IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

OLSUCHEL LINEAGE, represented by Desiiu Ngirkelau,
Appellant,
v.
MINORU UEKI,
Appellee/Cross-Appellant
v.
KERKUR CLAN,
Appellee/Cross-Appellee,
v.
ALEXANDER REKEMESIK and SALOME LANWI,
Appellees.

Cite as: 2019 Palau 3
Civil Appeal No. 18-013
Appeal from SP/B 16-00031

Decided: February 6, 2019[1]

Counsel for Appellant Olsuchel Lineage	Pro Se
Counsel for Appellee Minoru Ueki.....	Lalii Chin Sakuma
Counsel for Appellee Nona Luii/Kerkur Clan	No Appearance
Counsel for Appellee Alexander Rekemesik	No Appearance
Counsel for Appellee Salome Lanwi……	No Appearance

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
R. BARRIE MICHELSEN, Associate Justice
KEVIN BENNARDO, Associate Justice

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

[1] The parties did not request oral argument in this appeal. No party having requested oral argument, the appeal is submitted on the briefs. ROP R. App. P. 34(a).

OPINION

MICHELSEN, Justice:

INTRODUCTION

[¶ 1] This case involves appeals by Olsuchel Lineage and Minoru Ueki pertaining to the Land Court decision in SP/B 16-00031. The disputed properties are in Ngesekes in Ngerbeched Hamlet, Koror. Parts of the land have been called *Ulseked, Mesebelau* (*Mesebeluu*), and *Bital Beluu* (*Bitalbeluu*). Worksheet 2005-B-02A contains the lots at issue in this case: TR-2-1, TR-2-2, TR-2-3, TR-2-4, TR-2-5A, TR-2-5B, TR-2-6A, TR-2-6B, TR-2-7A, and TR-2-7B.

[¶ 2] The Land Court found that Kerkur Clan established all of the elements of a return of public lands claim to two properties, lots TR-2-1 and TR-2-2. It further found that no claimant met its burden on the return of public lands claims brought with respect to the other lots; TR-2-3, TR-2-4, TR-2-5A, TR-2-5B, TR-2-6A, TR-2-6B, TR-2-7A, and TR-2-7B. Those lots were to remain with the current private title holders. Olsuchel Lineage appeals the Land Court's decision with respect to all of the lots, and Ueki, one of the private title holders, appeals the Land Court's decision with respect to the lots determined to be transferred to Kerkur Clan. Kerkur Clan and the other two private title holders, Alexander Rekemesik and Salome Lanwi, did not file responses to Appellants' claims.

[¶ 3] The Court now **AFFIRMS** in part and **REVERSES** in part the Land Court's decision.

STANDARD OF REVIEW

[¶ 4] The Appellate Division reviews the Land Court's conclusions of law *de novo* and its findings of fact for clear error. *Ngotel v. Iyungel Clan*, 2018 Palau 21 ¶ 7. Clear error means that the Land Court's factual findings "will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion." *Id.* at ¶ 8 (citing *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009)).

BACKGROUND

[¶ 5] The land at issue became public lands during the Japanese Mandate period, and remained public under the Trust Territory government until 1960. In 1955, Kerkur Clan disputed the Trust Territory's right to lands called *Ngeritouchel* and *Kerekur*, possibly including land at issue in this case. That claim, Claim 83, was adjudicated in favor of the Trust Territory government in 1956. As noted in *Kerkur Clan v. Koror State Pub. Lands Auth.*, 2017 Palau 36 ¶18 n.4, "[t]his appears to be the result of pre-Constitution legal precedents."

[¶ 6] The District Land Title Officer made the following relevant factual findings related to the land known as *Kerekur*, which is the land the Land Court assumed to be at issue in this case:

> 1. "[T]he land known as Kerekur containing an area of 9.63 acres, [] located in the Hospital area, Koror Island [is] on record as land in control of the Alien Property custodion [sic], Trust Territory Government."
>
> 2. "Kerekur [was] formerly the property of the Kerekur clan."
>
> 3. "The land Kerekur was taken by the Japanese Government in 1929. The Government paid the clan 1000 yen for moving house [sic] off the land and for damages to plants and trees."

