

8/1/74
(NOMINAL)

M E M O R A N D U M

Subject: Summary of the Proposal to Organize a Non-profit Corporation to Receive the Public Lands of the Mariana Islands

The purpose of this memorandum is to summarize (i) the reasons we have recommended that a non-profit membership corporation be organized and designated as the entity to receive and administer the public lands of the Mariana Islands in trust for the people and (ii) the steps required to organize such a corporation in accordance with a suggested time schedule.

I. THE REASONS FOR RECOMMENDING THE ORGANIZATION OF A NON-PROFIT CORPORATION

In order to accomplish the transfer of public lands contemplated by the United States Policy Statement dated November 2, 1973, an individual or entity must be designated as the titleholder to the public lands that will be returned. We recommend that a non-profit membership corporation be established and designated for this purpose. The reasons for our recommendation are explained in this part of the memorandum.

The entity to be designated as titleholder to the public lands must meet three important criteria. First, it must be broadly representative of the people of the Marianas

and must take into account the interests of the municipalities. Second, the entity must be structured so as to hold and administer the lands in trust for the people of the Marianas, and not for its own benefit. Third, the entity must be so structured that it can utilize the best available management in order to maximize the benefits which will flow to the people of the Marianas from the return of the public land.

Various alternative titleholders are available; ^{*/}
e.g., the Mariana Islands District Legislature, a business corporation, a public corporation, a non-profit membership corporation, a common law trust, an express trust, or an association.

While it would be possible to designate the District Legislature as the titleholder to receive the public

^{*/} S. 296 as amended by the Committee on Judiciary and Governmental Operations of the Senate of Micronesia provides in Section 3(4) that the entities to receive the public lands can be "any chartered district government, non-profit corporation or individual." If legislation is enacted during the last week of the current Special Session of the Congress of Micronesia that preserves the restricted class of entities set forth in S. 296, the categories of entities that can be designated by any district would be limited by the terms of such legislation. If, however, legislation is not enacted, or is vetoed, the executive order that would authorize the transfers of public lands by the High Commissioner would not restrict the entities that could be employed.

lands, we do not believe that the District Legislature is the entity that most clearly would satisfy the criteria set forth above because its actions are subject to veto by the administrators of the Trust Territory. Indeed, until a constitution is approved by the people of the Mariana Islands providing for a government of, by and for the people, it seems inappropriate to transfer the public lands of the people to any existing governmental entity. Consequently, we concluded that a special legal entity designed exclusively to receive and administer the public lands in trust for the people should be created.

We believe that of all the types of legal entities which might be created for this purpose, the non-profit membership corporation is the most suitable. The corporate form assures certain advantages not embodied by a trust, common law or express, or by an association of individuals. The law governing corporations is more certain of application than that which has been developed for trusts and associations. Neither trusts nor associations possess those essential characteristics of the corporation that provide for continuity of interest and changes in management. The corporate form provides advantages in allowing such fundamental decisions as choice of management and determination of basic operating policy to be made in an orderly, flexible, established

manner by a large group of individuals who participate in decision making. Moreover, the limited liability of the corporate form permits qualified individuals to agree to serve as managers of a corporation without thereby exposing themselves to the risk of potentially serious personal liability in connection with corporate actions.

We have also considered whether or not the corporation should be a public corporation, a business corporation or a non-profit membership corporation. A public corporation is organized under governmental authority, operates under comprehensive governmental regulation and fulfills a public function that could be performed directly by government. The continued existence of a public corporation is dependent upon the will of the governmental body that created it. No particular advantages would be derived from a decision to create a public corporation ultimately controlled by the United States as the vehicle for land management and development. Until such time as the executive of the Mariana Islands is elected in a representative manner pursuant to a constitution promulgated by the people, it would seem unwise to administer and develop the lands through a public corporation.

Although the business and activities to be carried out by the corporation could be conducted by an ordinary stock corporation, we do not recommend that the administration and

management of the public lands and revenues derived therefrom be delegated to an ordinary business corporation. The business corporation's key characteristic is private ownership and private profit. Although stock in such a business corporation could be issued to all Marianans, sale or other transfer of the stock would have to be prohibited -- at least for many years -- in order to prevent outside speculators from gaining control of the public lands. In any case, moreover, such a decision would result in the profits of the corporation accruing exclusively to the present generation of citizens, rather than preserving the lands and revenues generated by the lands for all citizens, now and in the future.

