Private Lands Conservation in the Republic of the Marshall Islands

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PRIVATE LANDS CONSERVATION IN THE REPUBLIC OF MARSHALL ISLANDS

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

September 2004

Sponsored by The Nature Conservancy

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TABLE OF ACRONYMS

- **ALI**: American Law Institute
- **EEZ**: Exclusive Economic Zone
- **MIRC**: Marshall Islands Revised Code
- **NGO**: non-governmental organization
- **RMI**: Republic of the Marshall Islands
- **TTC**: Trust Territory Code
- **TTPI**: Trust Territory of the Pacific Islands
- **UCEA**: Uniform Conservation Easement Act
GLOSSARY OF TERMS

- **Alap**: the senior member of a lineage who is in immediate charge of a piece of land and the workers on the land

- **Bwij**: matrilineage members who communally hold land

- **Dri Jerbal**: a worker of a piece of land

- **Iroij**: of a royal or chiefly lineage

- **Iroijedrik**: a lesser chief who is an intermediary between the iroijlaplap and the lower classes

- **Iroijlaplap**: the paramount chief, or senior member of a royal matrilineage, who traditionally owns and controls the land

- **Kajur**: of a commoner lineage

- **Mo**: land reserved exclusively for use by the Iroijlaplap; or also, an area of a reef where fishing was forbidden in order to conserve resources

- **Nitijela**: the legislative body of the Marshall Islands and also a Marshallese term for a gathering of wise or powerful people

- **Restatement (American Law Institute)**: codifications by American legal scholars of U.S. common law

- **Weto**: the standard, narrow parcel of land which runs from lagoon to ocean
BRIEF QUESTIONS

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

   On paper, the RMI legislature has created two very strong environmental statements. In reality, however, the RMI has failed to meaningfully implement the statutes. The strongest such statement is the National Environmental Protection Act, which authorizes the acquisition of easements for conservation purposes. The Act also allows the administering agency to consult with foreign organizations and to accept monetary gifts from outside sources for the purpose of carrying out its duties. Another law—the Coast Conservation Act—is supposed to control all activities on the coastal lands, including private, and to provide for a development permit system. Again, though, these statutes have not been implemented to any significant degree in the RMI.

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

   Easements, servitudes, and rights of way over land are all recognized in the RMI. One RMI statute defines a servitude as “any” right over land, including a right of way and a right to draw water. The fact that most land in the RMI is unregistered, however, indicates that these interests are rarely formalized; and the extent to which they are enforced is unclear.

   Leaseholds are also recognized in the RMI and recent legislation suggests that this interest will be strictly enforced. By law, however, no lease agreement may exceed a term of fifty years.
3. **Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation in the RMI?**

Although the enactment of conservation easement legislation and the development of such precedent in the RMI courts might not be impossible, the importance placed on custom in matters involving land would make these endeavors very difficult in the RMI—especially at the enforcement level.

Perhaps the surest way to conserve private lands in the RMI, at least temporarily, is through a leasehold agreement. Recent legislation has established a database of private lands that are eligible to be leased, and that are in compliance with all of the customary requirements for such a transaction. For security purposes, strict enforcement measures are supposed to be taken to ensure the terms of the lease are followed. However, while it is not entirely clear by the terms of the statute whether land may be leased for conservation purposes, it is not expressly disallowed. Therefore, it might be possible to acquire a lease with land use restrictions.

Second, the Land Acquisition Act authorizes the RMI government to acquire “servitudes” over private land if it would serve a public purpose. The Act does not define “public purpose” but does prohibit land from being acquired to primarily generate income. Clearly, conservation meets this standard.

Lastly, the traditional practice of the chiefs creating “mo” reserves—to restore overused areas to better health—is also a potential tool for private lands conservation. It appears that two mo protected areas still continue in the RMI today, but it might be possible to work with the appropriate authorities to have more lands given mo status. An
added benefit to such a conservation method is that it does not conflict with the RMI Constitution’s requirement of non-interference with traditional land tenure practices.
INTRODUCTION

This report seeks to provide a basic description of the legal instruments, processes, and institutions relevant to private lands conservation that are currently in place in the Republic of the Marshall Islands (RMI). It also assesses the feasibility of introducing certain legal tools into the RMI legal system for the purpose of achieving private lands conservation, with particular emphasis given to the potential use of conservation easements. Section I of the report provides a contextual overview of the RMI by discussing relevant aspects—i.e., those pertaining to land—of its history, culture, geography, demographics, government and legal framework. Section II is a brief overview of the several rights and restrictions on land use and land alienation that are legally recognized in the RMI. It also describes the RMI’s institutional framework for the administration of private lands, and details the various laws and procedures relevant to this administration. Section III details the legal instrument of a conservation easement in general and describes the applicability of this instrument to the RMI. The next section describes several other tools that have the potential to facilitate the goal of private lands conservation within the RMI—most notably lease agreements. Section V provides an account of existing RMI legislation that is relevant to the conservation of private lands. Where possible, a brief description of the actual application of these statutes is provided. The last section of the report suggests certain steps that might be taken in order to introduce conservation easements, or similar concepts, in the RMI; and concludes that because of a strong adherence to traditional land ownership practices, these steps do not guarantee that the conservation easement will be recognized in the RMI. This section
offers several other strategies for conserving private lands as well—including the “conservation leasehold” and a type of land preserve recognized at tradition.

I. RELEVANT BACKGROUND

A. History of land ownership

1. Pre-colonial history

The original inhabitants of the RMI were Micronesians who arrived between 3000 B.C. and 500 B.C.\(^1\) Traditional Marshallese society was organized around matrilineal kin groups, with the ultimate control of land being held by chiefs.\(^2\) The society was also stratified, with individual rights and responsibilities differing based on whether one was of a royal or commoner lineage.\(^3\) The senior ranking member of a royal matrilineage was the paramount chief, or iroijlaplap, and this person was considered the owner of the land and all the fixed and mobile property upon the land.\(^4\) In a system roughly analogous to the feudal system of medieval Europe, the iroijlaplap oversaw the commoners, or the kajur, who resided on the land and used them for labor and defense purposes.\(^5\) During this time, all land in the Marshall Islands was controlled by only eighteen to twenty

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3 Zorn at 102.
4 J.A. Tobin, Land Tenure in the Marshall Islands, p. 4 (Pacific Science Board, revised ed. 1956) (hereinafter Tobin) (Tobin actually uses the term “iroij lablab,” but most subsequent sources use “iroijlaplap” so this term will be used throughout this report for the sake of consistency.).
5 *Id.*
Iroijlaplap. Gradually, some lesser land interests developed in addition to the Iroijlaplap—mainly the Iroijedrik, Alap and Dri Jerbal.

2. Colonial history

As with most of the original inhabitants of Micronesia, the Marshallese endured a long period of colonization by Spain, Germany, Japan, and the United States. Spain was the first outside nation to claim the islands in 1565, but due to the hostility of the Marshallese towards strangers it basically ignored the region for three hundred years—leaving the traditional islands culture unchanged. In the 1800s, however, Spanish missionaries were successful in converting a large number of Marshallese to Christianity. Also during this time, traders and whalers from Europe, the United States, Japan, and Russia began to occasionally visit the islands.

The relative lack of action in the area by Spain, however, caused Germany to dispute Spain’s territorial claim to the Marshall Islands. In 1885, the dispute was submitted to Pope Leo XIII, who gave administrative control of the region to Germany. The next year, Germany purchased the islands outright from Spain and declared them a protectorate. The Germans, unlike the Spanish, were very active on the islands, focusing their attention on trade, copra production, and phosphate mining; and

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7 These classes of land interests are described in Section II(A) of this report.
8 Zorn at 100.
9 *Id.*
10 *Id.* at 481.
11 Zorn at 100.
12 *Id.*
13 *Id.*
Micronesian laborers were paid very low wages to work the plantations and mines.\textsuperscript{15} Germany attempted to supplant the chiefs as the paramount authorities and to introduce western land ownership practices,\textsuperscript{16} but had relatively little success in this area.\textsuperscript{17}

In 1914 during the First World War, Japan displaced Germany from the Marshall Islands; and in 1920, the League of Nations granted a mandate over the islands to Japan.\textsuperscript{18} In 1934, Japan withdrew from the League but retained possession of the islands and strategically fortified them for military purposes.\textsuperscript{19} In addition, the economic development of the Marshall Islands was a primary focus for Japan, including the resettlement of significant numbers of Japanese and Okinawans on the islands.\textsuperscript{20} Japan, in order to facilitate the acquisition of land needed for military bases, introduced to the Marshallese the foreign concept of divisions in land ownership—i.e., the chiefs own the land but the commoners own the trees on the land.\textsuperscript{21} This strict division was an artificial one, however, and did not last beyond Japan’s control of the Marshalls.\textsuperscript{22}

