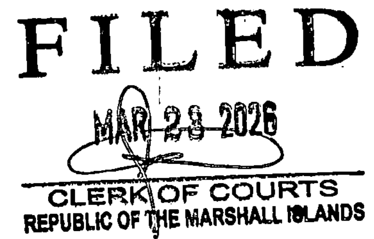

IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Supreme Court Case No. 2024-0142

DARREL MALACHI,
Plaintiff-Appellant,
vs.

TERRY ABON,
Defendant-Appellee.

BEFORE: CADRA, Daniel, C.J.; J. Michael Seabright, A.J.;[1] Richard Seeborg, A.J.[2]

CADRA, C.J. with whom SEABRIGHT, A.J. and SEEBORG, A.J. concur.

I. INTRODUCTION

Plaintiff-Appellant, Darrel Malachi, appeals a judgment of the High Court declaring that, as between Appellant Darrel Malachi and Appellee Terry Abon, Terry Abon holds the *Alap* and *Senior Dri Jerbal* titles and rights to Mokeo weto, Delap, Majuro Atoll.

In reaching its judgment, the High Court adopted the opinion(s) of the Traditional Rights Court (TRC). In summary, the TRC found that Mokeo weto was *Immon Ninnen* from the parties' common ancestor Lakuboke (male) to Neiboke (female). This *Immon Ninnen* to Neiboke established a *bwij* (*Immon Bwij*). Neiboke had two daughters, Neiteli and Lijulae. Neiteli had a daughter named Neijab. Lijulae had a daughter named Taklemen. Neijab and Taklemen were, thus, members of this *bwij* (Neiboke' *bwij*). Both Neijab and Taklemen were childless, but Neijab adopted Sailass Malachi (male) and Taklemen adopted Neimako (female) as *Kanin Lujen*. Both Sailass and Neimako were adopted "outside the *bwij.*"

[1] Hon. J. Michael Seabright, United States District Judge, District of Hawaii.
[2] Hon. Richard Seeborg, United States District Judge, Chief Judge, Northern District of California.

In or around 1980, Taklemen executed a *Kalimur* transferring the *Alap* and *Senior Dri Jerbal* rights and titles to Mokeo weto to her adopted daughter Neimako. Taklemen's *Kalimur* was approved by *Iroijlaplap* Joba Kabua, *Iroij* Amata Kabua, and *Leroij* Talean. Neijab, however, did not leave a *Kalimur* transferring any rights in Mokeo weto to her adopted son Sailass Malachi.

Neijab died in 1970. Sailass Malachi (Neijab's adopted son) died in 2018. Appellant Darrel Malchi is Sailass' son. Neimako, the adopted daughter of Taklemen, predeceased Taklemen. Appellee Terry Abon is Neimako's natural son.

Neiboke's *bwij* became extinct upon the death of Taklemen in 2005 (there being no natural or "flesh and blood" members of the *bwij* surviving and Sailass and Neimako having been adopted "outside the *bwij*.") Because the *bwij* had become extinct upon Taklemen's death and because Taklemen left a *Kalimur* approved by the *Iroilaplap, Iroij* and *Leroij* devising the *Alap* and *Senior Dri Jerbal* titles to her adopted daughter Neimako, those titles then went to Neimako's natural son Terry Abon under custom. Additionally, Taklemen's *Kalimur* was publicly confirmed at the 2005 *eoraak* (post-burial ceremony for Taklemen) by *Iroijlaplao* Jurelang Zedkia who recognized Terry Abon as holding the *Alab* and *Senior Dri Jerbal* rights on Mokeo weto. On this set of facts, the TRC concluded that Terry Abon is the proper person to hold the *Alap* and *Senior Dri Jerbal* rights to Mokeo weto pursuant to custom.

The High Court held a Rule 9 hearing and issued its Final Judgment on September 5, 2023. The High Court found that the TRC's findings had a sufficient factual basis and that its decision was not clearly erroneous. The High Court accordingly adopted the opinion(s) of the TRC and, in so doing, rejected *inter alia* Darrel Malchi's argument that a 1954 Trust Territory of the Pacific Islands (TTPI) Land Determination was *res judicata* between the parties. According

to Darrel Malchi, this Land Determination (judgment) awarded Sailass the *Alab* and *Senior Dri Jerbal* rights to Mokeo weto. The 1954 Land Determination was not appealed within one year and, thus, became final pursuant to (then) TTPI Office of Land Management Regulation No. 1. As the son of Sailass, Darrel Malachi claimed he is the proper person to be awarded the *Alap* and *Senior Dri Jerbal* rights to Mokeo. The High Court found the 1954 Land Determination was not *res judicata* because that judgment did not state what interests, if any, were intended to be awarded Sailass and the other individuals, Makrej and Andrew listed in that judgment. Darrel Malachi appealed.

Darrel Malachi appeals raising five "legal" issues of which he seeks *de novo* review. We AFFIRM for the reasons set forth below.

