Private Lands Conservation in Guam

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PRIVATE LANDS CONSERVATION IN GUAM

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

September 2004

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EXECUTIVE SUMMARY

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

   The Guam legislature has statutorily provided through the Guam Land Conservation Act for the creation of “Agricultural Preserves” which can include lands used for outdoor recreation or open space. To form a preserve the willing landowner enters into a contract with the Department of Agriculture, subject to the department’s approval, to restrict uses on the land for a minimum period of ten years. There are tax incentives in the form of property tax relief for these preserves. Also, the entire U.S. Internal Revenue Code is applicable to Guam. In the event that use of ‘conservation easements’ is authorized in the future, the provisions of the IRS code pertaining to conservation easements should operate in Guam.

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

   Three statutorily recognized legal tools resembling common law legal instruments could possibly be used for private lands conservation – appurtenant easements, servitudes held in gross, and covenants that run with the land.

   Although there is no statute authorizing the use of conservation easements per se, there is a statute authorizing the use of easements which can be held as appurtenant to land. These easements are limited to an enumerated list of burdens which can be recognized. This list does not include restricting development on property. Easements for burdens not included in the list can, under certain circumstances, arise by implication upon the transfer of land. It may be possible to have an easement restricting development arise by implication upon transfer of a portion of owned property.
There is also a statute authorizing servitudes on land to be transferred and held in gross. These servitudes are also enumerated in a list and include the rights to take game, fish, minerals, wood, and water. Those rights can be held ‘in gross’ or by a person or group without owning other land. Put another way, an owner of land can transfer to another person or to a group, the rights to take resources from their property. By holding these rights in property the person or group can limit others from taking these resources from the land. It may be possible to hold the right to take game and, in the event that someone begins to develop the land, argue that they are destroying habitat and interfering with the right to take game.

Covenants that run with the land, as they are recognized and sanctioned by Guam statutes and pre-adoption California case law as instruments for the restriction of development on private lands could be very effective for private land preservation in Guam. Constructed properly and carefully between two property owners, and registered with the title of the land, covenants could be written to conserve resources or restrict development on private land in perpetuity.

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

It may be possible to enact legislation authorizing the use of conservation easements to restrict development on private lands. Consideration would have to be given to the lack of interest in conservation easements encountered by the Natural Resource Conservation Service and negative reactions to conservation efforts by the U.S. Fish and Wildlife Service’s plan to designate critical habitat areas.

It may be possible also, to attempt to place an encumbrance restricting development on private land modeled after a conservation easement using the existing statutes for appurtenant easements, servitudes held in gross and covenants that run with the land. This strategy could be
supported by California case law that is controlling in Guam courts. Support may also be found for a ‘conservation easement’ from the American Law Institute’s Restatements which are considered persuasive in Guam courts, though not binding. The Restatement (Third) of Property recognizes conservation easements. Further, common law principles are cited and relied upon by both the Guam Superior Court and the Guam Supreme Court. The Guam Supreme Court has made a point of demonstrating that where a rule is not established by statute, the fact that a statute does not exist authorizing that rule in Guam will be of little consequence when the rule has received wide acceptance in American courts at both the state and federal level. Thus, even though no statute exists in Guam authorizing the use of ‘conservation easements’ per se, they could be considered American common law that has received wide acceptance in American courts at both the state and federal level.
INTRODUCTION

This report provides a basic description of the legal instruments, processes and institutions relevant to private lands conservation currently in place within the Territory of Guam. The report also assesses the feasibility of introducing a number of legal tools into the Guam 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 Guam by discussing the land, demographics, and land ownership breakdown. Section II describes the governmental framework in Guam and historical events that give insight to some issues of the legal context and land tenure system of today. Section III is an overview of the legal context including explanation of Guam’s unique legal status as a territory and the applicability of California case law to Guam legal questions. The rights and restrictions pertaining to private lands in Guam are found in Section IV. Registration of land and the land transfers are discussed in Section V, Private Land Administration. Section VI pays particular attention to conservation easements and the options available for crafting and placing a ‘conservation easement’ over private land in Guam. Section VII describes other tools based in common law principles that may be used. The final section, Section VII describes private land conservation programs that are already in place in Guam.

I. OVERVIEW OF THE LAND, DEMOGRAPHICS, AND RELATED ISSUES

A. Land Area and Population Figures

Guam is the largest and southern-most island in the Mariana Island chain which forms the eastern margin of the Philippine Sea. It is located 3,700 miles west-southwest of Honolulu; 1,500 miles east of Manila; and 1,500 miles south-southeast of Tokyo.¹ Formed by uplift of undersea volcanoes, Guam has a total land mass of 212 square miles or approximately 136,000 acres of
land. It is said to be three times the size of Washington, D.C.\(^2\) The northern half of the island is a limestone uplift that holds what is termed the northern water lens, Guam’s main source of fresh water. Most of the development and the population are concentrated in the northern half. The southern half of the island is made up of low hills and volcanic mountains. The highest point on the mountain is 1,300 feet above sea level.\(^3\) The capital of Guam is the city of Agana.

Of the 163,941 people living on Guam, 37 percent are native Chamorro, 26 percent are Filipino, 10 percent are white, and 27 percent are Chinese, Japanese, Korean, or of other ethnic groups.\(^4\) The average annual percentage change in the population from a surplus of births over deaths and the “balance of migration” is 1.5 percent.\(^5\) Military personnel and their families make up about 20 percent of the population.\(^6\)

A growing population and increased development to meet tourism demand has put pressure on the limited land resource of the island. Loss of habitat and commercial hunting are have contributed to the decline of the Marianas fruit bat, an endangered species native to Guam. Also, the introduction of the non-native brown tree snake has caused the decline of certain bird species including the Mariana crow to the point of their addition to the U.S. Fish and Wildlife list of endangered species. At the same time, high land values and increased pressure on the U.S. military to return lands taken from Guam citizens after World War II have created an environment where conservation is not the primary goal of Guamanians when considering uses of private lands.

\(^1\) http://www.doi.gov/oia/Islandpages/gumpage.htm
\(^2\) http://www.cia.gov/cia/publications/factbook/geos/gq.html - CIA Factbook website
\(^3\) http://www.doi.gov/oia/Islandpages/gumpage.htm
\(^5\) http://www.cia.gov/cia/publications/factbook/geos/gq.html - CIA Factbook website
B. Land Ownership

Lands in Guam are split between private owners (approximately 45%), the federal (U.S.) government (approximately 30%), and the Guam government (approximately 25%).

I. U.S. Federal Lands

Federal Lands on the island total approximately 40,800 acres (30% of the total land mass) and are divided among U.S. military installations, War in the Pacific Historical National Park, and the Guam National Wildlife Refuge.

Military installations are found across the island. Approximately 38,000 acres are taken up by Andersen Air Force Base, Agana Naval Air Station and a few other naval reservations, ‘magazines,’ hospitals, and communications annexes. These lands are owned outright by the U.S. government. In September of 1997, only 169 acres of land were leased by the U.S. government on Guam. The ‘War in the Pacific’ National Historical Park is the only U.S. national park on Guam. It is the only site in the National Park System that honors those who participated in the battles of the Pacific in World War II. The park is made up of 2,037 acres and is managed entirely by the U.S. National Park Service.

Administered by the U.S. Fish and Wildlife Service, the Guam National Wildlife Refuge has been the subject of some debate. The refuge was created to protect and recover endangered and threatened species, protect habitat, and control non-native species with emphasis on the brown tree snake. The refuge was created in 1993 when the military transferred 371 acres on the northernmost point of the island to the Fish and Wildlife Service.

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Today, the refuge is made up of 771 acres that were transferred from the military to the Fish and Wildlife Service and 22,456 acres owned and administered by the Navy and the Air Force. These lands owned by the Air Force and Navy are considered ‘overlay’ lands where the primary use is military and the Fish and Wildlife Service assists with the management of native species and habitats.

The debate has centered around the transfer of lands for wildlife conservation when many people in Guam are still hoping to regain title to lands that were taken by the U.S. military after World War II. When the original 370 acres were transferred to the wildlife refuge in 1993, the representative for Guam, Robert Underwood, condemned the action on the floor of the U.S. House of Representatives calling it a ‘land grab’ and citing injustices to the Chamorro people at the time the lands were taken. The government of Guam submitted a proposal echoing Underwood’s call to return the lands to the previous landowners at Ritidian Point.

Fish and Wildlife sparked more debate when, in 2002, they announced a plan to declare other lands (including private land) as critical habitat for endangered species. The critical habitat distinction would limit activities on private lands. The governor of Guam, Carl Gutierrez, strongly opposed the idea saying that Fish and Wildlife should have taken more preventive measures earlier and expressing concern over the hindrance that critical habitat designation would be to the return of lands to original landowners.

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12 Critical habitat distinction was proposed for 19,800 acres held by the US military, 2,800 acres held by Guam government, and 2,100 acres privately owned.
14 The governor stressed that Fish and Wildlife could have avoided the move to critical habitat if it had put more energy toward eradicating the brown tree snake, a non-native species of snake that established itself over the entire island by the 1980s. The snake is seen as the primary cause of the decline of the Mariana fruit bat and the Guam Micronesian kingfisher, the two species for which the critical habitat is being designated.
These reactions indicate the attitude of many Guam citizens toward some conservation efforts that have been made in Guam. It is entirely possible that this type of reaction would be limited to moves by the U.S. military and moves to force conservation measures on private landowners. Efforts to initiate voluntary land preservation measures may not meet with such resistance and, indeed, may be welcomed. Regardless, these reactions should be considered in any conservation effort on Guam, particularly any effort to initiate legislation to authorize the use of conservation efforts.

2. Guam Government Lands

The government of Guam holds title to approximately 25 percent, or 34,000 acres of land. All government of Guam lands are administered by the Department of Land Management. By the Organic Act, the U.S. government transferred approximately 11,028 hectares (27,251 acres) to Guam to be used for the benefit of the people. At first, there was a lot of confusion over exactly which lands had been transferred, what the exact boundaries were to those lands, and who could make claims to the lands as compensation for military takings. Eventually, most of these issues were resolved.

3. Private Lands

Land use on Guam is split between highly concentrated urban areas and underexploited rural lands.\textsuperscript{15} Forty-seven per cent of the privately-owned rural land on the island, in 1987, was covered with unused mixed wood and brush.\textsuperscript{16} Data from 1998 put the amount of arable land at almost eleven per cent.\textsuperscript{17} Recent data show that eleven percent is now in permanent crops.\textsuperscript{18}

\begin{footnotes}
\item[16] Id.
\end{footnotes}
Economic reports for Guam show agriculture and aquaculture increasing.\textsuperscript{19} Despite laws restricting alien ownership of land in Guam, alien investment in properties has been high. Most of this investment has been concentrated in properties serving the tourist industry.

\section*{II. RELEVANT BACKGROUND}

\subsection*{A. Government}

Guam is an ‘unincorporated’ but ‘organized’ territory, ceded to the United States by Spain in the Paris Treaty of 1898 that ended the Spanish American War.\textsuperscript{20} As an unincorporated entity, Guam is not recognized as forming an integral part of the United States in the same way as states. ‘Organized’ means that Guam has an Organic Act.\textsuperscript{21} From Article IV of the Constitution, the United States Congress has full and complete power to govern Guam.\textsuperscript{22} When Congress established the government of Guam through the Organic Act of 1950, it delegated much of its governing authority over Guam to the territorial government.\textsuperscript{23} The authority for the government of Guam is drawn solely from Congress through the Organic Act\textsuperscript{24} and Congress can withdraw that authority at any time by amending or annulling the Organic Act.\textsuperscript{25} Although Guam continues to gain a greater appearance of autonomy in its government, it is still essentially an instrumentality of the U.S. government under the administrative supervision of the Secretary of the Interior.\textsuperscript{26}

\begin{thebibliography}{9}
\bibitem{21} Laughlin, Jr. p. 403. The advantage of an Organic Act over creation of the government by executive order as was the case for American Samoa, is that amendment to the Organic Act and thus, change of the government of the organized territory is subject to review by the President, whereas, in an unorganized territory like American Samoa, changes are made solely by the President and not subject to review. As American Samoa now has a constitution, changes to which must be reviewed by Congress, the point is no longer as pertinent. Laughlin, Jr., pg. 90.
\bibitem{22} U.S. Constitution, Article IV, Section 3, Clause 2, “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…”
\bibitem{25} Stanford Research Institute, Vol. 2, p. 7.
\end{thebibliography}
Guam’s government, as established by the Organic Act, is very similar to the United States government consisting of an executive branch, a legislative branch and a judicial branch.

Citizens of Guam are citizens of the United States but are not allowed to vote in presidential elections as that right is dependent on state residency. Citizens of the United States who move to Guam retain their right to vote in presidential elections and are eligible to vote in local elections after a short residency period. Guam is represented by an elected non-voting member of the House of Representatives who otherwise has the same privileges and powers of representatives from other states.27

1. **The Executive Branch**

The executive power is held by a Governor who is elected jointly with a Lieutenant Governor every four years. The Governor is responsible for the faithful execution of the laws of Guam and of the U.S. laws applicable to Guam. The powers of the Governor include the power to pardon and reprieve for local law offenses; to veto legislation, subject to legislative override; and to declare martial law in emergencies subject to review and possible override by the Guam legislature.28 In 2002, the first elected Attorney General took office. Formerly referred to as the ‘Island Attorney,’ the Attorney General is the chief legal officer for the government of Guam and serves a four-year term. The Attorney General provides legal services to the government of Guam and has prosecutorial power.29

2. **The Legislature**

The unicameral legislature is made up of a maximum of twenty-one members known as senators. Currently, there are fifteen members of the Legislature.30 The senators are elected at

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28 48 U.S.C. 1422
29 [www.guamattorneygeneral.com](http://www.guamattorneygeneral.com)
large for a term of two years. General elections are held every two years in even-numbered years. The Legislature has the power to make law pertaining to issues of “local application” not inconsistent with U.S. laws applicable to Guam.

‘Local application’ is interpreted broadly: essentially, Guam may legislate in any area the U.S. Congress might legislate as long as Congress does not disapprove.\footnote{Stanford Research Institute, Vol. 2, pg. 91, citing \textit{Granville-Smith v. Granville-Smith}, 349 U.S. 1 (1957).} The Supreme Court has determined that it is appropriate for Congress to delegate its legislative power to the territories. That power can be so broad as to allow a territory to legislate in an area traditionally left only to the federal government, such as maritime matters, if the federal legislation on the matter has not blocked action of the territorial government by specifically being made applicable to the territory. In other words, even where the U.S. Congress has enacted statutes to cover certain matters, if the U.S. statute is not expressly made applicable to the territory, the territory can enact its own statute controlling the same matter.\footnote{Stanford Research Institute, Vol. 2, pg. 83, citing \textit{Fonseca v. Prann}, 282 F.2d 153 (1st Cir. 1960)} Essentially, the territory can be ‘deputized’ by Congress to govern in areas considered ‘off-limits’ to states. Still, this broad power to legislate is subject to Congress’s reserved absolute power to annul territorial legislation.\footnote{Stanford Research Institute, Vol. 2, p. 97.}

Included in the Guam Legislature’s scope is the power to tax and to issue bonds and other obligations. A bill passed by the Guam Legislature must be presented to the Governor. If not vetoed by the Governor, the bill becomes law and is sent to the head of the agency designated by the U.S. President for final action (today, it is the Secretary of the Interior).
3. The Judiciary

There are essentially two branches of courts in Guam – the local or territorial court system consisting of the Superior Court and the Guam Supreme Court and the U.S. federal court system which is represented in Guam by the Federal District Court of Guam.  

a. The Territorial Courts

The Superior Court is the trial court of general jurisdiction – the starting point for legal disputes, civil or criminal, that arise under the laws of Guam except where original jurisdiction has been vested by U.S. law in the U.S. Federal District Court of Guam. All hearings related to applications for certificates of title for unregistered land are held by the Guam Superior Court. Any appeals from those proceedings go to the Guam Supreme Court.

