

January 23, 1974

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Memorandum to HPW, JFL, MSH, and EOH re Marianas Land Corporation

Attached is a draft memorandum outlining my proposed resolution of the most important policy questions arising in connection with the proposed corporation. In each case, I have made a recommendation which either reflects my understanding of previous decisions or is intended as a starting point for discussions.

I believe it would be very helpful if, before Jay leaves, we could meet for the purpose of reaching a consensus among ourselves as to the preferred resolution of each of the questions discussed. In any case, we will require agreement in order to complete the drafting of articles.

I anticipate that an expanded and updated version of the attached memorandum will be prepared to help in explaining the major features of the corporation to the Commission, legislators and others.



DRAFT
January 23, 1974

MEMORANDUM ON THE ORGANIZATION OF THE MARIANAS LAND
CORPORATION

1. Manner of Chartering.

OK (It is recommended that the Corporation be chartered under the existing corporate laws of the Trust Territory. As pointed out in "A Proposal For A Private Corporation To Receive And Administer The Public Lands of the Marianas Islands," November 19, 1973 (the "Proposal"), this approach sacrifices some clarity as to corporate law which would be highly desirable.

Since the Proposal was drafted, however, we have had an opportunity to review the regulations adopted by the Registrar of Corporations, with the approval of the Attorney General and the High Commissioner, under 37 T.T.C. § 52. While these regulations provide substantial additional clarity for business corporations, credit unions and cooperatives, no regulations have been adopted for non-profit corporations. We are presently drafting proposed regulations for non-profits, patterned on the ABA Model Nonprofit Corporation Act. (The Registrar's regulations for profit-making corporations are apparently derived from the ABA Model Business Corporation Act.)

Although it may be impossible for such regulations to be adopted in the time proposed for organization of the corporation, we recommend working with the Registrar

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of Corporations in attempting to secure regulations which would be consistent with the organization and operation of the corporation as proposed. In the absence of any such regulations, the shortcomings described in the Proposal would continue to be a potential source of difficulty for the corporation; even if regulations were adopted, they would be subject to repeal or amendment by the Registrar.

An alternative to incorporating under the laws of the Trust Territory is to have the corporation chartered directly by the district legislature. This has certain psychological advantages in insulating the corporation from actions by the Congress of Micronesia. However, the corporation would still be regulated by the Congress of Micronesia in matters such as examination of books, investigations and actions in violation of law. Moreover, the Congress of Micronesia could pass legislation applying to corporations chartered by the district legislature. Thus the ultimate protection of the corporation from the Congress of Micronesia appears in any case to depend upon the due process and contract clauses, as outlined in the Proposal.

There is, moreover, an additional reason favoring organization under the laws of the Trust Territory rather than direct chartering. It now appears settled that the membership of the corporation will not be identical to the membership of the district legislature, in order to recognize certain other political interests (see 2. below). If

the corporation is chartered directly by the district legislature, it might be possible for the legislature to circumvent the present policy decision regarding membership by amending the corporation's charter. Although safeguards could be constructed against such action, it appears unwise to vest the chartering authority in a body whose members will have such substantial personal interest in the internal structure of the corporation. Of course, the new government to be created when the Marianas attain a new political status will have such powers in any case; but that government will itself be structured, following a constitutional convention, to reflect the overall political realities of the Marianas.

For these reasons, we recommend chartering the corporation under the laws of the Trust Territory and working with the Registrar of Corporations to obtain regulations governing non-profits. If such regulations have not been issued at the time the land transfer agreement is entered into, we recommend the corporation seek to commit the Trust Territory government at that time to their issuance.

2. Membership and Directors.

We understand that there is objection to organizing the corporation with all of the people of the Marianas as members, because of the cost and other practical difficulties entailed. We also understand there is objection

to the members of the district legislature becoming the entire membership of the corporation, on the ground that this membership would not adequately reflect the interests of Rota and Tinian and the interests of the municipal governments of the Marianas generally.