II. BACKGROUND

The relevant genealogy is undisputed. The parties' common ancestor began with Lakuboke (male). Lakuboke and his wife Lukelon had a child named Neiboke (female). Neiboke had two daughters: Neiteli (the older) and Lijulae (the younger). Neiteli had a daughter named Neijab. Lijulae had a daughter named Taklemen. Neither Neijab nor Taklemen had natural children. Neijab adopted Sailass Malachi (male). Taklemen adopted Neimako (female). Neimako had a biological son, Appellee Terry Abon. Sailass Malachi had a biological son Appellant Darrel Malchi. Darrel Malachi contends that Sailass Malachi was adopted by Neijab as *Kanin Lujen.* Similarly, Appellee Terry Abon contends that Neimako was adopted by Taklemen as *Kanin Lujen.*

Darrel Malachi's original theory of the case was that he is the proper person to hold both the *Alap* and *Senior Dri Jerbal* rights and title to Mokeo weto as the successor to his father, Sailass Malchi, the adopted son of Neijab. According to Darrel Malchi, Iroij Laelan gifted Mokeo weto to Neiteli under the custom of *Imon Aje*, or *Katlep*, in return for gold jewelry he

(Iroij Laelan) received from Neiteli. The title and rights to Mokeo weto then passed from Neiteli to her daughter Neijab. Under the custom of *Imon Aje*, Appellant claimed that Sailass Malachi should succeed Neijab to the titles to Mokeo weto because Neijab considered Sailass as her own child having adopted him as *Kanin Lujen*. Therefore, Darrel Malachi claimed he succeeds to the titles and rights to Mokeo weto from Sailass, his father.

Appellee Terry Abon's theory of the case was that he was Neimako's son and thus entitled to succeed to her rights as *Alap* and *Senior Dri Jerbal* on Mokeo. Neimako had been adopted by Taklemen as *Kanin Lujen*. Taklemen made a *kalimur* in 1980, approved by *Iroijlaplap* Joba Kabua, *Iroij* Amata Kabua and *Leroij* Telean transferring the *Alap* and *Senior Dri Jerbal* rights and title to Mokeo weto to Neimako. Neimako predeceased Taklemen and the rights went to Terry Abon. Terry Abon's right to the titles was confirmed by *Iroij* Jurelang Zedkeia in 1985. Appellee also contended that Sailass Malachi was adopted from outside the *bwij* and lacked a *kalimur* from Neijab and was, thus, not entitled to succeed to the rights and titles to Mokeo weto which were extinguished upon Neijab's death.

In its December 10, 2021 "TRC Answer & Opinion, Amended" the TRC rejected Darrel Malchi's theory that Mokeo weto was *Imon Aje* to Neiteli because, if this were the case, only Neiteli's descendants (not any of Lijulae's) would have succeeded to the interests in Mokeo weto. Under the custom "if an *Imon Aje* is gifted to a female, then the line of succession for the *alapship* (sic) and *Senior Dri Jerbal* titles will exclusively pass through her issues, and thereafter in subsequent succession from the line of the first beneficiary, and not through any of her younger sibling's children." However, Taklemen, Lijulae's descendant, was recognized as holding the *Dri Jerbal* title by a 1954 Trust Territory of the Pacific Islands (TTPI) "Determination of Ownership and Release No. 124" (Plaintiff's Exhibit B) and "TTPI

Ownership of Land, Majuro, August 15, 1959." (Plaintiff's Exhibit B-1; Defendant's Exhibit C). Thus, according to the TRC, because Taklemen was recognized as *Dri Jerbal*, it follows that the pertinent land interests in Mokeo weto were not gifted as *Imon Aje.*

The TRC also rejected Darrel Malachi's theory that Mokeo weto was *Katlep*. Mokeo weto could not have been *Katlep* because *Katlep* is land allocated by an Iroijlaplap to an individual or *bwij* to place a person or people on the land. In this case, Neiteli and Lijulae were already part of the *bwij* occupying Mokeo weto. Thus, according to the TRC, the land could not have been *Katlep* (because they were already on the land).

Instead of *Imon Aje* or *Katlep*, the TRC found that Mokeo weto was *Imon Ninnin* from Lakuboke to his child, Neiboke. This *Imon Ninnen* to Neiboke commenced a new line of succession (i.e. established a *bwij*) which included Neiboke's daughters, Neiteli and Lijulae, and her (Neiboke's) granddaughters Neijab and Taklemen. In reaching its conclusion that Terry Abon is the proper person to hold the *Alap* and *Dri jerbal* rights to Mokeo Weto, the TRC made the following factual findings:

(1) Mokeo weto is an *Imon Ninnin* from the parties' common ancestor Lakuboke to his daughter Neiboke. An *Imon Ninnin* is "land given by an *Alab* or head of the *bwij*, to his child or children, with the approval from the *bwij* and the Iroijlaplap."
(2) This *Imon Ninnen* from Lakuboke to Neiboke commenced a new *bwij*. The creation of a new *bwij* is evidenced by the fact that the *Alabship* (sic) was held by Neijab while Taklemen held the *Dri Jerbal* title.
(3) Both Neijab and Taklemen were childless.
(4) Neijab adopted Sailass Malchi as *Kanin Lujen.* Likewise, Taklemen adopted Neimako as *Kanin Lujen (Kanin Lujerro).*
(5) Neijab failed to leave a *Kalimur* (will or testament) for Sailass Malachi to succeed her and exercise the *Alab* and *Senior Dri Jerbal* titles for Mokeo weto.

