IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

BERNIE HITIO and HANDY EMIL,[1] Plaintiffs, **-v-** RAEIN TOKA[2] and NANCY CALEB, aka NANCY PIAMON, on behalf of BILLY PIAMON,[3] Defendants[4] and ALDEN BEJANG, AUN JAMES, AMON JEBREJREJ and CAROLINA KINERE, Defendants/Counterclaimants[5]	Civil Action Nwnbers 21-80 and 1986-149 (consolidated)6 **JUDGMENT**

To: Scott Stege
David Lowe
James Mccaffrey

[1] The court has *sua sponte* amended the caption to reflect the most current substitution of parties. A motion to substitute Handy Emil for Luckner Abner, who died April 16, 2013, was filed August 26, 2013. Although no objections were filed, it was never ruled on. The motion is granted.

[2] A motion to substitute Raein Toka for Towe Toka, who died June 24, 2012, was filed October 4, 2012. Although no objections were filed, it was never ruled on. The motion is granted.

[3] Nancy Caleb first entered an appearance on December 8, 1997, "for and on behalf' of her brother, Billy Piamon, who died, on September 24, 2006. At the trial in 2001, her lawyer referred to her as Nancy Piamon. On June 13, 2007, Mr. Lowe filed a motion to substitute Haney Caleb for Billy Piamon. Plaintiffs filed an objection based on their assumption that Haney Caleb was not the same person as Nancy Caleb. It does not appear this motion was rule on or addressed further. Due to the judgment entered here, the court does not need to address the merits of the motion.

[4] These parties will be referred to collectively as "Defendants," for convenience and to avoid confusion with the intervening defendants/counterclaimants.

[5] On September 3, 1997, Drioji Bejan, Aun James, Amon Jebrejrej and Calorina Kinere moved to intervene as defendants and counterclaimants. On October 23, 1997, that motion was granted. Confusion resulted from these parties being referred to as Intervenors at the 2001 trial. (Corrected Transcript of Proceedings, December 19, 2001, page 42). They intervened as defendants, and filed a counterclaim. For convenience and to avoid further confusion, they will be referred to collectively as "Counterclaimants."

[6] On September 30, 1996, the High Court ordered 1986-149 "merged" with 21-80 (on remand).

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I. Why this Conflict is Before the Court

Long ago, Iroijlaplap Laninbit was faced with a dispute. He resolved it by making certain decisions. After Laninbit's time, Iroijlaplap Jeimata made a decision that conflicted with Laninbit's decisions. The conflict between these decisions was not felt immediately. Only gradually, over time, did the conflict trigger a dispute that remains unresolved to this day. Successor iroijs have dealt with the effects of the conflict, and all have achieved various degrees of success. But none has achieved a permanent solution.

Before the Marshallese people came to be ruled by foreigners, the iroijlaplap's power was absolute. After foreign rule came to the Marshall Islands, the iroijlaplap's power was subject to the foreigners' laws. And while the iroij's power was still great, it was no longer absolute or unrestrained. Before, no one questioned an iroij's decisions. Now, if the iroij's decisions are questioned, they are scrutinized and must be supported by good cause.

The current dispute between the descendants of Abner and Jibke arose after the death of Iroijlaplap Jeimata, who had, during his lifetime, made very skillful decisions in the interest of achieving peace and harmony among his people. No one questioned his decisions. But his successors found themselves in a challenging predicament when one of Jeimata's decisions was questioned. They were bound to honor their predecessor iroij's decision, but that decision was only known by oral history, memory and reference to the Iroij Book. The reasons for the original decision were not known, at least not publicly. Regardless, each successor iroij chose to honor and follow Jeimata's decision. When that decision was questioned, and the conflict ended up before the Court, it was revealed that each successor iroij had his own explanation for Jeimata's decision, but none was aware of what good cause formed the basis for Jeimata's decision.

Now, the Marshallese people, including iroijlaplaps, are subject to the combined authority provided for in the Constitution: a balance between the Cabinet, the Nitijela, the Council of Iroij, and the Judiciary. In situations where a conflict is grounded in custom and tradition, it comes before the Judiciary only if all other avenues of dispute resolution fail. The other branches of the government still retain the power to resolve land conflicts

that stem from matters of custom and tradition. The Nitijela has the power to declare, by Act, the customary law in the Republic.[7] The Cabinet, whose members are collectively responsible to the Nitijela,[8] has a duty to recommend legislative proposals to the Nitijela.[9] And the Council of Iroij may consider any matter of concern to the Republic,[10] may express its opinion on any such matters to the Cabinet [11] and may request reconsideration of any Bill affecting any matter of customary law, traditional practice or land tenure.[12] Even when a controversy over these matters comes before the Court, the Iroijlaplap, by specific rules of the Court, remains the arbiter of first resort.[13] Only when the laws and decisions of these powers fail to resolve the dispute, does it fall upon the Judiciary to do so.

In July of 1982, Abner and Jibke's successors agreed, during the first trial held in this case, to meet with Iroij Manini, and to honor whatever decision he made to put an end to the dispute. Sadly, Manini was too ill to meet with them, and that great opportunity to achieve peace and harmony, and to avoid further involvement by the courts, was lost. The parties have not returned, together, to Manini's successors for settlement, and the iroijs, while having expressed opinions on this matter, have not exercised their power outside the court system to resolve the conflict. And so the conflict has continued before the courts for almost 35 years, and the courts, too, have failed to implement the primary mandate of their own rules: to secure the just, speedy, and inexpensive determination of this action.[14]

Today, the High Court enters final orders concerning this dispute, achieving a resolution in law. And while the Supreme Court has final authority to adjudicate this controversy, it still remains for the Iroijlaplap and his people to achieve a resolution in fact. Many may disagree with the Court's adjudication,. but the Iroijlaplap, and his

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[7] Const., Article X, Section 2(1).
[8] Const., Article V, Section 1(1).
[9] Const., Article V, Section 3(b).
[10] Const., Article III, Section 2(a).
[11] *Id.*
[12] Const., Article III, Section 2(b).
[13] Special Rule of Civil Procedure, Rule 1(a){l).
[14] Rule 1, Rules of Civil Procedure.

successors, are still owed a duty of loyalty by those whose interests are recognized by this adjudication. Only if these people honor their duties to one another, may justice ultimately be served.

II. History of this Case and its People: 1980 - 2015

1980 -1982

On September 17, 1980, the original complaint, captioned *Abner, et al., v. Jibke and Jebrejrej, et al.,* was filed in Civil Action 21-80. On July 21, 1982, Mathline Aini filed an answer. After a seven day trial on Ebeye, the High Court issued its decision in October of 1982, and entered judgment in favor of Jibke's successors, declaring them to be holders of the alab and dri jerbal rights on Aibwij, Manke and Lojonen wetos.

1984

On August 6, the Supreme Court reversed the High Court's decision, remanded the case for further proceedings, and recommended the case be referred to the Traditional Rights Court.

1985

In February, the High Court entered an order referring the case to the Traditional Rights Court. In October, the High Court granted Plaintiffs' request for a preliminary injunction, noting the Trust Territory High Court had already enjoined Defendants from receiving or disbursing alab and dri jerbal IUA payments for Aibwij, Manke and Lojonen wetos in November of 1981.

The case was not addressed by the Traditional Rights Court in 1985.

1986

After a conference with a Trust Territory Judge in October, the parties stipulated to dismiss CA 21-80 in favor of Plaintiffs filing a new case that named living parties, as both Abner and Jibke had died before CA 21-80 was filed.[15] On November 11, Civil Action 1986-149 was filed, captioned *Ellan Jorkan and Matrine Abner v. Matline Aini and Clemen Korok.* Defendants filed answers in December.

[15] This conference was held off the record, and the court did not enter an order from the conference. Later court orders reference this action.

1987

In August, Clemen Korok's lawyer filed a motion to dismiss for failure to prosecute and unjustifiable delay.

Clemen Korok died on December 24.

1988

In February, the court set trial for April.

In March, Beljo Korok, who had substituted as a party after Clemen's death, filed a motion to vacate the preliminary injunction on the basis of financial hardship. The court set the motion for hearing in July, but the hearing did not take place. Nor did the case go to trial in April, as scheduled.

1989

Ellan Jorkan died on November 2.

1990

In December, Matline Aini filed a motion to dismiss for failure to prosecute, citing financial hardship caused by the preliminary injunction. The following week, the court set a pretrial conference for February of 1991. The court never ruled on Matline's motion.

