

# Land in Trust: The Invasion of Palau's Land-Tenure Customs by American Law

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## I. INTRODUCTION

The Republic of Palau is the western-most nation of the Western Caroline Islands.<sup>1</sup> Palau has a long history of foreign powers taking over its governance and supplanting its rules with their own. This article chronicles some results of those incursions, with a general focus on land ownership and a particular focus on the imposition of the American trust concept to replace Palauan land allocation customs.

Socially significant contact between Palau and Western societies did not occur until the late nineteenth century, when English and Spanish traders and entrepreneurs began visiting Palau. It came under the political control of Germany in 1899, then Japan in 1914. During World War II, the United States expelled Japan from most of the Pacific, including Micronesia.<sup>2</sup>

After that expulsion, in an apparent fit of Wilsonian fervor and post-victory largess, the United States declined its opportunity to take possession of Micronesia as a spoil of war, as was commonly done by this planet's victors.<sup>3</sup> Instead, it arranged for these islands to be put under the

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<sup>1</sup> The Western Caroline Islands are the most western archipelago of the Pacific Micronesian region. *Caroline Islands*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/96488/Caroline-Islands> (last visited May 6, 2013).

<sup>2</sup> DOROTHY E. RICHARD, 2 U.S. NAVAL ADMIN. OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS 5-54 (1957) [hereinafter RICHARD Vol. 2].

<sup>3</sup> e.g. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1998, 30 Stat. 1754.

authority of the United Nations as part of a “Trust Territory.”<sup>4</sup> The United States then administered the islands as the “administering authority” under a “Trusteeship Agreement.”<sup>5</sup> This administration was subject to a written trust instrument. This Trusteeship Agreement between the United States and the United Nations enumerated specific powers and duties that the United States, as trustee, had with respect to the Peoples of Micronesia.<sup>6</sup>

In its resulting administration of Palau, the United States took pains to insure that Palauans learned and established U.S.-style democratic institutions. It fostered the creation of Palauan legislative, executive, and judicial bodies. It administered large doses of American and Anglo-American law to the Palauans. From these influences, Palau emerged in 1994 as an independent sovereign nation associated as a “freely associated state” with the United States under a constitution largely modeled on that of the United States’.<sup>7</sup> Land return played a role in this process.<sup>8</sup>

Upon becoming trustee, the United States assumed title to all the land in Palau previously owned by the expelled Japanese.<sup>9</sup> That land accounted for well over two-thirds of Palau’s landmass.<sup>10</sup> A large portion of that land had been either purchased by the Japanese under coercive circumstances or taken by force.<sup>11</sup> To the extreme frustration of Micronesians, especially Palauans, the United States continued to hold these lands in trust as “public lands” for over thirty years.<sup>12</sup> One professed reason for this tenacity was the trustee’s impliedly claimed uncertainty over how the lands should be returned.<sup>13</sup> In the late 1970s, under intense

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<sup>4</sup> 48 U.S.C. §§ 1681-1695 (2012).

<sup>5</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, art. 2, Jul. 18, 1947, 61 Stat. 3301, 8 U.N.T.S. 189. [hereinafter Trusteeship Agreement]. The Trusteeship Agreement was made pursuant to Article 73 of the Charter of the United Nations, which directs that “Members of the United Nations which . . . assume responsibilities for the administration of territories . . . recognize the principle that the interests of the inhabitants of these territories are paramount . . .” U.N. Charter art. 73.

<sup>6</sup> Trusteeship Agreement, *supra* note 5.

<sup>7</sup> *See infra* Part II.F.4.

<sup>8</sup> NORMAN MELLER, CONSTITUTIONALISM IN MICRONESIA 21 (1985); *see infra* Part IV.

<sup>9</sup> Order of the Area Property Custodian of the Trust Territory of the Pacific Islands (Sept. 27, 1951) [hereinafter Vesting Order].

<sup>10</sup> U.S. DEP’T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, CIVIL AFFAIRS HANDBOOK: WEST CAROLINE ISLANDS, OPNAV 50E-7 175 (1944) [hereinafter CIVIL AFFAIRS HANDBOOK].

<sup>11</sup> *See infra* Part II.D.

<sup>12</sup> MELLER, *supra* note 8, at 59-60; Vesting Order, *supra* note 9, ¶ 1; Sec. Order No. 2969 (Dec. 28, 1974).

<sup>13</sup> DOROTHY E. RICHARD, 3 U.S. NAVAL ADMIN. OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS 502 (1957) [hereinafter RICHARD VOL. 3]; MELLER, *supra* note 8, at

political pressure brought to bear chiefly by Palau, the United States finally resolved that question by requiring each Micronesian state to create its own board of public land trustees as a prerequisite for the return of each state's public lands.<sup>14</sup> Each board was required to receive the public lands from the United States, to continue to hold those lands in trust for the public benefit, and to provide a mechanism to adjudicate claims of aggrieved citizens for the return of those public lands.<sup>15</sup> In this manner, the trust concept, originally introduced to Micronesia as an alternative to appropriating Palau as a U.S. possession, became a fundamental aspect of how land rights were allocated in independent Palau.

This article traces a history of changes in Palau's traditional and colonial land tenure institutions through successive foreign administrations. It describes the evolution of the U.S. choice of the trust concept as a vehicle for returning the land it held. Additionally, it details how Palau began to cope with its former trustee's requirement that public land be held in trust and with the general Americanization of Palau's land tenure rules.

## II. A HISTORY OF PALAUAN LAND TENURE

Palau's pre-independence land tenure history is most conveniently considered in four eras: the era prior to contact with Western civilization, and three subsequent periods during which Palau was successively governed by Germany, then Japan, and finally the United States, each discussed in turn.

### A. Pre-Contact Land Tenure

Before Westerners began to regularly visit Palau, the island had a well-developed traditional system, characterized by chiefly rule, for dealing with what Western societies consider legal matters.<sup>16</sup> Under that system, land allocation did not rest on the concept of "title." Rather, the

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221; *see infra* Part II.E.

<sup>14</sup> RICHARD VOL. 3, *supra* note 13, at 502.

<sup>15</sup> Sec. Order No. 2969, § 3(b).

<sup>16</sup> OFFICE OF COURT COUNSEL, SUPREME COURT OF THE REPUBLIC OF PALAU, THE QUEST FOR HARMONY: A PICTORIAL HISTORY OF LAW AND JUSTICE IN THE REPUBLIC OF PALAU 5-7 (1995); RICHARD PARMENTIER, THE SACRED REMAINS: MYTH, HISTORY, AND POLITY IN BELAU 46-47 (1987); HOMER BARNETT, BEING A PALAUAN 59 (1960). Although Palau's complex traditional political structures are beyond the scope of this article, they generally have been composed of traditional village councils, each of which are composed of carefully ranked chiefs of clans and Palau's traditional clan structure and customs. In their book, "Micronesia: The Problem of Palau," the authors chronicle residual traditional power coming to bear in Palauan efforts to limit U.S. desires to place nuclear weapons there. ROGER CLARK & SUSAN RABBITT ROFF, MICRONESIA: THE PROBLEM OF PALAU 71-72 (1987).

system was normally of “control and usage.”<sup>17</sup> Except perhaps in Palau’s Southwest Islands, the right of private, individual land ownership probably did not exist as it does today.<sup>18</sup> Final authority over land use rights rested with the higher-ranking chiefs.<sup>19</sup>

There were four broad categories of land: (1) *chutem buai* (undeveloped public land), (2) *chutem beluu* (developed village land), (3) *chetemel chelid* (sacred lands), and (4) *chetemel a blai* (“private” land controlled by kinship groups).<sup>20</sup> Public and village lands were controlled by village councils, and private lands by heads of clans.<sup>21</sup> In early pre-colonial times, most land was controlled at the village council level, but in later pre-colonial times, more came under clan, lineage, and family control.<sup>22</sup>

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<sup>17</sup> HIJIKATA HISAKATSU, COLLECTED WORKS OF HIJIKATA HISAKATSU: SOCIETY AND LIFE IN PALAU 251 (1993) (“[T]here is a big difference in meaning between the right of control and usage in the Palauan *kebliil* system and the right of private ownership in civilized cultures.”); see also *Ucherbelau v. Ngirakerkeriil*, 2 T.T.R. 279, 284 (Tr. Div. Palau 1961) (“[I]t was common practice to refer to clan land as having been ‘given’ to an individual when all that had actually been given was the right to use the land.”).

<sup>18</sup> *Ngiruhelbad v. Trust Territory*, 2 T.T.R. 631, 634 (App. Div. 1961) (“It is recognized that ‘individually owned’ land was a foreign concept that had no place originally in Palauan customary land law.”). A possible exception to these statements is reported in a U.S. Navy Report. CIVIL AFFAIRS HANDBOOK, *supra*, note 10, at 174 (“Private property in land is practically unknown, occurring only in the case of a gift from the chief of another village.”).

<sup>19</sup> HISAKATSU, *supra* note 17, at 251, 254-57; accord CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174 (“Arable land is apportioned by the village chief.”).

<sup>20</sup> SHIGERU KANESHIRO, *Land Tenure in the Palau Islands*, in LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS 289, 296-300 (Office of the High Commissioner, Trust Territory of the Pacific Islands, Guam, 1958, vol. 1, part VI); Mary Shaw McCutcheon, *Resource Exploitation and the Tenure of Land and Sea in Palau* (1978) (Ph.D. Dissertation, University of Arizona). Note that Palau courts have rejected tenancies in common, which McCutcheon recognizes. See, e.g., *Riumd v. Tanaka*, 1 ROP Intrm. 597, 605 (available at the Guam Territorial Library). *Contra* WEST. U. SAISKE, THE NATURE AND SCOPE OF CUSTOMARY LAND RIGHTS IN A PALAUAN COMMUNITY 4 (1966) (“The ownership of land in the Palau Islands would fall into three categories: (a) Clan Lands; (b) Lineage Lands; and (c) Individual Lands.”).

<sup>21</sup> *Ngiraingas v. Isechal & Bank of Hawaii*, 1 ROP Intrm. 34, 39 (Tr. Div. 1982); accord *Ngiramelkai v. Sechelong*, 7 T.T.R. 119, 121 (Tr. Div. 1974) (“Land which is village land is held by the title holder for the village . . .”); see also *Airai Municipality v. Rebluud*, 4 T.T.R. 75, 77-78 (Tr. Div. 1968) (stating that unlike control of clan or lineage lands, “the consent of the then highest title in the village was required for sale of any village land.”); *Rechurudel v. PPLA*, 8 ROP Intrm. 14 (1999) (approving the holding in *Rebluud*).