(6) As a result (of Neijab's failure to leave a *Kalimur* transferring land rights to Sailass), Sailass Malachi's issue (i.e. Darrel Malchi) is unable to succeed as a titleholder on Mokeo. (HCT CA 1998-288).[3] [But] 'the Panel recognizes and acknowledges that Sailass Malachi's rights in the line of succession should not be terminated or be solely determined upon the absence of a *Kalimur*.'

(7) [Rather] The line of succession deviated from that of an *Imon Ninnen* to an *Imon Bwij* with Neiboke's line, which continued in succession to the current generation of today of Darrel Malachi and Terry Abon, in which Darrel Malachi is a descendant of a patrilineal line whereas Terry Abon comes from a matrilineal line.

(8) Taklemen conveyed her interests as *Alab* and *Senior Dri Jerbal* to Neimako by a written *Kalimur* approved by *Iroijlaplap* Joba Kabua, *Iroij* Amata Kabua and *Leroij* Telean on January 29, 1980.

(9) "During the *eoraak* of Alab Taklemen, Iroijlaplap Jurelang Zedkeia expressed his recognition of Terry Ebon as the proper person to hold and exercise the *Alab* and *Senior Dri Jerbal* titles, rights and interests on Mokeo Weto in Delap, Majuro Atoll. The panel believes his acknowledgement only solidifies Taklemen John's *Kalimur*."

Given the above set of facts, the TRC concluded that Terry Abon is the proper person to hold the *Alap* and *Senior Dri Jerbal* titles to Mokeo Weto.

A hearing was held and the High Court referred questions back to the TRC as follows:

> "The TRC Panel stated that the descendants of Neijab (which includes Sailass Malachi and after his demise, the current plaintiff Darrel Malachi) is unable to inherit the *Alap* and *Senior Dri Jerbal* titles, rights and interests on Mokeo Weto, because Neijab did not put or make a will for them as successors thereof. However, in the second part of the paragraph on page 4, the TRC seems to have a different answer.

[3] The TRC cited the case of *Riten Jeilar, et al v. Hattie Rusin, et al*, for the custom that the *Alap* and *Dri Jerbal* rights of children who are adopted outside the *bwij* end if the adoptive parent does not leave a will passing those rights to the adopted child. In that case, the TRC stated: "The adoptions of Jeilar Jolet and Hattie Rusin by Labilliet were done outside of Labiliet's *bwij*. Under custom, if an adopting parent leave(s) behind a will concerning his adopted children, such a will is valid and enforceable by the adopted children. Meaning that if the adopted children in reference here pass away without leaving a will to their children, then rights will end with the adopted children." TRC "Opinion In Answer," pp. 2-3, item 6.

In the second part of the paragraph on page 4, the TRC stated that the title, rights and interests of Sailass Malachi should not be terminated or be terminated solely on the fact that he was not given a will. And that the line of succession began with Neiboke and continued on to the current day of Darrel Malachi and Terry Abon. If this is the TRC's position, then why is Darrel Malchi, who is *Alap* Sailass Malachi's son, not the holder of the *Senior Dri Jerbal* (title) today?"

The TRC addressed these inquiries in its (Amended) "Opinion & Answer" dated December 21, 2022, as follows:

"... [T]he TRC Panel is still of the opinion that Terry Abon is the proper person to hold and exercise the two titles of *Alap* and *Senior Dri Jerbal* in accordance with the will of *Alap* Taklemen made bequeathing her adopted child, Neimako Abon, who is Terry Abon's mother with the two land titles of *Alap* and *Senior Dri Jerbal* for Mokeo Weto. With respect to the discussion on the line of succession under custom, it is apparent that Mokeo Weto changed from an *Imon Ninnen* to an *Imon Bwij* after Neiboke in whom a new *Bwij* commenced. For this reason, the opinion of the TRC is that if the *Bwij* line did not become extinct with Taklemen, then it follows that Terry Abon is from a matrilineal line and Darrel Malchi is from a patrilineal line. However, the *Bwij* became extinct with no one to succeed Taklemen. After Taklemen, there were only the adopted children, and the authorization went to the *Iroijlaplap* to certify the will *Alap* Taklemen made for her adopted child, Neimako Abon and her descendants to inherit the titles, rights and interests of *Alap* and *Senior Dri Jerbal* on Mokeo weto to this day. In addition to *Iroijlaplap* Joba's approval of the will, at the time, the signature of the successor in line to the *Iroij* title after Joba, Amata Kabua, was also acquired, as well as the *Iroijedrik's* signature, Telean. In addition to the will, after some time had passed, *Iroijlaplap* Jurelang Zedkeia further affirmed this will in his speech during *Alap* Taklemen's post-burial ceremony (*eoraak*). After Neimako Abon's demise, her son Terry Abon, then becomes the beneficiary according to the written will and the words of the preceding *Iroijlaplaps* of Mokeo Weto." (Emphasis by underlining added.)

