BRIEFING PAPER NO. 11

NATURAL RESOURCES

TABLE OF CONTENTS

NATURAL RESOURCES

This briefing paper discusses issues that the Convention may consider concerning natural resources and the environment. The problems inherent in protecting and using these resources differ in some respects, but have some material similarity with respect to the public policy decisions to be made by the delegates. Part I of this paper discusses the applicable provisions of the Covenant, the current protection of the natural resources of the Northern Mariana Islands, and general policy considerations regarding protection of land, water and air resources. Part II explores specific alternatives with respect to public lands, private lands, marine resources, and air and water quality.

I. BACKGROUND AND GENERAL CONSIDERATIONS

A. Applicable Provisions of the Covenant

The Covenant deals extensively with public and private land resources,[1/] and reflects some broad policy objectives for the utilization of Northern Marianas real property. These objectives restrict the scope of alternatives available to the Convention and limit the amount of land to which the Northern Marianas people and government will have access. As to other natural resources, the

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1/ COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS art. VIII, §§ 801-06 [hereinafter cited as COVENANT].

Covenant is silent. This affords the Convention the widest possible latitude in devising constitutional protection for air and water resources.

Section 801 of the Covenant provides that all right, title and interest in real property that the Trust Territory government held on February 15, 1975, or thereafter acquired will be transferred to the Northern Mariana Islands government. This transfer must take place no later than the termination of the Trusteeship Agreement.

Section 802(a) specifies certain real property that will be leased to the United States: approximately 17,799 acres on Tinian Island, together with the adjacent waters;[2/] approximately 177 acres at Tanapag Harbor on Saipan Island; and the entirety of Farallon de Medinilla Island, consisting of 206 acres, with the adjacent waters.[3/] Pursuant to section 803, the leasehold interests of the United States will extend for a term of 50 years; the United States has the option to renew its lease on all or

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2/ Tinian has a total of 26,146 acres.

3/ In § 802(b), the United States asserted that, as of February 15, 1975, it did not have the intention to acquire, or the need for, any interest in land greater than the leaseholds conferred by § 803 or any property additional to that described in § 802(a).

some of the land for another 50 years.[4/] The United States is required to pay the rental fees for those lands within the five-year period following the approval of the Constitution.[5/] If the United States fails to make this payment, the rented lands will revert to the Northern Marianas government.[6/] If the United States should cease to need the leased property on Tinian, the Northern Marianas government will have the first opportunity to acquire the interest of the government of the United States in such property in accordance with United States law.[7/]

4/ In return for the first 50-year term, and also for the second term should it exercise its option, the United States will pay the Northern Mariana Islands government a total of $19,520,600. This amount will be adjusted to reflect the rate of inflation as indicated by the composite price index of the U.S. Department of Commerce.

Two million dollars of the rental payments must be placed in a trust fund, with the income from the fund devoted to the development and maintenance of a public park at Tanapag Harbor. COVENANT art. VIII, § 803(d) and TECHNICAL AGREEMENT REGARDING USE OF LAND TO BE LEASED BY THE UNITED STATES IN THE NORTHERN MARIANA ISLANDS pt. I, ¶ 5.B [hereinafter cited as TECHNICAL AGREEMENT].

5/ The Technical Agreement pt. I, ¶ 2, provides that the United States will make payment within five years of the date on which §§ 802 and 803 of the Covenant are effective. Section 1003(b) of the Covenant specifies that those sections will take effect within 180 days of the approval of the Covenant and the Constitution.

6/ TECHNICAL AGREEMENT pt. I, ¶ 2.

7/ TECHNICAL AGREEMENT pt. I, ¶ 4.

Subsections (d) and (e) of section 803 require the United States to lease back to the Northern Mariana Islands government for one dollar per acre per year approximately 6458 acres on Tinian Island and approximately 44 acres at Tanapag Harbor on Saipan Island. The uses of these tracts must be compatible with their projected military purposes. In addition, the United States will permit the Northern Mariana Islands government to use without cost 133 of the leased acres at Tanapag Harbor as a park.[8/]

Section 804(a) directs the United States government to cause all agreements between it and the Trust Territory government conferring on the United States rights in Northern Mariana Islands realty to be terminated not later than 180 days after the Covenant and Constitution are both approved. At the same time, all right, title and interest held by the Trust Territory government in any land in which the United States has an interest or which it uses will be conveyed to the Northern Mariana Islands government. In turn, the Commonwealth government will guarantee to the United States government the continued utilitization of realty then "actively used" by the United States "for civilian governmental purposes." This use must be under

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8/ The Marianas government will also be entitled to use San Jose Harbor and West Field, both on Tinian, jointly with the United States. TECHNICAL AGREEMENT pt. II.

terms "comparable" to those covering the arrangement between the governments of the United States and the Trust Territory as of February 15, 1975.[9/]

Section 805(a) requires the Northern Mariana Islands government to permit only "persons of Northern Mariana Islands descent" to acquire "permanent and long-term interests" in public and private lands during the 25-year period following the termination of the Trusteeship Agreement. After that period, the Northern Mariana Islands government may continue to impose such a restriction.[10/]

Section 805(b) empowers the Commonwealth to limit the amount of lands that were public lands on February 15, 1975, that may be held or owned by one person. This subsection permits the Commonwealth to set a maximum on the amount of former public land that may be transferred

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9/ Section 804(b) grants United States military and naval aircraft access to all components of Isley Field that were developed with federal funds and to all Isley facilities where aircraft may take off and land. There can be no restrictions as to the time when the United States may use these facilities. Nor may the Northern Mariana Islands government charge the United States for its use of Isley Field, except if that use is substantial. In that case, "reasonable" fees may be set by agreement between the governments of the United States and the Northern Mariana Islands.

10/ The applicability of § 805(a) is discussed in BRIEFING PAPER NO. 12: RESTRICTIONS ON LAND ALIENATION § II(B)(2).

to any individual regardless of who sells the interest involved.[11/] The effect of this provision is thus not limited to permitting the imposition of certain restraints on transfers by the Commonwealth.

B. Current Protection of Natural Resources

Prior to the creation of a separate government for the Northern Mariana Islands, the Department of Resources and Development was the agency of the Trust Territory government charged with protecting natural resources.[12/] Various divisions of the Department provided a wide variety of services. The Division of Agriculture made agricultural surveys, conducted experiments designed to enhance agricultural production, recommended ways to regulate and preserve forests, and offered plant pathological services.

The Division of Lands and Surveys was charged with managing the public lands of the Northern Marianas. The Division's responsibilities included the identification, use and disposition of lands in the public domain as well as of the minerals on some of those lands. In addition, the Division surveyed and mapped land, inventoried land resources, and

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11/ This follows from the language: the section refers to limits on ownership, not sales; and to "land which is now public land," not simply "public land."