Accordingly, we recommend that membership in the corporation be available to all citizens of the Marianas holding any of a number of specifically designated elected public offices in the Marianas: district legislators, members of municipal councils, mayors and perhaps others. The specific offices whose incumbents would be entitled to membership would be designated in the Articles of Incorporation; a citizen holding any such office would become a member simply by filing a written declaration with the corporation of his agreement to become a member.

In order to accommodate the varying interests in the activities of the corporation, we recommend that the Board of Directors be composed of ~~12~~¹¹ Directors, as follows:

(a) ~~Six~~^{Five} Directors elected by those members of the corporation who are members of the district legislature;

(b) Two Directors elected by those members of the corporation who are elected municipal officials of the island of Tinian;

(c) Two Directors elected by those members of the corporation who are elected municipal officials of the island of Rota or the northern islands; and

(d) Two Directors elected by those members of the corporation who are elected municipal officials of the island of Saipan.

In this way, the interest of municipal governments are given equal weight with the interests of district government. Moreover, the islands of Rota and Tinian are given representation in excess of that to which they would be entitled on a strict population basis. No change could be made in the composition or election of the Board without an amendment of the Articles.

In order to preserve continuity on the Board of Directors, we recommend that half of the Directors elected by each of the groups of members outlined above be elected at the time of each annual meeting. Half of the Directors elected upon the organization of the corporation would serve only until the first annual meeting, and the other half until the second annual meeting. All directors elected thereafter would serve two-year terms.

We recommend that the members within any of the groups outlined above be allowed to vote cumulatively. In this way, the district legislators from Saipan would be precluded from selecting all six of the district legislature Directors against the will of legislators from Rota

and Tinian. (Assuming Saipan elected 80% of the district legislature, commensurate with its share of the population, it could elect 5 district legislature Directors and 2 Saipan municipal Directors on the 12-person Board.)

We also recommend that any person -- whether or not a member of the corporation, and whether or not a resident or citizen of the Marianas -- be eligible for election as a Director. The members may find it desirable to elect one or more Directors with specific skills in business, finance, planning or other fields, and we do not believe the search for appropriate Directors should be unnecessarily restricted.

3. Process of Organization.

We believe the Marianas Political Status Commission should take the responsibility for resolving the policy questions associated with the formation of the corporation and supervising the organizational process. In performing this function, we assume the Commission will want to consult on the broadest possible basis with representatives of municipal government on each island, the business community and other interested groups. In the course of these consultations, we recommend that the Commission identify a representative group of six to twelve people of the kind whom the Commission considers would be appropriate members of the Board and ask these individuals to serve as incorporators of the corporation.

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When a consensus has been reached as to the Articles (i.e., structure, powers and restrictions) of the corporation and the significant features of the legislation to be enacted by the district legislature designating the corporation to receive the public lands, the incorporators would file the Articles and obtain a corporate charter. As soon thereafter as possible, the District Legislature would pass the legislation required to designate the corporation and implement in other necessary respects the United States Policy Statement.

The Articles of Incorporation would require an initial meeting of the membership to elect Directors within 30 days following incorporation.

4. Land Transfer Agreement.

Because it may be difficult to secure commercial financing for the corporation before the Trust Territory government has entered into an agreement to convey the land to the corporation, it is important to seek such an agreement at the earliest possible date.

The land transfer agreement would bind the corporation to the various recommendations and safeguards spelled out in the Policy Statement. In addition to the corporation, the High Commissioner and the Attorney General (as alien property custodian), we recommend that the United States be made a party to the agreement. This is of interest

both to the United States, which seeks assurances from the corporation respecting the future sale or lease of military land, and to the corporation itself, which would seek a pledge from the United States as well as the High Commissioner as to the protection of the corporation's contemplated rights, powers and independence.