The High Court again referred additional questions to the TRC as follows:

"If, as the TRC recognized in its Amended Opinion, at 4, Neijab adopted Sailass Malachi 'as her own son or *Kanin Lujen*' and 'Sailass Malachi's rights in the line of succession should not be terminated or be solely determined upon the absence of a *Kalimur*, 'then in the absence of a Kalimur by Neijab in favor of Sailass, what were Sailass's rights and what are his descendants' rights in the line of succession.?

Why are descendants of Sailass, who was adopted as *Kanin Lujen*, not in line to be *Senior Dri Jerbal* – that is, do they not have the same rights as natural children?

Is it the case that Sailass' descendants, as descendants of a 'patrilineal line,' can live on Mokeo but cannot be *Senior Dri Jerbal*?"

The TRC in its July 17, 2023 "Answer to Supplemental Questions" [Ans. To 2nd Supp. Ques.], once again confirmed that Terry Abon is the proper person to hold the *Alap* and *Dri Jerbal* rights and title to Mokeo Weto. The TRC explained:

> "Also, even though Neijab considered Sailass and Taklemen considered Neimako '*Kobban Lojeiorro*' (from their wombs), Sailass and Neimako were not their "flesh and blood" son and daughter and thus could not inherit *Bwij* rights. Accordingly, with the passing of Taklemen, Neiboke's *Bwij* became "*Lot in Bwij*" or "*Elot Bwijeo,*" that is, extinct...However, the *Iroijlaplaps* had the power to approve Taklemen's will ('*Kalimur*') for her daughter Neimako Abon and her children and grandchildren to exercise *Alap* and *Senior Dri Jerbal* rights over Mokeo upon Taklemen's death. In fact, all the *Iroijlaplaps* starting with Joba in 1980 have recognized Neimako as the *Alap* and *Senior Dri Jerbal* over Mokeo. At the post-burial ceremony for Taklemen in 2005, then *Iroijlaplap* Jurelang Zedkeia publicly confirmed Taklemen's *Kalimur*. (Emphasis by underling added.)

The High Court issued its "Final Judgment" on September 5, 2023. The High Court concluded there was a sufficient factual basis for the TRC's findings and therefore adopted the TRC's conclusion that Terry Abon is the proper person to hold the *Alap* and *Dri Jerbal* rights to Mokeo weto.

In reaching its judgment, the High Court rejected Darrel Malachi's argument that a 1954 Trust Territory of the Pacific Islands (TTPI) Land Determination (Plaintiff's Exhibit B) confirmed Sailass Malachi's customary rights on Mokeo and was *res judicata* between the parties. The High Court reasoned that although that TTPI Land Determination listed Sailass' name on the Determination, it did not associate any rights to Mokeo with him. The High Court stated:

> "...the TTPI Land Determination listed four holders of land rights over Mokeo: Aisea David as *Iroij elab*; Lijeklok as *Iroij erik*; Neijab as *Alap*; and Litaklamen as *Dri-Jerbal.* Thereafter, Makrej, Sailass and Andrew are listed. However, the TTPI Land Determination does not associate rights with their names. At the time of the 1954 Land Determination hearing, Makrej, Sailas, and Andrew may have been *junior dri jerbal* with the potential to become what the Constitution refers to as an *Alap* or *Senior Dri Jerbal.* However, that never happened. With the death of Taklemen in 2005 (Def.'s G), Neiboke's *bwij* became extinct and the *Alap* and *Senior Dri Jerbal* rights in Mokeo passed under Taklemen's 1980 *kalimur* to Neimako Abon's son Terry Abon, as Neimako predeceased her adoptive mother on June 4, 1998 (Defendant's Exhibit H). ... Since 1989, leases executed with third parties for Mokeo weto were signed by Taklemen, Neimako, and Terry as *Alap* and *Senior Dri Jerbal,* not Sailass Deft's Exhs D, E and K. The TTPI Land Determination did not hold that Sailass was entitled to be the *Alap* or *Senior Dri Jerbal* over Mokeo. The TTPI Land Determination does not support Sailass' doctrine of *res judicata* claim."

After being granted a series of extensions, Darrel Malachi filed a Notice of Appeal on January 29, 2024, raising the following extremely broad issues:

1. Whether the High Court committed error in granting judgment in favor of Defendant;
2. Whether the High Court committed error in relying upon the improper opinion of the TRC; and
3. Whether the TRC inappropriately applied the wrong customary standard.

Appellant Darrel Malachi filed his Opening Brief on April 22, 2025, setting forth the issues raised on appeal as further set forth below. Appellee Terry Abon filed his Answering Brief on June 2, 2025, responding to each of Appellant's arguments and seeking to "center [the appeal] to the three main grounds for appeal noticed to the court – filed on January 29, 2024" and objecting to consideration of "a long laundry list of supposed errors by the trial courts which have not been identified in its appeal notice." Appellant filed a Reply Brief on June 12, 2025. Oral argument was held on February 2, 2026.