12/ A detailed discussion of the functions and objectives of the Trust Territory Department of Resources and Development is set out in Trust Territory of the Pacific Islands, Public Information Division, BRIEFING MATERIALS pp. 66-88 (1974).

investigated and resolved disputes concerning the ownership of private land. Among the objectives of the Division were the encouragement of the development of public lands by means of leases, land exchanges and homesteading programs and the protection of Chamorro and Carolinian land rights by regulating leases to noncitizens.

The conservation and development of ocean resources were the responsibilities of the Division of Marine Resources. The Division's particular objectives included fostering the fishing industry, training Micronesians for maritime occupations, constructing boats and conducting research.

The Division of Economic Development was concerned with stimulating economic growth while reducing the role of the United States government in the economic life of the Trust Territory. The Division encouraged exploitation of natural resources, growth of tourism, investment by non-Marianas sources of capital, and development of local means of production.

During the transition to Commonwealth status, these functions have been assumed by the government of the Northern Marianas under the supervision of the resident commissioner. The specific agencies of the Northern Marianas government now responsible for the duties described above are the Agriculture Department, Marine Resources

Department, Office of Public Land Management, the Tourism Commission and the Land Commission.[13/]

C. General Policy Considerations

The broad issues of public policy with respect to the protection of natural resources are: first, the extent to which natural resources need protection; second, whether the means used to achieve adequate protection should fall primarily in the public sector or in the private sector; and third, if responsibility is to be placed on the public sector, whether the power to carry out that responsibility should be vested in the executive branch, the legislative branch or local government entities.

The term "natural resources" as used in this paper has a wide scope encompassing all the natural resources of the Northern Mariana Islands. These resources may be classified into three broad types: land, water and air.

Land is the most important natural resource because of its scarcity and its cultural significance. Protection of land resources may be directed at both

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13/ These new agencies have been established by the resident commissioner acting pursuant to Secretarial Order No. 2989, 41 Fed. Reg. pp. 15892, 15893 (Apr. 15, 1976) [hereinafter cited as Order 2989]. The Order conferred on him the authority to reorganize the government of the Northern Mariana Islands upon the approval of the Director of Territorial Affairs in the Interior Department.

public and private lands and may be concerned with surface resources such as tillable land, sand beaches, forests and wildlife, and with subsurface resources such as petroleum, natural gas, minerals or construction materials. Protection may also be afforded specific uses of land for recreation, parks and other public needs.

Water resources are the second major category of the Northern Marianas natural resources. Fresh water resources are important to many aspects of everyday living. Marine resources range from commercial and sport fishing to minerals extracted from the bed of the sea surrounding each of the islands of the Commonwealth.

The third principal natural resource is the air. Protection of the quality of air resources is generally directed at public health concerns, although air pollution can cause serious damage to crops and to buildings constructed from certain types of materials.

Some of these natural resources may need protection, and others may not. The delegates might look first to immediate needs. The demands created in the course of economic growth will plainly affect land resources, and most economic forecasts project substantial land development in the coming years. The inevitability of immediate pressures on water and air resources is not so clear. The delegates

might also look to longer term needs. Some forms of protection are easier to accomplish if policy decisions are made well in advance of the projected adverse impact and if the administrative machinery is in place to deal with the problem when it arises. Protection of natural resources always involves a curtailment of individual rights to use land, water and air in ways that an unregulated economy would permit. The public resistance to protection of natural resources is generally in direct proportion to the impact that protection has on established economic interests. If ground rules for the protection of natural resources are established before the economic interests are created, the objective is accomplished at less cost and with less resistance. Therefore, if water and air resources are not in immediate need of protection, the delegates might consider appropriate measures to deal with potential future problems.

If the Convention finds protection of one or more categories of natural resources to be desirable, the next general policy issue to be decided is whether the system of protection should use means available within the public sector or the private sector. If the public sector is used, the principal means of ensuring protection will be constitutional provisions, laws or regulations that prohibit or limit certain forms of activity. Governmental machinery

will be used to monitor compliance with those laws, and those who do not comply will be subject to civil or criminal sanctions. If the private sector is used, the principal means of providing protection will be in the form of economic incentives to induce individuals, corporations and others to conduct their activities in a manner that will protect natural resources. Tax exemptions and rebates, government-sponsored loans, direct grant payments, eligibility for government contracts, preferences with respect to licenses and permits, and user chargers are some of the traditional economic incentives that might be used.

The advantage of relying on the public sector is that the government can make policy and implement it directly. Uniformity can be achieved because everyone can be made to comply. When new needs arise, means of meeting them can be implemented with reasonable promptness. The disadvantages of relying on the public sector are: (1) the large number of government civil servants needed to police the activities of the private sector to ensure compliance and the accompanying financial burden on the government; (2) the inability of enforcement efforts, even if large numbers of government employees are involved, to reach all private activity that is not in compliance; and (3) the need for due process of law in implementing civil and

criminal penalties and the resulting burden on the courts when individuals or corporations refuse to comply and challenge the legality of the government's regulations.

The advantages of relying on the private sector are: (1) the free market operates to secure a maximum amount of compliance with a minimum cost; (2) the amount of government intrusion into the affairs of individuals and corporations is minimized; (3) public resistance to protection of natural resources is minimized; and (4) those who do not act in the public interest make economic transfer payments for the benefit of those who do. The principal disadvantages of relying on the private sector are the lack of uniformity and the time lag in implementing public policy. Those who have the necessary economic resources to forego the incentives can refuse to comply with a public policy of protecting certain natural resources. Economic incentives sometimes do not reach ongoing activities, or reach them only at certain intervals, so that the incentives may require a longer period of time to take effect than would direct government regulation.

If the Convention decides to use the public sector to protect some or all of the Commonwealth's natural resources, then it must decide whether to vest the power to do so in the executive branch, the legislative branch or

local government. If the executive branch is to be primarily responsible for this function, then the Convention should include a provision directing the legislature to enact legislation meeting certain standards and to create an agency in the executive branch to be vested with appropriate powers.[14/] If the legislative branch is to have primary responsibility in this field, the Constitution need only contain general exhortations with respect to the importance of protection of natural resources.[15/] This type of provision (combined with a general grant of legislative power)[16/] leaves to the legislature the entire task of creating the framework for governmental action in this field. If protection of natural resources are to be left to local governments, then this power must be enumerated in the constitutional grant of powers to such entities or else the Constitution must make

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14/ The advantages and disadvantages of such specification of executive branch departments and agencies is discussed in BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT.

15/ The general grant of legislative power is discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(A)(1).

16/ E.g., MICH. CONST. art. IV, § 52:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

a general grant of powers to localities.[17/]

The choice in implementing policy with respect to natural resources through the executive or legislative branches of the government depends on the same factors as the delegates will consider in balancing the powers between these two branches generally. These factors are described in Briefing Paper No. 2: The Executive Branch of Government, and Briefing Paper No. 3: The Legislative Branch of Government. The choice with respect to local government depends on whether this is a type of power appropriate for local government under standards of uniformity, fiscal capacity, efficiency, equality and political control. An analysis of these factors is set out in Briefing Paper No. 5: Local Government, and this analysis is applied to functions of protecting natural resources in Appendix A of that briefing paper.

