

University of Colorado Law School

Colorado Law Scholarly Commons

Books, Reports, and Studies

Getches-Wilkinson Center for Natural
Resources, Energy, and the Environment

2004

Private Lands Conservation in the Federated States of Micronesia

Kevin Doran

University of Colorado Boulder. Natural Resources Law Center

Follow this and additional works at: https://scholar.law.colorado.edu/books_reports_studies



Part of the [Dispute Resolution and Arbitration Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Estates and Trusts Commons](#), [Indian and Aboriginal Law Commons](#), [Land Use Law Commons](#), [Legislation Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Tax Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Kevin Doran, Private Lands Conservation in the Federated States of Micronesia (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 2004).



William A. Wise Law Library
COLORADO **LAW**

UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

KEVIN DORAN, PRIVATE LANDS CONSERVATION IN THE
FEDERATED STATES OF MICRONESIA (Natural Res. Law Ctr.,
Univ. of Colo. Sch. of Law 2004).

Reproduced with permission of the Getches-Wilkinson
Center for Natural Resources, Energy, and the
Environment (formerly the Natural Resources Law
Center) at the University of Colorado Law School.

**AVAILABLE
ONLINE**

PRIVATE LANDS CONSERVATION IN THE FEDERATED STATES OF MICRONESIA

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

September 2004

Sponsored by The Nature Conservancy

Primary Author: Kevin Doran, NRLC Research Associate
dorank@colorado.edu

KVS
566
.D67
2004

Private Lands Conservation in the Federated States of Micronesia

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

September 2004

Primary Author: Kevin Doran, NRLC Research Associate
E-mail: dorank@colorado.edu

TABLE OF CONTENTS

| | |
|---------------------------------------------------------------|----|
| Brief Questions..... | 1 |
| Introduction..... | 4 |
| I. Relevant Facts..... | 4 |
| A. Chuuk State..... | 5 |
| B. Kosrae State..... | 6 |
| C. Pohnpei State..... | 7 |
| D. Yap State..... | 8 |
| II. Government and Legal Authorities..... | 9 |
| A. The FSM National Government..... | 9 |
| B. Legal Authority in the FSM..... | 10 |
| 1. The FSM Constitution..... | 10 |
| 2. Chuuk State Constitution..... | 11 |
| 3. Kosrae State Constitution..... | 14 |
| 4. Pohnpei State Constitution..... | 16 |
| 5. Yap State Constitution..... | 17 |
| 6. TT Code and the Modern Legislative Framework..... | 19 |
| 7. Customary Law and Tradition..... | 20 |
| 8. The Common Law..... | 20 |
| III. Traditional and Contemporary Land Tenure in the FSM..... | 21 |
| IV. Private Land Administration..... | 24 |
| A. Finality of Title in the FSM..... | 24 |
| B. Land Registration..... | 26 |
| 1. Chuuk State..... | 26 |
| 2. Kosrae State..... | 30 |
| 3. Pohnpei State..... | 33 |
| 4. Yap State..... | 37 |
| C. Ownership of Land..... | 38 |
| 1. Chuuk State..... | 38 |
| 2. Kosrae State..... | 39 |
| 3. Pohnpei State..... | 39 |
| 4. Yap State..... | 40 |
| D. Lease and Use Rights..... | 42 |
| 1. Chuuk State..... | 42 |
| 2. Kosrae State..... | 42 |
| 3. Pohnpei State..... | 42 |
| 4. Yap State..... | 43 |
| E. Transfer of Land..... | 43 |
| 1. Chuuk State..... | 43 |
| 2. Kosrae State..... | 45 |
| 3. Pohnpei State..... | 47 |
| 4. Yap State..... | 48 |
| F. Settling Land Disputes..... | 48 |
| 1. Chuuk State..... | 48 |
| 2. Kosrae State..... | 49 |
| 3. Pohnpei State..... | 50 |
| 4. Yap State..... | 51 |
| IV. Conservation Easements on Private Lands..... | 52 |
| A. Introduction to Conservation Easements..... | 52 |
| 1. Appurtenant Conservation Easements..... | 53 |
| 2. Conservation Easements In Gross..... | 56 |
| 3. Tax Incentives for Conservation Easements..... | 57 |
| 4. Uniform Conservation Easement Act..... | 58 |
| B. Conservation Easements in the FSM..... | 59 |

| | |
|---------------------------------------------------------------------|----|
| 1. Restatement (Third) of Property | 61 |
| V. Other Potential Legal Tools | 63 |
| A. Leases, “Leaseback” Agreements, and Reserved Life Interests..... | 63 |
| B. Real Covenants | 64 |
| C. Equitable Servitudes | 65 |
| D. Purchased Development Rights | 67 |
| E. Profits à Prendre..... | 68 |
| Bibliography..... | 71 |
| Appendix I..... | 73 |

BRIEF QUESTIONS

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

The research conducted for this report did not identify any legislation—at either the national, state or local levels of government—specifically designed to achieve or facilitate the goal of private lands conservation. However, some legislation has been enacted to achieve—in part—the purpose of environmental protection on public lands.¹ This legislation falls primarily within the province of state governments, rather than the national government. For instance, in the State of Pohnpei the Forest Management Act of 1979 authorizes the legislature to set apart government lands as Forest Reserves in order to maximize the public benefits of wildlife, water, timber, forage—and also to set aside Watershed Reserves on public land. Additionally, the Pohnpei Watershed Forest Reserve and Mangrove Protection Act of 1987 authorizes the State Government to protect watershed forests and conserve mangrove forests in Pohnpei.

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

Easements appurtenant and other land use restrictions in general, such as rights of way, are legally recognized in the FSM. Conservation easements, however, are not expressly recognized. In addition, the leasing of land is allowed in the FSM—albeit with restrictions for non-FSM citizens. No indication as to whether real covenants, equitable servitudes or easements in gross are recognized in the FSM was found in any statute or court opinion.

¹ A general listing of international agreements, national legislation, and state legislation relevant to environmental and conservation concerns is contained in an Appendix included with this report.

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 FSM?

In addition to above legal tools, the common law tradition adhered to by the FSM makes it possible to assert the legal validity of other tools conventionally recognized within this tradition. For instance, under jurisprudence established by the FSM Supreme Court, the common law of the United States is an appropriate source of judicial guidance for issues unresolved by statutes, customs and traditions in the FSM.² The common law of the United States recognizes the validity of an interest called a profit à prendre—an interest which has the potential to facilitate private lands conservation.³ In Iriarte v. Etscheit, a case decided by the FSM Supreme Court, the appellants asserted they had acquired a profit à prendre interest in the land in question.⁴ In holding that the appellants had not satisfied the elements of a valid profit à prendre interest, the court noted that “our comments on a profit à prendre do not constitute our recognition of such a right. . . . We have, based on the appellants’ legal authorities, only concluded that such an interest was not established in this case.”⁵ The relevance of this case is in the following point: there are interests which are recognized by U.S. common law—a tradition generally adhered to by the FSM—which have yet to receive formal judicial recognition within the FSM. While these interests have the potential to facilitate private lands conservation, judicial protection of the interest would depend upon their receiving such recognition.

The enactment of a Conservation Easement Act—one largely modeled on the UCEA—is also a possibility in the FSM. Another possibility would be for conservationists to acquire a conservation easement from a private landowner and attempt to establish favorable precedent for

² Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 140 (Pon. 1985).

³ The applicability of profits à prendre to private lands conservation in the FSM is discussed in more detail at Section V(E).

⁴ Iriarte v. Etscheit, 8 FSM Intrm. 231 (App. 1998).

⁵ *Id.* at 240.

conservation easements in a FSM court. The FSM courts look to the ALI Restatements for guidance in many situations, and the Restatement (Third) Property explicitly validates the conservation easement in gross; so it is possible, and perhaps even likely, that under ideal circumstances an FSM court would rule favorably regarding a conservation easement. An important caveat, however, is that such a favorable ruling would likely depend on convincing the court that the conservation easement (or other interest) is not conflict with any traditions or customs relevant to land tenure.

INTRODUCTION

This report seeks to provide a basic description of legal instruments, processes and institutions relevant to private lands conservation currently in place within the Federated States of Micronesia (FSM). The report also assesses the feasibility of introducing a number of legal tools into the FSM legal system for the purpose of achieving private lands conservation, with particular emphasis being given to the potential use of conservation easements. Section I of the report provides relevant background information on the FSM and the four states that comprise the federation: Chuuk, Pohnpei, Kosrae and Yap. Section II details the governmental structure and legal authorities of the FSM and its constituent states. Section III provides an overview of various laws and procedures relevant to the administration of private land in place throughout the FSM. The topical sweep of this section includes the following: finality of title, land registration, ownership of land, lease and use rights, transfer of land, and settlement of land disputes. Section IV introduces the concept of a conservation easement in general, and describes its potential applicability to the FSM. Section V describes several other legal tools that have the potential to facilitate the goal of private lands conservation within the FSM.

I. RELEVANT FACTS

The FSM consist of 607 islands with a total land area of 436 square miles. However, while the country's total land area is relatively small, the islands that make up the FSM span a territory that encompasses more than 1 million square miles of ocean. The FSM has been a free and sovereign nation since the Compact of Free Association between the United States and FSM (Compact) came into effect in 1986. In 1991 the General Assembly of the United Nations adopted a Resolution admitting FSM as a member nation. The FSM consists of four highly

autonomous states—each possessing their own systems of government and legislation—and an overarching national system.

FSM Geographical Features: State Comparative Data, 2000–2001

| Categories | Chuuk | Kosrae | Pohnpei | Yap | FSM |
|----------------------------------|--------|--------|---------|--------|---------|
| Population | 53,595 | 7,686 | 34,486 | 11,241 | 107,008 |
| % of Total FSM Population | 50.1% | 7.2% | 32.2% | 10.5% | 100% |
| Population Density, Square Miles | 1,094 | 179 | 261 | 244 | 395 |
| Total Land Area, Square Miles | 49 | 42 | 132.2 | 46 | 270.6 |
| Dry Land Area, Square Miles | 16.7 | 42.3 | 67.4 | 38.6 | 165 |
| Public Land | 0.2 | 27.2 | 24.4 | 0.9 | 52.7 |
| Private Land | 16.4 | 15 | 42.8 | 37.7 | 111.9 |
| Commercial Land | 0.1 | 0.1 | 0.2 | 0.1 | 0.5 |
| Lagoon, Square Miles | 823 | --- | 297 | 405 | 2776 |

Source: FSM 2000 Population and Housing Census Report (2002); FSM Division of Statistics.

The dynamic interaction between modern and traditional authorities presents a unique set of challenges to the land tenure systems in place throughout the FSM today. Each of the four states that comprise the FSM—Chuuk, Pohnpei, Kosrae and Yap—has a different heritage of customary land tenure; however, commonalities nonetheless exist throughout this diversity. One relevant example is the strong role that traditional extended family and clan systems have with respect to land tenure systems.⁶

A. Chuuk State

Chuuk has the largest population of any state in the FSM—over 53,500 people in 2000. This population is dispersed over relatively small islands that are scattered over a large expanse of ocean.⁷ Throughout the State, western land registration procedures and land tenure practices are becoming increasingly recognized; however, customary land tenure systems still strongly influence a majority of the lands in Chuuk. Customary rights of ownership, use, inheritance and

⁶ Economic Management Policy Advisory Team (EMPAT), Working Paper No. 6: Economic Use of Land in the FSM 2 (1996) (hereinafter EMPAT). Sections of this report rely heavily on the information contained in EMPAT. The EMPAT paper is contained in an Appendix to this report.

⁷ *Id.* at 10.

transfer are still followed in many of the outer-island communities.⁸ Disputes over title determinations and land registration also seriously complicate the efficient application of western land tenure practices.⁹

The introduction of a money economy has also influenced the dynamic between customary and western land tenure practices. As a result of the money economy, many lineage groups have fragmented into household units. This development has “diminished the importance of the customary land tenure system and has emphasized the need for individual registration and ownership of real property.”¹⁰

B. Kosrae State

Kosrae is the eastern most state of the FSM and is relatively isolated from the other states. It is the only State in the FSM with no outer islands. Kosrae is the second largest island in the FSM and has a total land area of 43.2 square miles.¹¹ The majority of the islands consist of interior uplands covered with lush tropical foliage. High rainfall and steep mountain slopes make the lands of the interior difficult to access—thus significantly reducing their potential for agriculture and settlement potential.¹² Kosrae has a relatively small population. According to one report, “[a]lmost everyone in the State knows each other, the history, language and custom and tradition are all the same.”¹³ This environment has “tended to make the Kosrae land tenure system less rigid, with less rules and regulations, and less difficulties of ownership conflict and dispute settlement.”¹⁴

⁸ *Id.* at 11.

⁹ *Id.* at 10-11.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 37.

¹² *Id.*

¹³ *Id.* at 36.

¹⁴ *Id.*

C. Pohnpei State

Composed of a main island and five inhabited outer atoll islands, Pohnpei State is state with the largest land area in the FSM.¹⁵ It is also the site of the FSM National Capital in Palikir. Pohnpei is unique in that the sale of real property is forbidden by law without legislative approval. However, land transfers by gift—*pengsahp*, which translates as “giving without condition”—is a common occurrence.¹⁶ Nonetheless, despite the frequency of transfers by gift, the legal validity of such transfers is very much an open question. Investors should be aware that judicial approbation of such transfers has yet to occur.¹⁷

Approximately 60 percent of the total land area of Pohnpei had been declared “public lands.”¹⁸ As a result of this large public lands designation, Pohnpei’s legal system for administering land is more developed than other states of the FSM. Usage and disposition of large public land tracts is a prominent political issue in Pohnpei, and has been the primary “focus of much of the legislative and associated legal activity regarding land tenure.”¹⁹ An additional unique aspect of land tenure in Pohnpei is the large private landholdings.²⁰ In Kitti Municipality the Nanpei Estate owns some 5,000 acres; and the Etscheit/Adams Estates in Nett Municipality encompasses lands that reach from the upland watershed to the seashore.²¹

The Constitution of Pohnpei limits ownership of land to citizens. However, non-citizen individuals and businesses can obtain land on the basis of long-term leases.