In 1944 during World War II, the United States won a battle with Japan and took military control of the Marshall Islands.\textsuperscript{23} Due to the damage caused by fighting and the subsequent neglect of the groves, copra production was virtually nonexistent after the war.\textsuperscript{24} The U.S., however, viewed the islands mostly as a strategic military location and it wasted no time in evacuating the residents of Bikini and Enewetak Atolls—and

\begin{flushleft}
\textsuperscript{15} Zorn at 102.
\textsuperscript{16} Tobin at 5.
\textsuperscript{18} Tom’talala at 980.
\textsuperscript{19} Id.
\textsuperscript{20} Zorn at 102.
\textsuperscript{21} Tobin at 5.
\textsuperscript{22} Id.
\textsuperscript{23} Laughlin, Jr. at 481-482.
\textsuperscript{24} The United States claimed to make the revival of the copra industry a top priority, but not until 1975 did copra production in the Marshall Islands exceed pre-war levels. Id. at 482.
\end{flushleft}
eventually other islands as well—so that they could be used as nuclear weapons testing sites.\textsuperscript{25} The weapons testing program continued for twelve years until 1958, and included the first detonation of a hydrogen bomb in 1954 at Bikini.\textsuperscript{26} Almost fifty years later, some of the land is so badly polluted that it is still unfit for human use.\textsuperscript{27}

In 1947, the United Nations created a Trusteeship Agreement which designated the Marshall Islands and the rest of Micronesia—except for Guam—as the Trust Territory of the Pacific Islands (TTPI), to be under the administration of the United States Navy.\textsuperscript{28} The U.S. view of the region as mainly a military location did not change after the establishment of the TTPI, and economic development of the Marshall Islands—when it occurred at all—was usually a byproduct of U.S. military needs.\textsuperscript{29} During the 1960s the U.S. began to encourage political developments based on the American model and contributed significant amounts of money to the TTPI to make this happen—but still little was done to develop the economy.\textsuperscript{30} Significantly, the Marshall Islands were closed to U.S. private investment until the mid-1960s and to private investment from other countries until the mid-1970s.\textsuperscript{31}

Regarding land ownership, the Navy civil administration completed a cadastral survey of most of the Marshall Islands in 1949 and 1950.\textsuperscript{32} The approximate locations (no surveying was done) of every land parcel, or weto, was recorded, along with the

\begin{itemize}
\item \textsuperscript{25} Zorn at 100, 102; Mason at 3-4.
\item \textsuperscript{26} The radioactive fallout from the hydrogen bomb required the evacuation of certain populations, but in later years many residents still developed thyroid and other serious disabilities. The U.S. government has since paid huge settlements to the affected communities as “compensation” for their forced resettlement and for the negative social and physical consequences. Mason at 3-4.
\item \textsuperscript{27} Laughlin, Jr. at 484.
\item \textsuperscript{28} The administrative authority over the TTPI was transferred to the Department of Interior in 1951. Id. at 100.
\item \textsuperscript{29} Id. at 102.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Mason at 20.
\end{itemize}
names of the associated Iroijlaplap, Iroijedrik, Alap, and Senior Dri Jerbal.\textsuperscript{33} The information was mimeographed for each atoll, but due to a lack of preservation measures only five or six of these atoll reports are still available today.\textsuperscript{34}

3. \textit{Post-colonial history}

In 1973, the Marshall Islands district legislature established a Political Status Commission to negotiate with the U.S. for its independence.\textsuperscript{35} As a result, the Marshall Islands Constitutional Convention was convened in 1977 and the Constitution of the Republic of the Marshall Islands was ratified in 1979—whereby the RMI became self-governing.\textsuperscript{36} In order to gain true independence, however, the RMI and other Trust Territory nations signed Compacts of Free Association with the U.S. in 1982.\textsuperscript{37} In the following year, the people of the RMI approved their Compact of Free Association (Compact) by a majority vote; and in 1986 the U.S. and the United Nations approved the Compact as well—which recognized the RMI as a sovereign nation.\textsuperscript{38}

In 1990, the United Nations Security Council belatedly approved the termination of the Trusteehip Agreement with respect to the RMI, so the RMI was at last internationally recognized as an independent nation.\textsuperscript{39} The RMI was given a seat in the United Nations in 1991.\textsuperscript{40}

\begin{flushleft}
\textsuperscript{33} \textit{Id.}; These classes of land interests are described in Section II(A) of this report.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 102-103.
\textsuperscript{37} \textit{Id.} at 101.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} Due to the fact that the TTPI was held as a “strategic trust,” some nations would not recognize the RMI as independent until the Security Council approved the termination of the trusteeship. Laughlin, Jr. at 483.
\end{flushleft}
During the long colonial period of the Marshall Islands, each successive occupying nation attempted—to some extent—to convert the land ownership practices of the Marshallese from customary group rights to individual freeholds; but because these attempts were never very advanced, most of the land owned by Marshallese today remains under customary tenure.41

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

1. Geography and climate

The RMI consists of two almost parallel archipelagic chains of islands, the Ratak (Sunrise) group and Ralik (Sunset) group.42 Together, the chains comprise 29 coral atolls and five low-elevation islands—with a land area of just under seventy square miles (181.3 square kilometers) spread out over 750,000 square miles of the Pacific Ocean.43 The atolls comprise over 1,225 islets and 870 reef systems.44 Most of the islands are very narrow45 and the mean elevation is only 6.6 feet (two meters), so the RMI is ecologically vulnerable to any future change in sea level.46 It is estimated that only 16.7 percent of the land in the RMI is arable47 or suitable for cultivation. Aside from a few tropical crops,
the sandy soil and high salt content renders most of the land unsuitable for agriculture.\textsuperscript{48} Interestingly, a recent report produced by the RMI claimed that land disputes and the migration of Marshallese to urban areas have caused a significant amount of the land that is fertile to be “underutilized.”\textsuperscript{49} To illustrate this, over 25 percent of the land used to grow copra was not productive in 1991 and nearly 70 percent of the productive land was under senile trees.\textsuperscript{50}

The climate in the RMI is tropical (hot and humid)\textsuperscript{51} with temperatures ranging from 81°F to 89°F.\textsuperscript{52} Average monthly rainfall is between twelve to fifteen inches.\textsuperscript{53}

2. Population figures

The 1999 census put the total population of the RMI at 50,840, with about 68 percent—or 34,578—of the people residing in the urban areas of the Majuro and Kwajalein Atolls.\textsuperscript{54} In 2004 the population was estimated to be 57,738.\textsuperscript{55} These figures are considerably lower than initially expected, but the census revealed that the RMI’s growth rate had slowed to 1.5 percent annually during the period of 1988 to 1999\textsuperscript{56}—a sharp drop from the approximately 3.9 percent annual growth that the RMI had experienced from 1958 to 1988.\textsuperscript{57} This decline has been attributed primarily to the

\textsuperscript{48} Pacific Economic Report at 2.
\textsuperscript{49} RMI UNCCD Report.
\textsuperscript{50} Harding at 180.
\textsuperscript{51} CIA-The World Factbook.
\textsuperscript{52} RMI UNCCD Report.
\textsuperscript{53} Id.
\textsuperscript{54} RMI UNCCD Report. The Kwajalein atoll is a reserved U.S. military area and site of the Kwajalein Missile Range. Pacific Economic Report at 2.
\textsuperscript{55} CIA-The World Factbook (the 2004 growth rate is estimated at 2.29 percent).
\textsuperscript{56} Republic of the Marshall Islands Economic Report, p. 2 (Bank of Hawaii, April 2001) (hereinafter RMI Economic Report). From 1980 to 1988, the RMI experienced an explosive growth rate of 4.1 percent annually—one of the world’s highest—so using this rate, the RMI’s population in 1998 was incorrectly estimated at 62,924. \textit{See} Pacific Economic Report at 1-2.
\textsuperscript{57} RMI UNCCD Report.
“large-scale” exodus of Marshallese to the United States during the 1990s; and to a lesser extent the decrease in fertility rates over the same period of time.\footnote{Id.}

The RMI still has Micronesia’s second highest population density—behind only Guam—at 726 people per square mile.\footnote{RMI Economic Report at 2.} The urban centers on the atolls of Majuro (3.75 square miles) and Ebeye (located in the southeast corner of the 6.3 square miles of the Kwajalein Atoll) have population densities that rank among the highest in the world.\footnote{Pacific Economic Report at 2.} Overcrowding has become “so severe [in these areas] that additional land simply is no longer available.”\footnote{David N. Zurick, *Preserving Paradise*, Geographical Review, Vol. 85:2 (April 1995). In addition, household waste that is drained into the Majuro Lagoon has essentially destroyed the reef stock.}