<sup>22</sup> JOHN USEEM, REPORT ON YAP, PALAU, AND THE LESSER ISLANDS OF THE WESTERN CAROLINES 96 (1945) (“It is said in some quarters, ‘[i]n the old days the village owned the land and no one needed land, now the *blai* owns it and everyone needs more land.’”); *Ngerdelolek Village v. Ngerebol Village*, 2 T.T.R. 398, 404 (Tr. Div. 1963) (“[I]n ancient times village lands in the Palau Islands were assigned and re-assigned by

The rules establishing authority to allocate public and private land were somewhat fluid and applied differently in different situations,<sup>23</sup> but certain common principles can be identified. Control over actively used land, such as that used for dwellings or crops, was generally held by the chief of a kinship group, whose decisions would not be countermanded by the village chief.<sup>24</sup> The most actively used land was under this sort of clan control. In larger clans, this power might have been delegated to male heads of lineage within the clan, although for some lands, such as taro paddies, use rights were parceled out by the female head.<sup>25</sup> Little-used or community-used areas, such as those producing lumber or used only for hunting and gathering, were under the control of the village council within whose jurisdiction they lay.<sup>26</sup> The same was true of village meeting houses and the old stone paths used in earlier days.<sup>27</sup> When people ceased using land for any purpose other than hunting and gathering, it reverted to *chutem buai* and returned to the administration of the village council.<sup>28</sup> In Western legal terms, all use rights in non-private lands were revocable at the will of the grantor.<sup>29</sup> As one judge put it, “[i]n ancient times, village lands in the Palau Islands were assigned and re-assigned by the village chiefs quite freely according to their belief as to what best served the interests of the village as a whole.”<sup>30</sup> In sum, Palau did not practice land ownership as understood in the United States and other Western cultures.

### B. British and Spanish Impact on Land Tenure

On August 9, 1783, Captain Henry Wilson of the British East India Company “discovered” Palau by running his ship, the *Antelope*, aground

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the village chiefs quite freely according to their belief as to what best served the interests of the village as a whole.”).

<sup>23</sup> HISAKATSU, *supra* note 17, at 252-53.

<sup>24</sup> *Id.*

<sup>25</sup> KANESHIRO, *supra* note 20, at 298. Matrilineality is a fundamental pillar of Palauan social structure. For a general introduction to the subject, *see* PARMENTIER, *supra* note 16, at 68, 70 n.13, 177, 242-44.

<sup>26</sup> HISAKATSU, *supra* note 17, at 254-57; KANESHIRO, *supra* note 20, at 297-301; *Ngiraingas*, 1 ROP Intrm. at 39; USEEM, *supra* note 22, at 96. More recently, courts have denied individual, clan, and lineage claims for land based upon findings that the land had historically been *chutem buai* and therefore not owned by the claimant prior to being taken by a foreign entity. *See, e.g., Rechurudel v. PPLA*, 8 ROP Intrm. 14; PALAU LAND CLAIMS HEARING OFFICE DECISION AT FORMAL HEARING NO. 12-PL-10 (dated in the 1990s and on file with the Palau Land Court).

<sup>27</sup> McCutcheon, *supra* note 20, at 194.

<sup>28</sup> *Id.* at 51, 90.

<sup>29</sup> *Ngiramelkei v. Sechelong*, 7 T.T.R. 119, 121 (Tr. Div. 1974) (holding that use rights in villages are normally not “vested.”).

<sup>30</sup> *Ngerdelolek Village v. Ngerchol Village*, 2 T.T.R. 398, 404 (Tr. Div. 1963).

on Palau's intermittently submerged barrier reef during rotten weather.<sup>31</sup> Although this was not the first European contact with the Western Carolines, earlier visits had a less significant social impact.<sup>32</sup> By the mid-1800s, independent traders sought to exploit the islands while Spain, Germany, and England argued over which of their spheres of influence should contain the Carolines.<sup>33</sup> The Pope acknowledged Spain's claim in 1885.<sup>34</sup> Although the Pope acknowledged Spain's claim in 1885, according to this author's research, the English entrepreneurs seem to have visited Palau more frequently than the Spanish.

Prior to European contact, Palau's population was an estimated 20,000 to 50,000 people.<sup>35</sup> Its decimation after the introduction of European diseases reduced the number of Palauans to fewer than 4000 by 1900.<sup>36</sup> Thus, land, of which there had once been an acute shortage, became much more available and many once-occupied or -utilized plots were abandoned.<sup>37</sup>

One student summarizes the pre-1900 history of the alienation of Palauan lands to foreigners this way:

From the meager records of the Spanish administration, it appears that very little land was alienated during or prior to this period. It is known that early traders acquired land in the island but the record of these acquisitions is obscured by the lack of documents. The British trader Cheyne is said to have occupied Malakal in the first half of the nineteenth century, the American Holkon Birge acquired Ngaregur island off Ngarhelong and the Irishman David O'Keefe is said to have occupied adjacent Ngarakelau island through payment of a red blanket, knives and muskets. It is questionable, however, if these transactions involved sales in fee simple as the foreigners may have assumed.<sup>38</sup>

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<sup>31</sup> FRANCIS X. HEZEL, *THE FIRST TAINT OF CIVILIZATION: A HISTORY OF THE CAROLINE AND MARSHALL ISLANDS IN PRE-COLONIAL DAYS, 1521-1885*, 66-73 (1983) [hereinafter HEZEL, *THE FIRST TAINT OF CIVILIZATION*]; DANIEL J. PEACOCK, *LEE BOO OF BELAU: A PRINCE IN LONDON* 25 (1987).

<sup>32</sup> HEZEL, *THE FIRST TAINT OF CIVILIZATION*, *supra* note 31, at 43-47, 60, 65, 73-74.

<sup>33</sup> *Id.* at 3-9.

<sup>34</sup> *Id.* at 8; PARMENTIER, *supra* note 16, at 6.

<sup>35</sup> *CIVIL AFFAIRS HANDBOOK*, *supra* note 10, at 32.

<sup>36</sup> Karen Nero, *A Cherechar a Lokelii: Beads of History of Koror, Palau 1783-1983* (1987) (Ph.D. Dissertation, Univ. of California, Berkeley).

<sup>37</sup> *See* RICHARD VOL. 3, *supra* note 13, at 500.

<sup>38</sup> KANESHIRO, *supra* note 20, at 307; *see also* McCutcheon, *supra* note 20, at 97 (discussing prior foreign occupation of Malakal); CARL SEMPER, *THE PALAU ISLANDS IN*

Another writer on Micronesian land issues reports that in 1893 Spain published *Laws Concerning Lease of Land in Overseas Provinces*, a publication that also dealt with land title issues.<sup>39</sup> According to the same source, “[t]he Spanish period virtually eliminated the traditional system of land tenure in the Marianas, but had no significant impact in the Caroline Islands.”<sup>40</sup> It appears that records of some Spanish-era land transactions in the Carolines may have survived until the 1950s, although this author’s research has yet to reveal any that are specific to Palau. It was then reported that “[t]he Spanish made a number of private land grants, particularly in the Caroline Islands, some of which were later recognized by the Germans and Japanese. They are today the basis for a number of claims and the only evidence of title is the Spanish deed.”<sup>41</sup> It is probable that these grants were in the Eastern rather than the Western Carolines because such grants played little or no role in determining title to Palauan lands in the 1990s.<sup>42</sup>

All told, it does not appear that the doings of the British and Spanish had a significant impact on Palauan land tenure customs.

### C. *The Impact of the German Administration*

In the aftermath of Spain’s defeat in the Pacific by the United States, Germany purchased Palau from Spain in 1899 as part of a broader program of Pacific expansion that included all of the Caroline Islands.<sup>43</sup> The Germans administered Palau through the Governor of German New Guinea and a Vice Governor and District Officer in Yap.<sup>44</sup> Before the discovery of phosphate on Angaur, the Germans’ primary interest in Palau was to expand copra<sup>45</sup> production.<sup>46</sup> For that reason, land policies were

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THE PACIFIC OCEAN 183 (Robert D. Craigs ed., Mark L. Berg trans., 1982) (“That’s Coröre, Doctor. Behind it lies Malakka, Cabel Schils’s island.”).

<sup>39</sup> Greg Miles, *The Micronesian Cadastrophy: The Role of Land in the Subversion of Indigenous Peoples*, in UNCLE SAM IN MICRONESIA: SOCIAL BENEFITS, SOCIAL COSTS 66, 69 (Rubinstein and Dames, eds. 1991).

<sup>40</sup> *Id.*

<sup>41</sup> RICHARD VOL. 3, *supra* note 13, at 500.

<sup>42</sup> As the legal representative of the Koror State Public Lands Authority from 1993 through 1997, and as a private attorney working with land title litigation from 1997 through 2004, the author was very actively involved in the land claims proceedings under Article XIII Section 10 of the Palau Constitution and encountered no claims based on a Spanish deed. Relatedly, it is unlikely that the Spanish conducted any land surveys of any sort in Palau. Miles, *supra* note 39, at 69.

<sup>43</sup> OFFICE OF COURT COUNSEL, *supra* note 16, at 9-10; CLARK & ROFF, *supra* note 16, at 6.

<sup>44</sup> OFFICE OF COURT COUNSEL, *supra* note 16, at 10.

<sup>45</sup> Copra is the white, inner meat of a coconut. It is used to make coconut oil. *Copra*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/search?query=copra> (last



formulated in ways calculated to encourage land cultivation.<sup>47</sup> At the same time, the Germans are reported to have had an “interest in protecting the land rights of the natives,”<sup>48</sup> and a desire to “inculcate individualism by breaking up the collective holdings.”<sup>49</sup> In pursuing these objectives, the Germans decided to consider those who planted copra on unused land to own the land on which they planted.<sup>50</sup> Such policies did indeed lead to “the fragmentation of land holdings and the weakening of matrilineal kinship ties.”<sup>51</sup> In this regard, it is reported that contrary to Palauan custom, the Germans were only willing to grant land titles to men.<sup>52</sup>

These were not the only land-related policies the Germans used to strengthen their political and economic control over Palau. Between 1905 and 1914, the German administration and other German nationals or entities obtained significant tracts by gift, outright purchase, and administrative fiat.<sup>53</sup> For example, Ibedul, the high chief of the village of Koror, gave a portion of Medalaii Hamlet to the German administration to entice the Germans to locate their headquarters in Koror, rather than in Airai.<sup>54</sup> Palauan money stolen by the Germans from shrines to local gods may have been used for significant land purchases, such as the island of Ngerchong.<sup>55</sup> A German ordinance from 1901 provided that non-natives could acquire land rights only if they engaged the government as an intermediary.<sup>56</sup> Accordingly, the German government apparently leased the phosphate deposits on Angaur to the German South Sea Phosphate

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visited May 18, 2013).

<sup>46</sup> KANESHIRO, *supra* note 20, at 308-09.

<sup>47</sup> RICHARD VOL. 3, *supra* note 13, at 500.

<sup>48</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174.

<sup>49</sup> USEEM, *supra* note 22, at 96; *accord* Ngruhelbad v. Trust Territory, 2 T.T.R. 631, 635 (App. Div. 1961) (“The concept of individual land ownership in the Palaus was introduced in German Times.”).

