IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellant,
v.
JOHNSON TORIBIONG and VALERIA TORIBIONG,
Appellees.

Cite as: 2017 Palau 12
Civil Appeal No. 16-002
Appeal from LC/B Nos. 14-285, 14-286

Decided: March 9, 2017

Counsel for Appellant .....N. Durflinger
Counsel for Appellees .....J. Toribiong

BEFORE: JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Land Court, the Honorable C. Quay Polloi, Senior Judge, presiding.

OPINION

PER CURIAM:

[¶ 1] This appeal arises out of a dispute over ownership of two lots of land in Koror State. The Land Court awarded both lots to Appellees Johnson and Valeria Toribiong ("Toribiong"), finding that they had met their legal burdens to establish ownership of both lots. The Koror State Public Lands Authority ("KSPLA") appealed. For thfe reasons below, we reverse.

BACKGROUND

[¶ 2] The land known as *Ngerbechedesau* is located in Ngermid Hamlet, Koror State. The land was the property of Milong lineage and its members. In the late 1920s, a portion of *Ngerbechedesau* was used and occupied by a

man named Medalarak,[1] then the chief of the lineage. Around 1932, the Japanese government forcibly took control of Medalarak's lands and began construction of a water pipeline.

[¶ 3] Following World War II, Medalarak sought to regain his lands. On March 8, 1955, he filed a Statement of Claims with the Palau District Land Office. The claim was numbered "82" on the form. (The claim would come to be known as "Claim No. 82.") He indicated the land was controlled by the Trust Territory Government and was "in custody of the Alien Property Custodian." His form further stated that "before the United States came" the land was used by the "Japanese Government." He wrote that he was claiming *Ngerbechedesau* "for myself."

[¶ 4] The claim was heard the following year. On August 27, 1956, Medalarak provided a statement to the District Land Title Officer. He stated he was claiming the land "for the Milong lineage" who had owned the land since the Spanish times. Medalarak swore that he was "now chief of the Milong lineage." He stated that about 1932, the Japanese government offered to buy the land, but he declined "as it [was] lineage land." He further stated that the government eventually "started to use the land for the water pipeline to Babelthuap," "told me to stay off the land," and that "[t]he lineage never received any payment for this land." The District Land Title Officer denied the claim. The officer apparently concluded that the Japanese government usually paid compensation for land taken for public works such as the water pipeline, despite the officer's finding that "no evidence can be found that any payment was made." Medalarak appealed and the Trust Territory High Court affirmed.[2]

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[1] The oldest record documents spell the name "Mdalarak." Later adjudications and the current parties use "Medalarak." This opinion uses the latter for consistency.

[2] These results appear to be the product of pre-Constitution precedents regarding claims for the return of public lands. The Palau Constitution went into effect on January 1, 1981. Article XIII, Section 10, and subsequent implementing legislation, provide a different framework for the return of lands wrongfully taken by previous occupying powers.

[¶ 5] Medalarak had a maternal cousin, Techereng Baules. Techereng was considered to be his niece. Sometime in the 1960s, Medalarak orally deeded his lands in *Ngerbechedesau* to Techereng and her husband Baules Sechelong. On May 14, 1964, Medalarak's relatives and members of Milong lineage confirmed the transfer in a recorded deed.[3] The deed listed specific Tochi Daicho lots and noted that the lots were Medalarak's "individual own properties."

[¶ 6] In January 1973, Techereng filed a claim for the land Medalarak lost to the government. The monumentation sketch indicates that she claimed what Medalarak claimed in 1955—Claim No. 82—along with a small adjacent triangular area. She renewed her claim around 1988.

[¶ 7] Claims in *Ngerbechedesau* were noticed and heard by the Land Claims Hearing Office ("LCHO") in 1990. In May 1990, "in preparation for a pre-hearing conference," an LCHO officer reviewed the record of Medalarak's "Claim No. 82." The original claim indicated the size of the tract at 259.99 acres. That would be a huge area, and the officer concluded it was likely "impossible." The National Surveyor and two other Lands and Surveys employees independently calculated the area to be 25.9 acres—in other words, the decimal point had originally been misplaced. The Senior Land Claims Hearing Officer filed a memorandum for the record that the size of Claim No. 82 for the upcoming hearing was 25.9 acres.