II. SPECIFIC ISSUES FOR DECISION

This section discusses the principal issues and alternatives with respect to public lands, the funds derived from public lands, private lands, marine resources, and air and water quality.

A. Public Lands

Management of the public lands of the Commonwealth will be one of the most important duties facing the government because approximately 80 percent of the land in the islands falls into this category. This includes military

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17/ These alternatives are discussed in BRIEFING PAPER NO. 5: LOCAL GOVERNMENT § II(B)(1).

retention lands, which are lands leased by the United States from the Trust Territory of the Pacific Islands. There are several issues that the Convention should consider on the subject. First, it must decide if a constitutional provision is appropriate. If a specific provision is to be included in the Constitution, the Convention should consider whether to deal extensively with either the disposition or management of public lands and the substantive and procedural rules applicable to either of those functions. This section reviews first the legal status of public lands in the Commonwealth, then examines several general considerations that will affect the decisions of the Convention in this area, and finally sets out the alternatives available with respect to the issues of disposition and management of public lands.

1. Legal status

It is necessary to examine the current and future legal status of public lands in the Commonwealth in order to put into proper context any decisions the Convention may reach.

On December 26, 1974, the Secretary of the Interior issued Secretarial Order 2969,[18/] providing for the transfer of public lands in the Trust Territory of the Pacific Islands to "legal entities" designated by the legislatures of the various districts of the Trust Territory. The Marianas District Legislature responded by passing a statute[19/]

18/ 40 Fed. Reg. 811 (1976) [hereinafter cited as Order 2969].

19/ MARIANA ISLANDS DIST. CODE tit. 15, ch. 15.12 (Act 100-1975) (1975) [hereinafter cited as MIDC].

establishing the Marianas Public Land Corporation and designating it the legal entity required by Order 2969. The corporation has not been formed, however, so no transfer to it has occurred. Instead, title to the public lands in the Northern Marianas is currently vested in the resident commissioner, pursuant to Secretarial Order 2989 providing for the separate administration of the Northern Mariana Islands.[20/]

The Covenant requires the United States to transfer the public lands in the Commonwealth to the government of the Northern Mariana Islands no later than the ending of the Trusteeship Agreement.[21/] Further, it provides a basis for the transfer of such lands to the government of the Commonwealth prior to the end of the Trusteeship.[22/]

20/ Order 2989 pt. VII, § 1.

21/ COVENANT art. VIII, § 801.

22/ This basis arises out of two factors. Sections 802 and 803 of the Covenant oblige the Commonwealth to lease certain lands to the United States under terms to be defined by the Technical Agreement that accompanies the Covenant. This Technical Agreement becomes effective on the date that §§ 802 and 803 of the Covenant come into effect. TECHNICAL AGREEMENT pt. IV.

Under the Technical Agreement, the government of the Northern Mariana Islands must execute the lease to the United States "immediately upon request," and the United States must make its request within five years of the effective date of §§ 802 and 803. Both parties' obligations are thus tied solely to the effective dates of §§ 802 and 803. TECHNICAL AGREEMENT pt. I, ¶ 2.

Section 1003(b) of the Covenant provides that these sections become effective no later than 180 days after the Constitution of the Northern Mariana Islands is approved. Section 202 of the Covenant provides that the Constitution will be deemed approved six months after its submission to the President of the United States, unless sooner approved or disapproved. In other words, the obligation of the government of the Northern Mariana Islands

[Footnote continued on next page]

[Footnote continued from previous page]

to execute a lease "immediately" and the running of the five-year period during which the United States may exercise its option both will commence no later than one year after the Constitution is submitted for approval, assuming no disapproval.

Assuming no untoward delays, the Constitution will be submitted at some time in 1977, and the rights and duties of the parties will thus come into force in 1978. All of this will happen whether or not any "legal entity" like the Marianas Land Corporation ever begins to function. If the government of the Northern Mariana Islands is legally incompetent to take title to the public lands until the end of the Trusteeship, the United States has not received a five-year option at all. Since the option may begin to run in 1978, if no authority capable of executing the lease will exist for certain until the end of the Trusteeship, then the United States may not be able to exercise its option within the specified five years. This appears contrary to the intent of the drafters of the Covenant. It is much more reasonable to see in these provisions an assumption that the government of the Northern Mariana Islands itself, prior to the end of the Trusteeship, will be able to take title to the lands involved, and in turn execute the leases to the United States.

This conclusion is fortified by the comment of the Drafting Committee to § 803 of the Covenant. That comment reads:

> It is understood that the government of the Northern Mariana Islands may exercise its obligations and rights under this Article through a legal entity established to receive and hold public lands in trust for the people of the Northern Mariana Islands.

Report of the Joint Drafting Committee on the Negotiating History, reprinted at S. Rep. No. 94-433, 94th Cong., 1st Sess. p. 404 (1975).

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Report of the Joint Drafting Committee on the Negotiating History, reprinted at S. Rep. No. 94-433, 94th Cong., 1st Sess. p. 404 (1975). The clear inference is that the Northern Marianas need not set up such an entity to exercise its obligations and rights, although the obligations at least involve being able to receive title to the lands to be leased so as to permit the execution of the lease.

No such transfer, however, can be made at the present time. The only existing mechanism for a transfer of lands is Order 2969. That order requires the district legislature to designate a transferee, which it is has done in the Public Land Corporation bill. Because the Marianas Land Corporation, although authorized, has not been formed and because no other legal entity has been authorized, there is currently no entity in the Northern Marianas to which the public lands can be transferred. If nothing is done, therefore, the resident commissioner will retain the public lands until the end of the Trusteeship.

2. General considerations

There are a number of general decisions or considerations that should precede the Convention's deliberations with respect to the disposition and management of public lands. These are: designation of an entity to receive public lands in the interim period before the Trusteeship ends; the utility of a constitutional provision with respect to public lands; and the general social and economic factors that will affect the substance of such a provision. For convenience, these factors are discussed in this section and the specific alternatives with respect to the substance of a consitutional provision are set out in the following two sections.

a) Interim transfer of public lands

The Convention can assure the interim transfer of the public lands by means of a schedule to the

Constitution[23] that either organizes the Marianas Land Corporation as the "legal entity," under Order 2969 or designates another entity in its stead.[24] Since Order 2969 requires the transfer of land as soon as its conditions are met,[25] taking either action would mean that the land would be under immediate control of some Marianan body at the time the Constitution becomes effective. This in turn means that the Constitution may set public land policy to the extent the Convention wishes.

b) Utility of a constitutional provision

The Convention must decide whether any aspects of public land policy will be treated in the Constitution. This is essentially a matter of the future legislature's authority over these lands.

23/ A schedule is an attachment to the Constitution that is not a part of any permanent provision but is an action by the Convention to submit a proposal to the voters for ratification along with the Constitution. In this respect, it is similar to a referendum on a proposal made by the Convention.