3. **Protected areas**

No legally established nature preserves or protected areas currently exist in the RMI.\footnote{Harding at 175.} Two nature reserves in the northern Marshall Islands—on the Bokak (Taongi) and Bikar (Pikaar) Atolls—were designated by the District Administrator while under the TTPI, but they have not been recognized or enforced since the RMI gained its independence.\footnote{Protected Areas Programme: Republic of the Marshall Islands (UNEP-WCMC), available at http://www.unep-wcmc.org/sites/wetlands/mhl_int.htm (last visited July 14, 2004).} Several field surveys of the northern Marshall Islands ecosystems have illustrated the special conservation value of this area\footnote{Harding at 175.}—especially the Ailingae Atoll which received consideration for World Heritage status in 2002\footnote{Peter Rejcek, Rongelapese Pushing for World Heritage Status for Atoll, *Kwajalein Hourglass*, p. 4 (July 12, 2002), available at http://www.smdc.army.mil/KWAJ/Hourglass/issues/02Issues/hourglass7_12_02.pdf (last visited July 14, 2004).}—but no preserve has yet been established.
At tradition, however, certain land or reef areas were classified as mo, or kotra. Mo land was reserved exclusively for use by the Iroijlaplap—who personally held all interests in this land.\footnote{Harding at 161.} Trespassing was strictly forbidden on these lands.\footnote{Mason at 13.} In addition, heavily fished reef areas were classified as mo, or essentially as “no-take” areas, so that the reef could be replenished and conserved.\footnote{Id.} The World Database on Protected Areas currently lists two atolls, Borak and Jemo, as “mo” protected areas, and cites “cultural and religious reasons” for their protection.\footnote{World Database on Protected Areas (UNEP-WCPC and World Commission on Protected Areas), available at http://sea.unep-wcmc.org/wdbpa/designation2.cfm?Desig=300252&country=MHL (last visited July 14, 2004) (hereinafter World Database).} No other information could be found on these areas, however.

C. Government

The RMI has adopted a “quasi-parliamentary” form of government,\footnote{Zorn at 107.} and its unitary structure is dictated by the Constitution of the RMI.

1. Executive branch

The executive powers are vested in a Cabinet, whose members are collectively responsible to the Nitijela—the legislative branch of the RMI.\footnote{Constitution of the Marshall Islands, Article V, § 1(1) (hereinafter RMI Constitution).} The Cabinet consists of a President\footnote{Id. at Article V, § 2(1).}—who is Head of State and elected by a majority of the Nitijela after each general election\footnote{Id. at Article V, § 3(1)-(3).}—and between six to ten other members who are nominated by the President and appointed by the Speaker.\footnote{Id. at Article V, § 4(1)-(2).} All members of the Cabinet, including the
President, are also members of the Nitijela.\textsuperscript{75} The Head of State is a mostly honorary position,\textsuperscript{76} with responsibility for foreign affairs and national security resting with the entire Cabinet.\textsuperscript{77}

2. \textit{Legislative branch}

The legislative branch of the RMI is called the Nitijela—a Marshallese term for a gathering of wise or powerful people.\textsuperscript{78} Under the RMI Constitution, the Nitijela has the power to enact, repeal, revoke, or amend all laws in force in the RMI.\textsuperscript{79} The Nitijela consists of thirty-three members\textsuperscript{80} who are elected by the citizens of the RMI.\textsuperscript{81} Being a member of the Nitijela is a prerequisite for becoming Head of State or a Cabinet member.\textsuperscript{82}

3. \textit{Judicial branch}

The judicial branch of the RMI—which is independent of the executive and legislative branches—has its powers vested in a Supreme Court, High Court, Traditional Rights Court, and such other courts as are created by law.\textsuperscript{83}

The Supreme Court is a “superior court of record” and, as of right, appeals lie in the Supreme Court from any decision of the High Court.\textsuperscript{84} At its discretion, the Supreme Court may take appeals from the final decisions of other courts as well.\textsuperscript{85} The Supreme

\begin{itemize}
    \item \textsuperscript{75} \textit{Id.} at Article V, § 2(1).
    \item \textsuperscript{76} Zorn at 107.
    \item \textsuperscript{77} RMI Constitution, Article V, § 1(3).
    \item \textsuperscript{78} Zorn at 104.
    \item \textsuperscript{79} RMI Constitution, Article IV, § 1(1)-(2).
    \item \textsuperscript{80} All twenty-four electoral districts elect members to the Nitijela, with Majuro (five members) and Kwajalein (three members) receiving the most representation. \textit{Id.} at Article IV, § 2(1).
    \item \textsuperscript{81} \textit{Id.} at Article V, § 2(1).
    \item \textsuperscript{82} \textit{Id.} at Article V, § 2(1).
    \item \textsuperscript{83} \textit{Id.} at Article VI, § 1(1).
    \item \textsuperscript{84} \textit{Id.} at Article VI, § 2(1)-(2).
    \item \textsuperscript{85} \textit{Id.} at Article VI, § 2(2)(c).
\end{itemize}
Court consists of three members—a Chief Justice and two associate judges—who are each appointed by the Cabinet and approved by the Nitijela.

The High Court is a “superior court of record” with original jurisdiction over controversies of law and fact in the RMI. It also has appellate jurisdiction over the decisions of subordinate courts.

The Nitijela, as authorized by the Constitution, established a system of District and Community Courts through the Judiciary Act. The District Court has original jurisdiction—concurrent with the High Court—in all civil cases involving property of less than five thousand dollars, except for “cases of adjudication of title to land or interest in land (other than the right to immediate possession).” The Community Court has original jurisdiction—concurrent with the High Court and the District Court—in its local government area in all civil cases involving property of less than one hundred dollars, except for “cases of adjudication of title to land or interest in land (other than the right to immediate possession).”

The jurisdiction of the Traditional Rights Court is “limited to the determination of questions relating to titles or to land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Marshall Islands.” This jurisdiction is ancillary to proceedings pending in other courts, and it may be invoked “as of right” by parties to other judicial proceedings if a “substantial question [arises] within

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87 RMI Constitution, Article VI, § 1(4).
88 Id at Article VI, § 3(1).
89 Id.
90 Id. at Article VI, § 1(1).
91 27 M.I.R.C., Ch. 2, §§ 226, 232.
92 Id. at § 228(1).
93 Id. at § 234(1)-(2).
94 RMI Constitution, Article VI, § 4(3) (emphasis added).
the jurisdiction of the Traditional Rights Court.”\textsuperscript{95} Decisions of the Traditional Rights Court must be given “substantial weight” by the certifying court and be deemed “binding” unless justice requires otherwise.\textsuperscript{96} However, in cases where the RMI government exercises its right of eminent domain, the decisions of the Traditional Rights Court are merely advisory to the certifying court—although they must still be given “substantial weight.”\textsuperscript{97}

The RMI Constitution requires that the panel of Traditional Rights Court judges comprise a “fair representation of all classes of land rights, including, where applicable, the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal;”\textsuperscript{98} and that the panel be chosen on such a geographical basis as to ensure fairness and expertise.\textsuperscript{99} The High Court requires that the Traditional Rights Court panel consist of twelve judges—four Iroij, four Alap and four Dri Jerbal—and consist of five members from the Ralik chain and seven from the Ratak chain.\textsuperscript{100} They are not required to have legal degrees but must be knowledgeable in Marshallese customs and traditions.\textsuperscript{101}

4.  

Council of Iroij

The Council of Iroij (Council) allows traditional leaders and chiefs, or Iroij, to participate in government. The Council’s functions include expressing its opinion to the Cabinet on “any matter of concern to the Marshall Islands;” and requiring the “reconsideration of any Bill affecting customary law, or any traditional practice, or land
tenure, or any related matter, which has been adopted . . . by the Nitijela.” \( ^{102} \) With the first function, the Cabinet must hear—but is not required to follow—the Council’s advice. \( ^{103} \) With the second function, a copy of every Bill passed by the Nitijela must be given to the Council for review; and every Bill that concerns the Council must be reconsidered. \( ^{104} \) The Nitijela is not required to change reconsidered Bills to the liking of the Council, \( ^{105} \) but the Council’s power to require reconsideration can be “quite sweeping” because “every [Bill] affects custom in some way” \( ^{106} \) and the Council has the discretion to decide which Bills do affect custom. \( ^{107} \)

D. **Legal framework** \( ^{108} \)

The RMI Constitution is the controlling authority in the RMI, but additional authority is recognized in the laws passed by the legislature, the Compact of Free Association, custom and tradition, and the common law. The extent that U.S. common law—i.e., the ALI Restatements—is relevant in the RMI is not perfectly clear but it has had an unquestionable influence in certain areas.

1. **RMI Constitution**

The RMI Constitution is the “supreme law of the Marshall Islands” and all judges and other public officers are bound by its provisions. \( ^{109} \) The judiciary branch is responsible for interpreting and applying the RMI Constitution. \( ^{110} \)

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102 RMI Constitution, Article III, § 2(a)-(b) (emphasis added).
103 Zorn at 110.
104 RMI Constitution, Article III, § 3.
105 Id. at Article III, § 3(7).
106 Zorn at 110.
107 RMI Constitution, Article III, § 3(2).
108 This section is organized similarly to Zorn at 103-105.
109 RMI Constitution, Article I, § 1(1).
110 Id. at Article I, § 3.
Several provisions of the RMI Constitution are applicable to the administration of land in the RMI:

- **Article II, § 5** – requires “just compensation” for the taking of land rights from any interest holder;

- **Article X, § 1** – states that “[n]othing in Article II [of the RMI Constitution] shall be construed to invalidate the customary law or traditional practice concerning land tenure or any related matter . . ., including, where applicable, the rights and obligations of the Iroijlaplap, Iroijedrik, Alap and Dri Jerbal;” and

- **Article X, § 2** – prohibits any interest holder in land “under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land.”