[¶ 8] At the 1990 hearing, Techereng's husband, Baules, "claimed jointly with Techereng . . . the entire public land involved in Medalarak's Claim No. 82." Baules was represented at the hearing by now-Appellee Johnson Toribiong. According to the LCHO's Adjudication and Determination, Toribiong stated that: (1) Techereng claimed "as successor to Medalarak's interest"; (2) her claim "is based on the record of Medalarak's Claim No. 82"; and (3) the claim "is also based on a deed of transfer of all of Medalarak's land in *Ngerbechedesau*." The LCHO's decision noted that "[i]n a further correspondence with this office, [Toribiong] informed this office that the

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[3] The deed also confirmed a transfer of lands to her that had been owned by Ngiracheluoll, another member of the lineage. *See* Judgment, Civil Action No. 19-76 (September 20, 1976).

lands listed in the Tochi Daicho as private properties of Medalarak, which lands were conveyed to claimants, are all located inside Claim No. 82."

[¶ 9] Following the hearing, the LCHO found that "[t]he public land known as *Ngerbechedesau*, or Medalarak's Claim No. 82 . . . was the property of the Milong lineage." The land was taken by the Japanese without compensation. "Milong lineage never filed a claim to this public land, and never showed any interest in the [LCHO] hearings . . . . This supports [the] assertion that Medalarak and the lineage had conveyed their rights and interest in this land to [Techereng]." The LCHO ultimately rejected the arguments of the other claimants at the hearing. The office concluded "that the public land known as *Ngerbechedesau* or Claim No. 82, containing . . . [25.9 acres], was the property of Milong Lineage" before it was wrongfully taken. Sufficient evidence shows that the lineage conveyed its rights of ownership to Baules Sechelong and Techereng Baules, who is herself a strong senior female member of the lineage." The LCHO determined "this public land" should be returned to them pursuant to 35 P.N.C. § 1104(b).[4] The LCHO determination was issued on August 27, 1990.[5]

[¶ 10] Shortly after the LCHO's determination, Baules and Techereng registered a land transfer ("Oidel a Chutem") with the Clerk of Courts. The document was dated October 19, 1990 and evidenced an intent to transfer certain land to Johnson Toribiong.[6] According to the document, the land transferred included the land on which Toribiong's house was situated. The document stated that the boundaries of the land transferred were depicted on an attached sketch.

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[4] Section 1104(b) was the functional predecessor of now-operative 35 P.N.C. § 1304(b), which provides the framework for the Land Court to return wrongfully taken public lands to the original citizen owners or their heirs.

[5] One claimant appealed, but the appeal was ultimately dismissed for failure to meet certain deadlines. *See* Order of Dismissal, Civil Action No. 475-90 (January 24, 1991).

[6] It appears the transfer was in consideration of Toribiong's legal services in the LCHO hearing, although the transfer document itself does not make that explicit.

[¶ 11] On February 9, 1995, Toribiong wrote "on behalf of" Techereng to the Chief of Lands & Survey and requested an official survey of *Ngerbechedesau* be made to support issuance of certificates of title. On November 3, 1995, Land Registration Officer Flavin Uro completed an LCHO Form No. 007 for *Ngerbechedesau.* The form listed Johnson and Valeria Toribiong as the "claimants." The form included a monumentation sketch, indicating that three monuments were placed across a middle portion of *Ngerbechedesau*.[7] The form was signed by the Toribiongs as well as Techereng as an "adjacent landowner."

[¶ 12] On November 24, 1995, the Senior Land Claims Hearing Officer issued a memorandum for the record. The memorandum stated that Cadastral Plat No. 020 B 00 had been "prepared at the request of Johnson and Valeria Toribiong." The plat map included nine lots. Five of the nine lots corresponded to stretches of the main public road from Koror to Babeldaob and a smaller public road that forked off the main road. The remaining four lots depicted land that was loosely bounded by the two public roads. The largest of these lots were Cadastral Lot Nos. 020 B 01 and 020 B 02 ("Lot 01" and "Lot 02"). The remaining two lots together made up a smaller triangle of land sandwiched at the fork in the two public roads. These smaller lots were Cadastral Lot Nos. 020 B 03 and 020 B 04 ("Lot 03" and "Lot 04"). In the memorandum, the hearing officer explained that through the earlier monumentation and field survey, "a parcel split of *Ngerbechedesau* property was undertaken to show Cadastral Lot 020 B 01 as owned by Techereng Baules and Baules Sechelong and 020 B 02 as owned by Valeria Toribiong and Johnson Toribiong." The memorandum authorized certificates of title be issued accordingly. On the same day the memorandum was issued, the LCHO issued a Certificate of Title stating that the Toribiongs owned Lot 02.