The Guam Supreme Court takes appeals from decisions of the Guam Superior Court. The creation of the Guam Supreme Court is evidence of Guam’s movement toward greater autonomy. Originally, all appeals from local courts were heard by an appellate division of the District Court. Congress gave Guam the power to create an appellate court of its own through the 1984 Omnibus Territories Act. The Guam Legislature created the Guam Supreme Court in 1993 and the “doors opened” in 1996. Like the supreme courts of states, interpretations of local law are now made by local judges accountable to the people of Guam. Eventually, Guam’s Supreme Court will be exactly like state supreme courts and parties wanting to appeal decisions of the Guam Supreme Court will be able to appeal directly to the U.S. Supreme Court. For the first fifteen years of its existence, though, (until 2011) appeals from the Guam Supreme Court

36 Codified at 48 USCA §§1424-1 through 1424-3.
will first be heard by the Ninth Circuit Court of Appeals before review can be sought in the U.S. Supreme Court.\textsuperscript{38} These appeals to the Ninth Circuit are not appeals of right but only by writ of certiorari. The Ninth Circuit Court of Appeals Judicial Council will report every five years to Congress evaluating whether the Guam Supreme Court has developed “sufficient institutional traditions” to justify direct review by the Supreme Court.\textsuperscript{39}

A case that arises under Guam law, then, starts in the Guam Superior Court. Appeal from the decision of the Superior Court would be taken to the Guam Supreme Court. This is true of appeals for land claims and from decrees registering land, also. Appeal from a decision of the Guam Supreme Court would be taken (if certiorari is not denied) to the Ninth Circuit Court of Appeals in California. And appeal from that decision would be taken (again if certiorari is not denied) to the U.S. Supreme Court.

\textbf{b. The Federal Courts}

The federal court system in Guam differs slightly from the operation of the U.S. federal court system in that the federal district court in Guam has jurisdiction similar to other district courts, but not identical. Appeals from the Federal District Court of Guam are taken to the Ninth Circuit Court of Appeals and any appeal of a decision in the Ninth Circuit Court of Appeals is taken to the U.S. Supreme Court.

As it was created by Congress under Article IV of the U.S. Constitution, (the “power to make all needful rules and regulations respecting” territories),\textsuperscript{40} instead of Article III (“the judicial power . . . shall be vested in . . . such inferior courts as Congress may…ordain and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} 48 USC §1424 – 2.
\item \textsuperscript{39} 48 USC §1424 – 2.
\item \textsuperscript{40} U.S. Const. Art. IV, Sect. 3, cl. 2.
\end{itemize}
\end{footnotesize}
establish”)

administration of Guam was transferred from the Department of the Navy to the Department of the Interior.

Certain historical events are important in understanding Guam’s legal system, land tenure system, and current political status. First, the native Chamorro culture and tradition were almost entirely lost, primarily due to Spanish and American influences. As a result, native custom now plays a very small role in the laws that govern Guam.\(^44\) Second, during their occupation of Guam, the Japanese destroyed many of the land records, and during the liberation of the island, many landmarks were destroyed making proof of land ownership after the War nearly impossible.\(^45\) Third, the Japanese use of Chamorros from the Northern Marianas created animosity between Guam and the Northern Marianas Islands that has hampered Guam’s chances of gaining greater autonomy in its governance.\(^46\)

1. **Decline of the Role of Custom**

Native custom plays a very limited role in the laws of Guam, today.\(^47\) Neither the Organic Act nor the Guam Code Annotated (Guam’s statutory code of laws) mentions native custom or tradition as a source of law. This is due in large part to heavy Spanish and American efforts to change the culture of the native Chamorro; efforts which were quite successful in light of the diminishing native population. The Spanish changed the settlement patterns of the Chamorro from a clan-based communal hamlet system to villages centered around a church. Both the Spanish and the Americans pressured the Chamorro to abandon the custom of matrilineage imposing more male-dominated beliefs and practices, instead. The Chamorro also readily accepted the Roman Catholic religion, introduced by the Spaniards, to such a degree that it is,

\(^{44}\) McCormick, pg. 520  
\(^{45}\) Souder, Paul, pg. 215  
\(^{47}\) McCormick, pg. 215
today, considered a part of the Chamorro heritage. Also, forty percent of the Chamorro native language is derived from Spanish words. The Chamorro heritage is blended with the Roman Catholic religion and the Spanish language so that it does not figure prominently in the Western – style legal framework in Guam today.

a. **Change in settlement pattern**

As with other Pacific islands, the native population of Guam was reduced significantly by the arrival of Westerners. When the Spanish arrived in 1521, the Chamorro population was estimated at between 50,000 and 100,000 people. War with the Spanish, Western diseases to which the native people had little resistance, and migration away from the island caused the numbers to decline to between 1,500 and 3,000 by 1783.

One major cultural change brought about by the Spanish was change in the patterns of settlement. Originally, the native Chamorro had divided Guam into well-organized districts made up of almost 200 clan hamlets. A clan was a group of extended families held together by mutual obligations, one of which was the use of land. The leaders of a hamlet (the oldest woman of the group and her oldest brother were the highest ranking individuals) controlled the land for the benefit of the entire community. From these mutual obligations and from the communal system, the people drew their understanding of their rights and limitations in relation to property in the same way that people draw their understanding of rights and limitations from a legal code today. A native Chamorro’s right to use the land may have been determined by her/his position in the hierarchy of the clan or by an obligation to another Chamorro whereas, today, the right to use the land is determined by concepts of ownership contained in the provisions of a legal code. The Spanish changed the ancient patterns of settlement by establishing villages or “pueblos” centered

48 Laughlin, Jr., page 421.
around the parish church. Interrelationships between families lost their importance and the people could not rely as much on their clan for guidance. Clans have virtually disappeared in Guam. Chamorro families are spread across the island and throughout the world. Increasingly, the Chamorro people looked to the Roman Catholic church for guidance instead of the extended family of the clan. With the disappearance of the communal settlement pattern, so disappeared the communal land system. The customs and traditions of the clans and the communal land holdings, though they affect Guam society in other ways, are only rarely looked to for guidance in establishing the rights of people in relation to land.

b. Loss of the matriarchal system

Another aspect of Chamorro culture removed by the Spanish and Americans was that of matrilineage - the Chamorro custom of the women controlling the land and other wealth (including the land) in a family. Traditionally, the women were very powerful and ruled the home. Separation or divorce was common and, when it occurred, all of the property automatically went with the wife. Children took the family name of their mother. This was quite a contrast to Spanish patriarchal values. Many of the Chamorro women married top Spanish officials bringing their land into the union. Much of the land, then, at the time the Americans acquired Guam, was in the control of Spanish colonists. Chamorro women enhanced their positions in the colonial society by these marriages, but were required to accommodate themselves to the patriarchal beliefs and practices of their husbands. Control of the land passed to the men.

49 Laughlin, Jr., pg. 400, citing a Spanish census of 1783.
In 1668, the Spanish prohibited divorce further limiting the freedom and control that native women had been accustomed to. Chamorro men, upon seeing a difference in the Chamorro wives of Spaniards, were reportedly eager to embrace this change and were told by the priests that it only would come through holy matrimony. Chamorro men headed to church and the traditions and customs of greater authority for women were traded for the Roman Catholic patriarchal custom. The cultural heritage of the Chamorro had been diluted.\(^{52}\)

The Americans outlawed matrilineage. American naval officers, the first American administrators on Guam, disliked the matrilineal practice of Chamorro children taking their mother’s surname. The U.S. Naval Government issued an executive order in 1919 declaring that a married woman should take the name of and follow the nationality of her husband. Thus, Chamorros were forced to abide by patriarchal notions of descent. The traditions and customs they had lived under for centuries gave way to more Western ways and did not influence the codes adopted by the Guam legislature for governing Guam.

c. **Resurgence of Interest in Chamorro Heritage**

By decimating the native population, changing the Chamorro communal pattern of settlement and outlawing matrilineage, the Spanish and the Americans virtually erased the culture and traditions of the native Chamorro of Guam to a degree that those traditions do not play a significant role in the laws of Guam today. However, there has been a resurgence of interest in Chamorro cultural heritage. Since the mid-nineties, a small but energetic Chamorro sovereignty movement has been emerging.\(^{53}\) Efforts to return ‘ancestral’ land to ‘native’

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52 Souder, Laura at 44, 45.
53 Laughlin, Jr., page 421.
Chamorro people have been successful\textsuperscript{54} and the traditional practice of ‘pattida,’ (from the Spanish word ‘partida’) by which a “patriarch, often on his deathbed, orally divests himself of title and vests it in his orally designated heirs,” has been recognized by Guam courts.\textsuperscript{55} What is being considered Chamorro custom, more accurately, is a blend of Chamorro custom with Spanish and American influence.

2. **Japanese Occupation**

Events brought about by the Japanese occupation and the re-taking of Guam by the Americans during World War II directly hampered the ability of Guamanians to establish claims to land after the war and indirectly limited Guam’s possibilities in its bid for greater autonomy after the war. Destruction of records by the Japanese and of landmarks by the Americans upon liberation made it very difficult for Guamanians to prove what land they owned and subsequently created lasting tension between Guamanians and the U.S. government. Tension between the Chamorros of Guam and Chamorros of the Northern Marianas used by the Japanese to aid in the occupation closed off the possibility of Guam joining with the Northern Marianas in its successful bid thirty years after the war to achieve commonwealth status and greater independence in its governance.

a. **Overview**

Guam is the southernmost of the Marianas chain of islands. Following World War I, the Japanese were directed by the League of Nations to enter and possess the Northern Marianas. The Japanese treated the Northern Marianas as its colony. Shortly after the attack on Pearl Harbor, the Japanese invaded Guam. The small American and Guamanian force there was

\textsuperscript{54} Any lands deemed by the United States military to be ‘surplus’ lands and returned to the government of Guam are called ‘ancestral’ lands. 21 GCA § 75104 (b). The term ‘Native Chamorro’ means any person who became a U.S. citizen by virtue of the enactment of the Organic Act of Guam or descendants of such person. 21 GCA § 75101 (d).

\textsuperscript{55} *Santiago v. Quinata*, 1991 WL 336906 (D. Guam A.D.)
subdued quickly. The Japanese occupation over the next two and a half years was brutal with death penalties sometimes imposed for even minor infractions.\textsuperscript{56} Guamanians clandestinely resisted the Japanese and those suspected of aiding American forces during the occupation were often tortured, executed, or imprisoned in concentration camps.\textsuperscript{57} Guamanians were forced into labor for the Japanese. Chamorro people of the Northern Marianas were brought to Guam to translate and to teach the Chamorros of Guam the ways of the Japanese. To many Guamanians, this made the people of the Northern Marianas collaborators in the occupation of Guam. Guamanian resentment caused a rift to open between the two peoples that has only recently begun to heal as Chamorros throughout the Marianas chain reach out to re-build their cultural heritage.

b. Land Ownership Claims

The occupation by the Japanese and the subsequent liberation by the Americans of Guam made difficult efforts by Guamanians to substantiate their claims to land. During the occupation, the Japanese destroyed most of the land records. In 1944, the Americans re-took Guam in a fierce battle. The fighting and the pre-invasion bombing caused widespread destruction of cities, landmarks and survey markers that had been used to describe properties. The island was an important staging ground for continued war operations so, complicating land matters even further, over half of the land on the island was taken by the U.S. military subject to future compensation.\textsuperscript{58} Without land records or descriptive markers, it was nearly impossible for the people to prove what land they had owned in order to receive compensation for takings by the U.S. military. Eventually, all of these claims were settled, but some were settled under suspect circumstances. Expressing doubts about the fairness of the compensation paid in some of the

\begin{thebibliography}{99}
\bibitem{Laughlin} Laughlin, Jr., p. 402
\bibitem{Rogers} Rogers, Destiny’s Landfall, pg. 432.
\end{thebibliography}
settlements, Congress amended the Organic Act in 1977 and 1980 giving the District Court of Guam the exclusive jurisdiction to review land claims that had been deemed settled by the court between 1944 and 1963 and the power to award fair compensation where less than fair market value had been paid as a result of duress, unfair influence, or other unconscionable actions of the United States.\textsuperscript{59} Some claims still may be pending.\textsuperscript{60} The difficulties in getting fair compensation have fueled tension between Guamanians and the United States government. Many Guam citizens want greater autonomy from the U.S. government and have approached Congress with proposals for political status change. Reflecting distrust of management of military installations in Guam and frustration over lack of control of Guam land held by the military, these proposals have included provisions requiring Guam’s approval of major changes in military bases on Guam.\textsuperscript{61} The Guam legislature has turned its attention to the land claims problem and has formed the Chamorro Land Trust Commission with the mandate of returning lands to the Chamorro people.\textsuperscript{62}

c. The Northern Marianas and Greater Autonomy for Guam

The animosity between the Guamanians and Northern Marianas Chamorros kept Guam from joining with the Northern Marianas Islands in its successful bid for self-governing Commonwealth status. After World War II, the United Nations created the Trust Territories of the Pacific Islands. Under the Trust Territory program, a trustee nation was given control of an area that seemed ill-prepared for self-government in a radically changed post-war world.\textsuperscript{63} The Northern Marianas Islands were included in the program. As trustee for the Northern Marianas

\textsuperscript{58} Souder, Paul, pg. 215.
\textsuperscript{59} 14 USCS § 1424c
\textsuperscript{60} One of the last cases involving this kind of claim was decided in 1992, \textit{In Re: Guam Land Cases v. United States}, 972 F.2d 1339 (9th Cir. (Guam)).
\textsuperscript{61} Rogers, “Destiny’s Landfall,” p. 274.
\textsuperscript{62} Guam Code Annotated, Title 21, Subpart E, Chapter 75.
\textsuperscript{63} Laughlin, Jr., pg. 95
and others, the United States was directed by the United Nations to move the areas toward self-determination and self-government. As Guam was already a possession of the United States, it was not included in the program and remained under the supervision of the United States Navy. Between 1958 and 1969, polls in the Northern Marianas had shown that a strong majority of the people wanted to be re-unified with Guam to form a new U.S. Territory of the Marianas. Guamanians, though, rejected the idea in a referendum in 1969. Many Guamanians were still bitter over the brutality of some Northern Marianas Chamorros during World War II. Rejected by the Guam Chamorros, the Northern Marianas approached Washington asking for ‘membership in the United States political family.’

In accordance with the United Nations mandate to move the areas toward self-government, the United States was obliged to honor their wishes. Negotiations were begun and the Northern Marianas, in 1986, achieved the status of self-governing Commonwealth. The people of Guam did not realize the United States’ desire to maintain control of the Northern Marianas and were surprised to see Washington providing greater local autonomy to the Northern Marianas. Guam, then, initiated efforts to pursue Commonwealth status. Without the mandate from the United Nations for the trust nation to move the trustees toward self-government, Guam has had a much more difficult time. Negotiations over Guam’s political status are ongoing. Had Guam joined with their neighbors to the North, they probably would have had a much better chance at Commonwealth status and greater self-government.