Kerkur Clan Ex. 3. The District Land Title Officer determined the following:

> The Government took Kerekur at on [sic] early date. There is a record of damages being paid for this land. While there is no evidence that payment was made for the land, usually the money was intended to cover damages and payment for the land.

Id. With respect to the other property at issue in Claim 83, *Ngeritouchel*, the District Land Title Officer found that no payment was ever made for that property.[2]

[2] *Ngeritouchel* was adjudicated in *Kerkur Clan*, 2017 Palau 36, where this Court affirmed the Land Court's decision that no claimant proved a return of public lands claim. *Id.* at ¶ 35. That land is decidedly not the location of the lots at issue in this case.

[¶ 7] Relying in part on the 1956 adjudication of Claim 83, the Land Court determined that the land at issue in this case was wrongfully taken by the Japanese. The Land Court noted that, in the decision in favor of the Trust Territory, the Land Title Officer "concluded that the land, 'was taken at such early dates that was time for court action [sic]'" and interpreted that to mean "the wrong happened so remotely in time by a prior occupying power that the District Land Title Officer could no longer undo what was done long ago." (citing Kerkur Clan Ex. 3).

[¶ 8] The Land Court acknowledged that it needed to determine "whether the lands at issue here are included in what was Claim No. 83 before the District Land Title Officer in 1956." It further acknowledged that no sketch of the land disputed in Claim 83 was entered into evidence. Because it could not compare the land in Claim 83 with the lots at issue in this case, the Land Court relied on witness testimony to determine that Kerkur Clan presented sufficient evidence that it was the prior owner of two lots, TR-2-1 and TR-2-2. It did not, however, specifically hold that the land at issue was included in Claim 83. The Land Court relied on the testimony of Hermana Kyota, who testified as to lot TR-2-1. Her house is located on that lot, and she testified that that lot belonged to Kerkur Clan because her mother said it belonged to Kerkur Clan. The Land Court found that Kyota, along with two other witnesses, provided consistent testimony about lot TR-2-1 and that the two other witnesses provided consistent testimony that lot TR-2-2 was Kerkur Clan land. It also found that Kerkur Clan did not provide sufficient proof of its claim to any of the other lots it claimed.

[¶ 9] With respect to the Ueki claim, the Land Court found as follows: In 1960, the Trust Territory Government maintained title to all of the lands at issue in this case. It, however, sought land on Malakal Island that Ueki's father had purchased from the Japanese Government. To obtain that land, it made a land swap offer to the elder Mr. Ueki, offering to deed to him three parcels of Trust Territory land, one of which is clearly coterminous with the land at issue in this case. He accepted the offer and received a quitclaim deed for the land, which was registered with the Clerk of Courts that same year. He then sold a portion of the land to Rekemesik Rengiil and Judah Rekemesik in 1986. Alexander Rekemesik and Salome Lanwi are their successors in interest.

[¶ 10] Because no claimant proved a return of public land claim regarding the remaining lots, the Land Court determined that lots TR-2-3, TR-2-4, TR-2-5A, TR-2-5B, TR-2-6A, and TR-2-6B would remain as Ueki's property based on his quitclaim deed and lots TR-2-7A and TR-2-7B belonged to Rekemesik and Lanwi based on their inheritance of the 1986 warranty deed.

I. Olsuchel Lineage's Appeal

[¶ 11] Olsuchel Lineage brought a claim for wrongful taking. It disputes the claim put forward by Kerkur Clan with respect to Claim 83, and claims the Japanese Navy took that property to build housing for its officers and other Japanese government workers and to build a power plant and radio station. Tr. 53:10–20. Olsuchel Lineage's representative testified that, under the Trust Territory government, the Americans thought the land at issue in this case was part of the land in Claim 83 that was taken by the Japanese. *Id.* That misunderstanding led to the land at issue in this case becoming public land, even though it had actually been private during the Japanese Mandate period. *Id.* Olsuchel Lineage argues that the information it presented at trial was not rebutted by other claimants and was sufficient to prove its claim.

