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PRIVATE LANDS CONSERVATION IN THE COMMONWEALTH OF NORTHERN MARIANAS ISLANDS

**A Country Report by the Natural Resources Law Center,
University of Colorado School of Law**

September 2004

Sponsored by The Nature Conservancy

Primary Author: Gregg de Bie, NRLC Research Assistant
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Private Lands Conservation in the Commonwealth of the Northern Mariana Islands

A Report by the Natural Resources Law Center
University of Colorado School of Law

September 2004

Primary Author: Gregg de Bie, NRLC Research Assistant
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TABLE OF ACRONYMS

- **ALI:** American Law Institute
- **AON:** Assessment of Need
- **CNMI:** Commonwealth of the Northern Mariana Islands
- **DEQ:** Division of Environmental Quality
- **DFW:** Division of Fish and Wildlife
- **DLNR:** Department of Lands and Natural Resources
- **EQIP:** Environmental Quality Incentive Program
- **FAWRA:** Federal Aid in Wildlife Restoration Act
- **FRMPA:** Fish Restoration and Management Projects Act
- **FLP:** Forest Legacy Program
- **FRPP:** Farm and Ranch Lands Protection Program
- **LWCF:** Land and Water Conservation Fund
- **MPLA:** Marianas Public Land Authority
- **MPLC:** Marianas Public Land Corporation
- **NGO:** non-governmental organization
- **NRCS:** Natural Resources Conservation Service
- **PDR:** purchased development right
- **TTPI:** Trust Territory of the Pacific Islands
- **UCEA:** Uniform Conservation Easement Act
- **USDA:** United States Department of Agriculture
- **WRP:** Wetlands Reserve Program

BRIEF QUESTIONS

1. What legal tools are in place for the purpose of achieving private lands conservation in the CNMI?

The CNMI legislature has enacted the Fish, Game and Endangered Species Act, which vests the Director of Fish and Wildlife with the power to acquire easements over land. Second, the Public Purpose Land Exchange Authorization Act allows private lands to be acquired through the exchange of public lands or through purchase, for the purpose of preserving sensitive ecological lands. Third, the Soil and Water Conservation Act is meant to facilitate the entering into of conservation contracts between private landowners, the CNMI government, and the USDA. In addition, the Act allows for the purchase of rights or interests in land in order to fulfill the purposes of the Act.

The U.S. offers several programs to achieve private lands conservation in the CNMI as well. The Forest Legacy Program, the Wetlands Reserve Program, and the Farm and Ranch Lands Protection Program are administered by the USDA and each places an emphasis on the acquisition of conservation easements on private lands. To date, however, none of these programs have been implemented in the CNMI.

2. What legal tools are recognized by the CNMI legal system and are capable of being used for private lands conservation?

Easements appurtenant and other land use restrictions in general, such as rights of way, are legally recognized in the CNMI. Conservation easements, however, are not expressly recognized. Within the *context* of conservation, the Commonwealth's Director of Fish and Wildlife is authorized to purchase (negative) easements under the Fish, Game and Endangered Species Act, but this authority has never been exercised.

In addition, the leasing of land is allowed in the CNMI. For persons not of Northern Mariana Islands descent, however, the leasing of private land is limited to a term of not more than fifty-five years, including any renewal rights. No indication as to whether real covenants, equitable servitudes, easements in gross, or profits à prendre are recognized in the CNMI was found in any statute or court opinion.

3. Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation in the CNMI?

This report concludes that the enactment of a Conservation Easement Act—that is largely modeled on the UCEA—is a possibility in the CNMI. The CNMI shares the U.S. common law in so many areas that its legal structure is most likely compatible with the concept of a conservation easement.

Another possibility offered by this report is to acquire a conservation easement from a private landowner and attempt to establish a precedent for conservation easements in a CNMI court. The CNMI courts look to the ALI Restatements for guidance in many situations and the Restatement (Third) of Property explicitly advocates the conservation easement in gross; so it is possible, and perhaps even likely, that under ideal circumstances a CNMI court would rule favorably regarding a conservation easement.

INTRODUCTION

This report seeks to provide a basic description of the legal instruments, processes and institutions relevant to private lands conservation currently in place within the Commonwealth of the Northern Mariana Islands (CNMI). The report also assesses the feasibility of introducing a number of legal tools into the CNMI legal system for the purpose of achieving private lands conservation, with particular emphasis being given to the potential use of conservation easements. Section I of the report provides a contextual overview of the CNMI by discussing relevant aspects—i.e., those pertaining to land—of its history, culture, geography, demographics, government and legal framework. This section also explores historical and contemporary trends in the CNMI system of land tenure. Section II is a brief overview of several restrictions on land alienation and land use that are legally recognized in the CNMI. Section III describes the CNMI’s institutional framework for the administration of private lands, and also details the various laws and procedures relevant to this administration. Section IV details the conservation easement in general and describes its applicability to the CNMI. It also exposes a couple of problems that might be encountered with a conservation easement on CNMI land. The next section introduces several other legal tools that have the potential to facilitate the goal of private lands conservation within the CNMI, including the leasehold agreement. Section VI reviews the laws and programs currently available in the CNMI to achieve the goal of private lands conservation. Where possible, a brief description of the application of these programs on the islands is provided. Section VII of the report recommends certain actions be taken in order to utilize conservation easements in the CNMI—and concludes that conservation easements are most likely

compatible with the CNMI legal system. As a precaution, however, some local customs related to land might contrast with the conservation easement concept. Nonetheless, this report recommends that the CNMI legislature adopt a Conservation Easement Act that would apply throughout the islands and require enforcement by the CNMI courts. This section also offers several other strategies for implementing and successfully enforcing conservation easements in the CNMI.

I. RELEVANT BACKGROUND

A. History of land tenure under foreign administrations

The first inhabitants on the Mariana Islands—a region which geographically includes Guam—were the Chamorros, who came from southeast Asia perhaps as early as 1500 B.C.¹ Little is known about the Chamorros' traditional system of land tenure, but anthropologists believe it was a highly stratified matrilineal system² with elements of communal ownership, in which a traditional leader or chief would control the land for the benefit of an extended family or tribe.³ The Chamorros' traditional way of life remained virtually undisturbed for over 3,000 years until the arrival of the Spanish in the 1500s. Spain was the first in a string of four successive foreign administrations to control the Marianas. Germany, Japan, and the United States would all follow, and each government administered the land in its own way.

¹ Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions*, p. 426 (Lawyers Cooperative Publishing, 1995) (hereinafter Laughlin, Jr.).

² William A. McGrath & W. Scott Wilson, *The Marshall, Caroline and Mariana Islands: Too Many Foreign Precedents*, in *Land Tenure in the Pacific*, p. 197 (Ron Crocombe ed., 3rd ed. 1987) (hereinafter McGrath & Wilson).

³ Laughlin, Jr., at 400.

1. *Spanish era (1521-1899)*

First sighted by Magellan in 1521, the Spanish claimed the Marianas island chain as a colony in 1565.⁴ Due to the introduction of European diseases and rebellions against the Spanish, by the end of the seventeenth century the original Chamorro population of about 100,000 had been reduced to below 5,000.⁵ By 1698 the Spanish had grown frustrated with the Chamorros' opposition to Catholicism and began to forcibly remove the remaining native population to Guam.⁶ As a result, with the exception of Rota⁷—where a small Chamorro population had managed to evade capture—the Northern Mariana Islands were left essentially uninhabited for over 100 years.⁸ In the mid-1800s the Spanish permitted Carolinians (from the Caroline Islands) to migrate to and settle on Saipan and the other northern islands.⁹ While the Chamorros were allowed to return to the Northern Mariana Islands in the second half of the nineteenth century, neither the Spanish government nor the repatriated Chamorros retained knowledge of where their ancestral lands were located—thus, these ancient patterns of land tenure were lost forever.¹⁰ Additionally, as a result of intermarriage with Spanish and other Asian groups during the two centuries prior to their return, the Chamorros had lost much of their traditional culture.¹¹ The Chamorros were also forced to compete for land and resources

⁴ *Id.* at 426.

⁵ Bruce L. Ottley, *The Commonwealth of the Northern Mariana Islands*, in *South Pacific Islands Legal Systems*, p. 541 (Michael A. Ntume ed. 1993) (hereinafter Ottley).

⁶ James B. Johnson, *Land Ownership in the Northern Mariana Islands: An Outline History*, p. 2 (Mariana Islands District Division of Land Management, 1969) (hereinafter Johnson).

⁷ Formerly known as Sarpan, the island of Rota is one of the Mariana Islands and part of the CNMI.

⁸ Laughlin, Jr., at 427.

⁹ *Id.* The island of Saipan is part of the CNMI. Currently, the CNMI headquarters is located at Chalan Kanoa, the chief settlement of Saipan.

¹⁰ McGrath & Wilson, at 198; Johnson, at 2.

¹¹ Ottley, at 541.

with the Carolinians, who had settled on the Northern Mariana Islands during their absence.¹²

Prior to the 1800s, most of the land in the CNMI was controlled by feudal landlords.¹³ However, with the settlement of the islands by the Carolinians and returning Chamorros, the Spanish began to grant individual titles to parcels of land and to keep records of land transactions.¹⁴ As the Spanish considered land to be owned by the public (but not owned by the government), individuals obtained land merely by taking possession of it and filing a description of the holding with the administration in Guam.¹⁵ Under Spanish law, after being in possession of the land for twenty years a person could request a crown grant of the land on the strength of that possession.¹⁶ The Spanish administration, however, did not have a system for the inspection, supervision or surveying of the land.¹⁷

2. *German era (1899-1914)*

Following the defeat of Spain in the Spanish-American War, the northern Marianas were sold to Germany in 1899 for about five million dollars.¹⁸ The Germans gave full recognition and protection to all private land rights on the islands; however, holders of the Spanish titles who did not fence in their pasture lands or did not cultivate their agricultural lands lost them to the public domain.¹⁹ Germany also bought large amounts of land from indigenous owners and leased the parcels to foreign companies.²⁰

¹² Laughlin, Jr., at 427.

¹³ McGrath & Wilson, at 198.

¹⁴ Johnson, at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Laughlin, Jr., at 428.

¹⁹ Johnson, at 3.

²⁰ McGrath & Wilson, at 198.

In the early 1900s, a homesteading program was initiated on the islands which attracted an increasing number of Chamorros from Guam.²¹ As with all German titles, each landowner had to make effective use of the land—including foreigners, who had to begin clearing the land for economic use within one year or risk forfeiture.²² Unlike the Spanish, the Germans kept meticulous records of all privately owned land, a practice which furthered the western concept of individual land ownership.²³

3. *Japanese era (1914-1944)*

With the outbreak of World War I in 1914, the Japanese seized the Northern Mariana Islands from Germany.²⁴ After the war, Japan received a mandate from the League of Nations to treat the islands as a protectorate.²⁵ The new administration recognized all existing claims to the land and conducted comprehensive surveys in order to establish boundaries and determine the extent of holdings.²⁶ Early on the Japanese discovered the potential for developing a sugar industry on the islands of Saipan, Tinian and Rota. In the interest of saving the available land for this purpose, homesteading was prohibited and new titles to public land were no longer issued to Chamorros and Carolinians.²⁷ Additionally, Japanese and other foreign nationals were not allowed to purchase land as individuals until 1931, and even then they were restricted to utilizing the land for the construction of commercial buildings.²⁸ In 1935 Japan withdrew from the

²¹ Johnson, at 3.

²² McGrath & Wilson, at 199.

²³ Johnson, at 4.

²⁴ *Id.* at 5.

²⁵ Laughlin, Jr., at 462. Following World War I Japan received the northern Marianas by the terms of the Treaty of Versailles on June 28, 1919, and then later as a mandate under the League of Nations on December 17, 1920. The U.S. recognized this mandate on Feb. 11, 1922.

²⁶ Johnson, at 5.

²⁷ *Id.*

²⁸ *Id.* at 10.

League of Nations and began to operate the islands in a more self-interested manner.²⁹ The islands were closed to the outside world and heavily fortified with military bases.³⁰ A large influx of Japanese immigrants occurred and Japanese sugar companies soon owned most of the land in the islands.³¹ In 1938, sugar cane was grown on about 58 percent of the land in Tinian, 32 percent in Saipan, and 29 percent in Rota.³² Of the cultivable land, over 70 percent of it was used for sugar production.³³ The dual factors of foreign immigration and the development of large sugar cane plantations radically altered what little Chamorro and Carolinian land traditions still remained³⁴—including on Rota, where the Japanese government imposed a land exchange program on a Chamorro population and culture that had previously been relatively undisturbed.³⁵

4. *United States era (1944-Present)*

During World War II, the U.S. engaged in an intense, month-long battle in the northern Marianas; and in June of 1944, the Japanese were forced out of the region.³⁶ The battle had devastating effects on the land system that remained—all official land records were destroyed, monuments and markers delineating boundaries were displaced, and many individuals with knowledge of land matters were killed.³⁷ The U.S. instituted measures to provide the indigenous people with an opportunity to reclaim their land, and

²⁹ Laughlin, Jr., at 462.

³⁰ *Id.* at 428, 462.

³¹ Johnson, at 5-6.

³² As estimated by the U.S. Navy. *Id.* at 6.

³³ McGrath & Wilson, at 200. The largest company, Nanyo Kohatsu Kaisha (NKK), was essentially a monopoly. NKK employed 21,000 people, operated four mills (two on Tinian and one each on Saipan and Rota), serviced the mills by a rail system with over twenty steam locomotives, and produced as much as 82,000 tons of raw sugar per year. Johnson, at 6.