The land transfer agreement might be executed at the same time as the deed itself, or might call for a closing upon the completion of specific tasks, depending upon circumstances at the time.

5. Articles of Incorporation.

In the case of a corporation organized under a modern detailed corporate law, such as the Model Nonprofit Corporation Act, the statute itself contains many of the provisions governing the corporation. Since the Marianas land corporation is to be incorporated under the present law of the Trust Territory, its Articles will, of necessity, be substantially more detailed. Substantial sections of the Model Nonprofit Corporation Act (for example, the section on general powers) will be written directly into the Articles, with such alterations as may be required under the particular circumstances. Of course, it must be recognized that any subsequent corporate law of the Trust Territory not in violation of due process or other rights, including regulations adopted by the Registrar of Corporations, may take precedence over the Articles.

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We recommend that amendments to the Articles of Incorporation be permitted only if proposed by a majority vote of the Directors and adopted by a vote of at least two-thirds of the members voting at an annual or special meeting. (All meetings of members and Directors would require adequate notice.) In addition, we recommend that amendments to the Articles be allowed only after approval by the district legislature, since the legislature will be designating the corporation to receive the public land on the basis of its original Articles. As a practical matter, it is unlikely in any case that an amendment opposed by the legislature could gain the support of a majority of the Directors and two-thirds of the members.

6. Restrictions on Administration of the Land.

The Articles of Incorporation would explicitly impose the specific limitations and safeguards spelled out in the Policy Statement. In addition, we recommend that the Articles of Incorporation contain provisions guaranteeing that the people of the Marianas will be informed in advance and given an opportunity to be heard before any sale, lease or other disposition of land by the corporation.

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Under the provisions we suggest, the officers of the corporation could negotiate in private with respect to proposed sales or leases. However, the corporation would be prohibited from entering into any sale or lease not approved by a majority of the Directors, following an open hearing on the terms and conditions of the proposed transaction at which the people of the Marianas would have an opportunity to express their views. As an alternative, specific administrative restrictions could be imposed, such as a flat prohibition against land sales or leases in excess of, say, 10 years. In our view, however, the best way to protect legitimate public interests of this sort -- while preserving the flexibility necessary to effective operation of the corporation -- is through adequate public disclosure.

In addition to these provisions, the district legislature will have certain continuing authority over the corporation's lands. The Policy Statement indicates that "recipients [i.e., the corporation] must agree to hold the public land in trust for the people of that district to be disposed of under terms determined by the district legislature" The recent draft of the proposed enabling legislation to be enacted by the Congress of Micronesia provides that the district legislature may "establish procedures for the exercise of" the "powers and duties" of the entities receiving public land in trust

(Section 4(1)). (We suggested amending this to "reasonable procedures of general applicability.") Finally, under present law, the district government is "primarily responsible" for "land law" (3 T.T.C. § 2(2)).

We cannot mark the precise limits of the legislature's powers under these provisions, nor can we predict the likelihood it will seek to exercise them. We believe that any restrictions considered essential may be included in the Articles of Incorporation, and we recommend that course be followed in preference to legislative controls over the administration of the land. In addition, to limit potential liability, we recommend that the district legislation designating the corporation include as precise a definition as possible of the meaning of holding the land "in trust for the people," although the legislature could of course amend any such definition at a later time.

Finally, we recommend that the corporation be authorized to sell or lease land to municipal entities for such consideration (which need not include cash) as the Board may consider appropriate in light of the public purposes for which the land is to be used.

7. Disposition of Excess Revenues.

It is hoped that the corporation will generate operating revenues exceeding its expenses. We recommend that the Articles of Incorporation permit the Board of Directors -- with the approval of a majority of the members -- substantial flexibility to loan or grant such funds for the social

or economic development of the people of the Marianas, following a public hearing upon appropriate notice of any proposed disposition. In

addition, the Articles would prohibit dividends or distribution of income or profits to the members, directors or officers.