¹⁵ *Id.* at 63.

¹⁶ *Id.* at 74.

¹⁷ *Id.*

¹⁸ *Id.* at 62.

¹⁹ *Id.* at 84.

²⁰ *Id.* at 62.

²¹ *Id.*

D. Yap State

The State of Yap consists of 16 units of island groups and single islands scattered over an area that encompasses some 2,400 square miles of the Western Pacific Ocean.²² Both the land and people of Yap are conventionally divided into two provinces: (1) the Wa’ab island group (Yap Proper)—a formation of high islands comprising 81 percent of the State’s total land mass; and (2) the Islands of Remathau (or Neighboring Islands).²³ Ten municipalities make up Yaps primary political subdivisions: Rumung, Maap, Gagil, Tomil, Fanif, Weloy, Dalipebinaw, Rull, Kanifay, and Gilman. Yap also contains 129 designated villages.²⁴

In Yap, traditional and modern systems for the governance of land have interacted to form an exceedingly complex land tenure system. In addition to this complexity, several other attributes of the Yapese land tenure system deserve mention:

- (a) The traditional and prevailing Yapese systems of land tenure are “dynamic and fluid.”²⁵ Transfers or exchanges of land frequently occurs “both within and among Yapese families, clans, villages and municipalities.”²⁶
- (b) While diminishing in power, traditional authority over land tenure still exerts a strong influence on land use, transfer and ownership rights.²⁷ However, such western procedures as the cadastral survey, mapping, public registration and issuance of “ownership papers” or titles are increasingly recognized as offering the greater security of ownership, “and of facilitating a rational and fair succession and inheritance of family land.”²⁸
- (c) Virtually all Yapese lands are privately owned with “public lands consisting of 0.4 to 0.6 percent of the land area of Yap Proper (about

²² *Id.* at 99.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 98.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

463 acres).²⁹ Private lands on Yap have not, for the part, been mapped, surveyed or registered.³⁰

II. GOVERNMENT AND LEGAL AUTHORITIES

A. The FSM National Government

Similar to the governmental structure imposed by the U.S. Constitution, the FSM Constitution provides for three separate branches of government at the national level—the executive, legislative and judicial branches. However, unlike the U.S. governmental system, the FSM Constitution delegates authority over most major governmental functions—excluding the conduct of foreign affairs and defense—to the State governments. The ownership of land in FSM by non-citizens is constitutionally prohibited.³¹

The Congress of the FSM is unicameral with fourteen senators, one from each state elected to a four-year term, and ten who serve two-year terms and whose seats are apportioned by population. The FSM Congress elects the President and Vice President from among the four-year Senators, and the vacant senatorial seats are then filled in special elections.³² The FSM Supreme Court—currently comprised of three Justices who sit in trial and appellate Divisions—heads the Judicial Branch of the National Government. At this time there are no other National courts. Justices are nominated by the President for a lifetime appointment and confirmed by the Congress. The State governments under their respective constitutions are structurally similar, all having three branches—executive, legislative and judicial.

²⁹ *Id.*

³⁰ *Id.*

³¹ FSM Constit. art. XIII, § 4.

³² U.S. Department of the Interior, Office of Insular Affairs, A Report on the State of the Islands 70 (1999).

B. Legal Authority in the FSM

The governmental system of the FSM is based primarily upon the following legal authorities: (1) national, state and municipal constitutions; (2) acts of national, state, municipal and community-based legislative bodies; (3) customary laws and tradition; (4) adapted and “holdover” Trust Territory (TT) laws—i.e., those which are not inconsistent with the Constitution or laws of the national and state governments, or with Micronesian customs and traditions; and (5) principles of the common law not inconsistent with the above.

1. The FSM Constitution

The FSM Constitution is the “supreme law of the Federated States of Micronesia.”³³ The Constitution contains a Declaration of Rights similar to the U.S. Bill of Rights, specifying basic standards of human rights consistent with international norms.³⁴ It also contains a provision protecting traditional rights.³⁵ The Constitution stipulates that a “power not expressly delegated to the national government or prohibited to the states is a state power.”³⁶ The FSM Supreme Court, however, has observed this provision holds “unless the subject is ‘of such an indisputably national character as to be beyond the power of a state to control.’”³⁷

The FSM Constitution divides sovereign ownership between the FSM and the state governments by vesting the FSM Congress with the power “to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines” and vesting sovereignty over the territorial sea in the state governments.³⁸

³³ FSM Const. art. II, § 1.

³⁴ FSM Const. art. IV.

³⁵ FSM Const. art. V.

³⁶ FSM Const. art. VIII, § 2.

³⁷ *In re Nahnsen*, 1 FSM Intrm. 97, 107 (Pon. 1982) (quoting FSM Const. art. VIII, § 1).

³⁸ FSM Const. art. IX, § 2(m).

The FSM Constitution prohibits non-citizens from acquiring title to land or waters in the FSM; additionally, lease agreements for the use of land for an indefinite term by a non-citizen, a corporation not wholly owned by citizens, or any government, is prohibited.³⁹ For the most part, however, land issues are conspicuously absent from the FSM constitution—a fact that cedes almost total authority over land to the individual states. A report issued by the Micronesian Constitutional Convention’s Committee on Governmental Functions notes that the “bulk of the power and legislative authority of government resides in the states. Most of these powers are reserved exclusively to the states, but some may be exercised concurrently by the national government.” Referring to this report the FSM Supreme Court observed that it “plainly confirms that regulation of inheritance and land were to be state powers.”⁴⁰ Thus, under the national Constitution state governments essentially have exclusive power to deal with such local issues as land, the environment and conservation within their respective jurisdiction—including the territorial sea, lagoons and rivers.⁴¹

2. *Chuuk State Constitution*⁴²

A number of provisions in the Chuuk State Constitution directly reference land tenure issues. These references deal primarily with the government’s right of eminent domain, support for traditional authority of land tenure, the geographical extent of state or municipal sovereignty and taxation of land.

Article I, § 1. This Section delineates the geographical territory of the State of Chuuk. The description is quite broad and includes any area that can be named by a Chuukese name, and lands that are or have been Chuukese by historic right, custom, or legal title. The Section extends the

³⁹ FSM Const. art. XIII, §§ 4-5 (as amended in 1991).

⁴⁰ In re Nahnsen, at 107; II J of Micro. Con. Con. 814; SCREP No. 33 (Oct. 10, 1975).

⁴¹ John R. Haglelgam, The FSM Constitution and the 2001 Constitutional Convention; see also, Kapas v. Church of Latter Day Saints, 6 FSM Intrm. 56, 60 (App. 1992) (noting that a strong presumption exists under FSM law for deferring land matters to local land authorities).

⁴² The Chuuk State Constitution took effect on October 1, 1989.

State marine space to 200 nautical miles, and claims all rights to seabed, subsoil, water column, insular and continental shelves, and airspace over land and waters.

This section may be in conflict with FSM constitution on sovereignty of waters extending from 12 miles to 200 miles for shorelines and jurisdiction of resources in these areas.⁴³

Article IV, § 4. This Section provides recognition for traditional rights over reefs, tidelands, and other submerged lands, including their water columns, and successors rights thereto. It also authorizes the State legislature to regulate their “reasonable use.”

This Section strengthens customary land use practices in marine areas. The Section is also unusual in that it does not reference dry land areas. Sections 1 and 2 of this Article give authority to Chuukese custom and tradition, as well as to the traditional leadership.⁴⁴

Article VII, § 3 (b). This Section accords the trial division of the State Supreme Court concurrent original jurisdiction with other courts to try land cases.⁴⁵

Article VIII, § 8. This Section stipulates that “[n]o government may levy a tax on real property.”

Article XI, § 2. This Section deals with the issue of eminent domain and compensation for land appropriated by the government. The Section states that the “power to take an interest in land may only be exercised by the State Government for a specified purpose of general public interest, as prescribed by statute. Negotiations with the owner for voluntary lease, sale, or exchange shall be fully exhausted and just compensation shall be fully tendered before a taking may occur.”

The Section also provides that “[u]pon the termination of the public use for which an interest in land is involuntarily acquired, the State Government shall return and quit claim the land to the owner or the owner’s successor.”⁴⁶

Article XIII, § 4. This section accords municipal governments jurisdiction over the sea area within the surrounding reefs of the islands which are

⁴³ EMPAT, at 27.

⁴⁴ *Id.* at 26.

⁴⁵ Except for those matters which fall under the exclusive jurisdiction of the FSM Supreme Court, which are only cases of diversity of citizenship.

⁴⁶ The omitted portion of this Section reads as follows: “The Legislature shall provide for access to the courts to ensure the good faith of the negotiations, the reasonable necessity of the acquisition, and the adequacy of the compensation tendered.” Chuuk State Constit., art. XI, § 2.

included within the municipality. Utilization of lagoon areas anywhere in Chuuk for extractive, recreational, or other exploitive purposes must have municipal approval. The section also notes that the powers and functions of the municipality with respect to its local affairs and government are *superior* to statutory law. What implications this land tenure issues is unclear.⁴⁷

There are a number provisions of the Chuuk State Constitution that indirectly affect land tenure. Most of these references bolster customary land tenure practices. In various ways, these references also influence the land tenure on Chuuk by limiting land use activities identified as environmentally harmful.

Article IV, §§ 1–2. These sections strongly support traditional and customary rights to the extent that even the bill of rights (Article III) may be compromised for the protection of Chuukese custom and tradition where a compelling social purpose is evidenced. While such Constitutional support for traditional rights is emphasized, in matters of land tenure there is a recognition of security and authority of land ownership by registration; as well as its attendant survey, mapping and documentation.

Article VII, § 14. This Section also supports the traditional culture of Chuuk requiring court decisions to be consistent with the Constitution, local traditions and customs, and the social and geographical configuration of the State.

Article XI, § 1. This Section provides a Constitutional mandate for the establishment of an independent state agency vested with the responsibility for environmental matters, and requires that the legislature provide by law for the development and enforcement of standards of environmental quality.

Article XIII, § 5. This Section requires each municipality to adopt its own constitution within limits prescribed by the State Constitution and by general law. The Section also states that the “powers and functions of a municipality with respect to its local affairs and government are superior to statutory law.”

There are some 40 municipalities in Chuuk. It may thus be necessary to review the municipal constitutions in order to determine and clarify land tenure issues within the State.

⁴⁷ EMPAT, at 28.

3. *Kosrae State Constitution*⁴⁸

The Kosrae State Constitution reflects the relatively informal framework of Kosrae’s prevailing customary land tenure system. The Kosrae Constitution directly references land tenure issues in Article IX, *Taxation and Revenue Sharing* (as amended), and in Article XI, *Land and the Environment*.

Article II, § 3. This Section states that any “conveyance of land from a parent or parents to a child or children, may be subject to such conditions as the parent or parents deem appropriate, provided, that such conditions are in writing at the time of conveyance and duly reflected in the certificate of title.”

Article IX, § 3. This Section regards tax exemptions for certain entities. The Section exempts “[r]eligious activities of churches, non-profit activities of non-profit organizations and land within the State, and property of the State Government and municipal governments” from taxation.”

Article XI, § 1. This Section iterates the right of an individual to “a healthful, clean, and stable environment.” The Section goes on to state that while it provides for the “orderly development and use of natural resources, the State Government shall by law protect the State’s environment, ecology, and natural resources from impairment in the Public Interest.”⁴⁹

Article XI, § 3. This Section provides that the “use of real property shall in the public interest be regulated by law to assure public health, community well-being, the orderly and economical use of land, preservation of places of cultural or historic value, and island beauty.”

Article XI, § 4. Under the terms of this Section, the “waters, land, and other natural resources within the marine space of the State are public property, the use of which the State Government shall regulate by law in

⁴⁸ The Kosrae Constitution took effect on January 11, 1984. The Kosrae Constitution contains a provision protecting Kosraean cultural heritage by authorizing the State Government to protect the State’s traditions as may be required by the public interest. Any stated rights may be superceded “when a tradition protected by statute provides to the contrary.” The Constitution also stipulates that court decisions “shall be consistent with this Constitution, State traditions and customs, and the social and geographical configuration of the State.”

⁴⁹ The emphasis on protection of natural land resources is a unique feature of the Constitution. This emphasis has made it possible for Kosrae to enact an island-wide land use program supported by law. *See*, Kosrae State Land Use Plan; EMPAT, at 50.

the public interest, subject to the right of the owner of land abutting the marine space to fill in and construct on or over the marine space. . . .”⁵⁰

Article XI, § 5. This Section deals with the issue of eminent domain and compensation for land appropriated by the government. The Section authorizes the State Government to “acquire interests in private land for a public purpose without the consent of the interested parties.” Such an acquisition may occur upon “upon payment of fair compensation and the State Government’s showing that the land and the interest are highly suited to their intended use, that it has made a good faith effort to gain the consent of the interested parties, and that it has made every reasonable effort to avoid substantial hardship to the interested parties in consideration of their personal circumstances.”⁵¹

Article XI, § 6. This Section designates rivers and streams as public property, and authorizes the State Government to regulate their use in the public interest.