[¶ 13] Two decades later, Toribiong filed a "Claim of Land Ownership" for Lots 03 and 04 on his and his wife's behalf. The June 3, 2014 claim form stated the lots were their "individual property" and "an integral part" of Lot 02. Toribiong indicated on the form that the corresponding Tochi Daicho lot number was "unknown" and that he had "no knowledge" of the ownership

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[7] The monuments corresponded with the boundary line between what would become Cadastral Lot Nos. 020 B 01 and 020 B 02.

listed in the Tochi Daicho, but that it "may be Japanese Govt." The claim indicated that the land was "part of LCHO Claim No. 82" Toribiong further indicated that this land had previously been "heard and determined" by the LCHO in file number 12-PL-07. In describing the LCHO's disposition, Toribiong wrote that the determination of ownership issued by the LCHO "only covered 020 B 02; for some reason 020 B 03 and 020 B 04 were omitted." He indicated that Lots 03 and 04 were "unclaimed to date." Toribiong explained that "020 B 04 was supposed to be for the easement but is not necessary as there is a road to the area. 020 B 03 was supposed to be part of adjacent land but claimant unknown and no claim was ever filed except by Johnson and Valeria Toribiong."

[¶ 14] Two months later, the Bureau of Lands and Surveys (BLS) issued a Notice of Monumentation and Survey for Lots 03 and 04. Subsequent to the notice, Ghandi Baules, Techereng's son, filed a claim for both lots. BLS included KSPLA as a "claimant" per KSPLA's 1988 claim for "all lands designated anywhere as public lands within Koror State." Prior to the hearing, however, KSPLA "indicated" to the court "that it only claimed [Lot 04] but not [Lot 03]." The court characterized KSPLA as "withdrawing" its claim to Lot 03.

[¶ 15] The Land Court ultimately determined that the Toribiongs owned both lots. In its December 31, 2015 decision, the court first recounted the history of Medalarak's Claim No. 82 and Techereng's subsequent claims culminating in the 1990 LCHO adjudication. The court found that after that adjudication, Techereng "transferred part of the land to Johnson Toribiong as payment for his legal services." The Land Court noted that "[w]hen executed, this transfer document indicated the existence of a sketch and otherwise stated that markers would be placed later" but that "[n]o sketch was admitted at the hearing." The court further found that the 1995 LCHO Form No. 007 was prepared "per instructions of Techereng" and that the sketch prepared by the registration officer depicted Lot 02 as well as Lots 03 and 04.

[¶ 16] Based on these findings, the Land Court first rejected the claims of Ghandi Baules to either lot. Ghandi Baules claimed that his mother had only transferred the portion of land that became Lot 02 to the Toribiongs and

"denied the extent of Mr. Toribiong's current claim." The court concluded that Toribiong was not claiming beyond what Techereng acknowledged in 1995. The court credited Techereng's participation in the 1995 monumentation as more probative than Ghandi Baules' testimony as to the extent of the land transfer to Toribiong.

[¶ 17] KSPLA's pre-hearing "withdrawal" of the claim to Lot 03 therefore left the Toribiongs as the only party pressing a claim to that lot. The Land Court observed that an award of the lot to them "must still be supported by evidence." "The basis of the Toribiong claim is that Techereng Baules deeded this land to Toribiong," the court explained. Acknowledging that Techereng "did not own" the lot "when the deed was executed," the Land Court found that Techereng "did have a colorable claim theory" for the lots and that, in effect, she had transferred this unadjudicated claim to Toribiong. The basis for Techereng's colorable claim was that "Milong Lineage owned the area of Claim No. 82 and beyond, including the large area of land across the main road to the west," which, but for the main road, "would all be one and the same land belonging to Milong Lineage." The court continued by concluding that "the small triangular area" including Lot 03 was "adjacent to Claim No. 82 and the road" and "would have fallen into" Techereng's pre-1990 claim. Together with the LCHO's 1990 finding that "Claim No. 82 and the greater area of *Ngerbechedesau* was forcibly taken to become public land, chances are Techereng Baules' entire claim . . . would have likely succeeded." "In turn, the 1990 deed to Toribiong would have validly transferred ownership to Toribiong had Techereng Baules' claim been heard in its entirety." The Land Court concluded that it "must choose among the claimants before it" and chose "the Toribiong claim as to [Lot 03]."

