

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS**



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Addendum**

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Commonwealth of the Northern Mariana Islands
Office of the Attorney General

2nd Floor Hon. Juan A. Sablan Memorial Bldg.
Caller Box 10007, Capitol Hill
Saipan, MP 96950

EDWARD MANIBUSAN
Attorney General

LILLIAN A. TENORIO
Deputy Attorney General

OAG 21-01
AMENDED

August 9, 2021

Subject: Operation of Managaha Island

Agency: Department of Public Lands

Opinion of the Attorney General

I. QUESTIONS PRESENTED

1. What is the scope of the Department of Public Lands' ability to administer Managaha Island in the absence of a Concessionaire, as regards...
 - a. ... temporary permitting of vendors?
 - b. ... life guards and security?
 - c. ... cleaning and maintenance?
2. Can the Department of Public Lands waive the landing fee for non-resident visitors to Managaha Island?
3. How should the Department treat revenues earned from Managaha Island while administering it in the absence of a special concessionaire?

II. SHORT ANSWER

1. DPL's regulations do not contemplate Managaha being without a concessionaire, and are silent on what DPL must do under those circumstances. However, DPL has a superseding authority to administer and manage public lands under 1 CMC § 2803 upon which it can rely to step into the shoes of the absent concessionaire in a limited fashion. This limited authority would allow DPL to approve the temporary permitting of subconcessionaires and provide for life guards, security, cleaning, and maintenance of Managaha.
2. No. The landing fee must be charged to all "tourists," which are defined as non-residents of the CNMI, pursuant to NMIAC § 145-30-210.
3. Revenues resulting from subconcession fees are analogous to rents, and therefore should be treated as arising out of the administration and management of public lands. Likewise,

Civil Division
Telephone: (670) 237-7500
Facsimile: (670) 664-2349

Criminal Division
Telephone: (670) 237-7600
Facsimile: (670) 234-7016

Attorney General's Investigative
Telephone: (670) 237-7625
Facsimile: (670) 234-7016

Division Domestic Violence Intervention Center
Telephone: (670) 664-4583
Facsimile: (670) 664-4589

landing fee revenues may be used for the “construction, maintenance, repair, and/or upkeep” of Managaha, with the remainder being remitted to the MPLT at the end of the fiscal year.

III. Background

A. The Mariana Public Lands Corporation

When the Constitution of the Commonwealth of the Northern Mariana Islands (“CNMI Constitution”) was ratified in 1977, it created the Marianas Public Lands Corporation (“MPLC”).¹ The MPLC was established to act as a steward of the Commonwealth’s public lands for the benefit of people of Northern Marianas descent within the context of several constitutional restrictions.²

The MPLC had a limited constitutional lifespan, and was dissolved in 1994.³ Its responsibilities and powers were succeeded by the Board of Public Lands, the Marianas Public Lands Authority, and then the Department of Public Lands (“DPL”).⁴ These entities inherited the MPLC’s fiduciary duties to people of Northern Marianas Descent (“NMDs”).⁵

B. Managaha Island and the Special Recreational Concession

The public lands of the Commonwealth to be managed by the MPLC include Managaha Island (“Managaha”). The Constitution instructs that Managaha must be “maintained as an uninhabited place and used only for cultural and recreational purposes.”⁶ By the early 1980s, it had become clear that proper care and maintenance of Managaha would require a partnership between the Commonwealth and private companies.⁷

Thus, in 1989 the MPLC contracted with Tasi Tours & Transportation, Inc., a local company, to grant it a Special Recreational Concession to exclusively operate all commercial concessions on Managaha, maintain the island, and provide other necessary public services.⁸ MPLC further defined the scope of this relationship and Tasi’s responsibilities via regulations enacted in 1993.⁹ Tasi Tours operated the Special Recreational Concession until August 2020. However, the successor Concessionaire, U-Top Investment (Saipan) Inc., did not take possession of the Special Recreational Concession and abandoned its associated rights, leading to the termination of its concession in February 2021.

¹ NMI Const. art. XI, § 4.

² NMI Const. art. XI, §§ 3-4.

³ See NMI Const. art. XI, § 4(f); Exec. Order 94-3.

⁴ See P.L. 15-2 (2006); P.L. 12-71 (2001); P.L. 12-33 (2000); P.L. 10-57 (1997).

⁵ See *DPL v. Commonwealth*, 2010 MP 14 ¶ 12.

⁶ NMI Const. art. XIV, § 2.

⁷ CNMI Atty. Gen. Opinion No. 82-18, at 4-5 (Aug. 30, 1982).

⁸ See *Island Marine Sports, Inc. v. Dep’t of Pub. Lands*, Civil Case No. 12-0151, Opinion & Order Granting Preliminary Injunction at 3 (July 19, 2012).

