

M E M O R A N D U M

Subject: Proposed Articles of Incorporation

The Articles of Incorporation contain detailed provisions dealing with powers and purposes, election of directors and selection of members, restrictions on corporate actions and various matters related to basic changes in corporate form. We recommend that detailed Articles be adopted by the incorporators because of the legal uncertainties that might otherwise exist under the law of the Trust Territory (Title 37).

In order to help resolve the uncertainties that may exist under Title 37 of the Trust Territory Code, we have prepared and submitted to the Registrar of Corporations for his consideration detailed regulations that would govern operations of non-profit corporations. There cannot be any assurance that such regulations will issue prior to the date on which the incorporators would decide to file the application for the charter. Accordingly, the matters covered by such regulations that would be essential to the organization and the operation of the Marianas Public Land Corporation (the "Corporation") have been covered in detail in the proposed Articles.^{*/}

*/ The Corporation would have the option of electing to be bound by the regulations if the draft submitted to the Registrar is promulgated. Unless the Corporation so elects, it would be governed by its Articles of Incorporation and its By-laws.

The following is an outline of the contents of the Articles of Incorporation:

Article I	Name
Article II	Term of existence
Article III	Offices and registered agent
Article IV	Corporate purposes, powers and limitations on powers
Article V	Matters connected to the organization of the Corporation
Article VI	Provisions dealing with the members
Article VII	Provisions dealing with the election of directors, designation of committees and responsibilities of officers.
Article VIII	Limitations on actions of the Corporation
Article IX	Prohibited transactions
Article X	Amendment of the Articles of Incorporation
Article XI	Corporate changes including mergers, consolidations, and transfers of assets
Article XII	Description of By-laws

I. Summary of the Articles

Article I--The Commission should be asked to select the name of the Corporation. For the purposes of the draft documents, we have used the name set forth in Article I.

Article II--The Article provides for perpetual duration.

Article III--The business corporation regulations require that a corporation designate its principal office, its registered office and its registered agent for service of process.

Article IV--Section 4.01 sets forth the purposes of the Corporation. The purposes enumerated in the draft have been taken from the provisions of the Administration land transfer bill submitted during the February session of the Congress of Micronesia. This section will require revision if more restrictive legislation is enacted by the Congress of Micronesia and may require revision if limits on the purposes of the Corporation are imposed by the chartered district legislature. Section 4.02 is derived from the provisions of the Model Act. Section 4.03 imposes restrictions upon the Corporation in dealing with members, directors and officers.

Article V--Section 5.01 will require completion. Section 5.02 provides for the management of the Corporation prior to the first meeting of members. Section 5.03 requires that the first meeting of members be called and specifies the manner in which individuals eligible for membership shall become members.

Article VI--Section 6.01 designates the individuals eligible to become members. Section 6.02 through 6.04 set forth various procedures with respect to electing membership and surrendering membership. Section 6.05 sets forth provisions authorizing the removal of members. Section 6.06 relegates to the by-laws the designation of the place, time and conduct of meetings of members. Section 6.07 provides one vote per member. Section 6.08 requires a quorum of two thirds for a meeting of members. Section 6.09 binds the members to the provisions of the Articles and By-laws.

Article VII--Sections 7.01-7.05 lodge the management of the affairs of the Corporation in a board of directors of at least eleven members; provide for an election of directors that will insure island representation on the board of directors; create terms for directors that will be staggered so that there will be continuity in the management of the affairs of the Corporation; and specify the methods of electing directors to fill vacancies and removing directors. Directors need not be citizens of the Mariana Islands nor members of the Corporation but must be residents of the Mariana Islands. The provisions have been drafted to preserve the concept of island representation so that each major island shall have at least two representatives serving as directors at all times. Section 7.06 designates the quorum for meetings of the board

as a majority. Section 7.07 would permit, but not require, the board of directors to constitute committees consisting of at least two directors and to delegate to such committees the powers of the board except with reference to the matters set forth in the section. This section also permits the appointment of advisory committees which would not have any powers of the board but could serve to provide expert assistance to the board. Members of advisory committees need not be members, officers or directors of the Corporation. Section 7.08 permits the by-laws to designate the place and time for meetings and the manner of giving notice of meetings of directors. Section 7.09 designates the officers of the Corporation.