[¶ 18] As to Lot 04, the Land Court began by noting that KSPLA claimed the lot was public land. The court noted, among other things, that Lot 04 "is surrounded by lands that were claimed as public lands" and ultimately found that it was "more probable than not that [Lot 04] became public land." Proceeding under the framework for a return of public lands claim pursuant to 35 PNC § 1304(b), the Land Court first determined that Toribiong's claim, traced through Techereng's 1973 claim, was timely. As to whether Lot 04 became public through a wrongful taking, the court concluded that because the hearing officer in 1955 "acknowledged a wrongful taking of

Ngerbechedesau," because the 1990 LCHO hearing "again found such wrongful taking of *Ngerbechedesau*," and because "the lot in this case is adjacent to larger parcels of lands that were found by those prior courts as having been wrongfully taken," it was more probable than not that Lot 04 was wrongfully taken. Finally, the Land Court concluded that "[a]s found in 1955 and again in 1990, *Ngerbechedesau* was owned by Milong Lineage before it was taken by force." The court noted that Medalarak and Techereng "were the proper representatives" for the lineage, that the LCHO had determined in 1990 that members of the lineage had "deeded the lands to Techereng," and that in turn she had deeded them to Toribiong. The court concluded that the Toribiongs therefore were "successors-in-interest" to Milong lineage and that "[t]heir claim prevails."

[¶ 19] The Land Court accordingly issued Determinations of Ownership for Lots 03 and 04 in favor of the Toribiongs. KSPLA timely appealed the determination with respect to Lot 04.

STANDARD OF REVIEW

[¶ 20] We review the Land Court's factual findings for clear error. *ASPLA v. Esuroi Clan*, 22 ROP 4, 5 (2014). Conclusions of law are reviewed de novo. *Id*.

DISCUSSION

[¶ 21] KSPLA argues that the Land Court clearly erred in holding that Toribiong met his burden on a return of public lands claim for Lot 04. The heart of KSPLA's argument is that the record does not support a finding that Medalarak ever owned Lot 04 or that that lot was wrongfully taken. KSPLA contends that because Medalarak never owned Lot 04 he could not have conveyed it to Techereng in the 1960s; likewise, if Lot 04 never came to Techereng, she could not have deeded it to Toribiong in 1990. As explained below, we agree.

[¶ 22] This appeal raises an additional issue regarding Lot 03. Because KSPLA "withdrew" its claim to Lot 03, it had no reason on appeal to assign legal error to the Land Court's determination as to that lot. We generally decline to address legal issues not raised by the parties on appeal. *See, e.g.*, *Nakamura v. Nakamura*, 2016 Palau 23 ¶ 25. However, "a number of

prudential considerations, including the need to avoid the misleading application of the law, may warrant appellate review of a legal issue not raised." *Id*. (citations omitted); *cf. also, e.g.*, *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 87 n.9 (2004) (Ngiraklsong, C.J., concurring) ("An appellate court may affirm or reverse a trial court decision on different grounds."). Additionally, we have explained that appellate courts may consider issues insufficiently presented on appeal where public interests are involved. *See, e.g.*, *ROP v. Airai SPLA*, 9 ROP 201, 204 (2002).

[¶ 23] We conclude that the Land Court's legal treatment of the claims to Lot 03 implicates the public interest and appellate review is necessary to avoid the misleading application of the law. The record here provides no meaningful legal basis to treat Lot 03 differently than Lot 04. As explained below, we conclude that ownership of Lot 03 should have been determined under the standard for claims for the return of public lands. As with Lot 04, the record evidence does not support a finding that any private claimant met her or his burden for the return of public lands as to Lot 03. When no private claimant meets that burden, the land remains public as a matter of law. The Land Court therefore erred in awarding Lot 03 to Toribiong.