Article XI, § 7. This Section limits ownership of land to a specified class of individuals. The Section states that “[o]nly a person who is a citizen of the Federated States of Micronesia and Kosraean by descent, including by adoption, or a corporation which is wholly owned by such persons, may acquire title to land in the State. Acquisition of title by persons whose status as Kosraean by descent is based solely on adoption shall be within limits set by law. Acquisition or utilization of interests in real property may be restricted or regulated by law.”⁵²

Article XI, § 8. This Section states that “[n]o certificate of title shall be issued to the State Government for land consisting of the road and adjacent areas except where the State has actual title. A certificate of title previously issued to the State for such land is voidable upon application by the landowner holding title; provided that any prior use agreement between the State Government and the private landowner shall be reinstated according to its terms until modified.”

⁵⁰ The remainder of the Section reads: “provided, the right may be limited by other provisions of this article and any use of the waters, land and other natural resources within the marine space of the municipality by the State Government is subject to prior consultation between the State Government and the municipality where the marine space is situated. Consultation procedures shall be provided by statute.”

⁵¹ The Section continues to state that “[p]rocedures for the acquisition shall be prescribed by law and shall include the payment by the State Government to the interested parties of the attorney costs and reasonable attorney’s fees incurred in connection with the acquisition proceedings.”

This is the right of eminent domain recognized in the FSM national constitution. Legislation identifying the procedures the government must follow to acquire public land are outlined in Title II (Land and Environment), Part 1. Land, Chapter 1. Public Land, of the Kosrae State Code. *See also* Palik v. Kosrae, 5 FSM Intrm. 147, 152-54 (Kos. S. Ct. Tr. 1991).

⁵² This Section echoes the non-alienation of land found in the FSM Constitution. However, limiting by constitution the acquisition of land in Kosrae to Kosraeans only may be in conflict with the FSM Constitution.

Article XI, § 9. This Section requires the State Government to transfer “all public land above the Japanese line” to “the original owners, their heirs or assigns” in process that “shall be as prescribed by law.”⁵³

Article VIII, § 3. Under this Section, a “municipality has powers and functions relating to its local affairs, property and government that are not denied or limited by law.” Pursuant to this Section, municipalities may be holders of real property, and may provide a forum for arbitration and resolution of land disputes.⁵⁴

4. Pohnpei State Constitution

In March 1984 the Pohnpei State Constitutional Convention completed the State Constitution which was ratified by popular vote on November 8, 1986. The Preamble to the Constitution iterates a pledge to protect and maintain the heritage of each of the islands of Pohnpei. The Constitution requires the government of Pohnpei to protect the customs and traditions of Pohnpei—and allows statutes to be enacted to uphold custom. However, in the event that a statute is challenged as being in violation of other Constitutional rights, “it shall be upheld upon the Pohnpei Supreme Court’s determination that the statute has reasonably protected an existing, regularly practiced custom or tradition.”⁵⁵

Article I, §§ 1–3. These sections identify the territorial jurisdiction of the State of Pohnpei and set for the procedures for the acquisition of new territory.

Article XII, § 1. This Section states that “[n]o lease of land, except from the Government or as provided in Section 4 of this Article, may exceed twenty-five years. The right for option to renew and other protections shall be provided by statute.”

Article XII, § 2. This Section limits ownership of land to a specified class of individuals. The Section states that “[t]he acquisition of permanent interest in real property shall be restricted to Ponapean citizens who are

⁵³ No statute has been enacted that sets forth the procedures to be used to devolve the public lands above the Japanese Line to private landowners. The Japanese line is a marked boundary identifying the mountainside boundary of private property. All interior lands, above those used by private landholders were declared public lands by the Japanese. Current surveying of private and public property lines do not go above the Japanese line. EMPAT, at 53.

⁵⁴ See EMPAT, at 52.

⁵⁵ Environmental Law in the South Pacific 3.2 (1996) (hereinafter ELSP).

also pwilidak of Pohnpei, as specified under Article 3 of this Constitution.”

Article XII, § 3. This Section prohibits any agreement that “grants the user of land the unilateral authority to continue use for an indefinite term”

Article XII, § 4. This Section authorizes the legislature to provide, “by appropriate legislation procedures to permit leases and other uses of land in excess of the limits prescribed in Section 1 of this Article.”

Article XII, § 5. This Section prohibits the sale of land, “except as authorized by statute.”⁵⁶

Article XII, § 6. This Section deals with the issue of eminent domain and compensation for land appropriated by the government. The Section authorizes the State Government to acquire interests in land for public purposes.⁵⁷

Article XII, § 7(6). This Section provides that all administrative functions relating to land—to the extent that it is practicable—shall be under a single office.⁵⁸

Article 14, §§ 2–3. These sections give authority for local governments to establish their own constitutions, and to exercise all authority not prohibited.⁵⁹

5. *Yap State Constitution*⁶⁰

With respect to land tenure, the Yap State Constitution recognizes the authority of traditions and custom, establishment of the Councils of Traditional Leaders,⁶¹ prohibits

⁵⁶ There are no records of land being sold since the ratification of the State Constitution in 1986. Land is transferred by *pengsahp*, or “deed of gift.” EMPAT, at 85.

⁵⁷ The Section goes on to state, “No taking shall occur until after consultation with the local government concerned, good-faith negotiation with the owners of such interests, which shall include the offer to exchange the land for land of comparable value, or a payment of just compensation.” *See also* Damarlane v. United States, 7 FSM Intrm. 56, 59-60 (Pon. S. Ct. App. 1995) (holding that under state law owners of land adjacent to a lagoon do not have sufficient property rights in the reef and the lagoon so as to entitle them to relief for damage to the reef caused by unauthorized dredging activity in the lagoon near their land).

⁵⁸ *See also* Etpison v. Perman, 1 FSM Intrm. 405, 420-21 (Pon. 1984) (holding the State Constitution and equity require decisions by the Public Lands Authority to be made openly and after providing adequate opportunity for participation by the public and interested parties).

⁵⁹ Article 14 establishes 11 local governments: Kapingamarangi, Kitti, Kolonia Town, Madolenihmw, Mwokil, Net, Ngetik, Nukuoro, Pingelap, Sokehs, and Uh.

⁶⁰ Yap State Constitution came into effect on December 24, 1982.

ownership of land by non-FSM citizens, and provides for the possibility of 50-year leases involving foreign interest—if approved by the State Legislature.

Article II, § 11. This Section deals with the issue of eminent domain and compensation for land appropriated by the government. The Section authorizes the legislature to “provide by general law for the taking of private property for a public purpose.” The Section requires that such a general law “provide for just compensation, good faith negotiations for lease or purchase and consultation with appropriate local government prior to the taking, and the manner of taking.”

Article IX, §§ 3–4. Section 3 exempts government property from taxation. Section 4 reserves taxing power to the State Government except as delegated to the local governments by the legislature. This Section also stipulates that the State government may not tax real property; however, the Constitution is silent with respect to the issue of municipal taxes on property.

Article XIII, § 2. This Section states that an “agreement for the use of land where a party is not a citizen of the Federated States of Micronesia or a corporation not wholly owned by such citizens shall not exceed a term of fifty years. The Legislature may prescribe a lesser term.”

Article XIII, § 3. This Section requires the title to land to be “acquired only in a manner consistent with traditions and customs.”

Article XIII, § 5. This Section provides recognition for “traditional rights and ownership of natural resources and areas within the marine space of the State, within and beyond 12 miles from island baselines.” The Section also states that “[n]o action maybe taken to impair these traditional rights and ownership, except the State Government may provide for the conservation and protection of natural resources within the marine space of the State within 12 miles from island baselines.”⁶²

Article XIV, § 8. This section identifies a citizen of the FSM domiciled in Yap as a citizen of Yap State. This provision also allows for land ownership in Yap by citizens of the FSM.

⁶¹ The Councils of Pilung and Tamol may disapprove a bill by returning the proposed law to the legislature for appropriate amendment within 30 days. Traditional leadership is thus accorded a powerful means by which to influence governance in matters of custom. ELSP, at 3.2.

⁶² This recognition of traditional rights of ownership of natural resources within the marine space of the State, within and beyond 12 miles from island baselines conflicts with the FSM Constitution which gives marine resource rights (mineral rights) to the FSM National Government. EMPAT, at 115.

Article III, §§ 1–2. Section 1 creates a Council of Pilung and a Council of Tamol which is the final authority on traditions and custom including land tenure. Section 2 formally recognizes traditions and customs in providing a system of law, and provides that nothing in the Yap State Constitution shall be construed to limit or invalidate any recognized tradition or custom.

Article XIII, § 1. This Section gives authority to the State Government to promote conservation and development of agricultural, marine, mineral, forest, water, land and other natural resources.

Article XV, §§ 1–4. These sections provide for succession of law from the TTPI Administration. However, Section 3 carves out the following exception: “None of the decisional law developed by the High Court of the Trust Territory of the Pacific Islands shall have the force of stare decisis in the adjudication of any case of controversy in the State Court.”

Article XV, § 5. This Section retains the integrity of the political subdivisions of the Chartered State Government and allows continued exercise of all powers and functions existing under the law.

6. *TT Code and the Modern Legislative Framework*

The U.S. began to establish a modern legal framework for land tenure in all TT Districts during the 1960’s with codification of Title 57 and Title 67 of the TT Code. Title 57 and Title 67 provide the framework for land tenure law and for the organization, administration and procedural systems of governmental land offices in the FSM today.

Under a “transition clause” in the FSM Constitution, the Code of the Federated States of Micronesia repeals a provision of the TT Code only if the statutory provisions in question are inconsistent or in conflict.⁶³ Moreover, even if a certain provision of the TT Code is implicitly or expressly repealed, other provisions of that same statute may remain intact if the statute (minus the deleted provision) is nonetheless “self-sustaining and capable of separate enforcement.”⁶⁴ With respect to TT laws relating to the “ownership, use, inheritance, and transfer of land,” the FSM Code stipulates that any such laws “in effect in any part of the Trust

⁶³ FSM Const. art. XV, § 1.

⁶⁴ FSM v. Boaz (II), 1 FSM Intrm. 28, 29 (Pon. 1981); FSM v. Albert, 1 FSM Intrm. 14, 16 (Pon. 1981).

Territory on December 1, 1941, shall remain in full force and effect to the extent that it has been or may hereafter be changed by express written enactment made under authority of the Trust Territory.”⁶⁵

At the state level, TT statutes applicable to the states have been incorporated into the laws of the states—regardless of whether they have been published in the FSM Code. Such holdover TT statutes retain their legal authority as laws of the states until superseded.⁶⁶

7. Customary Law and Tradition

As declared in the FSM National Code, in matters where recognized customary law is deemed relevant by the courts, the customary law “shall have the full force and effect of law so far as [it does not conflict with the TT laws of the or the laws of the U.S. in effect in the Trust Territory].”⁶⁷ Indeed, even where parties before a court have not asserted that any principle of custom or tradition applies, courts have an affirmative obligation of their own to consider custom and tradition.⁶⁸ The Constitution of the FSM includes a “Judicial Guidance Clause,” requiring that decisions of the Court be “consistent” with the customs and traditions of the indigenous people of the FSM.⁶⁹

8. The Common Law

Under jurisprudence established by the FSM Supreme Court, the common law of the United States is an appropriate source of judicial guidance for issues unresolved by statutes, customs and traditions in the FSM.⁷⁰ However, in relying on restatements and other common law rules as applied in the U.S., courts must ensure their decisions are consistent with

⁶⁵ 1 FSMC § 205. *See also* Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Ponape 1999) (holding that while no Trust Territory statute expressly authorizes easements, they are recognized by clear implication in the Trust Territory Code).

⁶⁶ Pohnpei v. Mack & John, Pohnpei v. Leopold, 3 FSM Intrm. 45, 55 (Pon. S. Ct. Tr. 1987).

⁶⁷ 1 FSMC § 202.

⁶⁸ Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 140 (Pon. 1985); 1 FSMC § 114.

⁶⁹ FSM Const. art. XI, § 11.

⁷⁰ Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 140 (Pon. 1985).

“Micronesian custom and tradition, and the social and geographical configuration of Micronesia.”⁷¹

Numerous FSM Supreme Court decisions have relied upon and adopted principles of U.S. common law. The FSM Supreme Court, however, is not bound by the doctrine of stare decisis with respect to the decisions of U.S. courts. As a result, it has often “applied the common law in imaginative and independent fashion, often reaching results at odds with historic common law principles”⁷²

III. TRADITIONAL AND CONTEMPORARY LAND TENURE IN THE FSM

Although patterns and rules of land ownership are changing within the FSM, complex traditional systems of land tenure still predominate. For instance, in the state of Yap land ownership has traditionally

involved multiple rights of use and one piece of land might belong to one person but be subject to the consent of another, be lived on by a third, and harvested by a fourth party. This complex system of land control [has] resulted in considerable diversity in management while preventing widespread changes to large pieces of land.⁷³

While the individual states have separate and distinct land tenure arrangements, there are some broad commonalities that persist throughout state land tenure systems. The FSM Constitution forbids land ownership to foreigners, as well as to domestic corporations that have non-FSM citizens among their shareholders.⁷⁴ Group and communal ownership of land is prevalent throughout the FSM. There are differences, however, concerning rights of land transfer within

⁷¹ Rauzi v. FSM, 2 FSM Intrm. 8, 14 (Pon. 1985).

⁷² Edward C. King, Custom and Constitutionalism in the Federated States of Micronesia, 3 Asian-Pacific Law & Policy J. 259 n. 33 (2002).