24/ Section 505 of the Covenant permits the government of the Northern Mariana Islands to alter laws of the Mariana Islands District. This means that the Commonwealth Constitution has the same effect. These steps could be taken by the district legislature instead of the Convention.

25/ Order 2969, § 4 provides: "Upon request, the High Commissioner is authorized and directed . . . to transfer . . . public lands . . . ." (emphasis added).

If the legislature is granted "all legislative power" rather than being restricted to enumerated powers, and if title to the public lands is vested in an entity subject to control by the government, the legislature's power to regulate the public lands will be clear. The question is whether the Convention is prepared to give the legislature unlimited discretion. Any constitutional provision limiting the legislature's discretion reduces its flexibility. Relatively little flexibility may be appropriate, however, if land policy is of great importance.

If the Convention chooses to limit the legislature to enumerated powers, it will be necessary to grant to the legislature express powers over public lands. If it is decided to establish the Marianas Land Corporation, so that title to the land will vest in it, a constitutional provision may be needed to clarify the relationship between the legislature and the Corporation.

c) Policy considerations

There are several factors that suggest that the Convention may wish to be cautious in approaching the question of the Constitution's treatment of public lands. First, the uncertain state of land records should be taken into account. The uncertainty with respect to boundaries will make the implementation of any policy toward public

lands extremely complex. Second, public lands policy is linked directly to the economic development of the Northern Marianas. The quantity of land involved relative to the total amount available means that decisions regarding such land will have a major impact. But the small total amount of land makes certain that different uses will compete vigorously against one another. This competition will be complicated by uncertainties as to profitable uses. Many of the proposals for use of the public lands may be entirely new to the Northern Marianas and it may be impossible to be sure that these land uses are workable or practical.

3. Disposition of public lands

If the delegates decide to include in the Constitution specific provisions with respect to public lands, they should consider the alternatives with respect to both disposition and management of these lands. With respect to disposition, the Constitution may set substantive standards that must be met in order for any disposition of public lands by sale or lease to become effective; it may also provide procedural protections to ensure that the substantive standards are met.

a) Substantive standards

i) General restrictions. The Convention may wish to set general standards against which the legislature's activities may be measured by the courts in reviewing challenges to legislative actions. These standards, it should be emphasized, would not expressly mandate or forbid specific actions, but would instead attempt to indicate the overall approach that will be required in the disposition of public lands. If no limitations are imposed, the legislature will be free to take any action for which a majority can be mustered.

In devising such general standards, several factors must be kept in mind. First, decisions regarding use of the land will be vital to the economy of the Commonwealth. This suggests that commercial considerations may appropriately be a part of any determination regarding disposition of land. Second, the economic benefits from the disposition of public lands will not be limited to the sale prices or lease rents that the government will receive. The Commonwealth will benefit from the jobs created by certain uses of land, from the training that Northern Marianas workers employed by land users will receive, and from the taxes the users and the employed workers will pay. Third, there are uses, the monetary return from which is either hard to

measure or nonexistent, but which are worthwhile. Agricultural and residential homesteading may fall within this category; use of land for parks or for cultural facilities certainly does.

The Alaska constitution provides an example of a general restriction applying economic standards. This provision requires the development of certain resources on the "sustained yield principle."[26/] The sustained yield principle is a technical concept used in conservation law; it is defined as

> [T]he achievement and maintenance of a high-level annual or regular periodic output of the various renewable resources of land without impairment of the productivity of the land.[27/]

This type of provision is directed to non-urban uses of land and may be applicable to the Northern Marianas.

Another example of a general restriction applying economic standards is provided by the Montana constitution:

26/ ALAS. CONST. art. VIII, § 4:

> Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

27/ Multiple Use and Sustained Yield Act of 1960, 43 U.S.C. § 1415(c) (1970).

Covenant permits such restrictions, and some state constitutions impose them.

The constitutions of Louisiana and Nebraska forbid alienation of mineral rights in some or all of the public lands of those states; the states are, however, permitted to lease such rights.[29/] Idaho and Washington limit in various ways the amount of public land that may be sold to any one individual.[30/] Other restrictions currently used by the states include a requirement of sale by auction[31/] and limitations on the amount of land that may be sold in any one year.[32/] The Hawaiian constitution declares certain preferred purposes and requires the use of public lands for the development "of farm and home ownership on as widespread a basis as possible . . . ."[33/]

29/ LA. CONST. art. IX, §§ 4, 5; NEB. CONST. art. III, § 20.

30/ IDAHO CONST. art. IX, § 8:

> [N]ot to exceed one hundred sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation.

WASH. CONST. art. XVI, § 4:

> No more than one hundred and sixty acres of any granted lands of the state shall be offered for sale in one parcel . . . ."

31/ IDAHO CONST. art. IX, § 8.

32/ WASH. CONST. art. XVI, § 3.

33/ HAWAII CONST. art. X, § 5.

In most states that have extensive public lands, details of this sort are generally left to legislation because of the need for flexibility. The current uncertainties regarding land in the Commonwealth may make it difficult to predict the effect of any particular restriction, and may counsel against attempts to fix such restrictions in the Constitution.

b) Procedural standards

i) Publicity. Most important in any list of procedural protections is a requirement of publicity. The Convention may wish to forbid any disposition of land not preceded by open public hearings and ample notice of the date and subject of the hearings. Notice of dispositions themselves might also be mandated. Alaska provided for this sort of safeguard in its constitution.[34/] Presumably, persons in authority who might be tempted to act in a questionable way if secrecy were possible would find it easier to resist temptation if they were required to take all actions in public. Procedures of this sort would permit interested citizens to object to any ill-advised transactions.

34/ ALAS. CONST. art. VIII, § 10:

> No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

ii) Special legislation. Another device that could be used is a prohibition on special legislation (or "special rulemaking," if the legislature is not in direct control) regarding disposition of public lands.[35] General legislation or rules would affect all public land similarly situated. Special legislation would affect only a designated parcel of land. A prohibition on special legislation and rules would make it difficult to acquire land through special influence with the legislature or the administering body. Hawaii's constitution has such a requirement:

> The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof.[36]

Such a restriction might raise problems, however, unless it was very carefully drafted. The uncertain state of land holdings in the Commonwealth may not be correctible without special legislation affecting public land. One possible form of language would be:

35/ Restrictions on special laws are discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(A)(2)(c).

36/ HAWAII CONST. art. X, § 4.

> Public land shall not be disposed of by special law, except such laws as are required to correct boundaries, satisfy claims, or otherwise settle bona fide disputes.37/

iii) Planning. Broader procedural limitations are possible. The most far-reaching would be a complete ban on dispositions of public land prior to legislative approval of a land use plan for the entire Commonwealth. There is no direct precedent in the United States for such a plan,38/ but no jurisdiction in the United States has ever had the large percentage of public land that eventually will be controlled by the Northern Marianas government. The great advantage of such a provision is the protection it would afford against haphazard development. This method of proceeding also presents important problems. Any plan

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37/ In order to impede the manufacture of claims, the provision could also require a detailed statement in the special law or rule of the situation it purported to correct. Further, the courts could be empowered to void any law or rule of this sort upon a finding that the statement of the situation to be corrected was not substantially accurate.