I. Return of Public Lands Claim for Lot 04

[¶ 24] The Land Court found that Lot 04 was public land. A claimant seeking the return of public land from the government must show that: (1) he or she is a citizen who filed a timely claim; (2) he or she is either the original owner or one of the original owner's proper heirs; and (3) the property is public land which attained that status by a wrongful government taking. *See KSPLA v. Idid Clan*, 22 ROP 21, 24 (2015). Crucially, it is the claimant, and not the governmental land authority, who "at all times bears the burden of proving, by a preponderance of the evidence, that each element is satisfied." *Id*.; *see also* 35 PNC § 1304(b). KSPLA first argues that the Land Court erred in finding that Toribiong met his burden to prove the second element—*i.e.*, "original ownership." We agree.

[¶ 25] As an initial matter, it is not immediately apparent that Toribiong is qualified to pursue a claim for the return of this lot. He does not purport to have owned Lot 04 before it became public; nor can he plausibly claim to be the original owner's "proper heir" as the term is normally used. Rather, he

claims the lot as the assignee of Techereng's interest in the land. The Land Court determined that what Techereng conveyed to Toribiong was her legal interest in "an unadjudicated claim" for the return of public lands. Because it does not affect the ultimate outcome of this appeal, we will assume, without deciding, that return of public lands claims are assignable such that Toribiong may pursue Techereng's claim.

[¶ 26] Techereng's 1990 conveyance puts Toribiong in Techereng's position regarding the lots at issue here. In other words, Toribiong must prove Techereng's return of public lands claim to Lot 04—*i.e.*, he must prove that she is either the original owner or that owner's proper heir. The history of the proceedings suggests two possible ways that Techereng might qualify.

[¶ 27] First, historically—including in various filings in this matter—Techereng's claim was premised on Medalarak's original ownership and, in turn, on her being Medalarak's proper heir. This was the theory pressed in the 1990 LCHO hearing for claims in *Ngerbechedesau*, in which Toribiong represented Techereng. According to that determination, "Johnson Toribiong made his statement of claims as follows":

> 1. Techereng Baules filed claim in 1988 as successor in interest to Medalarak's interest.
>
> 2. Her claim is based on the record of Medalarak's Claim No. 82 and the judgment in CA No. 80. . . .
>
> 3. The claim is also based on a deed of transfer of all Medalarak's land in *Ngerbechedesau* to claimants, executed on May 14, 1964, by Medalarak's close relatives, all of whom were members of Milong Lineage of Koror, in favor of claimants.

[¶ 28] Whether premised on being: (1) the successor-in-interest to Medalarak's ownership rights; (2) the assignee of his Claim No. 82; or (3) the grantee of the 1964 transfer deed, Techereng's claim to the land on this theory requires the land to have been originally owned by Medalarak. In order to succeed under this theory, Toribiong would have to prove that Medalarak was the original owner of Lot 04.

[¶ 29] We conclude that the record does not support a finding that Lot 04 was originally owned by Medalarak. The Land Court found—and it appears

indisputable—that both Lot 03 and Lot 04 are outside the area of his Claim No. 82. Further, the record is clear that the 1964 deed only conveyed his lands within Claim No. 82: the 1990 LCHO decision states that Toribiong "informed [the LCHO] that the lands listed in the Tochi Daicho as private properties of Medalarak, which lands were conveyed to claimants, are all located inside Claim No. 82." In short, we see no record evidence to support a finding that Medalarak originally owned Lot 04. To the extent the Land Court found otherwise, that finding was clearly erroneous. *See, e.g.*, *Kebekol v. KSPLA*, 22 ROP 38, 40 (2015).

[¶ 30] However, the Land Court appeared to find that Techereng's claim succeeded on a second theory. Under this theory, her claim is premised on Milong lineage being the original owner of Lot 04. The court below found that "it is more probable than not that prior to the taking by the Japanese, [Lot 04] belonged to Milong lineage." In turn, Toribiong is pursing the claim as a "successor-in-interest" through Techereng to Milong lineage. As before, we conclude that the record evidence is insufficient to support a finding that Toribiong met his burden to prove the element of original ownership.