<sup>50</sup> USEEM, *supra* note 49, at 96; HOMER BARNETT, PALAUAN SOCIETY, A STUDY IN CONTEMPORARY NATIVE LIFE IN THE PALAU ISLANDS 102 (1949) [hereinafter, BARNETT, PALAUAN SOCIETY].

<sup>51</sup> PARMENTIER, *supra* note 16, at 47.

<sup>52</sup> Miles, *supra* note 39, at 69.

<sup>53</sup> KANESHIRO, *supra* note 20, at 308.

<sup>54</sup> *Id.*; *accord* FRANCIS X. HEZEL, STRANGERS IN THEIR OWN LAND: A CENTURY OF COLONIAL RULE IN THE CAROLINE AND MARSHALL ISLANDS 115 (1995) [hereinafter HEZEL, STRANGERS IN THEIR OWN LAND].

<sup>55</sup> Memorandum from Palau Congress for Civil Adm’r of Palau (Apr. 23, 1951) (on file with the author).

<sup>56</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; *contra* USEEM, *supra* note 22, at 96 (“Under the Germans, native lands could not be sold to foreigners.”).

Company after having purchased the entire island for about three hundred dollars for the benefit of that company.<sup>57</sup> All that was left for the native islanders was a 150-hectare reservation in the southwest corner of the island.<sup>58</sup> As part of the deal, the government received a portion of that German company's substantial profits.<sup>59</sup>

In . . . selling the mining rights on Angaur to the German South Sea Phosphate Company, the government bought the land on the islands mentioned at the expense of the respective companies and leased the land to them for a certain term of years. To the companies concerned, this was a convenient method of acquiring land at a cheap price without the troubles attendant upon direct negotiations with the islanders, and it also avoided competitive bids by rival companies, while the Government found the arrangement most satisfactory from its own point of view since it ensured importation of capital and exploitation of land as well as increase of financial revenue. Ostensibly the regulation was to protect the islanders, but its real purpose was to control and utilize the land through an intermediary agency.<sup>60</sup>

Thus, it seems that Germany's interest in "protecting the land rights of natives" was not the primary motivation for the 1901 ordinance.

Some sources suggest that the amount of Palauan land acquired by the Germans appears modest.<sup>61</sup> One particular event, however, counters that notion: the German administration's decision to presume that all unused and uncultivated lands were government lands.<sup>62</sup> In addition, it has

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<sup>57</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 121; Fritz & Schoenian, *Summarization of the Contract of Acquisition Between Treasury of the Protectorate of German New Guinea and the Natives of the Islands of Angaur* (Mar. 30, 1910), in AUSTRALIAN NATIONAL GOVERNMENT, RECORDS OF THE GERMAN IMPERIAL GOVERNMENT OF THE SOUTH SEAS PERTAINING TO MICRONESIA AS CONTAINED IN THE ARCHIVES OFFICE Vol. XVIII, 3, Doc. 2, 5-7 (1910) (on file with the author). The given names of these authors are unknown. From the cited source, which is a compilation of summaries of documents from the German Administration, their titles are Imperial District Administrator Fritz and Director Schoenian of Angaur. *See generally, id.*

<sup>58</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174.

<sup>59</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 123.

<sup>60</sup> Miles, *supra* note 39, at 72.

<sup>61</sup> RECORDS OF THE GERMAN IMPERIAL GOVERNMENT, *supra* note 57, at 57-58 (including a list, dated September 1913, of "non-native" real estate in Palau, by owner, without mention of the German Administration's reported acquisition of all unused *chutem buai*).

<sup>62</sup> KANESHIRO, *supra* note 20, at 308; McCutcheon, *supra* note 20, at 91.

been reported that this wholesale alienation of the large tracts of little-used lands previously belonging to and administered by one of the several village councils was not “widely known among Palauans” at that time.<sup>63</sup> In any case, the German administration stimulated agriculture by transferring title to apparently unused or uncultivated lands to individuals willing to cultivate them.<sup>64</sup> The Japanese subsequently recognized title to such lands acquired from the German administration.<sup>65</sup>

In the 1950s, the U.S. Navy described these acquisitions as outright seizures of land.<sup>66</sup> Tadao Yanaihara, a Japanese commentator writing in 1940 about prior German activities in Micronesia as a whole, reportedly described German land acquisition activities as follows:

The transfer of land to private-owned estates . . . was initiated by persistent demand of foreign capitalists through the mediation of government authority. In the German period the transfers of land to persons other than natives was prohibited by the government, apparently with the object of protecting the islanders from being deprived of their land by foreigners. But the government itself freely purchased the land owned by islanders, practically monopolizing the powers of selling or leasing the lands to capitalists at its own discretion and making this a means of acquiring land as well as increasing its revenue.<sup>67</sup>

An additional significant event affecting contemporary land tenure issues occurred during the German administration. After a devastating typhoon, Palauans were forced to relocate from the Southwest Islands to Koror.<sup>68</sup> The displaced, about 150 in number, relocated to the then uninhabited Echang and Echol areas of Arakebesang Island in Koror.<sup>69</sup> With the cooperation of the relevant chiefs, the German Administrator,

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<sup>63</sup> KANESHIRO, *supra* note 20, at 308.

<sup>64</sup> *Id.*

<sup>65</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; McCutcheon, *supra* note 20, at 91.

<sup>66</sup> RICHARD VOL. 3, *supra* note 13, at 501.

<sup>67</sup> Miles, *supra* note 39, at 72.

<sup>68</sup> *Espangel and Ucheliou Clan v. Tirso, et al.*, 2 ROP Intrm. 315, 316-317 (1991); ASIA MAPPING, INC., TRANSLATION OF JAPANESE LAND DOCUMENTS: PALAU ISLANDS 123-32 (1971). This last work is the product of a special land survey of the Echol area, to where the Southwest Islanders were relocated, commissioned by the Trust Territory Government. The author had access to it from 1993 to 1995 while he was General Legal Counsel for the Koror State Government, which presumably still possesses it.

<sup>69</sup> *Espangel and Ucheliou Clan v. Tirso, et al.*, 2 ROP Intrm. 315, 316-317; ASIA MAPPING, INC., *supra* note 68, at 123-32.

Winkler,<sup>70</sup> established what has been referred to as a “permanent colony” for relocating the displaced Southwest Islanders.<sup>71</sup> The question of whether the granted use rights were permanent (as Winkler likely assumed) or revocable in accordance with then-prevailing Palauan custom (as the Koror chiefs likely assumed) has received judicial attention both during Japanese times and the present constitutional era.<sup>72</sup> Thus, the phenomenon of asserting control over Palauan land for the claimed purpose of “protecting” Palauans became a recurring theme under the subsequent Japanese and American administrations of Palau.

*D. The Considerable Japanese Impact on Palauan Land Tenure*

In 1914, after Japan declared war on Germany, the Japanese Navy seized control of Palau.<sup>73</sup> On December 17, 1920, after Germany’s World War I defeat, Japan consolidated its possessory rights by procuring a League of Nations mandate and instituted Japanese law in Palau.<sup>74</sup> The mandate required Japan to “promote to the utmost the natural and moral well-being and social progress” of the Palauan people.<sup>75</sup> In 1922, the Japanese Navy’s authority was transferred to the civilian South Seas Bureau, known as *Nanyo Cho*.<sup>76</sup> This colonial entity had broad administrative powers as well as the power to enact and adjudicate its own laws.<sup>77</sup> Interestingly, its enactments were not required to conform to the

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<sup>70</sup> Winkler appears to have used only that one name. In order to determine Winkler’s name, the author searched until he found a photograph of a stamped envelope postmarked in 1912. Consistent with the references to this person by other writers, the envelope is addressed simply to “Winkler, Koror.” A picture of the envelope is on file with the author.

<sup>71</sup> See ASIA MAPPING, INC., *supra* note 68, at 123-32; *Espangel and Ucheliou Clan v. Tirso, et al.*, 2 ROP Intrm. 315, 316-317; *Children of Ngeskesuk, et al. v. Esbei Espangel, et al.*, 1 ROP Intrm. 682, 689 (1989).

<sup>72</sup> ASIA MAPPING, INC., *supra* note 68, at 123-32; *Espangel and Ucheliou Clan v. Tirso, et al.*, 2 ROP Intrm. 315, 316-317; *Children of Ngeskesuk, et al. v. Esbei Espangel, et al.*, 1 ROP Intrm. 682, 689.

<sup>73</sup> STANLEY K. LAUGHLIN, *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 70 (1995); CLARK & ROFF, *supra* note 16, at 6.

<sup>74</sup> LAUGHLIN, *supra* note 73, at 70; OFFICE OF COURT COUNSEL, *supra* note 16, at 13-14.

<sup>75</sup> PARMENTIER, *supra* note 16, at 48; OFFICE OF COURT COUNSEL, *supra* note 16, at 13.

<sup>76</sup> PARMENTIER, *supra* note 16, at 48; Edward I-te Chen, *The Attempt to Integrate the Empire: Legal Perspectives*, in MYERS & PEATTIE, *THE JAPANESE COLONIAL EMPIRE, 1895-1945* 240, 240-41 (1984).

<sup>77</sup> Chen, *supra* note 76, at 244.

constraints that the Japanese Constitution imposed, not only in Japan, but also in other areas of the Japanese empire.<sup>78</sup>

The Japanese recognized all land rights in existence prior to their occupation of Palau, whether acquired by natives or by foreigners.<sup>79</sup> Despite that initial recognition, the *Nanyo Cho* quickly abolished the German rule requiring government consent for the alienation of non-private land.<sup>80</sup> It also reportedly “reestablished the rights of women to own land,” previously outlawed by the Germans.<sup>81</sup>

However benevolent the Japanese administration’s initial intentions were,<sup>82</sup> the administration ultimately presided over a very aggressive campaign to take Palauan land. Relying on their League of Nations Mandate and Article 257, paragraph 2, of the Treaty of Versailles, the Japanese continued to consider as public land all lands the Germans so considered.<sup>83</sup> The obvious fact that Palauans were party to neither of those treaties bears remembering here.<sup>84</sup> The Japanese view that “the ‘public

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<sup>78</sup> *Id.* at 254-68.

<sup>79</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; Miles, *supra* note 39, at 69.

<sup>80</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174.

<sup>81</sup> Miles, *supra* note 39, at 69.

<sup>82</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 191 (“At first the Japanese took a protectionist stance toward Micronesian-owned land. Nan’ yo-cho prohibited Japanese individuals or corporations from ‘entering into agreements aimed at purchase or sale, transference or mortgage, of lands owned by natives,’ and restricted the length of all land leases to ten years.”).