⁷³ Marjorie V.C. Falanruw, “People Pressure and Management of Limited Resources on Yap,” in National Parks, Conservation, and Development: the Role of Protected Areas in Sustaining Society 351 (J. McNeely & K. Miller eds. 1982).

⁷⁴ FSM Const. Art. XIII, § 4.

the FSM. In Chuuk, Kosrae and Yap, land can be transferred by law to all FSM citizens. In Pohnpei, however, it can only be transferred to persons from that island.⁷⁵

Traditional and cultural institutions have a strong presence in Micronesian life. The keystone of Micronesian society is the extended family, which is collectively responsible for maintaining the family welfare—particularly as it relates to customary family land.⁷⁶ Traditionally, land ownership in the FSM was limited to inheritance within a family or clan. As a result, many land parcels in the FSM are subject to the communal use and alienation rights of extended families, clans and communities.⁷⁷ Private landholders—influenced to varying degrees by customary land tenure systems—nevertheless occupy most lands.

A tremendous variety of chiefly systems, as well as differences in their respective economic and social roles, are encompassed by the four states that comprise the FSM. In Pohnpei, for example, a political order based on the *nahnmwarki* or paramount chief, with a ranked set of 11 royal titles below this level, evolved several centuries ago. New settlement districts later established their own lines of royal titles. The German colonial administration in Pohnpei attempted to undermine chiefly power—primarily by redistributing land to commoners through individual titles of ownership. However, in modern times chiefs retain an important status as leaders of traditional affairs. As a report by the Asian Development Bank (ADB) observes, “Chiefly feast houses (*nahs*) are focal points for the cultural life of Pohnpeians, which revolves around competitive feast giving and competition for prestige and traditional titles.”⁷⁸

⁷⁵ Pohnpei State Const. art. XII, § 2; R. Crocombe, Draft Report—Improved Economic Use of Land in the Federated States of Micronesia, Asian Development Bank (1997).

⁷⁶ FSM, National Biodiversity Strategy and Action Plan 8 (2002).

⁷⁷ Economic Management Policy Advisory Team (EMPAT), Working Paper No. 6: Economic Use of Land in the FSM 2 (1996).

⁷⁸ ADB, Women in Development: Federated States of Micronesia (1993).

Despite monetization of the economy, customary obligations requires that people seeking advancement propitiate the community chief and the paramount chief for titles conferred.⁷⁹

Yap has a particularly distinctive social system, dominated by the overlords of the main island of Yap. The inhabitants of the main island are divided among three social orders, which are further divided into the three levels of chiefs, nobles and commoners. A caste-like relationship prevails in which the lowest ranking groups act as the servants of higher-ranking groups that provide the land. Chiefs can require the delivery of food and other items, and thus can easily contribute to the burden of material poverty. Under existing reciprocity arrangements, a key issue is the degree of responsibility accepted by traditional leaders to provide for all community members according to need.⁸⁰

Patterns of public and private ownership over land and aquatic areas vary among the states. In Pohnpei and Kosrae, land is both privately and state owned, while aquatic areas are managed by the state as public trusts. In Chuuk, most land and aquatic areas are privately owned and acquired through inheritance, gift—or, more recently, by purchase. In Yap, almost all land and aquatic areas are owned or managed by individual estates and usage is subject to traditional control.⁸¹

Traditionally, the use of terrestrial resources and all accessible marine resources was distributed among the people under the control of chiefs. Rights could be given, earned and inherited either matrilineally or patrilineally. Complex usage rights overlaid actual site ownerships; for example, owners of a tree and users of its fruit might not be the owners of the land on which it grew.

⁷⁹ Christopher R. Dahl, Dissertation—The State and Tradition Conceptions of Land Tenure on the Island of Pohnpei, Dec. 1999.

⁸⁰ ADB, *Indigenous Peoples / Ethnic Minorities and Poverty Reduction: Pacific Region* ISBN: 971-561-436-1 16 (2002).

⁸¹ FSM, Draft—Economic Strategy for the Environment Sector 6 (2000).

Land tenure patterns generally involve communal ownership of a single plot, single ownership of several and separate plots, or usage right to land owned by traditional leaders. In the traditional economy, land is not a commodity to be sold or traded. However, the attitude in some areas towards land is changing, with sales and trades taking place—as well as leases—especially near centers of development.⁸²

Cadastral and registration programs have been undertaken in each of the states with varying effects. In the main island of Yap, less than 10 percent of the land has been registered and titled since a cadastral program commenced some 30 years ago.⁸³ Chuuk and Kosrae have made more progress in the initial determination of land parcels, although there is a substantial backlog in the land parcels to be surveyed and mapped and numerous outstanding disputes. Pohnpei appears to have made the greatest progress in the cadastral survey of private lands. However, most privately held land has not been surveyed, mapped, registered or titled.⁸⁴ As memories fade and differing claims for ownership arise, the absence of permanent survey and ownership records will make it increasingly difficult to attain the goal of secure and efficient land transactions.

IV. PRIVATE LAND ADMINISTRATION

A. Finality of Title in the FSM

The original system for state laws regarding the finality of official determinations of land ownership is found in Title 67 of the TT Code. Title 67 established a Land Commission in each district (now state) to survey land, determine its ownership and issue certificates of title.

⁸² FSM, Climate Change National Communication 9–10 (1997).

⁸³ ADB, *Indigenous Peoples / Ethnic Minorities and Poverty Reduction: Pacific Region* ISBN: 971-561-436-1 22–23 (2002).

⁸⁴ Briefing Paper, Session 1—Land Issues in the Pacific, Forum Economic Ministers Meeting, PIFS(01)FEMC.03 (2001).

Ownership disputes were heard and decided by the Commission, with appeal to the courts. Once such a determination and any appeal was completed, the title certificate was issued and recorded.

That certificate was then deemed to be

conclusive upon all persons who have had notice of the proceedings and all those claiming under them and shall be prima facie evidence of ownership as therein stated against the world, except that such ownership shall be subject to the following which need not be stated in the certificate:

- (a) any rights of way there may be over the land in question;
- (b) any taxes on the land in question which have become due within two years prior to the issuance of the certificate;
- (c) any lease or use rights for a term not exceeding one year.⁸⁵

Thereafter, any transfer or encumbrance of any interest in the land must also be recorded or risk being ineffective as against subsequent transfers or encumbrances which are recorded first.⁸⁶

However, there are some fairly standard exceptions. Depending on the state, those whose interests in the land are unaffected regardless of notice include the beneficiaries of:

- (a) rights of way over the land;
- (b) recent taxes on the land;
- (c) lease or use rights for a year or less; and
- (d) customary use rights of relatives already in existence.

Chuuk still relies entirely on the Title 67 system. Yap has abolished the Land Commission and placed all but its dispute resolution functions in a Land Resources Division. Dispute resolution is now handled by the municipal court within whose jurisdiction the land is located, subject to both removal and appeal to the State Supreme Court. The municipal court is made up of traditional leaders, which is appropriate since in Yap, unlike the other states,

⁸⁵ 67 TTC § 117(1).

⁸⁶ 67 TTC § 119(1); 57 TTC § 11202.

determination of title to land is exclusively a matter of traditional law. However, Title 67 still governs procedural requirements with respect to finality of title determinations.⁸⁷

While Kosrae still has a Land Commission, a new statute with essentially identical language has replaced Title 67.⁸⁸ In Pohnpei, the Land Commission has been replaced with a Court of Land Tenure with respect to resolving title disputes, and Title 17 of the Pohnpei Judiciary Act of 1995 has replaced Title 67. Once again, the language regarding finality of the title determination follows that of Title 67 quite closely. Both Kosrae and Pohnpei drop taxes—item (b) in the Title 67 quotation above—from the list of matters not affected by the title determination. And Pohnpei adds to that list “any customary use rights of relations in existence prior to the issuance of the certificate [of title].”

B. Land Registration

1. Chuuk State

The administration of land tenure in Chuuk is located in two agencies, the Chuuk Land Commission and the Division of Land Management, which is part of the Department of Commerce and Industry.⁸⁹

The Division of Land Management administers the uses and disposal of public lands, as well as the development, utilization and conservation of natural resources found on such lands. The Division also performs studies of public land use.⁹⁰ In more specific terms, the Division of Land Management—

- (a) Prepares quitclaim deeds of public lands deeded back to private individuals;

⁸⁷ See 3 YSC § 125; 4 YSC § 161 et seq.

⁸⁸ 11 KSC §11.616.

⁸⁹ EMPAT, at 29.

⁹⁰ *Id.*

- (b) Represents the State Government in public hearings before the land registration team to protect title to public land;
- (c) Conducts negotiations with individual landowners to acquire lands for projects or public use;
- (d) Is responsible for counting and recording crops damaged during construction of State and Municipal projects.⁹¹

The Chuuk State Land Commission continues to operate as organized under the TT Administration.⁹² Actions concerning the determination of land title rest initially with the Chuuk State Land Commission (Commission) which is statutorily charged with the registration and determination of land ownership.⁹³ The Chuuk State Land Commission may designate a registration area.⁹⁴ Once the Land Commission has designated a registration area, the courts shall not entertain any action with regard to interests in land with that registration area without a showing of special cause on the record why action by the court is desirable.⁹⁵

While any determination of the Chuuk State Land Commission may be appealed to the Trial Division of the Chuuk State Supreme Court, absent a finding of “special cause” on the record a trial court has no jurisdiction to entertain an action asserting an interest in land located within a designated registration area.⁹⁶ All such actions must be first filed with the Chuuk State Land Commission. A determination of the Land Commission that has not been appealed becomes final and conclusive upon lapse of the appeal time.⁹⁷ The procedures and documentation requirements of the Land Commission are also conditioned by a ruling of the State Supreme Court in which it held “the Land Commission should treat the determination of

⁹¹ *Id.*

⁹² See Land Registration, Title 67, Ch. 3, of the TT Code; TTPI Land Commission Act of 1966, Congress of Micronesia, Public Law No. 2-1.

⁹³ 67 TTC § 101; *Barker v. Paul*, 6 FSM Intrm. 473, 475-76 (Chk. S. Ct. App. 1994).

⁹⁴ 67 TTC § 104.

⁹⁵ 67 TTC § 105.

⁹⁶ *Barker v. Paul*, 6 FSM Intrm. 473, 475-76 (Chk. S. Ct. App. 1994).

⁹⁷ 67 TTC § 117.

every claim as if it will be appealed and to prepare its records accordingly.”⁹⁸ The transactional costs imposed by this ruling have slowed the land registration process in Chuuk.

The primary purpose of the Commission is to proceed on a systematic geographical basis to determine and register the ownership of land in the state utilizing a title registration system that would continuously reveal the current status of each property. The Commission also has responsibility to certify the survey and mapping of each individual ownership.⁹⁹

In addition to the land commissioners and clerical staff, the Chuuk State Land Commission consists of the following:

- (a) *A Section of Survey and Mapping* with a chief cadastral surveyor and land surveyors;
- (b) *A Record Section* with record and document technicians responsible for creating, filing, and securely storing all land records;
- (c) *A Land Title Registration Section* with chairmen and Land Title Investigators. Each chairman heads a Registration Team with two Land Title investigators. These four registration teams are responsible for determining land titles and for being the first authority for settling land disputes.¹⁰⁰

2. Registration Procedure

The procedures for land registration remain identical to those identified by the TTPI in 1966 and instituted in all TT Districts during the early 1970’s.¹⁰¹ These procedures are as follows:

- (a) *Designation of Registration Areas*: Each year areas of the Chuuk municipalities are designated Registration Areas.
- (b) *Dispatch of Registration Team*: The team speaks with all landholders in the registration area and encourages them to register their lands; notices are posted that publicize registration efforts and encourage

⁹⁸ Chuuk State Supreme Court, Civil Appeal No. 598.

⁹⁹ Public Law No. 2-1, 1966.

¹⁰⁰ EMPAT, at 30.

¹⁰¹ *Id.* at 31.

property claimants to file claims or discuss claims with the registration team.

- (c) *Preliminary Inquiry*: After notice of a claim to land is issued, a preliminary inquiry is held in the registration area. Land claims are then classified as either (a) disputed or (b) undisputed or uncontested claim.
- (d) *Formal Hearing*: Following a preliminary inquiry, a formal hearing is held in the registration area to review and adjudicate claims. Evidence of ownership must be presented by claimant landholders. Disputes on ownership or boundaries are recorded with evidence and supporting testimony. After reviewing the claim, the Land Registration team makes a written recommendation to the Land Commissioners. If approval is not recommended the reasons for disapproval must also be in writing.
- (e) *Determination of Ownership*: The Land Commissioners make a determination of ownership based on the evidence and testimony presented by the Registration Teams. There is a required waiting period of 120 days following ownership determinations to allow any appeals of the determination to be filed in the Trial Division of the State Supreme Court.
- (f) *Survey and Mapping of Boundaries*: When the 120 days has expired, if there are no remaining disputes or claims to the land, the land is then surveyed and mapped. A certified map of the parcel is sent to the Senior Commissioner for approval and attached to the title documentation.
- (g) *Registration and Issuance of Title*: After completion of the survey, marking of the boundaries and mapping the land, the parcel is registered or titled Fee Simple to the certified land holder. The title can be issued to an individual, an extended family, lineage group, a partnership, or to a joint tenancy.¹⁰²

Land registration procedures are frequently delayed due to the long and formalized procedures for the ownership determinations. Additionally, the law does not require adjudication of cases in Land Commission to meet deadlines or schedules for land hearings. The Land Commission also has no subpoena authority. Accordingly, there are significant delays in the processing of cases. The State Court lacks jurisdictional authority to hear cases until the Land

¹⁰² *Id.*

Commission has completed its work. However, upon certified referral from the Land Commission an appeal or petition to transfer land cases to the State Court is permitted after four or five years.¹⁰³

2. *Kosrae State*

The responsibility for the administration of land tenure in Kosrae is vested in two agencies: The Land Commission, a quasi-judicial authority, and the Department of Agriculture and Land.¹⁰⁴ Established during the U.S. TT Administration, The Land Commission continues to function as an independent administrative and adjudicatory agency of the State Government. The Land Commission has authority with respect to the implementation of Title II, Chapter 6 (Determination and Registration of Interests in Land) of the Kosrae State Code. The scope of this authority includes the following: investigating ownership, issuing Certificates of Title and registering of all lands on Kosrae. All difficult issues of law arising from land dispute or contested ownership of parcels are reserved by the Commission to the State court.¹⁰⁵

Within the Department of Agriculture and Land, two divisions have responsibilities for land management: the Division of Survey and Mapping and the Division of Land Management. Responsibilities of the Division of Survey and Mapping include: (1) the surveying, mapping, and monitoring the use of public lands; (2) maintaining a roster of all parcels of public lands; (3) assisting in the acquisition of lands for public projects; and (4) conducting the survey of private lands in coordination with the State Land Commission.¹⁰⁶

All land registration on Kosrae is occurs through the Land Commission. A legacy from the Trust Territory land registration program, these procedures provide the institutional

¹⁰³ *Id.* at 33.