³⁴ Ottley, at 540-541.

³⁵ Johnson, at 10-11.

³⁶ Laughlin, Jr., at 428.

³⁷ Johnson, at 11.

implemented two different land exchange programs aimed at restoring the land's productive use.³⁸

In 1947 the United Nations placed the Northern Mariana Islands and part of Micronesia in the Trust Territory of the Pacific Islands (TTPI).³⁹ The U.S. was designated the administering authority under the Trusteeship Agreement⁴⁰ and was given “full powers of administration, legislation, and jurisdiction over the territory.”⁴¹ Under the Trusteeship Agreement, the U.S. was granted certain military rights and was permitted to establish military bases in the area, including the Northern Mariana Islands.⁴² The creation of official U.S. policy toward land ownership soon followed. Native land concepts were codified in each area and land transfers made prior to Japan's departure from the League of Nations were considered binding. Additionally, native land holdings could not be transferred to non-natives. The U.S administration continued the process of keeping comprehensive land records; and lands acquired by the former Japanese and German governments reverted to the Trust Territory Government.⁴³ Although the U.S. possessed administrative jurisdiction, the Trust Territory Government held the lands in trust for the native people.⁴⁴ During the fifteen years following initiation of the Trusteeship Agreement, the TTPI was governed by the U.S. Navy and the

³⁸ *Id.* at 11, 18.

³⁹ Trusteeship Agreement for the United States Trust Territory of the Pacific Islands (1947).

⁴⁰ *Id.* at Article II.

⁴¹ *Id.* at Article III.

⁴² *Id.* at Article V.

⁴³ Office of the Deputy High Commissioner, *Trust Territory Policy Letter, P-1* (Dec. 29, 1947). Of note, the TTPI's Trust Territory Code was promulgated in 1952 but did not include the native-to-non-native land alienation clause until 1966.

⁴⁴ Johnson, at 19.

Department of the Interior pursuant to a series of executive orders,⁴⁵ with the goal being to eventually form all of Micronesia into a single nation.⁴⁶

Aside from some Saipan land title commissions⁴⁷ and a 1958 homestead program on Saipan (later extended to Tinian and Rota),⁴⁸ it was not until 1966 that a comprehensive system for establishing titles to all land in the Northern Marianas was created. In 1966 the Congress of Micronesia passed legislation that established land commissions in each district of the TTPI (including the Marianas District Land Commission) in order to make binding determinations on land boundaries and titles.⁴⁹ Each title determination was made by a Land Registration Team after the completion of a formal hearing and adjudication involving all interested parties.⁵⁰ By 1969, the Marianas District Land Title Officer had made over 1,300 land determinations on Saipan and over 400 on Rota.⁵¹ Surveys, however, were not part of the Mariana District's regular duties so exact locations of land parcels were often in dispute.⁵²

As the rest of Micronesia moved toward a free association status in the 1970s, the Northern Marianas expressed a desire to have a closer relationship with the U.S; so in spite of criticism from several members of the United Nations, the U.S. began separate negotiations with the Northern Marianas.⁵³ The negotiations resulted in a Covenant, which defined the relationship between the U.S. and the Northern Marianas.⁵⁴ On June

⁴⁵ Ottley, at 540.

⁴⁶ Laughlin, Jr., at 429.

⁴⁷ McGrath & Wilson, at 202-203.

⁴⁸ Johnson, at 19-20.

⁴⁹ *Id.* at 20-21.

⁵⁰ *Id.* at 21.

⁵¹ *Id.* at 11.

⁵² *Id.*

⁵³ Laughlin, Jr., at 430.

⁵⁴ Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (1975) (hereinafter Covenant).

17, 1975, almost 80 percent of voters on the islands were in favor of accepting the Covenant and becoming a U.S. Commonwealth.⁵⁵ Soon after, the U.S. Congress ratified the legislative-executive agreement by joint resolution.⁵⁶ Significantly, the Covenant required that large amounts of land be leased to the U.S. for defense purposes.⁵⁷ In 1986, pursuant to a Presidential Proclamation which terminated the United Nations Trusteeship Agreement as it applied to the Northern Marianas, under the terms of the Covenant the Northern Mariana Islands became a self-governing Commonwealth “in political union with and under the sovereignty of the United States of America.”⁵⁸ Today, the political status of the CNMI remains the same.

B. Overview of the land, demographics, and related issues

1. Land area and population figures

The CNMI consists of fourteen islands, with a total land area of 176.5 square miles spread over 264,000 square miles of ocean.⁵⁹ The estimated population in 2003 was 74,151—an increase of 4,930 people since the 2000 census.⁶⁰ From 1980 to 2000, the CNMI had one of the world’s highest population growth rates (7.3 percent per year)⁶¹ as the number of people more than quadrupled.⁶² Only five of the fourteen islands are inhabited, and 90 percent of the population lives on Saipan, the largest island at 46.5 square miles.⁶³ Tinian and Rota—at 39.2 square miles and 32.8 square miles, respectively—are essentially home to the remaining 10 percent of the population (two of

⁵⁵ Laughlin, Jr., at 429.

⁵⁶ H.R.J. Res. 549, 94th Cong., 1st Sess. (1975).

⁵⁷ Covenant, at § 802(a).

⁵⁸ Covenant, at § 101 (1975).

⁵⁹ *Commonwealth of the Northern Mariana Islands Economic Report*, p. 4, (Bank of Hawaii, October 2003).

⁶⁰ *Id.*

⁶¹ *Id.* at 3, 5.

⁶² CNMI’s population in 1980 was 16,780; by 2000 the population was 69,221. *Id.* at 4.

⁶³ *Id.* at 3-4.

the northern islands had a total population of six residents in 2000).⁶⁴ The 2000 census indicated that foreign-born residents (mostly workers) made up 64.1 percent of the population, with indigenous residents comprising only 35.9 percent.⁶⁵ In 1995 it was estimated that of the indigenous population, 70 percent were Chamorros and 30 percent were Carolinians.⁶⁶

2. *Public and private lands*

Public land in the CNMI is administered by the Marianas Public Land Authority (MPLA).⁶⁷ In 1993 it was estimated that 80 percent of land in the CNMI was public;⁶⁸ by 1997 this figure had fallen to 72 percent;⁶⁹ and in 2000 was estimated at 60 percent.⁷⁰ In 2003 the CNMI contained 20,000 acres of land designated as forest, of which 20 percent (4,000 acres) consisted of non-industrial private land.⁷¹

While the decrease in public lands is largely due to the homestead program,⁷² which is discussed below, the total amount of public land still remains relatively high. However, as one scholar points out, the amount of “public” land supposedly available is misleading.⁷³ First, the figure includes the essentially uninhabited islands north of Saipan, where most of the land is public.⁷⁴ These islands constitute 60 percent of the

⁶⁴ *Id.*

⁶⁵ *Id.* at 5.

⁶⁶ Laughlin, Jr., at 428.

⁶⁷ P.L. 12-71. The MPLA website is located at <http://www.mpla.gov.mp/welcome.php> (last visited June 29, 2004).

⁶⁸ Ottley, at 557.

⁶⁹ Helen A. Robbins, *Both Sword and Shield: The Use of Customary Law in the Commonwealth of the Northern Mariana Islands* (2001), p. 171 (unpublished Ph.D dissertation, University of Arizona) (on file with the John Jay College of Criminal Justice Library) (hereinafter Robbins).

⁷⁰ *Id.*

⁷¹ Commonwealth of the Northern Mariana Islands Forest Resource Fact Sheet (2003) at <http://www.fs.fed.us/r5/spf/projects/factsheets/nmariana.htm> (last visited June 29, 2004).

⁷² Robbins, at 171.

⁷³ *Id.*

⁷⁴ *Id.* The CNMI Constitution requires that the island of Managaha remain uninhabited, and that the islands of “Maug, Uracas, Asuncion, Guguan, and other islands specified by law . . . be maintained as

total land area in the CNMI, but many of them are uninhabitable.⁷⁵ Of the southern inhabited islands, the land is roughly split between public and private land.⁷⁶ Second, large sections of land on the southern islands which are classified as “public” are actually under lease to the U.S. military,⁷⁷ including about 71 percent of the total land on Tinian.

While debate still continues on how the remaining public lands should be administered, in recent years three approaches have generally been adopted: (1) wildlife sanctuaries have been established; (2) leasehold interests have been sold to (primarily foreign) investors; and (3) land parcels have been given away under a homestead program.⁷⁸

Several wildlife sanctuaries have been established in recent years, but generally these sanctuaries are located on and around uninhabited islands.⁷⁹ Proposals for wildlife preserves in more densely populated areas have frequently met with strong opposition.⁸⁰

The CNMI government has also leased land to investors, usually to foreign developers. The CNMI receives multiple benefits from this: (1) revenue from the leases themselves; (2) income from taxes; (3) development of land at little cost to the CNMI;

uninhabited places and used only for the preservation and protection of natural resources, including but not limited to bird, wildlife and plant species.” Constitution of the Commonwealth of the Northern Mariana Islands, Article XIV, § 2 (hereinafter CNMI Constitution).

⁷⁵ Robbins, at 171-172.

⁷⁶ *Id.* at 172.

⁷⁷ Under the Covenant, 17,799 acres (7,203 hectares) are leased on Tinian; 177 acres (72 hectares) on Saipan; and 206 acres (83 hectares) on Farallon de Medinilla. Article VIII, § 802(a)(1)-(3).

⁷⁸ *Id.* at 173-177. Information on the CNMI’s homestead program can be found at the MPLA’s website—see <http://www.mpla.gov.mp/homestead/homestead.php> (last visited June 29, 2004).

⁷⁹ See P.L. 12-46 (establishing sanctuaries on Bird Island and Forbidden Island) and P.L. 12-12 (designating Managaha Island as a “Marine Conservation Area”); see also CNMI Constitution, Article XIV, § 2 (setting aside certain islands for natural resource preservation purposes).

⁸⁰ This is especially true when the proposals have come from a U.S. federal agency and not from the MPLA. See e.g., Liberty Dones, “MPLA Joins Growing Clamor Against Critical Habitat for Endangered Bird,” *Saipan Tribune* (Jan. 8, 2003); Marian A. Maraya, “Senators Balk at Feds’ Plan to Designate Land for Birds,” *Saipan Tribune* (Nov. 7, 2002).

In a statement illustrative of this point, Senator Thomas P. Villagomez of Rota reacted to a proposal for a designated bird habitat on his island with the following: “I love birds but I won’t sacrifice the livelihood of our people for [a] crow.” Maraya, *Saipan Tribune* (Nov. 7, 2002).

and (4) more tourists drawn to the CNMI by new business ventures⁸¹ such as casinos and golf courses. For these reasons, many CNMI residents argue for an increase in the number of leases on public lands.⁸² The commercial leasing of public land is limited to twenty-five years—a term which includes renewal rights (past the twenty-five year term, renewals of no more than fifteen years may be given only with approval by three-fourths of the legislature).⁸³ In addition, an interest cannot be acquired in more than five hectares of public land for commercial purposes without legislative approval in a joint session.⁸⁴

By far the most popular choice for the use of public land is to divide it into homesteads. Partly to insure that the poor are not homeless,⁸⁵ the CNMI Constitution requires that “some portion of the public lands” be made available for a homestead program.⁸⁶ Today, however, homesteads are perceived as an “entitlement” by most persons of Northern Mariana descent.⁸⁷ To legally receive a homestead, an applicant must be at least one-fourth of Northern Mariana descent, be eighteen years old, cannot already own land, and cannot earn more than \$70,000 per year.⁸⁸ Also, “a person may not receive a freehold interest in a homestead for three years after the grant of a homestead and may not transfer a freehold interest in a homestead for ten years after receipt”⁸⁹

⁸¹ Robbins, at 173-174.

⁸² *Id.* at 173.

⁸³ CNMI Constitution, Article XI, § 5(c). This is a restriction on the leasing of *public land* by the MPLA, and should be distinguished from the fifty-five year lease restriction on real property in general. CNMI Constitution Article XII, § 3.

⁸⁴ *Id.* at § 5(d).

⁸⁵ Robbins, at 174.

⁸⁶ CNMI Constitution, Article XI, § 5(a).

⁸⁷ Robbins, at 175.

⁸⁸ *Id.*

⁸⁹ CNMI Constitution, Article XI, § 5(a).

Multiple problems accompany the homestead program. First, in the initial three year period, the requirement that a home must be built has served to exclude the truly poor—or in the alternative, has encouraged the building of shanty-homes.⁹⁰ Second, corruption and legal loopholes have resulted in homestead deeds being transferred to applicants (usually family and friends) who would not otherwise have qualified. For example, to circumvent the rule that current landowners are prohibited from receiving a homestead, individuals have delayed probate proceedings or transferred land to a “straw man” in order to appear landless.⁹¹ Third, insufficient enforcement measures are in place to assure that homestead recipients obey the regulations.⁹² For example, while homesteaders often lease their land prematurely or fail to “improve” their land within the required time period, their actions often go unnoticed.⁹³ Fourth, and perhaps most importantly, a rapidly growing population combined with the rapid diminishment of public land has placed increased pressure on the homestead program.⁹⁴ The scarcity of land has led the MPLA to consider a revision of the Homestead Act⁹⁵ to allow the construction of high-rise residential buildings, rather than giving away individual lots.⁹⁶ The MPLA has even considered terminating the program altogether, and in 2002 imposed a moratorium on new homestead applications in Saipan.⁹⁷ In 2003, however, there were

⁹⁰ Robbins, at 175.