<sup>83</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; McCutcheon, *supra* note 20, at 92; Tema v. Trust Territory, 1 T.T.R. 520, 526 (Tr. Div. 1958) (referring to the “Japanese Government’s view that all land not in actual use by someone belonged to the Government.”); USEEM, *supra* note 22, at 96 (“The Japanese recognized the German land holdings and threatened to confiscate all land not planted.”); HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 191 (“Nan’yo-cho had claimed all unoccupied land for the colonial government, in accordance with the National Resources Law that had gone into effect in Japan in 1921.”); accord BARNETT, PALAUAN SOCIETY, *supra* note 50, at 102 (“Since German times, too, there have been incentives to acquire more coconut groves. The movement, begun by the Japanese, has resulted in the appropriation of new lands for both individual and group benefits. Much of the area that used to be classed as public lands has, in the past thirty years, been opened to exploitation for coconut and other types of planting, and it has passed into group and private hands.”).

<sup>84</sup> See Yale Law Sch., Lillian Goldman Law Library, *Treaty of Versailles June 28, 1919*, THE AVALON PROJECT, <http://avalon.law.yale.edu/imt/parti.asp> (last visited May 23, 2013) (listing as signatories to the Treaty of Versailles is United States of America, Belgium, Bolivia, Brazil, British Empire, Canada, Australia, South Africa, New Zealand, India, China, Cuba, Ecuador, France, Greece, Guatemala, Haiti, Hedjaz, Honduras, Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Serb-Croat-Slovene State, Siam, Czecho-Slovakia, Uruguay.); see See *League of Nations Chronology*, WORLD AT WAR, available at <http://worldatwar.net/timeline/other/league18-46.html> (last visited May 26, 2013). The original members are listed as Argentina, Australia, Belgium,

lands' (previously *chutem buai*) were 'without owner' was, however, fallacious."<sup>85</sup> As a result of that fallacy, vast tracts of land, including all those below the mean high water mark; the spacious, but little-used, interior of Babeldaob; and Palau's stupendous rock islands; were simply appropriated very early in Japan's occupation of Palau.<sup>86</sup> Accordingly, by 1916, the Japanese forbade Palauans to use the rock islands without a permit.<sup>87</sup> As far as village and clan lands, the administration gave chiefs the unrestricted power to alienate lands under their jurisdiction unless the transaction involved a foreign national.<sup>88</sup>

During the years from 1923 to 1926, as part of a Micronesia-wide survey, the *Nanyo Cho* quieted title to lands on Babeldaob with the stated goal of separating the public domain from private lands.<sup>89</sup> The *Nanyo Cho*

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Bolivia, Brazil, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Honduras, India, Italy, Japan, Liberia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Poland, Portugal, Rumania, Siam, Spain, Sweden, Switzerland, South Africa, United Kingdom, Uruguay, Venezuela, and Yugoslavia. *Id.* Subsequent admissions and withdrawals were: 1920-Albania, Austria, Bulgaria, Costa Rica, Finland, and Luxembourg admitted in 1920; Hungary admitted in 1921; Ethiopia and Ireland admitted in 1923; Dominican Republic admitted in 1924; Costa Rica withdrew in 1925; Germany is admitted and Brazil withdrew in 1926; Mexico admitted in 1931; Germany and Japan withdrew in 1933; Afghanistan, Ecuador, and Union of Soviet Socialist Republics admitted in 1934; Paraguay withdrew in 1935; Guatemala, Honduras, and Nicaragua withdrew in 1936; Egypt admitted and Guatemala, Honduras, and Nicaragua withdrew in 1937; Chile and Venezuela withdrew, and Austria was annexed by Germany in 1938, Hungary, Peru, and Spain withdrew, Albania is annexed by Italy, and Union of Soviet Socialist Republics is expelled in 1939; Rumania withdrew in 1940; and Haiti withdrew in 1942. *Id.*

<sup>85</sup> KANESHIRO, *supra* note 20, at 309-10; McCutcheon, *supra* note 20, at 92.

<sup>86</sup> KANESHIRO, *supra* note 20, at 309-10; McCutcheon, *supra* note 20, at 92.

<sup>87</sup> Memorandum from Palau Congress for Civil Adm'r of Palau, *supra* note 55, at 2; *see also* PALAU DIST. LAND TITLE OFFICE, STATEMENT CLAIM NO. 101 (Feb. 29, 1956) ("In 1914 the Japanese Navy called all the chiefs of Palau together and had them sign a paper with their thumb prints. Fritz Rubash present at this hearing saw the paper and in a general way understood that it transferred all the islands between Koror and Peleliu to the Navy. The Japanese Naval Officers [sic] name who had them sign the paper is Bandai and the Japanese interpreter was Nakamoto. Nakamoto was here in Palau in German times. No payment was ever received for the islands. At the time of the first Japanese survey in 1924 the islands having coconut trees on them were divided among the people. They were told they had to pay rent to the Japanese Government for these islands. Each man paid 1 yen 59 sen per year. Rent was paid until the war. We never heard why the Navy wanted the islands nor what use would be made of them.").

<sup>88</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174.

<sup>89</sup> KANESHIRO, *supra* note 20, at 309-10. This initial survey of Micronesia was completed in 1932, but appears to have been completed in Palau by 1926 or 1927. *Compare* CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175 (survey initiated in 1923), *with* KANESHIRO, *supra* note 20, at 310 ("The South Seas Government . . . embarked upon a land survey on Babelthuap from 1923 to 1926 for the stated purpose of separating private lands from the public domain"), *and* TRUST TERRITORY OF THE PACIFIC ISLANDS,

described this survey as being “for the boundary lines between Clan land and Public Domain,” and stated in its survey records that it had conducted the survey “following Palauan Customs [from] before the Spanish and German period.”<sup>90</sup> From this 1923 to 1926 survey, the *Nanyo Cho* determined that it owned “most of the mountainous interior” of Babeldaob.<sup>91</sup> Immediately after it had completed the survey, the *Nanyo Cho* decreed that all village-owned lands were government property, but subsequently rescinded the order in part because of public outcry.<sup>92</sup> It follows that the Japan had some awareness of the Palauan view that Palauans still owned their unused lands. Notwithstanding that awareness, such lands were “allotted generously to Japanese colonists” by the Japanese administration, and leased to the government-affiliated South Seas commercial concerns.<sup>93</sup>

Other lands were purchased by the administration and its quasi-governmental corporate affiliates in several transactions ranging from eminent domain purchases, often at below market value prices, to arm’s length purchases for fair value.<sup>94</sup> Sometimes Palauans succeeded in leasing their land to a Japanese entity or individual as a means of avoiding a forced sale.<sup>95</sup> Sometimes land was taken, but compensation was given for buildings or crops on it.<sup>96</sup> The Japanese also are reported to have used land seizure as a means of suppressing undesired Palauan religious activities.<sup>97</sup> Because of generally aggressive Japanese land-management policies, as much as eighty-four percent of Palau’s total land area may

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OFFICE OF LAND MANAGEMENT, RECORDING SECTION, JAPANESE TOCHI DAICHO, NGERMID HAMLET, PALAU DISTRICT 321 (May 7, 1969) [hereinafter NGERMID TOCHI DAICHO] (“The survey in 1927 for the boundary lines between Clan land and Public Domain completed was following Palau Customs, before the Spanish and German period.”). This survey determined that 60,000 acres of Micronesia was owned by Micronesians and 156,000 acres was owned by the Japanese Government. HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 191.

<sup>90</sup> NGERMID TOCHI DAICHO, *supra* note 89, at 321.

<sup>91</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 191.

<sup>92</sup> USEEM, *supra* note 22, at 96.

<sup>93</sup> McCutcheon, *supra* note 20, at 92; *see also* USEEM, *supra* note 22, at 52; CLARK & ROFF, *supra* note 16, at 6 (“While barring other nationals from [Micronesia], the colonial power encouraged Japanese immigration as a means of alleviating Japan’s own problems of overpopulation.”).

<sup>94</sup> KANESHIRO, *supra* note 20, at 310.

<sup>95</sup> USEEM, *supra* note 22, at 96.

<sup>96</sup> As the attorney for the Koror State Public Lands Authority, the author became aware of a number of such cases.

<sup>97</sup> OFFICE OF COURT COUNSEL, *supra* note 16, at 14.

have belonged to the Japanese administration as public domain lands by 1935.<sup>98</sup>

In addition, by the end of that same year, as many as 869 hectares of the remaining *private* land may have belonged to non-Palauans.<sup>99</sup> Although law initially prohibited purchases by Japanese nationals, the law was revised before 1931.<sup>100</sup> In 1935, such transactions began to frequently occur in Palau, especially in Koror.<sup>101</sup> This was likely because Japan's withdrawal that year from the League of Nations<sup>102</sup> eliminated its need to respond to international criticism based on the terms of the mandate. Even though most Palauans who were attempting to claim public lands in the 1990s vigorously asserted that private Japanese purchasers paid too little in all or nearly all purchases from Palauans, there were others who staunchly maintained that most or all private transactions were for fair, if not overly generous, compensation.<sup>103</sup>

The Japanese administration recognized four types of its public lands: "(1) domain for public use; (2) domain for government use, e.g., for government enterprises and the residences of public officials; (3) domain for forests; and (4) domain for miscellaneous use."<sup>104</sup> Only state domain lands classified as "miscellaneous" could be leased or sold to private

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<sup>98</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175; *see also* KANESHIRO, *supra* note 20, at 311 ("By 1955, some [seventy-three percent] of the total land area of Palau fee into the category of public domain."); McCutcheon, *supra* note 20, at 93 ("The United States' victory over the Japanese in 1944 and 1945 and the ascension of the United States as administering authority under a United Nations Trusteeship agreement in 1947 meant resolving some of the problems of the public lands. The first action in the solution was to place all lands acquired by prior governments under the jurisdiction of the newly organized Trust Territory Government. By this time, it amounted to some [sixty-eight percent] of Palau's total land area."); TRUST TERRITORY LAND OFFICE, PALAU LAND SUMMARY (PRELIMINARY) 1 (undated) (copy on file with author) (reporting 77,828 acres of Public Land, or 68.1 percent, plus 8,123 acres of Municipal Land, or 7.1 percent, for a total of 85.2 percent of publicly held land based on June 1968 Lands and Surveys data); MELLER, *supra* note 8, at 21 ("Sixty percent of land throughout Micronesia remained public land of the Trust Territory Government as late as 1975.").

<sup>99</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175.

<sup>100</sup> MARK R. PEATTIE, NANYO: THE RISE AND FALL OF THE JAPANESE IN MICRONESIA 1885-1945 99 (1988); CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 174; HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 191; Miles, *supra* note 39, at 69.

<sup>101</sup> KANESHIRO, *supra* note 20, at 311 (noting that Japan withdrew from the League of Nations on Mar. 27, 1935.).