[¶ 12] Olsuchel Lineage asserts that the Land Court erred when it stated that Olsuchel Lineage's claim was untimely filed and also that it erred when it concluded that Olsuchel Lineage's claim failed for lack of proof.[3]

[¶ 13] The Land Court stated that the claim filed on May 6, 2005 by Jimmy Baiei on behalf of Kalista Ngirkelau, Desiiu Ngirkelau's mother, was untimely. Technically, that ruling was not appealed. Olsuchel Lineage may have intended its untimeliness argument to apply to this 2005 claim. In his testimony, Olsuchel Lineage's witness, Mr. Ngirkelau, asserted that he was representing the 2005 claim as well as the older Olsuchel Lineage claim at issue here. *See* Tr. 48:19–28. For purposes of this Opinion, we assume the untimeliness determination with respect to the 2005 claim is properly before us on appeal, and we affirm the Land Court's decision with respect to that

[3] Olsuchel Lineage makes two additional arguments on appeal — that the Land Court erred in granting Kerkur Clan's claim on the evidence it presented and that it erred in granting the private claimants property after it had determined the lands were public. The Court addresses both arguments in the section on Ueki's claim.

claim. Mr. Ngirkelau conceded that the claimed land became public lands, *see* Tr. 53:10–20; Olsuchel Lineage Br. 6, 14, so the Land Court properly dismissed as untimely any return-of-public-lands claim brought in 2005, years after the deadline for such claims.

[¶ 14] The Land Court, however, considered the merits of Olsuchel Lineage's pre-Constitution 1979 claim, treating it as if it were a post-Constitution return-of-public-lands claim. Olsuchel Lineage presented one witness, Mr. Ngirkelau, who testified to two different stories regarding the land's original ownership. He explained that the land was given to Olsuchel Lineage as a token for having helped Koror in a war with Ngerkebesang, but also that his mother took Besebes' taxi to the "lady judge that was (indiscernible) Dirruchob" and, to make peace, his mother got the land through a customary distribution of property. Tr. 52:13–23.

[¶ 15] The Land Court concluded that Olsuchel Lineage's claim failed because it "did not provide any evidence to show that the lands were taken through force, fraud, or without just compensation or adequate consideration and [did not provide evidence] that when the lands were taken to become public lands, claimant [] Olsuchel . . . was the original owner of the land at the time."

[¶ 16] Having reviewed the evidence and arguments presented by Olsuchel Lineage, this Court agrees with the Land Court's factual findings and conclusions of law with respect to its claim. Olsuchel Lineage presented generalized statements that the Land Court determined to be insufficient proof of ownership prior to public administration of the land and no evidence regarding the taking itself.

[¶ 17] We find no clear error requiring that the Land Court's factual findings be set aside and agree with the Land Court's conclusions of law. As a result, the Land Court's determination with respect to Olsuchel Lineage's claim is affirmed.

II. Minoru Ueki's Appeal

[¶ 18] Ueki appeals the Land Court's decision with respect to worksheet lots TR-2-1 and TR-2-2, the two lots the Land Court determined belong to Kerkur Clan. His first argument is that Kerkur Clan failed to monument its

claim. However, "failure to monument, in and of itself, is not a stand[-]alone basis to deny a claim." *Kerkur Clan*, 2017 Palau 36 ¶ 27. Thus, the Court does not overturn the Land Court's decision simply because Kerkur Clan failed to monument its claim.

[¶ 19] Ueki raises another argument, one on which we find we can reverse the Land Court's finding: He argues that Kerkur Clan failed to properly identify the land in its claim.[4] Ueki points out that Kerkur Clan relied on Claim 83 for support, but it did not present evidence identifying the land in Claim 83 as the same land it now claims. He emphasizes that Kerkur Clan presented exhibits from Claim 83, but failed to submit any of the contemporaneous maps referenced in those documents and that there is no testimony that the land known in Claim 83 as *Kerekur* and *Ngiritouchel* is the same as the land in this case, which has been identified as *Mesebelau*, *Bital Beluu*, and *Ulseked*.[5] Kerkur Clan submitted with its claim a map created for the hearing, which depicts the area that it now claims, covering worksheet lots TR-2-1 through TR-2-4 and lots TR-2-5A through TR-2-7A, as well as additional property not at issue in this case.