⁹¹ *Id.* at 176.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 2 N. Mar. I. Code §§ 4301-4385.

⁹⁶ Liberty Dones, “MPLA to Revise Land Use Plan,” *Saipan Tribune* (Mar. 28, 2003). For an editorial advocating vertical development in the CNMI, see “NMI Homestead Program,” *Saipan Tribune* (Jan. 10, 2001).

⁹⁷ Liberty Dones, “MPLA Gets Proposals for Land Use Plan,” *Saipan Tribune* (Apr. 17, 2003). See also the MPLA’s website at http://www.mpla.gov.mp/homestead/moratorium_advisory.php (last visited June 29, 2004).

3,512 applications still pending for only 300 available lots in Saipan.⁹⁸ As of March 2003, a total of 3,277 homestead lots had been issued on Saipan; on Tinian, a total of 1,038 subdivision lots and 370 agricultural lots had been issued; and for Rota, 881 home lots had been issued.⁹⁹

C. Government

The governmental structure of the CNMI is largely modeled on that of the United States, and includes local governments and representation in the United States.

1. Executive branch

Executive powers are vested in a Governor “who shall be responsible for the faithful execution of the laws.”¹⁰⁰ The Governor is elected jointly with a Lieutenant Governor for a term of four years.¹⁰¹

2. Legislative branch

The legislative branch consists of a Senate and a House of Representatives.¹⁰² The Senate is composed of nine members, with three members elected at large from each senatorial district of Rota, Tinian and Aguiguan, and Saipan.¹⁰³ The House is composed of fourteen members, with twelve from Saipan, one from Tinian and Aguiguan, and one from Rota.¹⁰⁴ In addition to enacting legislation that is applicable throughout the Commonwealth, the legislative branch may enact local laws which only apply in a single senatorial district.¹⁰⁵

⁹⁸ Dones, *Saipan Tribune* (Mar. 28, 2003).

⁹⁹ *Id.*

¹⁰⁰ CNMI Constitution, Article III, § 1.

¹⁰¹ *Id.* at § 4.

¹⁰² *Id.* at Article II, § 1.

¹⁰³ *Id.* at § 2.

¹⁰⁴ *Id.* at § 3.

¹⁰⁵ *Id.* at § 6.

3. *Judicial branch*

The CNMI Constitution vests judicial power in a Commonwealth Trial Court.¹⁰⁶ Today, the Trial Court is known as the Commonwealth Superior Court, with appeals from this court being heard in the Supreme Court of the CNMI.¹⁰⁷ The Superior Court has original jurisdiction over all land actions in the CNMI.¹⁰⁸ Supreme Court holdings on issues that are local in scope cannot be appealed to any other court.

The CNMI also has a U.S. federal court system. The U.S. District Court for the Northern Mariana Islands was provided for by the Covenant¹⁰⁹ and has the same jurisdiction as other district courts—authority to hear cases arising under U.S. constitutional and statutory law or cases between a CNMI resident and a foreign resident.¹¹⁰ Appeals from the Northern Marianas District Court, and from the CNMI Supreme Court if a federal question is involved, are heard in the U.S. Court of Appeals for the Ninth Circuit.¹¹¹ Beginning in 2004, appeals from the CNMI Supreme Court involving a federal question were set to go directly to the U.S. Supreme Court.

4. *Local governments*

The CNMI Constitution authorized the establishment of local governments, headed by elected mayors on Rota, Tinian and Aguiguan, Saipan, and the islands north of

¹⁰⁶ *Id.* at Article IV, § 1.

¹⁰⁷ Commonwealth Judicial Reorganization Act of 1989, P.L. 6-25 (1989).

¹⁰⁸ The Superior Court has original jurisdiction over civil and criminal actions as well. CNMI Constitution, Article IV, § 2.

¹⁰⁹ Covenant, Article IV, § 401.

¹¹⁰ *Id.* at § 402(a).

¹¹¹ *Id.* at § 403(a). Appeals from cases involving U.S. federal programs such as the Forest Legacy Program and Wetlands Reserve Program (*see* Section IV(B)(2) of this report) might qualify as a “federal question.”

Saipan.¹¹² Each mayor is responsible for coordinating federal programs and activities on the island(s) they serve¹¹³ and for performing other responsibilities provided by law.¹¹⁴

The Local Law Act of 1983 sets out the guidelines for enacting local laws, and requires that local bills be introduced only by senators or representatives from the affected senatorial district.¹¹⁵ It also requires that the mayor of the affected senatorial district have an opportunity to review and comment on all local bills before they are enacted.¹¹⁶ Local bills may pertain to, but are not limited to, the conservation of wildlife,¹¹⁷ appropriations,¹¹⁸ or real property taxes not to exceed two percent of the appraised value of the land.¹¹⁹

5. U.S. representation

As authorized by the Covenant,¹²⁰ the CNMI elects a representative to serve in the United States.¹²¹ The representative is not a member of the U.S. Senate or House of Representatives, but merely presents to the U.S. Congress the views of the CNMI on issues affecting it.¹²²

D. Legal framework

The legal system of the CNMI is a mixture of U.S. and local laws. The Covenant, along with certain provisions of the United States' Constitution and laws, comprise the

¹¹² CNMI Constitution, Article VI, § 2.

¹¹³ *Id.* at § 3(e).

¹¹⁴ *Id.* at § 3(h).

¹¹⁵ 2 N. Mar. I. Code § 1403.

¹¹⁶ *Id.* at § 1405.

¹¹⁷ This holds so long as the local law is “more restrictive than Commonwealth-wide laws.” *Id.* at § 1402(a)(5). *See e.g.*, Rota Local Law 9-1, codified at 10 N. Mar. I. Code §§ 1801-1802 (establishing the Sabana Wildlife Conservation Area); Rota Local 9-2, codified at §§ 1821-1822 (establishing Wedding Cake Mountain Wildlife Conservation Area); and Rota Local Law 10-8, codified at §§ 1841-1842 (establishing Sasanhaya Fish Reserve).

¹¹⁸ 2 N. Mar. I. Code § 1402(b).

¹¹⁹ *Id.* at § 1402(c).

¹²⁰ Covenant, Article IX, § 901.

¹²¹ CNMI Constitution, Article V, § 1.

¹²² Ottley, at 548.

supreme law of the land;¹²³ but the Commonwealth’s Constitution, statutes, customs and judicial decisions (which incorporate U.S. common law) are additional sources of law in the CNMI.¹²⁴

1. Supreme law

Supreme law rests at the top of the legal hierarchy. Lesser legal authority may coexist with supreme law, but it must not contradict or infringe upon the supreme law.

a. Covenant

The Covenant governs relations between the U.S. and the CNMI and recognizes the right of the CNMI people “to exercise their inalienable right of self-determination.”¹²⁵ Consequently, its “fundamental provisions” cannot be changed without mutual consent.¹²⁶ One of the “fundamental provisions,” Article VIII, § 805, explicitly concerns land ownership. It restricts land ownership in the CNMI to “persons of Northern Mariana Islands descent”¹²⁷ and authorizes the CNMI to regulate the ownership of its “public land.”¹²⁸

b. U.S. Constitution

The Covenant states that “[t]o the extent that they are not applicable of their own force,” certain provisions of the U.S. Constitution “will be applicable within the [CNMI] as if the [CNMI is] one of the several states.”¹²⁹ For example, Amendments I through IX

¹²³ Covenant, Article I, § 101.

¹²⁴ Ottley, at 542.

¹²⁵ Covenant, Preamble.

¹²⁶ *Id.* at Article I, § 105.

¹²⁷ *Id.* at Article VIII, § 805(a).

¹²⁸ *Id.* at § 805(b). The other “fundamental provisions” are: Article I (defines the political relationship between the two countries and enables the U.S. to pass legislation in the CNMI); Article II (provides for a CNMI Constitution); Article III (grants U.S. citizenship to CNMI citizens and certain other residents); and Article V, § 501 (specifies the applicable provisions of the U.S. Constitution to the CNMI).

¹²⁹ *Id.* at Article V, § 501(a).

were made applicable to the CNMI; as were the Fourteenth Amendment's Due Process and Equal Protection Clauses.¹³⁰

c. U.S. laws

The U.S. is authorized by the Covenant to enact legislation applicable in the CNMI.¹³¹ This authority is restricted, however, so that the U.S. cannot interfere with the “fundamental provisions” of the Covenant.¹³²

The Covenant, addressing previously enacted laws in the U.S., expressly makes certain U.S. programs and statutes applicable to the CNMI,¹³³ in addition to the laws “which are applicable to Guam and which are of general application to the several states as they are applicable to the several states.”¹³⁴ In other words, it is possible to use Guam as the “guiding criteria” on the applicability of U.S. law to the CNMI.¹³⁵ Since many federal statutes state their applicability to Guam, when these are combined with the statutes explicitly noted in the Covenant, most federal laws apply to the CNMI as they apply to the several states,¹³⁶ including the major environmental statutes.

As for the laws that are inapplicable to the CNMI under the above criteria, the Commission on Federal Laws¹³⁷ required that two questions be asked before determining whether a U.S. statute should be extended to the CNMI: (1) is the law necessary and

¹³⁰ The other parts of the U.S. Constitution applicable to the CNMI are: Article I, § 9, Clauses 2, 3, and 8; Article I, § 10, Clauses 1 and 3; Article IV, § 1 and § 2, Clauses 1 and 2; Amendment XIII; Amendment XV; Amendment XIX; and Amendment XXVI. *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at Article V, § 502(a)(1).

¹³⁴ *Id.* at § 502(a)(2).

¹³⁵ Laughlin, Jr., at 442.

¹³⁶ *Id.*

¹³⁷ The creation of the Commission was mandated by the Covenant, Article V, § 504.

proper for carrying out the Covenant? and (2) is the law inconsistent with the right of self-government over local and internal matters?¹³⁸

2. Other sources of law

Besides supreme law, other legal authority exists in the CNMI. These authorities are valid to the extent that they do not conflict with supreme law.

a. CNMI Constitution

The CNMI adopted its Constitution in 1978.¹³⁹ Several provisions of the CNMI Constitution are of particular relevance to the administration of land:

- Article I, § 9 – recognizes that every person has a right to a clean and healthy public environment, including the land, air and water;
- Article X, § 5 – prohibits the taxing of any owner-occupied single family residential, agricultural, or unimproved real property (unless approved by three-fourths of the votes in a particular senatorial district);
- Article XI – creates public lands; establishes the Marianas Public Land Corporation (now the MPLA¹⁴⁰) to administer the public lands; mandates a homestead program; and requires the MPLA to adopt a comprehensive land use plan; and
- Article XII – restricts the acquisition of “permanent and long-term interests”¹⁴¹ in CNMI land to “persons of Northern Marianas descent,”¹⁴² including “acquisition by sale, lease, gift, inheritance or other means.”

¹³⁸ Laughlin, Jr. at 443, *citing* The Final Report for the Northern Mariana Islands Commission on Federal Laws to the Congress of the United States, CNMI Reports Vol. 1, p. 1G (1991).

¹³⁹ As mandated by Covenant, Article II, § 201.

¹⁴⁰ *See* P.L. 12-71 (2001).

¹⁴¹ Freehold and leasehold interests of more than fifty-five years including renewal rights, unless the real property interest is above the first floor of a condominium building. CNMI Constitution, Article XII, § 3.

¹⁴² A corporation is a “person of Northern Marianas descent” so long as it is incorporated in the CNMI, has its principal place of business in the CNMI, and all of the directors are “persons of Northern Marianas descent.” *Id.* at § 5.

b. CNMI legislation

The CNMI legislature has the power to enact laws in “all rightful subjects of legislation.”¹⁴³ This means that CNMI legislation must be consistent with the U.S. Constitution, U.S. laws applicable to the CNMI, and the CNMI Constitution.¹⁴⁴ The laws enacted are contained in the Northern Mariana Islands Commonwealth Code (CNMI Code).

c. CNMI common law and U.S. common law

The principle of stare decisis is applied in much the same way in CNMI courts as it is in American jurisprudence.¹⁴⁵ CNMI courts, however, not only apply precedent from their own body of decisions, but also apply American case law.¹⁴⁶ The CNMI Code provides that in the absence of written or customary law, “the rules of the [U.S.] common law, as expressed in the restatements of the law approved by the American Law Institute [ALI] . . . , shall be the rules of decision in the courts of the Commonwealth,”¹⁴⁷ and in fact, under these circumstances the CNMI courts do refer to the U.S. common law and usually adopt it as their own.¹⁴⁸

d. CNMI customs

The CNMI Constitution makes no mention of custom or traditional law, but the CNMI Code and CNMI case law do heavily rely on custom in several areas, including

¹⁴³ *Id.* at Article II, § 1.

¹⁴⁴ Ottley, at 544.

¹⁴⁵ Robbins, at 222.

¹⁴⁶ *Id.* at 222-223.

¹⁴⁷ 7 N. Mar. I. Code § 3401.