⁹ *Id.* at 2-3. See also NMIAC § 145-30-001 through -410.

DPL has not yet contracted with a new Concessionaire to operate the Special Recreational Concession for Managaha, but has been providing daytime security and maintenance for the island in the interim. As tourism resumes, it has inquired as to the scope of its ability to administer Managaha in the absence of a concessionaire.

IV. ANALYSIS

A. DPL's statutory authority to administer and manage public lands allows it to step into the shoes of the absent concessionaire.

DPL is responsible for the administration and management of public lands.¹⁰ Managaha is public land that must be "maintained as an uninhabited place and used only for cultural and recreational purposes."¹¹ Thus, the administration and management of Managaha falls within the general scope of DPL's powers, with the caveat that DPL has a constitutional obligation to limit the use of Managaha to cultural and recreational purposes.

Within the scope of this authority, DPL has established by regulation a public-private partnership for the administration of Managaha.¹² Under this system, a private concessionaire¹³ maintains Managaha and provides security in exchange for exclusive commercial rights.¹⁴ The concessionaire may also be assisted by subconcessionaires mutually agreed upon by DPL and the concessionaire.¹⁵

The regulations do not address how Managaha should be administered in the absence of a concessionaire.¹⁶ Considering DPL's broader authority to administer public lands as well as its constitutional obligations in administering Managaha, this silence cannot prevent DPL from administering Managaha in the absence of a concessionaire. If DPL does so, it should step into the shoes of the concessionaire in a limited capacity in order to minimize current and later disruption of operations and deviation from the regulations. This involvement should be limited to security/lifeguards, cleaning/maintenance, and permitting subconcessionaires rather than directly engaging in commercial activities.

1. DPL may contract with subconcessionaires when acting as a concessionaire.

A "subconcessionaire" is "[a] subcontracted company with a permit from DPL, approved by both DPL and the Concessionaire, to provide commercial activities such as food service, human powered watercraft or wind powered watercraft on Managaha Island, etc., under the Special

¹⁰ NMI Const. art. XI, § 3; See P.L. 15-2 (2006); P.L. 12-71 (2001); P.L. 12-33 (2000); P.L. 10-57 (1997).

¹¹ NMI Const. art. XIV, § 2.

¹² NMIAC § 145-30-001 through -410.

¹³ The "Concessionaire" is "[w]hoever DPL awards the Special Recreational Concession to with a formal Agreement who has the exclusive right to operate all commercial concessions on the Island, provide island maintenance, and provide other provision of public services under the Agreement terms." NMIAC § 145-30-015(e).

¹⁴ NMIAC § 145-30-101.

¹⁵ *Id.* The number of subconcessionaires is not set by regulation, but is instead subject to mutual agreement between the concessionaire and DPL. *Id.*

¹⁶ See generally NMIAC § 145-30-001 through -410.

Recreational Concession Agreement.”¹⁷ DPL and the concessionaire must mutually agree to the selection, number, and activities of the subconcessionaires.¹⁸

In the absence of a concessionaire and Special Recreational Concession Agreement, DPL may contract directly with permitted companies as subconcessionaires (with DPL acting as concessionaire) as needed.¹⁹ Any resultant contracts should be explicitly limited in duration to terminate once a concessionaire is selected.²⁰

2. DPL may either directly provide lifeguards and security, or contract with a subconcessionaire to provide them.

The concessionaire is responsible for providing lifeguards to monitor, patrol, and supervise water-related activities at Managaha’s beaches between the hours of 08:00 a.m and 5:00 p.m.²¹ Likewise, the concessionaire is responsible for the security of Managaha.²² DPL rangers and enforcement officers are required to enforce these regulations.²³

In the absence of a concessionaire, DPL can either provide lifeguards directly or contract a subconcessionaire to provide life guards. Contracting a subconcessionaire is probably preferable in order to limit the Commonwealth’s liability for any injuries or accidents that may occur.

3. DPL is responsible for the cleaning and maintenance of Managaha in the absence of a concessionaire.

The concessionaire is responsible for cleaning and maintaining Managaha and its improvements.²⁴ These duties are at the core of the rationale for originally creating the concession.²⁵ If DPL steps into the shoes of the concessionaire to administer Managaha due to the absence of a concessionaire, it is responsible for carrying out these duties.²⁶

¹⁷ NMIAC § 145-30-015(k).

¹⁸ See NMIAC §§ 145-30-015(k), -101(a).

¹⁹ As noted, DPL’s regulations do not account for the possibility of Managaha not having a concessionaire; consequently, they do not provide a process for directly selecting a subconcessionaire. See generally NMIAC § 145-30-001 through -410. However, DPL’s temporary occupancy regulations contain processes for selecting and contracting with concessionaires under other circumstances. NMIAC § 145-70-215. DPL should use those processes for selecting subconcessionaires.