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[4] Ueki also argues that the lots had previously been adjudicated in his favor in Trial Division Case *Ueki v. Kaluu*, Civil Action No. 09-077, and alternatively, he argues that his family's private property since 1960 should not have been treated as public land subject to return under Article XIII, Section 10 of the Republic of Palau Constitution. The Court recently had the opportunity to address the Constitutional argument when presented in *Idid Clan v. Nagata*, 2016 Palau 18, but declined to do so because that case could be resolved on other grounds. We again choose not to address the argument or Ueki's preclusion argument, as his appeal can be resolved on other grounds as well. *See Wally v. ROP*, 16 ROP 19, 23 (2008) ("It is a fundamental rule of judicial restraint . . . that we avoid constitutional questions when it is possible to decide the case on other grounds.") (internal quotation and citation omitted); *see also State Pub. Lands Auth. v. Ngermellong Clan*, 21 ROP 1, 3–4 (2012) (proceeding along "a clear cut alternative path to affirm[] the Land Court, [while] avoid[ing] the thorny constitutional issue").

[5] In her testimony on behalf of Kerkur Clan in this case, Nona Luii testified that Hermana Kyota's and Ngesenges Nakamura's houses were on the claimed property, which she called *Ulseked*, but that Yoshiharu Ueda's house was not. Specifically, she said, "He lived on Mesebeluu. He did not live on this land that we are in Court for today." Tr. 101:20–25. She further explained that another resident, Kaluu, had a house on *Mesebeluu*, and that Kerkur Clan is not claiming it. Tr. 107:4–10. Debed Luii testified on behalf of Kerkur Clan as well and indicated that lot TR-2-3 contains Kaluu's house, lot TR-2-1 contains Kyota's house, and lot TR-2-2 contains Nakamura's house. Tr. 118:25–119:1. From this testimony, it appears that Kerkur Clan claims property on *Ulseked*, which includes worksheet lots TR-2-1 and TR-2-2, but not *Mesebeluu*, which includes worksheet lot TR-2-3.

[¶ 20] In its appeal, Olsuchel Lineage similarly argues that Kerkur Clan's evidence does not support its claim to the specific lands at issue in this case, and in this regard, its arguments support Ueki's appeal as well. Referring to Kerkur Clan's exhibits before the Land Court, Olsuchel Lineage notes that the properties described in the land claim documents "as sharing boundary with the Nona Luii's [sic] claim filed on December 13, 1988 [Kerkur Clan Ex. 6] are not anywhere within the Kerekur [Clan]'s Exhibit 7 [Kerkur Clan's current litigation map] or anywhere close to the property at issue before the Court." Olsuchel Lineage Br. 10. Olsuchel Lineage points out that Kerkur's Exhibit 4, for example, provides boundary descriptions for *Ngiritouchel* and *Kerekur*:

> Ngiritouchel is bounded in the West by mangrove and on the East by Hospital, now Koror State Government Office, North by government and South by Likong. Kerekur is bounded in the North by Government, in East by government, on South by road and government and in the West by road.

Id. (emphasis omitted) (citing Kerkur Clan Ex. 4).[6] *Ngiritouchel* is clearly not land in the area near the lots at issue here, and the description of *Kerekur* does not provide sufficient detail to determine whether the land here falls within what is described as *Kerekur*.

[¶ 21] Olsuchel Lineage further noted that the claim form on which Kerkur Clan's claim is based, Kerkur Clan Ex. 6, describes the property differently. It listed the properties abutting the claimed land as follows: "Ongos-Ngerbelik, Dims-Ngermellong, South-West-Ilou, West-Ngermesekiu, and Diluches-MOC [now Palau Community College]." *Id.* (quoting Kerkur Clan Ex. 6). Referring to *Kerkur Clan*, 2017 Palau 36, Olsuchel Lineage further notes that Kerkur Clan did not monument its claim in that case and instead, as here, attempted to rely on a map created for that case to support its claim. There, we affirmed the Land Court's findings that Kerkur Clan failed

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[6] In *Kerkur Clan*, the Court explained that "[t]he *Kerkur* area of Claim 83 was across Ngerbeched Road" and outside the hearing area in that case. 2017 Palau 36 ¶ 23. That vague description places the Kerkur area of Claim 83 on the same side of Ngerbeched Road as the claims at issue, but does not provide sufficient detail for us to determine whether the disputed lots in this case are contained in the Kerkur area of Claim 83.

to "point[] to evidence that would establish that the location of *Ngeritouchel* is [the location indicated on the submitted litigation map]" and that, as a result, it did not prove its return of public lands claim. *Id.* at ¶ 29.