Article VIII--Section 8.01 contains a recognition by the Corporation of its obligation to deal with the lands that it will receive as a trust to be administered for the benefit of the people. Section 8.02 states the awareness of the Corporation that eventually its function may be assumed by a government organized pursuant to a constitution. Section 8.03 implements the two prior sections by requiring that the members at their first meeting adopt specific guidelines (designated as "Trust Policy Guidelines") at the first meeting, and that prior to their adoption, such Guidelines

be published for popular comment. The Guidelines can be amended at any time by the affirmative vote of 75% of the members and such vote is also required to adopt the initial Guidelines. Ten percent of the members can request amendment of the Guidelines. Section 8.04 sets forth restrictions on the Corporation as to permissible land transactions. Under its provisions fee title may be transferred by the Corporation only (i) to a governmental unit or agency for public purposes or (ii) to persons eligible to own land under general land development programs approved in accordance with the terms of the Articles. Section 8.04 prohibits the Corporation from entering into leases in perpetuity. It implements the United States Policy Statement by authorizing the lease of lands described therein to the United States Government. Section 8.05 requires the Corporation to collect all revenues derived from the lands, to pay all its expenses and to have the results of its operations audited. The annual financial statements of the Corporation are required to be published in a paper of general circulation. Section 8.06 permits the board of directors to determine whether or not any net income from the Corporation is available to be distributed for public purposes. Section 8.07 requires the members to determine whether or not any distribution shall be made. It recognizes that the chartered district legislature has

the power to designate the order of application of such distributable income but provides that the members may specify the order of allocation if the chartered district legislature has not acted.

Article IX--Article IX provides the basis for setting forth in the Trust Policy Guidelines provisions that would prohibit actions which the members believe to be inconsistent with the duties of members, directors and officers.

Article X-- Article X specifies the manner of amending the Articles of Incorporation. Amendment of the Articles would require the recommendation of two thirds of the directors and the approval of at least three fourths of the members present at a duly constituted meeting. The filing provisions are similar to those required for business corporations.

Article XI--Section 11.01 generally prohibits transfers of assets of the Corporation. Section 11.02 constitutes a general exception to the prohibition which requires the Corporation to transfer its assets in accordance with the provisions of any valid law enacted by any constitutional government of the people. In the event of such transfer, the Corporation is required to reserve sufficient funds to satisfy its obligations. Section 11.03 would permit merger or consolidation of the Corporation or the disposition of assets of the Corporation if approved in the manner specified in the following Section 11.04. Among the

substantive restrictions on any such transaction is a requirement that the chartered district legislature not object to the plan. Section 11.05 designates the High Court as the judicial body with exclusive jurisdiction over dissolution proceedings.

Article XII--Section 12.01 specifies the manner of amending the by-laws of the Corporation. Section 12.02 embodies the requirements of Title 37 with respect to examination the books and records of non-profit corporations.

II. Policy Matters To Be Discussed

The Articles of Incorporation embody preliminary decisions on various policy matters. The incorporators should discuss such policy matters and determine whether or not they agree with the resolution of such matters suggested by the draft Articles.

The following policy questions are hereby called to the attention of the members of the Marianas Political Status Commission and the proposed incorporators of the Corporation:

- (1) The designation of the individuals who are eligible to be members of the Corporation;
- (2) The need to insure island representation on the Board of Directors;

(3) The concept of staggering the election of directors so that continuity of management is insured;

(4) Delegation of Board duties to committees of the Board;

(5) The quorum requirements for meetings of members and directors and the voting requirements for basic corporate decisions;

(6) The restrictions imposed by the Articles of Incorporation on transactions affecting the public lands; and

(7) The trustee-like duties imposed on members, directors and officers.

Members of the Corporation--Section 6.01 designates persons eligible to be members. It provides that all members of the district legislature, mayors of the three municipalities and members of the municipal councils shall have the right to be members. In addition it permits the district legislature to designate individuals who are not publicly elected officials to serve as members. We recommend that such individuals be eligible for membership to insure that the corporation will be able to have members who have particular expertise in economic and social matters related to the land development functions of the Corporation. In addition, such individual memberships can be used, if the district legislature so elects, to provide representation in the membership of the Corporation

for any nongovernmental organizations functioning in the Mariana Islands.

The proposed Articles require that any individual eligible to be a member file a written declaration of his intent to be bound to his duties as a member. We recommend that this provision be retained by the Corporation to permit any eligible member who does not feel that he has the time or desire to participate in the work of the Corporation to refuse membership.

The provisions dealing with membership provide that a member may be removed whenever he is not acting in the best interests of the Corporation by the other members.

Island Representation--During our December 1973 meetings, various members of the Commission stressed the importance of providing for the participation of individuals representing the specific interests of the islands other than Saipan. In order to insure island representation, the draft Articles require that a majority (i.e., six out of eleven) of the Board of Directors be elected on an island representation basis. Specifically, the first six directors to be elected will be two directors from Saipan or the northern islands, two directors from Rota and two directors from Tinian. The provisions of the Articles dealing with the selection of six directors in each even-numbered year and five directors in each odd-numbered year and the filling of vacancies that could occur preserve the concept of island representation.