1991

In February, Plaintiffs' current lawyer entered his appearance in this case. At a status hearing later that month, Judge Bird noted, "[H]opefully we can get this case which has now grown a beard as gray as mine brought to fruition.... It has languished ..." He set some pretrial deadlines and stated, "Let's start categorizing these things. If we leave them 11 open now we'll be back here a year from now having the same conversation and trust me, I don't want to do that. I don't think you want to do it and I know your clients don't want to do it, o.k.?" Judge Bird apparently left the High Court later that spring.

1993

There is no record of anything having happened in the case for over two years until July of 1993, when Madine Aini filed another motion to dismiss. Her lawyer painstakingly stepped through the lack of progress in the case, and pointed out that

Plaintiffs' counsel had failed to comply with the February 1991 deadlines. He stated, "Even taking into consideration the considerable Marshallese patience and forbearance, to allow this suit to remain on the calendar would be absolutely contrary to basic justice for this poor woman [Matline Aini], who is entitled to dismissal for want of prosecution .... the 13 year delay, coupled with a new opportunity in 1991 for Plaintiffs to prosecute this case and subsequent failure to do so, is without question, a terrible miscarriage of justice." The court heard Matline's on July 13, and entered the following one sentence ruling: "The Court considered the motion over the objection of Plaintiff's Counsel and denied the motion."

On August 3, plaintiffs Enti Tibon and Matrine Abner filed an amended complaint against defendants Beljo Korok and Matline Aini.

On December 7, defense counsel filed a motion to continue the December 14 pretrial conference due to a scheduling conflict. On December 14, the High Court granted that motion and stated, "It is ordered that this matter be dropped from the calendar until proper notice is given for a further hearing."

1994

On September 13, Plaintiffs' counsel requested the pretrial conference be rescheduled. In his affidavit, counsel stated: "Plaintiffs are prepared, are ready and desire to proceed to bring this matter to a conclusion after nearly fourteen years of waiting and are concerned that long delay only works to Defendant's advantage." Plaintiffs also filed a motion for default judgment against Beljo Korok. The court took no action on either motion.

1995

Plaintiffs' counsel again requested the court address the motions filed in 1994.

1996

In March, a hearing was scheduled for May. Days before the May hearing, Beljo Korok's lawyer moved to withdraw based on a conflict. The court held the May hearing, set pretrial deadlines and set trial for November 25, 1996, before the Traditional Rights

Court and High Court. On September 30 the court entered more pretrial orders and entered defaultjudgment against Beljo Korak:.[16]

In November, the court ordered the amended complaint in CA 1986-149 be deemed to relate back to the date of filing the complaint in CA 21-80, and vacated the trial set for later that month.

1997

In January, the court ordered the Iroij Book be produced. In February, the court noted that it had been produced and entered further pretrial orders. In July, the High Court entered a lengthy decision concerning the law of the case. In September, Defendants filed a motion to join parties, and Drioji Bejang, Aun James, Amon Jebrejrej, and Calorina Kinere moved to intervene, to protect interests they claimed in Manke and Lojonen wetos. In granting these motions, the High Court stated; "It should not be too much to expect that these proposed new parties and all counsel give their highest priority to this case and cooperate in getting this decades old dispute to a prompt resolution by trial. ... The court is loath to again delay plaintiffs' day in court."

The intervening defendants filed their answer and counterclaims in October. In December the court set trial before the Traditional Rights Court for May 11, 1998.

1998

Trial was not held on May 11, or at any time in 1998.

1999

Matline Aini died on September 13.

On September 22, in response to this case having been placed on a Dismissal Docket, Plaintiffs filed·a response to show cause why the case should not be dismissed.

Enti Tibon died on December 6.

2000

Droiji Bejang died on March 21.

[16] On November 6, 1996, the High Court ordered the motion for default be held in abeyance until the case went to judgment. During the 2001 trial, High Court Justice Johnson, sitting with the Traditional Rights Court, held that the matter of Korok's default had been decided, and declined to entertain any further argument on the issue.

On November 14, Plaintiffs' counsel filed an informal request to set a status conference to address the response to the show cause order he filed over a year earlier. The court set a status conference for January 2001.

2001

In September, the court set trial before the Traditional Rights Court for November, and on November 28, 2001, trial began in Ebeye. It ended on December 19, in Majuro.

2002

On March 22, the Traditional Rights Court issued its Opinion. A few days later, in a memo to counsel, the High Court indicated it would submit a request for clarification to the Traditional Rights Court, and invited counsel to provide their own questions or areas needing clarification. Subsequently, counsel for all the parties noted their challenges to the Traditional Rights Court opinion.

On August 20, the High Court issued its Judgment and Opinion, without having conferred further with the parties.

On September 19, Counterclaimants filed a notice of appeal in the Supreme Court and Plaintiffs filed a notice of cross-appeal.

2003-2006

Most of the activity on file focused on obtaining and perfecting a transcript of the 2002 Traditional Rights Court trial. On December 20, 2006, the record on appeal was finalized.

2004

Matrine Abner died on July 27.

2006

Billy Piamon died on September 24.

2007

On March 14, the Supreme Court entered an order dismissing the appeal and remanding the case to the High Court. On September 20, the High Court set a status

conference for October to set a Rule 9 hearing, as ordered on remand from the Supreme Court.

On November 26, the long process of finding a High Court judge to preside over the case began.

2008

In November, the court held a hearing to address what judge would preside over the case.

2009

The only action taken on the record was the appointment of a *pro tem* Associate Justice on March 6.

2010

No action was taken on the record.

2011

On February 17, the Chief Justice of the High Court, who had earlier recused himself from all but procedural matters, entered an order concerning efforts to renew the appointment of the *pro tem* judge appointed in 2009. In that order he stated: "Clients are getting old and infirm and are dying. We need to move forward."

In March, although the Judicial Service Commission recommended the *pro tem* judge's appointment be renewed, the Cabinet rejected that recommendation. Efforts to find a replacement judge continued for the rest of the year.

2012

On April 27, the case was assigned to a new *pro tem* Associate Justice.

Towe Toka died on June 24.

Alden Bejang died on August 14.

On October 26, the High Court entered a scheduling order for a hearing set for December 5. No hearing was held on December 5.

2013

On March 14, the High Court held oral argument.

Luckner Abner died on April 16.

On June 3, the High Court entered an order addressing procedure for referring questions to the Traditional Rights Court.

On November 28, the court entered an order tentatively scheduling trial to begin March 10, 2014.

2014

On February 3, the court entered a second amended scheduling order, removing the March 2014 trial date from the calendar until resolution of issues concerning the condition of files. On April 9, the court entered an order inviting suggestions from counsel on how to address problems with the record. On July 7, plaintiff's counsel responded to that invitation. No further orders were entered in 2014.

2015

On January 27, High Court Chief Justice Ingram reassigned this case to the Associate Justice. On March 5, the court gave counsel an opportunity to supplement their responses to issues raised in both the Supreme Court's 2007 remand and the High Court's June 2013 order. Timely responses were filed.

III. The Supreme Court Ordered this Court to Take Action

On March 14, 2007, the Supreme Court remanded this case back to the High Court due to its failure to hold appropriate proceedings under Rule 14 of the Rules of the Traditional Rights Court.[17] Six years later to the day, the High Court heard oral argument from the attorneys concerning the remand. As stated by the High Court, the issue at the hearing "was the proper course to follow in view of Rule 14 of the Traditional Rights Court and all of the intervening circumstances." (June 3, 2013 Order, page 1).

At the hearing on March 14, 2013, the lawyers argued the positions they had briefed for the court in pre-hearing filings, and essentially brain-stormed ideas about how to resolve the case. The High Court concluded that it would, once again, certify questions to the Traditional Rights Court for its determination and resolution. But the court deferred

[17] The Traditional Rights Court Rules were amended in 2006, at which time Rule 14, in effect in 2002, was replaced by Rule 9. Rule 9 addresses procedure in the High Court after the Traditional Rights Court issues its opinion.

entering the Referral Order[18] to give the parties a further opportunity to address how trial should proceed.

In a November 28, 2013 order, the court suggested a trial date of March 10, 2014, and gave the parties until December 13 to object to that date. Plaintiffs' counsel objected, based on what he termed "file integrity issues." In response, the court vacated future dates, and turned its focus to the parties' objections to the state of the record. On April 8, 2014, the High Court invited counsel to make suggestions. Plaintiffs responded to that invitation on July 7, and no further action was taken until January 27, 2015, when the case was transferred to the undersigned judicial officer.