<sup>102</sup> Stewart Brown, *Japan Stuns World, Withdraws from League*. JOHNDCLARE.NET, Feb 24, 1933, available at [http://www.johndclare.net/league\\_of\\_nations6\\_news.htm](http://www.johndclare.net/league_of_nations6_news.htm).

<sup>103</sup> Interview with Peter Sugiyama, Senator, in Koror, Palau (Oct. 1996).

<sup>104</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175.



persons.<sup>105</sup> Whatever the initial classification was, the Americans later reported that “the original idea of public land was totally obscured by . . . frantic land grabbing that occurred mainly between 1937 and 1944.”<sup>106</sup>

The Japanese administration recognized two types of private lands:

(1) property of natives, subdivided into private property and communal property; and (2) property of persons other than natives, including both Japanese and foreigners. Private lands [could] be freely bought, sold, leased, exchanged, or otherwise transferred, and natives [had] unrestricted freedom to buy or lease land from Japanese, foreigners, or one another.<sup>107</sup>

A final round of seizures by the Japanese military is reported to have occurred just prior to the outbreak of World War II hostilities in the Pacific region.<sup>108</sup>

Finally, the 1938-1941 survey and its resulting ownership records, known as *Tochi Daicho*, was another important land-related aspect of the Japanese administration. The administration’s goal was to record all existing land titles, public *and* private, and to settle boundary disputes.<sup>109</sup> The *Tochi Daicho* recorded the size, ownership, and type of land of each parcel.<sup>110</sup> For each Palauan village (now state), the administration produced a separate *Tochi Daicho*, which listed the lot size and ownership information for all land parcels in Palau by lot number.<sup>111</sup> Maps showing lot boundaries and locations were apparently prepared but, much to Palau’s misfortune, have been lost.<sup>112</sup> Five teams conducted the survey, each composed of a Japanese surveyor, a Japanese examiner, several

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<sup>105</sup> *Id.*

<sup>106</sup> McCutcheon, *supra* note 20, at 93.

<sup>107</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175.

<sup>108</sup> PEATTIE, *supra* note 100, at 99-100; RICHARD VOL. 3, *supra* note 13, at 501.

<sup>109</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175.

<sup>110</sup> *See generally* NGERMID TOCHI DAICHO, *supra* note 89.

<sup>111</sup> *Id.*

<sup>112</sup> McCutcheon, *supra* note 20, at 201. The loss of the *Tochi Daicho* maps creates enormous social costs related to increased uncertainty and otherwise needless litigation, which were experienced first-hand while conducting research for this article. The author spent years while in Palau trying to find out what happened to the maps, and could find only (very few) conflicting rumors. The rumor the author thought most likely true was an unconfirmed story that the maps were lost to a fire up in Airai. The author believes the most common official responses: that nobody knows what happened to the maps, or that the maps were lost during the U.S. takeover.

laborers, a Palauan interpreter, and three local elders to witness title determinations along with male and female clan leaders.<sup>113</sup>

Although the administration's purpose was to take more land, the 1938 -1941 survey was fairly and thoroughly done. Existing records of the hearings of disputed parcels are a testament to thoroughness, at least with respect to the determination of land ownership.<sup>114</sup> In a classified report made less than two-and-a-half years after Pearl Harbor, during the height of World War II hostilities, even the U.S. Navy allowed that "the land survey appears to have been conducted, on the whole, with fairness."<sup>115</sup> These acknowledgments of the fairness and thoroughness of the 1938-1941 survey have been further recognized in more recent efforts to sort out title to Palauan lands. Palau courts have consistently ruled that, except for the *Tochi Daicho*'s listings for land in Peleliu and Angaur, its designations of ownership are presumed to correctly identify who held title at the time of the survey, and any party contesting a *Tochi Daicho* listing has the burden to show by clear and convincing evidence that the listing is wrong.<sup>116</sup>

In sum, the Japanese occupation made extensive German land appropriations permanent, established policies and laws to foster the replacement of Palauan land control with Japanese ownership, and surveyed land to record and consolidate Japanese ownership of most Palauan land.

#### *E. The Post-War Impact of the U.S. Naval Administration*

After the expulsion of the Japanese from Micronesia in 1945, the U.S. Navy began governing Palau. The legal basis for this was an executive order issued by President Truman on July 18, 1947.<sup>117</sup> The United States asserted that it had "acquired all rights" to lands that had been held by either the German or the Japanese administration.<sup>118</sup> It soon began to install mechanisms of democracy previously foreign to this area. According to a Navy historian, however, by the time the Americans had

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<sup>113</sup> KANESHIRO, *supra* note 20, at 321.

<sup>114</sup> See ASIA MAPPING, INC., *supra* note 68, at 12.

<sup>115</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175.

<sup>116</sup> See, e.g., *Olngebang Lineage v. ROP*, 8 Palau Intrm. 197 (2000); *Llecholch v. Lawrence*, 8 Palau Intrm. 24, 24-25 (1999); *Blaluk v. Markub*, 7 Palau Intrm. 199, at 199 (1999); *Ngirdaidong v. Ngesechi Clan*, 7 Palau Intrm. 121, 122 (1998); *Rebluud v. Fumio*, 5 Palau Intrm. 55, 57 (1995); *Elbelau v. Semdiu*, 5 Palau Intrm. 19, 21 (1994); *Espangel v. Tirso*, 2 Palau Intrm. 315, 318 (1991); *Ngiradilubech v. Timulch*, 1 Palau Intrm. 625, 629 (1989). For a thoughtful, provocative critique and historical analysis of the doctrine of the presumptive validity of the *Tochi Daicho*, see *Olngebang Lineage*, 8 Palau Intrm. 197, 202-03 (Michelson, J., concurring).

<sup>117</sup> Exec. Order No. 9875, 12 C.F.R. 4837 (1947).

<sup>118</sup> *Thomas v. Trust Territory*, 8 T.T.R. 40, 46 (1979).

arrived, “[t]he Micronesians were old hands at politics and at pleasing their overlords,”<sup>119</sup> and, within a short time, “American democratic processes had to all intents and purposes been adopted but the hereditary chiefs kept their powers and conducted island business from behind the scenes.”<sup>120</sup>

In the early stages of planning for the U.S. Navy’s civil administration, the Navy decided that, “native rights in lands must be especially protected.”<sup>121</sup> A eight-week course covering land tenure taught at Stanford University was included in the training of the Civil administration’s prospective officers.<sup>122</sup> Unfortunately, initial high-mindedness regarding native land rights soon succumbed to an American unwillingness to let go of lands the administration desired for its own purposes. By late 1946, an upper-echelon inspection team criticized the Civil administration for failing to organize local land claims commissions to review land tenure, as provided for in the U.S. Navy’s plans.<sup>123</sup> This delay appears to have been partly the result of the administration’s “uncertainty concerning land for military requirements,”<sup>124</sup> and the evident view, revealed by that delay, that Naval requirements were more compelling than protecting “native rights in lands.”<sup>125</sup> There is also evidence that the U.S. Navy intended to give first priority to clearing title to agricultural lands, a category unlikely to be needed by the administrators themselves.<sup>126</sup> By January 1947, the U.S. Navy had authorized the appointment of native Magistrates and Clerks with

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<sup>119</sup> RICHARD VOL. 2, *supra* note 2, at 311.

<sup>120</sup> *Id.*, see also MELLER, *supra* note 8, at 30 (“The advent of the U.S. Naval Government with World War II temporarily returned to positions of authority in community and district government those traditional chiefs still acceptable to their people, but reserved all higher administrative and judicial positions for Americans.”). Mr. Meller seems more inclined to explain the phenomenon described by Ms. Richard as a cosmopolitan versus rural dichotomy, rather than one of stage-front versus behind-the-scenes. See MELLER, *supra* note 8, at 38 (“Outside of the district centers, government at the local level in Micronesia retained an element of tradition which offset taking the American-innovated municipal forms too seriously.”).

<sup>121</sup> RICHARD VOL. 2, *supra* note 2, at 75 (quoting U.S. NAVY, DEPT. OF STATE, DEPT. OF THE ARMY, AND DEPT. OF THE INTERIOR, PROPOSED PLAN FOR CIVIL GOVERNMENT BY THE NAVY OF CERTAIN PACIFIC ISLANDS AREAS UNDER UNITED STATE CONTROL ¶ 3 (Sept. 17, 1945)).

<sup>122</sup> *Id.* at 150, 158.

<sup>123</sup> *Id.* at 288 (a list of “Outstanding problems which must be attacked at once” including a “land tenure and sales review” and the organization of a “local ‘Land and Claims Commission’.”).

<sup>124</sup> RICHARD VOL. 3, *supra* note 13, at 502.

<sup>125</sup> RICHARD VOL. 2, *supra* note 2, at 75.

<sup>126</sup> *Id.* at 411.

enumerated judicial and administrative powers.<sup>127</sup> Those powers did not include the power to adjudicate land title when any American person or entity was involved.<sup>128</sup>

### 1. The Trusteeship Agreement Forms a Jurisdictional Trust

The Trust Territory of the Pacific Islands (“TTPI”) was created during the Naval administration pursuant to the Trusteeship Agreement entered into between the United States and the U.N. Security Council on April 2, 1947.<sup>129</sup> The U.S. Congress approved the Trusteeship Agreement on July 18, 1947.<sup>130</sup> Under the Trusteeship Agreement, the United States had “full powers of administration, legislation, and jurisdiction” over Palau.<sup>131</sup> Pursuant to Chapter XII, Articles 82 and 83, of the U.N. Charter, the Trusteeship Agreement designated Micronesia, including Palau, as a “strategic trust,” thus permitting the United States to maintain a military presence there and to exclude the military forces of other nations from the area.<sup>132</sup> The Secretary of the U.S. Navy initially governed Micronesia under authority of the Trusteeship Agreement and delegated this authority to a series of three High Commissioners.<sup>133</sup> Naval authority was transferred to the Secretary of the Interior in 1951.<sup>134</sup>

The Trusteeship Agreement explicitly obligated the United States to administer Micronesia in accordance with the requirement of Chapter XII, Article 73, of the U.N. Charter, which ensured “the well being of the inhabitants of these territories” and their educational, social, and economic “advancement.”<sup>135</sup> The agreement also required the United States to “give due recognition to the customs of the inhabitants in providing a system of law for the territory.”<sup>136</sup> Most significantly, the agreement required the United States to “protect the inhabitants against the loss of their lands and resources.”<sup>137</sup> Despite any fiduciary scruples, the return of public lands was decades to come.

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<sup>127</sup> *Id.* at 317-18.

<sup>128</sup> *Id.*

<sup>129</sup> Trusteeship Agreement, *supra* note 5.

<sup>130</sup> CLARK & ROFF, *supra* note 16, at 7; RICHARD VOL. 3, *supra* note 13, at 3.

<sup>131</sup> Trusteeship Agreement, *supra* note 5, art. 3.

<sup>132</sup> LAUGHLIN, *supra* note 73, at 464-65.