We have recommended that a non-profit corporation be selected because we have concluded that a non-profit corporation is the legal entity that comes the closest to meeting the three criteria set forth above. Non-profit corporations have members rather than stockholders, and the members do not own the assets of the corporation but rather act to authorize transactions consistent with the corporate purposes. We are further recommending that the membership of the corporation include the members of the Mariana Islands District Legislature and the mayors and members of the municipal councils of the Mariana Islands. This will assure representation of the people of the Marianas in the management of the affairs of the corporation.

In the United States non-profit membership corporations have evolved as a major vehicle through which concerned citizens can band together in order to work for social, economic, philanthropic and other causes designed to benefit the common good of all citizens. Non-profit membership corporations are often used in the United States to protect the public's interest in land, in the "new towns" and in "homeowners' associations" controlling parks, recreational and other such facilities within a neighborhood.

II. STEPS REQUIRED TO ORGANIZE THE CORPORATION

We recommend that a non-profit corporation be organized under the provisions of Title 37 of the Trust Territory Code as a corporation of the Trust Territory of the Pacific Islands. When separate administration is ordered, the corporation would, by operation of such order, become a corporation of the Mariana Islands.

Section 3 of Title 37 governs the organization of the corporation. It requires that two or more individuals be designated as incorporators and that incorporators file

on behalf of the corporation an application requesting the grant of a charter, pursuant to Section 1 of Title 37, from the High Commissioner. The application would consist of the proposed Articles of Incorporation and proposed By-laws.

Corporate existence would commence on the date the High Commissioner granted the Charter of Incorporation. Thereafter the proposed Articles (see Exhibit A, Section 5.03) require the incorporators to call the first meeting of members. At that meeting, the members are required to take all actions necessary to complete the organization of the corporation. The members would adopt the By-laws, elect the first Board of Directors, and elect, or delegate to the Board of Directors the right to elect, officers. In addition, the members would be required by Article VIII of the proposed Articles to adopt the first guidelines that will govern all actions by the agents of the corporation in connection with the development of the public lands.^{*/} At the first meeting, the members would also receive reports and recommendations by economic consultants with respect to the initial activities and funding of the corporation.

*/ Incorporators traditionally assist at the first meeting by recommending by-laws and candidates for directors and officers; in this instance it would also be necessary for the incorporators to recommend adoption of such guidelines.

It will be necessary for the District Legislature to enact a law or to pass a resolution that permits the corporation to negotiate on behalf of the people the return of the public lands. After such act or resolution has been promulgated, the corporation would be in the position to enter into negotiations, to secure funding for its initial operations and to plan the program for land development.

Attached to this memorandum are the following exhibits containing documents related to the organization of the corporation:

Exhibit A is a draft dated July 31, 1974, of Articles of Incorporation.

Exhibit B is a memorandum analyzing the Articles of Incorporation and setting forth policy considerations that require resolution by the Commission prior to adoption of the Articles of Incorporation.

Exhibit C is a draft of legislation which could be introduced during the August session of the Mariana Islands District Legislature. This legislation (i) responds to the United States Policy Statement dated November 2, 1973, by requesting the transfer of the public lands from the Trust Territory of the Pacific Islands to the corporation in trust for the people of the Mariana Islands and (ii) authorizes

the President of the District Legislature, the Chairman of the Marianas Political Status Commission and three others to take the steps necessary to organize the corporation and to receive the public lands.

III. TIME SCHEDULE

The following is a tentative proposed time schedule for the actions required in connection with organization of the corporation:

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| By August 30, 1974 | The District Legislature to adopt the implementing legislation required to authorize the organization of the corporation and, hopefully, to designate the corporation to negotiate the return of lands. |
| By September 30, 1974 | The final Articles of Incorporation and By-laws to be agreed upon. |
| By October 15, 1974 | The incorporators to file the application for charter with the Registrar of Corporations. |
| By October 30, 1974 | The incorporators to agree upon the guidelines they will propose to the members and to prepare the notice and agenda for the first meeting of members. |
| By _____, 1974 | 1) The High Commissioner to grant the charter;

2) Notice, agenda and background material to be mailed |

to persons eligible to be members, together with declarations to elect membership.

By _____, 1974

Declarations of intent to become members to be received by the incorporators.

By December 31, 1974

1) The organizational meeting of members to be held.

2) The corporation immediately after the organizational meeting to enter into negotiations with the United States Government.