IV. This Court Must Apply Established Procedural Law

DEFERENCE TO THE TRADITIONAL RIGHTS COURT

The standard of review that applies to the Traditional Rights Court's opinions is grounded in an acknowledgment of that court's superior expertise and unique position to determine matters of custom and tradition. *Dribo v. Bondrik,* 3 MILR 127, 138 (2010). Both the High Court and the Supreme Court must give proper deference to the decisions of the Traditional Rights Court in cases that involve customary law. *Id.* The Constitution, Article VI, Section 4(5) mandates that "when a question has been certified to the Traditional Rights Court for its determination, its resolution of the question shall be given substantial weight in the certifying court's disposition of the legal controversy before it." *Dribo,* 3 MILR at 133. The High Court has a very limited role in the final determination of questions within the Traditional Rights Court's jurisdiction. *Dribo,* 3 MILR at 135. It has the duty to review and adopt the decision of the Traditional Rights Court unless that decision is "clearly erroneous or contrary to law." *Dribo,* 3 MILR at 133; *Bulele v. Morelik,* 3 MILR 96, 100 (2009); *Nashion and Sheldon v. Enos and Jacklick,* 3 MILR 83, 87 (2008); *Tibon v. Jihu,* 3 MILR 1, 6 (2005).

[18] Rule 4, Traditional Rights Court Rules of Procedure.

CLEARLY ERRONEOUS

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Bule/e v. Morelik,* 3 MILR 96, 100 (2009), citing *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985); *Zaion v. Peter,* 1 MILR (Rev.) 228, 232 (1991).19 The reviewing court's function is not to decide the factual issues *de novo,* as the "clearly erroneous" standard does not entitle it to reverse the finding of the trier of fact simply because it is convinced it would have decided the case differently. *Dribo,* 3 MILR at 133, citing *Bulele, supra.* Therefore, under this standard, where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.; Bulele,* 3 MILR at 100, citing *Amadeo v. Zani,* 486 U.S. 214, 225 (1988). When the High Court acts as a court of review, as it does when the Traditional Rights Court has responded to questions referred by the High Court, it must view the evidence in the light most favorable to the lower court's ruling and must uphold any finding that is permissible in light of the evidence. *Dribo,* 3 MILR at 133, quoting *Exxon Corp.* v. *Gann,* 21 F.3d 1002, 1005 (10th Cir. 1994).

BURDEN OF PROOF

The party who asserts a claim has the burden of proving that claim. The plaintiff, who brings an action by filing a complaint, has the burden to prove every essential element of its claim by a preponderance of the evidence. FED-JI § 104:01.20 "[T]he burden of proof in the sense of the risk of non persuasion, [ ] remains throughout the trial upon the party on whom it was originally cast." 28 MIRC, Ch. 1, Article III, Rule 301. And the plaintiff, "the party seeking change, bears the risk of failing to prove the elements of its claim." 2 Handbook of Ped. Evid. § 301.2, *Burden of Proof*

19An obvious corollary of this rule is that a finding is also clearly erroneous when there is no evidence to support it.

20Although this jury instruction is not applicable in the Republic of the Marshall Islands, as there is no right to a jury trial in civil matters, this does not alter the fact that the burden of proof remains on the proponent of a claim. Whether the finder of fact is a jury, or a judge, or panel of judges, the plaintiff has the burden of proving its claims.

In this case, claims were raised in the complaint and by counterclaim. Although proceedings in the Traditional Rights Court differ from other civil proceedings in that the triers of fact are directed to answer specific questions posed by the High Court, the rules of evidence apply in the Traditional Rights Court,[21] whereby a party asserting a claim still has the burden of proving that claim.[22] Furthermore, a party relying on a rule of custom has the burden of proving its existence and substance at trial. *Tibon v. Jihu, et al.,* 3 MILR 1, 5 (2005); *Zaion, et al., v. Peter and Nenam,* 1 MILR (Rev.) 228,232 (1991).

Therefore, this court must determine whether Plaintiffs and Counterclaimants satisfied their burdens of proof at trial. The court must also determine whether the parties challenging the Traditional Rights Court's conclusions have met their burden of persuading the court that the lower court's findings and conclusions were clearly erroneous. *Dribo,* 3 MILR at 133.

V. This Court Must Apply Established Substantive Law

Certain Trust Territory Courts' rulings inform the legal issues presented here, as some of the facts underlying this controversy developed during Trust Territory times, and the case itself was filed shortly after the birth of the Republic. While the Republic of the Marshall Islands is a jurisdiction separate and distinct from the former Marshall Islands District of the Trust Territory, in some circumstances the value of Trust Territory court decisions as precedent will exceed the precedential valu of cases from non-Pacific Islands jurisdictions. *Langijota v. Alex,* 1 MILR (Rev.) 216, 218 (1990). It is particularly instructive to look to cases that discuss the law related to iroijlaplaps' decisions as they evolved from being supreme to being required to be supported by good cause, especially as related to the custom ofmarjinkot lands.

[21] **Rule 101, Rules of Evidence.**
[22] **Rule 301, Rules of Evidence.**

CUSTOM

"Custom" is usage by common consent and uniform practice that has become the law of the place, or of the subject matter, to which it relates; it is a law established by long usage. *Lalou v. Aliang,* I TTR 94, 99 (Palau Trial Div.1954). If a local custom is firmly established and widely known, the court will take judicial notice of it. *Lajutok v. Kabua,* 3 TIR 630, 64 (App. Div.1968), quoting *Teitas v. Trust Territory* ([ruk. Trial Div.), as cited in *Kenyul v. Tamangin,* 2 TTR 648, 650 (App. Div.1964).

THE IROIJLAPLAP'S POWER AND AUTHORITY

Long ago, the iroijlaplap's supreme power and authority was recognized by custom, and decisions made according to that power were unquestioned. This power arose from the practical necessity of retaining the loyalty of the iroij's subordinates to support him when faced with force of arms. *Limine* v. *Lainej,* 1 TTR 107, 110 (Trial Div.1954). However, once the Marshall Islands came under control of foreign administration, the Marshallese people, including iroijlaplaps, were required to follow foreign laws that prohibited war among them and restricted the iroij's supreme power.

By 1941 it had become clear that the iroijlaplap, in making determinations as to land rights, must act with an honest regard for the welfare of his people, and with reasonable consideration for the rights of those having .interests in the land under Marshallese custom; there must be a good reason or reasons for their decisions, especially when these would upset rights that had once been clearly established. *Limine v. Lainej,* 1 TIR at 111. The iroijlaplap continued to supervise all lands in his domain, but he no longer had unbridled power, and his decisions were subject to scrutiny. *Labiliet* v. *Zedekiah,* 6 TIR 19, 24 (Trial Div.1972) (as the unlimited authority of the iroij was curtailed, the courts have the responsibility of settling disputes between iroij and commoner). In order for his decisions to have legal effect in land matters, the iroij must act within the limits of the law, including Marshallese customary law so far as it had not been changed by higher authority, and where the law left matters to his judgment he must act reasonably as a responsible official and not simply to satisfy his own personal wishes.

Limine v. *Lainej,* I TTR at 111; *Binni* v. *Mwedriktok,* 5 TTR 373, 376 (App. Div.1971)("The actual holding in *[Limine* v. *Lainej]* emphasized that the Iroij lablab does not have authority to cut off, change or transfer alab rights, once they have vested, for any reason except good cause")(emphasis omitted). While the iroij's determinations were still entitled to reat weight, they carried only the presumption of reasonableness, meaning they were presumed to be reasonable "unless it is clear that they are not." *Langjo* v. *Neimoro,* 4 TTR 115, 118 (Trial Div.1968); *Anjetob v. Tak/ob,* 4 TTR 120, 121 (Trial Div.1968). And when a dispute is brought before the courts, the courts must apply the legal principle that requires a good reason for the iroijlaplap's determinations. *Limine v. Lainej,* I TTR at 111.

A logical extension of this rule is that once rights are firmly and clearly established and recognized, they may not be cut off except for good cause arising after they were established. *Langjo* v. *Neimoro,* 4 TTR at 119. This same rule applies to the iroij' s power to transfer alab rights, which is now more limited than it once was. *Limine v. Lainej, supra* (finding no good cause to support the iroij's changing his mind as to who he recognized as alab just because he did not like the wife of the alab he had previously recognized, when that alab had not failed in any of his obligations since being established as alab). While a decision that is not supported by good cause may be followed, that decision is not entitled to any weight in a court of law.

MARJINKOT

Marjinkot land is given by the chief to a warrior for bravery in battle. J. Tobin, *Land Tenure Patterns* (1956), page 34 (referenced by the Supreme Court in its 1984 ruling in this case, *Abner, et al. v. Jibke, et al.,* 1 MILR (Rev.) 3,7 (1984)). And marjinkot land is a type of established land right that may be terminated only by good cause or consent.[23]

[23] Even though there is no evidence of the reason for tennination of an established land right, the fact that all who were affected by the decision had acquiesced in that decision for a long time may be sufficient to show consent. *Anjetob v Tak/ob,* 4 T I R 120, 121 (Trial Div.1968).