Again, it should be recognized that the district legislature may be free to exercise certain controls over the revenue of the corporation. The recent draft of the proposed enabling legislation provided that "all revenues derived from such land . . . to be used and disposed of pursuant to district law." (Section 7(5).) We recommended deletion of this provision. We do not believe the district legislature should be free to make the business determination of what funds are not necessary for purposes related to the land, nor do we believe the district legislature should allocate or direct specific expenditures even after the corporation has identified certain amounts as excess.

As an alternative, the corporation could be required to accumulate such revenues for the future post-Trusteeship government, or it could be required to devote such amounts to specific functions, such as land development. However, we believe the revenues thus derived are basically public in nature, and should thus be available to meet the most pressing economic or social demands of the Marianas.

8. Internal Controls.

In addition to the controls imposed on corporations by the general provisions of the Trust Territory.

Code, we recommend that the Articles of Incorporation contain certain additional specific requirements.

We believe the Articles should require the publication of a quarterly report to the people summarizing and explaining the activities of the corporation. The Board of Directors should be required to meet at least quarterly, and it would be contemplated that the reports would be a product of the quarterly meetings. We recommend that each quarterly report be required to include financial statements, and that the corporation be required to publish an annual report including financial statements audited by a certified public accountant.

9. Transfer of Assets.

It is necessary to provide for the transfer of the assets of the corporation to a post-Trusteeship government. We recommend that the Articles require the corporation to transfer any or all of its assets in accordance with any valid law enacted by a government of the Marianas Island organized under a constitution approved by the people of the Marianas Islands, provided that such law makes adequate provision for the satisfaction of the lawful obligations of the corporation.

We recommend that no other sale, lease, exchange, mortgage or other disposition of substantially all of the

assets of the corporation, and no merger or voluntary dissolution of the corporation, be permitted unless recommended by a majority of the Directors and approved by two-thirds of the members voting at a meeting of members. In addition, we believe that the Articles should require the consent of the district legislature to any such transaction, with the exception of a mortgage of assets required to secure working capital financing. (It is possible, although we do not recommend, that the Articles could impose a dollar limit on the amount of working capital financing that could be secured without the consent of the legislature.)

We contemplate that the regulations to be adopted by the Registrar of Corporations would provide for involuntary, court-supervised dissolution in certain extreme cases such as massive illegality or irreconcilable internal deadlock. The Articles should contain provisions (as in the case of United States' tax-exempt corporations) attempting to insure that the assets would continue to be held for the benefit of all the people of the Marianas Islands.

10. Administrative Flexibility.

Recognizing the problems in transportation and communications, we recommend the Articles contain certain provisions designed to reduce cost and make administration

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less cumbersome. Members and Directors should be permitted to vote by proxy, although we believe that a quorum of 50 percent should be required for any meeting of the membership of Board. In addition, we recommend that the Articles authorize the corporation to adopt a bylaw establishing an executive committee of six members of the Board. This committee would consist of one-half the Directors of each class discussed above. We believe it would be appropriate for the corporation to select as its executive committee those Directors who could most easily attend Board meetings, travel to hearings on various islands and otherwise devote themselves to the corporation's business. The executive committee would have the full range of powers of the Board.

11. Bylaws.

The corporation would have bylaws which would be adopted -- and could be amended from time to time -- by a majority of the Board with the concurrence of a majority of the members. We recommend that the initial bylaws be adopted at the organizational meeting of members. The bylaws would deal with matters of a routine or housekeeping nature, of insufficient importance -- or excessive detail -- for inclusion in the Articles of Incorporation. In particular, we believe the bylaws should include detailed conflict-of-interest provisions.

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12. Name.

We recommend the corporation be called Marianas Land Corporation. Other suggestions which have been voiced include Marianas Public Land Corporation and Marianas Development Corporation; however, we are fearful that these names may be misleading as to the intended nature or operation of the corporation.