38/ Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), aff'd, 448 F.2d 793 (10th Cir. 1971), interpreted the Wilderness Act, 16 U.S.C. §§ 1131-36 as forbidding any Forest Service use of "wilderness areas," "primitive areas," and "any contiguous [non-'primitive'] area, as forbidding any forest lands predominantly of wilderness value" (which the Act permits the President to designate as "wilderness"), which would so change these areas as to preclude the President from recommending this land be classified as "wilderness" in the report the Act required him to make by September 3, 1974. This, of course, is considerably different from holding essentially all the land in a jurisdiction out of any likely use for an indefinite period.

for the economic development of the Commonwealth will require some use of the public lands. If all such use if forbidden, even temporarily, economic development will necessarily be held back. This outcome would, of course, disappoint many citizens of the Commonwealth. Moreover, it would generate strong pressures to grant "exceptions" to the prohibition, or to produce a plan very quickly, without regard to its quality.[39/] To reduce pressures for haste, the Constitution might require approval of a plan by two separate legislative sessions, similar to New York's requirement for constitutional amendments.[40/]

It may be possible, however, to realize many of the benefits of planning without an overall requirement. If whatever body is in charge of the public lands is forbidden to initiate any program of disposition without a plan for the island on which the land is located, the Commonwealth

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39/ This latter problem could be avoided, perhaps, if the Constitution set out the criteria for such a plan. It could require "classification" of land by a particular body, as does the Montana constitution:

> All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

MONT. CONST. art. X, § 11(4).

40/ N.Y. CONST. art. XIX, § 1.

could begin to make use of particular areas as each one is studied. Thus, development of one part of the Commonwealth need not be delayed until all areas are ready. The great disadvantage of this approach is the possible absence of coordination between plans for various areas. It would seem, however, that careful administration could overcome this difficulty.

iv) Enforcement. In addition to dealing with the legislation itself, the Convention may wish to specify the manner in which restrictions on the sale of public land would be enforced. This problem has two aspects. First, if land is disposed of by a nonlegislative body, the Convention may wish to provide some way for members of the public to challenge the legality of that body's programs.[41/] Second, it is possible that particular transactions may be

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41/ It is assumed that any such body will make rules only after public notice and with an opportunity for public comment. See proposed Trust Policy Guidelines, Marianas Land Corporation:

> In connection with any proposal, the Members may direct the Board of Directors to give public notice to the people of an open hearing for the purpose of commenting on the proposal.

Guideline II.A.1.e.;

> The Board of Directors shall submit such general program to the Members at any regular or special meeting, provided that prior to action by the Members, a summary of the proposal shall be published once a week for two consecutive weeks in a newspaper of general circulation.

Guideline II.A.2.c.

carried out that violate the general laws or rules governing such transactions.

The first issue clearly raises very serious questions. It would involve allegations that the rulemaking body had violated its basic purpose. Accordingly, anything less than a court proceeding would seem inadequate as a means of enforcement. Permitting any citizen to sue in such cases risks a great many suits, but appears to be the only way to guarantee protection of the public interest.

The second type of suit is more specific, focusing on particular transactions. The Constitution could explicitly limit enforcement to suits brought by the attorney general; or it could permit suits to be brought by any citizen as well as the attorney general. The first alternative would make it difficult for persons outside the government to block a disposition. The second alternative could lead to frivolous suits, brought only to extort a settlement, and might not permit substantial citizen involvement because even interested citizens may find it difficult to undertake a lawsuit of this nature.

A third alternative would be to require automatic court review, preceded by an examination of the transaction and an opinion by the attorney general as to compliance with all legal requirements. Any citizen could be permitted

standing in court, either for or against the disposition. The court would be empowered to consider such objections in light of the attorney general's findings and to conduct the necessary fact-finding to resolve disputed points.

4. Management of public lands

Management of the public lands can be treated in the Constitution even if it contains no provision with respect to disposition.

If it is decided to provide for land management in the Constitution, the Convention may wish to use general language indicating that a high standard of care will be required in managing public lands. An example is given by the Utah constitution, which includes the following section: "[T]he public lands of the state . . . shall be held in trust for the people . . . ."[42/] The difficulty with use of wording of this sort is that its legal effect is not clear. The courts necessarily have great scope to define its reach, and may or may not extend it to all subjects the Convention wishes to cover.[43/] A general provision

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42/ UTAH CONST. art. XX, § 1.

43/ General expressions of this nature carry with them certain connotations not relevant to the situation of the Northern Marianas. For example, land deemed to be held by the state as a "public trust," as in the Utah example, has been ruled subject to very severe limitations on alienation, and contrasted with land held for sale. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

could permit the legislature to act and, within the specified policy guidelines, to use whatever management techniques seemed most efficient, fair and economical. This would include placing control of public lands in a regular department of the executive branch.

An alternative to general provisions with respect to management would be a provision setting up a special land agency. In Alaska, Michigan and Wyoming, there are constitutional provisions that specify the body controlling all public land.[44/] Hawaii's constitution requires the legislature to establish a board or boards to manage natural resources, although only "conservation" lands must be placed under the jurisdiction of the board or boards.[45/] The Hawaiian Homes Commission is also established by the Hawaii constitution, since that document incorporates the original Hawaiian Homes Act.[46/]

One approach to a land management agency would be to require the legislature to establish an independent body, either the Marianas Land Corporation[47/] now provided

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44/ ALAS. CONST. art. VIII, § 6; MICH. CONST. art. X, § 5; WYO. CONST. art. XVIII, § 3.

45/ HAWAII CONST. art. X, § 2.

46/ HAWAII CONST. art. XI, § 1.

47/ If the Constitution makes no mention of public lands at all, the Public Land Corporation statute would continue in effect, and the legislative and executive branches of the new government could establish the Marianas Land Corporation under the existing statute if they desired to do so.

by statute or some other similar body. Such an approach would appear to answer most concerns with respect to public land policy. Legislation like that for the Marianas Land Corporation would set clear parameters for corporate action, and would provide an organization that maximizes the chances that competent persons would be put in charge. Most important, such a corporation makes possible the development of considerable expertise in land management and a coherent long-term policy of land use shielded from hasty changes in response to political problems. Should administrative difficulties develop, the statute providing for the corporation can be amended.

A modification of this alternative would require the legislature to act with respect to the public land only by a specified extraordinary majority of both houses. This would guard against changes that do not have broad support.

B. Funds Derived from Public Lands

The funds derived from the sale or lease of public lands (especially the lease of land on Tinian to the United States) are a unique resource that may merit constitutional treatment because of their size and non-recurring nature.

These funds may need as much protection from depletion for unworthy purposes as will the lands that produced them.