¹⁴⁸ *See Estate of Barcinas*, 4 N. Mar. I. 149, 153 (1994) (applying U.S. common law to issue of advancements in an intestacy case); *Ada v. Sablan*, 1 N. Mar. I. 164, 168-169 (1990) (approving the Superior Court’s use of U.S. common law to make its decision, but overturning the lower court’s finding on what the U.S. common law actually was).

probate and family law.¹⁴⁹ A particular example is the codified Chamorro custom of performing a “partida,”¹⁵⁰ in which the father calls his family together before his death and orally divides all family and ancestral lands among his children.¹⁵¹ The father is expected to divide the land fairly and according to customs and standards.¹⁵² Although the legality of the practice has been disputed by locals, the CNMI courts have held that once the father performs a partida, a legal interest is vested in his heirs and the divisional scheme cannot be revoked at any time.¹⁵³ Due to an increased number of disputes and the high value of land, recent efforts have been made to encourage the elderly to make written wills; and as a result, oral transfers are becoming less common.¹⁵⁴ Nonetheless, land transactions performed pursuant to a legitimate partida will be upheld.¹⁵⁵

II. OWNERSHIP OF PRIVATE PROPERTY

A. Restrictions on alienation of land

The Covenant, “in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency,” requires that land ownership in the CNMI be restricted to “persons of Northern Mariana Islands descent.”¹⁵⁶ However, the CNMI Constitution does allow leases of less than fifty-five years including renewal rights to non-locals.¹⁵⁷ The restrictions are mandatory for twenty-five years after the termination of the Trusteeship Agreement, and thereafter

¹⁴⁹ Title 8 of the CNMI Code.

¹⁵⁰ 2 N. Mar. I. Code § 4916.

¹⁵¹ Ottley, at 561.

¹⁵² *Id.*

¹⁵³ Robbins, at 233, 241-242.

¹⁵⁴ Ottley, at 561; Robbins, at 211.

¹⁵⁵ *See Pangeliman v. Tudela*, 1 CR 708 (District Court 1983).

¹⁵⁶ Covenant, Article VIII, § 805.

¹⁵⁷ CNMI Constitution, Article XII, § 3.

become discretionary for the CNMI.¹⁵⁸ Although it would likely violate the Equal Protection Clause in the U.S., the Ninth Circuit has upheld the CNMI restriction on land alienation.¹⁵⁹ Interestingly, as provided by the CNMI Constitution a person is designated “full-blooded” Chamorro or Carolinian if he or she was born in, domiciled in, or a citizen of the Northern Mariana Islands by 1950.¹⁶⁰ As a result, it is possible for a descendant of Japanese or Americans to qualify as “of Northern Mariana descent.”¹⁶¹

B. General restrictions on land use

The CNMI Code recognizes rights of way, easements appurtenant, and use rights, stating that “ownership shall be subject to the following which should, but need not, be stated in the certificate:

- (1) Any rights of way there may be over the land in question;
- (2) Any lease or use right for a term not exceeding one year.”¹⁶²

It continues, “[a]ny easements or other rights appurtenant to the land in question which are over unregistered land shall remain so appurtenant, even if not mentioned in the certificate, and shall pass with the land until cut off or extinguished in some lawful manner . . .”¹⁶³

Adverse possession is also recognized in the CNMI. The CNMI Supreme Court has held that in order for a person to gain title against a co-tenant through adverse possession, a claimant has the burden of showing (1) a “clear intent” to adversely

¹⁵⁸ *Id.* at § 805(a).

¹⁵⁹ *Wabol v. Villacrusis*, 1 N. Mar. I. 19 (1989), 958 F.2d 1450 (9th Cir. 1992).

¹⁶⁰ CNMI Constitution, Article XII, § 4.

¹⁶¹ So long as their ancestors were born in, domiciled in, or a citizen of the Northern Mariana Islands by 1950. Robbins, at 181. A land owner must be at least one-fourth of Northern Mariana descent, including in the equation as “full-blooded” those ancestors who were born in, domiciled in, or a citizen of the islands by 1950. CNMI Constitution, Article XII, § 4.

¹⁶² 2 N. Mar. I. Code § 4251(a).

¹⁶³ *Id.* at § 4251(b) (emphasis added).

possess; (2) adverse possession “in fact;” and (3) notice to, or knowledge by, the co-tenant who is out of possession that there was a “hostile holding.”¹⁶⁴ In addition, the adverse possession must have been continuous for at least twenty years.¹⁶⁵

III. PRIVATE LAND ADMINISTRATION

A. Institutional framework

The Land Commission Act of 1983 was enacted in order “to promptly register all land within the Commonwealth,” with “priority to the surveying of those lands to which the Trust Territory government issued title determination without surveys.”¹⁶⁶ The Act established the Land Commission, which has since been abolished and its functions transferred to the Division of Land Registration in the Department of Lands and Natural Resources.¹⁶⁷ The Division’s duties include the following:

- To make land surveys and plats in connection with land title determinations;
- To hold hearings on land disputes;
- To issue title certificates; and
- To record title certificates with the Recorder.¹⁶⁸

Land registration teams are responsible for designated areas, and generally perform the Division’s duties on a local level.¹⁶⁹ After reaching a decision on a claim, the land registration team shall:

- “record the place name, if any, of the land, otherwise a brief description thereof, together with the names of individuals,

¹⁶⁴ *Apatang v. Mundo*, 4 N. Mar. I. 90 (1994) (adopting the standards of the Hawaii Supreme Court).

¹⁶⁵ *Id.* (citing 7 N. Mar. I. Code § 2507(a)(2)).

¹⁶⁶ *Id.* at § 4213.

¹⁶⁷ Executive Order 94-3, “Second Reorganization Plan of 1994” (Aug. 23, 1994).

¹⁶⁸ 2 N. Mar. I. Code § 4222(a)-(e).

¹⁶⁹ *Id.* at § 4241(a)-(c).

families, or other bodies found to be the rightful owners thereof and the type of ownership involved;” and

- “shall also record the name of any person or group who holds either any subordinate rights (*such as rights of administration or use or an encumbrance or easement with respect to such land*).”¹⁷⁰

The land registration team then submits its decision and the record concerning the claim to the Director of Land Registration.¹⁷¹

B. Establishing clear title and settling disputes

Land ownership in the Northern Marianas is complicated by incomplete, unreliable, and missing title histories for much of the land.¹⁷² Gaps in the chain of title have been caused by war, natural disaster, time, and corruption; as a result, there has been considerable difficulty proving whether land really belongs to those who claim it in the CNMI.¹⁷³ As these circumstances have naturally led to numerous disputes, the CNMI legislature has laid out a set of ground rules for resolving them as best they can.

With respect to any claim that is disputed, the land registration teams will conduct a hearing and adjudicate such claims.¹⁷⁴ If a claim is not disputed, the teams will record the claim and it shall have the same force and effect as an adjudication by the team.¹⁷⁵ For a hearing, notice must be given at least thirty days in advance through a posting on the land involved and by serving notice to interested parties.¹⁷⁶ Each team has the authority to administer oaths to witnesses, take testimony under oath, subpoena witnesses, order the production of papers, and issue punishment for contempt.¹⁷⁷ “[A]ny evidence that will be helpful in reaching a just decision” may be considered.

¹⁷⁰ *Id.* at § 4241(a)(3) (emphasis added).

¹⁷¹ Formerly known as the Senior Land Commissioner but changed with Executive Order 94-3.

¹⁷² Robbins, at 157-170.

¹⁷³ *Id.* at 157-160.

¹⁷⁴ 2 N. Mar. I. Code § 4241(a)(2).

¹⁷⁵ *Id.* at § 4241(b).

¹⁷⁶ *Id.* at § 4244(a).

¹⁷⁷ *Id.* at § 4245.

Additionally, all hearings must be public and every person claiming an interest in the land must be given an opportunity to be heard.¹⁷⁸ Any matter that has already been determined by the same parties, a court judgment, or a land title officer may not be reheard.¹⁷⁹ In all hearings where a dispute has arisen, the team shall include in its record to the Director tape recordings or summaries of the pertinent testimony taken.¹⁸⁰ Upon receipt of a decision from a team, the Director reviews the record and either (1) makes a determination of ownership based upon the record; or (2) holds further hearings and makes a new determination of ownership based on the record and the additional information obtained.¹⁸¹

Two scenarios are possible in which a land registration team may not conduct a hearing. First, if a team deems that a disputed case will be unduly burdensome and will interfere with its other duties, it may refer the case to the Director without making a decision.¹⁸² Second, the Director may withdraw a claim from consideration by a team if he or she determines that the team is spending an undesirable amount of time on a claim.¹⁸³ In both of these situations, the team submits its record to the Director and the Director may either (1) hold a hearing and adjudicate for him or herself; or (2) refer the claim to the Commonwealth Superior Court.¹⁸⁴

After a determination of ownership is made by either the Director or the Superior Court, notice shall be given¹⁸⁵ and any person who claimed an interest in the land and who disagrees with the determination may file a complaint for review in the Superior

¹⁷⁸ *Id.* at § 4246.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at § 4241(c).

¹⁸¹ *Id.* at § 4243.

¹⁸² *Id.* at § 4242(b).

¹⁸³ *Id.* at § 4242(c).

¹⁸⁴ *Id.* at § 4242(d).

¹⁸⁵ *Id.* at § 4248.

Court within 120 days.¹⁸⁶ If the 120-day term expires without any complaint for review being made, the Director then issues a certificate of title to be recorded with the Recorder.¹⁸⁷ The CNMI Code states that the certificate of title is “prima facie evidence of ownership as therein stated against the world,” subject to any rights of way over the land, leaseholds, use rights, *or easements or other appurtenant rights*.¹⁸⁸

C. Land registration and transfer

Original certificates of title are bound in a permanent register, which remains in the custody of and under the supervision of the Director of Land Registration.¹⁸⁹ The Director also holds all original maps, plats, and subdivision maps that are registered with the Division.¹⁹⁰ These items are copied and duplicates are provided to the Recorder and the owners.¹⁹¹

Assuming an interest in land is in accordance with the Commonwealth’s constitutional restrictions (e.g., only “persons of Northern Mariana descent” may own land), the creation, grant, assign, surrender, or transfer of the interest must be in writing and signed by the party who is acting.¹⁹² An exception is a transfer performed by a *partida*, but if a written will exists at the time of death this document takes precedence over the oral transfer.¹⁹³

Upon the transfer of an interest in land, the writing that describes the transfer must be recorded with the Commonwealth Superior Court’s Recorder’s Office by the

¹⁸⁶ *Id.* at § 4249.

¹⁸⁷ *Id.* at § 4251(a).

¹⁸⁸ *Id.* at § 4251(a)-(b) (emphasis added).

¹⁸⁹ *Id.* at § 4252.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Except for leasehold interests of less than one year. 2 N. Mar. I. Code § 4912.

¹⁹³ Robbins, at 210.

party receiving the interest.¹⁹⁴ Once recorded, the information is available to any person who requests it.¹⁹⁵

IV. CONSERVATION EASEMENTS ON PRIVATE LANDS

A. Introduction to conservation easements

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes.¹⁹⁶ Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a conservation easement.¹⁹⁷ A conservation easement is thus a voluntary, legally enforceable agreement in which a landowner agrees (usually with a governmental entity or NGO) to limit the type and amount of development that may occur on his or her property in order to achieve the goal of conservation. They are legally recorded deed restrictions that “run with the land” and can be obtained voluntarily through donation or purchase from the landowner.

Traditionally, an easement was “affirmative” (carrying rights to specified actions) and “appurtenant” (attached to a neighboring parcel of land). For example, one landowner might hold an easement in the land of a neighbor, allowing him or her to cross the neighbor’s property or draw water from the neighbor’s well. In contrast to conventional easements, conservation easements are generally “negative” (prohibiting specified actions) and “in gross” (that is, they may be held by someone other than the owner of a neighboring property). While a conventional easement involves the

¹⁹⁴ 2 N. Mar. I. Code § 4913(a).

¹⁹⁵ *Id.* at § 4913(b).

¹⁹⁶ Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

¹⁹⁷ Depending on the type of resource they protect, easements are frequently referred to by different names—e.g., historic preservation easements, agricultural preservation easements, scenic easements, and so on.

conveyance of certain affirmative rights to the easement holder, an easement for conservation purposes involves the relinquishment of some of these rights and a conferral of power in the new holder of the rights to enforce the restrictions on the use of the property. This is a critical distinction—the landowner relinquishes the right to develop the land, but that right is not conveyed to the easement holder. That particular right (to develop the land) is extinguished.¹⁹⁸ What the easement holder does acquire is the right to enforce the land-use restrictions.

To understand the concept of an easement, it is helpful to think of owning land as holding a bundle of rights—a bundle that includes the right to occupy, lease, sell, develop, construct buildings, farm, restrict access or harvest timber, and so forth. A landowner may give away or sell the entire bundle, or just one or two of those rights. For instance, a landowner may give up the right to construct additional buildings while retaining the right to grow crops. In ceding a right, the landowner “eases” it to another entity, such as a land trust. However, in granting an easement over the land, a landowner does not give away the entire bundle of ownership rights – but rather forgoes only those rights that are specified in the easement document.¹⁹⁹

1. *Appurtenant conservation easements*

In legal terms, conservation easements generally fall into one of two categories: (1) *appurtenant easements*; and (2) *easements in gross*. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights affected by the easement

¹⁹⁸ Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving *purchased development rights* (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross. For a more extensive discussion of PDRs, please refer to Part I § A.6.