III. OVERVIEW OF LEGAL CONTEXT

The primary sources of law for Guam are the Revised Organic Act of 1950 and the Guam Code Annotated. Certain provisions of the U.S. Constitution, and certain U.S. federal statutes

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64 Rogers, “Destiny’s Landfall,” pg. 249.
65 Id. at 250.
that are applicable to Guam are additional sources of law. Case law from Guam Supreme Court decisions are controlling in Guam as well as Federal case law derived from decisions of appellate courts which have the jurisdiction to hear matters pertaining to Guam. Common law plays a role in interpreting the laws of Guam and the Restatements are cited in some court decisions though the Restatements are not expressly mentioned as a source of law. Custom also is not referenced as a source of law in the Organic Act or the Guam Code Annotated, but has been recognized in court and may be recognized more in the future. Interpretations by California appellate courts of statutes copied into the Guam code from the California civil code are considered persuasive evidence in Guam cases involving those provisions.

A. Applicability of the U.S. Constitution to Guam

The entire U.S. constitution does not apply of its own force to Guam. That is to say that it is not automatically assumed that all provisions of the Constitution apply to Guam without Congress making them expressly applicable. As Guam’s territorial government exists solely because of Congress’s constitutional Article 3 power, the Constitution is said to always be in operation in Guam and the legislative powers of Congress and the Guam government are limited by the fundamental portions of the Constitution which provide basic, undeniable individual rights. The question, though, is whether every provision of the Constitution is automatically applicable to Guam. Through a series of cases referred to as The Insular Cases in the early 1900s, the U.S. Supreme Court determined that the Constitution was only applicable in its entirety in territories that were ‘fully incorporated’ into the United States. The Supreme Court decided in the Insular Cases that Puerto Rico had not been fully incorporated into the United

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66 U.S. Const., art. 4, Sec. 3, cl. 2. “The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”
67 Laughlin Jr., pg. 414
68 Id. at 118.
States. Because Guam and Puerto Rico were acquired by the same treaty, it is accepted by implication that Guam is not incorporated, either. Additionally, the Supreme Court sanctioned Congress’s technique of extending some provisions of the Constitution to a territory and not others stating that “Congress should have a free hand in dealing with peoples of an alien and different civilization . . . it would be unrealistic for a territory accustomed to its own legal traditions and customs to be forced to accept an alien brand of jurisprudence overnight.”

Today, when considering provisions of the Constitution which have not been specifically made applicable to a territory, the policy is that the entire Constitution is presumed to be fully applicable, but that presumption can be rebutted by showing that the application of the provision to the specific territory would be “impractical or anomalous.” The provisions which Congress has specifically made applicable to Guam through the Guam Organic Act are the Bill of Rights (including the 5th amendment assurance of compensation for land taken by the government), the 13th, 14th, and 15th amendments. The commerce clause does not apply to Guam which means that Congress does not need to rely on the commerce clause to legislate for Guam, and that Guam’s legislature can enact legislation which affects interstate commerce subject, of course, to review by Congress.

70 Id. citing Balzac v. Porto Rico, 258 U.S. 298 (1922).
71 Laughlin, p. 415 citing Wabol v. Villacrusis, 958 F 2d 1450 (Ninth Cir. N. Mariana I. 1992). The best example of this is the situation in the Northern Marianas Islands and American Samoa which both prohibit sale of land to anyone but natives citizens. This restriction would, arguably, not withstand an equal protection challenge under the 14th Amendment in a state, but the restrictions have been upheld because the local culture makes application of the 14th Amendment unworkable (impractical) or because application would destroy local custom which the United States has agreed to preserve (anomalous).
73 Laughlin, Jr., pg. 170.
74 Laughlin, Jr., 1997 Supplement, pg. 60
B. Applicability of Federal Statutes

The Federal statutes that are applicable to Guam are the Federal statutes which Congress intended to be applicable to Guam based on the plain language of the statute or from Congressional intent reflected in the legislative history surrounding the adoption of the statute.\footnote{Laughlin, Jr., pg. 417; Stanford Research Institute, vol. 2 p. 89. citing Fonseca v. Prann, 282 F.2d 153 (1st Cir. 1960).} Generally, if Congress intends new legislation to be applicable to the territory, it will be stated in the federal statute.\footnote{A 1960 First Circuit Court of Appeals decision (Fonseca v. Prann, 282 F.2d 153) stated that the territories could legislate in an area where Congress had spoken through legislation if Congress had not specifically stated that the federal statute was to be applicable to the territory, but that territorial governments could not legislate over matters for which federal statutes were expressly made applicable to the territory. This power is not available to the states as that would upset the uniformity of the law. The territories, the court stated, could be ‘deputized’ by Congress to legislate over matters normally reserved to Congress. (Stanford Research Institute, “A Study and Review of Laws Pertaining to Alien Investment on Guam,” vol. 2, pp. 80 – 90, September, 1974.)} This may be seen as a reaction to the Supreme Court ruling stating that a territory could legislate in areas normally restricted to Congress if Congress had not made existing statutes covering the issue specifically applicable to the territory.

In Guam, the federal bankruptcy statutes are applicable as is the Fair Labor Standards Act and the Sherman Antitrust Act. The Internal Revenue Service Code is fully applicable to Guam but the taxes stay in Guam and are to be expended for the benefit and government of Guam.\footnote{Guam Organic Act, § 1421h; 48 USCA 1421h} It could be assumed, then, that the provisions of the IRS code which provide tax incentives for conservation easements should apply to Guam, also.

C. Applicability of Federal Case Law

The Guam Supreme Court has held that “decisions of the federal courts are not controlling upon [its] construction of the law.”\footnote{Guam Organic Act, § 1421h; 48 USCA 1421h} If the Guam Supreme Court decides that reason demands a different interpretation of a Guam law than that provided in the past by federal appellate courts, they can diverge from those federal holdings. From the formation of the Guam government in 1950 until 1996, all appeals of decisions from the territorial courts were heard by
an appellate division of the Guam Federal District Court. To many, this was yet another way in which the U.S. federal government was controlling Guam as interpretation of Guam’s laws, enacted by legislators, elected by Guamanians, was being made by federally appointed judges with no accountability to the people of Guam.\footnote{Holmes v. TLUC, 1998 Guam 8, citing Sumitomo Construction Co. v. Zhong Ye, Inc., 1997 Guam 8 and People of the Territory of Guam v. Quenga, 1997 Guam 6, n. 4.}
The creation of the Guam Supreme Court was applauded by those who wished for Guamanians to be in control of the interpretation of Guam’s laws. Congress, in providing for the Supreme Court of Guam, gave the Court the authority to interpret Guam’s laws in the same way that a state supreme court interprets the laws of a state.\footnote{Laughlin, Jr., 1997 Supplement, p. 56, citing letter from Chief Justice Siguenza, Chief Justice of the Supreme Court of Guam, to Judge John S. Unpingco, Chief Judge of the District Court of Guam, July 26, 1996. “…henceforth, our laws will not only be enacted by duly elected officials of the Territory, but given meaningful interpretation by Guamanian Justices also answerable to the People of Guam.”} Decisions of the federal appellate courts (the Guam District Court appellate division and the Ninth Circuit Court of Appeals) interpreting Guam’s laws are binding on the trial court in Guam (the Superior Court) because those appellate courts directly reviewed decisions of the trial court in Guam. For the Guam Supreme Court, though, the decisions of federal appellate courts interpreting Guam law are considered persuasive authority and not binding precedent.\footnote{People of the Territory of Guam v. Quenga, 1997 Guam 6, n. 4 (Guam Terr.)}

In several cases the Guam Supreme Court has noted its authority to “modify interpretations previously addressed by federal courts,” but has stated that it will not “disturb precedent that is well supported in law and well reasoned.”\footnote{Id.} The precedent set by federal appellate courts stands as good law until the court addresses the issues, and the court will only change the precedent if the change is reasonable.\footnote{Holmes v. TLUC, 1998 Guam 8, citing People of the Territory of Guam v. Quenga, 1997 Guam 6, n. 4 (Guam Terr.) (Supreme Court of Guam).} When the court does choose to make changes in interpretations of Guam’s laws by the federal courts, the justices will use their own
independent and reasoned analysis of the issues’ at hand considering local law and customs, if applicable.\textsuperscript{84}

Decisions of the Guam Supreme Court can also be appealed. Until 2011, the first stop for appeals is the Ninth Circuit Court of Appeals, and after 2011, appeals will go directly to the U.S. Supreme Court. As the Guam Supreme Court is a local court made up of local justices, its decisions may carry greater weight than past federal interpretations of Guam’s laws.\textsuperscript{85}

D. Custom

As mentioned above in the section on relevant history, custom is not recognized as a source of law in the Organic Act or in the Guam Code Annotated.\textsuperscript{86} Furthermore, in appellate decisions, custom has played a limited role in interpreting the laws of Guam. In light of the 1991 recognition by the Appellate Division of the Guam District Court of the custom of pattida and the resurgence of interest in native Chamorro heritage, it is possible that local custom may play a greater role in decisions by the Supreme Court of Guam in the future. The growing interest in preserving Chamorro heritage coupled with the existence of the Guam Supreme Court may bring about greater reliance on Chamorro custom in interpreting Guam law in the future. This development would be a consideration to address in any effort to initiate legislation in the Guam legislature that would authorize conservation easements in Guam.

E. Common Law

There is currently no Guam statute authorizing the application of common law principles by the courts of Guam, however, the courts of Guam have applied common law principles in

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\textsuperscript{84} \textit{Sumitomo v. Zhong Ye}, 1997 Guam 8, p. 4. (Guam Terr.)\\
\textsuperscript{85} Laughlin, Jr., 1997 Supp. pg. 56.\\
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deciding cases.\textsuperscript{87} The Superior Court of Guam in 1975 stated that its subject matter jurisdiction over “those cases arising under the laws of Guam,” included all causes of action that existed at common law.\textsuperscript{88} The Supreme Court also has applied common law principles, especially where the common law rule has seen widespread adoption by U.S. courts. In 20 cases of the 192 cases it has heard since 1996, the Guam Supreme Court has cited common law principles and adopted common law rules.\textsuperscript{89} One case in particular is worth noting for our purposes because it relies specifically on what has become widely adopted American common law. In \textit{Fleming v. Quigley},\textsuperscript{90} the Guam Supreme Court specifically relies on American common law. The court chose the “American Rule” for determining how attorney’s fees should be awarded because the rule was a “long-established rule at common law that had been universally adopted by American courts” at both the federal and the state level.\textsuperscript{91} The court stated that even in the absence of a statute regarding the issue at hand, it would adopt the common law rule primarily because of the widespread adoption by American courts.\textsuperscript{92} Also, the court stated that: “A finding that there is no statute which specifically codifies the American Rule in this jurisdiction would be of limited consequence. . . . a more appropriate inquiry here is whether the legislature has specifically rejected the American Rule.”\textsuperscript{93}

Similarly, there is no statute in Guam specifically authorizing the use of a ‘conservation easement’ and it may be necessary to rely on common law tools to preserve private lands. An attempt to use a ‘conservation easement’ in the absence of a Guam conservation easement statute

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\item [87] McCormick, p. 520, citing 6 GCA § 4205, comment.
\item [89] From a search of Guam Supreme Court cases for “Restatement,” http://teamsupreme.temp.powweb.com/OPINIONS.htm
\item [90] \textit{Fleming v. Quigley}, 2003 Guam 4 (Guam Terr.) (Supreme Court of Guam).
\item [92] Title 7 GCA §§ 26601(f), (g) (1994)
\item [93] \textit{Fleming v. Quigley}, 2003 Guam 4, pg. 4
\end{itemize}
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could be substantiated by arguing the widespread adoption of conservation easements themselves in American courts.

To make the claim that conservation easements are now considered American common law, their inclusion in the Restatement (Third) of Property could be cited as the Restatements are generally considered a codification of American common law. The Restatements are published by The American Law Institute as a guide to the general rules of common law applied in most states of the United States.\footnote{McCormick, pg. 656, n. 10}

Guam courts also have applied provisions from the Restatements of the common law. One case from the District Court of Guam referred to the Restatement of Property § 506(f) (1944) in interpreting the extinguishment of an easement by adverse use of the servient tenement.\footnote{Holmes v. Cassidy, 1988 WL 242559 (D. Guam A.D.)} The holding of the case is not as important as the fact that the Restatement of Property was used. As noted above, the Restatement (Third) of Property, a later version, expressly recognizes conservation easements. If a Guam court would rely on this Restatement recognition of a conservation easement, the court may uphold use of a conservation easement in Guam even in the absence of a statute authorizing the use of conservation easements.

On the other hand, according to the Office of the Attorney General in Guam, “The Restatements can be persuasive in Guam, but are not binding.”\footnote{E-mail from Charles Troutman, Compiler of Laws, Office of the Attorney General of Guam.} If, indeed, the Restatements are not binding, reliance on the acceptance of conservation easements in U.S. common law might also be questionable. In addition, the Fleming court, did consider of importance the fact that the common law rule it was adopting had been established through decisions of the courts and not through statutes. Most U.S. jurisdictions allowing the use of conservation easements rely on

\begin{itemize}
\item McCormick, pg. 656, n. 10
\item Holmes v. Cassidy, 1988 WL 242559 (D. Guam A.D.)
\item E-mail from Charles Troutman, Compiler of Laws, Office of the Attorney General of Guam.
\end{itemize}
statutory recognition by the legislature. The court had also applied the rule in an earlier case which made their decision easier. These challenges to substantiating use of conservation easements based on the *Fleming* treatment of common law rules may be persuasive, though, and is another tool to be considered.

In summary, common law principles are cited and relied upon by both the Guam Superior Court and the Guam Supreme Court. The Guam Supreme Court has made a point of demonstrating that where a rule is not established by statute, the fact that a statute does not exist authorizing that rule in Guam will be of little consequence when the rule has received wide acceptance in American courts at both the state and federal level. Considered persuasive though not binding, the Restatements of common law are cited in Guam courts and may be helpful in preserving private land by placing restrictions on the land.

**F. Application of California Case Law**

Decisions of California appellate courts interpreting California statutes that were adopted by Guam are at least persuasive, and in some cases, controlling authority in Guam courts.

In 1933, the U.S. Naval Government of Guam adopted California’s Civil Code of statutes, including the Land Title Registration Act, for governing Guam. The fact that Guam’s code was directly adopted allows the inference that the codified rules were intended to be given the same meaning as they had previously been given by the appellate courts of California.\(^{97}\) Courts in Guam frequently rely on California appellate interpretations of statutes which were adopted from the California Code.\(^{98}\) For example, in 2000, Guam’s Supreme Court, used a 1965 California District Court of Appeals decision to extend the Guam Code definition of

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\(^{97}\) *U.S. v. Johnson*, 181 F.2d 577 (Ninth Cir. 1950).

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‘encumbrance’ to: “any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee.”\textsuperscript{99} Consequently, California appellate case law interpreting a building restriction as an easement that would pass with the title to land upon transfer, might be used in a Guam court to support the use of a similar restriction in Guam.