[¶ 22] "In a return of public lands case, the claimant must show that a piece of property became public land 'through force, coercion, fraud, or without just compensation or adequate consideration' in addition to showing a proper connection to the land." *Idid Clan v. Koror State Pub. Lands Auth.*, 20 ROP 270, 273 (2013) (quoting 35 PNC § 1304(b)(1)–(2)). A claimant can make this showing by establishing the following:

> (1) [T]he claimant is a citizen who has filed a timely claim; (2) the claimant is either the original owner of the claimed property, or one of 'the proper heirs'; and (3) the claimed property is public land which became public land by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration."

Omechelang v. Ngchesar State Pub. Lands Auth., 18 ROP 131, 134 (2011); *Markub v. Koror State Pub. Lands Auth.*, 14 ROP 45, 47 (2007). "'At all times, the burden of proof remains on the claimants . . . to establish by a preponderance of the evidence, that they satisfy all requirements of the [Land Registration Act].'" *Idid Clan*, 20 ROP at 273 (quoting *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006)).

[¶ 23] The Land Court acknowledged that it needed to determine "whether the lands [claimed by Kerkur Clan] are included in what was Claim No. 83 before the District Land Title Officer in 1956." It recognized that there was no sketch of the land at issue in Claim 83 entered into evidence in this case. Because it could not compare the land in Claim 83 with the lots here, the Land Court stated that it would rely on witness testimony to make that determination. The Land Court, however, ignored the question of whether the land at issue was included in Claim 83, and it did not determine whether the land was included in the description in Kerkur Clan Ex. 6.

[¶ 24] Although not expressly articulated by the Land Court, to reach its conclusion that lots TR-2-1 and TR-2-2 belong to Kerkur Clan, the Land Court impliedly concluded that Kerkur Clan properly identified the lands in

its claim and tied them to the properties at issue in this case. Such a finding is clearly erroneous because no reasonable trier of fact could conclude that Kerkur Clan showed that the area described in Kerkur Clan Ex. 6, or within Claim 83, encompasses worksheet lots TR-2-1 and TR-2-2. Through its evidence and witness testimony, Kerkur Clan drew no connection identifying the land in Claim 83 or its Exhibit 6 as the land at issue in the case. The Land Court's determination that the lots belong to Kerkur Clan must be set aside because that determination "lack[s] evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion." *Ngotel*, 2018 Palau 21 ¶ 8. Moreover, as in *Kerkur Clan*, 2017 Palau 36, Kerkur Clan's claim presents other evidentiary problems: it passed up the opportunity to timely monument its claim and has again attempted to rely on a modern litigation map for support. Any lands claimed by Kerkur Clan must be described in its claim form. Evidence describing areas outside of the claim form cannot expand Kerkur Clan's claim. *See id.* at ¶ 22.

[¶ 25] Kerkur Clan did not meet its evidentiary burden, and the Land Court's implied determination that lots TR-2-1 and TR-2-2 fall within the description in Kerkur Clan Ex. 6 or within Claim 83 is in clear error. For this reason, the Court REVERSES the Land Court's grant of lots TR-2-1 and TR-2-2 to Kerkur Clan.

CONCLUSION

[¶ 26] The Court **REVERSES** the Land Court's decision with respect to TR-2-1 and TR-2-2, and **AFFIRMS** the Land Court's decision regarding TR-2-3, TR-2-4, TR-2-5A, TR-2-5B, TR-2-6A, TR-2-6B, TR-2-7A, and TR-2-7B for the reasons stated herein.

BENNARDO, J., concurring in the judgment:

[¶ 27] While I concur with the majority's outcome in both appeals, I write separately because my reasoning differs from that of the majority.

I.