¹⁰⁴ The statutory framework for State land tenure is found in Title II, Land and Environment, Part 1: Land, chapters 1 through 6, of the Kosrae State Code. *See also* EMPAT, at 55.

¹⁰⁵ EMPAT, at 54.

¹⁰⁶ *Id.* at 55.

mechanisms for identifying land owners, resolving land disputes, issuance of title, and land transfer procedures.

Title II, Part 1, Chapter 6, of the Kosrae State Code is the Determination and Registration of Interests in Land. The procedures outlined follow Title 67 of the TT Code, Section 11.601 (as amended) and Section 11.602 of the Kosrae State identify qualifications of the Land Registration Teams. The powers of the Land Commission and the Registration Teams are presented in Section 11.610.

The Commission and a Land Registration Team have the power and duty to: (1) administer oaths to witnesses; (2) take testimony under oath; (3) subpoena witnesses; (4) order the production of papers and documents; and (5) punish for contempt committed in their presence.

The procedure for land registration is presented in KSC Section 11.603 to Section 11.610 and Section 11.613 to 11.617. These procedures include the following:

- (a) *Designation of Registration Areas*: The Land Commission designates all registration areas for treatment within one year. All of the private land parcels on Kosrae are within designated areas.
- (b) *Survey Exterior Boundaries of Individual Parcels in the Designated Areas*: The Division of Survey and Mapping surveys and maps all parcels within a designation area. Existing boundaries (monuments) are cleared and identified. New boundary markers are set if none exist.
- (d) *Preliminary Hearing*: The Land Registration Team institutes a preliminary inquiry on the ownership and boundaries of the parcels. All immediate, local claims to the property are heard and recorded. Where common consensus can be reached, the parcel is recorded: (a) by name of parcel and its description; (b) by name of person found to have lawful interest therein; and (c) the nature of the interest.
- (d) *Adjudication of Claims by the Registration Teams*: If dispute over ownership or boundaries occurs, the registration team will adjudicate the problem. If the conflict in claim is difficult, the case is referred to

the Commission and may be referred or appealed to the State Court for final settlement. Upon receipt of a registration team adjudication and the accompanying record the Commission may: (a) affirm the adjudication making a determination of ownership; (b) return the records to the Registration Team with instructions for further hearings or other action; (c) may hold hearings itself and make a determination of ownership based on the records and the evidence received during its hearings.

- (e) *Notice of Determination and Period of Appeal:* After a determination of ownership is given public notice is made, as prescribed in KSC Section 11.609(1), and an appeal period of 120 days is observed. The appeal for the Commission’s determination of ownership is to the State Court.
- (f) *Issuance of Title:* After the appeal period has elapsed without the filing of an appeal, or after the appeal(s) have been concluded, the Commission issues a certificate of title setting forth the names of each person holding an interest in the parcel pursuant to the determination, either as originally made or modified by judicial action. A certificate of title is conclusive upon a person who had notice of the proceedings and a person claiming under him and is prima facie evidence of ownership—except that a determined interest is subject to a public right-of-way over the property, and a lease or use interest not exceeding one year 2 KSC § 11.616.
- (g) *Registry of Titles:* The Commission retains the original certificate of title in a permanent register. A duplicate certificate of title is issued to the landholder.¹⁰⁷

Land Use Planning in Kosrae. Title 7, Chapter 4, of the Kosrae State Code, establishes and delineates the authority of the Development Review Commission (DRC). The DRC is composed of five members selected by the Governor. The scope of the Commission’s responsibilities are quite broad, and could possibly have a profound influence on the way in which land Kosrae’s land resources are used.¹⁰⁸

The DRC has authority to require development projects—public or private—to complete an Environmental Impact Study. The DRC also possesses statutory authority for right of entry

¹⁰⁷ *Id.* at 57.

¹⁰⁸ 7 KSC § 402; DRC Legislation— Kosrae State Land Use Plan: Final Draft, Appendix B (1994).

and the right to enforce cease and desist orders and compel violators to mitigate harmful impacts of development activities.¹⁰⁹ Failure to comply with a DRC directive can lead to a referral to the court for an injunction or other appropriate remedy.¹¹⁰

The DRC has implementing authority for the Kosrae State Land Use Plan. In general terms, the plan identifies three “Land Use Districts” and stipulates guidelines and recommendations for the development and management of these districts.

- (a) *Active Use Districts*: include agricultural, industrial, tourism and marine park areas.
- (b) *Special Consideration Districts*: include mangrove, freshwater wetlands, upland forests, ocean waters from the reef to 12 miles out, and the shoreline and inner reef.
- (c) *Areas of Particular Concern*: include mangrove reserves, shoreline erosion hazard areas, the eight primary watersheds, mouths of rivers, the trochus sanctuary, and cultural and historic sites.¹¹¹

The land use plan places conditions on the use of these areas; and in conjunction with the authority of the DRC, provides a set of regulations for the development of land resources on Kosrae.

3. Pohnpei State

In Pohnpei, the identification, determination, survey and mapping of land—as well as the issuance of title—are all functions of the State Government. There are two government institutions charged with the administration of land in Pohnpei: The Court of Land Tenure and the Division of Lands. The Division of Lands—which is part of the Department of Resource Management and Development—has three offices: (1) the Office of Historic Preservation and Cultural Affairs; (2) the Office of Surveying and Mapping; and (3) the Office of Management

¹⁰⁹ 11 KSC § 1302.

¹¹⁰ 11 KSC § 1303.

¹¹¹ EMPAT, at 59.

and Administration of Public Lands.¹¹² The Office of Survey and Mapping is responsible for the survey and mapping of all public and private lands on Pohnpei. This office is composed of a Field Survey section and a Cartography section. The Office of Management and Administration consists of the following three sections: (1) Land Record and Archives; (2) Inspection and Negotiation—which is responsible for first-tier field inspection and negotiation with land owners over boundaries, monument placement, corners, area extent and so on; and (3) Administration.¹¹³

The Land Commission—originally established for the District of Pohnpei pursuant to Title 67 of the TT Code—has been re-designated The Court of Land Tenure.¹¹⁴ The Pohnpei Judiciary Act (PJA) of 1995 establishes three courts for the State: (1) the Pohnpei Supreme Court; (2) the Court of Land Tenure; and (3) the Court of Traffic and Misdemeanor Offenses. Direct references to land tenure issues in the PJA include the following:

PJA, Title XI, § 11-2. Judgments Affecting Land. This section gives permanent authority for a judgment adjudicating an interest in land after the time for appeal has passed.

PJA Title XI, § 11-26. Writs of Execution on Real Property, Levy and Sale. This section gives the Pohnpei Supreme Court the exclusive jurisdiction to issue writs of execution against real property situated within the State of Pohnpei. Such a writ cannot be issued for ten years following the final judgment for the writ by the court. As cited, the process for securing a judgment against real property on Pohnpei is so onerous there are no cases to date that have completed and a judgment rendered that has resulted in the sale of land for payment of debt.

PJA Title XI, § 11-33. Exemptions. “The following described property shall be exempt from attachment and execution: Subsection (3) Interests in Land. (a) All interests in land within the State of Pohnpei held by natural persons, inclusive of equitable and leasehold interests; except where such interests can be shown to have been acquired to avoid attachment or execution with respect to the cause of action to which the attachment or execution is ordered or where attachment or execution against such interests in land is specifically permitted under a real property mortgage

¹¹² EMPAT, at 90.

¹¹³ *Id.*

¹¹⁴ *Id.* at 87.

statue or real property deed of trust statute for the State of Pohnpei; and (b) Such other interests in land held by such other entities or organizations as may be otherwise specifically exempted from attachment or execution, or both, by State statute.”

PJA Title XVII, §§ 17-1 to 17-19. The Court of Land Tenure. This Title replaces the authority of Title 67 of the Trust Territory Code creating the TT Land Commission. The purpose of this Title is to provide for the mechanisms to complete the process begun during the Trusteeship of title investigation, determination, and registration of interests in lands within the State of Pohnpei, and to provide for the means to develop and maintain a singular system of filing all recordable interests in land.

The Court of Land Tenure is authorized and empowered, subject to the provisions of this act and other State law, to hear and determine claims of ownership, heirship, interest, right and boundary to land within the State of Pohnpei and to inquire and determine whether any transfer of an interest in land is in conformity with the requirements of Section 5 (Land Sales) of Article 12 of the Pohnpei State Constitution.

The primary purpose to the Court shall be to proceed in the manner in which the Court determines to be in the best interest of the people to accomplish the determination and registration of the title and other property interests to as many of the land parcels as practical within such registration areas as the Court may designate. The Pohnpei Supreme court retains the right to hear any land cases brought before it directly or on appeal, however, the State Supreme Court, in its own rules may require that claims to land areas first be filed with the Court of Land Tenure.¹¹⁵

The procedures for the registration of land in Pohnpei are as outlined below:

- (a) *Designation of Registration Area:* The Court of Land Tenure first designates a land registration area or areas within which it believes it will be desirable and practicable to register lands. Because of the multiple requests for land registration from all municipalities of Pohnpei, all the lands of Pohnpei Proper have been designated as Registration Areas. The process of claim determination, survey and mapping of parcels is on going throughout the municipalities of Pohnpei Proper.
- (b) *Delineation of Land Registration Areas and Surveys of Plots and Boundaries:* Once the Court of Land Tenure has designated an area for registration the Chief of the Division of Land (previously the Department of Land) will cause delineation of the exterior bounds of the area to be registered, and will survey and map the plots (parcels)

¹¹⁵ *Id.* at 87-88.

claimed within the area. During this process minor land and boundary disputes may be resolved by the field teams.

- (c). *Venue Hearings*: Initial or preliminary hearings are then held on all land claims within the registration area. Notice of such hearings must be posted in the respective municipality, as well as broadcasted on the radio, at least 30 days in advance of the Venue Hearing and in English and Pohnpeian (or the principal language of that municipality). Notice must also be served on the *Soumas en Kousapw* (a traditional authority within the Kousapw) and all adjacent landowners. Upon reaching a decision on a claim, the judge shall place on record the place name and the parcel number of the land with the Clerk of the Court of Land Tenure; along with all actions taken and decisions made with reference to settlement of the claim.
- (d) *Disputed Claims Procedure*: If disputes arise during the course of settlement of the land claims with the judge assigned to the registration area, the disputed land claim may be assigned to a different judge in the Court of Land Tenure, or appealed to the Pohnpei Supreme Court.
- (e) *Notice of Determination of Ownership*: Upon finalization of a decision of a land claim by the Court of Land Tenure, a ruling is issued in writing and notice of this ruling is given the same distribution as required for the preliminary venue hearing. The final decision on a land claim made by the Court of Land Tenure can be appealed to the Appellate Division of the Pohnpei Supreme Court by any aggrieved party within 90 days from the date of notice of determination.
- (f) *Issuance of Certificate of Title*: After the time for appeal from a determination of ownership by the Court of Land Tenure has expired without notice of appeal, or after an appeal duly taken has been determined, the final survey and mapping of the parcel can be completed. Following final survey and mapping that reflects the boundary settlement, the Court of Land Tenure issues a Certificate of Title. The Certificate of title may be Fee Simple assigned as “Individual” or as “Tenants in Common.”

All land transfers or encumbrances of interests in registered lands must be noted on the Certificate of Title.¹¹⁶

¹¹⁶ PJA Title XVII, §§ 17-9 & 17-4; EMPAT, at 91-92.

4. *Yap State*

While the authority of the Yap Land Commission was established in 1966 when the Congress of Micronesia passed The Land Commission Act, at present there is no Land Commission or Land Commissioner in Yap. The investigatory and arbitral functions of the TTPI Land Commission have instead been vested in the Division of Lands, located in the Department of Resources and Development.¹¹⁷ Adjudication of land disputes and boundary problems are resolved through traditional and customary methods; and at the municipal level with assistance from the Cadastral Survey Projects Branch of the Division of Lands.¹¹⁸

The Division of Land Resources consists of the following three sections:

- (a) *Survey & Mapping Section*: The section is composed of three Branches: (1) the Economic Development Projects Branch; (2) the Drafting & Computing Branch; and (3) the Cadastral Survey Projects Branch.
- (b) *Land Registration Section*: This section is responsible for documenting, filing, storing and retrieval of all land titles and associated documents.
- (c) *Public Lands and Property Section*: This section is responsible for the acquisition and management of Government lands.¹¹⁹

With relatively few changes, the land registration program instituted by the U.S. TT Government in 1974 is still being used today. In order to facilitate land transactions, the TT survey, mapping and registration program has stressed the need to document both land titles and land owners. This emphasis on “paper” title holding continues to diminish the power and authority of the traditional or customary land tenure system.¹²⁰ The procedure for land registration today is as follows:

¹¹⁷ Executive Branch Re-Organization Act of 1979

¹¹⁸ EMPAT, at 116-117.