2. **Legislation**

Three types of legislation have force in the RMI: (1) provisions of the Trust Territory Code (TTC); (2) laws passed by the Nitijela prior to the RMI Constitution; and (3) laws passed by the Nitijela subsequent to the RMI Constitution. The first two types of legislation remain viable because the RMI Constitution, after its ratification, kept in force all existing laws until either their repeal or revocation. The Marshall Islands Revised Code (MIRC) contains all prior legislation that is still in effect, as well as the laws subsequently enacted by the Nitijela.

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111 This Article is the RMI’s “Bill of Rights.”
112 These classes of land interests are described in Section II(A) of this report.
113 *Id.*
114 Zorn at 104.
115 RMI Constitution, Article XIII, § 1(1)(a).
116 Zorn at 104.
3. **Compact of Free Association and other treaties**

Foreign affairs are the responsibility of the Cabinet, but all treaties must be approved by the Nitije la.\(^ {117}\) At the current time, the Compact of Free Association with the U.S. is the RMI’s primary international agreement. Under the terms of the Compact, which became effective in 1986, the RMI government is required to “develop standards and procedures to protect their environment” that are “substantively similar to those required of the government of the United States.”\(^ {118}\)

In addition, under the Compact the U.S. has full responsibility for defense matters relating to the RMI—meaning it must defend the RMI and its people as if it were a part of the United States.\(^ {119}\) This responsibility includes the right of the U.S. to operate military bases in the RMI,\(^ {120}\) primarily on the Kwajalein Atoll. The Compact also guaranteed, until 2001, a significant amount of financial assistance for the purpose of developing the RMI economy.\(^ {121}\) Including land rents and nuclear claims compensation, the U.S. had given the RMI over one billion dollars by 2001.\(^ {122}\) Upon expiration of the Compact’s original financial assistance package, the terms were extended for two years so that the U.S. and RMI could negotiate a new package.\(^ {123}\) A new financial assistance package was agreed to in 2003 that will be in force until 2023.\(^ {124}\)

\(^{117}\) RMI Constitution, Article V, § 1(3)(d).

\(^{118}\) Compact of Free Association, Title I, Article VI, § 161(b) (hereinafter Compact).

\(^{119}\) Compact at Title 3, Article I, § 311(a)-(b)(1).

\(^{120}\) *Id.* at Title 3, Article II, § 321(a). The U.S. and RMI recently negotiated to allow the U.S. to operate the Kwajalein Missile Range until 2066, *available at* http://www.yokwe.net/modules.php?op=modload&name=News&file=article&sid=660 (last visited July 15, 2004).

\(^{121}\) Compact, Title 2, Articles I and II.

\(^{122}\) Of the one billion dollars, four hundred million went to land rents and compensating nuclear claims; three hundred million was basic grant assistance; and three hundred million was agency- and program-specific. RMI Economic Report at 3, *citing* “President Kessai Note’s Key Goal: Confidence in Government,” *The Marshall Islands Journal*, pp. 16-17 (Jan. 12, 2001).

\(^{123}\) “Secretary Norton Applauds President's Signing of Compact Legislation,” Department of Interior Release, *available at*
In other foreign affairs, the RMI participates in or is a member of the United Nations, the South Pacific Forum, the Asian Development Bank, the International Atomic Energy Agency, and the World Health Organization, among others.125

4. Custom

The immense importance of custom in the RMI is illustrated in several ways. First, the RMI Constitution provides that all existing law—including custom—on the effective date is to remain in force until it is repealed or revoked.126 In essence, this means that the courts are required to apply custom whenever it is applicable.127 If a contrary statute to custom exists, however, the RMI Constitution suggests that custom might not apply since repeal can occur implicitly.128 It also suggests that custom becomes “frozen” at the effective date of the Constitution, but the High Court has held that new custom may be judicially recognized when it is firmly established, generally known, and acquiesced in by those whose rights are affected.129

Second, the RMI Constitution provides that the Nitijela is responsible for declaring, by Act, the customary laws of the RMI and any parts thereof.130 To date, the Nitijela has never exercised this authority,131 but in 1989 it created the Customary Law Commission—whose duty it is to declare the customary law of the land.132 As of 2002,


124 Id.
125 Zorn at 119; CIA-The World Factbook.
126 RMI Constitution, Articles X and XIII.
127 Zorn at 105.
128 Id.
130 RMI Constitution, Article X, § 2(1).
132 Id. at 10-11, citing Customary Law Commission Act 1989.
the Commission had not completed its work;\(^\text{133}\) and it does not appear to be completed in 2004.

5. **Common law**

Little guidance is available—in either the RMI Constitution or the MIRC—on how the common law is to be developed in the RMI.\(^\text{134}\) By analogy, it could be argued that the method for interpreting the RMI Constitution—“a court shall look to the decisions of the courts of other countries having constitutions similar . . . to the [RMI] Constitution, but shall not be bound thereby”\(^\text{135}\)—should be used to develop the RMI common law.\(^\text{136}\) The TTC provided that U.S. Common law, as expressed in the American Law Institute (ALI) Restatements or as generally understood and applied in the U.S., would be the common law of the TTPI;\(^\text{137}\) so the RMI Constitution, which continued in force all existing laws,\(^\text{138}\) could suggest that the RMI courts look to the ALI Restatements for guidance.\(^\text{139}\) The TTC provision that requires courts to look at the Restatements does not appear in the MIRC, however, so it is at least arguable that it has been repealed by implication.\(^\text{140}\) In fact, though, the RMI Supreme Court has cited to U.S. common law in certain situations;\(^\text{141}\) and one opinion, *Likinbod v. Kejlat*, interpreted the RMI Constitution as continuing “the [U.S.] common law in effect [in the RMI] as the governing law, in the absence of customary law, traditional practice or constitutional or

\(^{133}\) *Id.* at 11.

\(^{134}\) Zorn at 105.

\(^{135}\) It continues, “and in following any such decision, a court shall adapt it to the needs of the [RMI], taking into account this Constitution as a whole and the circumstances in the [RMI] from time to time.” RMI Constitution, Article I, § 3(1).

\(^{136}\) Zorn at 105.

\(^{137}\) 1980 1 TTC 103.

\(^{138}\) RMI Constitution, Article XIII, § 1.

\(^{139}\) Zorn at 105.

\(^{140}\) In this case, the RMI would then be free to develop an indigenous common law. *See id.*

\(^{141}\) *See e.g.*, Elmo v. Kabua, 1 M.I.R.L.R. 450 (1999) (citing U.S. Supreme Court opinion on clearly erroneous standard for findings of fact); Langijota v. Alex, 1 M.I.L.R. 164 (1990) (citing 9th Circuit opinion on doctrine of laches).
So where custom or statutes are absent, it appears that the RMI courts might look to the U.S. common law, or ALI Restatements, for guidance.

Lastly, the RMI Supreme Court has held that decisions of the TTPI courts do not have stare decisis effect in the RMI courts, but “in some circumstances, the value of [TTPI] court decisions as precedent will exceed the precedential value of cases from non-Pacific Islands jurisdictions.” The RMI Supreme Court did not clarify “some circumstances,” but it has cited to TTPI court decisions on numerous occasions.

II. OWNERSHIP OF PRIVATE PROPERTY

Land is the “fundamental basis” of Marshallese culture and society. At tradition, every person had certain rights and obligations to the land—which he or she acquired at birth by virtue of lineage—and these rights and obligations have been mostly preserved in modern times by the RMI Constitution. As a result, most of the privately owned land in the RMI is still held under customary tenure. Some additional rights and restrictions are also discussed below.