[¶ 28] As to Olsuchel Lineage's appeal, I do not believe that the Land Court should have reached a determination on the merits of Olsuchel Lineage's claim. Rather, I would apply the doctrine of preclusion to Olsuchel Lineage's claim.

[¶ 29] Actual notice of a determination of land ownership is sufficient to preclude a later Land Court adjudication regarding the same property. *See Baules v. Toribiong*, 2016 Palau 5 ¶¶ 27-31; *see also Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 32 (2006). Here, Olsuchel Lineage already litigated the ownership of this land with Minoru Ueki in the Trial Division in Civil Action No. 09-077. In that matter, the Trial Division held a four-day trial in 2011. In the end, the Trial Division found that Ueki was the owner of the land as compared to the other claimants before it. Olsuchel Lineage had more than actual notice of the prior proceeding—it participated in the prior proceeding. Thus, Olsuchel Lineage should not have been provided with a second bite at the same apple before the Land Court. On this reasoning, I would affirm the Land Court's determination that Olsuchel Lineage was not entitled to a determination of ownership of any of the lots in the proceeding below.

II.

[¶ 30] Next, with regard to Minoru Ueki's appeal of the Land Court's disposition of lots TR-2-1 and TR-2-2 in favor of Kerkur Clan, I am unconvinced that the Land Court's factual findings were clearly erroneous. Rather, I would find that reversal is appropriate based on Ueki's claim that the Land Court improperly proceeded with a return-of-public-lands proceeding when, in fact, no public lands were at issue. No parties disputed that Ueki received a quitclaim deed for the land from the Trust Territory government in 1960 in an exchange for land that Ueki owned on Malakal. Ueki's argument is straightforward: because the land has not been publicly owned at any time since the ratification of the Constitution in 1981, the land is not subject to the Constitution's return-of-public-lands provision, Article XIII, Section 10. Indeed, Ueki argues that divesting him of this land would be an impermissible taking that would run afoul of another constitutional provision, Article IV, Section 6. While the majority may find it unnecessary to decide this issue of constitutional interpretation to resolve this appeal, I

think it would be the appropriate approach because I am unconvinced by Ueki's clear error argument and because I believe that further clarity surrounding the proper interpretation of Article XIII, Section 10 would be beneficial.

[¶ 31] Let's begin with the language of the Constitution. The return-of-public-lands provision applies to "any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration." Const. Art. XIII, § 10. This language could be interpreted to contain no temporal limitation—that is, "public lands" could be read to include any land that was ever public land and met the other qualifying conditions. Or this language could be interpreted to include some temporal limitation—for example, "public lands" could be read to only include land that was public land at or since the time of the Constitution. In short, the words "public lands" are ambiguous in this respect. The Land Court adopted the former interpretation; Ueki presses the latter.

[¶ 32] A similar argument was before this Court only a few years ago in *Idid Clan v. Nagata*, 2016 Palau 18. We noted in *Idid Clan* that "language in several of our cases might be read to suggest that a Land Court claimant may not pursue [a return-of-public-lands] claim if the land at issue is not public land at the time the claim is filed" and quoted numerous passages to that effect. *Id.* ¶ 12 & n.4. However, we also noted that "a close reading of the statute suggests that a claimant may pursue [a return-of-public-lands] claim even if the government entity that is alleged to have wrongfully acquired the land subsequently conveyed title to a private party." *Id.* ¶ 12 (quoting 35 PNC §§ 101, 1304(b)). Ultimately, we did not resolve the issue in *Idid Clan* because the appeal was disposed of on other grounds. *Id.* ¶ 14.

[¶ 33] I believe that the time has come to resolve this issue—or at least to narrow its scope—and that Ueki's argument provides the appropriate vehicle to do so. In my view, Ueki is correct that the return-of-public-lands provision, Article XIII, Section 10, does not apply to TR-2-1 and TR-2-2. These parcels were conveyed by the Trust Territory government to a private party acting in good faith in 1960—well before the adoption of Article XIII, Section 10 in

1981. Thus, it was in error for the Land Court to award these lots to Kerkur Clan in a return-of-public-lands proceeding.