On the other hand, a California case that interprets a statute not adopted by Guam or decided after Guam did adopt a statute, may or may not be followed by the Guam court. Decisions from California courts from before Guam adopted the California Civil Code (pre-adoption California case law) in December of 1933 are considered “controlling authority” in Guam courts and opinions from post-adoption California cases “while not binding, are persuasive.”\textsuperscript{100} The definition of ‘encumbrances’ cited above was taken from California appellate decisions from as late as 1993. The definition by the California court, even as a post-adoption interpretation, was persuasive enough to be adopted by the Guam court. To the contrary, though, the Ninth Circuit Court of Appeals (in its Guam appellate jurisdiction) in interpreting a rule contrary to other California rulings, stated that those other California appellate interpretations were from after Guam’s adoption of the statutes and were not “controlling upon” the court.\textsuperscript{101}

IV. RIGHTS AND RESTRICTIONS PERTAINING TO PRIVATE LANDS

A. Ownership of Private Property

1. Restrictions on Alienation of Land – Alien Ownership

The law regarding ownership of land by non-Guamanians and the reality of alien ownership of land in Guam are at odds with each other. According to the statutory code, aliens

\textsuperscript{99} Roberto v. Aguon, 519 F.2d 754, 755 (Ninth Cir. 1975). “Decisions of California courts which pre-date enactment of territorial laws are controlling authority on issues of the statutory construction and effect of Guam laws; cases subsequent to adoption of the Guam codes are persuasive, but not binding.”

are not allowed to hold and dispose of land except under certain restrictive circumstances. The reality, though, is that much alien investment in Guam land has occurred.

Anyone who is not a citizen of the United States or who has not declared their intention to become a citizen of the United States is considered an alien in Guam. The circumstances under which aliens can own land in Guam as provided by the Guam Code Annotated are: 1) aliens may own or lease single family, residential apartment or condominium type housing (one unit per family) and the land on which such housing is located; 2) resident aliens may acquire land by inheritance or succession so long as that land is sold within five years of the time it is received; and 3) aliens may hold and dispose of land in Guam where that right has been secured by existing treaties.

These restrictions have not, in reality, limited acquisition of real property by aliens on Guam. Possibly, the Attorney General has failed to enforce the statute for lack of being informed or lack of informing himself of alien ownership, or possibly the statute has not been applied to alien corporations on the supposition that “person” does not apply to corporations. In 1974, twenty-four percent of Guam’s land was owned by foreign companies.

2. Adverse Possession

Before property is registered, it is possible for a person to acquire the right to title to the property through adverse possession. Once land has been registered and an official certified

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100 Roberto v. Aguon, 519 F.2d 754, 755 (9th Cir. 1975).
101 Wells v. Lizama, 396 F2d 877 (9th Cir. 1968).
102 21 GCA § 1204
103 21 GCA § 1204(a)
104 21 GCA § 1204(c)
105 21 GCA § 1204(a)
107 Id.
108 21 GCA § 29106

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copy of the title is on file with the registrar, ownership rights to the land cannot be gained by adverse possession.\textsuperscript{109}

In general, adverse possession is allowed in order to encourage the active use of property, to push people to put land to beneficial use. In the event that the owner of property is not using it, and someone else does put the property to use, that person can acquire a right to ownership of the property. Many states have adverse possession statutes. In Guam, the person who adversely possesses the property must actually possess the property in an open manner as the true owner would, keep all others off of the property, and pay all taxes levied on the property. If the adverse possessor continues to meet these requirements for five years without interruption, she may apply for title to the property or, if after the five year period the ‘true owner’ attempts to register the property, she can challenge the registration by making her adverse claim. The adverse claimant must include in her petition the nature of the possession and proof of all of the elements of her adverse possession. Of course, if the ‘true owner’ enters the property and moves for ejectment of the adverse possessor before the five year period passes, the attempt to acquire the ownership right will have failed and the court will deny registration in the name of the adverse possessor.

B. General Restrictions on Land Use

The Guam code provides restrictions on land use by zoning regulations and Guam Environmental Protection Agency restrictions.

\textbf{1. Zoning}

Guam has a zoning statute recognizing the need to encourage the most appropriate use of the land and to prevent undue concentration of population.\textsuperscript{110} The zone most appropriate for use

\textsuperscript{109} 21 GCA § 20136
for private land preservation would be the “A” – Rural Zone. On rural zone lands only single-family dwellings are allowed. Activities allowed include farming, fisheries, and the activities customarily involved in the pursuit of agriculture and aquaculture. Land which is not zoned ‘rural’ cannot be re-zoned to be designated rural, and land that is zoned ‘rural’ cannot be changed to a different classification without an ‘Agricultural Impact Statement.’ The impact statement must address adverse conservation affects which are unavoidable should the re-zoning be approved.

2. Guam Environmental Protection Agency

The Guam EPA issues Air, Hazardous Waste, Environmental Land Use, Pesticide, Solid Waste, and Water permits. Permits are required for certain land use/development activities and the EPA sets out guidelines to be followed in preparing reports needed to obtain those permits. Environmental Protection Plans are required for most clearing, grading and marine-related work. Environmental Impact Assessments are required for all zone-change, variance, wetland, seashore, and golf course type permits. The more stringent Environmental Impact Statement may be required if impacts will cause “significant loss, damage, or degradation of resources.” Field Wetland Identification is also provided by the Guam EPA as wetlands are protected and require identification, delineation, and permitting before development. The Guam EPA works closely with the Guam office of the United States Department of Agriculture’s Natural Resources Conservation Service on wetlands permitting.

110 21 GCA § 61102
111 21 GCA § 61304
112 21 GCA § 61637
113 All information about the Guam EPA was taken from the website - http://www.guamepa.govguam.net/index.html.
V.  PRIVATE LAND ADMINISTRATION

A.  Institutional Framework

The Department of Land Management is charged with the maintenance and management of all public lands in Guam. The Director of Land Management is the official registrar of titles and all certificates of title are filed with the registrar in the Land Records division of the Department of Land Management. The Territorial Surveyor is housed in the Department of Land Management and is responsible for establishing the 1993 Guam Geodetic Network, surveying all government land in Guam, and maintaining all files relating to land surveys in Guam.

B.  Land Transfer

Land transfers in Guam are explained more fully in the section “Transfers of registered land.” Transfers of land can only occur by way of contract between the two parties so long as the contract contains the full name, residence and post office address of the person to receive the transfer, and the signatures of the parties to the transfer. Unregistered land can be transferred, though, for reasons set out below, only registered land should be purchased or purchase of unregistered land should be made contingent upon the successful registration and quieting of the title. The process for transferring registered land is very simple requiring primarily the filing of the contract creating the transfer with the registrar and the surrender of the duplicate title to the registered land. A new title certificate is then issued by the registrar in the name of the transferee or buyer. The transfer is considered complete upon the filing of the instrument creating the transfer and surrender of the duplicate certificate of title.

114 21 GCA §§ 29102, 29116
115 21 GCA § 29155
116 21 GCA § 29149
C. Land Registration and Establishing Clear Title

1. Overview

In Guam, there are two types of land – registered and unregistered. Once land is registered, the title is clear and quieted in the holder of the title as against all the world. The title to registered property is a conclusive title created in favor of the one determined by the court to be the rightful owner. The major difference between Guam’s system of registration and other systems is that registration in Guam is of the title itself, whereas in other systems, registration is of the evidence that the title exists. In Guam, the title to the land ‘attaches’ to the land and all subsequent transactions operate ‘directly upon the land’ as opposed to operating between two parties.

Further action affecting the title to registered land (transfer, encumbrance, mortgage, lien) is handled in the manner that a stock transaction is handled or, at least, in the manner a stock transaction used to be handled. To transfer stock, the stock certificate was surrendered by the seller and a new certificate was issued in the name of the new owner. In much the same way, for a transfer of land in Guam, the seller relinquishes the duplicate copy of the title to the registrar and a new copy is issued in the new owner’s name. Guam’s system is a modification of the Torrens system of land registration and was adopted from California in 1933. Today, the system is codified in Title 21, Subpart E, Chapter 29 of the Guam Annotated Code.

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118 Id., citing In re. Bickel, 301 Ill. 484.
120 Id., citing Heinrich supra.
121 21 GCA § 29149.
122 The Torrens system of title registration was created by Sir Robert Richard Torrens, the Premier of South Australia in the late 1850’s and was adopted by the South Australia legislature in 1857. Buonassissi, II, pg. 302.
123 McCormick, pg. 532 citing Taitague v. First Island Industry, Inc., 942 F2d 794 (9th Cir. 1991)
124 21 GCA § 29101 - § 29206
In Guam, it is highly advisable to only purchase land that has already been registered as the owner holds the land “free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title.” Land that is not registered may be vulnerable to adverse claims. If the land of interest is not already registered, the purchaser should seek to have the owner register the property and quiet the title in the owner’s name before purchasing the property or purchase only subject to the successful registration and quieting of title to the property. Otherwise, the property could be purchased and during the registration process, the buyer could lose the property to an adverse claim. There are title companies in Guam who can assist with this process.

2. **The Registration Process**

The registration process starts with application by someone to register the land in their name. The application must contain certain information described below. Next, all parties with any interest in the land are identified and given notice that the registration process has been initiated. There are two steps to notification – notifying parties known or discovered to have an interest in the land, and public notification. Once the court is satisfied that adequate measures have been taken to notify all parties who may have any interest in the land, a hearing will be held in which all parties present their claims. The court then determines in whom the registration should be made and enters a decree confirming the title of the person found to be the owner.126

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125 Buonassissi, II, at 314, 21 GCA § 29117.
126 In 1980, there were 29,019 private tracts recorded, valued at $1,483,798,000. Souder, Paul p. 218.
a. Petition

For land that has not been previously registered, the registration process starts when an applicant petitions the Superior Court for a decree quieting title to the land in the applicant. This application/petition must be verified by a notary public, the director of Land Management, the clerk of any court, or any other person authorized by the Governor of Guam. Verification is merely an acknowledgment by the notary or other qualified person that the person who signed the document is the person who executed it. There is one exception to having to go through this quiet title process for land that has not been registered, but it is a narrow exception.

The exact contents required to be in the petition are described in 21 GCA § 29105 which can be found in the appendix. Of interest to our purpose here, is that the petition must contain a description of the property and the value at which the land and permanent improvements were assessed on the last assessment for taxation. The petition must also contain a statement of whether the land is occupied and, if so, by whom. To help in identifying all parties that may have claims against the property, the application must contain the names of any person who has an estate in the property and the names and addresses of all who own adjoining property. Registration proceedings can be initiated by corporations and, if so, the petition can be made by an authorized agent.

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127 21 GCA § 29105
128 21 GCA §§ 29105, 33102. For petitions verified or ‘acknowledged’ outside of Guam but in the U.S., the verifying person must be a Justice, Judge, or any clerk of any court of record of the U.S., a Justice, Judge, or clerk of any court of record of any state of the U.S. Verifications of this sort must be accompanied by certification by the clerk of the county saying “certificate under the hand and seal of...” and by a statement that the Justice is authorized to take acknowledgments and that the writing is that of the Justice.

Acknowledgments in foreign countries must be made before: a minister, commissioner, or charge d’affaires of the United States who is resident and accredited in the foreign country; a consul, vice consul, or consular agent of the U.S who is resident in the country where proof is made; a judge of a court of record of the country where the proof is made; or commissioners appointed by the Governor of Guam for such purposes; or a Notary Public.

129 21 GCA § 39102 – If the person in possession of the land has an unbroken chain of title to any interest in land by himself or his immediate and remote grantors since January 1, 1935, the title held is deemed to be a ‘marketable title’ to such interest. § 39103 – unbroken chain of title is shown when the recorder in Guam holds official public records showing a conveyance or other title transaction dated before 1/1/35. This record must record the transaction to the person in possession or his immediate or remote grantors. There can be nothing that shows the interest was ever divested of this person or grantors. This title is considered marketable
If the property being registered for the first time is in a town and there is an adequate map or plat on file in the Land Records office and the property can be readily identified from that map or plat, then the map description of the property is sufficient for the petition. If the property is not readily identifiable from a map on file, a survey of the property is required.

Accurate surveys and descriptions of property were difficult to obtain for a long time after World War II but, in 1993, the Guam Geodetic Network was set up simplifying matters greatly. All surveys afterward have been tied to the Network. While establishing the network the Territorial Surveyor was to survey all government land on the island and the land of any private owner bordering government land who agreed to pay for the survey. Each time a survey was done for a private landholder, the landholder was to pay for the placement of concrete monuments secure enough to be referred to later. In 1999, legislation was introduced recognizing that plenty of survey monuments had been placed and that the people were being made to bear an unnecessary expense in being required to place new monuments. It seems reasonable, then, to assume that the network is sufficiently in place and that accurate surveys are no longer as difficult to obtain as before.

Every application must be accompanied by an abstract of the title. An abstract is a concise statement summarizing the history of a piece of land, including all conveyances (transfers of any interests), interests, liens, and encumbrances that affect title to the property. The court may appoint an Examiner of Titles (an attorney in good standing skilled in title

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130 21 GCA § 29106
131 21 GCA § 60517
132 21 GCA § 60601
133 21 GCA § 29106
examination) to examine the abstract and investigate any other claims to the land being registered that might arise.\textsuperscript{134} The court also may examine the title abstract itself.

Once the application is complete, the first step in the process is finished and the proceeding will move to the actual quieting of the title. The application process should not be started for an interest less than fee simple (such as an easement or covenant) before the fee simple estate in the land is registered.\textsuperscript{135} Following petition of the court and examination of the title abstract, the court will notify all interested parties that a registration hearing will be held.

b. Notice

Once the application for registration is complete and the court determines that the title to the land described in the application “appears to be substantially as alleged, the court will order notice to be given.”\textsuperscript{136} Notice will be served to all those who appear on the original abstract of the title and public notice will be given of the upcoming hearing. This is the beginning of the title quieting process and it is intended to give everyone who may have a claim to the land opportunity to make that claim.

Personal service of the notice of the proceeding will be made to all who are listed on the petition, the abstract of the title, or found by the Examiner of Titles, if any, to have any interest in the land or any part of the land. Those who receive notice in this manner will have ten days to respond to the petition for registration. This part of the process gives all known persons who may have an interest in the property the opportunity to assent or object or join their claims in the registration of the land. Next, the court announces by public notification that the property will be registered and gives the general public the opportunity to assent or object to the registration. The

\textsuperscript{134} Id.
\textsuperscript{135} 21 GCA § 29106
\textsuperscript{136} 21 GCA § 29111
notice that the court is about to register the land will be published in newspapers in the capital of Guam (Agana) and in three places in the district in which the land is located.\textsuperscript{137} Everyone who was served notice personally before, and who has not assented or objected to the petition will personally be served notice again giving them a second chance to assent or object to the registration. If those who respond object to the registration of the land in the name of the applicant, they will be made defendants in the registration proceeding.\textsuperscript{138}

c. \textbf{Hearing}

After notice has been given and all parties have been given ample time to appear and assent or object to registration in the name of the applicant, a hearing will be held by which the court will determine the ownership of the property and all interests affecting the property.\textsuperscript{139} The court will enter a decree stating the ownership of the property and order the registration of the property in the name of that person. The decree will be filed with the clerk of the court and a certified copy will be filed with the registrar.\textsuperscript{140} The registrar will then issue a certificate of title in the name of the owner of the property. The original certificate is kept on file at the registrar’s office and a duplicate is given to the owner. The original title is kept in the “Register of Title.”\textsuperscript{141} This certificate will show the description of the property and all of the encumbrances and charges against the land, such as easements, which are found to exist by the hearing and decree.\textsuperscript{142} At the point that the registrar issues the certificate, the land is said to be ‘registered’ and the title is considered ‘quieted’ as against the claims of all persons.\textsuperscript{143} Anyone who disagrees with the decree may appeal to the Supreme Court of Guam in the manner provided for appeals in

\textsuperscript{137} 21 GCA § 29112
\textsuperscript{138} Id.
\textsuperscript{139} 21 GCA § 29115
\textsuperscript{140} 21 GCA § 29116
\textsuperscript{141} 21 GCA § 29130
\textsuperscript{142} 21 GCA § 29124. An encumbrance is a right other than an ownership interest in real property that is attached to the property that may lessen its value. A copy of the suggested form of the certificate can be found in the appendix.
civil actions. The statute of limitations for contesting a registered title is one year after the first registration of the land. This title is an indefeasible and conclusive title to the land in the name of the court-determined rightful owner.