The iroij who succeeds the iroij who made a marjinkot gift does not have the authority to take the land away from the successor recipient alab. *Labiliet v. Zedekiah*, 6 TTR 19, 23-24 (Trial Div.1972), citing *Wena* v. *Maddison*, 4 TTR 194 (Trial Div.1968). Before the iroij may terminate a marjinkot recipient's successor's interest under the custom, it is necessary for the recipient to consent to the change, in the absence of good cause for termination. *Labiliet v. Zedkiah*, 6 TIR at 24-25 (evidence that the iroijlaplap terminated rights in morjinkot land so he would be free to give the land to his new wife did not establish good cause for termination of the rights).

Following a predecessor iroijlaplap's decision is not good cause to create a right or terminate an established right. The original decision that is subsequently followed must itself be supported by good cause. In *Lebeiu v. Motlock*, 6 TTR 145 (Trial Div.1973), defendant claimed entitlement to alab rights based on the fact that her claim had been approved by three iroijlaplaps. The court stated that whether it should upset the decision of the iroij depends upon the circumstances surrounding the subsequent iroijs' approval of defendant's claim. *Id.* at 149, citing *Lalik v. Elsen*, 1 TTR 134 (Trial Div.1954). As there was no evidence showing good cause why the original Iroijlaplap made the decision he did when he rejected the plaintiff and recognized the defendant, the court rejected the successor iroijlaplaps' decisions to follow their predecessor's determination and recognize the defendant. "This is not good cause justifying cutting off land interests." *Lebieu*, 6 TTR at 152.

As Iroij Kabua Kabua concisely stated on June 6, 1983, in a document filed in this case,

> According to Marshallese custom, any land or wetos that have been given to someone by an iroij to have rights on shall not be, later on, given to anybody else if there are no fair and justifiable reasons for an iroij to do so. This is what I believe to be fair and just.

VI. This Court Must Apply the Law of the Case

In 1984, the Supreme Court issued its opinion on appeal of the High Court's 1982 judgment. *Abner, et al. v. Jibke, et al.*, 1 MILR (Rev.) 3 (1984). It cited the following four legal principles. The appellate court must refrain from re-weighing the evidence, and

must make every reasonable presumption in favor of the trial court's decision. *Id,* at 5, citing *Oiper v. Damarlane,* 1 TTR 496 (App. Div. 1977). The determinations of an iroij are presumed to be reasonable unless it is clear that they are not. *Id.,* at 7. In order to change rights in marjinkot lands, in the absence of consent there must be good cause shown. *Id.,* at 7, citing *Labiliet v. Zedekiah,* 6 TTR 19 (Trial Div. 1972). Possession or use of land does not, in itself, convey any rights in the land under the custom. *Id, at* 7, *citingAnjetob v. Taklob,* 4 TTR 120 (Trial Div. 1968).

In 1997, the High Court entered a Memorandum of Decision concerning the applicability of the "law of the case" doctrine to this case. The court directed the trier of fact, whether the High Court or the Traditional Rights Court, to apply the principles of law set forth by the Supreme Court in *Abner v. Jibke,* I MILR (Rev.) 3 (1984) to factual findings the court might make based on evidence received in the second trial. Illustrating this point, the High Court stated that if the trier of fact were to find that the lands are marjkinot lands given to Abner's bwij, the court must apply the rule of law that "in order to change rights in marjinkot lands, in the absence of consent, good cause must be shown." If the trier of fact were to find that plaintiffs received land payments, then the court must consider that fact as "highly significant."[24] The High Court concluded the Supreme Court's mandate was to retry the case anew in light of the principles of law expressed in the Supreme Court decision.

VII. Analysis of the Opinion of the Traditional Rights Court

Analyzing the Traditional Rights Court's Opinion according to applicable legal principles, and then determining whether the claimants have carried their burden of proof, permits this court to adjudicate all of the issues at this time.

[24] The Supreme Court noted: "Actually no one was allowed to live on the land during the time in question; there was no right of "possession" as such, but only the right to receive payments for land use, and occasional rights to go back for planting. Thus, evidence of receipt of payments becomes highly significant. The court found, as fact, that Plaintiffs did receive payments, but dismissed the significance of that finding." *Abner v. Jibke,* 1 MILR at 6.

THE INTERESTS OF JUSTICE REQUIRE ACTION

A number of Traditional Rights Court hearings have been held jointly with the High Court; the parties have been given the opportunity to participate in numerous hearings over the past thirty-four years; counsel have been given a full opportunity to present evidence and make argument in support of their respective positions; and counsel were given years to develop and present their responses before participating in the High Court's Rule 9 proceedings. The issues have been fully litigated before the courts. *See, Dribo v. Bondrik,* 3 MILR 127 (2010)(discussing circumstances that support deciding not to hold further hearings).

The High Court is not required to certify this case back to the Traditional Rights Court for a third time. In fact, both Rule 1 of the Rules of Civil Procedure[25] and Rule 16 of the Traditional Rights Court Rules of Procedure[26] mitigate in favor of this court entering a final adjudication at this time. The delays that have occurred in this case are deplorable. Ten of the parties have died since the case was filed. Land payments have been held in trust for over thirty-three years, depriving the rightful owners and their families of the use and benefit of that income. Individual parties have begged the Court to resolve the case. Individual judicial officers have commented on the woefully slow pace of the proceedings. Individual attorneys have urged the court to bring this case to a conclusion. All to no avail.

The case is now before yet another judge in a long list of judicial officers who have presided over this controversy. No case filed in this Republic better illustrates the saying, "Justice delayed is justice denied." The people impacted by this case have been denied justice for over thirty-four years. To delay an adjudication of these issues further, for any reason, would truly be a travesty of justice.

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[25] "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, Rules of Civil Procedure.

[26] The Traditional Rights Court Rules of Procedure complement the Rules of Civil Procedure when the Traditional Rights Court's jurisdiction has been invoked. Rule 16 of the Traditional Rights Court Rules states: "In the interest of justice, or for other good cause, the High Court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

A. Questions Referred to the Traditional Rights Court

On September 21, 2001, the High Court referred the following questions to the Traditional Rights Court:

> Question I: What specific parcels of land are in dispute in this matter? Please identify each parcel by giving the name of the weto, the name of the island, and the name of the atoll. (In the following Questions, the parcels of land you name in answer to this Question 1 will be called "the disputed parcels.")
>
> Question 2: What person or persons are proper under Marshallese tradition and customary practices to hold the position of alap for each of the disputed parcels?
>
> Question 3: What person or persons are proper under Marshallese tradition and customary practices to hold the position of dri jerbal for each of the disputed parcels?
>
> Your advice to the High Court in the form of an opinion on the Marshallese tradition and customary practices is requested.

B. Answers to Question 1 and Question 2

The pleadings, along with the parties' Rule 8 pretrial statements,[27] clearly identified that the land at issue in this case was Aibwij, Monke and Lojonen wetos, Bikej Island, Kwajalein Atoll. Those three wetos have been the only wetos at issue since this case was filed.[28]

In answering Question 1, the Traditional Rights Court first defined what the dispute was, and then determined which of the wetos were in dispute. It identified the dispute as being whether the land had been awarded as marjinkot. It answered that only Aibwij was in dispute.[29]

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[27] The Traditional Rights Court Rules of Procedure require the parties to file pretrial statements. In 2001, this was covered by Rule 8. It is now covered by Rule 2.

[28] The amended complaint unambiguously identifies Aibwij, Monke and Lojonen as the wetos at issue in the case.

[29] The amended complaint also unambiguously claims the marjinkot award applied to Aibwij, Monke and Lojonen wetos.

In answering Question 2, the Traditional Rights Court expanded on the logic it used in answering Question 1. Its answer to Question 2 depended on whether it determined the marjinkot award to be historical fact or legend. Because of its answer to Question 1, it limited its inquiry to Aibwij. It reasoned that if marjinkot were legend, Jibke's successor would be entitled to the alab interest on Aibwij. If marjinkot were historical fact, Abner's successor would be entitled. It concluded that the award of marjinkot on Aibwij weto was historical fact, and recognized Enti Tibon's alab interest in the land. [30]

FINDINGS: MARJINKOT

Plaintiffs' claims are based on a single premise: Iroijlaplap Laninbit made a gift of marjinkot land to Laemokmok, who killed Loeme for Laninbit, and Laemokmok passed his interest to his bwij, to which Plaintiffs belong.[31] As the Traditional Rights Court's opinion was necessarily based on Marshallese tradition and customary practices, the court first discussed what marjinkot land is.

