PRESENTED TO MPSC, 30 MAY

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May 29, 1974

U.S. COMMENTS ON MPSC RESPONSES ON LAND

The following comments relate to the "Position Paper of Marianas Political Status Commission in Response to U.S. Presentation on Various Land Issues", dated May 27, 1974, which the U.S. delegation has studied with interest and appreciation. It seems to us that it is possible to find common ground in the subjects covered in the MPSC paper, and these comments are offered in an effort to bridge remaining gaps.

1. Non-Military Land Requirements.

We are pleased that there seems to be a meeting of the minds on this subject and agree that any future requirements are likely to be minimal and to be generated in response to requests for federal services from the Government of the Northern Marianas. So far as present services are concerned (Postal Service and Coast Guard) it would be appreciated if the MPSC would confirm the specific suggestions made for carry-over under the new Government of the Northern Marianas of current leasing arrangement. So far as future requirements go, a further definition of "non-discriminatory basis" would also be appreciated, together with an indication as to the acceptability to the MPSC of the acquisition procedures suggested in Section 703 of Article VII in the draft U.S. Covenant.

2. Purchase or Lease.

As indicated previously the U.S. delegation understands fully the considerations underlying the MPSC position on this issue. It would be

grateful, however, for a further exposition of the MPSC's long term lease formula.

In speaking of a 50-year lease with option to renew for another 50 years is it the Commission's intention that such renewal would be automatic at U.S. option?

Would any kind of further payment be involved in the exercise of such option?

At the time of termination of the lease would the federal government be free to dispose of federally financed improvements attached to the land, where they have a positive residual value, on the same terms as if the land were reverting after it had been sold?

3. Lump Sum Payments

The U.S. notes with pleasure that the Commission recognizes at least in theory the equality of cost to the federal government and income to the Marianas in the lump sum proposal. We believe this is a practical as well as theoretical equality with advantages to both parties. We feel, however, that it would be a grave mistake to suggest a periodic review or automatic adjustment of the lump sum paid. Neither the Executive Branch nor the Congress would be willing to consider periodic adjustments. Indeed the U.S. would be willing to consider a long term lease only if it were spread over 99 years or 50 years with an automatic 50 year renewal at U.S. option and a single lump sum payment covering both the initial period and the renewal option. Periodic adjustments represent a thoroughly unsatisfactory way of doing business and can only lead to untold future difficulties,

sowing the seeds of interminable arguments and misunderstandings in the future. A simple lump sum payment on the other hand has the great advantage of being a single, clean transaction. With the proceeds in the hands of the seller or lessor to do with as he sees fit the question becomes one of how well he managed the funds subsequently, not whether in retrospect the original arrangement could not have been improved upon.

4. Fair Market Value

The MPSC notes that the Commission cannot distinguish between public land and military retention land so far as value is concerned. The U.S. concurs in the sense that the same quality of agricultural land in one location, for example, should be accorded the same value whether or not it happens to be on the public land side of a line or the military retention land side. The reason for U.S. insistence on making a distinction is that the value of the military retention land in our judgment should then be discounted to take account of the pre-existing U.S. payments and early relinquishment of our use and occupancy rights.

The U.S. paid in 1951 what was then considered to be the fair market value of this public land. In the Marianas the total sum paid for all military retention lands was $984,000. If the U.S. were now to ask for the refund of that amount with accumulated interest at 10% the value would be just under $9 million. The Marianas several years ago spent a large part of the original payment for a variety of projects including Dr. Torres Hospital. There is still a balance of almost one half million dollars left in the bank. In addition to the normal payments and interest

earned 19,000 acres have already been returned to the public domain at no cost.

From a legal standpoint the U.S. considers it still has a valid lease on the remainder which would survive the end of the Trusteeship. It has chosen, however, voluntarily to renegotiate the leases of those areas which it will continue to need and to relinquish the remaining areas. We consider that both the areas to be retained and the areas to be relinquished have value which distinguishes them from ordinary public land and should be recognized in the form of a credit against the price asked for the retained lands. The exact amount of this credit is to be negotiated along with the value of the land itself.