¹¹⁹ *Id.* at 117-118.

¹²⁰ *Id.* at 107.

- (a) An application for registration of land is filed with the Division of Land Resources.
- (b) Members of the Cadastral Survey Program visit the land in question. This team is responsible for clarifying the ownership of the property, informing the various traditional authorities of the property, and speaking with all adjacent property owners about boundary identification. The team is charged with ensuring community, municipal and traditional consensus with respect to the registration of property.
- (c) When a consensus or agreement is reached concerning the rightful landowner and the boundaries, a survey and official mapping of the lot and/or registration area is completed.
- (d) The determination and registration package is then sent to the governor for approval.
- (e) Following the approval by the governor, the documents are returned to the Division of Land Resources, Registration Section, for final document preparation, registration and issuance of title. Title for the land may be issued as “Fee Simple—Individual,” or “Fee Simple—In Common.”¹²¹

According to one report, there have been cases where individuals received title in fee simple, yet ownership of the land was still contested through traditional authorities. In several of these cases actual use of the lands by the titleholder was blocked by various means. Importantly, the choice to block the use of certain lands depended on such factors as the titleholder’s traditional rank and customary authority over land.¹²²

C. Ownership of Land

1. Chuuk State

Contemporary ownership of land in Chuuk is a confused admixture of modern and traditional land tenure practices. However, in simple terms, modern ownership via fee simple

¹²¹ *Id.* at 118.

¹²² *Id.* at 119.

title to land can be held by any citizen of the FSM, lineage groups, a family or extended family, or by a business or joint tenancy.¹²³

The bulk of private land in Chuuk has determined or registered by the Chuuk State Land Commission. Thus, lineage authorities retain a strong influence over much of the land. While lands held by customary authorities can be sold, leased, or traded by the lineage heads, there is considerable confusion regarding the role that chiefs, head-of-households, or matrilineal authority can play in such transactions.¹²⁴

2. *Kosrae State*

The majority of land in Kosrae remains in the hands of the government. Land is generally owned fee simple with a certificate of title issued after completing registration. Title to land is issued to individuals—or to tenants in common where heirs inherit lands in common or where customary family lands are held in common.¹²⁵

3. *Pohnpei State*

Throughout Pohnpei, the validity of ownership of land by title is widely recognized. Indeed, the government's registration program is experiencing increased pressure as more and more families want to secure their land holdings with clear title, and to use these lands as real-property collateral for business loans or home improvement.¹²⁶

¹²³ *Id.* at 10-35.

¹²⁴ *Id.* at 14.

¹²⁵ *Id.* at 40.

¹²⁶ *Id.* at 74.

4. *Yap State*

Traditional Ownership of Land. To understand the modern land tenure system of Yap, it is helpful to understand several traditional terms and concepts that still influence customary land use today. These terms and concepts include:¹²⁷

- (a) ***Tabinaew:*** The term *tabinaew* refers to certain parcels of land, to a location. The people who have inherited the land or reside on the land are called “people of the estate.” The term *tabinaew* is also used to designate parcels of land associated with a house foundation or to a specific house foundation itself. Traditionally, the person in control of the highest-ranking *Tabinaew* in the village became the Village Chief.
- (b) ***Mafen:*** The *Mafen* concept still seems crucial to understand the land tenure and social structure of Yap. *Mafen* designates of a group of people who have certain rights to an estate. People with *Mafen* authority are expected to safeguard the *Tabinaew* heritage against the whims of its current inhabitants and against breach of custom on the land. *Mafen* rights, are associated with a woman and her children, her sisters and their children, and are usually conferred as matrilineal rights. The *Mafen* rights usually go to eldest female sibling or to one that is capable; other female siblings are “people of the *Mafen*.” While *Mafen* rights do not refer to ownership rights, historically *Mafen* rights gave the woman the right to confiscate the estate lands of an offender. People with *Mafen* rights needed to be consulted when major land use changes or alienation of land occurred.
- (c) ***Suwon*** (overseer of the land). *Suwon* does not refer primarily to a person, but instead to a mantle of authority and responsibility. Every estate also had a *suwon*. *Suwon* rights were more limited than *Mafen*. However, no alienation of land could occur without permission of a *Suwon*.
- (d) ***Caste and Land:*** All villages (and people of the estates of each village) were ranked somewhere in the hierarchy of castes. Low caste villages were close to what westerners would call landless estates, with low caste villagers as tenants. The low castes villagers were guardians of lands which fell under the authority of higher caste estates. The Lower Class Village Chief was a spokesman for high class chief. Historically, in order to maintain land holdings the low caste had to perform certain services of high class. The High Class Chiefs of various estates were not just rulers, but such titled

¹²⁷ *Id.* at 100-101.

persons had many responsibilities to the people of the lower ranked estates under the title's authority. Responsibilities of the inhabitant of high title house foundations have become burden some in today's world. As a result of some of the highest titled foundations on Yap are uninhabited.

If ownership rights also denote the right to possession, use, enjoyment, or the ability to sell or dispose of property according to the will of the owner, then historically there has been no such ownership in Yap.¹²⁸ In the past multiple individuals had varied interests and authorities over the land in Yap.

Contemporary Ownership of Land.

While tradition remains a strong influence over land tenure in Yap, people are increasingly “by-passing the older, traditional systems of land tenure in order to secure land ownership, land transfer or lease rights.” Thus, the current system of land tenure is a

complex mix of the old and the new. Older customary land tenure conditions are strong or weak depending on the people involved, the location and history of the land, the historical title and rank of the land, and the cash opportunity associated with ownership, lease or use rights.¹²⁹

There is, however, a major doctrinal exception to this general trend toward a more western concept of ownership—the State Government's “deference to the customary and traditional systems of land tenure.”¹³⁰ Legislation pertaining to land often cedes considerable authority to traditional and customary authorities over land. For instance, the Yap State Mortgage Law and the Yap State Deed of Trust Law require *Mafen* approval with respect to applications for the use of real property for security.¹³¹

¹²⁸ *Id.* at 101.

¹²⁹ *Id.* at 108.

¹³⁰ *Id.*

¹³¹ *Id.* at 109.

D. Lease and Use Rights

1. Chuuk State

With respect to the highly populated lagoon islands of Chuuk, contemporary lease and use rights are fairly straightforward. All leases for a term greater than one year are noted on the certificate of title along with other encumbrances on the property. Leases are negotiated for money and once formalized, they are supported by the State court system.¹³²

2. Kosrae State

While use rights to lands in Kosrae were fairly flexible in the past, they are considerably less so today. Population growth, and an attendant increase in the density of settlement areas, has led to more tension over land boundaries. Such use rights as hunting, agro-forestry, gathering of medicinal plants and herbs primarily takes place on upland, government owned areas. With respect to more productive lands, as well as lands in settled areas, use rights are now determined “within the framework of documented leasing.”¹³³

Use rights to mangrove areas are generally controlled by the municipalities. Also, the Kosrae Land Use Plan and its regulatory body, the DRC, condition use rights to “government land, the mangrove areas, and near-shore areas or the lagoon. . . .”¹³⁴

3. Pohnpei State

The lease of private land is considered a “fortuitous” method for securing family income in Pohnpei. Provided the landowner holds clear title, private lands can be leased in Pohnpei. Under certain conditions, public lands can be subleased by a landholder; and in some cases, lands held by Naval Lease agreements can also be subleased.¹³⁵

¹³² *Id.* at 14-15.

¹³³ *Id.* at 41.

¹³⁴ *Id.*

¹³⁵ *Id.* at 74.

Lease agreements for private lands that exceed a term of one year must be registered on either the certificate of title or on the certificate of lease holding. Neither public nor private lands can be leased for a term greater than 25 years without legislative waiver of the State Constitutional Constraint, and approval of the terms of the lease.¹³⁶ The Office of Management and Administration of Public Lands issues and oversees the administration lease and use agreements for public lands.¹³⁷

4. Yap State

The majority of privately held land in Yap has not been surveyed, mapped or registered—thus, many of the customary use rights remain in effect with respect to these lands. Landholders—or other land authorities—can grant “permission or transfer use rights of estate lands in the traditional manner.”¹³⁸

The Yap State Constitution permits the leasing of lands. However, if a foreign interest is involved, the lease must be limited to a term no greater than 50 years. Additionally, the same constitutional provision empowers the State Legislature to prescribe a shorter lease term by statute. The State Legislature must approve by resolution any lease on public land that extends beyond five years.¹³⁹

E. Transfer of Land

1. Chuuk State

Traditional Land Transfer. The following are among the most common traditional methods for inheriting or transferring land in Chuuk: (1) lands inherited through lineage; (2)

¹³⁶ Pohnpei St. Const. art. XII, § 1.

¹³⁷ EMPAT, at 74.

¹³⁸ *Id.* at 109.

¹³⁹ *Id.*

lands inherited from parents, particularly the *efukur* land or lands owned by the father; and (3) lands obtained by purchase.¹⁴⁰

- (a) *Fonuen Eterenges, Lineage Land*: Typically, lineage land is not owned by any one individual or family. Rather individuals, usually families, acquire use rights to the land through the matrilineal line. The land was under the authority of the head, or master, of the lineage, always a man. Most authorities recognize that lineage lands could not be sold or transferred without the approval of members of the clan and women often had a decisive role to play in distributing the land. At present, however, the law holds that consent is required from all male members of the lineage before land can be sold, leased or given away.
- (b) *Fonuen Efukur, Land from Father's Lineage*: Land from one's *efukur* is treated differently than land holdings occupied and used through the mother's lineage. The father's land passes down from father to his sons. It is owned, not simply used. Lands to which a man has full title are considered on all islands to be inherited properly by the man's children, unless he specifically gives such lands to someone else.
- (c) *Fonu Mei Kamo, Purchased Land*: Historically, lands were purchased by offerings of services, promises of tribute, or exchanges of trading goods or other lands. The purchasing of land for money was a practice of foreigners. Early German trading representatives "bought" copra-producing lands by various methods; sometimes by threat of force. Land was purchased during colonial administrations between the administration and Chuukese, and among the Chuukese themselves. Land that has been purchased or bought by cash remained without condition the property of the owner and could be transferred to any individual, leased, or resold at the will of the owner.¹⁴¹

Contemporary Land Transfer. There are currently no written laws in effect pertaining to inheritance, intestate succession or wills. However, the customary practice of traditional inheritance, heirship or use of a will is still practiced. Both state courts and the Land Commission continue to base legal decisions on tradition and customary law.¹⁴²

¹⁴⁰ *Id.* at 15.

¹⁴¹ *Id.* at 15-16.

¹⁴² *Id.* at 16.

There is, however, an growing contemporary trend of disregarding traditional or customary systems for transferring or certifying ownership—a trend that includes virtually every level of society: lineage heads and family heads, individual members of the clan, and chiefs and other traditional leaders. Whether or not modern or traditional practices are adhered to—or asserted as the most valid—often depends upon which type of practice offers the claimant the greatest support for his or her claim. Older, customary land tenure systems appear to be breaking down the most in the highly populated islands of the Chuuk lagoon and Chuuk Proper.¹⁴³

2. *Kosrae State*

During the German (1899 – 1914) period the concept of individual and family land ownership began to take hold in Kosrae. This period thus marked the beginning of ownership or title transfer.¹⁴⁴ As the population of Kosrae increased during the German and Japanese periods, the transfer of land occurred primarily through the following four procedures:

- (a) Land was sold or traded. Land sales were not common, but not unknown. Trading land was common where a person wanted to consolidate contiguous parcels, or where the landowner wanted to expand his lands to include special categories of land such as a fresh-water swamp for taro.
- (b) Land was transferred by “Obligating Gift” or “Divided Title.” This was the most common way of land transfer. The giver of the land retained rights of sharing produce from the land as long as he lived. The receiver could settle on the land and cultivate the land as he wished. Upon the death of the original landholder, the land passed to the heirs of the recipient.
- (c) Land was also transferred by “Non-obligating Gift.” In this case the title was transferred without condition.
- (d) Land could be temporarily transferred by means of a loan. In this case there was no transfer of title. At death of the lender, the title passed to his heirs.¹⁴⁵

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 41.

¹⁴⁵ *Id.* at 41-42.

At present, land may be sold or leased by the owner in Kosrae. However, the State Constitution prohibits the sale of land to non-citizens of the FSM.¹⁴⁶ Additionally, the Constitution limits the sale of land to FSM citizens who are also Kosraean by descent.¹⁴⁷

The validity of customary practices for transferring land is still recognized in Kosrae. For instance, the conveyance of land from parents to children may be subject to such conditions as the parents deem appropriate—provided that such conditions are in writing at the time of conveyance and duly reflected in the certificate of title. Usually, however, such land transfers are now accompanied by a transfer of title, or in the case of subdivision of land by a new title issued to the heir.