²⁰ The duration should be limited because subconcessionaires require the mutual agreement of both DPL and the concessionaire. See NMIAC §§ 145-30-015(k), -101(a).

²¹ NMIAC §§ 145-30-110(a)(7), -120, 135(b).

²² See NMIAC § 145-30-135(a).

²³ See NMIAC § 145-30-135(d) (requiring the Department’s rangers to enforce the Managaha regulations).

²⁴ NMIAC § 145-30-110(a)(1), (2), (3), (6).

²⁵ CNMI Atty. Gen. Opinion No. 82-18, at 4-5 (Aug. 30, 1982).

²⁶ See also NMIAC § 145-30-135(d) (requiring the Department’s rangers to enforce the Managaha regulations).

B. Non-residents visiting Managaha must be charged landing fees.

“The Department or its designee *shall* charge a landing and user fee from all tourists arriving on the island.”²⁷ This fee shall be at least \$10.00, and shall only be charged once daily per tourist.²⁸ A “tourist” is defined as “a person who is not a resident of the CNMI.”²⁹ Thus, the plain language of DPL’s regulations does not permit any waiver of the fee for non-resident visitors to Managaha.

Moreover, the money from the collection of these fees shall be “used only for reimbursements for cost of the construction, maintenance, repair, and/or upkeep of the improvements, infrastructure, pier, appearance, safety, and cleanliness of Managaha Island.”³⁰ All unused revenue from these fees must be remitted to the Marianas Public Land Trust at the end of the fiscal year.³¹ Considering the constitutional dimensions of MPLT’s right to receive funds,³² refusing to collect the landing fee from a person who is subject to it could constitute a violation of DPL’s fiduciary duty in administering and managing public lands.³³

C. Revenues from operating Managaha are derived from the administration and management of public lands.

DPL is required to place funds from the administration and management of public lands in a “DPL Operations Fund” where they remain untouched until appropriated.³⁴ Like rents, concession fees and payments from subconcessionaires to DPL would clearly be derived from the administration and management of public lands and should be treated accordingly. Likewise, as discussed above, landing fees received are likewise available for the “construction, maintenance, repair, and/or upkeep” of Managaha, with the remainder being remitted to the MPLT.³⁵

One reason for the recommendation that DPL not directly engage in commercial activities is that it is not clear from the constitution, statutes, and regulations how any resulting revenue should be treated. An argument could be made that it arose out of the administration and management of public land since DPL would only be engaged in those activities as part of administering and managing Managaha. Conversely, an argument could be made that it did not since the funds were directly earned in commerce. Considering the time and expense resolving that question satisfactorily would likely require, it would be better for DPL not to directly engage in commercial activities and thereby avoid the issue.

²⁷ NMIAC § 145-30-210(a) (emphasis added). Separately, 2 CMC § 1621 imposes a \$5 landing fee on each non-resident passenger who disembarks on Managaha, but was advised to be unconstitutional by Attorney General Opinion No. 06-11. See CNMI Atty. Gen. Opinion No. 06-11, 34 CNMI Reg. 32394 (Mar. 29, 2012).

²⁸ NMIAC § 145-30-210(b), (d)

²⁹ NMIAC § 145-30-101(1). A person is a “resident” of the CNMI if they are domiciled in the CNMI. *Id.* at (j).

³⁰ NMIAC § 145-30-210(f).

³¹ *Id.*

³² *DPL v. Commonwealth*, 2010 MP 14 ¶¶ 33-34 (2010).

³³ See *DPL v. Commonwealth*, 2010 MP 14 ¶ 12.

³⁴ 1 CMC § 2803(c).

³⁵ NMIAC § 145-30-210(f).

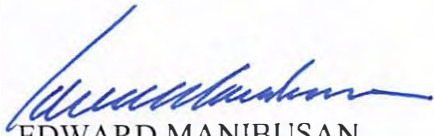
V. Conclusion

Although DPL's regulations do not contemplate Managaha being without a concessionaire, DPL can rely on its authority to administer and manage public lands to step into the concessionaire's position. If DPL does so, it should limit its activities to providing lifeguards, security, cleaning, and maintenance, as well as contracting with subconcessionaires, rather than directly engaging in commercial activities.

DPL cannot waive the landing fee due from non-residents visiting Managaha.

DPL should treat fees paid by subconcessionaires like rents derived from the administration and management of public lands. Landing fees should be used in accordance with NMIAC § 145-30-210(f) for the "construction, maintenance, repair, and/or upkeep" of Managaha, with the remainder being remitted to the MPLT.

DPL should update its regulations to address the possibility of Managaha not having a concessionaire, in order to clarify both its powers and duties under these circumstances.



EDWARD MANIBUSAN
Attorney General