<sup>133</sup> RICHARD VOL. 3, *supra* note 13, at 65.

<sup>134</sup> *Id.* at 1108-11.

<sup>135</sup> Trusteeship Agreement, *supra* note 5, art. 6.

<sup>136</sup> *Id.* art. 4.

<sup>137</sup> *Id.* art. 6(2).

## 2. The Palau Congress: A Prototype for American-Style Democracy

In April 1947, presumably in response to the April 2, 1947 execution of the Trusteeship Agreement, the Joint Chiefs of Staff issued a directive that the military governors of Micronesia encourage democratic self-governance to the fullest extent possible by, among other things, promoting the use of local legislative institutions and popular elections.<sup>138</sup> In May 1947, a supplemental directive “astounded the military government personnel in the field” by ordering the creation of municipal governments by September 1947, “along democratic lines like a New England town or a mid-Western county.”<sup>139</sup> Despite these initial intentions, the resulting institutions were soon described as “strictly Micronesian with their native political customs and complexes molding the municipal government into a type of democracy rare or unique in the political science field.”<sup>140</sup>

Under this system, the government of the Palau Municipality consisted of the Palau Administrative Council, the Palau Congress, and the Palau High Court.<sup>141</sup> Its jurisdictional territory included sixteen of the thirty-seven political subdivisions the U.S. Navy recognized as the Palau District.<sup>142</sup> The sixteen of those subdivisions in modern Palau, chartered as “municipalities” in their own right in the 1950s, had the same jurisdictional territories that the sixteen states of the Republic possess today.<sup>143</sup> They were, more or less, the same as the sixteen traditional Palauan villages.<sup>144</sup>

The members of the Administrative Council included the Paramount High Chiefs Ibedul and Reklai, who were the then-Chiefs of Koror and Melekeok villages, respectively, and were traditionally considered the two highest Palauan chiefs.<sup>145</sup> Following the traditional

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<sup>138</sup> RICHARD VOL. 2, *supra* note 2, at 312.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 315.

<sup>141</sup> OFFICE OF COURT COUNSEL, *supra* note 16, at 24-28.

<sup>142</sup> RICHARD VOL. 3, *supra* note 13, at 396.

<sup>143</sup> *Palau Sixteen States*, REPUBLIC OF PALAU: NATIONAL GOVERNMENT, <http://www.palau.gov.net/PalauGov/States/STATES.htm> (last visited May 22, 2013) (“The Palau Constitution designates sixteen traditional municipalities of Palau as states.”); *see also* MELLER, *supra* note 8, at 30.

<sup>144</sup> *Palau Sixteen States*, *supra* note 143. In the order of their original constitutional senatorial districts, which is roughly north to south, the Palauan States are: Kayangel, Ngarchelong, Ngaraard, Ngiwal, Melekeok, Ngesar, Airai, Ngardmau, Ngaremlengui, Ngatpang, Aimeliik, Koror, Pelelieu, Angaur, Sonsorol, and Tobi. PALAU CONST. art. XV, § 13.

<sup>145</sup> The author recalls this uncontroversial fact from his service in Palau,

form of ten-man councils in Palau, the high chiefs of the eight next highest-ranking Palauan villages comprised the rest of the Council.<sup>146</sup>

The Palau Congress included the top-ranking chiefs of each of the sixteen districts, or their proxies, plus a number of elected representatives, based on population, from each village.<sup>147</sup> In May 1947, the Palau Congress held its first convention and in July, its first session.<sup>148</sup> The United States “formally recognized” the Palau Congress on September 20, 1948.<sup>149</sup>

These initial arrangements, however, were not institutions of Palauan self-government, notwithstanding directives of the Joint Chiefs of Staff, and arguably the Trusteeship Agreement. To “avoid future disappointments” arising from any perception that Palau had in some sense become an independent nation, the Deputy High Commissioner took pains to instruct the congress that its function was solely advisory.<sup>150</sup> The High Commissioner did, however, review all proposed enactments of the Palau Congress, and eventually enacted some of them into law.<sup>151</sup> It should not be assumed, though, that the early congressmen, at least those who were not chiefs, took steps to develop independent power bases by catering to loyal constituencies from the villages they might be viewed as “representing.” Nor should it be imagined that these early congressmen readily undertook to vote contrary to their chiefs, most of whom were part of those legislative proceedings, as that would have been quite contrary to custom.

### 3. Sources of Law During the Naval Administration: The Trusteeship Agreement, Policy Letter P-1, and Interim Regulation 2-49

The first of the three chief sources of law particular to Micronesia during the Naval administration was the Trusteeship Agreement itself. The Naval administration could draw upon three sources of law: (1) the

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including a short stint advising the Palau Council of Chiefs, presided over by both Ibedul and Reklai. *See also* RICHARD VOL. 3, *supra* note 13, at 398 (“All legislation passed was approved by the President of the Congress, the two high chiefs, the magistrate and the civil administrator.”); MELLER, *supra* note 8, at 126 (“Ibedul and Reklai, Palau’s two paramount chiefs.”).

<sup>146</sup> The author recalls this uncontroversial fact from his service in Palau.

<sup>147</sup> RICHARD VOL. 3, *supra* note 13, at 396-98.

<sup>148</sup> OFFICE OF COURT COUNSEL, *supra* note 16, at 24.

<sup>149</sup> *Id.*

<sup>150</sup> RICHARD VOL. 3, *supra* note 13, at 398.

<sup>151</sup> *See, e.g.*, Palau District Code § 190, based on Public Law 1-4-68, *approved* Apr. 3, 1968 (authorizing the Palau District Code); Palau District Code § 203, based on Public Law 4-62, *approved* Feb. 4, 1963 (conservation of Dugong).

Trusteeship Agreement, (2) the acts of the U.S. Congress, and (3) treaties and international agreements. The U.S. Navy's enactments and regulations mostly arose from the first of these, particularly Articles 3, 6, 7, and 12 of the Trusteeship Agreement.<sup>152</sup> These articles conferred administrative and legislative authority upon the trustee along with obligations to exercise them with consideration of the local customs and some individual rights from the U.S. Constitution.<sup>153</sup> The U.S. Navy Judge Advocate General limited the effect of Congressional acts by issuing opinions that such acts could not be selectively applied to the Trust Territory without Congress first specifically enumerating which acts were so applicable.<sup>154</sup>

Under the Trusteeship Agreement, the following types of laws were promulgated by the Naval administration: (1) Proclamations of the High Commissioner, (2) Interim Declarations of the Deputy High Commissioner or the High Commissioner, (3) Ordinances of the governors of the subareas, (4) District Orders of the District Administrators, and (5) Common law developed by the Territorial Court.<sup>155</sup> The Naval administration's Territorial Courts were created by a series of Interim Declarations.<sup>156</sup> Land tenure matters were under the jurisdiction of a District Court.<sup>157</sup> Local law consisted of the written municipal laws of the Palau Congress (as approved High Commissioner) and unwritten Palauan customary law.<sup>158</sup> Many principles of the latter were added to the "common law" applied by the Palauan courts through court decisions.

The second important source of land-related law during the Naval administration was Policy Letter P-1. In 1946, shortly before the execution of the Trusteeship Agreement, the United States identified several fundamental issues regarding land tenure that it considered to need swift resolution. The two issues of foremost importance were: (1) the degree to which the Trust Territory would honor agreements of previous occupying powers and (2) what would be done about the considerable tracts of land in Koror, Peleliu, and Angaur that were already in use by the United States.<sup>159</sup> Uncertainty regarding these issues was reported to be disrupting "the economic and community life in Palau"<sup>160</sup> in that "natives [could not]

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<sup>152</sup> Trusteeship Agreement, *supra* note 5.

<sup>153</sup> *Id.* art. 6, §§ 1, 2, 4; *id.* art. 8, § 2

<sup>154</sup> RICHARD VOL. 3, *supra* note 13, at 421-23.

<sup>155</sup> *Id.* at 425-36.

<sup>156</sup> *Id.* at 429.

<sup>157</sup> *Id.* at 436-49; OFFICE OF COURT COUNSEL, *supra* note 16, at 29-30.

<sup>158</sup> RICHARD VOL. 3, *supra* note 13, at 433.

<sup>159</sup> DOROTHY E. RICHARD, 1 U.S. NAVAL ADMIN. OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS 609-611, 632-633 (1957); RICHARD VOL. 2, *supra* note 2, at 206.

<sup>160</sup> USEEM, *supra* note 22, at 97.

plan their population relocation, re-establish their farms, build permanent homes or make long range plans.”<sup>161</sup> Although the Trust Territory government’s solutions to these problems should have been consistent with its duty under the Trusteeship Agreement to “protect the inhabitants against the loss of their lands,”<sup>162</sup> in the following ways they were not.

On December 29, 1947, in an apparent response to these concerns, Deputy High Commissioner C. H. Wright, released Trust Territory Policy Letter P-1.<sup>163</sup> That document specifically cited the U.S. obligation under the Trusteeship Agreement to “protect the inhabitants against loss of their lands and resources,”<sup>164</sup> as well as the Administering Authority’s view that “[i]t is considered essential . . . that doubts concerning right [sic] in land, including riparian, remainder and reversionary rights, be eliminated at the earliest possible date.”<sup>165</sup>

Policy Letter P-1 made six basic pronouncements. First, in spite of its own explicit acknowledgment that “rulings by the Germans and Japanese”<sup>166</sup> treating lands not actively used as public domain “violate some Micronesian concepts of ownership,”<sup>167</sup> Policy Letter P-1 declared it necessary to “continue to regard all such lands . . . as having acquired the status of public lands, which are to be administered [by the American administration] for public benefit.”<sup>168</sup> In this way, the jurisdictional trusteeship begat the public land trust concept, the holding of public lands by the trustee government for the beneficiary of the trust, the Micronesian public.<sup>169</sup> Although Policy Letter P-1 allowed the trustee government to use the public lands for “any proper governmental purpose,”<sup>170</sup> it also forbade the Trust Territory government from conveying title to such lands to “non-native individuals.”<sup>171</sup> This was an improvement over the

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<sup>161</sup> *Id.* In addition, Mr. Useem reported that “[l]arge sections of the interior of Babelthuap, which contains valuable farm lands, also await American decision.” *Id.*

<sup>162</sup> Trusteeship Agreement, *supra* note 5, art. 6(2).

<sup>163</sup> TRUST TERRITORY OF THE PACIFIC ISLANDS, OFFICE OF THE DEPUTY HIGH COMM’R, TRUST TERRITORY POLICY LETTER P-1 (Dec. 27, 1947) [hereinafter POLICY LETTER P-1] (Copies are available in the Trust Territory Archives, the depositories of each Micronesian State, and the University of Hawai‘i at Mānoa Library. A copy is also on file with author).

<sup>164</sup> *Id.* ¶ 5.

<sup>165</sup> *Id.* ¶ 4.