III. ISSUES ON APPEAL

In his Opening Brief, Darrel Malachi raises five issues which we set forth *verbatim:*

1. What is the legal effect of the land determination and release document admitted into evidence as Plaintiff-Appellant's Exhibit "B" and was it legal error for the High Court and the Traditional Rights Court to disregard that determination?
2. Because Sailass was *Kanin Lujen*, and where the evidence was inconclusive as to whether or not Neimako was *Kanin Lujen*, did the Defendant-Appellee sustain his burden of proof justifying a decision that Defendant-Appellee is the title holder of *Alap* and *Senior Dri Jerbal* for Mokeo weto or did the Traditional Rights court commit legal error?
3. Did the High Court and Traditional Rights Court commit legal error as a matter of customary law, where there was no showing of good cause justifying the removal of customary rights of Sailass Malachi by way of *Kalimur* of Taklemen?
4. Should Chief Justice Ingram have disclosed and consulted with counsel about his involvement as counsel in the review and proper execution of the lease agreement between the National Telecommunications Authority (NTA) as lessee and Defendant-Appellee's mother and grandmother as lessors?
5. Due to the nature of cases involving customary land rights and customary law, does the introduction of matters for the first time on appeal satisfy the exception to the general prohibition of argument presented for the first time on appeal?

We limit our discussion to the specific issues raised on appeal in Appellant's Opening Brief.

IV. STANDARD OF REVIEW

Matters of law are reviewed *de novo. Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991). Mixed questions of law and fact are reviewed under the *de novo* standard. *Samson, et al, v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992). Construction of a judgment is a legal issue we review *de* novo. *See, e.g., McKenzie Co., N.D. v. United States of America, Dept. of Interior*, 131 F.4th 877, 888 (8th Cir. 2025) *citing United States v. Spallone*, 39 F.3d 413, 423 (2nd Cir. 2003)("[t]he interpretation of the text of a court order or judgment is considered a conclusion of law subject to *de novo* review.")

Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al*, 3 MILR 127, 131 (2010); *Abner v. Jibke, et al*, 1 MILR 3, 5 (1984). A finding of fact is "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. *Lobo v. Jejo, supra,* at 225-6 (1991). The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of fact of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo. Bulele v. Morelik*, 3 MILR 96, 100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56, 61 (2008). We are required to defer to the factual findings of the court(s) below even if the evidence would make another conclusion more plausible. *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip Op. 12/10/21; *see also, Glossip v. Gross*, 576 U.S. 863 at 881 (2015) *citing Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

We also give deference to the TRC and High Court's credibility findings. The clearly erroneous standard of review requires "even greater deference to the trial court's findings when

they are based upon determinations of credibility." *See, e.g., Computer Sciences Corporation v. Tata Consultancy Services Limited*, 159 F.4th 429, 437 (5th Cir. 2025). This is because the trial court is in a position to observe the witnesses whereas we are not. *See, e.g., Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013)("Where, as here, findings of fact turn on credibility determinations, the findings receive heightened deference in light of the fact finder's unique opportunity to observe the demeanor of witnesses.")

In cases involving customary issues decided by the TRC, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, art. VI, sec. 4(5). "The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis for a final court decision does it become law in the modern sense." *Lebo v. Jejo, supra,* at 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991); *Kabua v. Malolo, supra.*

Expressions of custom by the courts of the prior Trust Territory Administration, while instructive, are not binding. *See, e.g., Langiota v. Alex*, 1 MILR (Rev.) 216, 2018 (1990). We are also not bound by trial court decisions although they may be considered instructive. *See, e.g.,Hart v. Massanari,* 266 F.3d 1155, 1174 (9th Cir. 2001)("...[T]he binding authority principle

applies only to appellate decisions and not to trial court decisions ...") Similarly, treatises on Marshallese custom, while instructive, are not binding because those treatises have not been adopted as authoritative by statute or Supreme Court decision. *Kabua v. Malolo, supra.*

V. DISCUSSION

A. The High Court and TRC did not commit "legal error" in failing to find that Plaintiff's Exhibit B (1954 TTPI Land Determination) awarded Sailass the *Alab* and *Senior Dri Jerbal* interests over Mokeo.

Darrel Malachi contends the High Court and Traditional Rights Court committed "legal error" in failing to find that the 1954 TTPI Land Determination (Plaintiff's Exhibit B) awarded Sailass the *Alab* and *Senior Dri Jerbal* interests in Mokeo weto. Appellant argues:

(1) that the 1954 TTPI Land Determination is *res judicata* because the present parties to this litigation were in privity with the parties present at the land determination hearings and appeal was not taken within one year under Land Management Regulation 1, Section 14 (thus making the land determination or judgment final) and

(2) because the listing of Makrej, Sailass and Andrew followed the succession order under custom it was error for the High Court not to find that Sailass was awarded the *Alab* and *Senior Dri Jerbal* interests in Mokeo.