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142 The court emphasized that the RMI Constitution established a “parliamentary-style Nitijela and Cabinet, a Bill of Rights modeled on the United States Bill of Rights and a Judiciary Article continuing the U.S.-style court system that operated during the period when the Marshall Islands were a part of the [TTPI].” 1 M.I.R.L.R. 366 (1995).
143 Langijota v. Alex, 1 M.I.L.R. 164 (1990).
145 Mason at 4.
146 Id.
147 RMI Constitution, Article X.
148 Land Issues in the Pacific at 45, Table A2.1.
A. Traditional land tenure

The typical Marshallese land parcel, the weto, averages two to five acres (one to two hectares) and extends across the islet from the lagoon to the ocean.\(^{149}\) In this way, each parcel provides the resident lineage and associated members, the bwij, with all the resources available in a coral atoll environment\(^{150}\)—including farmland, forage land and fishing access.\(^{151}\) Boundary markers were not necessary in pre-contact times, but today, owing to the increased value of land, a bwij will plant distinctive shrubs or cut marks into coconut trees growing along the boundary.\(^{152}\)

Each bwij is headed by the Alap—usually the oldest male—who is in immediate charge of the land and the Dri Jerbal (the workers) on the land.\(^{153}\) The Alap represents his or her lineage in community affairs and inter-lineage dealings,\(^{154}\) as well in relations with the Iroijedrik (sub-chief), if any, and the Iroijlaplap who is associated with their land parcel.\(^{155}\)

The Iroijlaplap (paramount chief) is the Alap, or senior ranking member, of a royal matrilineage\(^ {156}\) and is the acknowledged final distributor of all land interests in his jurisdiction.\(^ {157}\) However, the Iroijlaplap and Iroijedrik are not necessarily members of the bwij that inhabit their land, as many Iroij holdings are traced to centuries-old war victories and promises of protection.\(^ {158}\) In theory, the Iroijlaplap could redistribute land

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\(^{149}\) Mason at 5.  
\(^{150}\) Id.  
\(^{151}\) Zorn at 128.  
\(^{152}\) Mason at 8.  
\(^{153}\) Tobin at 10. The Dri Jerbal—or working class of people—plant, clear, and make improvements on the land in return for a place to live and a portion of land proceeds. Harding at 160.  
\(^{154}\) Mason at 9.  
\(^{155}\) Tobin at 10.  
\(^{156}\) Id. at 65.  
\(^{157}\) Harding at 160.  
\(^{158}\) Id.
rights and interests at will;\textsuperscript{159} but in practice and in law—as discussed below—this is not really the case today.

B. Restrictions and rights pertaining to private land ownership

1. Citizenship restriction

As put forth by the Nitijela, only citizens of the RMI or corporations wholly owned by citizens of the RMI may own land in the RMI.\textsuperscript{160} This restriction does not apply to some lesser interests such as a leasehold.\textsuperscript{161} The statute does not provide a reason for this restriction on ownership, but as with another South Pacific nation with a similar provision, presumably it is intended to prevent the exploitation of the Marshallese, to promote their economic advancement, and to preserve their culture.\textsuperscript{162}

2. Alienation restrictions

As discussed earlier, the RMI Constitution prohibits the “alienation or disposition of [any land interest], whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land.”\textsuperscript{163} These four classes represent “all persons having an interest in that land,”\textsuperscript{164} so approval is required from each before any land interest is alienated. Such agreement is oftentimes hard to obtain.\textsuperscript{165}

\textsuperscript{159} Zorn at 128.
\textsuperscript{160} Real and Personal Property Act, 24 M.I.R.C., Ch. 1, § 13.
\textsuperscript{162} See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Article VIII, § 805 (1975).
\textsuperscript{163} RMI Constitution, Article X, § 1(2).
\textsuperscript{164} Id.
\textsuperscript{165} Land Issues in the Pacific at 58-59.
Also, the ultimate power of the Iroijlaplap has been limited by the RMI courts. For instance, the High Court has ruled that an Iroijlaplap may not terminate one’s right of inheritance without good cause shown by clear and convincing evidence.\footnote{Zorn at 128, citing Limet Mojilong v. Atol, Civ. Act. No. 1982-76 (1982).}

3. **Servitudes and easements**

The RMI, at least on paper, recognizes servitudes, easements and rights of way over land. The Land Acquisition Act 1986 provides that a “servitude” may be acquired over land for a public use,\footnote{Land Acquisition Act 1986, 9 M.I.R.C., Ch. 2, § 5(1).} and defines a “servitude” as “any right over any land,” including “a right of way, right to draw water and similar rights over any land.”\footnote{Id. at § 2(h).} The National Environmental Protection Act 1984 defines “land” as including “easements relating thereto;”\footnote{National Environmental Protection Act 1984, 35 M.I.R.C., Ch. 1, § 3(g).} and it delegates the authority to “acquire by purchase, lease, sublease, easement or otherwise, any land or interest in land.”\footnote{Id. at § 21(3)(a).}

4. **Leases**

Lease agreements may be entered into only if they are executed by each senior land interest holder—the Iroijlaplap, Iroijedrik where necessary, Alap, and Senior Dri Jerbal.\footnote{RMI Constitution, Article X, § 1(2).} The Marshall Islands Development Land Registration Authority Act 2000\footnote{See Section II(C)(1).} establishes the legal requirements and procedures for valid land leases:

- no lease may exceed a term of fifty years,\footnote{P.L. 2001-26, § 33.}
- leases are binding on a senior interest holder’s heirs, successors, assigns, or any one claiming an interest;\footnote{Id. at § 31.} and

\begin{itemize}
  \item no lease may exceed a term of fifty years,
  \item leases are binding on a senior interest holder’s heirs, successors, assigns, or any one claiming an interest;
\end{itemize}
5. **Mortgages**

The power to mortgage land in the RMI is very limited. The Nitijela has made it difficult by only permitting mortgages of leaseholds, and not of ownership or other traditional land rights. Mortgaged property may be sold off upon foreclosure, but only the lease interest may be purchased.

### C. Private land administration

#### 1. **Institutional framework**

The RMI does not have a strong institutional framework in place for the recording and enforcement of property rights—and major problems have been documented by various economic and research institutes.

First, there is “unclear” ownership and boundaries in the RMI due to lack of recording. The Real and Personal Property Act briefly requires that the Clerk of Court “keep in a permanent record a copy of all documents submitted to him for recording which relate to title to real estate” and makes invalid any “transfer of or encumbrance upon title to” land if the parties in the transaction fail to record the related documents.

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175 *Id.* at § 32.

176 Zorn at 127.

177 Real Property Mortgage Act 1987, 24 M.I.R.C., Ch. 3, § 2(a).

178 *Id.* at §§ 8-11.


180 RMI Private Sector Assessment at 49.
with the Clerk, but little land has actually been recorded. When land rights are recorded, it can be a “cumbersome and difficult” process.

Second, the principles of customary land ownership in the RMI are often not publicly known to all interested parties in a land transaction. This causes a cloud of uncertainty to surround many land transactions, and the parties involved often wind up disputing the legal effects of such transactions. As a result, the RMI courts have been “overloaded” with cases regarding disputed land titles and rights.

Third, dispute resolution methods regarding land in the RMI are “weak” and unrecorded. The Real and Personal Property Act is completely silent on this matter.

Partly in response to these criticisms, the Marshall Islands Development Land Registration Authority Act 2000 was enacted by the Nitijela. The Act, however, is primarily geared to promote economic activity—particularly lease agreements—and not for the purpose of land registration in general.

The Act establishes the Marshall Islands Development Land Registration Authority (Authority), the purposes of which are to:

- “provide a legal framework for the people of the [RMI] to register their interests in land in order to promote investment and development;”
- “provide a legal regime satisfactory to investors and lending institutions in order to encourage investment;”

182 Land Issues in the Pacific at 45; RMI Private Sector Assessment at 49.  
183 RMI Private Sector Assessment at 50.  
184 Id. at 51.  
185 Id.;  
186 Mason at 26.  
187 RMI Private Sector Assessment at 49.  
188 See Land Issues in the Pacific at 58-59.  
189 P.L. 2001-26, § 3. The Authority is a Corporation that may sue and be sued in its corporate name. Id. at § 4(1)(a) and (f).
“provide for standards and criteria for land leases . . . to protect land interest holders and investors;” and

“maintain and keep records of land and land transactions open to the public” and “bring land into the economic marketplace” in the RMI.\footnote{190}{Id. at § 16.}

In order to accomplish these purposes, the Authority is vested with “any powers as are necessary and convenient for carrying out [the Act’s] purposes,”\footnote{191}{Id. at § 17(1).} including, but not limited to:

- accepting applications from senior land interest holders to register, or classify, their land as “available for lease by investors;”
- providing for the land “registration process” and settling related disputes;
- issuing “Certificates of Registration to senior land interest holders;”
- establishing a “land database,” with contact information for registered senior land interest holders, for use by potential investors;
- guaranteeing and underwriting lease agreements “with respect to assuring the uninterrupted use of leased land;”
- providing “mediation assistance between senior land interest holders and investors when requested;” and
- maintaining “on file copies of all leases in the [RMI] to ascertain the prevailing market values of land.”\footnote{192}{Id. at § 17(2).}

2. \textit{Land registration}

As mentioned above, the Real and Personal Property Act requires that land and land transactions in general be recorded with the Clerk of Court.\footnote{193}{24 M.I.R.C. Ch.1, §§ 17-18.} Only leases of less than one year are not required to be recorded with the Clerk.\footnote{194}{Id. at § 18.}
If senior land interest holders are interested in leasing their land to investors, the Marshall Islands Development Land Registration Authority Act 2000 is controlling. To register their land as available for lease, an Application for Registration of Land must be submitted to the Authority, containing:

- a description of the land to be registered, including the name of the weto, island and atoll;
- a survey map of the land;
- the names and addresses of the applicable senior land interest holders—the Iroijlaplap, Iroijedrik where necessary, Alap, and Senior Dri Jerbal;
- the names and addresses of all successors in interest to the senior land interest holders;
- copies of any final court decisions or title determinations relating to the land; and
- the signatures of each senior land interest holder and of any successors in interest.\(^{195}\)

As with all other land transactions, the Authority will not accept for registration any application that is not agreed to by each senior land interest holder.\(^{196}\) Upon receipt of a duly executed application, however, the Authority is required to issue public notice and afford an opportunity for interested parties to object for a period of at least 180 days.\(^{197}\) Objections may only be made by individuals who claim they are the respective senior land interest holder(s) and that the individual(s) seeking registration are not.\(^{198}\)

\(^{195}\) P.L. 2001-26, § 2.
\(^{196}\) Id. at § 19.
\(^{197}\) Id. at § 20(1).
\(^{198}\) Id. at § 21(1). Objections based on other grounds are null and void. Id. at § 21(2).
If an objection is made, the parties are encouraged “to resolve their differences amicably in accordance with Marshallese custom and tradition;” but if this is not possible, the objectors have forty-five days to bring an action in the High Court to resolve the dispute. In this case, the registration process is suspended until a decision is made by the High Court.