¹⁹⁹ The grantor of a conservation easement remains the title holder, the nominal owner of the land. The landowner conveys only a part of his or her total interest in the land—specifically, the right to develop the land. However, the landowner retains the right to possess, the right to use (in ways consistent with the easement), and the right to exclude others. Daniel Cole, *Pollution and Property* 17 (2002).

are thus *appurtenant* or *incidental* to the benefited land. Put differently, if an easement is held incident to ownership of some land, it is an appurtenant easement. The land subject to the appurtenant easement is called the *servient estate*, while the land benefited is called the *dominant estate*. Unless the grant of an appurtenant easement provides otherwise, the benefit of the easement is automatically transferred with the dominant estate—meaning that it “runs with the land.”²⁰⁰ Under the majority U.S. common law authorities, an appurtenant easement does not require the dominant and servient estates to be adjacent to one another—an easement may be appurtenant to noncontiguous property if both estates are clearly defined and if it was the parties’ intent that the easement be appurtenant.²⁰¹ There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.²⁰² In such jurisdictions, there are a number of ways to meet—or potentially relax—the adjacency requirement while furthering the goal of private lands conservation. The following list is a brief sample of such methods:²⁰³

²⁰⁰ Roger Bernhardt and Ann Burkhart, *Real Property in a Nutshell* 191, 214 (4th ed. 2000). An interest “runs with the land” when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

²⁰¹ *Verzeano v. Carpenter*, 108 Or.App. 258, 815 P.2d 1275 (1991) (“[W]e agree with the majority view that an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties’ intent that it be appurtenant.”) (citing 7 Thompson on Real Property § 60.02(f)(4)); see also *Day v. McEwen*, 385 A.2d 790, 791 (Me.1978) (enforcing reserved “right of an unobstructed view” over servient tenement where dominant tenement was on the other side of a public road); *Private Road’s Case*, 1 Ashm. 417 (Pa.1826) (holding that a circumstance in which a navigable river intervenes between a meadow and an island is no legal reason why a way across the former should not be appurtenant to the latter); *Saunders Point Assn., Inc. v. Cannon*, 177 Conn. 413, 415, 418 A.2d 70 (1979) (holding that while an easement appurtenant must be of benefit to the dominant estate, the servient estate need not be adjacent to the dominant estate); *Woodlawn Trustees, Inc. v. Michel*, 211 A.2d 454, 456 (1965) (holding that in cases of noncontiguous parcels, the easement over the land of the servient tenement is valid and enforceable if, by means of a right of way of some sort which traverses land of another, the servient tenement benefits the dominant tenement).

²⁰² Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23 (2003).

²⁰³ The information is taken primarily from Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23–24 (2003).

- **Purchase by NGOs of land that can serve as adjacent estates** – A method for an NGO to meet an adjacent lands requirement by acquiring, via purchase or donation, land adjacent to the property to be subject to the easement. This allows the NGO’s property to be the dominant estate, and the NGO to hold the easement over adjoining lands.

- **Creative “nexus” arguments for non-adjacent lands** – A potential method for creating a valid appurtenant easement between non-adjacent properties by establishing (e.g., by successfully arguing its existence in a court of law) an adequate nexus between the properties in question. In Costa Rica, the Center for Environmental Law and Natural Resources (CEDARENA) created an appurtenant easement between a parcel of private land and a nearby state reserve that shared the same birds.

- **Reciprocal easements** – Enables adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.²⁰⁴ Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek judicial enforcement of the rights and obligations derived from the easement. Thus, the use of reciprocal easements can potentially provide a conservation NGO with enforceable rights over land, without the need for the NGO to own adjacent land.

- **Use of public lands as the dominant estate to hold an easement** – Easements over private land have been created in several Latin American countries by using adjacent or nearby public lands as the dominant estate. In some instances, the easements have also provided a third-party NGO with the right to enforce its terms.

- **Legal limitations and uncertainties to third-party enforcement** – The common law of some jurisdictions only recognizes the right of an easement’s holder to enforce its terms. Thus, depending on the jurisdiction in question, the practice of granting a third-party NGO the right to enforce the easement may or may not survive legal scrutiny. Additionally, the relevant legal authority is often unclear as to whether the grant to an NGO of the right to monitor and enforce an easement is a real property right that runs with the land, or a personal right enforceable only against the original maker of the easement.

²⁰⁴ In order to take advantage of federal and state tax incentives, U.S. landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially an effective method for achieving private lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.

Under the common law adhered to in the U.S., third party enforcement of a conservation easement would be invalidated in court due to a basic principle of contract law which mandates only the parties to the contract may enforce its terms. However, many U.S. states have laws authorizing the assignment of this specific power to non-profit organizations—provided the assignment is written into the conservation easement.

2. *Conservation easements in gross*

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally to the easement owner—regardless of whether the owner of the easement owns any land.²⁰⁵ At common law an easement in gross could not be transferred. Today, however, there are many jurisdictions where legislation and more modern trends in the relevant common law have authorized the transferability of easements in gross.²⁰⁶

As noted above, both an appurtenant conservation easement and a conservation easement in gross meet the legal criteria for what is known as a negative easement—an easement that prohibits the owner of the servient estate from doing something. Conservation easements are negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. However, while the common law has generally recognized and enforced certain limited types of negative easements, it has generally refused to enforce negative easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law, statutes have been

²⁰⁵ Examples of typical easements in gross include the right of a non-owner to harvest timber, mine minerals, extract water or other items from the owner's land.

²⁰⁶ Restatement (Third) of Property, Servitudes, §4.6 (T.D. No. 4, 1994), provides that all easements in gross are assignable unless contrary to the intent of the parties. It eliminates the restriction of the first Restatement that only commercial easements in gross are assignable.

enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.²⁰⁷

In addition to statutorily authorized interests in land, U.S. common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation in the CNMI. Among these interests are real covenants, equitable servitudes, easements and profits. It is important to note, however, that while the common law recognizes these interests, it has traditionally imposed requirements that, in many instances, render their use problematic for conservation purposes. The American Law Institute’s Restatement (Third) of Property has simplified the law governing real covenants, equitable servitudes, easements and profits by combining the rules governing these interests into a single doctrine—that of the Servitude. This modernized law of servitudes has also largely eliminated the common law impediments to the use of these interests for conservation purposes.

3. Tax incentives for conservation easements

What incentive does a private landowner have to convey valuable development rights to either a public or private trustee? In the U.S., along with the desire of landowners to preserve undeveloped land, the answer is often money—received in the form of tax benefits (e.g., income, property, gift and estate taxes) or cash payments. For instance, U.S. landowners who donate conservation easements that satisfy requirements of the Internal Revenue (IRS) Code can take advantage of federal income and estate tax

²⁰⁷ Jesse Dukeminier and James E. Krier, Property 856 (4th ed. 1998). Traditionally, courts have disfavored interests conveyed “in gross” and negative easements because they can cloud title and may raise recordation problems—the difficulty being notice to future landholders. However, in the U.S. legislation with proper recordation requirements and limitations upon those who may hold these kinds of interests have largely overcome these objections.

benefits. To satisfy the relevant section of the Internal Revenue Code, a conservation easement must be granted:

- to a governmental entity or charitable organization that meets certain public support tests; and
- exclusively for conservation purposes, which include (1) the preservation of open space for scenic enjoyment pursuant to a clearly delineated governmental conservation policy; (2) the preservation of land for outdoor recreation; (3) the protection of the natural habitat of wildlife or plants; and (4) the preservation of historically important land or a certified historic structure.²⁰⁸

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in property's value before the easement was granted compared to the property's value after the granting of the conservation easement.

This is often referred to as the “before and after” test.²⁰⁹ In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives.

4. Uniform Conservation Easement Act

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act's primary objective is to enable “private parties to enter into consensual arrangements with

²⁰⁸ IRS Code, § 170(h).

²⁰⁹ For federal income tax purposes, this difference in value is a charitable deduction which can be used for a period of up to 5 years to reduce the income tax of the grantor of the easement. The maximum deduction in any year is 30 percent of the grantor's adjusted gross income. For federal estate tax purposes, the grant of the easement results in a lower valuation of the property—and thus, a lower valuation of the estate to which the federal estate tax will be applied. Under the Farm and Ranch Protection Act (1997), IRS Code § 2031.c, landowners can receive an exclusion from federal estate taxes for up to 40 percent of the value of their land under a conservation easement. Only easements granted in perpetuity are eligible for federal tax benefits.

charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.”²¹⁰

The UCEA defines “conservation easement” as “[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property.”²¹¹

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.²¹²

A unique feature of the Act is the “third-party enforcement right.” Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a

²¹⁰ UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>.

²¹¹ UCEA, §1(1)—Definitions.

²¹² § 4, 12 U.L.A. 179.

holder. Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

B. Conservation easements in the CNMI

1. CNMI authority for conservation easements

It does not appear that any CNMI-produced legal authority explicitly authorizes, or even mentions, the use of “conservation easements.” A few local statutes briefly refer to easements in general,²¹³ but only one is even within the *context* of conservation (see the discussion of the Fish, Game and Endangered Species Act in Section IV(C)(1) below).²¹⁴ As discussed earlier, however, in the absence of written or customary law in the CNMI, the CNMI courts apply U.S. common law as expressed in the ALI Restatements; or as generally understood and applied in the U.S. if the Restatement does not express an applicable rule.²¹⁵

a. Restatement (Third) Property

The Restatement (Third) of Property recognizes conservation easements (servitudes)²¹⁶ and states that they are the most common use of negative easements.²¹⁷ Early on, there was doubt about whether the benefits of a conservation easement could be held in gross (i.e., not running with land) so most states enacted authorizing statutes.²¹⁸ However, as previously noted, the most recent Restatement eliminates restrictions on the

²¹³ See e.g., 2 N. Mar. I. Code §§ 4241(a)(3) (recording of easements during land registration), 4251(a)-(b) (placement of easements on the certificate of title), 5104(b)(5) (right of Director to acquire easements for the protection of endangered or threatened species).

²¹⁴ *Id.* at § 5104(b)(5).

²¹⁵ 7 N. Mar. I. Code § 3401.

²¹⁶ In the latest Restatement, “servitude” is a generic term that covers “easements, profits, and covenants.” Restatement (Third) of Property §§ 1.1(2), 1.1 cmt. a, 1.1 cmt. d (2000).

²¹⁷ *Id.* at § 1.2 cmt. h (2000).

²¹⁸ *Id.* at §§ 1.2 cmt. h, 2.6 cmt. a.

creation and transferability of benefits in gross,²¹⁹ so “there is no longer any impediment to the creation of servitudes for conservation or preservation purposes.”²²⁰ Additionally, the benefits may be granted to third parties who are not involved in creating the easement.²²¹

The benefits of conservation easements are often held by governmental and conservation entities, and public funds are usually spent to acquire them. As a result, the public’s interest in enforcing conservation easements is “strong,”²²² and “special protections”²²³ are afforded them. For instance, if the benefits are held by a governmental body or conservation organization,²²⁴ the conservation easement may not be modified or terminated unless (1) the particular purpose for which the easement was created becomes impracticable; or (2) the easement can no longer be used to accomplish a conservation purpose.²²⁵ If the changed condition is attributable to the holder of the servient estate, damages may be charged.²²⁶ To further secure the conservation easement, governmental bodies or conservation organizations may enforce it by coercive remedies (e.g., injunctions) and other methods (e.g., require restoration).²²⁷ Lastly, benefits held by governmental bodies or environmental organizations may only be transferred to other governmental bodies and environmental organizations (unless the creating instrument provides otherwise); whereas all other benefits in gross are freely transferable.²²⁸

²¹⁹ *Id.* at §§ 2.6, 4.6.

²²⁰ *Id.* at § 2.6 cmt. a.

²²¹ *Id.* at § 2.6(2).

²²² *Id.* at § 8.5 cmt. a.

²²³ *Id.* at § 1.6 cmt. b.

²²⁴ “A ‘conservation organization’ is a charitable corporation, charitable association, or charitable trust whose purposes or powers include conservation or preservation purposes.” *Id.* at § 1.6(2).

²²⁵ *Id.* at § 7.11(1)-(2).

²²⁶ *Id.* at § 7.11(3).

²²⁷ *Id.* at § 8.5 (including cmt. a).

²²⁸ *Id.* at § 4.6(1)(b)-(c).

As illustrated above, the Restatement (Third) of Property explicitly recognizes, and even encourages, conservation easements. It also outlines all of the important elements of the conservation easement. The CNMI courts have not yet decided this issue, however, so the question is open as to whether (or to what degree) the CNMI courts would adopt the Restatement’s provisions.

2. U.S. authority for conservation easements in the CNMI

Aside from the U.S. common law as expressed in the ALI Restatements, several U.S. statutes authorize federal programs for which the acquisition of conservation easements is an explicit priority. The CNMI is eligible to participate in each of these programs.

a. Forest Legacy Program (FLP)

Administered by the U.S. Department of Agriculture (USDA) Forest Service, and authorized by the Cooperative Forestry Assistance Act of 1978,²²⁹ the FLP is intended to protect “environmentally important forest areas that are threatened by conversion to non-forest uses.”²³⁰ The FLP is available to all of the states, which by statutory definition includes the CNMI.²³¹ To achieve the program’s goal, the Secretary of Agriculture may purchase and hold conservation easements against willing landowners,²³² which may not be “limited in duration or scope” by “any provision of state law.”²³³ In addition, the conservation easement may not be defeated because it is held in gross, is transferred to a non-federal entity, or if the FLP is ever disestablished.²³⁴ The U.S. Federal share of costs

²²⁹ 16 U.S.C.A. §§ 2101-2114.

²³⁰ *Id.* at § 2103c(a).

²³¹ *Id.* at § 2109(d)(1).

²³² *Id.* at § 2103c(c).