[¶ 34] No one has questioned Ueki's good faith in his acquisition of the land in 1960. He gave the Trust Territory government something of value for it—he exchanged land in Malakal for the land. He also had no reason to question the Trust Territory government's ownership of the land at the time. He was not on notice that two decades later Article XIII, Section 10 would command the return of public lands that had been wrongfully acquired by occupying powers. Interpreting Article XIII, Section 10 to include TR-2-1 and TR-2-2 as "public lands" could create conflict with the takings clause of Article IV, Section 6 because it could potentially violate a private individual's fundamental right to be secure in his land. Further, as a matter of equity, Ueki surely would not have agreed to the land exchange deal in 1960 had Article XIII, Section 10 been in effect at that time.[7]

[¶ 35] I would take this opportunity to interpret the term "public lands" in Article XIII, Section 10 narrowly enough so that it does not include lands that have not been publicly owned or maintained at any time since the Constitution's ratification in 1981. Our previous precedents have implied as much. *See Idid Clan*, 2016 Palau 18 ¶ 12 n.4 (quoting language from various cases); *see also Markub v. Koror State Pub. Lands Auth.*, 14 ROP 45, 47 (2007) (listing the third element of a return-of-public-lands claim as a present tense requirement that "the claimed property is public land"); *Etpison v. Sugiyama*, 8 ROP Intrm. 208, 208 (2000) (noting that the appellant had "correctly" abandoned the argument that land conveyed by the Trust Territory government in 1962 did not fall within the scope of Article XIII, Section 10); *Basiou v. Ngeskesuk Clan*, 8 ROP Intrm. 209, 211 n.4 (2000) (noting, in a companion case to *Etpison*, that appellants' counsel had agreed to a similar

[7] Necessarily, I withhold comment as to the precise moment at which land must be publicly owned or maintained to qualify as "public lands" for purposes of Article XIII, Section 10. At the very least, lands that have never been publicly owned or maintained since the ratification of the Constitution do not qualify. This is not the appropriate case to decide whether, for example, land conveyed from the government to a private party in the mid-1980s—after the ratification of the Constitution but before the filing of return-of-public-lands claims—could qualify as "public lands." In that situation, the private party transferee would have been on notice of the existence of Article XIII, Section 10 and therefore of possible other claimants to the land.

concession at oral argument). Narrowing this issue by interpreting "public lands" in Article XIII, Section 10 would help further consistent expectations among land claimants and consistent treatment of their claims.[8]

[¶ 36] To be sure, the statutory definition of "public lands" does not expressly require public ownership of the land at any particular time. Rather, the statute only requires past ownership or maintenance of the land by the Japanese administration or the Trust Territory government. *See* 35 PNC § 101. Thus, the statutory definition could be read to include land, like TR-2-1 and TR-2-2, that was conveyed for value by the Trust Territory government to a private individual almost six decades ago. However, it is axiomatic that the Constitution takes precedence over legislation. The OEK cannot modify the scope of a constitutional provision through legislation. In short, the statutory definition of "public lands" in 35 PNC § 101 does not control the meaning of the term "public lands" in Article XIII, Section 10 of the Constitution.

[¶ 37] Thus, as I see it, the lots at issue simply do not fall within the return-of-public lands provision of the Constitution, Article XIII, Section 10. These lots were conveyed for value by the Trust Territory government to a private individual acting in good faith in 1960. They were not, and have not been, public lands at any time during which Article XIII, Section 10 has been in force. Thus, the Land Court's determination of ownership of TR-2-1 and TR-2-2 in favor of Kerkur Clan pursuant to a return-of-public-lands proceeding was in error. As a result, I agree with the majority's declaration of ownership of these two lots in favor of Ueki.

[8] Compare, for example, the Land Court's inconsistent treatment of similar arguments in the instant case and the case appealed in *Idid Clan*. In *Idid Clan*, the Land Court determined that the land at issue was not "public land" because it was not publicly owned at the time of the appellant's 1988 return-of-public-lands claim. *Idid Clan*, 2016 Palau 18 ¶¶ 5, 12. In the present case, the Land Court determined that the land at issue was "public land" even though it had last been publicly owned in 1960. These two interpretations cannot be reconciled.