[¶ 31] First, it is not clear that the record supports a finding that Milong lineage originally owned Lot 04. The Land Court noted that the District Land Office, in 1955, and the LCHO, in 1990, had found that "*Ngerbechedesau* was owned by Milong lineage before it was taken by force." However, neither one of those decisions adjudicated ownership of Lot 04; both were limited to other areas of land, particularly Medalarak's Claim No. 82. Put another way, neither one of those decisions determined that Lot 04 was part of *Ngerbechedesau* or was owned by anyone in particular.

[¶ 32] However, we need not determine whether a finding that Milong lineage owned Lot 04 is supported by the record. Assuming it is, Toribiong's ability to pursue Milong lineage's claim to the lot relies on a valid conveyance of that claim from Techereng. Techereng's authority to convey the lineage's claim to Lot 04 to Toribiong in turn relies on either the lineage having transferred the claim to her, or on her having sole authority to transfer the lineage's claim to Lot 04 on behalf of the lineage. There is insufficient record support for either alternative.

[¶ 33] The Land Court did not make a finding that Milong lineage had transferred its claim to Lot 04 to Techereng to pursue in her individual capacity, and the record lacks evidence that might support such a finding. As to Techereng's authority to transfer claims to lineage land, the Land Court noted only that she was a "proper representative" of the lineage. But "it is widely known that Palauan custom requires the consent of all senior strong members of a lineage to alienate lineage land." *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 47 (2006) (collecting cases). We see no reason to treat the alienation of a lineage's claim to land any differently here. There is no evidence in the record that all senior strong members of Milong lineage consented to alienate the lineage's unadjudicated interest in Lot 04. Thus to the extent the Land Court found that Lot 04 was originally lineage land, its finding that the lineage's claim to the lot was validly conveyed to Toribiong was clearly erroneous. *See, e.g.*, Kebekol, 22 ROP at 40.

[¶ 34] In short, the record does not support a finding that Toribiong's claim to Lot 04 validly traces to that of the original owner or proper heir. His return of public land claim for Lot 04 must therefore fail. As no claimant has proven a return of public lands claim, the lot remains public land. *Salii v. KSPLA*, 17 ROP 157, 160 (2010). We accordingly reverse the Land Court's decision and vacate its determination of ownership as to Lot 04.

II. Ownership of Lot 03

[¶ 35] In preparing for the Land Court proceedings, BLS included KSPLA as a "claimant" for both Lot 03 and Lot 04 based on KSPLA's standing claim to public lands. Prior to the hearing on these lots, however, KSPLA "indicated" to the court "that it only claimed [Lot 04] but not [Lot 03]." The court characterized KSPLA as "withdrawing" its claim to Lot 03. In making a determination of ownership for Lot 03, the Land Court first found that Toribiong had a stronger claim than Ghandi Baules. With KSPLA not pressing a claim to that lot, the court characterized Toribiong's claim as "uncontested." Under those circumstances, the Land Court held that claim "must still be supported by evidence" and concluded that the relevant inquiry was whether Toribiong "ha[d] a basis for his ownership claim." The court found a basis stemming from the 1990 conveyance from Techereng—that is to say, the same basis as for Lot 04. Finding that basis sufficient, the Land

Court concluded that it "must choose among the claimants before it" and accordingly chose Toribiong's claim. As explained below, this was legal error.

[¶ 36] "[I]t is well-established that a Land Court claimant may raise one of two types of claims": "(1) a superior title claim"; and "(2) a return of public lands claim." *Idid Clan*, 22 ROP at 26 (collecting cases). The requirement that the Land Court "must choose among the claimants before it" only applies in superior title cases. *See, e.g.*, *Eklbai Clan v. KSPLA*, 22 ROP 139, 146 (2015) ("[W]e have specifically limited this requirement to superior title/land registration cases, as opposed to those for the return of public land."). A relevant question, then, is whether this is a return of public lands case or a superior title case.