> Morijinkot is an award (inheritance) given to a man for his bravery! A man who has shown loyal to his Iroij by putting his life on the line to defend his Iroij. MORIJINKOT is the highest reward given by a Iroij. Another Iroij cannot MODIFY it without good cause, he must respect and uphold the MORIJINKOT awarded by the processor Iroij because MORIIINKOT is awarded as a price for saving a life.

It then reviewed the evidence, from both expert and lay witnesses, to determine whether the marjinkot award to Laemokmok were fact or fiction. It found that Abner had been recognized by the Iroij as alab, he had undertaken alab duties, he had made Church contribution to the collection of the United Church of Christ (alliniju), he had received K.AC payments for Aibwij, he attended a meeting for alabs called by Iroij Lojelan, and Iroij Lojelan told him to stay on Aibwij to care for the land. The Traditional Rights Court found this evidence supported the conclusion that Aibwij had been awarded to Abner's

[30] Bernie Hitto substituted in place ofEnti Tibon, who died in 1999.
[31] Abner's claim as one Laemokmok's bwij was uncontested.

bwij as marjinkot long ago, and that the award was one of common knowledge and historical fact.

There was additional evidence on the record, not specifically referenced in the Traditional Rights Court's opinion, to support this conclusion. Abner stayed in mid-corridor replacement housing for alabs; his niece was provided similar housing for the dri jerbal; and Iroij Lojelan gave Abner the machete[32] that the iroij only gives to the person who is going to inherit the land.[33]

In finding in favor of Abner's successor, the court rejected the evidence offered by Defendants. They argued that the marjinkot award was only a story, not a fact.[34] They also offered alternative theories. First, that the circumstances of Laemokmok's killing Loeme for Laninbit did not constitute a battle of the magnitude that, under custom and tradition, would support a marjinkot award. Second, that a marjinkot award was never made for such a small portion of land. And third, that the marjinkot award did not exist because many had not heard of it. The Traditional Rights Court rejected all of these arguments.

FINDINGS: NO BWILOK

The Traditional Rights Court also addressed whether there had been a bwilok (cut off). As to this issue, Defendants made a fourth alternative argument: Laemokmok's descendents lost their claims to the land, originally received as marjinkot, when Abner did not follow Iroij Jeimata's order to stay and clear the land, after which Jeimata gave the land to Jibke. The Traditional Rights Court analyzed the custom of raro (clearing up the land) and found that "RARO cannot take the place of a MORIJINKOT, it is inferior." Raro, it said, was excuseable; bwilok, unexcuseable. It concluded there was no bwilok that terminated the marjinkot gift at any point after it was awarded.

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32 The machete was brought to court as evidence.

33 The significance of this gesture was confirmed by Imata Kabua's statement filed with the court on August 31, 1995.

34 Defendant Beljo Korok admitted the lands had been given to Laemokmok as marjinkot in his answer to the amended complaint, filed November 9, 1993. Generally such a judicial admission would be binding on the party making it. 29A Am. Jur. 2d Evidence § 783, Judicial Admissions. However, Korok's answer was subsequently amended, after which he was found to be in defimlt. He did not participate in the 2001 trial.

FINDINGS: NO GOOD CA USE

In finding there was no bwilok to cut off the marjinkot award, and rejecting the claim that Jeimata's subsequent designation of Jibke as alab of Aibwij overcame that award, the Traditional Rights Court implicitly found there was no good cause to support Iroij Jeimata's determination in favor of Jibke.[35]

C. Review of tlze Traditional Rights Court's Answers to Questio,z I and Question 2

As stated above, the High Court has a very limited role when reviewing issues within the Traditional Rights Court's jurisdiction, and is required to adopt the Traditional Rights Court's factual determinations and conclusions unless they are clearly erroneous or contrary to law. *Dribo v. Bondrik,* 3 MILR 127, 135 (2010). This court may not vacate any of the Traditional Rights Court's findings merely because it would have viewed the evidence and weighed the facts differently, or because it would have reached a different conclusion. This court's view of the evidence is irrelevant unless the Traditional Rights Court's findings are clearly erroneous.

That being said, there was much evidence presented to support a different conclusion based on a different view of the evidence. The original marjkinkot award was made during Jeimata Kabua's lifetime, before he became Iroijlaplap. There is no credible reason to believe he was not aware of the facts the Traditional Rights Court relied on to support its conclusion that the marjinkot award was fact, not legend. Therefore, Jeimata was either unaware of the award, discredited it, or believed it had been successfully terminated. One can only speculate as to which scenario is true. Regardless, Iroij Jeimata acted in accordance with his role as ruler of his people, and kept peace between Abner and Jibke throughout his own lifetime. Both received Jeimata's public recognition,[36] and

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[35] While there was some evidence that Jeimata gave Jibke the land in return for taking Jibke's wife, the Traditional Rights Court noted this only in passing, when discussing bwieo, and did not even consider that this might establish good cause for a determination in Jibke's favor.

[36] *See, Lalik v. Elsen,* I TTR 134, 141 (Trial Div.19 54), recognizing that "in doubtful cases, with a view to avoiding controversies and securing a constructive use of the land ... the iroij lablab may properly consider what other lands the various claimants concerned already control, the back history of the land, what the various claimants have had to do with it in the past, and other matters which would not be material under a

both received alab benefits, as demonstrated by testimonial and documentary evidence. Only privately did Iroij Jeimata recognize Jibke as alab of Aibwij, as evidenced by the Iroij Book. This evidence raises the question: if Iroij Jeimata were unaware of Abner's claim to Aibwij through Laemokmok, why would he have recognized Abner at all?

Regardless of the answers to the questions raised, Jeimata's legacy is, and should be, that he kept the peace. But according to evidence presented to the court, as applied to customary and traditional"law, his decision to enter Jibke's name in the Iroij Book lacked good cause. This private declaration was ineffective to override the historical fact of the marjinkot award to Laemokmok's bwij.

After Jeimata's death, it fell to his successors to determine how to deal with the situation he had created and handled so skillfully. For the remainder of Abner's life, Abner received Kwajalein Atoll Interim Use Agreement mid-corridor payments. After Abner's death, in 1977, his bwij continued to receive the payments. It was only after his successor no longer received payments, in or around the first part of 1980, that the situation ripened into a controversy. Abner's successor requested an explanation, which resulted in the September 1980 meeting where Lojelan first declared that the Iroij Book named Jibke as alab of Aibwij, not Abner.[37] As a result, the delicate balance Jeimata had achieved was upset. This case was then filed.

Whether Jeimata's successors had independent reasons to conclude Jibke was entitled to Aibwij, or just loyally followed what Jeimata had written in the Iroij Book, is not clear from the Traditional Rights Court's opinion.[38] But the evidence shows that Iroij

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system of absolutely fixed rules concerning inheritance and transfer of land. It is definitely in accord with Marshallese custom for him to make practical promises when he deems best . . . " While earlier rulings in this case made it clear that the facts here do not present a "doubtful case" of entitlement, but instead a clear case of recognizing the marjinkot award as fact or legend, the custom of dealing with doubtful cases may further explainwhy Iroij Jeimata acted as he did as 1:etween Abner and Jibke.

[37] The rationale underlying the custom of the iroij producing the Iroij Book as proof of a decision without displaying the contents, is similar to the rationale underlying the custom of accepting an iroij's determination on its face without requiring that he reveal the reason behind it. When the iroijlaplap's decisions were not subject to scrutiny, this was sufficient proof. It is no longer sufficient proof.

[38] The Defendants' attorney, during his opening statement, summarized the iroij successors' positions as follows: "[I]t will be clear that the successor to Jeimata as Iroijlaplap for Aeboj weto, Lojelan Kabua, honored Jeimata's decision. It will then [be] established without doubt that neither Manini Kabua nor Joba Kabua had either an opportunity to or in any way changed the decision of Jeimata that had been honored by Lojolan . . . because all Lojelan did was honor the decision of Jeimata. It will then become established that

Lojelan followed Jeimata's practice. Iroij Manini continued this practice by leading both Abner's and Jibke's successors to believe he recognized them, such that both were sufficiently confident in Manini's wisdom to agree to meet with him and abide by his settlement.of the dispute (which meeting, unfortunately, did not take place). Iroij Amata Kabua filed a statement with the court in 1985 recognizing that Jibke had been alab, reflecting his confirmation of "the arrangement established by Iroijlablab Jeimata Kabua." Iroij Imata Kabua took the position, in a 1995 statement filed with the court, that Abner's interest in the land was terminated when he failed to clear the land at Iroij Jeimata's request.[39]

Iroij Michael Kabua testified at trial for the defendants. He did not dispute what had been related to the Traditional Rights Court concerning the marjinkot award. In fact, he stated that he had heard it himself, and acknowledged that some said it was legend, some said it was history. He also testified he would not speculate on anything that happened before he was born (1945). However, in a statement filed with the court after the Traditional Rights Court had issued its opinion, he made it very clear that he had a different view of the evidence and would have judged the facts differently than the Traditional Rights Court did.