3. **Registered Land – Registering Transfers and Encumbrances**

Registering conveyances is a much simpler process than the first registration of land. The registered owner of the property presents the verified instrument of conveyance to the registrar (All instruments of conveyance must be in the form of a contract between the parties), and surrenders the duplicate copy of the title. Every conveyance must be registered in a timely manner. A conveyance includes creation of an interest in the land, alienation (sale of the land), mortgage or encumbrance, or any event by which the title to the land may be affected. The registrar then issues a new original and copy, in the case of a transfer of the land, or marks the original and duplicate, in the case of an easement or encumbrance.

a. **Transfer of Registered Land**

As noted above, to transfer registered land, first the verified instrument (contract) creating the transfer is presented to the registrar and filed with the new certified title. The transferee, or buyer, must sign a document indicating their awareness of the availability or lack of availability of water and power to the property. The registrar will not record the transfer of land without this notice. Upon filing the instrument of conveyance and surrendering the

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143 21 GCA § 29117
144 21 GCA § 29116.
145 21 GCA § 29146
146 21 GCA § 29155
147 21 GCA § 37102
148 21 GCA § 37103
149 21 GCA § 29149
150 21 GCA § 60314. Copy of the suggested form can be found in the appendix.
151 Id. Provisions are stated for the placement of the notice in the contract creating the transfer and also for the rescission of the contract in the event that the availability of water and power is not as the seller has represented it to be.
duplicate title, the transfer is complete and the title vests in the transferee (buyer).\textsuperscript{152} The registrar then issues new certificates of title certifying the title in the name of the new owner. One copy remains on file in the registrar’s office and one is given to the new owner as a duplicate. The official time of the transfer is considered to be the time when the new duplicate to the transferee is marked showing the page where the original is filed with the registrar.\textsuperscript{153} Transfers of real property transfer all easements attached to the property.\textsuperscript{154}

\textbf{b. Placing an Easement or Similar ‘Charge’ on Registered Land}

Placing an easement on land is quite simple and similar to transferring title to land. Again, the instrument creating the easement (a contract between the parties) is presented to the registrar along with the duplicate title certificate.\textsuperscript{155} The registrar will determine from the original certificate of title if the person intending to create the easement has the title and right to place the easement on the land; and the registrar will determine that the person who will benefit from the easement is entitled to have the easement registered. In the context of a conservation easement, the registrar would be determining that the person on whose land development will be restricted is the owner of the land, and that the person in charge of holding the easement, or enforcing the restriction on development, has the right to have the conservation easement registered.\textsuperscript{156}

Once the registrar is satisfied that the parties are entitled to create the charge they are attempting to create, the registrar marks the original and the duplicate certificates with the word

\begin{itemize}
  \item \textsuperscript{152} 21 GCA § 29149
  \item \textsuperscript{153} 21 GCA § 29133
  \item \textsuperscript{154} 21 GCA § 4201
  \item \textsuperscript{155} 21 GCA § 29160 – the statute actually refers to “instruments intended to create charges on land.” 21 GCA § 29159 states that every instrument intended to create an encumbrance on registered land is a charge on the land immediately upon registration. The Supreme Court of Guam has adopted California case law definition of ‘encumbrance’ as “any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee.” The court goes on to state and recognize that covenants restricting the use of property and easements have been found to be encumbrances. Hemlani v. Nelson, 2000 Guam 20 (Guam Terr.) citing Evans v. Fraught, 231 Cal.App.2d 698, 706, 42 Cal.Rptr. 133, 137 (Cal. Dist. Ct. App. 1965).
  \item \textsuperscript{156} Guam does not have a statute specifically authorizing use of conservation easements, so it is not certain that the registrar will allow the recordation of a ‘conservation easement.’ If they will, it is possible that simply recording it will be enough to make it
\end{itemize}
‘Encumbered’ and enters upon the original and the duplicate certificate a ‘memorial’ of the easement.\textsuperscript{157} A memorial is a written record showing the terms of the contractual agreement and is carried forward on all certificates of title until it is canceled. As with transfers, a copy of the instrument of conveyance (the contract creating the charge or easement) is kept on file with the registrar and duplicates of the instrument are kept by the parties.

To register placement of any charge on the land, the duplicate copy of the certificate of title must be presented as this is the only proof that the certificate holder gives the registrar authority to create the charge and to enter the memorial on the certificates. The land, therefore, cannot be bound without the consent of the registered holder of title. No new certificate is issued in the case of an easement being registered and no title is created for the easement itself. The memorial and the instrument on file are the evidence of the existence of the easement and are binding and enforceable by law.\textsuperscript{158} There is statutory provision for transfers and charges that are ’in trust’ to be noted on the certificates by the words, \textit{in trust}.

Cancellation or surrender of the charge, or easement, can only be done by the person holding the benefit of the easement or charge. Thus, the owner of the restricted property cannot unilaterally destroy the restriction. The easement holder presents the duplicate of the instrument of conveyance and surrenders the easement. The registrar will stamp across the duplicate of the instrument, across the instrument on file and across the memorial on file the word ‘Canceled’ and the easement is canceled.\textsuperscript{159}

\begin{flushright}
\textsuperscript{157} 21 GCA § 29155
\textsuperscript{158} 21 GCA § 29166
\textsuperscript{159} 21 GCA § 29164
\end{flushright}
VI. CONSERVATION EASEMENTS FOR PRIVATE LANDS CONSERVATION IN GUAM

A. Statutory Law

Guam’s property statutes were adopted from California and are located in Title 21 of the Guam Code Annotated. There is no statute expressly authorizing the use of ‘conservation easements’ per se, although “servitudes” are recognized – both servitudes appurtenant as easements and servitudes in gross.\(^\text{160}\)

One Guam statute specifically authorizes the Chamorro Land Trust Commission to acquire lands or interests in lands by various means including by “negative or affirmative easement in gross or appurtenant covenant.”\(^\text{161}\) So, a negative easement in gross (a.k.a. a conservation easement) is recognized in the law, though it is not known whether a negative easement in gross acquired by someone other than the Chamorro Land Trust Commission would be upheld in court.

The primary form of easement that is recognized in the statutory code is the classic affirmative easement allowing a person access to another person’s property for maintenance of utilities, or for rights-of-way.\(^\text{162}\) The Guam code also recognizes burdens that can be attached to land as incidents or appurtenances and that then are called easements,\(^\text{163}\) and burdens which may be granted and held though not attached to the land.\(^\text{164}\) The latter are interpreted to be easements in gross as there is no dominant estate in land to which the benefit of the easement attaches. These statutes were adopted directly from the California Civil Code and California case law applies to their interpretation in Guam.

\(^{160}\) 21 GCA §§ 7101, 7102
\(^{161}\) 5 GCA § 87103
\(^{162}\) Chapter 62 of Title 21 Guam Code Annotated.
\(^{163}\) 21 GCA § 7101
\(^{164}\) 21 GCA § 7102
1. Servitudes Attached to Land – Appurtenant Easements

The servitudes that attach to land as incidents or appurtenances, called easements, include:

- The right of pasture
- The right of fishing
- The right of taking game
- The right of way
- The right of taking water, wood, minerals, and other things
- The right of transacting business upon land
- The right of conducting lawful sports upon land
- The right of receiving air, light, or heat from or over, or discharging the same upon or over land
- The right of receiving water from or discharging the same upon land
- The right of flooding land
- The right of having water flow without diminution or disturbance of any kind
- The right of using a wall as a party-wall
- The right of receiving more than natural support from adjacent land or things affixed thereto
- The right of having the whole of a division fence maintained by a coterminous owner
- The right of having public conveyances stopped, or of stopping the same on land
- The right of a seat in church
- The right of burial.
Pre-adoPTION California case law indicates that this list is not exclusive as the legislature could not have specified every easement that arises by implication as authorized by 21 GCA § 4201 – easements that “spring” into existence at the transfer of property based on historical use of the property. This holding, though, is narrow and its application in Guam will be discussed further in section VB1a, “applicability of appurtenant conservation easements to Guam.”

2. Servitudes Not Attached to Land – Easements in Gross

Guam’s code also sets out burdens which may be granted and held though not attached to land. These are:

- The right of pasture, and of fishing and of taking game
- The right of a seat in church
- The right of burial
- The right of taking rents and tolls
- The right of way
- The right of taking water, wood, minerals, or other things.

These burdens can be held ‘in gross’ (not attached to an estate in land) and are transferable and assignable. Their use for conservation purposes in Guam is discussed in section VB2, ‘conservation easements in gross.’

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166 21 GCA § 7102
B. Common Law 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. Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a conservation easement. 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 often 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 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

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168 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. 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).


170 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.
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.\textsuperscript{171} What the easement holder acquires is the right to enforce the land-use restrictions.

In legal terms, conservation easements generally fall into one of two categories: (1) \textit{appurtenant easements}; and (2) \textit{easements in gross}.

1. \textit{Appurtenant conservation easements}

An appurtenant easement is an easement created to benefit a particular parcel of land; the rights affected by the easement are thus \textit{appurtenant} or \textit{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 \textit{servient estate}, while the land benefited is called the \textit{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.”\textsuperscript{172}

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.\textsuperscript{173} There are some jurisdictions, however, that require the estates

\textsuperscript{171} 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.

\textsuperscript{172} 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.

\textsuperscript{173} 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.”)
affected by an appurtenant easement to be adjacent.\textsuperscript{174} 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:\textsuperscript{175}

- **Purchase by NGOs of land that can serve as adjacent estates** – An NGO might 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 valid appurtenant easement could be created between non-adjacent properties by establishing in court 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** – Reciprocal easements enable adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.\textsuperscript{176} Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-

\textsuperscript{174} Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 23 (2003).

\textsuperscript{175} 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).

\textsuperscript{176} 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
party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek judicially 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 America 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.

Under U.S. common law, 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

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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.
authorizing the assignment of this specific power to non-profit organizations—provided
the assignment is written into the conservation easement.

a. Applicability of Appurtenant Conservation Easements to Guam

Guam statutorily recognizes seventeen burdens that can be placed on land and attached to
another parcel as an easement appurtenant. 177 This is important as a transfer of property transfers
all easements attached to the property, 178 effectively making an appurtenant easement
perpetual. 179 Again, the burdens enumerated in the statute are not exclusive, so new burdens not
mentioned by the legislature in the statute may be created. These new burdens could be
challenged as not known to the law of the jurisdiction, but a conservation easement could
probably meet that challenge based on the following arguments.

Based on pre-adoption California case law, burdens not specifically stated in the statute
on servitudes can be attached to a separate parcel of land as an appurtenance and called an
easement. In Jersey Farm Company v. The Atlanta Realty Company, 180 the Supreme Court of
California, interpreting section 1104 of the California Code, which is mirrored by Guam’s
section 4201, 181 stated that “in the case of a transfer of real property, other easements may spring
into existence.” 182 These new types of burdens could not be enumerated in the statute because
they would arise from the previous use of the land burdened, and the legislature could have no

177 21 GCA § 7101
178 21 GCA § 4201
179 21 GCA § 1108 “Appurtenances – a thing is deemed to be incidental or appurtenant to land when it is by right used with the land
for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another.”
180 164 Cal. 412, 415
181 21 GCA § 4201 states, “A transfer of real property transfers all easements attached thereto, and creates in favor thereof an
easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such
property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the
transfer was agreed upon or completed.” The interpretation given by the court in Jersey Farm, is the clearest interpretation of this
statute found (cited 32 times, distinguished once on a different basis than this statute.)
way of knowing all of the easements that might arise in this manner. This may be a narrow holding for our purposes, because it applied to land that was burdened in a certain manner at the time the land was transferred. This may be a narrow holding for our purposes, because it is limited to land that was burdened in a certain manner at the time the land was transferred. Nevertheless, it might still be used by placing the burden on the property first, then transferring the property giving rise to the easement by implication.

A challenge to this maneuver could be raised based on a later (though still pre-adoption) California Supreme Court holding in which the court limited the unenumerated burdens that could arise. Faced with a covenant restricting building on a property and a party that wished the covenant to be ruled an easement, the court, in *Friesen v. City of Glendale*, decided that “Parties may not by mutual covenants in private contracts create for themselves an estate in land not known to our law . . . .” This ruling would seem to destroy chances in Guam of creating an appurtenant conservation easement because Guam does not have a statute recognizing conservation easements. However, two later developments could be argued to support the creation of an easement of this type. First, the holding from *Friesen* that covenants could not be recognized as estates because they were not statutorily recognized was over-ruled. In the *Friesen* case, the party praying for their covenant to be considered an easement was seeking compensation from the City following an eminent domain proceeding on the theory that their covenant was an easement or, a property right that deserved compensation. In 1973, the Supreme Court of California held that a building restriction is a property right for eminent domain proceedings and the City must compensate a landowner who is damaged by violation of the

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183 Id.
condition. The California court, then, was saying that even though the covenant was not recognized statutorily as a property right, it still was a property right. Second, the California opinion in *Friesen* prohibits the creation by private parties of estates not known to the applicable law, but it could be argued that appurtenant negative easements *are* known to Guam law. A conservation easement is technically a negative easement held in gross or appurtenant and the Guam Code Annotated, though nowhere officially defining the use of a negative easement held in gross or appurtenant, does authorize the Department of Chamorro Affairs to use negative easements in gross or appurtenant to acquire interests in properties determined by the department to preserve and protect the Chamorro heritage.

This analysis is vulnerable to the charge that the Guam statute only recognizes affirmative easements – easements that convey rights to *do* things on the land of another whereas, the conservation easement is a negative easement – conveys the right to keep the servient tenement *from* doing something. The pre-adoption case law researched did not deal with negative easements although the post-adoption case cited here did. Again, the post-adoption case would be persuasive only. Another response to a “negative/affirmative” challenge would be to point again to recognition of “negative easements” elsewhere in the Guam code (e.g., those available to the Chamorro Land Trust Commission or addressed in the income tax code.)

Additionally, it must be noted that opinions of the Superior Court of Guam were not available for research. The Superior Court may provide more insight to what can be

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186 Southern California Edison Co. v. Bourgerie, 9 Cal.3d 169 (Cal. Supreme Court 1975); This holding is attractive because it recognizes building restrictions as a property right. The holding is narrow, though, in that it recognizes a building restriction as a property right for a condemnation proceeding. The fact that the court recognized a building restriction as a property right is, nonetheless, pertinent. As this is a ‘post-adoption’ decision it would be of persuasive value in Guam, and not controlling.

187 5 GCA § 87104.