We have not suggested that the voting requirements on various matters be approved on a basis that would permit representatives of a particular island to block corporate action because we believe that such a provision could seriously disable the Corporation. It seems more appropriate, and in the best democratic tradition, to insure that the representation of special needs of the islands is made through having a voice and vote, but not a veto, on all corporate matters.

Staggered Election of Directors--Almost all the United States corporate laws, permit the division of directors into classes, and the election of less than the total number of directors at any given meeting. We recommend that the Corporation adopt such staggered terms for its Board of Directors because we believe that the corporate proceedings will be benefited by the experience of those members who have served in a prior year. This seems particularly important for this corporation where continuity of management will be critical to a sound development of the public lands.

Should the incorporators determine that the directors should all be elected equally, the provisions of the Articles can be greatly simplified. In addition, it would no longer be necessary to have two directors elected for the purpose of island representation. That number could be, if the incorporators desire, reduced to one for each island.

Board Committees--Section 7.07 of the proposed Articles provides for the creation of two different types of committees. Section 7.07(a) permits the directors to designate major responsibilities of the Board of Directors to committees composed of at least two directors. Section 7.07(b) permits the creation of advisory committees, which would not have or exercise the powers of the Board but could be employed by the Board to provide expert assistance in the management of the public lands. Members of advisory committees need not be members, officers or directors of the Corporation or citizens of the Trust Territory.

We recommend that Section 7.07 be a part of the Articles of Incorporation. Even if the members or directors determine that committees should not be used in the work of the Corporation in the initial phases, the provisions could be useful in the future.

Quorum Requirements--The Articles specify that the quorum for a meeting of members is two thirds, and the quorum for a meeting of directors is a majority. The Articles require the approval of two thirds of the members voting on various important matters and require a vote of 75% of the members on matters dealing with policy affecting the public lands. The incorporators should determine whether or not these quorum and voting requirements are appropriate.

Restrictions on Land Transactions--Article VIII sets forth the specific provisions dealing with the Corporation's principal function -- administration and development of the public lands for the benefit of the people.

Section 8.01 imposes upon the members, directors and officers of the Corporation the duty to avoid conflicts of interest or self-dealing and requires them to fulfill their respective functions with the same degree of care and skill that a prudent man would employ in the management of his own property. These duties will be clarified by the inclusion within guidelines to be adopted by the members of a series of prohibited transactions.

Section 8.03 requires that guidelines be adopted by the members at the first meeting of members. The guidelines are required to contain limitations on land dispositions, the procedures to be followed in connection with land transactions and a list of prohibited transactions.

Section 8.04 imposes basic restrictions on land transactions. It prohibits the Corporation from transferring a fee interest in land except to a governmental unit or agency for a public purpose and except under general development programs approved by the members. It further prohibits the Corporation from entering into the equivalent of a

transfer of fee interest through a device such as a lease that is renewable in perpetuity. The incorporators must consider whether the restrictions should be more severe or whether these provisions are unduly limiting.

Section 8.05 requires the Corporation to appoint independent accountants and to publish its annual financial statements. The Corporation could adopt provisions, similar to those required of national banking institutions, that would require such accountants to perform at least one surprise audit during any fiscal period. Such provisions have not been suggested at this time principally because of the cost to the Corporation in accounting expenses.

Sections 8.06 and 8.07 contain the provisions setting forth the manner of determining whether the Corporation has income available to be distributed for programs to benefit the people. Section 8.07 recognizes that the district legislature would have the power to designate the purposes or programs to benefit from such distributable income. If the incorporators believe that the district legislation will not insist upon such power, the incorporators should consider whether or not they wish to be bound by laws enacted by the district legislature in connection with distributing income.

Strict Duties of Members, Directors and Officers--

Section 8.01 and Article IX of the Articles of Incorporation create for the members, directors, and officers duties which resemble those of a fiduciary and are more strict than those normally imposed upon members, directors and officers of Corporation. Section 9.01 requires that the guidelines to be adopted specify the transactions that are prohibited between the Corporation and any member, director or officer. Section 9.02 authorizes the by-laws to specify procedures to remove a member, director or officer, after a hearing on the merits, for a breach of any duty to the Corporation. Finally, Section 9.03 removes the cloak of corporate limited liability from any member, officer, or director who has been found by a court of competent jurisdiction to have willfully breached the duty of loyalty.

In the initial draft of the proposed Articles, we have embodied the strictest possible provisions designed to discourage conflicts of interest. We strongly recommend that the incorporators carefully consider whether or not the sanctions that have been provided are too onerous.