5. Outstanding Leases.

The U.S. agrees in principle that it should be charged with the legitimate expenses of settling outstanding leases on both the public and military retention lands it requires for military purposes. We propose that the exact terms of settlement be worked out between the lessees and the lessor subject to the agreement of the U.S. Government. In the case of public land the lessor would be the Trust Territory Government or the Marianas legal entity once public land is returned to the district by the TT and the entity is established. In the case of military retention land the lessor will remain the TT Until the land can be made available in unencumbered form to the U.S. and the balance of unencumbered military retention land can be turned over to the public domain. In both cases the United States would expect that the lessee would be dealt with fairly and equitably in accor-

dance with the terms of his lease and that settlement would be made by the lessor with the concurrence of the United States.

6. Potential Value

As indicated earlier the USG has great difficulty with the suggestion that the value of public land take into consideration its potential future use. Criteria such as these are too vague and subjective to be practically meaningful. The U.S. is prepared, on the other hand, to consider the current value of comparably situated land of the same quality as one indicator of its fair market value, e.g., the value of undeveloped, privately held farmland on Tinian as an indicator for the value of undeveloped public farm lands on Tinian. We can also concur in the suggestion that special criteria be established to take care of the special cases of Farallon de Medinilla and the Tanapag Memorial Park Military Retention Area

The U.S. remains of the view that it may well be possible to arrive at an agreement on price now with the MPSC without the long and protracted delays associated with negotiations or the formal appraisal process. It is believed that the lack of precedents and criteria involved in assessing the value of large amounts of public land and military retention land would provide professional appraisers with little more if anything to go on than is now available to the two delegations or members of the Joint LAND Committee. We suggest we at least give the matter a serious try before giving up and to this end invite the MPSC to suggest what they would consider to be a fair price for the entire amount of land involved.

7. Indicators

For the record it should be repeated that the available possible indicators outlined in the original U.S. presentation were not intended to represent those that should be finally determinative of ~~free~~ fair market value. Rather they were advanced to show the paucity and unreliability of normally available indicators. We would not suggest for example that the value of military retention land in Tinian leased to MDC is only $4 per acre - that is ten times the annual rental price per acre of $.40.

So far as private land is concerned we cannot concur in the use of prices other than those officially recorded. Any others are wholly unreliable and subject to wide variation. Even certain recorded prices may also require careful scrutiny to eliminate any obvious anomalies.

The U.S. is pleased that the Commission agrees it would be useful to include the full acquisition price in the status agreement. We also suggest that serious consideration be given to constructive uses to which this amount can be put bringing in a maximum return on investment. In the event the new government feels it is not yet capable of managing a portfolio of this dimension we can suggest the possibility of sound commercial management under contract with a large variety of trustworthy and experienced investment management firms.

Finally, the U.S. has considerable difficulty with the procedures suggested for professional appraisal in the event this should prove necessary or desirable. The Commission should be aware that there are carefully prescribed procedures laid down in federal regulations for such a process which the USG would be obliged to follow. These can be explained to the Commission

in the event a professional appraisal should be decided upon failing agreement between the two delegations.

8. Eminent Domain

We were pleased to note that in your comments on eminent domain you reaffirmed that you recognized the interest of the federal government in being able to exercise eminent domain in the Commonwealth. Nonetheless, it is obvious that difficulties remain, which involve the fashion in which these principles are to be implemented. As we understand your most recent statement on this matter, you want to have an opportunity to express your views concerning any proposed acquisition in the Marianas by a federal agency or entity before they take steps to acquire land for public purposes. We can certainly sympathize with this concern, and we are quite willing to enter into consultations with you on this subject. However, consistent with our instructions, we cannot and will not agree to terms or mechanisms which would serve to undercut the basic power of the U.S. Congress to authorize the exercise of federal eminent domain.

In this connection you suggest that the absence of agreement on whether the Commonwealth would have a non-voting delegate in the U.S. Congress would subject the Commonwealth to potential abuse of the power of eminent domain. We would prefer to deal with the issues separately and believe it should properly be referred to the Senior Legal Drafting Group to see if they can agree upon a mechanism which does not hinge upon the issue of a delegate.