Upon a decision by the High Court, or upon 180 days passing without an objection, “a Certificate of Registration shall be issued by the Authority in the names of the senior land interest holders and successors in interest for the parcels of land subject to the registration.” The Certificate constitutes “a presumption of good and marketable land interests in and to the land registered,” and “[l]and leases made by holders of a Certificate . . . shall be deemed conclusively valid and enforceable in accordance with the terms of the lease.” Finally, all of the documents or instruments affecting land that are created under this Act must be recorded with the Clerk of Court.

III. CONSERVATION EASEMENTS ON PRIVATE LANDS

A. Introduction to conservation easements

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes. Where this purpose is to achieve the goal of

199 Id. at § 21(4).
200 Id. at § 21(5).
201 Id. at § 21(6).
202 Id. at § 22(1).
203 Id. at § 22(2).
204 Id. at § 23(1).
205 Id. at §§ 25 and 32 (in accordance with the Real and Personal Property Act).
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 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 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. What the easement holder does acquire is the right to enforce the land-use restrictions.

207 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.

208 Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving purchased development rights (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross. For a more extensive discussion of PDRs, refer to Part I § A.6.
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.\(^{209}\)

1. **Appurtenant conservation easements**

In legal terms, conservation easements generally fall into one of two categories: (1) **appurtenant easements**; and (2) **easements in gross**. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights affected by the easement are thus **appurtenant or incidental** to the benefited land. Put differently, if an easement is held incident to ownership of some land, it is an appurtenant easement. The land subject to the appurtenant easement is called the **servient estate**, while the land benefited is called the **dominant estate**. Unless the grant of an appurtenant easement provides otherwise, the benefit of the easement is automatically transferred with the dominant estate—meaning that it “runs with the land.”\(^{210}\) Under the majority U.S. common law authorities, an

\(^{209}\) 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).

\(^{210}\) 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,
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{211}

There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.\textsuperscript{212} In such jurisdictions, there are a number of ways to meet—or potentially relax—the adjacency requirement while furthering the goal of private lands conservation. The following list is a brief sample of such methods:\textsuperscript{213}

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

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

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

\textsuperscript{212} Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 23 (2003).

\textsuperscript{213} 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).
• **Reciprocal easements** – Enables adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties. Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek 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 the common law adhered to in the U.S., third party enforcement of a conservation easement would be invalidated in court due to a basic principle of contract law which mandates only the parties to the contract may enforce its terms. However, many U.S. states have laws authorizing the assignment of this specific power to non-profit organizations—provided the assignment is written into the conservation easement.

2. **Conservation easements in gross**

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally

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214 In order to take advantage of federal and state tax incentives, U.S landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially an effective method for achieving private lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.
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. Conservation easements are negative in character because they prevent the owner of the burdened estate from developing the land, typically in any way that would alter its existing natural, open, scenic, or ecological condition. However, while the common law has generally recognized and enforced certain limited types of negative easements, it has generally refused to enforce negative easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law, statutes have been enacted in most U.S. states authorizing conservation easements—both in gross and appurtenant.

In addition to statutorily authorized interests in land, U.S. common law recognizes a number of interests in land that have the potential to facilitate the goal of private lands conservation in the RMI. Among these interests are real covenants, equitable servitudes, easements and profits. It is important to note, however, that while the common law

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215 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.
216 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.
217 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.
recognizes these interests, it has traditionally imposed requirements that, in many instances, render their use problematic for conservation purposes. The American Law Institute’s Restatement (Third) of Property has simplified the law governing real covenants, equitable servitudes, easements and profits by combining the rules governing these interests into a single doctrine—that of the Servitude. This modernized law of servitudes has also largely eliminated the common law impediments to the use of these interests for conservation purposes.

3. Tax incentives for conservation easements

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

- to a governmental entity or charitable organization that meets certain public support tests; and
- exclusively for conservation purposes, which include (1) the preservation of open space for scenic enjoyment pursuant to a clearly delineated governmental conservation policy; (2) the preservation of land for outdoor recreation; (3) the protection of the natural habitat of wildlife or plants; and (4) the preservation of historically important land or a certified historic structure.\(^\text{218}\)

\(^{218}\) IRS Code, § 170(h).
If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in property’s value before the easement was granted compared to the property’s value after the granting of the conservation easement. This is often referred to as the “before and after” test.\textsuperscript{219} In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives.

4. Uniform Conservation Easement Act

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act’s primary objective is to enable “private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.”\textsuperscript{220}

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

\textsuperscript{219} 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.

(5) preserving the historical, architectural, archeological, or cultural aspects of real property.\(^{221}\)

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.\(^{222}\)

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

**B. Conservation easements in the RMI**

No legislation enacted in the RMI explicitly authorizes, or even refers to, “conservation easements” per se. The National Environmental Protection Act 1984 does authorize the acquisition of easements for the purpose of “conservation,”\(^{223}\) but this is mentioned only very briefly and without further explanation. As discussed earlier, however, there is some reason to believe that the RMI courts, absent any controlling

\(^{221}\) UCEA, §1(1)—Definitions.
\(^{222}\) § 4, 12 U.L.A. 179.
\(^{223}\) 35 M.I.R.C. Ch. 1, § 21(3)(a).
custom or statute, might look to the ALI Restatement (Third) of Property for guidance in this area.

1. Restatement (Third) of Property

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, as previously noted, 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. 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

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224 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).
225 Id. at § 1.2 cmt. h (2000).
226 Id. at §§ 1.2 cmt. h, 2.6 cmt. a.
227 Id. at §§ 2.6, 4.6.
228 Id. at § 2.6 cmt. a.
229 Id. at § 2.6(2).
230 Id. at § 8.5 cmt. a.
231 Id. at § 1.6 cmt. b.
232 “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).
created becomes impracticable; or (2) the easement can no longer be used to accomplish a conservation purpose.\textsuperscript{233} If the changed condition is attributable to the holder of the servient estate, damages may be charged.\textsuperscript{234} 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).\textsuperscript{235} 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.\textsuperscript{236}

IV. OTHER POTENTIAL LEGAL TOOLS

A. Leases, “Leaseback” Agreements, and Reserved Life Interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.\textsuperscript{237} A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case, a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation

\textsuperscript{233} Id. at § 7.11(1)-(2).
\textsuperscript{234} Id. at § 7.11(3).
\textsuperscript{235} Id. at § 8.5 (including cmt. a).
\textsuperscript{236} Id. at § 4.6(1)(b)-(c).
\textsuperscript{237} EnvironmentaLaw 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.
NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

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

As discussed earlier, recent RMI legislation aims to make available its private land for leasing.\(^{238}\) It is not clear, however, whether leaseholds entered into strictly for the purpose of conservation would be allowed; but presumably, some types of land use restrictions included in the lease agreement would be valid.

**B. Real covenants**

A real covenant is a promise concerning the use of land that (1) benefits and burdens both the original parties to the promise and their successors and (2) is enforceable in an action for damages.\(^{239}\) A real covenant gives rise to personal liability only. It is also enforceable only by an award of money damages, which is collectible out of the general assets of the defendant.\(^{240}\) If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee’s land is suing, or a person who buys the promisor’s land is being sued, then the

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\(^{238}\) See Section III(C)(2) of this report.

\(^{239}\) Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

\(^{240}\) This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefited property before and after the defendant’s breach.
The rules of property law thus determine when a successor owner can sue or be sued on an agreement to which he or she was not a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two “sides”—the burden (the promissor’s duty to perform the promise) and the benefit (the promissee’s right to enforce the promise).