[¶ 37] The decision below does not make explicit under what framework the court analyzed the claim to Lot 03. It does not use the term "superior title." In most instances, the decision simply describes Toribiong as having filed "a claim" to the lot. Toribiong's claim form and filings in the court below are similarly ambiguous. The June 3, 2014 claim form states that the lot is an "integral part of their property – [Lot 02]." Lot 02 was public land at the time Techereng prevailed on her return of public land claim in the 1990 LCHO hearing, suggesting this claim for an "integral part" of that property is also for a return of public land. While certain statements on the form might be construed as asserting a superior title claim, other statements seem to indicate a return of public lands claim. For example, although the form disclaims knowledge of the Tochi Daicho listing for Lot 03, it says it "may be Japanese Govt." The form also reiterates Toribiong's view that the lot should have been adjudicated during the 1990 LCHO hearing, but that "for some reason [Lot 03] and [Lot 04] were omitted." The 1990 proceeding only involved claims for the return of public lands.

[¶ 38] Ambiguity in making land claims—that is, whether a claim is asserting superior title or seeking the return of public lands—is not just a stylistic issue: it is a substantive one. "Although these claims may be asserted concurrently and in the alternative, they involve distinct elements, carry different burdens of proof, and are susceptible to different defenses."

Idid Clan, 22 ROP at 27.[8] Here, if Toribiong was asserting a return of public lands claim for Lot 03, it would fail for the same reasons the claim for Lot 04 failed. The fact that KSPLA decided not to present any evidence or press any arguments with respect to Lot 03 does not change the result. "[P]ublic lands authorities have no obligation to appear or present evidence at a return of public lands hearing[.]" *See Kebekol v. KSPLA*, 22 ROP 74, 75 (2015) (quoting *PPLA v. Ngiratrang*, 13 ROP 90, 96 (2006)). The question in a return of public lands case is whether the individual claimant met his or her burden. If they did not, the land remains public. *See id*. ("[A] land authority, if it so wishes, may stand silent and still prevail on a return of public lands claim if the claimant fails to meet her burden.").

[¶ 39] Thus the only way that the Land Court could have legally awarded Lot 03 to Toribiong was if the court first construed his claim as asserting superior title and then determined that he had met the burden to prevail on that claim. Both conclusions are problematic. *Cf., e.g., KSPLA v. Idid Clan*, 22 ROP 66, 68-70 (2015) (reaffirming that the Land Court may not inquire into a claim not before it or reform a superior title or return of public lands claim into the other). It is not clear that Toribiong has asserted a distinct superior title claim separate from a return of public lands claim. The Land Court treated KSPLA's decision not to press a claim on Lot 03 as conclusively demonstrating that it was unnecessary to evaluate a return of public lands claim and that therefore Toribiong's claim must be evaluated as a superior title claim. This is not correct. "In a case where a claimant seeks the return of public land, the land authority will prevail if the claimant cannot overcome his burden, regardless of whether the land authority presses its claim before the court." *In re Appeal of Sugiyama*, 19 ROP 128, 135 (2012). In other words, the determining factor in whether a claimant must meet the legal burdens for a return of public lands claim is not whether the relevant land authority presses a claim for the lot at issue; the determining factor is whether the lot at issue is public land.

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[8] Due to the significant differences between these two types of claims, where a land claimant asserts both a superior title and a return of public land claim for the same property the Land Court must consider such claims separately. *See Idid Clan*, 22 ROP at 27.

[¶ 40] The importance of land status—public or private—does not change even in cases in which a claimant clearly and explicitly asserts only a superior title claim. This is because "in asserting superior title, a claimant is claiming the land on the theory that it *never became public land in the first place*." *Ikluk v. KSPLA*, 21 ROP 66, 68 (2014) (citation omitted). We have repeatedly held that evidence that the land was not public is "one of the elements to a superior title claim." *Id*. (collecting cases). In other words, a claimant who wishes to press a superior title claim must first prove the land is not public. *See id*.