The official transfer of private land holdings requires that the land be titled and that the Land Commission have a copy of the original registration. Before noting a transfer of interest in the parcel on a certificate of title, the Commission (Land Commission) reviews the documents supporting the title and determines that the document of transfer is in proper form. If a transfer of a titleholder's interest occurs, the Commission cancels the old certificate of title and issues a new certificate of title to the transferee.¹⁴⁸ If a transfer of a portion of the parcel has occurred, the Commission may require that the titleholder have the transferred portion surveyed by the Commission at the titleholder's expense. The Commission then issues a certificate of title for each part of the parcel covered by the original certificate.¹⁴⁹

¹⁴⁶ Kosrae St. Const. art. XI, § 7.

¹⁴⁷ *Id.*

¹⁴⁸ 11 KSC § 11.617

¹⁴⁹ *Id.*

3. *Pohnpei State*

Inheritance of land, and the laws and regulations guiding inheritance, wills and intestate transfer of real property remains a major concern of land holders on Pohnpei. Contemporary inheritance statutes refer back to the Pohnpei District Law of 1957.¹⁵⁰ This statute formally changed the old inheritance laws posted with the German Title Codes. The principal change was to allow female heirs to inherit real property. The 1957 Pohnpei Inheritance Law identifies as heir

- (a) Oldest son who is either living or has left issue who are living.
- (b) Oldest daughter who is living or has left issue who are living.
- (c) Oldest brother who is living or has left issue who are living.
- (d) Oldest sister who is living or has left issue who are living. In March 1959 further changes in the inheritance laws were enacted
- (e) Oldest son or his issue.
- (f) Oldest daughter or her issue.
- (g) Oldest adopted son or his issue.
- (h) Oldest adopted daughter or her issue.
- (i) Oldest brother or his issue.
- (j). Oldest sister or her issue.
- (k). Oldest child made prior to marriage contract of the same parties provided that any child born of the union between married man and his first wife shall have precedence of succession regardless of age.¹⁵¹

¹⁵⁰ *Id.* at 75.

¹⁵¹ Pohnpei Law No. 3-17-59; Ponape District Code 12-101; EMPAT, at 75.

4. Yap State

There is no modern legal framework, or inheritance law, that conditions or identifies rights of succession in real property. The traditional and customary process of land transfer applies to almost all private property whether it is registered or not. It should be noted that all of the highest ranked platforms (house foundations associated estates) have been transferred to or inherited by contemporary families and chiefs.¹⁵² However, almost all of these foundations are uninhabited. This seems to be because “occupancy” or “resident ownership” of the high foundations still require from the occupant a more traditional way of life and have customary (sacred) responsibilities that are hard to satisfy in modern times.¹⁵³

F. Settling Land Disputes

1. Chuuk State

Because the modern registration system has not been extended to a major portion of the municipalities providing title documentation and boundary survey, many of the land disputes in Chuuk are first handled by traditional authorities. Most arbitrators, whether they are village elders or chiefs or whether they operate with quasi-judicial or judicial authority, have not felt it fair to all concerned to rush to settlement.¹⁵⁴ Hearings are often stopped when heated arguments occur between claimants, and new hearings may not convene for months.¹⁵⁵ The pattern of long, drawn-out land dispute arbitration is at least partly a holdover from very early traditional times.¹⁵⁶

¹⁵² *Id.* at 110.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Should parties remain unhappy with the settlement by lineage heads, village chiefs or other traditional leader, an appeal can be made directly to the Trial Division of the State Supreme Court.¹⁵⁷

For lands that have been titled, registered or lands that have some ownership or leasehold documentation, and for those lands in a designated registration area, the Land registration Team is the first level of authority that can be approached for dispute settlement. Initially, the Land Registration Teams will work with the customary and traditional authorities to come to some resolution.¹⁵⁸

Should the Land Registration team, fail to reach settlement with the disputed parties, the claim is referred to the Land Commissioners.¹⁵⁹ Originally, one purpose of the Land Commission was to help resolve land disputes out of court and with sensitivity to the customary law. The problem now is that the Land Commission, once acting as an informal arbitrator between parties, has become increasingly more formal in its procedures.¹⁶⁰ Hearings are held with witnesses and records to tie its procedures directly to the judicial system. Hence, the Land Commission is less effective today as an alternative means to dispute settlement.¹⁶¹

2. *Kosrae State*

Land conflicts are not significant social problem today.¹⁶² The majority of land claim disputes are settled by the Land Registration teams during their preliminary hearings on the parcels designated for registration.¹⁶³ If the Registration Team or the Land Commission Administration finds that an excessive length of time is being spent by the team in settling a

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 44.

¹⁶³ *Id.*

dispute, the case may be deferred to the Commission itself. Principles of the Commission then hear the claimants and witnesses and make a determination on evidence received by the original team and the Commission.¹⁶⁴

If the Land Commission cannot adjudicate a claim, the case may be referred to the State Court without determination.¹⁶⁵ Appeals for previous Land Commission determinations may also be referred to the State Court. The Court's decision of the claim is final. Upon certification of the judicial result of the case to the Land Commission the Land Commission issues a certificate of title in the same manner as following a Commission determination.¹⁶⁶

3. *Pohnpei State*

The resolution of land disputes now rests with the Court of Land Tenure.¹⁶⁷ Each judge of the Court of Land Tenure first endeavors to settle all disputes on lands within his assigned registration area during the initial hearings.¹⁶⁸ If such disputes continue over an undue length of time (interfering with pace of adjudication of claims within the registration area), the dispute may be referred to the Principal Judge of the Court of Land Tenure.¹⁶⁹ The Principle Judge may either designate another Judge of the Court of Land Tenure to hear the case or refer the claim to the Pohnpei Supreme Court. The decision of the Pohnpei Supreme Court is final.¹⁷⁰

With public lands, initial arbitration in land disputes on leased lands, or homesteaded lands awaiting title transfer, is taken up with the Office of Management and Administration of

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 17 PJA § 17-19.

¹⁶⁸ EMPAT, at 77.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Public Lands. If settlement cannot be achieved at this level, the case is referred to the Court of Land Tenure.¹⁷¹

4. *Yap State*

The Yap Constitution strengthens the traditional and customary land tenure authorities by specifically stating that “Title to land may be acquired only in a manner consistent with traditions and customs.”

If there is dispute regarding ownership, the ability of an individual to acquire ownership, or a boundary delineation, a hierarchy of traditional authorities exists to resolve the issues.¹⁷² Resolutions can be obtained through consultation with the *Mafen*, *Suwon*, Village Chief and other elders of the immediate community.¹⁷³ Petitioning to these traditional authorities may differ in each case depending on personality, land in question, ranking of land or individuals associated with the land, etc. Land “ownership” or authority over estates, or disputes on use rights, and so on are determined in a traditional manner.¹⁷⁴

Should no decision be made at this level of authority the dispute is taken to the municipal court.¹⁷⁵ Most of the decisions concerning land disputes are settled in the traditional system with few cases going on to the municipal court. In addition, the three high ranked municipalities (Rull, Tamil, Gagil) may serve as appeal authority for land disputes among or within municipalities. If municipal authorities cannot settle the dispute, the case may be referred to the two high traditional councils: the Council of Pilung and the Council of Tamol.¹⁷⁶ However, very few land

¹⁷¹ *Id.*

¹⁷² *Id.* at 110.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

cases are brought before these two high authorities. The last appeal can be made to the State Supreme Court.¹⁷⁷

IV. CONSERVATION EASEMENTS ON PRIVATE LANDS

A. Introduction to Conservation Easements

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right, granted by an owner of real property, to use all or part of his or her property for specific purposes.¹⁷⁸ Where this purpose is to achieve the goal of conservation, the easement is frequently referred to as a conservation easement.¹⁷⁹ 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

¹⁷⁷ *Id.*

¹⁷⁸ Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

¹⁷⁹ 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.

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.¹⁸⁰ What the easement holder does acquire is the right to enforce the land-use restrictions.

To understand the concept of an easement, it is helpful to think of owning land as holding a bundle of rights—a bundle that includes the right to occupy, lease, sell, develop, construct buildings, farm, restrict access or harvest timber, and so forth. A landowner may give away or sell the entire bundle, or just one or two of those rights. For instance, a landowner may give up the right to construct additional buildings while retaining the right to grow crops. In ceding a right, the landowner “eases” it to another entity, such as a land trust. However, in granting an easement over the land, a landowner does not give away the entire bundle of ownership rights—but rather forgoes only those rights that are specified in the easement document.¹⁸¹

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*.

¹⁸⁰ 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.

¹⁸¹ The grantor of a conservation easement remains the titleholder, 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).

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.”¹⁸²

Under the majority U.S. common law authorities, an appurtenant easement does not require the dominant and servient estates to be adjacent to one another—an easement may be appurtenant to noncontiguous property if both estates are clearly defined and if it was the parties’ intent that the easement be appurtenant.¹⁸³ There are some jurisdictions, however, that require the estates affected by an appurtenant easement to be adjacent.¹⁸⁴ 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:¹⁸⁵

- **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

¹⁸² Roger Bernhardt and Ann Burkhart, *Real Property in a Nutshell* 191, 214 (4th ed. 2000). An interest “runs with the land” when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

¹⁸³ *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).

¹⁸⁴ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 23 (2003).

¹⁸⁵ 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).

existence in a court of law) an adequate nexus between the properties in question. In Costa Rica, the Center for Environmental Law and Natural Resources (CEDARENA) created an appurtenant easement between a parcel of private land and a nearby state reserve that shared the same birds.

- **Reciprocal easements** – Enables adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.¹⁸⁶ 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.

¹⁸⁶ 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.

2. *Conservation Easements In Gross*

Unlike an appurtenant easement, an easement in gross is not created for the benefit of any land owned by the owner of the easement, but instead attaches personally to the easement owner—regardless of whether the owner of the easement owns any land.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹

¹⁸⁷ 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.

¹⁸⁸ 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.

¹⁸⁹ 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.

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

3. Tax Incentives for Conservation Easements

What incentive does a private landowner have to convey valuable development rights to either a public or private trustee? In the U.S., along with the desire of landowners to preserve undeveloped land, the answer is often money—received in the form of tax benefits (e.g., income, property, gift and estate taxes) or cash payments. For instance, U.S. landowners who donate conservation easements that satisfy requirements of the Internal Revenue (IRS) Code can take advantage of federal income and estate tax 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.¹⁹⁰

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.¹⁹¹ 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."¹⁹²

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

¹⁹⁰ IRS Code, § 170(h).

¹⁹¹ 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.

¹⁹² UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm>.

resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property.¹⁹³

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.¹⁹⁴

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 FSM

There appears to be no legal authority in the FSM that directly involves—or in fact even mentions—the use of “conservation easements” per se. Easements, however, are a well-established interest in property, created when a “nonowner” possesses positive rights (to do something) or negative rights (to prevent something being done) over another’s land. Thus to the extent the common law regarding easements does not conflict with national and state laws—or with local laws, customs and traditions—it is valid legal authority throughout the FSM.¹⁹⁵ The

¹⁹³ UCEA, §1(1)—Definitions.

¹⁹⁴ § 4, 12 U.L.A. 179.

¹⁹⁵ FSM Const. art. XV, § 1; 1 FSMC § 205; see also, Pohnpei v. Mack & John, Pohnpei v. Leopold, 3 FSM Intrm. 45, 55 (Pon. S. Ct. Tr. 1987).

research for this memorandum identified two cases by the FSM Supreme Court that directly address the concept of an easement over real property: Nena v. Kosrae, and Nena v. Kosrae (II).¹⁹⁶ In Nena v. Kosrae (II) the Court observed that:

[a]n easement may be created for a permanent duration, or, as it is sometimes stated, in fee, which will ordinarily continue in operation and be enforceable forever. The grant of a permanent easement is for as definite a term as the grant of a fee simple estate. Both are permanent and not for a definite term.¹⁹⁷

An easement that is “not for a definite term” would seemingly be in conflict with Article XIII, section 5, of the FSM Constitution, which prohibits any agreement for the use of land for an indefinite period. In addressing this potential conflict the Court held the constitutional prohibition against indefinite land use agreements does not apply to easements granted for a perpetual, rather than indefinite, term.¹⁹⁸ As stated by the Court in Nena v. Kosrae (II): “The grant of a permanent easement is for as definite a term as the grant of a fee simple estate. Both are permanent.”¹⁹⁹ It is perhaps also worth noting that the Court in Nena v. Kosrae (II) relied upon an American restatement of the common law regarding easements and licenses to characterize the legal properties of an easement.²⁰⁰

The State Supreme Court of Kosrae has also addressed the question of whether a perpetual easement runs afoul of Article XIII, section 5. In Melander v. Kosrae the court held that section 5 “was intended to cover leases, not easements, and therefore an easement that is indefinite in term does not violate this constitutional section.”²⁰¹ In Palik v. Kosrae the Kosrae State Supreme Court was again presented with a case involving the use of easements. The Palik

¹⁹⁶ Nena v. Kosrae, 6 FSM Intrm. 251 (App. 1993); Nena v. Kosrae (II), 6 FSM Intrm. 437 (App. 1994).

¹⁹⁷ Nena v. Kosrae (II), 6 FSM Intrm. 437, 439 (App. 1994).

¹⁹⁸ Nena v. Kosrae, 6 FSM Intrm. 251, 254 (App. 1993).

¹⁹⁹ 6 FSM Intrm. 439.