In order for the successor to the original promissor to be obligated to perform the promise—that is, for the burden to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must “touch and concern” land; (4) horizontal privity must exist; (5) vertical privity must exist; and (6) the successor must have notice of the covenant. In contrast, the common law traditionally required only four elements for the benefit of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the

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

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

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

244 Vertical privity concerns the relationship between an original party and his or her successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.
prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the Restatement’s approach, a covenant is a servitude if either the benefit or the burden runs with the land. The benefit or burden of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.245

C. Equitable servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.246 An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,247 for the burden of an equitable servitude to bind the original promissor’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;248 (2)
the original parties must intend to burden successors; (3) the promise must “touch and concern” land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the benefit to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must “touch and concern” land.

Under the law of servitudes set forth by the Restatement (Third) of Property (Servitudes), there are eight basic rules that govern expressly created servitudes:249 (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;250 (4) a servitude is valid if it is not otherwise illegal or against public policy; (5) a servitude is interpreted to carry

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.

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

250 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.


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

Even where a conservation easement is not authorized by statute, courts have recognized the benefit in gross as a valid and enforceable interest. See e.g., Bennett v. Commissioner of Food and Agriculture, 576 N.E.2d 1365 (Mass.1991) (where beneficiary of a restriction is the public and restriction reinforces a legislatively stated public purpose, old common law rules barring creation and enforcement of easements in gross have no continuing force; question is whether bargain contravened public policy when made and whether enforcement is consistent with public policy and reasonable).
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;251 (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.

D. Purchased development rights

In the U.S., purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.252

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a

251 Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.
252 At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph and Adrian M. Gosch, Comment, A Practitioner’s Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143, 146 (2000).
community’s conservation efforts. Financial support for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

E. Profits à Prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.\(^{253}\) Although it is not commonly used for conservation purposes, a profits à prendre have the potential to facilitate the conservation of private lands. For instance, a landowner that wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to that timber.\(^{254}\) The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away. Under the common law, a landowner can grant a profit à prendre to anyone—there is no requirement that the holder of a profit à prendre own adjacent property.\(^{255}\)

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the

\(^{253}\) 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.

\(^{254}\) To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

\(^{255}\) Profits à prendre of this kind are called profits en gross.
land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone interferes with the profit à prendre.256

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

V. RMI LEGISLATION RELEVANT TO PRIVATE LANDS CONSERVATION

Although conservation easements have not been expressly authorized in the RMI, the Nitijela has enacted legislation that is of some relevance to the conservation of privately owned land. The details of such legislation are laid out below.

A. National Environmental Protection Act 1984

The National Environmental Protection Act 1984 establishes the National Environmental Protection Authority (Authority), whose objectives include:

- “to restore and maintain the quality of the environment;”

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256 Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner’s rights.
• to create “conditions under which mankind and nature can coexist in productive harmony;”
• “to prevent, as far as practicable, any degradation or impairment of the environment;”
• “to regulate individual and collective human activity in such manner as will ensure to the people [a] safe, healthful, productive, and aesthetically and culturally pleasing surroundings;” and
• “to preserve important . . . natural aspects of the nation’s culture and heritage.”

To accomplish these objectives, the Authority is vested with “all such powers as are necessary or convenient;” and the Authority may in consultation with any “person or organization in the [RMI] or abroad,” make regulations regarding:

• all drinking water;
• pollutants, chemicals, and hazardous waste; and
• “the preservation of . . . [all] aspects of the environment which, in the opinion of the Authority, require regulation.”

The Authority may also “acquire by purchase, lease, sublease, easement or otherwise, any land or interest in land . . . for the purpose of its own use, conservation or rehabilitation.” Significantly, the Authority may “obtain the advice and services of any person or organization,” including entities located “abroad,” when performing its functions. Lastly, the Authority is supposed “to report to the President, matters concerning the protection and management of the environment, and to advise the

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257 35 M.I.R.C. Ch. 1, § 19.
258 Id. at § 21(1).
259 Id. at § 21(2) (emphasis added) (The power of the Authority to act in consultation with foreign organizations opens the door for NGOs such as The Nature Conservancy.).
260 Id. at § 21(3)(a) (emphasis added).
261 Id. at § 21(3)(d) (emphasis added) (see parenthetical to note 259).
President as to the need for any new legislation or amendment to existing legislation concerning any aspect of the environment.\textsuperscript{262}

For the purposes of carrying out its duties generally or “for any [other] particular purpose,” the Authority may expend its own funds or borrowed monies.\textsuperscript{263} Where any money is borrowed—or received by grant, contribution, or gift—for a specific purpose or subject to conditions, “it may be expended only for that purpose or subject to those conditions.”\textsuperscript{264}

B. Coast Conservation Act 1988

Unfortunately, the extent to which the Coast Conservation Act 1988 has been implemented is very limited\textsuperscript{265}—mostly due to limited resources.\textsuperscript{266} However, according to one commentator, when the Act is given full effect it will be a “strong environmental statement.”\textsuperscript{267}

The Act gives administration and control of the “Coastal Zone”\textsuperscript{268} to the National Environmental Protection Authority.\textsuperscript{269} Although the Coastal Zone is narrow, this area covers much of the “usable and desirable” lands in the RMI.\textsuperscript{270} The Authority appoints a Director of Coast Conservation (Director),\textsuperscript{271} who “shall be responsible for the formulation and execution of schemes of work for coast conservation within the Coastal

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\textsuperscript{263} 35 M.I.R.C. Ch. 1, § 21(3)(f)-(g).
\textsuperscript{264} Id. at § 35(5).
\textsuperscript{265} RMI UNCCD Report at Section G(ii); Harding at 167.
\textsuperscript{266} Harding at 167.
\textsuperscript{267} Id.
\textsuperscript{268} The area laying within a limit of twenty-five feet landwards of the mean high water line and a limit of two hundred feet seawards of the mean low water line. Coast Conservation Act 1988, 35 M.I.R.C. Ch.4, § 2(c).
\textsuperscript{269} Id. at § 3.
\textsuperscript{270} Harding at 165.
\textsuperscript{271} 35 M.I.R.C. Ch. 4, § 4(1).
\end{flushleft}
Zones.” In the execution of his duties, the Director must “act in consultation with the respective landowners affected by the implementation of this Act.”

As soon as possible, the Director was to take “an inventory of all estuaries or wetland areas within the Coastal Zone with an indication of their significance as fisheries or wildlife habitat.” Within three years of the Act’s passage, the Director was to create a comprehensive Coastal Zone Management Plan (Plan) that was based on the inventories taken. The Plan was to include proposals dealing with “land use” and “the reservation of land or water in the Coastal Zone for certain uses, or for the prohibition of certain activities in certain areas of the Coastal Zone.”

The Authority may, on the recommendation of the Director, make regulations to give effect to the Plan or to restrict “any development activity within the Coastal Zone.” In addition, “no person shall engage in any development activity . . . within the Coastal Zone except under the authority of a permit issued . . . by the Director.” To receive a development permit, the proposed development activity must not “have any adverse effect on the stability, productivity and environmental quality of the Coastal Zone.” The Director may attach to any permit “such conditions as he may consider necessary for the proper management of the Coastal Zone,” and may subsequently vary

272 Id. at § 5(1)(a).
273 Id. at § 5(2).
274 Id. at § 6(1)(e).
275 Id. at § 7(1).
276 Id. at § 7(1)(b)(i).
277 Id. at § 7(1)(c).
278 Id. at § 7(6).
279 Id. at § 7(7).
280 Id. at § 10(b).
281 Id. at § 12.
these conditions or revoke the permit if it is necessary “for the proper management of the Coastal Zone.”

C. **Land Acquisition Act 1986**

Under the Land Acquisition Act 1986, the RMI government may acquire private land, or a “servitude” over private land, that is suitable for a public use. The Act defines “land” to include “any interest in, or any benefit to arise out of any land,” any “leasehold or other interest,” and “things attached to the earth.” A “servitude” is defined as “any right over any land and includes a right of way, right to draw water and similar rights over any land.” 

The definition of “public use” is left open for interpretation, but it may not include “a use primarily to generate profits or revenues and does not include a use not primarily providing a public service.”

Upon a decision that certain land is suitable for a public purpose, notice must be given and the landowners must have an opportunity to make written objections to the Secretary in charge of land matters. Where it is determined that the land should still be acquired, the Attorney-General must file an application in the High Court “praying for a declaration . . . that such taking of land for public use is lawful.” In making its decision, the High Court “shall have due regard for the unique place of land rights in the life and law of the [RMI].”

If the High Court determines that the taking of land is justified, all of the former interest holders shall be compensated with at least “reasonably

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282 Id. at § 14.
283 Land Acquisition Act 1986, 9 M.I.R.C. Ch. 2, § 5(1).
284 Id. at § 2(c).
285 Id at § 2(h).
286 Id. at § 2(f).
287 Id. at § 5.
288 Id. at § 6(1).
289 Id. at § 8(4).
equivalent land rights.” The Traditional Rights Court makes a decision as to whether the compensation offered by the High Court is just, and the High Court must give “substantial weight” to the traditional Rights Court opinion. Compensation may come in the form of an exchange for government land or, if available, the transfer of land with other private landowners.