²³³ *Id.* at § 2103c(k)(2).

²³⁴ *Id.* at § 2103c(k)(2)(A)-(D).

must not exceed, to the extent possible, 75 percent of the total costs; but the acquisition costs may be shared with regional organizations, other governmental units, landowners, corporations, or private organizations.²³⁵ To participate in the program, a state must conduct an Assessment of Need (AON) that identifies the land areas it wishes to include in the program.²³⁶ Upon approval by the Secretary of Agriculture, a FLP is implemented in the state and lands and interests in lands (i.e., conservation easements) are acquired on a willing seller/willing buyer basis.²³⁷

In 2003, the CNMI contained 4,000 acres of unprotected non-industrial private forest land,²³⁸ yet no FLP has been implemented in the CNMI to date. The program is active, however, in the other U.S. Commonwealth—Puerto Rico.²³⁹

b. Wetlands Reserve Program (WRP)

Administered by the USDA Natural Resources Conservation Service (NRCS), authorized under the Food Security Act of 1985,²⁴⁰ and reauthorized by the 2002 Farm Bill, the WRP seeks to preserve private wetlands through the acquisition of permanent or thirty-year conservation easements.²⁴¹ The easements are held by the U.S. government,²⁴² which will pay up to 100 percent of the costs for a permanent easement and up to 75 percent of the costs for a thirty-year easement.²⁴³ Significantly, the

²³⁵ *Id.* at § 2103c(j)(2).

²³⁶ U.S. Dept. of Agriculture Forest Service, *Forest Legacy Program Implementation Guidelines*, pp. 8-12 (June 30, 2003).

²³⁷ *Id.*

²³⁸ Commonwealth of the Northern Mariana Islands Forest Resource Fact Sheet (2003) at <http://www.fs.fed.us/r5/spf/projects/factsheets/nmariana.htm> (last visited June 3, 2004).

²³⁹ And also the U.S. Virgin Islands. U.S. Dept. of Agriculture Forest Service, *Forest Legacy Program Overview* (updated as of Dec. 31, 2003).

²⁴⁰ 16 U.S.C. §§ 3837-3837f.

²⁴¹ *Id.* at § 3837(b)(2).

²⁴² *Id.* at § 3837a(a)(1).

²⁴³ But not less than 75 percent and 50 percent of the costs, respectively. *Id.* at § 3837c(b)(1). This payment structure exhibits the express priority given to obtaining permanent easements before thirty-year easements. *Id.* at § 3837c(d).

Secretary of Agriculture may terminate or modify the easement, but only with the consent of the current landowner and only for “public interest” purposes.²⁴⁴ In order for private wetlands to be eligible for the program, they must be able to serve certain wildlife purposes (either after restoration efforts or immediately after acquisition).²⁴⁵ In addition, the landowner must have owned the land for at least twelve months prior to enrolling it in the program, unless (1) the land was acquired by will or succession; (2) ownership changed due to a foreclosure on the land; or (3) the Secretary determines that the land was not acquired for the purposes of placing it in the WRP.²⁴⁶ The types of wetlands being protected by the WRP are floodplain forests, prairie potholes, and coastal marshes.²⁴⁷

Large amounts of wetlands in the CNMI were lost in the last century through the draining of waste water into the lakes by Japanese sugar mills and through extensive filling.²⁴⁸ Almost all of the remaining wetlands in the CNMI are located on Saipan and Tinian, with two areas on Saipan—the Susupe Wetland Protected Area and the contiguous reed marsh and swamp on the west coast—comprising over 60 percent of the freshwater wetlands.²⁴⁹ The Pagan Lakes, Lake Hagoi, and some smaller coastal marshes comprise most of the remainder.²⁵⁰ Although the Susupe Wetland is strictly regulated public land for the protection of freshwater wetlands, habitat, and species,²⁵¹ it is not

²⁴⁴ *Id.* at § 3837e(b)(1)-(2).

²⁴⁵ *Id.* at § 3837(c)(1)-(3).

²⁴⁶ *Id.* at § 3837e(a).

²⁴⁷ U.S. Dept. of Agriculture Natural Resource Conservation Service, *Farm Bill 2002: Wetlands Reserve Program*, p. 2 (Mar. 2003).

²⁴⁸ Derek W. Stinson, “Commonwealth of the Northern Mariana Islands,” p. 1 (circa 1991), available at http://www.wetlands.org/inventory&/OceaniaDir?Doc_chapters/No_Mariana_Is.doc (last visited May 21, 2004).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Pursuant to Public Law 2-51 (1981).

known what percentage of the other wetlands are in private hands; and it does not appear that the WRP is currently implemented in the CNMI.

c. Farm and Ranch Lands Protection Program (FRPP)

Administered by the USDA NRCS, authorized under the Food Security Act of 1985,²⁵² and reauthorized and amended by the 2002 Farm Bill,²⁵³ the FRPP is intended to prevent farm and ranch lands that contain “prime, unique or other productive soil, or that contains historical or archaeological resources” from being converted to non-agricultural uses.²⁵⁴

For the CNMI to be eligible for the FRPP, the NRCS State Conservationist in charge of the Pacific Basin Area (which includes the CNMI) must first submit a State FRPP Plan to the NRCS National Office.²⁵⁵ As of 2004, it does not appear that this initial step has been taken on behalf of the CNMI. Any Plan submitted must contain information on the cooperating entities, estimates on the amount of farm and ranch land to be protected and the amount already lost, and the amount of FRPP funding being requested.²⁵⁶ The NRCS National Office then allocates funds to the State (i.e, CNMI) based on the information in the State FRPP Plan.²⁵⁷ If funds are allocated to a State, “eligible entities” with programs that purchase conservation easements on farm lands—such as States, units of local governments, and NGOs²⁵⁸—could then request funding by

²⁵² 16 U.S.C.A. § 3830.

²⁵³ Which changed the name from Farmland Protection Program (FPP).

²⁵⁴ Farm and Ranch Lands Protection Program Notice, 69 Fed. Reg. 12,632 (Mar. 17, 2004) (hereinafter FRPP Notice).

²⁵⁵ The CNMI qualifies as a “State” for the purposes of this program. *Id.* at 12,634. NRCS State Conservationist contact information as of March 17, 2004: Joan B. Perry, Director, Pacific Basin Area, Suite 301, FHB Building, Suite 301 400 Route 8, Mongmong, GU 96910; phone: (671) 472-7490; fax: (671) 472-7288; joan.perry@pb.usda.gov.

²⁵⁶ FRPP Notice at 12,634.

²⁵⁷ *Id.*

²⁵⁸ *Id.*, at 12,633-12,634.

submitting a proposal describing (1) the private farm or ranch land to be protected; and (2) the “pending offer” to acquire a conservation easement for the land, such as a written bid, contract, commitment, or option extended to the landowner.²⁵⁹ The “pending offer” must be for an easement in “perpetuity,” unless the State’s laws prohibit permanent easements.²⁶⁰ If the proposal is accepted, the U.S. will contribute up to fifty percent of the acquisition costs for the conservation easement, with the other fifty percent being provided by the “eligible entity.”²⁶¹ Significantly, title to the easement is held by the “eligible entity,” and title will only vest in the U.S. if the “eligible entity” abandons, fails to enforce, or attempts to terminate the conservation easement.²⁶² The FRPP has not been implemented in the CNMI.

3. *Hindrances to implementing conservation easements in the CNMI*

a. Lack of property taxes

As briefly described earlier, a common incentive for private landowners to convey a conservation easement is a tax break.²⁶³ However, this might not be an available incentive in the CNMI because it does not appear that private land is currently taxed. The CNMI Constitution prohibits the taxing of any owner-occupied single family residential, agricultural, or unimproved real property unless approved by three-fourths of the votes in a particular senatorial district.²⁶⁴ The CNMI Code also states that local governments may not collect real property taxes of greater than two percent of the appraised value of the land.²⁶⁵ Research for this report could not verify the existence of

²⁵⁹ *Id.* at 12,635.

²⁶⁰ *Id.* at 12, 632, 12,635.

²⁶¹ The “eligible entity” may receive up to half of its share from the private landowner. *Id.* at 12,632.

²⁶² *Id.* at 12,634.

²⁶³ *See* Section IV(A)(3) of this paper.

²⁶⁴ CNMI Constitution, Article X, § 5.

²⁶⁵ 2 N. Mar. I. Code § 1402(c).

any tax collected by any local government. If this is proven to be accurate, attempts should be made to find other types of incentives.

b. Enforcement

It is not known whether the current DLNR Secretary has pro-environment tendencies, but the level of enforcement on wildlife sanctuaries has been known to fluctuate depending on who sits in office.²⁶⁶ It is reasonable to conclude from this that if a Secretary were to hold a conservation easement in the near future, the enforcement of the easement (or lack thereof) would depend on his or her conservation beliefs. As a result, the CNMI courts must be willing to do more than just recognize conservation easements—they must be willing to issue injunctions and award damages when the terms of the easement are broken or not enforced. Although this problem is not unique to the CNMI, it is certainly an issue to consider when creating a conservation easement in the CNMI.

c. Customary practice

Where land is traditionally owned the picture is somewhat clouded. For instance, transfers of interests in land are irrevocable and permanent in the American common law, but for Chamorros and Carolinians the transfer is not finite but part of a relationship where there is an expectation of continued cooperation, respect and obligation.²⁶⁷ When land is given to a child pursuant to a partida, the child must use the land to fulfill certain familial obligations such as caring for elderly parents; otherwise, according to custom the

²⁶⁶ E-mail from Gayle M. Berger, Natural Resources Planner, Division of Fish and Wildlife, CNMI, to Gregg de Bie, Research Assistant, Natural Resources Law Center (June 24, 2004, 11:26:16 MST) (on file with author).

²⁶⁷ Robbins, at 184-191.

parents have the right of reversion.²⁶⁸ If a child were to grant a conservation easement affecting the “family” land, a question remains whether this would be inconsistent with his or her customary obligations. Also, it is not clear if a court would adhere to custom or U.S. common law in this situation.

V. OTHER POTENTIAL LEGAL TOOLS

A. Leases, “leaseback” agreements, and reserved life interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.²⁶⁹ A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case, a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable

²⁶⁸ *Id.* at 188-189 (citing Julianna Flinn, Brother Versus Sister: Land Disputes Among Carolinians of Saipan (Paper presented at the ASAO 1996)).

²⁶⁹ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

the landowner to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon his or her death.

B. Real covenants

A real covenant is a promise concerning the use of land that (1) benefits and burdens both the original parties to the promise and their successors and (2) is enforceable in an action for damages.²⁷⁰ A real covenant gives rise to personal liability only. It is also enforceable only by an award of money damages, which is collectible out of the general assets of the defendant.²⁷¹ If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee's land is suing, or a person who buys the promisor's land is being sued, then the law of property is applicable.²⁷² The rules of property law thus determine when a successor owner can sue or be sued on an agreement to which he or she was not a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two "sides"—the burden (the promisor's duty to perform the promise) and the benefit (the promisee's right to enforce the promise).

In order for the successor to the original promisor to be obligated to perform the promise—that is, for the *burden* to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the

²⁷⁰ Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

²⁷¹ This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefited property before and after the defendant's breach.

²⁷² English courts never extended the concept of real covenants outside the landlord-tenant context. American courts, however, extended it to promises between fee simple owners or neighbors.

covenant must “touch and concern” land;²⁷³ (4) horizontal privity must exist;²⁷⁴ (5) vertical privity must exist;²⁷⁵ and (6) the successor must have notice of the covenant. In contrast, the common law traditionally required only four elements for the *benefit* of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the Restatement’s approach, a covenant is a servitude if either the benefit or the burden runs with the land. The *benefit or burden* of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.²⁷⁶

²⁷³ For the covenant to “touch and concern land,” it must relate to the direct use or enjoyment of the land. A covenant that restricts the development on a parcel meets this requirement.

²⁷⁴ The common law traditionally requires that the original parties have a special relationship in order for the burden to run, called horizontal privity. In some U.S. states, horizontal privity exists between the promissor and the promisee who have mutual, simultaneous interests in the same land (e.g., landlord and tenant). Other U.S. states also extend horizontal privity to the grantor-grantee relationship.

²⁷⁵ Vertical privity concerns the relationship between an original party and his or her successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.

²⁷⁶ Restatement (Third) of Property (Servitudes) §§ 1.3, 1.4 (2000). Under the Restatement, a covenant burden or benefit that does not run with land is held “in gross.” A covenant burden held in gross is simply a contractual obligation that is a servitude because the benefit passes automatically to successors to the benefited property. A covenant benefit held in gross is a servitude if the burden passes automatically to successors to the land burdened by the covenant obligation.

C. Equitable servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.²⁷⁷ An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,²⁷⁸ for the *burden* of an equitable servitude to bind the original promisor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;²⁷⁹ (2) the original parties must intend to burden successors; (3) the promise must “touch and concern” land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the *benefit* to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must “touch and concern” land.

²⁷⁷ There is some doctrinal confusion regarding the difference—if any—between an equitable servitude and a conservation easement. However, under the approach adopted by the Restatement (Third) of Property, easements, profits, covenants—including equitable servitudes, are governed by a single body of law. See Susan F. French, *Highlights of the new Restatement (Third) of Property: Servitudes*, Real Property, Probate and Trust Journal 226, 227 (2000).