<sup>166</sup> *Id.* ¶ 6.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See infra* Part IV.

<sup>170</sup> POLICY LETTER P-1, *supra* note 163, ¶ 7.

<sup>171</sup> *Id.* ¶ 6.



Japanese policies that had allowed, if not encouraged, land alienation to non-Palauans, but was arguably a mere token gesture falling short of the trustee government's duty to protect native land rights. Notwithstanding that improvement, this aspect of Policy Letter P-1 disappointed Palauan expectations that there would be an imminent "redivision" of such lands conducted by the United States to get land back into Palauan hands.<sup>172</sup>

Second, because "native concepts of land right vary greatly in different localities," and "[i]n order to ascertain native concepts of land tenure, for use as a guide in future decisions on land titles,"<sup>173</sup> each District Administrator was required to prepare, with appropriate mechanisms for public input, a codification of each community's land ownership rules and concepts.<sup>174</sup> Unfortunately, the Palau District Administrator did not do this. A possible reason for this omission was that the complexity of the traditional land allocation system prevented his doing this within a reasonably useful period of time.<sup>175</sup>

Third, to begin the process of sorting out land ownership for non-"public domain" lands, Policy Letter P-1 declared, among other things, that:

10. Decisions by former governments as to land ownership and rights prior to the effective date of Japan's resignation from the League of Nations on March 27, 1935, will be considered binding;

11. Rights in lands acquired by the German or Japanese Governments will be deemed to be property belonging to the Government of the Trust Territory;

12. Land transfers from the public domain [to] Japanese corporations or Japanese nationals since March 27, 1935, will be considered invalid; and

13. Land transfers from non-Japanese private owners to the Japanese Government, corporations, or nationals, will be subject to review. Such transfers will be considered valid unless the former owner (or heir) establishes that the sale was not made of free will and the just compensation was not received. In such cases, title will be returned to former owner upon his paying into the Trust Territory Government

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<sup>172</sup> USEEM, *supra* note 22, at 97.

<sup>173</sup> POLICY LETTER P-1, *supra* note 163, ¶ 8.

<sup>174</sup> *Id.* ¶ 9.

<sup>175</sup> See McCutcheon, *supra* note 20, at 102. It is possible that Resolution 2-51 of the Palau Congress was a response to this second basic pronouncement of Policy Letter P-1. See *Ngruchelbad v. Merii*, 1 T.T.R. 367, 370 (Tr. Div. 1958).

the amount received by him.<sup>176</sup>

Unfortunately for the Palauans, but conveniently for the American concern that it retain sufficient land for military and administrative purposes, the first three of these declarations tended to increase the public domain to be administered by the Trust Territory government according to its own view of “the public benefit.”<sup>177</sup> The Trust Territory’s recognition of the previous Japanese and German appropriations of *chutem buai* and *chutem beluu*, and its edict that such lands, whether taken from the Palauans justly or otherwise, would not be returned and would instead be public domain land to be used by the United States “for any proper governmental purpose”<sup>178</sup> certainly perpetuated all the injustices to those who had been wronged.<sup>179</sup> At the same time, it made vast tracts available, at the expense of the previously wronged, for whatever the Trustee considered generally beneficial to all Palauans. Invalidating transfers of public domain lands to Japanese corporations and nationals after 1935 did nothing to help any Palauans. Rather, it consolidated U.S. control over those lands without regard to protecting the traditional interests in them of the Palauan communities in which they were located.<sup>180</sup> Allowing *private* owners to recoup unjustly taken or purchased lands upon disgorging to the U.S. moneys received for them was the only bright spot from the Palauan perspective.<sup>181</sup> It should be noted, however, that somewhere between sixty-five and eighty-four percent of Palau’s land was public domain, and for that reason, came under American control pursuant to this policy.<sup>182</sup>

Fourth, Policy Letter P-1 announced rules to discourage the Trust Territory government from continuing to use lands that the Americans themselves had seized from Palauans during or immediately after the war. Operations on American-seized lands were to be moved to the public

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<sup>176</sup> POLICY LETTER P-1, *supra* note 127, ¶¶ 10-13.

<sup>177</sup> *Id.* ¶ 6.

<sup>178</sup> *Id.* ¶ 7.

<sup>179</sup> *Id.* ¶¶ 6-7 (“It is realized that rulings by the Germans and Japanese, which treated as public domain those lands areas which were not used continuously by native people, violate some Micronesian concepts of ownership, since the resources of such ‘no man’s land’ were usually recognized by the native people as belonging to some specific community or group. In view of the changes and improvements which have been made in much of the land which was declared to be public domain, it is deemed necessary to continue to regard all such lands, which the German or Japanese governments took physical possession of, or developed or used, as having acquired the status of public lands, which are to be administered for public benefit . . . . Public domain lands may be used for any proper governmental purpose.”).

<sup>180</sup> McCutcheon, *supra* note 20, at 93-94.

<sup>181</sup> POLICY LETTER P-1, *supra* note 163, at ¶ 13.

<sup>182</sup> CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 175; KANESHIRO, *supra* note 20, at 311; McCutcheon, *supra* note 20, at 93.

lands, such as those previously seized by the Germans and Japanese.<sup>183</sup> Where “necessary” though, American-seized private lands could be “retained” if just compensation was paid the previous owner.<sup>184</sup> Again, this policy falls short of the Palauan-desired re-dividing of such lands among Palauans.

Fifth, Policy Letter P-1 contained rules intended to prevent alienation of the small amount of remaining native-owned lands to non-natives.<sup>185</sup>

Finally, it exhorted the District Administrators to take necessary steps to discover Japanese land records and plan for a cadastral survey.<sup>186</sup> Notably, very little, if any, action appears to have been taken in this last regard until April 5, 1949. Policy Letter P-1, as a proclamation of the High Commissioner, was found by the Trust Territory High Court “to be an authoritative document, binding on the courts, at least until such time as it is rescinded or modified.”<sup>187</sup>

The third important source of land-related law during the Naval administration was Interim Regulation 2-49, discussed here together with the administration’s establishment of the Land and Claims Section. The Deputy High Commissioner issued Interim Regulation 2-49 on April 5, 1949, titling it Recording Transfers of Land.<sup>188</sup> Regulation 2-49 can be fairly described as a bare-bones recordation law, setting up a recordation mechanism and giving the protection such systems usually give to “bona fide purchasers for value” from claims made by those who have failed to record their interests.<sup>189</sup> The Naval administration’s purpose was to “clarify land holdings after that date.”<sup>190</sup> The next step, taken the next fiscal year, was to fund “the establishment of a ‘Land and Claims Section’ in the office of the Attorney General of the Trust Territory.”<sup>191</sup> Unfortunately for Palau, the very limited personnel available to the Section were not made available to work in Palau, except to determine that the need to sort out land title there was less pressing than in other districts.<sup>192</sup>

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<sup>183</sup> POLICY LETTER P-1, *supra* note 163, ¶ 15.

<sup>184</sup> *Id.* ¶¶ 14-18.

<sup>185</sup> *Id.* ¶¶ 19-20.

<sup>186</sup> *Id.* ¶¶ 21-22.

<sup>187</sup> *Tamael v. Trust Territory*, 1 T.T.R. 520, 526 (Tr. Div. 1958).

<sup>188</sup> RICHARD VOL. 3, *supra* note 13, at 1182-83

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 502.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 502-04.

#### 4. The Request for the Rock Islands

Palau's heart and soul are its beautiful, mostly uninhabited rock islands. Though these islets are a critical part of Palauan life and identity,<sup>193</sup> it is nearly impossible to imagine that they were of any use whatsoever to the United States or its Naval administration. On April 23, 1951, apparently growing impatient, the Palau Congress joined with the Chiefs and Magistrates of Koror, Peleliu, and Airai to request that the U.S. Navy's Civil Administrator assist them "through the proper procedure for the restitution of title" to the rock islands.<sup>194</sup> This may have been the first formal request directed to the Trust Territory government for the return of public lands acquired by the Americans through the previous administrative fiats of the Germans and Japanese. The request was, in hindsight, ill timed, because the Naval administration was to last only two more months, insufficient time to consider the claim.

#### *F. Governance Under the Department of the Interior*

On June 30, 1951, authority to administer the Trust Territory passed from the Secretary of the U.S. Navy to the U.S. Secretary of the Interior. The U.S. Department of the Interior would govern Palau, chiefly through its Office of Territorial and Insular Affairs,<sup>195</sup> until October 1, 1994, when the Trust Territory was dissolved.<sup>196</sup>

#### 1. The Vesting Order

On September 27, 1951, under authority of Interim Regulation 4-48 and its amendments, Horace G. Marshall, the Area Property Custodian of the Trust Territory of the Pacific Islands, issued an order styled Vesting Order.<sup>197</sup> The Vesting Order provided:

That the title to all real property including estates in fee simple, fee tail, any and all lesser estates and easement, together with their appurtenances and wheresoever situate in the Trust Territory of the Pacific Islands, heretofore owned or held by any private Japanese National, private Japanese organizations including corporations, partnerships and associations, the Japanese Government or any department or agency thereof, Japanese Government quasi-

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<sup>193</sup> This is the author's opinion based on personal observations.

<sup>194</sup> Memorandum from Palau Congress for Civil Adm'r of Palau, *supra* note 55.

<sup>195</sup> RICHARD VOL. 3, *supra* note 13, at 1091-1107.

<sup>196</sup> U.S. President, Proclamation 6726, 59 F.R. 49777 (Sep. 27, 1994) ("the Trusteeship Agreement for the Pacific Islands will be no longer in effect with respect to the Republic of Palau as of October 1, 1994, at one minute past one o'clock p.m. local time in Palau.").

<sup>197</sup> Vesting Order, *supra* note 9.

corporations, Japanese associations or Japanese Government subsidized corporations, is hereby vested in the Area Property Custodian of the Trust Territory of the Pacific Islands to be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the indigenous inhabitants of the Trust Territory of the Pacific Islands.<sup>198</sup>

The government quickly justified this appropriation in the third reported decision of the newly established Trust Territory High Court.<sup>199</sup> That decision was partially based on the theory that the “government of the Trust Territory of the Pacific Islands is in a position like that of a succeeding sovereign taking over the government land conquered by it or ceded to it by another nation.”<sup>200</sup> *American Jurisprudence*, an U.S. legal encyclopedia, provided this justification.<sup>201</sup>

The Trust Territory Attorney General, in his capacity as the Alien Property Custodian, later succeeded the “Area” Property Custodian as titleholder of the property subject to the Vesting Order.<sup>202</sup> Land transferred pursuant to the Vesting Order passed “just as effectively as if made with an appropriate deed of conveyance.”<sup>203</sup> Further, even though the Alien Property Custodian may have received title for no consideration, and “therefore . . . does not fulfill all the requirements of a bona fide purchaser, nevertheless he is entitled to the position enjoyed by a transferee from a bona fide purchaser.”<sup>204</sup> No court addressed whether the

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<sup>198</sup> *Id.* ¶ 1 (containing a similar provision regarding personal property).