There are several ways the Constitution could deal with revenues from public lands:

- place the revenues in a special trust fund, the principal of which would be maintained intact and the interest from which could be available for appropriation by the legislature;
- place the revenues under the control of the same agency or department that manages the public lands with restrictions on the purposes for which the revenues could be spent (e.g., the improvement of the public lands, the protection of any natural resource, education, or to provide economic development);
- use the revenues to begin a development bank that could make commercial loans within the Commonwealth in order to promote economic development;
- make the revenues a part of general revenues available for appropriation for any purpose the legislature chooses.

A trust fund has several advantages. It is an established legal concept that would not require extensive detail in the Constitution. Independent trustees could be named, either from outside the government or ex officio (by reason of the office held by the individual), who could have no duties other than the management of the public lands revenues and no loyalties other than to the faithful execution of the duties placed on them by the Constitution. The trustees would maintain accounting records showing the amount of public land revenues in their hands and payments made under the terms of the trust. The trustees would also be responsible for investing the principal amount and for retaining whatever investment advisers were necessary in that regard. The terms of the trust could limit the kinds of investments the trustees were empowered to make.

Control by an independent public agency or executive branch department would make the management of the public land revenues more a part of the regular organization of government. The functions of planning the disposition of public lands that generated the revenues and the management of the revenues so generated would be combined, leading to some gain in managerial efficiency. This method, however, would vest control of a substantial part of the public treasury in the hands of one agency, perhaps making appointments to that agency more

sensitive and less oriented to finding the most capable managers.

A development bank could put the public lands revenues to work in the Northern Mariana Islands and assist in economic development. A bank could be run in accordance with established banking principles so that the loans made would provide interest income and the principal would not be dissipated. Lower rates of interest and favorable repayment terms could be made available to Northern Marianas residents (or citizens). This would assist in maintaining local control of the economy and would help maximize local participation in the benefits of economic development.

Contribution to the general revenues held by the public treasury vests control of these funds in the legislature. This may be particularly appropriate for a new government that will require substantial amounts of capital to finance economic development. Having the revenues from the public lands available at the outset may maximize growth and minimize dependence on foreign capital.

Once the delegates make the basic decision as to how these revenues are to be managed, more detailed provisions with respect to the specialized methods -- a trust fund, a public land corporation or a development bank -- could be drafted. The practice of the states is of little help

in this case, since the proportion of public lands within them, and thus, the relative amounts of money in question, were smaller than in the Commonwealth. Further, the western states in particular were obliged by the terms of their admission to the United States to use the income for certain lands to support schools, a restriction the Commonwealth does not face.

C. Private Lands[48/]

A broad range of mechanisms is available to regulate the effect of private land ownership on public goals. Some of the alternatives presented below are phrased in terms of the Constitution's requiring their implementation. The Convention, however, could opt merely to authorize the legislature to adopt these approaches.

1. Eminent domain

The principal direct approach to the regulation of private land use is conferring condemnation power upon one or more executive branch agencies or departments. This power consists of the authority to take title to, or some

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48/ Land is privately owned only on the islands of Saipan, Tinian and Rota. Land is generally not sold, but passes from one generation to the next of the same family. There were only 800 recorded transfers of land in the Northern Mariana Islands from 1948 to 1974. Trust Territory of the Pacific Islands, Public Information Division, BRIEFING MATERIALS p. 122 (1974).

lesser interest in, privately owned land.[49/] In return, the owner must receive fair compensation for his property.

Should the Convention decide to extend the Commonwealth's eminent domain power to the protection of natural resources, a wide variety of specific alternatives is available. These alternatives would vary in the extent to which they would impinge upon the private ownership and use of land.

The Convention will be faced with three issues concerning eminent domain. First, the delegates must decide how broad the grant of eminent domain power will be. Under the traditional approach, the Constitution could authorize the Northern Marianas government as an entity to condemn land. This would permit any executive branch agency to exercise the eminent domain power and would permit maximum flexibility to meet future needs of the government. This broad power might be qualified by limiting the exercise of the power to the furtherance of a "public purpose." Traditional public

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49/ All of the state constitutions confer the power of eminent domain.

Use of the eminent domain mechanism would remove land from the tax rolls and impose on the Northern Marianas government the expenses of maintaining the land it acquires. Condemning property and paying its owner a fair price for its acquisition, however, may be fairer than restricting the uses which the owner is permitted to make of his land while paying him nothing. Use restrictions are discussed below in § II(C)(2).

purposes include the taking of land for the construction of schools, hospitals and highways. By extending the definition of "public purpose" to include the protection or enhancement of natural resources, the Convention would grant the Commonwealth the power to use eminent domain to protect natural resources.[50/]

The delegates may wish to be more limiting by granting the eminent domain power only to specified agencies within the executive branch whose activities logically require that power. The Missouri constitution has embraced this technique, and provides, for example:

> The [conservation] commission may acquire by . . . eminent domain . . . all property necessary, useful or convenient for its purposes . . . .[51/]

50/ An example of this approach is set out in WASH. CONST. art. I, § 16, permitting the taking of property for public use and art. XXI, § 1, providing:

> The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

The delegates may also opt in one section of the Constitution not only to declare a use public but also to provide that the power of eminent domain may be exercised to accomplish that use. The New Jersey constitution provides, for example, that

> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired.

N.J. CONST. art. VIII, § 111, ¶ 1.

51/ MO. CONST. art. IV, § 41.

Another alternative would expand the eminent domain power beyond the government and permit private individuals and organizations to condemn land for specific purposes. The draftsmen of the Wyoming constitution adopted such an approach:

> Eminent domain. -- Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.52/

Second, the Convention must resolve whether to limit the interest which can be taken by eminent domain. The delegates may impose no limitation. This would permit the acquisition of title to real property through condemnation, giving outright ownership to the government, as well as making available the option of taking a leasehold interest, an easement or a use.

If the delegates desire to confer a limited power of condemnation, they may provide that the condemnor may

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52/ WYO. CONST. art. I, § 32. There is a similar provision in WASH. CONST. art. I, § 16.

obtain only a leasehold interest in lands.[53/] This approach would empower the condemnor to use these lands upon payment to the owners of fair rental prices. Another possibility would be to authorize only the taking of an easement. Such an easement would prevent a landowner from using his property in a way that detracts from the pleasure of others, but would otherwise leave ownership of the property undisturbed. Easements are often used to preserve scenic places or to provide access to public beaches through privately owned property. Easements can also be used for land use planning purposes to maintain open spaces, agricultural uses or other desirable features.

Rather than limiting the interests that may be acquired by condemnation, the Convention may permit a condemnor to choose whether to take title, a leasehold or an easement. This would create great flexibility: the condemnor could select the means that would least disrupt the landowner's enjoyment of the property while permitting the purpose of the condemnation to be achieved.

53/ For example, the Missouri provision states:

> [P]rivate property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner subject to the use for which it is taken.

MO. CONST. art. I, § 26 (emphasis added).

