scope of these basic enabling documents there may be difficulty in denying an application for such a permit because of political contraindications.

Procedures for obtaining a business permit (appendix, p. 47 et seq), The Trust Territory Foreign Investors Business Permit Act (appendix, pps, 35 et seq), and application forms for acquiring a business permit (appendix, pps. 108 et seq) are enclosed for your information.

The Corporation must also comply with Title 63, Trust Territory Code and regulations issued pursuant thereto relative to Public Health.

(3) What is to prevent the Corporation from importing a greatly increased amount of livestock having a disproportionately high "market value" in this area in relation to cost?

There appears to be no written prohibition against this type of activity. With military acquisition imminent the Corporation would be wise to begin such a practice. This is particularly true in view of the fact that the lease requires the government to acquire all physical assets at fair market value plus 20%! It would also appear that any curtailment of the Corporation's activities on Tinian might possibly save to give rise to further allegations of damage by Mr. Jones in view of the fact that the intent of the lease, etc. seemingly contemplates increasing production.

(4) Can the government terminate the lease by condemnation before the fifteenth year in view of paragraph 10 of the lease? (appendix, p. 24).

Case law holds that the exercise of the power of eminent domain in instances wherein the defendant has acquired his interest from the soverign does not contravene the prohibition against impairment of contracts. (Cf. AmJur extract, appendix, p. 57).

(6) If the U.S. Government elects to use the retention land what is the position of Jones and/or the Trust Territory Government in view of the fact that Jones' lease contains a quiet and peaceful enjoyment covenant?

Jones might elect to sue the Trust Territory for damages alleging, inter alia:

(a) breach of covenant for quiet and peaceful enjoyment,
(b) deprivation of such a substantial acreage so as to render the residue uneconomic, hence total breach.
(c) implied contractual covenant not to terminate any portion of the lease in less than fifteen years.
(d) greater damages than those contemplated for termination after fifteen years through loss of profits, etc.

He may ask for payment of the following elements of damages:

(a) Fair market value for his leasehold interest including the ten year renewal option.
(b) Fair market value plus 20% for all physical assets in the Mariana Islands District (Cf. Lease Item 10, appendix, p. 24).
(c) Additional damages in the form of lost profits for the entire term of the lease.
(d) damages for past earnings on his investment that he could reasonably have expected to earn had he not been misled into entry into the investment.

Any or all of the above demands are possible. Any legal opinion as to his success or failure in such litigation is purely speculative.

Conversely it can be urged:

Jones had constructive if not actual knowledge of the retention agreement. He only acquired such interest by lease as the Trust Territory Government had. Therefore, if the U.S. Government elects to reenter the portion of the ranch that is retention land Jones is without remedy unless he can successfully urge (a) that the Trust Territory Government also has this knowledge (b) that the government intended to incorporate the quiet and peaceful enjoyment clause into the lease to indemnify him in the event the retention land was taken.

It would not appear, however, that such an allegation would have merit in view of the fact that the Trust Territory Government had no authority at all to lease the retention land in 1965.

It is difficult to understand why this error was made. Execution of the license of 1970 (appendix, p. 84) would partially correct the error pursuant to the legal doctrine of "shooting title."

Conclusions and Recommendations

A negotiator first approaching Mr. Jones relative to relinquishment of part or all of his interests should be fully aware of all of the above and foregoing practical and legal considerations.

Mr. Jones should perhaps be made aware at the proper time that all of the advantages and equities do not necessarily run in his favor. At this juncture it should be reiterated:

(1) The Corporation may not have a permit to conduct a dairy business.

(2) All lease provisions may not apply as to the retention portion of the ranch.

(3) Exercise of eminent domain could easily be held to be without the provisions of the lease relative to liquidated damages. If this proves to be true the government is under no compulsion to purchase cattle and moveable personalty per se. Mr. Jones might obtain some relief under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, but the 20% "blue sky" provision of the lease would not thereby be operative.

Essentially:

(1) Continuation of the Jones industry may be desirable for a number of political, practical, and economic reasons once the proposed base is established.

(2) Both parties to the negotiations have some negotiating leverage until the legal issues are resolved.

(3) Cooperative negotiation would be far preferable to condemnation.

(4) Negotiations would be greatly facilitated if the military is able to accommodate the Jones industry within the confines of the proposed base. Such a course of action might also eliminate the necessity of calling for open bids on areas which the military might choose to lease once the base is established. In other words if accommodation of Jones is part and parcel of a negotiated acquisition agreement Jones could be secure in continued useage of some of the land without having to bid for it.

It should also be noted that the area colored green on the Tinian Map (appendix, p. 2) is Lot 218 T 01 (formerly Agricultural Homestead No. 79) which Honorable Herman M. Manglona of the Mariana District Legislature recently deeded to Senator Olympio Borja of the Congress of Micronesia for a consideration shown in the deed to be $85,000.00. (Appendix, p. 134). This transaction could have an effect on market values of Tinian land in that it could be used in court in a condemnation proceeding as a "comparable."

The area colored orange on the Tinian Map (appendix, p. 2) is the land that the Honorable Manglona recently sought to lease the Pacific Basin Hotel and Development Corporation (another Jones enterprise) for a hotel. (Appendix, p. 116). As of this writing Pacific Basin Hotel and Development Corporation has not yet received a permit to do business in the Trust Territory.

No ready inventory is available as to what constitutes all physical assets of Micronesian Development Corporation in the Mariana Islands District. As previously pointed out the lease from the Trust Territory Government requires purchase of all physical assets in the District for termination after the first fifteen years. It is perhaps a ridiculous thought, but it is possible at least that Mr. Jones may allege that Micronesian Development's shares in other enterprises constitute physical assets. If he should be correct then it would follow that he would also ask for an additional 20% pursuant to the lease.

The entire matter deserves serious research and consideration before any action is taken. The Trust Territory Government could be placed in a very embarrasing financial position should Jones prevail in some or all of the allegations hereinabove set out.

Emmett M. Rice

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