That this court, too, might draw a different conclusion from the evidence presented at trial is irrelevant. The fact that there are many different views of the evidence underscores the wisdom of requiring an iroij's determination to be supported by objective reasonableness, not just subjective reasonableness, and to be supported by good cause when that determination is contested. These differences also explain why following a predecessor iroij's decision is not, in and of itself, sufficient good cause and does not cure lack of good cause in the initial decision.

Based upon a thorough review of the answers to Question 1 and Question 2, the court concludes the Traditional Rights Court's findings and conclusions are not clearly

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neither Amata Kabua, as the Iroijlaplap for the lands of Jeimata, nor Imata Kabua has wanted to or has changed the decision of Jeimata." (Corrected Transcript of Proceedings, Volume I, November 28, 2001, pages 248-249).

[39] Although subpoenaed to testify at trial, Imata did not appear.

erroneous. Furthermore, a review of the evidence from the trial supports the conclusion that Plaintiffs satisfied their burden of proof on their claim to the Aibwij alab interest.

D. Review of the Traditional Rights Court's Answer to Question 3

In response to Question 3, the Traditional Rights Court answered that Towe Toka holds the position of dri jerbal for Aibwij. This answer is explained by a simple statement: "This Court award such [dri jerbal] right to Towe Toka in recognition of the fact that Jibke had been living on Aibwij Wato for a very long time. That is all."[40]

The Traditional Rights Court is not a court of equity. It does ot have power *make* awards of land for any reason; it may only determine whether awards have been made, and to whom.[41] Although the Traditional Rights Court made findings, supported by the evidence, that Jibke had been living on Aibwij for a very long time, it did not apply these facts to any recognized custom or tradition to support a conclusion that Towe Toka was the dri jerbal.

The rationale behind the High Court's deference to determinations of the Traditional Rights Court is that the laws of this country, and the Supreme Court's interpretation of those laws, recognize the superior expertise of those comprising the Traditional Rights Court in matters related to tradition and custom. But deference is neither required nor permitted when that court draws a conclusion not supported by tradition and custom, as happened here. The answer to Question 3 leaves this court with the definite and firm conviction that a mistake has been committed.

In answering Question 2, the Traditional Rights Court first made factual findings and then analyzed those findings in light of tradition and custom before reaching the conclusion that formed the basis for its answer. That was a legally sound analysis. However, in answering Question 3, the Traditional Rights Court referenced its finding that Jibke had been living on Aibwij for a long time, and then concluded, without

[40] Towe Toka substituted for Matline Aini after her death in 1999.

[41] "The jurisdiction of the Traditional Rights Court shall be limited to the determination of questions relating to titles or land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Republic of the Marshall Islands." Const., Art. VI, Section 4(3).

applying this fact to any tradition or custom, that Towe Toka should be awarded the dri jerbal interest.[42] That is not a legally sound analysis. Furthermore, the Traditional Rights Court had applied the very same facts to reject Jibke's bwij's claim to the alab right. To then apply identical facts to reach a conclusion that accepts Jibke's bwij's claim to the dri jerbal right, with no legitimate explanation, confounds logic and reason, in addition to being contrary to the custom and tradition applied elsewhere in the opinion. This opinion was not based "on the Marshallese tradition and customary practices" as specifically requested by the High Court. Instead, the Traditional Rights Court itself "awarded" Towe Toka that interest, which exceeds its jurisdiction. The High Court concludes the Traditional Rights Court's answer to Question 3 is clearly erroneous, and cannot stand.

E. The High Court's Answer to Question 3 -Aibwij

This court applies the same well-founded logic the Traditional Rights Court applied to the facts in answering Question 2, while observing that Plaintiffs and Defendants presented identical evidence to support their claims for both the alab and dri jerbal interest on Aibwij, and concludes that Plaintiffs have proven their claim to the dri jerbal interest on Aibwij. This analysis leads to the additional conclusion that Plaintiffs also satisfied their burden of proof on this claim.

Handy Emil is therefore the proper person under Marshallese tradition and customary practices to hold the position of senior dri jerbal for Aibwij.

F. The High Court's Answer to Question 3 - Monke and Lojonen

While the Traditional Rights Court was "reluctant to form an opinion" regarding who holds the position of alab and dri jerbal for Monke and Lojonen wetos, the answer to those questions lies within the Traditional Rights Court's Opinion. Applying the same analysis the Traditional Rights Court applied in reaching the opinions it did give, and basing that analysis on principles of tradition and custom as the Traditional Rights Court

[42] The Traditional Rights Court essentially found that that Towe Toka should be *rewarded* with the dri jerbal interest.

did, along with the law applicable to a review of that opinion, enables this court to answer the questions left unanswered by the Traditional Rights Court

RECOGNITION OF MONKE AND LOJONEN WETOS

The Traditional Rights Court's reluctance to state an opinion concerning who holqs alab and dri jerbal rights on Monke and Lojonen appears to have stemmed from the judges' collective belief that the Iroij Book should list all wetos and those who inherit the rights and interests in each weto.[43] Monke and Lojonen were not named in the Iroij Book, and some witnesses testified they had not heard of those two wetos. This does not translate into a finding that they do not exist,[44] and none of the parties argued that these wetos do not exist. There was ample evidence offered to explain why Monke and Lojonen were not listed in the Iroij Book, and that evidence, along with the pleadings, supports the conclusion that Monke and Lojonen wetos exist on Bikej Island, Kwajalein Atoll. To the extent the Traditional Rights Court's reluctance to form an opinion concerning these wetos might be interpreted as a finding that Monke and Lojonen do not exist, that would be clearly erroneous.

THE PARTIES' CLAIMS TO INTERESTS ON MONKE AND LOJONEN WETOS

The Traditional Rights Court concluded Plaintiffs' claims would be recognized only if the land they made claims to had been given as marjinkot. An obvious corollary to

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[43] The following colloquy between a Traditional Rights Court judge and one of Counterclaimants' witnesses illustrates this issue.

TRC Judge: Do you still recall [the testimony of two of Defendants' witnesses] that while they were living on Bikej they had never heard the names Monke and Lojonen?
Witness: Yes.
TRCJudge: Are you in agreement with them or not?
Witness: I do not because my weto's name is Monke.
TRCJudge: Just a question. Could it be that you and Michael [Kabua] invented the names ofMonke and Lojonen?
Witness: Not us. We did not do that. The - those, they were the names from the beginning.
TRCJudge: Thank you, but I had examined the book, the Iroij Book. They were brought to us and I examined the books and tried to find the names, Lojonen and Monke, but there was no such weto Lojonen and Monke in the iroij book. Thank you.

(Corrected Transcript of Proceedings, Vol. II, November 28, 2011, pages 40-41).

[44] Similarly, the court declined to find that Aibwij was not marjinkot land just because many had not heard ofit.

that rule is: if the land Plaintiffs made claims to had not been given as marjinkot, their claims would not be recognized.

When evaluating the claims of Defendants, the court said, "[I]flroijlaplap Jeimata Kabua had given another wato instead of Aibwij, there would be no question that they own it." (Opinion, page 4). As Defendants only claimed rights in Aibwij, this statement cannot be interpreted to recognize Defendants had claims to any other weto.[45] Instead, it recognizes claims to rights in "another wato instead of Aibwij" if Jeimata had given those rights and the land was not marjinkot land.

Plaintiffs' Claims to Manke and Lojonen

The Traditional Rights Court found in Plaintiffs' favor concerning Aibwij on the basis of two conclusions: the land was marjinkot land, and the rights in the land had not been terminated. The evidence presented by Plaintiffs for their claims to Manke and Lojonen was identical to the evidence they presented for their claims to Aibwij. The Traditional Rights Court obviously discredited this evidence as related to Manke and Lojonen, as it did not find in Plaintiffs' favor on these claims, and it did not find that these wetos were marj inkot lands.