Third, the Convention will confront the problem of protecting landowners from the capricious exercise of the authority of eminent domain. Because land is so important, the Convention may want to limit the eminent domain power by providing procedural safeguards protecting those whose property is taken.[54/] The condemnor may be required to make a showing that acquisition of the necessary land by voluntary means is not possible and that the natural resources to be protected by the taking may be conserved by no other reasonable means. If a leasehold interest is taken against the wishes of the landowner, the landowner should have the right of the return of the rented land if, prior to the expiration of the lease term, the property is not used appropriately.

2. Use restrictions or zoning

Zoning is another direct method of regulating private lands. Traditional policies involve separating an area into zones. The use of land in each zone is then subjected to restrictions. For example, only residences might be permitted in one zone, with commercial structures such as stores allowed in another region and industrial operations, such as factories, in a third. Further regulations could be imposed in each zone: minimum or maximum lot

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54/ Since so much land is available for public purpose, however, it is not likely that the Commonwealth would need to make extensive use of the eminent domain power.

sizes may be specified for residential communities; height limitations may be imposed on commercial buildings; and the types of permissible industries could be prescribed.[55/] In addition, zoning could be used to preserve open space, such as coastal areas. California currently uses this approach.[56/] The bulk of state zoning rules are issued by state agencies acting under the generalized police power of the state to impose regulations with respect to public health and safety.

Three approaches to zoning are open to the Convention. First, the delegates may decide not to provide for zoning in the Constitution. The effect of this choice would be to permit the legislature itself to exercise the power to zone or to empower either the executive branch of the Commonwealth government or local government to zone. The legislature will have the inherent authority to pass measures to promote "the public health, safety, morals or general welfare"[57/] of the Northern Marianas people. Since reasonable and nonarbitrary zoning laws fall within that category

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55/ H. Franklin, D. Falk & A. Levin, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON EXCLUSIONARY LAND USE PROGRAMS pp. 25-26 (1974).

56/ The Cost of Coastal Zoning, BUSINESS WEEK p. 71 (May 3, 1976).

57/ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

of legislation,[58] no constitutional mandate is necessary for the imposition of use restrictions. As a result, most state constitutions do not specifically discuss zoning.

Second, the Constitution may explicitly authorize the legislature to restrict land use. A variant of this approach is constitutionally authorizing the legislature to empower local governments to promulgate zoning regulations. New Jersey's constitution is illustrative:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.[59]

58/ Id.

59/ N.J. CONST. art. IV, § VI, ¶ 2. Another such provision is GA. CONST. art. XV, § II, ¶ 3, which provides:

> [T]he governing authority of each county is empowered to enact for unincorporated areas of the county appropriate planning and zoning ordinances for public safety, historic, health, business, residential, and recreational purposes. Such governing authority is hereby authorized to establish planning and zoning commissions separately or in conjunction with any combination of other counties and municipalities of this state and adjoining states. The General Assembly is hereby authorized to provide by law for such joint planning and zoning commissions and provide the powers and duties thereof. Such governing authority is hereby authorized to participate in the costs of such planning commission.

Finally, the Convention could require the legislature to divide Northern Marianas' land into zones, and to specify the uses of the land in each zone. Reflecting the inflexibility of this approach, no state constitution directs the legislature to zone.

Use restrictions are a straightforward way to ensure that private lands will be utilized for purposes deemed in the public interest.[60/] Such restrictions may be applied so as to further development as well as conservation. But these restrictions have an economic cost. The government will lose tax revenues because to the extent the potential of land for economically profitable utilization is decreased, its value and hence the real estate taxes based upon that value are diminished. Similarly, owners of regulated land receive less profit from their properties than if they were able to put the land to its most financially rewarding uses, and they pay less taxes on those profits.

60/ If a zoning power is included in the Constitution, consideration should be given to specifying the uses to which land may be limited. Possible uses include residential enclaves, agriculture, forestry, undeveloped coastland, and development for such purposes as tourism or industry. If the Constitution does not include this safeguard, those with the authority to impose restrictions may define permissible uses frivolously.

3. Tax benefits

The Northern Marianas tax system may be designed to stimulate uses of private land that are compatible with the conservation and sound development of natural resources. Under the "use-value" method of assessing the value of real property, a landowner's real estate taxes are reduced if he limits the utilization of his land to certain specified activities.[61/] These specific uses may be listed in the Constitution or left to the legislature to delineate. The amount of the reduction should be left to the legislature in order to maintain flexibility in the future and keep the Constitution free of unnecessary detail.

There are three principal methods of "use-value" assessment. The first, or "preferential assessment," approach entails a landowner's petitioning the tax assessor for reduced

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61/ Twenty-eight states employ use-value assessments for agricultural or open space lands. Such assessments are pursuant either to statutory or constitutional provisions. E.g., W. VA. CONST. art. VI, § 53:

> The Legislature may by general law define and classify forest lands and provide for cooperation by contract between the State and the owner in the planting, protection, and harvesting thereof. Forest lands embraced in any such contract may be exempted from all taxation or be taxed in such manner, including the imposition of a severance tax or charge as trees are harvested, as the Legislature may from time to time provide.

taxation on the ground that the landowner's property is being used for a favored purpose. Should the owner convert the land to a non-favored use, the taxes on the land return to their normal level without any other penalty.

Under a "deferred taxation" program, the landowner is subject to "recoupment."[62/] If the landowner benefits

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62/ The New Jersey constitution contains language illustrative of provisions establishing "deferred taxation" programs:

> The Legislature shall enact laws to provide that the value of land, not less than 5 acres in area, which is determined by the assessing officer of the taxing jurisdiction to be actively devoted to agricultural or horticultural use and to have been so devoted for at least the 2 successive years immediately preceding the tax year in issue, shall, for local tax purposes, on application of the owner, be that value which such land has for agricultural or horticultural use.
>
> Any such laws shall provide that when land which has been valued in this manner for local tax purposes is applied to a use other than for agriculture or horticulture it shall be subjected to additional taxes in an amount equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the land been valued and assessed as otherwise provided in this Constitution, in the current year and in such of the tax years immediately preceding, not in excess of 2 such years in which the land was valued as herein authorized.
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> Such laws shall also provide for the equalization of assessments of land valued in accordance with the provisions hereof and for the assessment and collection of any additional taxes levied thereupon and shall include such other provisions as shall be necessary to carry out the provisions of this amendment.

N.J. CONST. art. VIII, § I, ¶ 1(b).

from reduced taxation but then changes the use of the property to a non-specified purpose, he must repay with interest the amount of the reduction in each of a prescribed number of years. The length of this recoupment period ranges from two years in Alaska to the full period during which taxes were reduced in Hawaii.[63/]

The third method of "use-value" assessment is the "restricted use" approach.[64/] Under this approach, land must be subjected to a legally binding use restriction before its owner may benefit from a reduction in taxes. Land regulated by zoning limitations designed to foster conservation would qualify for reduced taxes. So would land for which uses have been limited to favored purposes by agreement between the owner and the government. If the restriction is violated, the landowner may be subjected to a penalty or to recoupment of the amount of reduced taxes for a given period.[65/]

63/ Stanford Environmental Law Society, THE PROPERTY TAX AND OPEN SPACE PRESERVATION IN CALIFORNIA: A STUDY OF THE WILLIAMSON ACT pp. 115-16 (1974)

64/ California embraced the "restricted use" approach in a statute popularly known as the Williamson Act. Id. p. 116.