²⁷⁸ Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

²⁷⁹ If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:²⁸⁰ (1) a servitude is created by a contract or conveyance intended to create rights or obligations that run with the land if the servitude complies with the Statute of Frauds; (2) the beneficiaries of a servitude are those intended by the parties; (3) servitude benefits held in gross are assignable unless contrary to the intent of the parties;²⁸¹ (4) a servitude is valid if it is not otherwise illegal or against public policy; (5) a servitude is interpreted to carry out the intent or legitimate expectations of the parties, without any presumption in favor of free use of land; (6) servitude benefits and burdens run to all subsequent possessors of the burdened or benefited property;²⁸² (7) servitudes may be enforced by any servitude beneficiary who has a legitimate interest in enforcement, whether or not the beneficiary owns land that would benefit from enforcement; and (8) servitudes that have not been terminated may be enforced by any appropriate legal and equitable remedies.

²⁸⁰ As noted above, under the “integrated approach” adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes

²⁸¹ Restatement (Third) of Property (Servitudes) § 2.6 (1)–(2) (2000). Early law prohibited the creation of servitude benefits in gross and the creation of servitude benefits in persons who were not immediate parties to the transaction. However, under the Restatement (Third) of Property (Servitudes), the benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property. Also, the benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

Homeowner associations are entitled to enforce covenants despite owning the fact that they do not own land. See, e.g., *Streams Sports Club, Ltd. v. Richmond*, 109 Ill.App.3d 689, 440 N.E.2d 1264 (1982), *aff’d*, 99 Ill.2d 182, 457 N.E.2d 1226 (1983); *Merrionette Manor Homes Improvement Ass’n v. Heda*, 11 Ill.App.2d 186, 136 N.E.2d 556 (1956); *Neponsit Property Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

Courts have also held that developers are entitled to enforce covenants after selling all their lots if intended to have the power to do so. See, e.g., *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 95 N.E. 216 (1911); *Christiansen v. Casey*, 613 S.W.2d 906 (Mo.Ct.App.1981).

Even where a conservation easement is not authorized by statute, courts have recognized the benefit in gross as a valid and enforceable interest. See e.g., *Bennett v. Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass.1991) (where beneficiary of a restriction is the public and restriction reinforces a legislatively stated public purpose, old common law rules barring creation and enforcement of easements in gross have no continuing force; question is whether bargain contravened public policy when made and whether enforcement is consistent with public policy and reasonable).

²⁸² Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

D. Purchased development rights

In the U.S., purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.²⁸³

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a community's conservation efforts. Financial support for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

E. Profits à prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.²⁸⁴ Although it is not commonly used for

²⁸³ At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph and Adrian M. Gosch, Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143, 146 (2000).

conservation purposes, profits à prendre have the potential to facilitate the conservation of private lands. For instance, a landowner that wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to that timber.²⁸⁵ The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. Under the common law, a landowner can grant a profit à prendre to anyone—there is no requirement that the holder of a profit à prendre own adjacent property.²⁸⁶

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone who interferes with the profit à prendre.²⁸⁷

²⁸⁴ See 28A C.J.S. Easements § 9 (noting that a “right to profits à prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement.” Historically, there were five types of profits à prendre depending on the subject matter of the profit: (1) rights of pasture—where the taking is done by the mouths of the grazing animals; (2) rights of piscary—to harvest the fish; (3) rights of turbary—to cut turf or peat as fuel; (4) rights of estover—to take wood necessary for furniture for a house; and (5) a miscellaneous group referring to the taking and using of sand, gravel, stone, etc. A profit à prendre cannot generally be used to take minerals.

²⁸⁵ To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

²⁸⁶ Profits à prendre of this kind are called *profits en gross*.

²⁸⁷ Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner’s rights.

A profit à prendre document is designed to outlive the landowner—and perhaps even the profit à prendre holder. In creating a profit à prendre, it is thus essential to consider potential conflicts between a landowner and a profit à prendre holder and describe exactly what the parties intend in the document itself. To protect the profit à prendre holder if the land is subsequently sold, the profit à prendre should be registered in the appropriate land title office. The profit holder can lease, sell, give away or bequeath the profit à prendre to someone else. The holder can also terminate a profit à prendre by giving a written release to the landowner, which would then be registered in the land title office.

VI. CNMI LEGISLATION RELEVANT TO PRIVATE LANDS CONSERVATION

A. Fish, Game and Endangered Species Act

This Act vests exclusive power in the Department of Lands and Natural Resources (DLNR), and in particular the Director of Fish and Wildlife, to protect fish, game, and endangered and threatened species.²⁸⁸ To carry out the Act’s purposes, the Director may (1) conduct studies on the status of resident species of fish, wildlife, and plants;²⁸⁹ (2) ensure the survival of endangered and threatened species²⁹⁰ by designating both a species and its critical habitat;²⁹¹ and (3) regulate recreational and commercial hunting and fishing activities.²⁹² Significantly, the Director is also granted the authority to “[a]cquire land or aquatic habitat, or *easements* thereon, as necessary to carry out the

²⁸⁸ Public Law 2-51, § 5, codified at 2 N. Mar. I. § 5104(a).

²⁸⁹ 2 N. Mar. I. Code §§ 5104(b)(1), 5104(b)(6).

²⁹⁰ *Id.* at § 5104(b)(3).

²⁹¹ *Id.* at § 5108.

²⁹² *Id.* at §§ 5104(b)(2), 5104(b)(7).

purposes of [the Act], subject to the receipt of any appropriate guarantee or assignment from the [MPLA].”²⁹³

For reasons unknown, however, the Director has not yet utilized the power to acquire easements.²⁹⁴ Also, of the regulations promulgated under this Act that have established protected areas, all of them affected only public lands.²⁹⁵

A species is designated either endangered or threatened by the Director,²⁹⁶ and “when appropriate” the species’ “critical habitat” may also be designated.²⁹⁷ When doing so, the Director must consider the “economic impact” and other “relevant impacts” of the designation.²⁹⁸ If the benefits of not designating land as “critical habitat” outweigh the benefits of designating it, then the land is not required to be designated unless not doing so would lead to the worldwide extinction of a species.²⁹⁹ Depending on where critical habitat is designated, this provision has the potential to affect private land.

Also under this Act, the CNMI assents to the provisions of two U.S. statutes: “the Federal Aid in Wildlife Restoration Act (16 U.S.C. § 669 et seq.) and the Fish Restoration and Management Projects Act (16 U.S.C. § 777 et seq.),”³⁰⁰ both of which are described below. Pursuant to its assent to these statutes, the CNMI is eligible to receive federal funds if it does not spend its hunting license revenues for any other

²⁹³ *Id.* at § 5104(b)(5) (emphasis added).

²⁹⁴ E-mail from Gayle M. Berger, Natural Resources Planner, Division of Fish and Wildlife, CNMI, to Gregg de Bie, Research Assistant, Natural Resources Law Center/The Nature Conservancy (June 24, 2004, 11:26:16 MST) (on file with author).

²⁹⁵ *Id.* See e.g., Bird Island Sea Cucumber Reserve, Laulau Bay Sea Cucumber Reserve, Susupe Wetland, and Tank Beach Trochus Reserve, all of which were established pursuant to Public Law 2-51 and all were on public lands.

²⁹⁶ Designation must be based on consideration of the species’ habitat or range and its utilization by humans, 2 N. Mar. I. Code § 5108(a)(1), a review of the species’ status, consultation with CNMI and U.S. federal officials, and a public hearing. *Id.* at § 5108(b).

²⁹⁷ *Id.* at § 5108(a)(2).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ 2 N. Mar. I. Code § 5106(a).

purpose than administering its Division of Fish and Wildlife.³⁰¹ The Fish, Game and Endangered Species Act establishes a Fish and Game Conservation Fund into which the license revenues are supposed to be deposited; but the Governor may transfer the revenues into the General Fund³⁰² if he certifies to the legislature that it is “in the best interest of the Commonwealth.”³⁰³ Further inquiry is needed to determine whether the revenues are currently deposited in the Fish and Game Conservation Fund, and if so, whether they are transferred out for unrelated purposes—so as to make the CNMI eligible to receive federal funds under these U.S. statutes.

1. Federal Aid in Wildlife Restoration Act (FAWRA)

Under FAWRA, the Secretary of the Interior is authorized to provide federal funds to states for “wildlife restoration projects.”³⁰⁴ A “wildlife restoration project” may include the “*acquisition of such areas or estates or interests therein*” as may be necessary to make them available as “feeding, resting, or breeding places for wildlife.”³⁰⁵ Presumably, “interests therein” would include a conservation easement or an analogous interest.

2. Fish Restoration and Management Projects Act (FRMPA)

Under FRMPA, the Secretary of the Interior is authorized to provide federal funds to states for “fish restoration and management projects.”³⁰⁶ A “fish restoration and management project” may include “*the acquisition by purchase, condemnation, lease, or gift of such areas or estates or interests therein*” as suitable to make them available as

³⁰¹ *Id.* at §§ 669, 777(a).

³⁰² 2 N. Mar I. Code § 5107.

³⁰³ *Id.* at § 5106(b).

³⁰⁴ 16 U.S.C.A. § 669.

³⁰⁵ *Id.* at § 669(a)(8) (emphasis added).

³⁰⁶ *Id.* at § 777(a).

“hatching, feeding, resting, or breeding places for fish.”³⁰⁷ Once again, “interests therein” presumably would include a conservation easement or an analogous interest.

B. Public Purpose Land Exchange Authorization Act of 1987

To facilitate the accomplishment of certain “public purposes,” the Land Exchange Act authorizes the MPLA to obtain freehold interests in private land in exchange for transferring freehold interests in public land to private landowners.³⁰⁸ Public purposes includes “[t]he acquisition of privately owned beach, shoreline and historic property or access to such properties, and the acquisition of privately owned wetlands and sensitive ecological and environmental lands.”³⁰⁹ The land to be exchanged must be of comparable value,³¹⁰ but not necessarily of equal size.³¹¹ Under the Act, the MPLA is required to make available public lands for the purpose of land exchanges, “provided, however, in the exchange of public lands adjacent to protected resources, the [MPLA], in consultation with appropriate government agencies, shall delineate by cadastral survey an area adequate for preservation of the protected resources.”³¹² Most land transactions that have occurred were for the purpose of right of way and easement projects, and not for the preservation of ecological settings.³¹³

The Act also states that “land exchanges, rather than monetary compensation, are . . . the preferred means of obtaining private lands for public purposes,” but “nothing in this [Act] shall be construed as precluding or prohibiting monetary compensation, either

³⁰⁷ *Id.* at § 777a(1)(D) (emphasis added).

³⁰⁸ *Id.* at §§ 4141, 4142.

³⁰⁹ *Id.* at § 4143(e)(7).

³¹⁰ *Id.* at § 4144(b)(2).

³¹¹ *Id.* at § 4144(c).

³¹² *Id.* at § 4145(c).

³¹³ Benhur C. Saladores, “Gov’t Owes Landowners \$80 Million,” *Saipan Tribune* (Oct. 28, 1999).

in lieu of or in addition to a land exchange.”³¹⁴ In the early 1990s, there were “huge land exchange undertakings” and less monetary transactions.³¹⁵ Also, the CNMI government vastly underpriced the public lands and traded these lands in return for private lands worth approximately thirty-times less than the public lands.³¹⁶ Of the cash that was promised to landowners during this time, however, a backlog of over eighty million dollars in unpaid settlements had strapped the CNMI government by 1999.³¹⁷

A provision requiring that land exchanges be made only for land located in the same senatorial district expired due to a ten year sunset clause in 1997.³¹⁸ Following this expiration, public lands on Saipan have diminished due to more developments and exchanges occurring in the district.³¹⁹ As a result, a bill that essentially seeks to reenact the expired provision by prohibiting inter-island exchanges was recently passed in the House of Representatives.³²⁰

C. Soil and Water Conservation Act of 1984

The purpose of this Act is to prevent erosion on the islands and to enable the CNMI to participate in U.S. federal conservation programs³²¹ (e.g., FLP, WRP and FRPP). Three soil and water conservation districts—Saipan and the northern islands, Tinian, and Rota—are established by the Act.³²² Each district is managed by the DLNR.³²³ In order to perform its responsibilities under the Act, the DLNR has the

³¹⁴ 2 N. Mar. I. Code § 4145(a).

³¹⁵ Benhur C. Saladores, “Legislator Pushes Land Buys Over Exchanges,” *Saipan Tribune* (Feb. 12, 1999).

³¹⁶ *Id.*

³¹⁷ “Gov’t Owes Landowners \$80 Million” (Oct. 28, 1999).

³¹⁸ 2 N. Mar. I. Code at § 4145(d).

³¹⁹ Marian A. Maraya, “Inter-Island Land Exchange Ban Revived,” *Saipan Tribune* (Mar. 3, 2004).

³²⁰ House Bill 14-68 was offered by Rep. Jesus T. Attao and passed 17-0 on Mar. 2, 2004. *See id.*

³²¹ 2 N. Mar. I. Code §§ 3211, 3212.

³²² *Id.* at § 3221(a).

³²³ Formerly known as the Department of Natural Resources but changed by Executive Order 94-3.

authority to acquire, hold, and dispose of real property, including any “*rights or interests therein*.”³²⁴ Each district’s jurisdiction includes public or private lands that are designated as agricultural or conservation areas.³²⁵ Each district is run by administrators, who may enter into conservation agreements with farmers located in their district,³²⁶ and who act as intermediaries between farm land owners and the USDA in order to facilitate conservation contracts between them.³²⁷

The Kagman Watershed Project is a large-scale example of a soil and water conservation district working in partnership with the USDA NRCS. As of early 2004, the U.S. had spent over \$4.4 million (compared to just over \$817,000 in local funds) to prevent flooding, efficiently supply irrigation water, and protect wildlife habitat and a coral reef system.³²⁸ The Saipan and Northern Islands Soil and Water Conservation District, created by this Act and delegated authority by the DLNR, was very active in securing land rights, obtaining necessary permits, and considering the needs of the local people.³²⁹ The types of land rights that were acquired for this project are not known.