We reject Appellant's arguments because the 1954 TTPI Land Determination does not associate names with interests in Mokeo weto allegedly being awarded to Makrej, Sailass, and Andrew. Although Sailass' name is listed in the Land Determination, it does not state what interests, if any, were intended to have been awarded him; the *Alab* or *Senior Dri Jerbal* titles or both. Indeed, Appellant hedges on what that Land Determination supposedly awarded him when he states he "should *at least* be awarded the *Senior Dri Jerbal* interest." It is also unclear whether the Land Determination intended to adjudicate future interests to Mokeo weto or whether Sailass was listed as having a mere expectancy in succeeding to those titles. The 1954 Land Determination lacks clarity as to whether any interests were being awarded to Sailass and is therefore vague or ambiguous.

A vague or ambiguous judgment is not entitled to *res judicata* effect. *Res judicata* requires a final judgment that clearly establishes the rights of the parties and the claims adjudicated. *See, e.g., La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.*, 914 F.2d 900, 907 (7th Cir. 1990)("Where a judgment is ambiguous and it is not possible to definitively determine what interests were decided, issue preclusion cannot apply."); *Byrd v. State through Department of Transportation and Development*, 293 So.3d 89, 94 (La. 2020)(A vague judgment is not entitled to *res judicata* effect.); *Melaro v. Mazzanotte*, 352 F.2d 720, 721 n. 2 (D.C. Cir. 1965)("A judgment the basis of which is ambiguous is not *res judicata*.")

"It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *See, e.g., United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979). There is no opinion, memorandum of proceedings or record accompanying the 1954 TTPI Land Determination indicating what was noticed and litigated, what parties were present and what interests, present, future or mere expectancy, were intended to be awarded Makrej, Sailass and Andrew. Thus, we conclude the 1954 TTPI Land Determination is not entitled to *res judicata* effect.

Because we find that the 1954 Land Determination is not entitled to *res judicata* effect, we need not address Appellee's argument that the 1959 Land Determination "superseded" the 1954 Land Determination.

B. We defer to the TRC's Factual Findings Regarding the Status of Both Parties as *Kanin Lujen* and as to the Applicable Custom.

Darrel Malachi argues that the TRC committed "legal error" in finding Neimako was *Kanin Lujen* which would justify its decision that Terry Abon holds the *Alap* and *Senior Dri Jerbal* titles to Mokeo weto. He argues the background of Neimako is "shrouded in mystery"

having gone by different names, including Luther which is not a Marshallese name. The inference being that there was insufficient evidence for the TRC to find that Neimako was adopted by Taklemen and therefore it was error to find Neimako was *Kanin Lujen.* He argues that his witness, Mudge Samuel, had testified that Neijab, as well as Sailass and his father were from the Ripit *jowi*, as was Sailass' natural mother Jila. The significance being that the *bwij* did not become extinct upon Taklemen's death but, as a member of the *bwij*, Sailass would be entitled to the titles because he was the oldest surviving member of Neiboke's *bwij,* not Neimako. He argues that, as *Kanin Lujen,* Sailass was entitled to inherit all the rights as a natural descendant of the *bwij* citing the Traditional Rights Court decision in *Kelemen v. Mwejenwa*, H.Ct.CA No. 1982-10 at 2-3 as well as *Tobin*, p. 18. The *Kelemen, supra,* case stated:

> "*KANIN LUJEN,* Lata, who is the older sister of Mannana, took Defendant Atadrik when he was only a child and had adopted him as a natural son, when a *bwij* land comes to an end, the adoptive child, who had become like a natural child is entitled to inherit all the interest rights on the land, but in *Ninnen* land the inheritor is called *Bwibwin Lo Koreak.*" (emphasis by underlining added.)

However, this statement of custom (i.e. that when a *bwij* land comes to an end, a child adopted as *Kanin Lujen* is entitled to inherit all the interests in the land) is qualified later in the decision when the TRC stated:

> "However, for the *Kanin Lujen* to seek the inheritance rights, the defendant should have called one of his very close relative (sic) to carry out all the responsibilities and to live with Lata and Mannana during the days they were very sick."

The inheritance rights of the *Kanin Lujen* "to seek the inheritance rights" in *Kelemen* were conditioned on carrying out certain responsibilities. Thus, it cannot be said that the *Kelemen* case stands for the invariable custom that *Kanin Lujen* inherit all the land interests upon extinction of the *bwij*. Further the *Kelemen, supra,* decision appears to be in variance to the

TRC's later decision in *Jeilar v. Rusin*, HCT CA No. 1998-288 which stated that the *Alap* and *Dri Jerbal* rights of children who are adopted outside the *bwij* end if the adoptive parent does not leave a will passing those rights to the adopted child.

Because the alleged custom as stated in *Kelemen, supra,* that *Kanin Lujen* inherit all the land interests upon extinction of the *bwij* has not been codified or declared by a final Supreme Court decision, we cannot say that the TRC and/or the High Court erred "as a matter of law" in finding, under the particular facts of this case, that Terry Abon is the holder of the *Alap* and *Senior Dri Jerbal* interests in Moeko weto. The TRC found that both Neimako and Sailass were *Kanin Lujen* but under custom a *Kalimur* was necessary to transfer the titles when the *bwij* became extinct. We give deference to these findings and find no clear error.