[¶ 41] Here, the Land Court apparently considered KSPLA's decision not to argue ownership of Lot 03 as sufficient proof the lot was never public land. In contrast, for Lot 04, for which KSPLA did press a claim, the Land Court appeared to place the burden on KSPLA to prove that the lot was public land. The different legal treatment of the two lots suggests that the Land Court considered land to be private by default and only public once a land authority makes a sufficient evidentiary showing. This is backwards. Unregistered land is presumed to be public, held in trust by the government until a private claimant either prevails on a return of public lands claim or proves that the land never became public in the first place such that she or he can prevail on a superior title claim. *Cf., e.g., In re Ownership of Ngerchelngael Island*, 22 ROP 266, 276 (Land Ct. 2014) (determining first whether claimed land was or was not public).[9]

[¶ 42] To be sure, KSPLA's decision not to contest Toribiong's claim to Lot 03 is relevant to whether Toribiong proved that the lot was never public land. But it is not conclusive. "Sometimes through honest error," for example, "a government official may treat public property as if it were private." *PPLA v. Salvador*, 8 ROP Intrm. 73, 78 (1999). Interests in public lands, and claims to it, are "fundamentally different" than interests in, and claims to, private land. *See Eklbai Clan*, 22 ROP at 146. The government, as trustee of public lands, "is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *Salvador*, 8 ROP Intrm. at 79. Land

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[9] A return of public lands claimant necessarily concedes that the land is public. *See Idid Clan*, 22 ROP at 67.

is not automatically legally converted from public to private simply because a land authority official decides not to press a claim to that land in litigation. Put another way, a case involving public land is not the equivalent of a superior title case in which a government land authority is also a claimant. *Cf., e.g.*, *Masang v. Ngirmang*, 9 ROP 215, 217 (2002) ("The Court does not 'award' title to a public lands authority as part of return-of-public-lands proceedings."). The Land Court's conclusion that Toribiong's claim was "uncontested" and prevailed because the court "must choose among the claimants before it" would only be valid if Toribiong proved that Lot 03 never became public land in the first place. *See Ikluk*, 21 ROP at 68.

[¶ 43] The decision below, however, does not include a finding that Lot 03 never became public.[10] In other circumstances we might remand the case for an evaluation of whether the lot ever became public. Here, however, the record supports only one finding. If Lot 04 became public land—as we agree that it did—we see no basis to treat Lot 03 differently. Having carefully reviewed the record, we conclude that any differences between the two lots are immaterial to whether the lots ever became public land.

[¶ 44] In short, the record does not support a finding that Lot 03 never became public land. No private claimant met the legal burden to prevail on a return of public lands claim. The law is clear that in such cases the land remains public. *See, e.g. Salii*, 17 ROP at 160. The Land Court's contrary determination was legal error and we accordingly vacate its determination of ownership with respect to Lot 03.

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[¶ 45] Our decision today is based upon the application of established law to the record evidence. We note in closing that our decision is also consistent with public records that were not introduced in proceedings before the Land Court. *Cf., e.g.*, *Napoleon v. Children of Masang Marsil*, 17 ROP 28, 32

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[10] Toribiong's appellate brief in fact characterizes the Land Court as making a finding that both lots became public through a wrongful taking by the Japanese government. *See* Appellees' Br. at 4 ("The Land Court found that Cadastral Lot Nos. 020 B 03 and 020 B 04 . . . were wrongfully taken by the Japanese Government.").

(2009) (explaining that a court may properly take judicial notice of certain public records). Before the Land Court, Toribiong introduced the 1990 registered land transfer ("Oidel a Chutem") from Techereng as a one-page document. Toribiong introduced that page in combination with the 1995 monumentation form as a single exhibit. The Land Court's decision noted that although the Oidel a Chutem indicated the existence of a sketch depicting the boundaries of the land transferred from Techereng to Toribiong, no sketch was admitted at the hearing.

[¶ 46] The sketch, however, is in the permanent land register, immediately following the Oidel a Chutem. The register also contains a third page with an additional area calculation sketch. Although the sketches are not conclusive, they suggest the triangular area of Lot 03 and Lot 04 was not within the boundaries of the land transferred to Toribiong in 1990. It is unclear why only the first page of the 1990 transfer documentation was presented to the Land Court.

CONCLUSION

[¶ 47] For the reasons above, we **REVERSE** the decision of the Land Court and **VACATE** its determinations of ownership. We **REMAND** this case with direction to enter determinations of ownership for Cadastral Lot Nos. 020 B 03 and 020 B 04 in favor of KSPLA.

SO ORDERED, this 9th day of March, 2017.