188 See section V.A (Chamorro Land Trust Commission) and V. D. (income tax)

189 Superior Court decisions can be searched through a fee service called Juris Pacific - https://www.jurispacific.com/
established as an easement appurtenant in Guam. Likewise, the comments of Guam attorneys, though sought, were not attained.

b. Recommendation

To make an appurtenant easement work within the confines of the existing statutes would require creating a scenario like that of the Jersey Farm case. In that case, the original large tract had been drained and reclaimed by a series of canals and pumps built by the original landowner. A parcel, on which was located one of the pumps, was conveyed to the defendant who tried to block the original owner from accessing the pump for maintenance claiming that, as access to a pump was not enumerated in the statutory burdens that would give rise to easements, the original owner did not have an easement for access and could be blocked. The court reasoned that the easement arose by implication based on the historical obvious and permanent use of the property.

To create this scenario in Guam, the burden would have to be in place, “obvious and permanent” at the time the transfer occurred. The original owner could establish that the property is used, and will always be used as a scenic open space or as a ‘preserve’ on which development will be restricted. The original owner would then transfer the property to another conservation-minded individual or organization retaining a portion of the property to serve as a dominant tenement to which the easement right would attach as an appurtenance. The easement based on prior use ‘springs’ out of the transaction according to Guam statute 21 GCA § 4201 which establishes that an easement can arise out of the transaction based on obvious historical use of the property – an easement by implication.

190 146 Cal. 412; 129 P.593
One vulnerability of this argument is the ‘apparent and continuous’ or ‘obvious and permanent’ requirement. These requirements were defined in Swarzald v. Cooley, a post-adoption (persuasive only) California opinion from 1940. The court, there, explained that an obvious easement is one that is visible on the estate and evidenced by a permanent artificial structure such as a trail, pipe, sewer, or ditch.\textsuperscript{192} Thus, an easement such as a right of fishing could not arise by implication. In our scenario, evidence of the restriction on development by permanent artificial structure might be accomplished by the erection of a sign on the property naming the area a private open space or wildlife preserve and, possibly, by the building of wildlife viewing platforms on the property. No Guam legal precedent was found to support or challenge this ‘sign’ theory, and the requirements of permanent structures to satisfy the ‘permanent and obvious’ part of Guam’s adopted ‘easement by implication’ statute\textsuperscript{193} are from post-adoption California case law, which is not ‘controlling authority’ in Guam and might be ignored by the court.

In the event that the requirements are not ignored, the effectiveness of posting a sign might be supported by a California statute, unrelated to Guam law, that allows for blocking a prescriptive easement by posting signs on property.\textsuperscript{194} The argument can be made, that if notification that an easement will not arise can be made by a sign, then notification that a burden on property does exist should be allowed by a sign. As this statute is unrelated to Guam’s statutes, it would be viewed by a Guam court as informative only.

In summary, Guam’s code recognizes and enumerates certain burdens that can be attached as appurtenances to other property and called easements. Pre-adoption California case

\textsuperscript{192} \textit{Id.} at 590.
\textsuperscript{193} 21 GCA § 4201
law has established that the enumerated burdens are not the only burdens that may become easements as another statute provides for easements to arise by implication and the legislature could never have accounted for all possible implied easements. Thus, though not specified as a burden that can be attached as an appurtenance in the Guam statute, an obvious and permanent conservation easement might arise by implication upon the transfer of a property.

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. 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.

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. 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

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194 Cal.Civ.Code § 1008 states, “No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: ‘Right to pass by permission, and subject to control, of owner.’”

195 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.

196 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.
transferability of negative easements in gross at common law, statutes have been enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.\textsuperscript{197}

Guam’s code provides for and enumerates burdens that are servitudes held in gross.\textsuperscript{198} Though no Guam appellate decisions were discovered interpreting this statute, these servitudes have been referred to in pre-adoption and post-adoption California appellate decisions as easements in gross.\textsuperscript{199} The question of whether or not these easements in gross were transferable was settled by the California Supreme Court in \textit{Fudickar v. East Riverside Irrigation District}.\textsuperscript{200} The court, in that opinion, stated that the class of servitudes provided for in the statute are property and that they can be transferred or assigned.\textsuperscript{201} According to one commentator, reading the ‘in gross’ servitude section together with the preceding ‘appurtenant’ section leads to the conclusion that the list of enumerated burdens that can be held ‘in gross’ is exclusive and that no new burdens can be added to the list.\textsuperscript{202} To the contrary, the California Supreme Court held in \textit{Gion v. Santa Cruz}, that no cases had ever construed the statute so, that the list was not exclusive, and that an easement for ‘general recreation’ could be held in gross and was supported by the statute.\textsuperscript{203} This holding would seem to open the door to expanding the types of easements which could be held in gross beyond the enumerated list, possibly to the point of using the ‘in gross’ statute (21 GCA § 7102) to support an easement restricting development. The two principal challenges to this argument are that the holding in \textit{Gion} (that the list of burdens is not exclusive) is only persuasive as it is a post-adoption California interpretation, and that the

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\textsuperscript{197} 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.

\textsuperscript{198} 21 GCA § 7102

\textsuperscript{199} \textit{Hopper v. Barnes}, 113 Cal. 636, 45 P. 874 (Cal.Sup.Ct. 1896)

\textsuperscript{200} 109 Cal. 29, 41 P. 1024 (Cal.Sup.Ct. 1895)

\textsuperscript{201} \textit{Id}, citing Cal.Civ.Code §§ 654, 802, 1044. All have Guam equivalents § 1044 corresponds to 19 GCA § 40201; § 802 corresponds to 21 GCA § 7102; and § 654 corresponds to 21 GCA § 1101.

\textsuperscript{202} Burby, pg. 119.
\end{flushright}
burdens enumerated in the statute and the easement allowed in the *Gion* case are all affirmative rights whereas, a conservation easement is a negative easement. In contrast, as mentioned above regarding appurtenant easements, statutory authorization for the use of negative easements is recognized in the Guam Code for use by the Department of Chamorro Affairs. This may help counter any argument against the use of negative easements.\(^{204}\)

It may be possible to acquire the enumerated right of taking game and fish and indirectly restrict development. The rights to take game and fish could be acquired on land, then, when development of the land was started, the holder of the rights could argue that the development was destroying habitat and thereby ‘taking’ game and fish interfering with the held exclusive right.

To conclude, servitudes held ‘in gross’ are statutorily recognized in Guam and have been referred to in controlling authority case opinions as ‘easements in gross.’ Based on persuasive authority, expansion of the types of burdens cognizable to include restrictions on development may be possible. Regardless, the enumerated burdens include rights – to take water, wildlife and minerals – the acquisition of which would effectively advance conservation efforts on private lands. The advantage of an easement in gross is that the rights can be held and transferred, if necessary, without being attached to land. Thus, a conservation-minded individual or organization could acquire rights to activities on private land either from the owner or from others who hold the rights and control how the land is used.

\(^{203}\) *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 84 Cal.Rptr. 162 (Cal.Sup.Ct. 1970).
\(^{204}\) Though acquisition of these types of property interests may be seen as limited to this particular department, it would be helpful to know if the department has successfully registered easements of this type. Chamorro Land Trust Commission, 901 Central Ave., Tiyan, Guam 96910; (671) 475-4251
The American Law Institute’s Restatement (Third) of Property has simplified the law governing easements and other interests (real covenants, equitable servitudes, 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. The Restatement may be helpful in supporting use of these common law property interests in Guam.

The Restatement (Third) of Property recognizes conservation easements (servitudes) and states that they are the most common use of negative easements. 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. However, the most recent Restatement eliminates restrictions on the creation and transferability of benefits in gross, so “there is no longer any impediment to the creation of servitudes for conservation or preservation purposes.” Additionally, the benefits may be granted to third parties who are not involved in creating the easement.

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,” and “special protections” are afforded them.

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205 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).
206 Id. at § 1.2 cmt. h (2000).
207 Id. at §§ 1.2 cmt. h, 2.6 cmt. a.
208 Id. at §§ 2.6, 4.6.
209 Id. at § 2.6 cmt. a.
210 Id. at § 2.6(2).
211 Id. at § 8.5 cmt. a.
212 Id. at § 1.6 cmt. b.
For instance, if the benefits are held by a governmental body or conservation organization, 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. If the changed condition is attributable to the holder of the servient estate, damages may be charged. 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). 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.

As described 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 question is open, however, as to whether (or to what degree) the Guam courts would adopt the Restatement’s provisions.

The Restatements are persuasive in Guam courts though not binding. As noted in section III, Overview of Legal Context, a court in Guam may or may not accept the support of the Restatement (Third) of Property in deciding the legitimacy of a conservation easement. The Guam Supreme Court’s holding in Fleming v. Quigley may be very useful in arguing for the use of the Restatement. The court there put high value on the fact that the rule it adopted had been widely adopted by American courts and the Restatement is basically a codification of principles.

“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).

Id. at § 7.11(1)-(2).

Id. at § 7.11(3).

Id. at § 8.5 (including cmt. a).

Id. at § 4.6(1)(b)-(c).
widely adopted by American courts. Also, the court noted that the lack of a statute in Guam adopting the rule did not matter stating that the question, instead, should be whether the legislature had specifically rejected the rule. On the other hand, the court also commented that the rule it was adopting had developed predominantly through case law and was not a rule established by statute\textsuperscript{218} and most states have statutes authorizing conservation easements. Additionally, the court relied on its previous application of the rule to support adopting it.\textsuperscript{219}

In sum, the Restatement (Third) of Property’s specific recognition of conservation easements may provide support for upholding a conservation easement in Guam courts. The Restatements, as well as the common law, are cited and relied upon by Guam courts. Recent case law from the Guam Supreme Court could be very helpful in arguing for adoption of the Restatement view on conservation easements, though some obstacles from that opinion would have to be overcome.

D. **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 under the Internal Revenue (IRS) Code. 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

\textsuperscript{218} Fleming v. Quigley, 2003 Guam 4, pg. 4 (Guam Terr.) (Supreme Court of Guam).

\textsuperscript{219} Fleming, citing Guam Radio Services v. GEDA, 2000 Guam 23, para. 9 (Guam Terr.) (Sup. Ct. of Guam)
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.  

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in the 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. Since the entire Internal Revenue Code is applicable to Guam, the incentives outlined above should operate in Guam as well. These incentives are merely incentives, though. Use of a conservation easement would still have to be authorized by the government of Guam before they would have to be recognized by the courts.

Additionally, Guam has a property tax from which certain properties are exempted. The exemptions which are specifically listed in the statutes do not include property over which ‘conservation easements’ have been placed. However, the concept is not foreign to Guam. There is a provision for abatement of taxes on private lands over which the Department of Chamorro Affairs has placed an “historic preservation easement.”

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220 IRS Code, § 170(h).
221 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. In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives.
222 Guam Organic Act, § 1421h; 48 USCA 1421h.
223 11 GCA §§ 24103 “…levied on all land property in Guam a yearly tax at the rate of one-quarter percent (1/4 %) of the value thereof and one percent (1%) of the value of the improvements thereon.”
224 21 GCA § 4301 and 11 GCA § 24401; section 24401 enumerates: property held by the United States or the government of Guam, property used for public roads or easements; property used exclusively for educational, religious, or other eleemosynary purposes; property included in any cemetery in use and not conducted for profit; property upon which the provisions of 21 GCA § 61504 prohibit the construction of buildings; and property used in active farming for at least eight months in any tax year.
225 5 GCA § 87150.
Consequently, any conservation easement statute that might be adopted probably could successfully include property tax exemptions for private lands covered by such easements.

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

The UCEA defines “conservation easement” as “[a] non-possessory 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.”

Where it is adopted, the UCEA can make 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

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227 UCEA, §1(1)—Definitions.
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.\textsuperscript{228}

A unique feature of the UCEA is the “third-party enforcement right.” Under the UCEA,
an easement \textit{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 holder.
Additionally, one organization may own the easement, but delegate enforcement to another,
provided the terms of the easement allow it.

The Guam legislature could look to the UCEA for guidance in drafting conservation
easement statutes. The potential for enactment of conservation easement legislation will depend, at
least in part, on public and government support for conservation in Guam. Unfortunately, there
appears to be a lack of public interest in conservation easements on private lands and a negative
response by the public and government officials to conservation efforts based on desires to return
lands to Chamorro natives. The lack of public interest in conservation easements stems from land
being a valuable, limited resource in Guam.\textsuperscript{229} Commenting on his agency’s failure to implement
U.S. federal conservation programs in Guam, a Natural Resources Conservation Service
representative said that the programs would not be attractive to landowners because of the high
land values and the low amount the programs pay out. When the question was put to the public
‘years ago,’ there was not much interest.\textsuperscript{230}

\textsuperscript{228} § 4, 12 U.L.A. 179.
\textsuperscript{229} From an e-mail response from the area director for the Natural Resources Conservation Service in Guam, Joan Perry – “I do
think an easement on private lands would be feasible; the difficulty resides in the sheer limitation of availability of land on a very
small island. Owners are reluctant to commit land to conservation reserves because the value of the land is so great.”
joan.perry@pb.usda.gov
\textsuperscript{230} From an e-mail response from Jaquay Soriano of the Natural Resources Conservation Service in Guam.
Jaquay.soriano@pb.usda.gov
The push to return lands to native Chamorros, as outlined earlier, arises from the taking of lands by the U.S. military after World War II. Recently, transfers of U.S. military land to the Guam National Wildlife Refuge and designation by the U.S. Fish and Wildlife Service of 2,100 acres of private land as critical habitat for endangered species drew fire from citizens of Guam and government officials alike.231

It may be difficult to predict the impact of this negative sentiment on the future of conservation easement legislation. The antagonism may only be toward the U.S. federal government, or only concern military lands that could be returned to Chamorros, in which case private efforts would not be disfavored.232

Absent action by the Guam legislature to pass specific conservation easement legislation, there are two other, relatively unlikely, avenues for creating a conservation easement act in Guam. First, a Territorial Land Use Commission has been created by statute to prepare a Land Use Plan for Guam.233 This commission might be influenced to include conservation easements in its recommendations or possibly in legislation adopting the Land Use Plan. The status of the commission’s progress on the plan is not known.234 Second, the U.S. Congress can legislate in Guam by amending the Organic Act. As there is no U.S. federal statute authorizing the use of conservation easements for the states (existing conservation easement statutes are state statutes), Congress might find it difficult to justify legislation of this type specifically for Guam.

232 The critical habitat designation was directed at private lands and the negative response by citizens may indicate that conservation easement legislation, even though it concerns lands that could not be returned to native Chamorros, still would meet public disapproval. The distinction should be made, then, that the critical habitat designation restricted land in private hands regardless of the wishes of the landowner, and conservation easements could only affect the land of willing landowners.
233 5 GCA § 1200
234 Territorial Planning Council; 101/103 N St.; Tiyan, Guam 96910; (671) 472-9770/71
VII. **OTHER COMMON LAW LEGAL TOOLS FOR PRIVATE LANDS CONSERVATION IN GUAM**

U.S. common law recognizes a number of interests in land that could be used to restrict development on private lands in Guam in perpetuity. Among these interests are real covenants (codified in Guam as ‘covenants running with the land’), equitable servitudes, and profits. While the common law recognizes these interests, it has traditionally imposed requirements that, in many instances, render their use problematic for conservation purposes. As discussed above for easements, the Restatement may be helpful in supporting use of these common law property interests in Guam.