While not necessary to our decision, we believe it is appropriate to comment on Terry Abon's assertion that our decision in *Tibon v. Jihu,* 3 MILR 1 (2005) "affirms" the proposition that "under Marshallese custom, titles do not pass to adopted children in the absence of a *kalimur*." The *Tibon* case held, *inter alia*, that the wetos at issue were given as *kitre* and were not *bwij* lands. Therefore, *bwij* consent was not necessary for the title holder to dispose of the land by *kalimur* to his adopted son. The *Tibon* case is clearly distinguishable from the case at bar because *bwij* lands are involved in the case at bar, not *kitre* lands. *Tibon, supra,* does not stand for the broad proposition that titles to adopted children do not pass in the absence of a *kalimur*.

C. The TRC and High Court Did Not Err, As a Matter of Customary Law, In Finding in Favor of Appellee When There Was No Showing of "Good Cause" Justifying Removal of the Customary Rights of Sailass Malachi by Way of the *Kalimur* of Taklemen.

Darrel Malachi argues that the *Iroijs'* approval of Taklemen's will and without consulting him constituted a taking of his vested interests in Mokeo weto without "good cause" citing the Trust Territory trial court decisions in *Lalik v. Elsen*, 1 TTR 134 (1954), *Abija v. Larbit*, 1TtTR

382 91958) and *Labillet v. Zedekaiah*, 6 TTR 119 (1972) However, having found no error in the TRC and High Court's finding that Sailass Malachi was not entitled under custom to inherit an interest in Mokeo and that the 1954 TTPI Land Determination did not grant an interest in Mokeo weto to Sailass, it follows there was no error as a matter of law for a failure to show "good cause" justifying removal of customary rights.

D. A Remand Is Not Appropriate for the Failure of the Trial Judge to Recuse Himself.

Darrel Malachi contends that the trial judge, Judge Ingram, should have either recused himself or raised the issue of recusal and obtained consent from the parties to proceed with his involvement in the case. The alleged basis for recusal was because Defendant-Appellee's Exhibit D (a 1990 lease agreement of Mokeo weto between the National Telephone Association [NTA] and Defendant-Appellees) was approved "as to form" by Judge Ingram while he was employed as counsel for NTA approximately 35 years ago. Because Judge Ingram did not raise the issue of his recusal *sua sponte* and either recuse himself or obtain a waiver, Appellant argues the judgment needs to be reversed and the matter remanded for a new trial before an "impartial judge."

Appellant premises his argument on RMI Code of Judicial Conduct, Section 4.1 which states:

> A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities, both professional and personal.

RMI Code of Judicial Conduct, Section 2.5 states that a judge <u>shall</u> disqualify himself if a judge has personal knowledge of "disputed evidentiary facts concerning the proceedings, other than facts commonly known by members of the public" or if "it may appear to a reasonable observer that the judge is unable to decide the matter impartially.".

The United States Federal analogue is found at 28 USC Sec. 455(a) which states:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The question, according to Appellant, is "whether another person might reasonably question a judge's impartiality under the circumstances." It is the "appearance" of partiality which is the prohibited conduct. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Appellant, citing the factors identified in *Liljeberg, supra,* argues that if the judgment is not vacated due to the trial judge's failure to either obtain a waiver or recuse himself that "the risk of prejudice to Plaintiff (Malachi) far outweighs any prejudice to defendant; there is little risk that denial of relief will impose injustice in other cases as this case is case specific; and there is no doubt that not granting relief will undermine the appearance and integrity of the judicial system."

Regarding the first factor referenced by *Liljeberg, supra,* "the risk of injustice or prejudice to the parties in the particular case," Appellant has failed to identify what that risk may be. If Appellant was concerned about a risk of prejudice or bias to his case based on the trial judge having approved a lease "as to form" more than three decades ago, Appellant could and should have voiced his concern when he became aware of that lease. As discussed below, Appellant sat silent and did not raise the issue of recusal when the lease was introduced into evidence. If there was a risk of injustice or prejudice Appellant should have raised the issue of recusal at that time, not years later on appeal.

Regarding the *Liljeberg, supra*, factor of "the risk of undermining the public's confidence in the judicial process," courts apply an objective reasonable person standard to determine whether there is an appearance of impartiality requiring recusal. The test asks whether a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned. *In re Kensington Intern. Ltd.*, 368 F.3d 289, 296 (3rd Cir. 2004).

The alleged circumstance giving rise to the issue of partiality stems from reviewing an NTA lease and approving it "as to form" more than three decades before the instant case. The trial judge did not represent Appellees in approving the lease "as to form." The issue of ownership of Mokeo weto was not at issue and it is thus improbable that merely reviewing the lease "as to form" imputed knowledge of any disputed facts in the instant case. It is generally recognized that approving a lease or other document "as to form" merely means reviewing the document and assuring it meets with whatever requirements for validity might be required by law. We find that a reasonable person would not find an appearance of impropriety under these circumstances.