VI. RECOMMENDED ACTIONS

Due to the traditional and unique system of land tenure in the RMI, the concept of conservation easements per se might be difficult to establish in this country. For them to become recognized, the rights of the Iroijlaplap, Iroijedrik where necessary, Alap, and Senior Dri Jerbal must all be considered beforehand. In the end, the method chosen to conserve private lands might be similar to a conservation easement, but not the same as in other countries and legal frameworks.

A. Enact conservation easement legislation

The most obvious way to establish the legal concept of a conservation easement in the RMI would be for the Nitijela to enact conservation easement legislation. Careful drafting would be required, however, due to the unique system of land ownership in the RMI. The UCEA could be helpful for use as a guiding tool, but any statute passed by the Nitijela would need to be custom-tailored for suitability in the RMI. For instance, any conservation easement could not conflict with or invalidate the customary law or traditional practices concerning land tenure. To make this more likely to succeed, the Nitijela could act in consultation with the Council of Iroij, or other experts on RMI

290 Id. at § 8(1).
291 Id. at § 8(3).
292 Id. at § 13(1).
293 The National Environmental Protection Act alludes to the idea, but it does not go far enough.
294 See RMI Constitution, Article X, § 1(1).
custom. In addition, the National Environmental Protection Authority may offer advice on how to draft the new legislation.\textsuperscript{295}

B. Develop conservation easement precedent

As discussed earlier, it appears that in certain situations the RMI courts will look to U.S. common law as expressed in the ALI Restatements in order to base their decisions on it. This would only be the case, however, where there is an absence of any controlling custom or statute in the RMI. It is unclear whether a conservation easement would conflict with any RMI custom, but the Restatement (Third) Property clearly recognizes and encourages conservation easements. To clarify this situation in the RMI, it could be beneficial to bring a “test” case before a RMI court.

To increase the chance that a RMI court will recognize and enforce a conservation easement, as strong of a foundation as possible should be laid. Several suggestions to lay a strong foundation are:

- if possible, to acquire a conservation easement on land that is not customarily owned;\textsuperscript{296}
- if it is not possible to acquire non-customary land, acquire a conservation easement with the consent of the Iroijlaplap, Iroijedrik where necessary, Alap, and Senior Dri Jerbal;\textsuperscript{297}
- to have the purchaser of the conservation easement be a citizen of the RMI or a corporation wholly owned by citizens of the RMI;\textsuperscript{298}
- to duly record the transaction with the Clerk of Court;\textsuperscript{299}

\textsuperscript{295} See P.L. 2002-55, 26(1).
\textsuperscript{296} “Most” land in the RMI is owned under custom so it might not be possible to do this. Land Issues in the Pacific at 45. If it is possible, the worry that a conservation easement conflicts with custom disappears.
\textsuperscript{297} This is required by the RMI Constitution, Article X, § 1(2).
\textsuperscript{298} RMI law limits land ownership to RMI citizens, 24 M.I.R.C. Ch. 1, § 13; but even though this requirement does not apply to some lesser interests, it might cause a RMI court to be more inclined to recognize the conservation easement.
\textsuperscript{299} This is required under 24 M.I.R.C. Ch. 1, § 18.
to acquire a conservation easement on a smaller sized parcel of land.\textsuperscript{300}
and

\begin{itemize}
  \item to acquire a conservation easement on land that is ecologically significant.\textsuperscript{301}
\end{itemize}

C. Acquire a leasehold interest for the purpose of conservation

Perhaps the best option in the RMI is to acquire a leasehold interest over ecologically important land. With the passage of the Marshall Islands Development Land Registration Authority Act 2000, the leasing of land is now a more realistic option. To fulfill the goal of conservation, however, land use limitations should be included in the lease agreement.

A drawback to this strategy is that in the RMI a lease agreement may not exceed a period of fifty years;\textsuperscript{302} but a “conservation leasehold” could still be a valuable tool because:

\begin{itemize}
  \item “[a] lease executed by a senior land interest holder is binding on his or her heirs, successors, assigns, or any one claiming an interest through him or her;”\textsuperscript{303} and
  \item the lease may be “guaranteed” by the Marshall Islands Development Land Registration Authority for the benefit of the third party.\textsuperscript{304}
\end{itemize}

In order to obtain an enforceable leasehold, care should be taken to acquire the interest from holders of an undisputed Certificate of Registration. If this is done, the lease is “deemed conclusively valid and enforceable in accordance with the terms of the lease.”\textsuperscript{305}

\textsuperscript{300} The less of a burden the conservation easement is to the economic potential of the land, the more inclined a RMI court might be to recognize the interest.

\textsuperscript{301} Again, a RMI court might be more inclined to recognize the conservation easement.

\textsuperscript{302} P.L. 2001-26, § 33.

\textsuperscript{303} Id. at § 31.

\textsuperscript{304} Id. at § 26.

\textsuperscript{305} Id. at § 23(1).
D. Utilize the National Environmental Protection Act

As discussed earlier, the National Environmental Protection Authority has the power to acquire easements for the purpose of conservation.\footnote{306}{306 M.I.R.C. Ch. 1, § 21(3)(a).} It may also advise the President as to the need for any new legislation.\footnote{307}{P.L. 2002-55, § 26(1).} Unfortunately, it does not appear that the Authority has taken either of these steps.\footnote{308}{See Harding at 164.}

A possible explanation for the failure to acquire easements might be a lack of resources. Under the Act, however, the Authority may accept monetary gifts and may consult with outside persons or organizations—domestic or abroad—in order to fulfill its duties and functions.\footnote{309}{309 M.I.R.C. Ch. 1, § 21(3)(d) and (g).} In this case, domestic or foreign organizations that are willing to make monetary contributions and consult with the Authority should be located. As a safeguard, money that is received by the Authority for a particular purpose—i.e., acquiring conservation easements—“may be expended only for that purpose.”\footnote{310}{Id. at § 35(5).}

E. Utilize the Coast Conservation Act

The extent to which the Coast Conservation Act has been implemented is limited;\footnote{311}{RMI UNCCD Report at Section G(ii); Harding at 167.} but since the Act is a “strong environmental statement” on paper,\footnote{312}{Id. at 167.} and because the Coastal Zone comprises much of the “usable and desirable” lands in the RMI,\footnote{313}{Id. at 165.} the implementation of the Act is important for the well-being of the RMI environment. Implementation would include taking an inventory of important natural areas within the Coastal Zone and the drafting of the Coastal Zone Management Plan, if these steps have not been completed already. In addition, the Director of Coast
Conservation may limit and attach conditions to development on private lands in the Coastal Zone through the issuance of permits.\textsuperscript{314}

\textbf{F. Utilize the Land Acquisition Act}

The extent to which the Land Acquisition Act has been utilized is not known. However, the Act has the potential to serve conservation purposes. Under the Act, “public use” may include a broad range of things except for uses “primarily to generate profits or revenues.”\textsuperscript{315} Presumably then, natural resource or wildlife conservation would qualify as a “public use.” In this case, the RMI government could locate private lands that are of ecological importance and exercise its authority to acquire title to the land or an interest in the land for the purpose of conservation.

\textbf{G. Establish “mo” reserves}

Lastly, it might be possible for mo reserves to be established for conservation purposes. At tradition, these areas were established by the Iroijlaplap so that heavily utilized reef or land areas could be replenished or conserved. At a recent Summit on the Socio-Economic aspects of Land Management,\textsuperscript{316} it was recommended that the traditional mo system be re-introduced as a reserve system to protect threatened resources.\textsuperscript{317} In this way, the traditional land system in the RMI would not be interfered with. Although the World Database on Protected Areas lists two mo protected areas in the RMI,\textsuperscript{318} little was discovered about the administration of these areas.

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\textsuperscript{314} 35 M.I.R.C. Ch. 4, §§ 7(6), 7(7), 12, and 14.
\textsuperscript{315} 9 M.I.R.C. Ch. 2, § 2(f).
\textsuperscript{316} The purpose of which was to provide input for a fifteen-year development strategy for the RMI.
\textsuperscript{317} RMI UNCCD Report at Section E.
\textsuperscript{318} World Database.
CONCLUSION

The likelihood of successfully introducing conservation easements into the RMI legal system is unclear. Custom and tradition are such major components of land ownership in the RMI that it might not be possible to accomplish the feat. However, certain statutory provisions—allowing easements to be acquired for conservation purposes and suggesting that the U.S. common law can be determinative—suggest that the RMI courts could potentially recognize conservation easements, or at least would embrace a somewhat similar concept. To clarify the matter, it is recommended that a solid “test” case be brought before a RMI court. In the interim, however, it appears that “conservation leaseholds” are a viable option in the RMI and this matter should be explored further.
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* All materials listed are available for review in the Appendix to this report unless it is marked with “**”.