The conclusion that Manke and Lojonen were not awarded as marjinkot land is supported by analyzing the structure of the Traditional Rights Court's opinion. The Opinion does not discuss Manke and Lojonen until after the court resolved the issues concerning Aibwij. At that point it then turned back to a discussion of what evidence supported a finding that Manke and Lojonen had been given by Jeimata. Had the court found Monke and Lojonen had been the subject of the marjinkot award, and that Plaintiffs were therefore entitled to their claims, it would have said so. Further, if it had made this conclusion but was reluctant to express it, there would have been no purpose in looking for evidence that Jeimata had given those wetos to the Counterclaimants. But that is exactly what the court did. And it looked for this evidence because it had already stated

[45] Defendants' counsel, during his opening statement at trial in November 2001, made it clear that his clients' claims were only as to Aibwij. (Corrected Transcript of Proceedings, Volume I, November 28, 2001, pages 248-250.)

that such evidence was dispositive of who owned the alab and dri jerbal rights on land that was not given as marjinkot. (Opinion, page 4).

In light of the record, the Traditional Rights Court's conclusion that Plaintiffs were not entitled to their claims on Monke and Lojonen is supported by their findings and analysis and was not clearly erroneous.

Counterclaimants' Claims to Monke and Lojonen

The Traditional Rights Court's evaluation of Counterclaimants' claims begins with two sentences. "How could the Intervenors assert their claim that they are the Alab and Dri Jerbal of these watos, Lojonen and Monke. If Iroijlaplap Jeimata Kabua had empowered them then how." However, instead of then reviewing evidence Counterclaimants had pr sented, the court turned to a set of interrogatories submitted fourteen years earlier, over ten years before the Counterclaimants had first entered their appearance in this case. While the reason the court focused on these interrogatories is unclear, its reliance on them accounts for that court's confusion about both the Counterclaimants' role in this case and the strength of their claims. It also helps explain the Traditional Rights Court's reluctance to express an opinion concerning Monke and Lojonen.

The Traditional Rights Court indicated that the interrogatories quoted in the Opinion were issued by High Court Justice Ralph Kondo on February 17, 1988. This is incorrect. In fact, they were asked by the Defendants of their own witnesses in May of 1987.[46] While the High Court did take action on February 17, 1988, it merely directed the parties to prepare for trial and to address the interrogatories that each had issued to the other. These interrogatories were not only asked and answered in written form in a non-adversarial setting, but were also asked by only a faction of the current Defendants' predecessors, were asked of their own witnesses in support of their own claims, and do

[46] The trial at which the answers to the interrogatories were to be offered was bifurcated, to address only the claims ofKorok, not Aini.

not appear to have been offered as evidence at the 2001 Traditional Rights Court trial.[47] Furthermore, the interrogatories supported Defendants' claims for rights on Monke and Lojonen, which claims had been abandoned well before this case was heard by the Traditional Rights Court.

It is no wonder the Traditional Rights Court was stymied by this "evidence." Having relied on these interrogatories, a reliance that was clearly misplaced, the court chose not to navigate this path further, notwithstanding having been asked by the High Court to do so. It would not serve the interests of justice to direct the same question to that court again, thirteen years later.

ALAB AND SENIOR DRI JERBAL INTERESTS IN MONKE AND LOJONEN WETOS

Applying the same logic the Traditional Rights Court applied as it analyzed the evidence in reaching its answers, and then detennining whether the parties sustained their burdens of proof, enables this court to determine who, between the parties, has alab and senior dri jerbal interests in Monke and Lojonen. The record demonstrates that Counterclaimants presented sufficient evidence to support the finding that Jeimata empowered them, and how he empowered them.

A number of witnesses, including the expert Willie Mwekto and Iroij Michael Kabua, presented evidence that Jeimata put the Jebrej family on Lojonen, and that Jeimata gave Monke to the Bejang family. Much of this evidence was the same type of evidence the Traditional Rights Court found would have supported claims to Aibwij, had Aibwij not been marjinkot land: possession, use, receipt of land payments, and Jeimata's gift. As the Traditional Rights Court did not conclude that ¥onke and Lojonen were marjinkot lands, and as there was no evidence of any of superior claim to these lands, the record supports a conclusion in favor of the Counterclaimants' claims.

Plaintiffs failed to satisfy their burden of proof as to their claims to Monke and Lojonen, and Counterclaimants proved their counterclaims by a preponderance of the

[47] Although these interrogatories were made part of the file in 1987, the trial at which they were to be offered in evidence did not take place.

evidence.[48] The record supports the conclusion that as to Monke weto, Alden Bejang holds the position of alab and Aun James holds the position of senior dri jerbal. As to Lojonen weto, Amon Jebrejrej holds the position of alab and Calorina Kinere holds the position of senior dri jerbal.

VIII. Analysis of the High Court Judgment and Opinion

The Supreme Court's 2007 remand based on the High Court's failure to hold appropriate Rule 14 proceedings did not expressly vacate the High Court's 2002 Opinion and Judgment. Therefore, this court will address that order. In doing so, this court notes a number of changed circumstances since that order was entered.

Almost fifteen years have passed since the High Court entered its ruling, and over eight years have passed since the Supreme Court reviewed that order and remanded the case to the High Court with directions. The High Court has yet to enter that order, and only one hearing has been held. While this passage of time and other intervening events do not, in themselves, affect the merits of the High Court's 2002 ruling, they must be considered as the court evaluates whether any part of that order may stand.

FACTUAL FINDINGS

In its August 2002 Judgment, the High Court stated it found the Traditional Rights Court's Opinion was "supported by evidence, and adopts the findings set forth in that Opinion." (Judgment, page 1). It also acknowledged its duty not to "disregard a finding of the Traditional Rights Court applying Marshallese tradition and customary practices unless such finding is clearly erroneous." (Opinion, page 3). But it then rejected a number of the Traditional Rights Court's findings, and entered judgment based upon legal conclusions that were wholly inconsistent with the Traditional Rights Court's Opinion.

Instead of applying the "clearly erroneous" standard to an analysis of the Traditional Rights Court's finding that only Aibwij was in dispute, the court applied the

[48] This conclusion is contrary to that made by the High Court in its 2002 opinion. This court exercises its discretion to overrule that order, to the extent it stands. See below, at Section VIII.

lesser "preponderance of the evidence" standard to conclude that references to Aibwij were actually references to Aibwij, Manke and Lomojen. And it did so not from the position of a reviewing court determining whether the findings below were supported by the evidence, but as a trier of fact, reviewing the facts *de novo.* To support this conclusion, the court found that "up until very recently, these three wetos were known collectively as 'Aibwij,' and were a single unit for land rights purposes." (Opinion, page 1). Additionally, the court inferred that Iroijlaplap Jeimata Kabua used "the term 'Aibwij"' in the Iroij Book to refer to all three wetos. As appealing as this theory might have been to the reviewing court, it was improper for that court first to adopt the Traditional Rights Court's findings, then reject them without any analysis, and then replace them with its own. The reviewing court is prohibited from reversing a finding of the trier of fact "simply because it is convinced that it would have decided the case differently," *Dribo v. Bondrik,* 3 MILR 127, 133 (2010), and is prohibited from deciding the factual issues *de novo, id.* Also, there is no evidence in the record to support this conclusion, and substantial evidence to the contrary (including that from the expert Willie Mwekto and Iroij Michael Kabua).[49]

The High Court had no authority to reject any of the Traditional Rights Court's findings without having first found them to be clearly erroneous. It also had no authority to replace the Traditional Rights Court's findings with its own, particularly when it had expressly found the Traditional Rights Court's findings not to be clearly erroneous.

LEGAL CONCLUSIONS

The High Court then proceeded to address the effect of the statute of limitations on the parties' claims. While this issue had been raised in the pleadings, it is not an issue of custom and tradition that was before the Traditional Rights Court, and the parties had

[49] The High Court also relied on the interrogatories referenced in the Traditional Rights Court's Opinion to support its own findings, accepting the Traditional Rights Court's mistaken belief that the High Court had submitted those interrogatories. As discussed above at Section VII, the Traditional Rights Court's reliance on those interrogatories was suspect. While Traditional Rights Court judges might not understand that a High Court judge would not "submit interrogatories," High Court judges understand they have no role in actively eliciting evidence in this manner.

not had the opportunity to address the issue before the High Court.[50] And while this legal issue might have been addressed in proceedings after the Traditional Rights Court opinion was issued, the High Court did not hold appropriate proceedings, as the Supreme Court pointed out. Furthermore, the High Court misstated the record and misapplied the law when reaching its legal conclusions.