65/ The Convention should permit the legislature the flexibility to determine the sanction or sanctions imposed for breach of the restriction. This would allow the penalty to be changed as the conservation program of the Northern Marianas evolves.

D. Marine Resources

This section discusses possible constitutional treatment of marine fisheries and mineral resources.

1. Fisheries

The states have the power to regulate fisheries within territorial waters.[66/] Since this power is an aspect of the police power, it would be within the powers of the Commonwealth.

The more difficult question concerns fisheries lying within the 200-mile "exclusive economic zone" to be created by the Law of the Sea Convention.[67/] The United States will have the authority, under the Convention, to regulate fishing in the zone.[68/] Currently, there is no exact equivalent to the exclusive economic zone in American law. The United States, however, has taken jurisdiction

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66/ Manchester v. Massachusetts, 139 U.S. 240 (1891). Currently, the United States claims as territorial waters that portion of the sea within three miles of its coast. See United States v. Maine, 420 U.S. 515 (1975). The U.S. government owns the lands and minerals beneath the territorial waters, United States v. California, 332 U.S. 19 (1947), but has turned this land over to the states. Submerged Lands Act, 43 U.S.C. § 1311 (1970).

67/ Proposed Law of the Sea Convention pt. 2, art. 44.

68/ Id.

over the submerged lands of the Outer Continental Shelf.[69] Except with regard to mineral leases, which are federally regulated, the law of the states adjacent to the particular portions of the shelf is adopted as federal law for those areas, but no level of American government exercises authority over the waters above this land.[70] The states have no inherent authority over this area.[71] If Congress, however, decides to regulate the waters of the zone in the same way it regulates the land of the outer shelf, state law will be applied.

If it were to follow the same procedure, Northern Marianas law would regulate the Northern Marianas' fisheries in the exclusive economic zone. The powers, if any, of self-governing jurisdictions other than states are not indicated under current statutes, making the situation difficult to analyze. The Supreme Court, however, based its determination that the United States had the right as against the states to control submerged lands beneath territorial waters and belonging to the Outer Continental Shelf on the federal government's responsibility for defense and foreign affairs.[72] The United States government

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69/ 43 U.S.C. § 1333 (1970).

70/ 43 U.S.C. § 1332(b) (1970).

71/ United States v. Maine, 420 U.S. 515 (1975).

72/ United States v. California, 332 U.S. 19 (1947); United States v. Maine, 420 U.S. 515 (1975).

enjoys the same powers with regard to the Commonwealth,[73] and may therefore have equivalent authority over the equivalent areas adjacent to the Commonwealth. Whether it will treat the Commonwealth as it would a state is simply not clear, even assuming that prediction is possible regarding the treatment the states will receive.

The legislature will be able to exercise, as part of its police power, whatever authority the Commonwealth may have over its fisheries in light of its relationship to the United States. It would appear, therefore, that the Convention need not act on this subject unless it wishes to impose broad limitations on legislative power. The Convention may wish to forbid any permanent alienation of any fishery, as Alaska does.[74] In addition, it may wish to guarantee the rights of all citizens to use the fisheries, subject to reasonable regulation, as do Hawaii, California

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73/ COVENANT art. I, § 104.

74/ The Alaska constitution provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

ALAS. CONST. art. VIII, § 15.

and Rhode Island.[75/] In any case, it will probably wish to make explicit the principle that the fisheries should be developed for the common good, in a manner similar to that used for public lands. Some of the procedural safeguards developed in that context may also prove useful. It would appear, however, that most government action with respect to fisheries would involve conservation and regulation of access. The latter subject may be discussed in the Constitution in broad terms, as mentioned above. A more precise discussion of access, and any attempt to deal with conservation beyond requiring it, seem to require more detail and rigidity than is appropriate for a constitution.

75/ HAWAII CONST. art. X, § 3:

> All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

CAL. CONST. art. I, § 25:

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon . . . ."

R.I. CONST. art. I, § 17:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been theretofore entitled under the charter and usages of this state . . . ."

2. Minerals

The United States government has been held to be the owner of submerged lands off the coast of the states, even lands under territorial waters. The states have no rights in these lands beyond what the United States government gives them. This federal power is based on the United States Constitution's provisions with respect to defense and foreign affairs.[76/] Since the United States government has similar powers regarding the Commonwealth,[77/] it may own these lands off the coast of the Commonwealth as well.

In light of the uncertainty as to whether the Commonwealth has any authority over submerged minerals, it is difficult to suggest any means of dealing with the subject in the Constitution. Negotiations on this subject with the United States may be necessary for the Commonwealth to have any authority at all. It seems unwise to mention the subject in the Constitution because it is difficult to predict what will be needed, and the legislature will have full power in any case.

E. Air and Water Quality

The third principal element of natural resources is the quality of the air and water. Some states, notably

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76/ United States v. California, 332 U.S. 19 (1947).

77/ COVENANT art. I, § 104.

Florida, Illinois, Louisiana and Michigan,[78] direct the legislature to pass statutes guarding the environment. Florida's provision is typical:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.[79]

This approach directs the legislature to take action, while retaining the advantage of flexibility. The legislature is afforded the opportunity to study carefully various mechanisms for protecting the environment and to select the best approach. Then, as time progresses, the legislature may modify or even change its approach to reflect altered circumstances.

Another possibility is illustrated by the constitution of Illinois, which imposes on every individual and organization the duty to refrain from harming the environment and confers on private parties the corresponding right to a "healthful" environment.[80] Illinois also permits private parties to sue to enforce this right. The Illinois constitution provides, in relevant part:

78/ FLA. CONST. art. II, § 7; ILL. CONST. art. XI, § 11; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52.

79/ FLA. CONST. art. II, § 7.

80/ ILL. CONST. art. XI, §§ 1, 2.

> The public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations . . . . Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulation as the General Assembly may provide by law.81/

Permitting private individuals to sue in the public interest is known as the "private attorney general" approach. This approach increases the likelihood that environmental abuses will either be prevented or checked soon after they develop, for it creates as many potential protectors of the environment as there are citizens.

Montana imposes a similar duty to care for the environment. Montana's formulation of a remedy for the breach of that duty, however, is more flexible than that of Illinois; it charges the legislature with fostering the performance of the duty:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.82/

81/ Id.

82/ MONT. CONST. art. IX, § 1.

Conclusion

Protection of natural resources is a rapidly growing field of government endeavor. The results of environmental damage are sometimes irreversible, and the effort to eliminate environmental abuses after the fact can be very burdensome to the taxpayers. The Convention has the opportunity to design a system for preventive maintenance with respect to natural resources that will accommodate economic development, conserve the resources on which that development must be based, and enhance the quality of life in the Commonwealth.