A. **Real covenants**

The Guam code recognizes two types of covenants that run with the land. A covenant that runs with the land is basically a promise by one landowner to another to do or not do something on his property. That it runs with the land means that the promise binds all future owners of the property.

The first type of covenant arises in the context of a grant of an interest in real property. If the covenant states that it is intended to be for the direct benefit of the property it will run with the land.\(^{235}\) The second type of covenant recognized is a covenant, or promise, made by an owner of land to another owner of land to do or not to do something on his own land for the benefit of the other landowner. If this covenant expressly states that it is intended to bind and benefit the future owners of both parcels, it will run with both parcels of land.\(^{236}\)

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\(^{235}\) 18 GCA § 81106 “Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.”

\(^{236}\) 18 GCA § 81112 “A covenant made by the owner of land with the owner of other land, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land.”
At common law, a real covenant is a promise concerning the use of land that benefits and burdens both the original parties to the promise and their successors.\textsuperscript{237} The person making the promise is the ‘covenantor’ or ‘promisor’ and the person receiving the promise is the ‘covenantee’ or ‘promisee.’ In Guam, “covenants running with the land” are provided for in the statutory code.\textsuperscript{238} This provision was adopted from the California Civil Code and pre-adoption California interpretations of the statute are controlling authority in Guam courts. The two types of covenants that run with the land in Guam are: 1) covenants contained in grants of estates in property that are for the benefit of the estate granted,\textsuperscript{239} and 2) covenants between one landowner and another where the first owner promises to do or refrain from doing something for the benefit of the second owner’s property.\textsuperscript{240} Future owners of the restricted parcel will only be bound if they are notified of the existence of the restriction prior to purchase.

1. **Proper Specification of the Covenant**

For the covenant to be binding on the land and to pass with the title in subsequent transfers of the land, the intent of the covenantor that the covenant is to bind future owners must be very clearly expressed. Pre-adoption California cases clearly state that the covenants will be strictly construed against limitations on the free use of land so the instruments creating covenants must be very clear.\textsuperscript{241} First, the covenant must be contained in the final contract between the parties. Second, the covenant must state that it is to be for the benefit of the covenantee. Third,

\textsuperscript{237} Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

\textsuperscript{238} 18 GCA § 81104

\textsuperscript{239} 18 GCA § 81106; If the owner of a parcel grants to a child some portion of the parcel and promises that they will never build on the main parcel for the benefit of the child’s parcel, that promise, if specified in the grant properly, will remain as a restriction to all who own the main parcel in the future for the benefit of all who own the child’s parcel in the future provided that all future buyers are notified of the covenant. *Bean v. Stoneman*, 104 Cal. 149, 37 P. 777 (Cal.Sup.Ct. 1894) (“A grantor conveyed a portion of a tract of land, and also conveyed to the grantee a certain proportion of all the water rising on the tract, and covenanted to suffer the water to flow to the grantee’s line…”); *Hunt v. Jones, Oroville Water Company*, 86 P. 686 (Cal. Sup. Ct. 1906)

\textsuperscript{240} 18 GCA § 81112; If the owner of a property promises the neighbor that he will not build on his property for the benefit of the neighbor’s property, that promise will be binding on the original owner who makes the promise and all future owners of his restricted tract of land and will benefit the neighbor and all future owners of the neighbor’s tract of land. The promise (covenant) must be properly specified in the instrument creating the agreement.
the covenants must be set out as covenants and not conditions. An injunction may be sought in Guam for breach of a covenant so long as the subsequent owner was notified of the existence of the covenant before purchasing the land. These strict constructions of covenants running with the land were stated in cases at a time when courts were just becoming accustomed to restricting future owners of land and may not be as stringent today.

The covenant must be contained in the contract between the parties which creates the grant of an estate in the property or which creates the covenant. The contract must be the instrument exchanged by the parties as their final understanding of the agreement. Thus, an oral or written agreement during negotiations over a grant of an interest or negotiations for a restrictive covenant will not be recognized unless it is included in the full and final agreement between the parties.

Pre-adoption California case law clearly shows that building restrictions will run with the land as long as they are for the benefit of the covenantee (the person to whom the promise was made). The benefit must be designated as going to another person ‘as the owner of land’ (which land must be designated and described). It also must be stated that the benefit is to go to the various successors in interest to the land of the covenantee. If these references to land are not made explicit, the covenant may be construed as only having been intended to benefit the person to whom the promise was originally made and not all future owners of the land. If it is not clear that all future owners were meant to benefit, future owners of the restricted property will not be held to the restrictions.

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242 Id.
243 Id.
Furthermore, distinction must be made between conditions and covenants. A condition is a qualification attached to an estate – ‘purchase of the lot is conditioned on agreement not to build an outhouse.’ The occurrence of the condition either enlarges or defeats the estate – ‘If an outhouse is built, the seller may re-enter and re-take the property.’  

A covenant, on the other hand, is an agreement of the covenantor only, ‘I promise not to build an outhouse on the property.’ A covenant does not state the remedy for the covenantee in the event that the promise is broken. The remedy is to be determined by the court.

At common law, only damages can be sought as a remedy for breach of a covenant. Pre-adoption California case law states, though, that “covenants may be enforced in equity when the subsequent purchaser takes with notice of the covenant in favor of another.” If a covenant is breached, then, perhaps by the owner of the restricted property beginning to develop the property, the owner of the benefited property may sue for an injunction to have the development stopped and is not limited to suing merely for money damages so long as the owner of the restricted property was notified of the existence of the covenant before purchasing. Registration of the covenant on the title to the land as an encumbrance is sufficient notification of the existence of the covenant. Registration of a covenant is the same as registering an easement or similar charge on land.

Covenants, of course, do not have to be limited to building restrictions. Covenants could be crafted to meet different conservation goals so long as they can be demonstrated to be for the benefit of the ‘dominant’ parcel.

245 *Id.*


247 See section IV.C.2.
2. **Recommendation**

It should be possible, then, for a landowner in Guam to promise to not develop their land or promise to otherwise conserve resources on their land and have that covenant pass with the title to the land. Owners of private land could covenant to restrict development on their land for the benefit of land granted to a conservation group or for the benefit of land owned by the conservation group. Any grants of property attempted should expressly contain reference to the covenant. The drawback to this strategy for a conservation group is that the conservation group would have to own land to ensure that the covenant remain in place forever. Neither the statute in Guam nor the pre-adoption case law found refer to the covenant being held ‘in gross’ – not attached to land for the benefit of the land. It most likely, then, is necessary for the conservation group to be the owner of the benefited parcel.

One possible scenario using the first type of covenant recognized by statute would be a property owner granting a portion of the land they own to another party (possibly a conservation group) and covenanting in the grant to restrict development of the retained main property for the benefit of the granted parcel. This would bind the main parcel and all subsequent owners of the main parcel and benefit the granted parcel and all subsequent owners of that parcel. Or, based on the second type of covenant enumerated in the statute, as an owner of land, the conservation group could accept a covenant from the owner of private land to restrict the property for the benefit of the property owned by the group.

Care should be taken in grants of properties to expressly state that the covenants exist and are to be passed with the grant. Any time the word ‘grant’ is used to transfer an estate of inheritance or in fee simple, there are only two covenants that will be implied in the grant by
Guam law. One of those implied covenants is that the estate is free of encumbrances.\textsuperscript{248} A covenant has been recognized by the Guam Supreme Court to be an encumbrance,\textsuperscript{249} So if the estate is granted without mention of the restrictive covenant, the grantee could maintain that the covenant does not exist or is not binding based on this rule. This ‘implied covenants’ rule applies only to grants.

**B. Equitable servitudes**

The primary modern tool for enforcing private land use restrictions is the equitable servitude.\textsuperscript{250} 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. Enforceability by injunction is important because it often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,\textsuperscript{251} 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,\textsuperscript{252} (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

\textsuperscript{248} 21 GCA § 4210
\textsuperscript{249} Hemlani v. Nelson, 2000 Guam 20 (Guam Terr.); supra note 206.
\textsuperscript{250} 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).
\textsuperscript{251} Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.
\textsuperscript{252} 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.
implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must “touch and concern” land.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:253 (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;254 (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;255 (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.

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

254 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.

255 Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.
Because Guam recognizes common law rules, it is possible that equitable servitudes could be used in Guam and that they would hold up in Guamanian courts. Again, the Restatements are persuasive in Guam courts but are not binding. While it may be effective to rely on the existing statutes that recognize covenants and servitudes and the pre-adoption California case law that supports those instruments, it may be useful to cite to the common law and Restatement if all of the conditions are satisfied.

C. 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, state government, or nonprofit organizations. 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 non-possessory 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. 256

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The conservation 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. Financing for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

256 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
The applicability of PDRs to Guam is not known. Their success may depend on legal recognition of the “right to develop” as a property right that can be sold. Guam statutorily recognizes the ability of the government to contract with a private landowner to exclude uses of land other than agricultural use for agricultural preserves. But the agricultural preserve program merely authorizes the government to ‘contract’ with a landowner to restrict use of the property and recognize the diminution of the value of the land in the program. While this is far from being a right to sell a right to develop the property, perhaps, it is the first step needed to equate development rights and transferable property rights.

D. 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. A “leaseback” agreement allows a landowner to donate or sell land in fee simple to an NGO or government agency and immediately lease it back for an agreed use and period. 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. If the lessee breaches the lease, the NGO can terminate the lease and take possession of the land.

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Guam Code Annotated, Title 5, Chapter 65, “Land Conservation Act.” Use of this program for conservation purposes is discussed in section VI.A.

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

These types of agreements should be possible in Guam. Long-term lease agreements with conditions are common in Guam and are used by the Chamorro Land Trust Commission in providing land for native Chamorros.

E. Profits à Prendre

A profit à prendre (profit) is a common law interest in land that gives a right to enter and take part of the land or something from the land.\(^{259}\) Under the common law, a landowner can grant a profit to anyone—there is no requirement that the holder of a profit own adjacent property.\(^{260}\) Although it is not commonly used for conservation purposes, a profit has 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 to a conservation group with respect to that timber. 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.

To help ensure its legal validity, a profit 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

\(^{259}\) 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.
as an easement and thus apply the much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit 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 to a conservation organization for the harvest of timber.

A landowner creates a profit by granting it in writing to the profit holder. The landowner specifies precisely what the holder is allowed to enter the land to take. The profit holder can sue if the owner deals with the land in a way that detracts from the rights of the profit holder. The holder of a profit can also sue anyone who interferes with the profit.\textsuperscript{261}

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

Many of the traditional common law profits are included in both of Guam’s statutes referring to servitudes. Rights such as fishing, taking game, pasture, taking water, wood, minerals and other things can be made appurtenant to another parcel and continue as easements or granted to another person or organization and held ‘in gross.’\textsuperscript{262} The vague reference to “taking…other things” in the statute leaves room for the granting of other rights not originally contemplated by the legislature – rights which might further help conservation efforts. The advantage, of course, to

\textsuperscript{260} Profits of this kind are called \textit{profits en gross}.
\textsuperscript{261} Conversely, the profit 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.
employing this strategy is that the rights can be held by a person or organization without having to, at the same time, own property.

F. Encumbrances

It may be possible to use the Guam Supreme Court’s recent definition of encumbrance coupled with registration statutes to create a charge on land that can only be removed by the person holding the charge.

Although Guam’s code includes a definition for encumbrance, the Guam Supreme Court provided a broader definition in 2000. Citing a 1965 California Court of Appeals case, the court defined encumbrance as “any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee.” Further, the court noted that other California courts had found “covenants restricting the use of property, restrictions on construction, reservations of right of way, easements, encroachments, leases, deeds of trust, and pendency of condemnation proceedings to be encumbrances.” In addition, a registration statute states that “[e]very…instrument intended to create a lien, encumbrance, or charge upon registered land, or any interest therein, shall be a charge…” on the land at the point that the instrument is registered. The encumbrance, so registered, can only be removed by agreement between both parties.

A conservation organization in agreement with a private landowner could create an encumbrance restricting development on land and register it as a charge on the land. The charge

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262 21 GCA §§ 7101, 7102.
264 Id.
265 21 GCA § 29159
266 21 GCA § 29164.
could not be removed without the consent of the conservation organization holding the charge. The only potential problem is that, during the registration process, the registrar is required to determine that the person creating the charge has the right to create it and that the person benefited by the charge is entitled to have the charge created.\textsuperscript{267} Also, while the charge or encumbrance may be registered and recorded without issue, the challenge may only come upon transfer of the burdened property when a subsequent landowner challenges the charge or encumbrance in court.

\textbf{VIII. \textsc{Private Lands Conservation Programs in Guam}}

In addition to the legal tools for private land conservation discussed above, there are several Guam and U.S. laws and programs that promote or may otherwise affect private lands conservation in Guam. These include the Guam Land Conservation Act, laws for the protection of government land in Guam, and U.S. Federal conservation programs that apply to Guam.

\textbf{A. Guam Land Conservation Act}

Enacted in 1974, the Guam Land Conservation Act authorized the Guam Department of Agriculture to create “Agricultural Preserves.”\textsuperscript{268} The name can be misleading, however, since not only is the Act intended to preserve land devoted to agricultural use, but also land for ‘recreational’ use and for ‘open space.’\textsuperscript{269} Along with covenants running with the land, this may be the easiest most effective way to preserve private lands in Guam – at least temporarily. The preserves are created by contract between the government and the landowner.\textsuperscript{270} The contracts restrict the uses on the property to uses compatible with the designation of the land – agricultural

\textsuperscript{267} 21 GCA § 29160
\textsuperscript{268} 5 GCA § 65103.
\textsuperscript{269} 5 GCA § 65102
\textsuperscript{270} 5 GCA § 65304
production, recreation, or open space, for a term of at least ten years.\textsuperscript{271} Restricted land is, apparently, allowed some form of property tax break. Designation of preserve areas and negotiation of the contracts is subject to relatively heavy involvement by the Department of Agriculture.

The process starts with the Department of Agriculture, after a public hearing and approval by the Territorial Land Use Commission,\textsuperscript{272} establishing an agricultural preserve.\textsuperscript{273} By establishing the preserve, the department delineates the area in which it is willing to enter into contracts with private owners who want to limit the use of their land. The landowners voluntarily enter the contract with the government. The preserve established can be no smaller than ten hectares (24.7 acres),\textsuperscript{274} but contiguous parcels may be joined together to meet the size requirement. Land outside of established preserve areas can be contracted upon if the land was already being used for agriculture, recreation, or as open space.\textsuperscript{275}

Land must meet certain criteria in order to be included in the program. Agricultural land must meet a carrying capacity minimum for livestock or production minimum for crops.\textsuperscript{276} Exceptions are made for lands planted with crops that will produce in the future. Lands for recreational use are lands that will be open to the public with or without charge for “walking, picnicking, boating, swimming, or hunting…” and a few other activities including outdoor sports for which facilities are provided for public use.\textsuperscript{277} Open space lands are lands used or maintained so as to preserve its natural characteristics, beauty, or openness for the benefit of the public or to

\textsuperscript{271} 5 GCA § 65304
\textsuperscript{272} 5 GCA § 65204; The Territorial Land Use Commission is statutorily charged with developing a land use plan for Guam by 5 GCA § 1200. Territorial Planning Council; 101/103 N St., Tiyan, Guam 96910; (671) 472-9770
\textsuperscript{273} 5 GCA § 65201.
\textsuperscript{274} http://www.eddisons.co.uk/property/converter2
\textsuperscript{275} 5 GCA § 65303
\textsuperscript{276} 5 GCA § 65102(c)
\textsuperscript{277} 5 GCA § 65102(h)
provide essential habitat for wildlife. Wildlife habitat areas must be designated by the department as “of great importance for the protection or enhancement of the wildlife resources of the territory.”