STATUTE OF LIMITATIONS

The Trust Territory Code included a limitation of twenty years on actions addressing interests in land. 6 TTC § 302. For purposes of computing time limitations, any cause of action existing on May 28, 1951, was considered to have accrued on that date. 6 TTC § 310; *Kanser v. Pitor,* 2 TTR 481,488 (Truk Trial Div.1963); *Ei* v. *Inasios,* 2 TTR 317,319 (Truk Trial Div.1962). The subsequently enacted Marshall Islands Code incorporated the same language. 29 MIRC § 117.[51]

Initially, it might appear, as found by the High Court, that the actions raised in this case were barred by the statute of limitations. The evidence supports the finding that the Iroij Book, which listed Jibke as alab of Aibwij, was completed by 1927. If Plaintiffs' cause of action accrued in 1927, computing the statute of limitations from that date would result in the conclusion that claims by Laemokmok's descendants were effectively barred in 1971. However, a proper application of legal principles that define when a cause of

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[50] The High Court judge who sat with the Traditional Rights Court panel during trial told counsel for Counterclaimants that statute of limitations issues could be raised after the Traditional Rights Court opinion issued. (Corrected Transcript of Proceedings, Volume II, November 28, 2001, page 104).

[51] 29 MIRC § 117, originally read:

> Limitation of twenty years.
>
> (1) The following actions shall be commenced only within twenty (20) years after the cause of action accrues:
>
> (b) actions for the recovery of land or any interest therein.
>
> (2) If the cause of action first accrued to an ancestor or predecessor of the person who presents the action, or to any other person under whom he claims, the 20 years shall be computed from the time when the cause of action first accrued.

Section 117(l)(b) was amended in 1996 to add the following language: ***"with the exception that the limitations of twenty years shall not apply to the inheritance of/and by rightful heirs."***
[ITC 1966, § 316; 6 ITC 1970; 6 TTC 1980, § 302; amended by P.L. 1996-26, §2(2).]

action accrues for purposes of calculating statutes of limitations demonstrates this conclusion is incorrect.

When a Cause of Action Accrues

A statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued." *CTS Corp.* v. *Waldburger et al.,* 134 S.Ct. 2175, 2182 (2014), quoting Black's Law Dictionary 1546 (9th ed. 2009). Accrual is the date on which the statute of limitations begins to run, and under federal law a claim accrues "when the plaintiff knows or has reason to know of the injury that is the basis of the action." *Ervine v. Desert View Regional Medical Center Holdings, LLC,* 753 F.3d 862, 869 (9th Cir. 2014), quoting *Pouncil v. Tilton,* 704 F.3d 568, 574 (9th Cir.2012).

The record before the Traditional Rights Court demonstrates that notwithstanding the fact that Iroij Jeimata completed the Iroij Book by 1927, plaintiffs were not aware of this fact at that time. The record also demonstrates that it was not until the meeting on September 2, 1980, when Abner's and Jibke's successors met with Iroij Lojelan, that Plaintiffs were advised of the fact that the Iroij Book indicated Jeimata recognized Jibke, not Abner, as alab of Aibwij. As the High Court adopted the Traditional Rights Court's findings, and did not find they were clearly erroneous, it erred in making further findings, not supported by the record, that Abner's bwij became aware of its cause of action before 1980.[52]

Counterclaims

When addressing statute of limitations law, the court stated, ..[a] statute of limitations does not extinguish a party's underlying property rights by the passage of time[;] [r]ather, [it] prohibits bringing a lawsuit to enforce the underlying property right

[52] Plaintiffs argued, when opposing the motion to intervene in 1997, that Counterclaimants' claim that they were unaware of this case until that time was incredible. They characterized Counterclaimants' claim that they were unaware their land payments had been being withheld, since the temporary injunction entered shortly after the original case was filed, as "one of the great mysteries of this case." The court rejected Plaintiffs' argument and accepted Counterclaimants' representation that they had only recently (in 1997) become aware of the lawsuit. The Defe,ndants supported this position. In light of this, argument that Plaintiffs had reason to know their claims had accrued before 1980 would be particularly disingenuous.

after the time of limitations has expired. Theoretically, the right in question still exists. It is just unenforceable." (Opinion, pages 4-5). The court concluded, based on this theory and after reviewing the pleadings, that plaintiffs' claims to Aibwij were time-barred, but their claims to Monke and Lojonen were not. In drawing this conclusion, the court also misstated the status of the pleadings.

Noting the "fundamental rule ofMarshallese law [] that the courts will only grant that relief which is prayed for by the parties in their pleadings" (Opinion, page 5), the court concluded that the Defendants' request for recognition of Aibwij interests should be granted, as they had made that request in a counterclaim. It then reasoned that because Defendants had not raised a counterclaim for rights on Monke or Lojonen, they were not entitled to recognition of rights on those wetos, whereby Plaintiffs' claims were unopposed and recognized essentially by default (Opinion, page 6). This appears to be the analysis that informed the court's ultimate conclusion that Towe Toka and Billy Piamon were entitled to their claims as alab and senior dri jerbal, respectively, on Aibwij; and Bernie Hitto and Mathrine Abner were entitled to their claims as alab and senior dri jerbal, respectively, on Monke and Lojonen.

The facts the court relied on to draw this conclusion are not borne out by the record. Defendants did not make a counterclaim for Aibwij rights, they only denied Plaintiffs' claim for Aibwij rights. However, Counterclaimants did make a counterclaim for Monke and Lojonen rights, and also denied Plaintiffs' claims for those rights. Therefore, Plaintiffs' claims to Monke and Lojonen were not unopposed. Further, as the court found Plaintiffs' were time-barred from bringing the lawsuit to enforce their rights, under the court's own analysis Plaintiffs could not then prevail on their claims to Monke and Lojonen in light of the Counterclaimants' claim to those rights. As Counterclaimants made a counterclaim for rights on Manke and Lojonen, the only remaining issue before the court would be whether they had carried their burden of proof, unless, of course, their claims should be recognized merely because they challenged the Plaintiffs, whose claims were barred if challenged. The logical extension of the court's analysis, in light of the actual state of the record, highlights its weaknesses.

RECONSIDERATION OF THE HIGH COURT'S 2002 JUDGMENT AND OPINION

Principles of comity and uniformity that preserve the orderly functioning of the judicial process suggest that one judge should not overrule the prior decisions of another sitting in the same case. *Castner v. First Nat'l Bank of Anchorage,* 278 F.2d 376,380 (9th Cir. 1960). But some courts recognize that as the power of each judge in a multi-judge court is equal and coextensive, one may overrule the order of another under proper circumstances in the proper exercise of judicial discretion. *Id.,* cited in *Fairbank v. Wunderman Cato Johnson,* 212 F.2d 528, 530 (9th Cir. 2000). A court has the inherent power to revisit its non-final orders, and that power is not lost when the case is assigned mid-stream to a second judge. *Dreith v. Nu Image, Inc.,* 648 F.3d 779, 787-788 (9th Cir. 2011). Reconsideration is appropriate if the district court is presented with newly discovered evidence, committed clear error or the initial decision was manifestly unjust, or if there is an intervening change in controlling law. *Multnomah County v. A.* C. & S., *Inc., 5* F.3d 1255, 1263 (9th Cir. 1993). If the facts or circumstances have changed significantly in the interim, because of a better-developed record or a change or clarification in the applicable law from a high court, the second judge is not truly overruling the first, and neither is he substituting his own views as to whether the decision of the first judge was correct. *Gallimore v. Missouri Pacific Railroad Co.,* 635 F.2d 1165, 1172 (5th Cir. 1981).

The High Court concludes the 2002 Judgment and Order of the High Court was based on a misapplication of law. This court exercises its discretion to reconsider the order of its predecessor, and vacates that order to correct error.

IX. Order and Judgment

The Traditional Rights Court, Supreme Court and High Court have presided over this controversy for almost 35 years. A thorough review of the voluminous record, according to the legal standards required of this court, leads to the following conclusion and order.

As to Aibwij Weto, Bernie Hitto holds the alab interest and Handy Emil holds the senior drijerbal interest.

As to Monk.e Weto, Alden Bejang holds the alab interest and Aun James holds the senior drijerbal interest.

As to Lojonen Weto, Amon Jebrejrej holds the alab interest and Calorina Kinere holds the senior drijerbal interest.

Default judgment enters against Beljo Korok, as entered by the court on September 30, 1996, and held in abeyance until this date.

The court sets aside the preliminary injunction and vacates the order that the Secretary of Finance direct quarterly IUA payments for Aibwij, Monk.e and Lojonen weto to an interest bearing account at the Bank of Guam. Funds being held in trust in that account may be distributed according to the judgment entered above, subject to a thirty-one day stay. Unless otherwise ordered by the Court, the stay will be lifted at that time.