²⁰⁰ *Id.*

²⁰¹ 3 FSM Intrm. 324, 330 (Kos. S. Ct. Tr. 1988); see also Nena v. Kosrae, 5 FSM Intrm. 417 (Kos. S. Ct. Tr. 1990).

court noted that “for the state to acquire an easement by prescription, the state’s use must be open, notorious, hostile, and continuous for the statutory period under a claim of right.”²⁰² The court went on to hold that utility poles do not constitute trespass on land when “the owner consented to their placement, accepted compensation for crop damage, and signed an agreement which effectively granted an easement for placement of utility poles.”²⁰³ In setting forth legal requirements pertaining to easements, the Palik court—much like the FSM Supreme Court in Nena v. Kosrae (II)—relied upon an American restatement of the common law regarding easements.²⁰⁴ The Kosrae State Code briefly addresses the use of appurtenant easements in Title 11, Chapter 6, which deals generally with land and the environment. The relevant passage is excerpted below:

Appurtenant easements. A preexisting easement or other right appurtenant to the land:

- (a) Remains appurtenant even if it is not described in the certificate; and
- (b) Passes with the land until cut off or extinguished in a lawful manner independent of the certificate.²⁰⁵

As discussed previously, however, there is some reason to believe that the FSM courts, absent any controlling 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)²⁰⁶ and states that they are the most common use of negative easements.²⁰⁷ Early on, there was

²⁰² 5 FSM Intrm. 147, 154 (Kos. S. Ct. Tr. 1991).

²⁰³ 5 FSM Intrm.155–56

²⁰⁴ *Id.* at 147.

²⁰⁵ 11 KSC § 11.615(4).

²⁰⁶ 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).

²⁰⁷ *Id.* at § 1.2 cmt. h (2000).

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.²⁰⁸ However, as previously noted, the most recent Restatement eliminates restrictions on the creation and transferability of benefits in gross,²⁰⁹ so “there is no longer any impediment to the creation of servitudes for conservation or preservation purposes.”²¹⁰ Additionally, the benefits may be granted to third parties who are not involved in creating the easement.²¹¹

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,”²¹² and “special protections”²¹³ are afforded them. For instance, if the benefits are held by a governmental body or conservation organization,²¹⁴ the conservation easement may not be modified or terminated unless (1) the particular purpose for which the easement was created becomes impracticable; or (2) the easement can no longer be used to accomplish a conservation purpose.²¹⁵ If the changed condition is attributable to the holder of the servient estate, damages may be charged.²¹⁶ 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).²¹⁷ Lastly, benefits held by governmental bodies or environmental organizations may only be transferred to other

²⁰⁸ *Id.* at §§ 1.2 cmt. h, 2.6 cmt. a.

²⁰⁹ *Id.* at §§ 2.6, 4.6.

²¹⁰ *Id.* at § 2.6 cmt. a.

²¹¹ *Id.* at § 2.6(2).

²¹² *Id.* at § 8.5 cmt. a.

²¹³ *Id.* at § 1.6 cmt. b.

²¹⁴ “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).

²¹⁵ *Id.* at § 7.11(1)-(2).

²¹⁶ *Id.* at § 7.11(3).

²¹⁷ *Id.* at § 8.5 (including cmt. a).

governmental bodies and environmental organizations (unless the creating instrument provides otherwise); whereas all other benefits in gross are freely transferable.²¹⁸

V. OTHER POTENTIAL LEGAL TOOLS

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

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.²¹⁹ A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case, a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

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

²¹⁸ *Id.* at § 4.6(1)(b)-(c).

²¹⁹ Environmental Law Institute, *Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success* 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

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.²²⁰ 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.²²¹ If the promisee sues the promisor for breach of the covenant, the law of contracts is applicable. If, however, a person who buys the promisee's land is suing, or a person who buys the promisor's land is being sued, then the law of property is applicable.²²² The rules of property law thus determine when a successor owner can sue or be sued on an agreement to which he or she was not a party. Two points are essential to understanding the function of these rules. First, property law distinguishes between the original parties to the covenant and their successors. Second, each real covenant has two "sides"—the burden (the promisor's duty to perform the promise) and the benefit (the promisee's right to enforce the promise).

In order for the successor to the original promisor to be obligated to perform the promise—that is, for the *burden* to run—the common law traditionally required that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must "touch and concern" land;²²³ (4) horizontal privity must exist;²²⁴ (5) vertical privity must exist,²²⁵ and

²²⁰ Promises that restrict permissible uses of land are referred to as negative or restrictive covenants.

²²¹ 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.

²²² 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.

²²³ 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.

²²⁴ 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 promisor and the

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

The Restatement (Third) of Property (Servitudes) has eliminated a number of these traditional common law requirements. The horizontal privity requirement and the prohibition on third party beneficiaries have been entirely eliminated. Also, the prohibition on covenant benefits in gross, the touch and concern requirement, and the vertical privity doctrine have been replaced with doctrines designed to more effectively accomplish their respective purposes. Pursuant to the Restatement's approach, a covenant is a servitude if either the benefit or the burden runs with the land. The *benefit or burden* of a real covenant runs with the land where (1) the parties so intend; (2) the covenant complies with the Statute of Frauds; and (3) the covenant is not otherwise illegal or violative of public policy.²²⁶

C. Equitable Servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.²²⁷ An equitable servitude is a promise concerning the use of land that (1) benefits and

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.

²²⁵ 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.

²²⁶ Restatement (Third) of Property (Servitudes) §§ 1.3, 1.4 (2000). Under the Restatement, a covenant burden or benefit that does not run with land is held "in gross." A covenant burden held in gross is simply a contractual obligation that is a servitude because the benefit passes automatically to successors to the benefited property. A covenant benefit held in gross is a servitude if the burden passes automatically to successors to the land burdened by the covenant obligation.

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

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,²²⁸ for the *burden* of an equitable servitude to bind the original promisor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;²²⁹ (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:²³⁰ (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;²³¹ (4) a servitude is valid if it is not otherwise illegal or against public

²²⁸ Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

²²⁹ If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

²³⁰ As noted above, under the "integrated approach" adopted by the Restatement (Third), easements, real covenants, profits and equitable servitudes are all categorized as servitudes

²³¹ 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.

policy; (5) a servitude is interpreted to carry out the intent or legitimate expectations of the parties, without any presumption in favor of free use of land; (6) servitude benefits and burdens run to all subsequent possessors of the burdened or benefited property;²³² (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.²³³

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

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

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

²³² Special rules govern servitude benefits and burdens that run to life tenants, lessees, and persons in adverse possession who have not yet acquired title.

²³³ 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

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

E. Profits à Prendre

A profit à prendre is a common law interest in land that gives a right to enter and take part of the land or something from the land.²³⁴ 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.²³⁵ 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

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).

²³⁴ 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.

²³⁵ 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.

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.²³⁶

A landowner creates a profit à prendre by granting it in writing to the profit à prendre holder. The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit à prendre, he or she must respect its terms. The profit à prendre holder can sue if the owner deals with the land in a way that detracts from the rights of the profit à prendre holder. The holder of a profit à prendre can also sue anyone who interferes with the profit à prendre.²³⁷

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.

In Iriarte v. Etscheit, a case decided by the FSM Supreme Court, the appellants asserted they had acquired a profit à prendre interest in the land in question.²³⁸ In holding that the appellants had not satisfied the elements of a valid profit à prendre interest, the court noted that “our comments on a profit à prendre do not constitute our recognition of such a right. . . . We have, based on the appellants’ legal authorities, only concluded that such an interest was not

²³⁶ Profits à prendre of this kind are called *profits en gross*.

²³⁷ 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.

²³⁸ Iriarte v. Etscheit, 8 FSM Intrm. 231 (App. 1998).

established in this case.”²³⁹ The relevance of this case is in the following point: there are interests which are recognized by U.S. common law—a tradition generally adhered to by the FSM—which have yet to receive formal judicial recognition within the FSM. While interests such as a profit à prendre have the potential to facilitate private lands conservation, judicial protection of the interest would depend upon their receiving such recognition.

²³⁹ *Id.* at 240.

BIBLIOGRAPHY

Supporting materials are contained in a companion Appendix to this report.

Primary Sources

Chuuk State Constitution
Constitution of the Federated States of Micronesia
Kosrae State Constitution
Pohnpei State Constitution
Yap State Constitution

Caselaw

Barker v. Paul, 6 FSM Intrm. 473, 475-76 (Chk. S. Ct. App. 1994)
Chuuk State Supreme Court, Civil Appeal No. 598.
Damarlane v. United States, 7 FSM Intrm. 56 (Pon. S. Ct. App. 1995)
Etpison v. Perman, 1 FSM Intrm. 405 (Pon. 1984)
FSM v. Albert, 1 FSM Intrm. 14 (Pon. 1981)
FSM v. Boaz (II), 1 FSM Intrm. 28 (Pon. 1981)
In re Nahnsen, 1 FSM Intrm. 97 (Pon. 1982)
Iriarte v. Etscheit, 8 FSM Intrm. 231 (App. 1998)
Island Cable TV v. Gilmete, 9 FSM Intrm. 264 (Ponape 1999)
Kapas v. Church of Latter Day Saints, 6 FSM Intrm. 56, 60 (App. 1992)
Nena v. Kosrae, 6 FSM Intrm. 251 (App. 1993)
Nena v. Kosrae (II), 6 FSM Intrm. 437 (App. 1994)
Palik v. Kosrae, 5 FSM Intrm. 147 (Kos. S. Ct. Tr. 1991)
Pohnpei v. Mack & John, Pohnpei v. Leopold, 3 FSM Intrm. 45, 55 (Pon. S. Ct. Tr. 1987)
Rauzi v. FSM, 2 FSM Intrm. 8 (Pon. 1985)
Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131 (Pon. 1985)

Secondary Sources

Asian Development Bank, *Indigenous Peoples / Ethnic Minorities and Poverty Reduction: Pacific Region* ISBN: 971-561-436-1 16 (2002)

Asian Development Bank, *Women in Development: Federated States of Micronesia* (1993)

Briefing Paper, Session 1—Land Issues in the Pacific, Forum Economic Ministers Meeting, PIFS(01)FEMC.03 (2001)

R. Crocombe, *Draft Report—Improved Economic Use of Land in the Federated States of Micronesia*, Asian Development Bank (1997)

Christopher R. Dahl, *Dissertation—The State and Tradition Conceptions of Land Tenure on the Island of Pohnpei*, Dec. 1999

Economic Management Policy Advisory Team (EMPAT), Working Paper No. 6: Economic Use of Land in the FSM 2 (1996)

Environmental Law in the South Pacific (1996)

Federated States of Micronesia, Climate Change National Communication 9–10 (1997)

Federated States of Micronesia, Draft—Economic Strategy for the Environment Sector 6 (2000)

Federated States of Micronesia, National Biodiversity Strategy and Action Plan 8 (2002)

Marjorie V.C. Falanruw, “People Pressure and Management of Limited Resources on Yap,” in *National Parks, Conservation, and Development: the Role of Protected Areas in Sustaining Society* (J. McNeely & K. Miller eds. 1982)

John R. Haglegam, *The FSM Constitution and the 2001 Constitutional Convention*

Edward C. King, Custom and Constitutionalism in the Federated States of Micronesia, 3 *Asian-Pacific Law & Policy Journal* (2002)

U.S. Department of the Interior, Office of Insular Affairs, *A Report on the State of the Islands* 70 (1999)

APPENDIX I

Note: In addition to this Appendix, supporting materials to this report can be found in a separate companion Appendix to this report.

I. Listing of Relevant Legislation

A. International Environmental Agreements

International Plant Protection Convention, with Annex, 1951.
United Nations Convention on the Law of the Sea, 1982.
Agreement relating to the Conduct of a Joint Program of Marine Geoscientific Research and Mineral Resource Studies of the South Pacific Region, with Annexes, 1982; with Related Agreement, 1984.
Vienna Convention for the Protection of the Ozone Layer, 1985.
Convention for the Protection of the Natural Resources of the South Pacific Region, 1986; and companion protocols, 1986.
United Nations Framework Convention on Climate Change, 1992
Convention on Biological Diversity, 1992

B. National Legislation

Endangered Species Act.
Endangered Species Regulations (Adopted).
Federated States of Micronesia Administrative Procedures Act.
FSMEPA Earthmoving Regulations.
Federated States of Micronesia Environmental Protection Act (FSMEPA) 1984.
FSMEPA Environmental Impact Assessment Regulations.
FSMEPA Subsidiary Regulation – Environmental Impact Assessment (EIA).
Foreign Investment Act.
Trust Territory Endangered Species Act of 1975.
Trust Territory Environmental Quality Protection Act.
Trust Territory Regulations.
United States National Environmental Protection Act.

C. Kosrae Legislation

Endangered Species Regulation.
National Environmental Impact Assessment Regulations.
Regulations on Fill and Construction Projects Below High Water Mark.
Trust Territory Regulations.

D. Pohnpei Legislation

Conservation and Resource Enforcement Act.
Deed of Trust Act of 1987.
Forest Management Act of 1979.
Marine Resources Conservation Act of 1981.
Mangrove Protection Act of 1987.
National Environmental Impact Assessment Regulations.
Pohnpei Cultural Preservation Act.
Pohnpei Environmental Protection Act of 1991.
Pohnpei Watershed Forest Reserve.
Pohnpei Watershed Forest Reserve and Mangrove Protection Act Subsidiary
Regulations.
Public Trust Lands Distribution Act of 1980.
Public Lands Act of 1987.
State of Pohnpei Earthmoving Regulations.
Trust Territory Environmental Quality Protection Act.
Watershed Act.

E. Chuuk Legislation

Chuuk State Historic Preservation Act of 1991.
National Earthmoving Regulations.

F. Yap Legislation

Draft Earthmoving and Sedimentation Regulations.
Environmental Protection Agency Regulations.
Environmental Quality Protection Act of 1987.
United States Trust Territory Environmental Quality Protection Act.
Yap State Environmental Quality Protection Act.