The Department of Agriculture then enters into a contract with the landowner wishing to join the program. The contract restricts uses to those that are compatible with the use designated for the property. At the end of the minimum ten year term, the contract automatically renews for another year if no non-renewal notice has been served. All contracts creating agricultural preserve lands are registered and recorded with the registrar and are considered binding on all future owners of the property within the contract period. Both the landowner and the government can sue for breaches of the contract seeking remedies including but not limited to specific performance of the contract or an injunction.

Either party can end the contract relationship by non-renewal and the landowner may end the relationship by cancellation, subject to conditions. The owner or the department can decide not to renew the contract at the end of the term. Notification must be served on the other party of the intent to not renew the contract within a specified period before the end of the term. Failure to notify within the specified term results in an automatic renewal of the contract for one more year. If the Department of Agriculture serves non-renewal notification, the owner is given an opportunity to protest.

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278 5 GCA § 65102(i)  
279 5 GCA § 65103  
280 5 GCA § 65304  
281 5 GCA § 65305  
282 5 GCA § 65310  
283 5 GCA § 65304 (b)  
284 5 GCA § 65311  
285 5 GCA § 65307
A landowner may seek to cancel the contract before the term has expired. Such cancellation will only be granted upon the department determining that the dedication of the land to the use prescribed is no longer “necessary nor desirable.”\(^{286}\) The cancellation must be in the public interest and cannot be contrary to the original reason for restricting use on the land.\(^{287}\) The department will not cancel a contract if the landowner is merely seeking to take advantage of an opportunity to put the land to another use unless there is no other non-contracted land close by which is suitable for the same use. The “uneconomic character” of the designated use of the preserved land is not a sufficient excuse for cancellation of the contract.

For cancellation of the contract, the landowner is required to pay a fee based on the amount of deferred taxes accumulated by the placement of the land in the program. Before the department gives tentative approval to cancel a contract, the tax assessor makes a determination of the full cash value of the land as though it were not under contract restriction. The assessor then determines the amount of ‘deferred taxes’ and submits that number to the department as the cancellation fee.\(^{288}\) Under certain circumstances the fee can be reduced. Apparently, there are some tax incentives based on participation in the program – either exemption from property taxes based on ‘agricultural’ use of the land, or deferment of taxes based on a lower assessment because of the burden of the restrictive contract – but these could not be verified for this report.

It is not known if the Guam Department of Agriculture has established any of these agricultural preserves. But, it seems that the program could be a very effective tool for private land conservation in Guam if current owners are willing to enter the program or if conservation buyers are found to buy property and enter the program. Success of the program for conservation

\(^{286}\) 5 GCA § 65401  
\(^{287}\) 5 GCA § 65403  
\(^{288}\) 5 GCA § 65404
purposes depends on the Department of Agriculture agreeing that the land fits the criteria set out
by the program and being willing to contract for the lands.

B. Government of Guam Lands

Of importance to our effort here, are three Guam government programs which would
affect efforts to purchase private land in Guam – the Guam Territorial Seashore Protection
Commission, the Department of Parks and Recreation program to acquire public rights of way
for beach access, and the Chamorro Land Trust Commission which is authorized to lease land to
‘native’ Chamorros.

1. Guam Territorial Seashore Protection Act

The Guam Territorial Seashore Protection Act was passed as an effort to regain title to
the beaches of the territory for protection of the natural resource and for public use. Provisions of
the Act authorizing exchanges of government of Guam lands may provide a method for private
actors to acquire lands that the Guam government holds.

By the Organic Act of 1950, the U.S. government conveyed to the government of Guam
(GovGuam) all right, title, and interest in the tidelands of Guam and in submerged lands within
three miles of the shore.289 Tidelands by the Organic Act definition included all lands covered by
tidal water up to, but not above the mean high tide mark.290 Traditionally, though, tideland
parcels on Guam only extended to a point above the high water mark. The Organic Act
effectively enlarged coastline parcels moving the seaward boundary from a traditionally
recognized point above high water mark down to the high water mark. Recognizing that the
government of Guam was losing control of the beaches, the legislature passed the Territorial
Seashore Protection Act to “preserve the ecological balance of the “seashore reserve” and

289 Guam Organic Act of 1950 § 1705; cite GU Organic Act § 1750

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prevent its deterioration and destruction.”

A subsequent act was passed to ensure public access to the beaches.

The inland boundary of the seashore reserve is described as the nearer of: 1) mean high water line plus 10 meters on a horizontal plane, or 2) mean high water line to the nearest public right-of-way. Essentially the seashore reserve consists of a strip of dry land above the mean high water mark which was not included in the original transfer of land to the government of Guam by the Organic Act but which GovGuam feels originally was public land and wants to protect. To protect the reserve, the Guam legislature authorized creation of a commission (the Seashore Protection Commission) with the power to acquire “lands, waters, and interests therein” by donation, or purchase, or by exchange for other GovGuam land subject to legislative approval.

It may be possible, then, for a private actor who is interested in acquiring land that GovGuam holds outside of the seashore reserve to purchase property in the seashore reserve and swap that property for the GovGuam land of interest. The land to be gained for conservation would have to be land not slated for return to native Chamorros. This strategy could be particularly attractive to the government of Guam in a situation where the Seashore Protection Commission is having difficulty negotiating acquisition of certain seashore reserve land in private hands and does not want to exercise its power of eminent domain. What is not known is the extent to which this program has been implemented, how much seashore reserve land has been acquired, and whether the commission has actually exchanged any land.

290 Id.
291 Guam Territorial Seashore Protection Act, 21 GCA § 63101 - § 63111.
292 21 GCA § 63106
293 21 GCA § 60112
2. **Public Access to the ‘Seashore Reserve’**

The private party wishing to acquire shorefront property should be aware of efforts by GovGuam to ensure access for the public to all beaches. The Guam legislature has declared that the public policy of Guam is for the public to have unrestricted access to the beach, and that the strip of land above the mean high water mark is to be held for public use.²⁹⁴

Accordingly, the Department of Parks and Recreation was authorized to purchase land for public rights-of-way between the beach and the nearest public highway.²⁹⁵ Further, before any government land between a public highway and the ocean shore can be leased, exchanged, or sold, a perpetual right of way must be recorded on the certificate of title in the Land Records office.²⁹⁶ The rights-of-way are to be two meters wide and placed at ‘reasonable intervals’ considering the topography of the area and how much public demand there is for access to the beach.²⁹⁷ Again, here, it is not known how much of these access ways have been created or how strictly these statutes are being enforced.²⁹⁸ There is a public highway which runs the entire perimeter of the island and is, at some points, within one-quarter mile of the shore but, at no point, is the highway over five miles from the shore.²⁹⁹

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²⁹⁴ 21 GCA § 64101 – 21 GCA § 65109; These ‘traditionally’ public beach areas were lost due to the manner in which the U.S. government transferred the ‘tidelands’ in 1950 wherein the U.S. stipulated that tidelands only extended to the mean high water mark. Many of the tidelands transferred to Guam through the Organic Act were subsequently conveyed to private owners by GovGuam. This legislation then was an effort to ‘re-acquire’ the beaches for public use and to block further construction on the beaches. It coincides with the Seashore Protection Act, but is stronger in that the acquisition is for ‘public use’ not just for preservation.

²⁹⁵ 21 GCA § 65106

²⁹⁶ 21 GCA § 65108

²⁹⁷ 21 GCA § 65108

²⁹⁸ It should be noted that the legislative findings for the statutes in Chapter 64 and Chapter 65 (21 GCA § 64101 – 21 GCA § 65109) do state that the provisions were being adopted in response to the executive’s “failure to adequately preserve and protect that strip of said land above the mean high watermark which belongs to the people of Guam.” Thus, these provisions may not be strictly enforced.

²⁹⁹ “Political Map of Guam, Central Intelligence Agency,” Perry-Castaneda Map Collection, University of Texas Library Online, http://www.lib.utexas.edu/maps/guam.html
3. **Chamorro Land Trust Commission**

Reacting to rising land values, increased foreign investment in land and growing frustration over unsettled land claims, the Twelfth Guam Legislature created the Chamorro Land Trust Commission in 1974. The Commission was authorized to lease “Chamorro homelands” to “native Chamorro” people.

Between 1971 and 1974 land prices in Guam skyrocketed.\(^{300}\) In Agana, the capital, prices increased from $21.75/square meter in 1971 to $447.50/square meter in 1974 with the typical price in October of 1973 being between $61 and $405 per square meter.\(^{301}\) At the same time, it was recognized that most native Guamanians were finding it very hard to acquire land. Legislation was passed declaring all available lands held by the government of Guam as Chamorro homelands.\(^{302}\) These lands are available for lease to native Chamorro people for $1 per year for up to 99 years.

The increased demand for a limited supply of land created fear for those with unsettled land claims that their land would never be returned. To calm these fears, the Guam legislature mandated that all lands returned to GovGuam would have the status of ‘ancestral lands’ and were to be reserved for the settlement of outstanding land claims.\(^{303}\) The Chamorro Land Trust Commission was to oversee the returns of these lands in addition to leasing land.

Owing to disagreement over what defined a native Chamorro, the statutes creating the Chamorro Land Trust Commission were not implemented for 18 years.\(^{304}\) The result of a 1992 case brought by a group called Chamoru Nation was an order by the court to the governor to

\(^{300}\) Souder, Land Tenure in a Fortress, p. 224.
\(^{301}\) Id., citing “General Land Use Data and Trends, Department of Land Management, Government of Guam (November 1973).
\(^{302}\) 21 GCA § 75104
\(^{303}\) 21 GCA § 75104(b)
\(^{304}\) Rogers, p. 249.
form the commission and implement the law.\textsuperscript{305} It was settled that a native Chamorro is any person who became a U.S. citizen by virtue of the enactment of the 1950 Organic Act of Guam and their descendants.\textsuperscript{306} ‘Ancestral lands’ taken sixty years ago by the U.S. military are, today, being returned to people in Guam.\textsuperscript{307} To apply for lands, claimants are responsible for paying for a land survey and researching the land’s title.

Efforts to protect private lands in Guam may be affected only minimally by the Chamorro Land Trust Commission, if at all. Primarily, the Commission deals with ‘excess lands’ handed to the Guam government by the U.S. military and with other GovGuam lands. One aspect of the commission’s authority may be useful, though. Similar to the Territorial Seashore Protection Commission, the Chamorro Land Trust Commission has the authority to swap government lands for private lands it desires. Such exchanges, again, are subject to legislative approval.\textsuperscript{308} It may be possible to acquire critical lands desired for preservation by purchasing land the Commission would like to develop and lease to Chamorro people and exchanging it for less developable property the Commission holds.

\section*{C. U.S. Federal Programs for Land Conservation Applicable in Guam}

Several U.S. statutes authorize federal programs that include acquisition of conservation easements as an explicit priority. Guam is, according to these statutes, eligible to participate in each of these programs. Apparently, however, the Natural Resources Conservation Service has not established the Wetlands Reserve Program or the Farm and Ranch Lands Protection Program in the Pacific Basin because lack of public interest in conservation easements makes it difficult

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\textsuperscript{305} Rogers, p. 249. Unable to find the case name and number.
\textsuperscript{306} 21 GCA § 75101
\textsuperscript{308} 21 GCA 60112
\end{flushleft}
to justify expending the resources necessary to establish the program.\textsuperscript{309} It is possible that express interest in the programs could spur the agency to establish the programs in the Pacific Basin region.

1. **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,\textsuperscript{310} the Forest Legacy Program (FLP) is intended to protect “environmentally important forest areas that are threatened by conversion to non-forest uses.”\textsuperscript{311} To achieve this goal, the Secretary may purchase and hold conservation easements against willing landowners,\textsuperscript{312} which may not be “limited in duration or scope” by “any provision of state law.”\textsuperscript{313} 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.\textsuperscript{314} The U.S. Federal share of costs 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.\textsuperscript{315} To participate in the program a state (which includes the Guam)\textsuperscript{316} must conduct an Assessment of Need that identifies the land areas it wishes to include in the program.\textsuperscript{317} Upon approval by the Secretary, a FLP is implemented and lands and interests in lands (i.e., conservation easements), then, are acquired on a willing seller/willing buyer basis.\textsuperscript{318}
In 2003, there were 10,000 acres of non-industrial private forest land in Guam. It is not known if the Forest Legacy Program is active on Guam. The program is active, however, in the other U.S. Commonwealth of Puerto Rico.

2. Wetlands Reserve Program (WRP)

Administered by the USDA Natural Resources Conservation Service (NRCS), authorized under the Food Security Act of 1985, and reauthorized by the 2002 Farm Bill, the Wetlands Reserve Program (WRP) seeks to preserve private wetlands through the acquisition of permanent or thirty-year conservation easements. The easements are held by the U.S. government, 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. Significantly, the Secretary of Agriculture may terminate or modify the easement, but only with the consent of the current landowner and only for “public interest” purposes. 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). 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

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320 And also the U.S. Virgin Islands. U.S. Dept. of Agriculture Forest Service, Forest Legacy Program Overview (updated as of Dec. 31, 2003). Cite for this?? That indicates VI and PR in the program?
322 Id. at § 3837(b)(2).
323 Id. at § 3837(a)(1).
324 But not less than 75 percent and 50 percent of the costs, respectively. Id. at § 3837(c)(b)(1). This payment structure exhibits the express priority given to obtaining permanent easements before thirty-year easements. Id. at § 3837(c)(d).
325 Id. at § 3837(e)(1)-(2).
326 Id. at § 3837(c)(1)-(3).
purposes of placing it in the WRP. The types of wetlands being protected by the WRP are floodplain forests, prairie potholes, and coastal marshes.

The Guam EPA is responsible for protection and restoration of wetlands on Guam and may have data on the extent of Guam’s wetlands.

3. **Farm and Ranch Lands Protection Program (FRPP)**

Administered by the USDA NRCS, authorized under the Food Security Act of 1985, and reauthorized and amended by the 2002 Farm Bill, the Farm and Ranch Lands Protection Program (FRPP) is intended to prevent farm and ranch land that contains “prime, unique or other productive soil, or that contains historical or archaeological resources” from being converted to non-agricultural uses.

For Guam to be eligible at all, the NRCS State Conservationist in charge of the Pacific Basin Area (which includes Guam) must first submit a State FRPP Plan to the NRCS National Office. 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. The NRCS National Office then allocates funds to the State or Territory based on the information in the State FRPP Plan. If funds are allocated to a State, “eligible entities” with programs that purchase conservation easements on farm lands—such as

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327 *Id.* at § 3837e(a).
329 http://www.guam.epa.gov/usa/index.html
331 Which changed the name from Farmland Protection Program (FPP).
333 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.
334 FRPP Notice at 12,634.
335 *Id.*
States, units of local governments, and NGOs—could then request funding by 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. The “pending offer” must be for an easement in “perpetuity” because Guam law does not prohibit permanent easements. 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.” 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. The FRPP has not been implemented in Guam.

336 Id. at 12,633-12,634.
337 Id. at 12,635.
338 Id. at 12, 632, 12,635.
339 The “eligible entity” may receive up to half of its share from the private landowner. Id. at 12,632.
340 Id. at 12,634.
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