You have suggested some safeguards, in addition to those available under federal statues, and have requested our reaction. Within the restraints of

our instructions we are quite willing to listen to your proposals on this issue, and we believe that the Senior Legal Drafting Group is the appropriate forum in which to discuss them. I can tell you now, however, that, regarding a guarantee of jury trial on just compensation, we are pleased that you have accepted our proposal that this safeguard be included in the agreement. Such a jury trial would, of course, be made available in accordance with the procedures contained in federal statutes concerning such matters.

Also you have further suggested that as a desirable procedural safeguard we consider expanding somewhat the scope of judicial review. We are most doubtful. It is difficult for us to conceive how an expansion of the scope of judicial review in this area would only be a procedural matter. In response to your December proposal we referred to the normal judicial practice in this area, which clearly - and purposefully - restricts judicial review and relegates most questions to the considered judgment of the executive agency. Perhaps it should be explained that such limited judicial review exists,in general, where the issue in question relates to decisions or actions of executive agencies on matters which are best resolved or determined by executive agencies. The logic behind this approach is simple. The courts simply are not capable, generally, of properly addressing and coming to reasoned conclusions on many matters which the executive agencies, with their expertise and resources, are best suited to handle. This concept is confirmed in Title 5 of the United States Code. The Administrative Procedure Act, found in Title 5, generally excludes from judicial review

matters committed to agency discretion. In our view, a departure from this practice would constitute a substantive issue.

You have suggested that we explore the possibility of inclusion in the Status Agreement of a formal U.S. statement that our foreseeable land needs for military purposes in the Marianas have been met in the Agreement and that there is no anticipation that the power of eminent domain will be used for such purposes.

The U.S. of course cannot give the latter form of assurance if its purpose or intent is to restrict the ability to use eminent domain for national defense purposes. On the other hand, the U.S. would be willing to see language in the agreement stating that the present requirements represent the limit of presently known U.S. military needs except for circumstances of national emergency.

Lastly, you have proposed that we explore further methods by which the Commonwealth Government can protect the interests of its citizens when the U.S. attempts to obtain land from them by negotiation. While we have some difficulty in concurring in your description of this proposed endeavor as one of "protecting" private citizens from the U.S. Government, we will be pleased to receive your views and proposals on this subject.

9. Land Alienation

We believe that we demonstrated in our original presentation the strong federal interest in limitations on the alienation of land to outsiders. This interest derives (a) from the circumstances that the original inhabitants of an area now joining the United States are particularly exposed to exploi-

tation by selfish outsiders and the pressures of a more advanced outside economy, and (b) from the costly attempt of the United States to raise the living standards of the area. Those efforts will be seriously undermined and lose their very purpose if a large portion of the local population becomes landless.

We are not familiar with the incident mentioned in your position paper (at p. 13) that Congress rejected in 1950 an effort to limit land alienation on Guam on the grounds that it was basically "un-American". Events on Guam have since established that any rejection was a mistake. In any event the 1950 Guam episode is not the last time Congress dealt with this issue. In the Hawaii Statehood Act of 1959 Congress took the opposite position by requiring that the Hawaii Homes Commission Act of 1920 be adopted as a provision of the Hawaiian Constitution subject to amendment only with the consent of the United States.

The United States has at present no particular ideas about the method of enforcing this obligation. We had assumed that the Commonwealth would faithfully carry out the commitments undertaken by it in the Status Agreement. We did not anticipate the need to pass federal legislation in this field. On the other hand, failure to carry out that obligation may be deemed to constitute a refusal of the Commonwealth to contribute its fair share to its own development and may be taken into consideration in determining the amount of U.S. assistance after the expiration of the first seven-year period. This would be particularly true if as the result of the failure to enact or to enforce such limitation on land alienation a large portion of the population

of the Northern Marianas had lost its land, and the average citizen of the Commonwealth consequently failed to benefit from the U.S. assistance while those aliens who acquired the land absorbed the benefits of U.S. assistance.

We are somewhat puzzled by the suggestion that our proposal involved an issue of self-government and that any provision of the status agreement which is not popular risks being evaded or sabotaged. The status agreement will necessarily contain some unpopular undertakings by the Commonwealth. But we assume their endorsement by the people in a plebiscite would constitute their affirmative vote in favor of such restrictive legislation.