We also reject Appellant's argument that Judge Ingram should have either recused himself or obtained a waiver for several additional reasons:

First, the issue of recusal was not raised below and is consequently waived. It is generally held that a party who fails to file a motion to recuse the judge despite having knowledge of the grounds for recusal waives his right to urge recusal on appeal. *See, e.g., Taylor v. Carter*, 333 S.W.3d 437, 445-6 (KY Ct. App. 2010)(Recusal is waived if not asserted at the first instance a party learns of grounds for recusal); *Day v. State*, 285 So.23d 171, 179 (MS. Ct. App. 2019)(If a defendant knows of, or with the exercise of reasonable diligence may have discovered, possible grounds for recusal of a judge, but fails to raise those issues, it is considered implied consent to have the judge go forward presiding over the case); *DeLuca v. Mountaintop Area Sanitary Authority*, 234 A.3d 886, 895 (PA. 2020)("A party is required to request a judge's recusal 'at the earliest possible moment, i.e. when the party knows of the facts that form the basis for a motion to recuse … *citation omitted*… [t]he party that does not move promptly to recuse the assigned judge upon learning of the facts relevant to recusal waives the issue.")

The United States Federal Courts have also held that a failure of a party to raise an issue of recusal below waives the ability to raise the issue on appeal. The Ninth Circuit has warned that a recusal motion made after the entry of judgment is presumptively untimely. *See, e.g., E&J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992)(holding that a recusal motion made after entry of judgment was untimely; "[to] hold otherwise would encourage parties to withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke [section 455] in order to get a second bite at the apple."); *In re U.S.*, 441 F.3d 44, 65 (1st Cir. 2006)("...[C]ourts will reject what appears to be a strategic motion to recuse a judge whose rulings have gone against the party."); see also *Kolon Industries, Inc. v. E.I. du Pont de Nemours and Co.*, 846 F.Supp.2d 515, 522 E.D. Va. 2012)(cataloguing cases imposing a timeliness requirement for filing a motion for recusal). The court in *Smith v. Danyo*, 585 F.2d 83, 86 (3rd Cir. 1978) stated: "[T]he judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back while calling upon the court for hopefully favorable rulings and then seeking recusal when they are not forthcoming." The issue of recusal was not raised in Appellant's Notice of Appeal. Instead, Appellant waited almost two years before raising the issue in his opening brief. Appellant knew or reasonably should have known of the arguable appearance of impropriety at the time the NTA lease was introduced into evidence. Appellant's delay in raising the issue is unexplained and was raised only after an adverse judgment, thus, raising a concern of whether the issue was reserved for tactical reasons. Appellant was represented by counsel and, as such, should have known of the potential recusal issue. Appellant offers no explanation for failure to timely raise the issue of recusal until appeal. We conclude that the issue of recusal has been waived because it was not timely raised.

Second, even if the trial judge should have either recused himself or obtained a waiver, there are no grounds for reversing and remanding for a new trial. United States federal and state authorities have held that a reversal and remand for a new trial is not required where a judge fails to recuse himself due to an alleged appearance of impropriety. "[I]f a judge proceeds in a case when there is [only] an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties." *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989); *see also People v. McLain*, 589 N.E.2d 1116, 1125 (1992)(noting that appearance of impropriety alone does not affect substantial rights warranting reversal); *Opher v. State*, 513 A.2d 939, 942 (MD. 1986)(noting that "[e]ven where there is an appearance of impropriety ..., reversal is not required unless substantial rights of the defendant are actually affected.") Appellant does not point to any way in which his substantial rights were affected by the trial judge's failure to either recuse himself or raise the issue of his recusal with the parties and obtain a waiver. The record does not reveal anything that would suggest that the trial judge behaved, ruled, or acted unfavorably towards Appellant at trial.

Finally, requiring recusal solely based on the trial judge's representation of a governmental agency in an uncontested matter over three decades ago overlooks the reality of long legal careers, especially in a small jurisdiction such as the Marhsall Islands. As a practical matter there is no hint or suggestion that the judge's approval of a lease 'as to form" thirty-five years ago would cause a reasonable person to question the integrity of the trial judge or the judiciary as a whole. We don't blind ourselves to the realities confronting the judicial system. We also note that the RMI Rules of Civil Procedure (MIRCP) Rule 75 (c) were amended to now state "[a] party waives disqualification of a judge by (1) failing timely to object or move for

disqualification." Although this Rule was not in effect at the time the lease was introduced into evidence which gave rise to the issue of recusal, the policy for that Rule certainly was.

We conclude that a remand is not appropriate for the trial judge's failure to *sua sponte* raise the issue of recusal and either recuse himself or obtain a waiver to proceed because Appellant was aware of the issue, timely failed to raise the issue and the substantial rights of the Appellant were not affected by the trial judge's continued participation in the proceedings.

VI. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the High Court.

Dated: 3/20/26

/S/

Hon. Daniel Cadra, C.J.

/S/

Hon. J. Michael Seabright, A.J.

/S/

Hon. Richard Seeborg, A.J.