D. Coastal Resources Management Act of 1983

This Act lays out the Commonwealth’s policy on coastal resource management, establishes a Coastal Resources Management Office and an Advisory Council, and vests regulatory powers in several agencies. Several policy statements are of particular interest:

- to promote “concepts of resource management, conservation and wise development of coastal resources;”

³²⁴ 2 N. Mar. I. Code § 3222(a)(6) (emphasis added).

³²⁵ *Id.* at § 3225(d)(2).

³²⁶ *Id.* at § 3226(c).

³²⁷ *Id.* at § 3226(d).

³²⁸ “USDA: Kagman Project to Benefit All,” *Saipan Tribune* (Feb. 20, 2004).

³²⁹ *Id.*

- to not permit (“to the extent practicable”) development of hazardous lands such as floodplains, erosion-prone areas, fault lines, etc.;
- to require all developments “to strictly comply with erosion, sedimentation, and related land and water use districting guidelines;”
- to not permit (“to the extent practicable”) development when significant adverse impacts would occur in “fragile areas such as . . . critical wildlife habitats, beaches, designated and potential pristine marine and terrestrial communities, limestone and volcanic forests, designated and potential mangrove stands and other wetlands;”
- to “manage ecologically significant resource areas for their contribution to marine productivity and value as wildlife habitats, and preserve the functions and integrity of . . . significant natural areas;”
- to “encourage development of recreation facilities which are compatible with the surrounding environment and land uses;” and
- to encourage “the preservation and maintenance of critical agricultural lands for agricultural uses.”³³⁰

The Coastal Resources Management Office was established to coordinate the implementation of the policies and all related planning.³³¹ The Development Advisory Council advises the governor (and the heads of those agencies with regulatory powers under the Act) on the effect of government policies and actions on private land development.³³² In order to establish a coastal resources management program, provide for a permit process, designate “future areas of particular concern,” and create “standards and priorities of land and water uses,”³³³ the following agencies are vested with joint regulatory powers under the Act: the DLNR, the Department of Commerce, the Department of Public Works, the DEQ in the Department of Public Health, the Historic

³³⁰ Selected policy statements from 2 N. Mar. I. Code § 1511.

³³¹ *Id.* at § 1512(a). Pursuant to Executive Order 94-3, the Coastal Resource Management Office is part of the DLNR.

³³² Executive Order 94-3 § 402. The Order also changed the name of the council from Coastal Advisory Council.

³³³ 2 N. Mar. I. Code § 1531(c).

Preservation Office in the Department of Community and Cultural Affairs, and the Commonwealth Utilities Corporation.³³⁴

E. Commonwealth Environmental Protection Act

The Environmental Protection Act was enacted to, among other things, protect the right to a “clean and healthful public environment” as guaranteed by the CNMI Constitution³³⁵ and to preserve “the aesthetic quality of the land, water, and natural resources” of the CNMI.³³⁶ The Act mandates that systems of standards and permits be developed in order to regulate or prohibit pollutant discharges, waste disposal, and earthmoving.³³⁷ The Act also provides for public awareness and an opportunity for public comment related to subdivisions; major public works projects; the construction of hotels, industrial parks, oil processing facilities, and shopping centers; and other large scale projects.³³⁸

To enforce the Act’s provisions, the Division of Environmental Quality (DEQ) may issue any necessary order, seek injunctive relief in the Superior Court, and charge civil penalties of not more than \$1,000 per day.³³⁹ In addition, a permit holder under any program of this Act must concede a right of entry on his or her land so that authorized representatives may carry out inspections.³⁴⁰

³³⁴ *Id.* at § 1531(a).

³³⁵ 2 N. Mar. I. Code § 3111(a)(1).

³³⁶ *Id.* at § 3111(a)(7).

³³⁷ *Id.* at § 3122(c)(1)-(3).

³³⁸ *Id.* at § 3122(d).

³³⁹ *Id.* at § 3131(a)-(c).

³⁴⁰ *Id.* at § 3132.

VII. RECOMMENDED ACTIONS

A. Enactment of conservation easement legislation in the CNMI

The most obvious and efficient way for conservation easements to become firmly established in the CNMI is for the CNMI legislature to enact a general Conservation Easement Act. In this way, the CNMI could control exactly what type of conservation easements they will enforce and the CNMI courts will have clear guidelines before them on which to base their decisions. The Act could dictate, among other things: (1) who may hold a conservation easement; (2) how they may be transferred, modified, or terminated; and (3) whether they must “run with land.”

For guidance during the drafting stages, the CNMI legislature could look to the UCEA. Many sections of the UCEA could be adopted verbatim, and others could be modified as needed in order to comply with the current laws and recognized customs. In particular, the constitutional restraints on land alienation in the CNMI would have to be addressed in the Act, especially as it pertains to third parties and NGOs who might want to hold a conservation easement.

The U.S. Congress has the authority to enact legislation in the CNMI,³⁴¹ but this is not the preferred way to pass a Conservation Easement Act on the islands. First, the U.S. has agreed to limit exercising its authority in order to respect the Commonwealth’s right of self-government.³⁴² Second, it would be politically unpopular for the U.S. Congress to impose legislation on the CNMI. Third, the U.S. Congress has yet to enact similar legislation domestically. These factors combine to reinforce the conclusion that the most practical way to get conservation easement legislation passed in the CNMI is to

³⁴¹ Covenant, Article I, § 105.

³⁴² *Id.*

build up support internally, through education and foreign examples, and not by external imposition.

B. Develop conservation easement precedent in the CNMI

Given that the CNMI courts apply U.S. common law as written in the Restatements in the absence of CNMI law or custom, and that the Restatement (Third) of Property clearly recognizes conservation easements,³⁴³ it could be beneficial to bring a “test” case before the CNMI courts. By doing this and receiving a decision that recognizes conservation easements, favorable precedent could be established that would steer subsequent court opinions in the same direction.

In order to do this and be successful, however, care must be taken to lay a strong foundation for the “test” case. A strong foundation is laid if:

- the holder of the easement, whether an individual, NGO, corporation, or governmental body, is “of Northern Mariana descent;”³⁴⁴
- all transfers of interests in land (i.e., the conservation easement) are in writing;³⁴⁵
- the conveyance is promptly recorded with the Recorder’s Office with the terms of the conveyance clearly disclosed;³⁴⁶
- the conservation easement is placed on the certificate of title;³⁴⁷
- the land in question is not held pursuant to a *partida* or any other custom;³⁴⁸
- the terms of the conveyance and the issues involved in the case do not conflict with existing CNMI law and recognized custom;³⁴⁹
- the transaction was voluntary;³⁵⁰ and

³⁴³ See Section IV(B)(1)(a) of this report.

³⁴⁴ As required by the CNMI Constitution, Article XII. See, Section II(A) of this report.

³⁴⁵ See 2 N. Mar. I. Code § 4912.

³⁴⁶ See *id.* at § 4913(a).

³⁴⁷ Even though by statute this is not required. See, *Id.* at § 4251(a)-(b).

³⁴⁸ See Section IV(B)(3)(c) of this report.

³⁴⁹ Otherwise, regarding the conflicting issue the CNMI would not look to the ALI Restatements for guidance. See 7 N. Mar. I. Code § 3401.

- the land parcel affected is relatively small in size.³⁵¹

C. Utilize the Fish, Game and Endangered Species Act

As discussed earlier in this paper, the Director of Fish and Wildlife is authorized to acquire easements on land if it would further the purposes of the Fish, Game, and Endangered Species Act.³⁵² As of now, however, the Director has never exercised this power. The reasons for this inaction are unknown, but possibilities include a lack of financial resources, preferences for other methods of protection, disinterest, or adverse political pressure. With support building through education, all but the first reason for inaction can be eliminated. If a lack of funding is hindering the acquisition of easements under this Act, it may be possible to raise the necessary funding by retaining all of the hunting and fishing license revenues in the Fish and Game Conservation Fund—and become eligible for U.S. federal assistance under FAWRA and FRMPA.³⁵³

In the future, the Director should utilize his or her authority to acquire an easement on land—and three steps should be taken to help assure its success. First, the Director should categorize the easement as a “conservation easement” in order to familiarize the CNMI with this legal concept. The more ubiquitous the term “conservation easement” becomes in the CNMI, the quicker it will become “mainstream” law. Second, the Director should set the terms of the easement so as to actually resemble a conservation easement, regardless of whether it is called a conservation easement. If conservation easement-style interests are enforced in the CNMI (even if only by the Director) this might lead to their general use and acceptance in other land transactions as

³⁵⁰ It might be more persuasive to the CNMI court if both parties agreed to the conservation easement.

³⁵¹ A CNMI court might be reluctant to allow restrictions on large parcels of land.

³⁵² See Section VI(A) of this report.

³⁵³ See *id.*

well. Lastly, the CNMI should make itself eligible for (if they are not already) and actively request federal funds under FAWRA and FRMPA. With easements acquired under these U.S. statutes, presumably U.S. federal law would preempt CNMI law and many uncertainties would consequently disappear.³⁵⁴

D. Become eligible for U.S. federal programs

It is recommended that the CNMI become eligible for, and actively engage in, the several federal programs in which conservation easement acquisition is an explicit priority. The degree of success in implementing each program, however, will probably vary.

1. Forest Legacy Program³⁵⁵

The FLP appears to be well suited for implementation in the CNMI for several reasons. First, under the terms of the program the U.S. holds the conservation easement without any interference from conflicting state laws. Presumably, this rule would be valid in the CNMI as “supreme law.”³⁵⁶ Second, the U.S. shoulders up to 75 percent of the conservation easement acquisition costs (in partnership with other entities). This enables the CNMI to conserve its private lands at no cost to it. Third, only “willing” sellers participate. For this reason, the program may not be viewed as a U.S. federal imposition on the CNMI people, but rather as an additional choice given to the CNMI people. Fourth, the program requires that all conservation easements be in perpetuity, which provides conservation security.

³⁵⁴ U.S. laws that applicable to the CNMI are supreme law in the CNMI. See Section II(D)(1)(c) of this report.

³⁵⁵ See Section IV(B)(2)(a) of this report.

³⁵⁶ See Section II(D)(1)(c) of this report.

The CNMI would need to complete an Assessment of Need to make itself eligible for this program and it could then actively seek out willing landowners to participate. To facilitate implementation, local support for this program could be developed through education. In addition, eligible organizations should be encouraged to partner with the U.S. government and pledge their financial support for acquiring conservation easements in the CNMI.

2. *Wetlands Reserve Program*³⁵⁷

The WRP appears to be suited for the CNMI (although it is not known how much wetlands are currently in private hands) for some of the same reasons as the FLP: the U.S. government is the holder of the conservation easement so state law is likely to be preempted; the U.S. government will fund up to 100 percent of the acquisition costs if the easement is permanent;³⁵⁸ the program is voluntary; and permanent easements are preferred. Unlike the FLP, one important aspect of the WRP is that it appears that private landowners may become eligible for it on their own, without any preliminary action being required from the CNMI government.

Initially, the extent of private wetlands in the CNMI should be determined. When this is completed, landowners should be contacted and educated about the WRP so that they might become participants.

3. *Farm and Ranch Lands Protection Program*³⁵⁹

The FRPP is perhaps the most problematic of the federal programs profiled here. Under this program the conservation easement is not held by the U.S. federal government, but rather by a NGO or other “eligible entity.” In the CNMI, under its

³⁵⁷ See Section IV(B)(2)(b) of this report.

³⁵⁸ And up to 75 percent for thirty-year easements.

³⁵⁹ See Section IV(B)(2)(c) of this report.

constitution the “eligible entity” would have to qualify as “of Northern Mariana Islands descent.” Also, the question arises of whether there will be more or less enforcement of the easement when it is held by a NGO or other “eligible entity.” Another matter to consider is that the U.S. will only pay up to fifty percent of the costs of a conservation easement under the FRPP, with the eligible entity providing the other half. Less U.S. federal contribution means more money must be found elsewhere.

It is recommended, however, that the NRCS State Conservationist in charge of the Pacific Basin Area take the initial step of completing a State FRPP Plan so as to make the CNMI eligible for the program. When this is completed, eligible entities “of Northern Mariana descent” should be located, “pending offers” should be made, and an application should be submitted with the NRCS State Conservationist.

CONCLUSION

From the research conducted for this paper, it appears likely that the CNMI legal system is suited for and adaptable to the concept of conservation easements. Although conservation easements are not expressly recognized in the CNMI, easements and land use restrictions in general are enforceable. In addition, a CNMI court looking to the Restatement of Property for guidance will find that conservation easements are strongly recognized and even encouraged. With a growing population, a decreasing availability of public lands, and an increase in private land holdings, there is a growing need for the CNMI government to find a way to conserve its vanishing natural resources and wildlife. Under these pressures, with appropriate education measures taken, and with the appeal of conservation easements as an efficient, effective, and fair way to conserve private lands,

it seems likely that the CNMI legal authority will eventually accept some form of conservation easement.

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* All materials listed are available for review in the Appendix to this report.