<sup>199</sup> *Wasisang v. Trust Territory of the Pacific Islands*, 1 T.T.R. 14, 16 (Tr. Div. 1952).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* This raises the question of whether this critical part of deciding how to balance the U.S. desire for land for potential military needs against its trustee's duty under article 6(2) of the Trusteeship Agreement to “protect the inhabitants against the loss of their lands,” Trusteeship Agreement, *supra* note 5, art. 6(2), was made in the field by a Judge with no better sources on principles of international law than a U.S. legal encyclopedia generally considered informative but not authoritative in U.S. courts.

<sup>202</sup> See T.T.C. (1966) §§ 531-536 27 T.T.C. (1970) §§ 1-5; *Ngikleb v. Trust Territory*, 2 T.T.R. 139, 141 (Tr. Div. 1960) (“This court, however, takes judicial notice that by the Vesting Order issued September 27, 1951 . . . any interest previously owned or held by the Japanese Government in any land in the Trust Territory was vested in the predecessor of the Alien Property Custodian of the Trust Territory.”); *accord Ngirkelau v. Trust Territory*, 1 T.T.R. 543, 545 (Tr. Div. 1958) (“Pursuant to Vesting Order of September 27, 1951, appellee Joseph C. Putnam, as Alien Property Custodian of the Trust Territory of the Pacific Islands, owns title to Ilengelang and Sankak, as property formerly owned by a Japanese national.”).

<sup>203</sup> *Ngirkelau*, 1 T.T.R., at 548.

<sup>204</sup> *Id.* at 548-49.

Vesting Order was consistent with the Trusteeship Agreement requirement that the United States protect the Micronesians “against the loss of their lands.”<sup>205</sup>

## 2. Regulation No. 1

On June 29, 1953, the High Commissioner approved the Office of Land Management’s Regulation No. 1.<sup>206</sup> Its primary purpose was:

[T]o provide procedures for the determination of ownership of lands now or formerly used or occupied or controlled by the United States Government, or any of its agencies, or the Government of the Trust Territory of the Pacific Islands and to effect return of those lands no longer needed to the owners, consistent with the full protection of all parties . . . .<sup>207</sup>

Regulation No. 1 empowered a District Land Title Officer (“DLTO”) in each District, including the Palau District, to “determine” the ownership of any piece of land then or previously used, occupied, or controlled by the United States or the Trust Territory government, and to recommend what settlement, if any, should be given the owner of such lands.<sup>208</sup> It also empowered the DLTO to release such lands to their former owners if and when they were “no longer required for use or occupation by” the U.S. or the Trust Territory government.<sup>209</sup>

Regulation No. 1 set procedural requirements for the filing of ownership or damage claims for such lands,<sup>210</sup> and provided that the DLTO’s determinations could be appealed to the Trust Territory High Court.<sup>211</sup> Palauans could file claims from May 31, 1954, through May 30, 1955.<sup>212</sup> Some Palauans were able to submit claims during that

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<sup>205</sup> Trusteeship Agreement, *supra* note 5, art. 6(2).

<sup>206</sup> OFFICE OF LAND MGMT., REGULATION NO. 1 § 1 (June 29, 1953) (on file with author) [hereinafter REGULATION NO. 1].

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* § 2.

<sup>209</sup> *Id.* § 3.

<sup>210</sup> *Id.* §§ 4-8.

<sup>211</sup> *Id.* §§ 13-14.

<sup>212</sup> Regulation No. 1 required the claims period in each district to remain open “in no event . . . be less than one year from the date of such notice.” REGULATION NO. 1, *supra* note 206, § 4(b). According to the author’s notes, the notification that Palau’s Regulation No. 1 claims period extended from May 31, 1954, through May 30, 1955, is either contained in, or consists of, a letter from Alfred J. Gargely maintained by the PALAU LAND COURT IN DISTRICT LAND TITLE OFFICE, CLAIM NO. 187, at 28.

timeframe.<sup>213</sup> The DLTO subsequently made several determinations, some of which were appealed to the High Court.<sup>214</sup>

### 3. New Sources of Law During the Interior-Department Administration

The constraints on Palauan efforts to get their land back after the Interior Department began administering the trust was shaped by new sources of law, especially Secretarial Orders, the Trust Territory Code, acts of the Palau Congress, acts of the Congress of Micronesia, judicial precedent, and the Palau Constitution.<sup>215</sup> A brief discussion of these sources is necessary for a more complete understanding of the story of the eventual return of Palau's land.

The first of the new sources of law were the Orders of the Secretary of the Interior. With the transfer of the authority from the U.S. Navy, the "full powers of administration, legislation, and jurisdiction"<sup>216</sup> over Palau devolved upon the Secretary of the Interior.<sup>217</sup> Although the President ordered some restrictions to ensure State Department control over areas that might be closed for security reasons,<sup>218</sup> these restrictions appear to be intended to secure atomic test sites in the Marshall Islands, and they had little, if any, material impact on Palau.<sup>219</sup> The Secretary exercised his powers through the High Commissioner<sup>220</sup> and by issuing Secretarial Orders.<sup>221</sup> Secretarial Orders applicable to Micronesia<sup>222</sup> were

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<sup>213</sup> The author worked with many such claims in the early 1990s when they were resurrected in appeals from determinations of the Palau Land Claims Hearing Officer discussed in Part III D, *infra*. In some instances, claims were denied untimely due to a claimant's lack of timely awareness of the claim period.

<sup>214</sup> See *infra* Part III.A.

<sup>215</sup> See *infra* Part IV.

<sup>216</sup> Trusteeship Agreement, *supra* note 5, art. 3.

<sup>217</sup> RICHARD VOL. 3, *supra* note 13, at 1091-1107.

<sup>218</sup> Exec. Order No. 11021, 27 Fed. Reg. 4409 (May 7, 1962).

<sup>219</sup> Unlike the Marshall Islands, the part of the Trust Territory where the U.S. would test nuclear weapons and place a missile base, Palau never hosted a significant post-war military presence, and was, as far as the author can tell, never closed by the U.S. for security reasons.

<sup>220</sup> See, e.g., Sec. Order No. 2918, § 3 (Mar. 24, 1976) ("The High Commissioner shall perform such other functions for the Department of the Interior in the Trust Territory as may be assigned him by the Secretary or his Delegate.")

<sup>221</sup> See *id.* and the orders listed, *infra*, note 222.

<sup>222</sup> Sec. Order No. 2658 (Aug. 29, 1951); Sec. Order No. 2902 (Nov. 15, 1967); Sec. Order No. 2918 (amended Mar. 24, 1976); Sec. Order No. 2876 (amended Jan. 30, 1964); Sec. Order No. 2882 (amended Sept. 28, 1964); Sec. Order No. 2969 (issued Dec. 28, 1974 and amended Dec. 30, 1978) (dealing solely with land matters); Sec. Order No. 3027 (effective Oct. 1, 1978); Sec. Order No. 3039 (amended Jul. 17, 1980); Sec. Order

later included in the pre-independence edition of the Palau National Code.<sup>223</sup>

The second of the important new sources of law during the Interior Department administration was the Trust Territory Code. On December 22, 1952, the High Commissioner promulgated the first Code of Laws of the Trust Territory of the Pacific Islands.<sup>224</sup> This Trust Territory Code was revised four times: on December 31, 1959;<sup>225</sup> October 19, 1966;<sup>226</sup> September 22, 1970;<sup>227</sup> and finally, in 1980.<sup>228</sup>

The 1966 Code contained provisions restricting land ownership to Trust Territory citizens,<sup>229</sup> organizing the Office of Land Management,<sup>230</sup> providing for homesteading of public lands,<sup>231</sup> allowing public lands to be used to settle private land claims,<sup>232</sup> providing recording of land transfers,<sup>233</sup> and providing for zoning.<sup>234</sup> Extensive additions codified the Land Commission Act of 1966, providing for a land registration program.<sup>235</sup> Finally, the 1966 Code “confirmed” the Japanese law that lands below the ordinary high water mark belonged to “the government.”<sup>236</sup> This code provision was based, in part,<sup>237</sup> on Executive

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No. 3119 (issued Jul. 10, 1987 and amended Jan. 14, 1988); and Sec. Order No. 3142 (Oct. 15, 1990).

<sup>223</sup> The Palau National Code was Palau's first post-Constitutional codification of its laws.

<sup>224</sup> Trust Territory of the Pacific Islands, Office of the High Commissioner, Exec. Order No. 32 (Dec. 22, 1952). Somewhat confusingly, one case holds that Section 316 of the Code went into effect on May 28, 1951. *Armaluuk v. Orrukem*, 4 T.T.R. 474, 478 (Tr. Div. 1969).

<sup>225</sup> Preface to T.T.C. (1959), signed by High Commissioner D.H. Nucker (Dec. 31, 1959).

<sup>226</sup> *See generally* T.T.C. (1966), at 1.

<sup>227</sup> *See generally* T.T.C. (1970), at Preface-9.

<sup>228</sup> T.T.C. (1980). The 1980 Code is available at the Guam Territorial Library, Hagåtña, Guam.

<sup>229</sup> T.T.C. § 900 (1966).

<sup>230</sup> *Id.* §§ 924-929.

<sup>231</sup> *Id.* §§ 950-960.

<sup>232</sup> *Id.* § 990.

<sup>233</sup> *Id.* § 1023.

<sup>234</sup> *Id.* § 1024.

<sup>235</sup> *Id.* §§ 1025-1044; Congress of Micronesia Pub. L. No. 2-1 (Sept. 2, 1966) (T.T.C. (1966) §§ 1025-1041)

<sup>236</sup> T.T.C. § 32 (1966).

<sup>237</sup> One case exploring this issue prior to Executive Order No. 81 based the Trust Territory Government's ownership of submerged lands on similar provisions of Anglo-



Order No. 81, dated December 10, 1959, and required any person with a conflicting claim to such submerged lands to file a written claim within two years of January 8, 1958.<sup>238</sup> The author found no record that Palau's village chiefs, who traditionally controlled submerged tidal lands,<sup>239</sup> had notice of that deadline.

In 1970, the Third Congress of Micronesia revised the Code. It reorganized the 1966 Code, and added "all Public Laws of a general and permanent nature" subsequently enacted by the Congress of Micronesia as well as selected provisions from Secretarial Orders.<sup>240</sup> The 1970 Code reserved Title 51 for "Land Use and Planning"<sup>241</sup> and codified laws pertaining to "Public Lands and Resources" in Title 67.<sup>242</sup>

The 1980 revision added planning and zoning laws,<sup>243</sup> criteria and procedures to be followed by the Trust Territory government when acquiring land,<sup>244</sup> and provisions for relocation assistance for persons displaced by such land acquisitions.<sup>245</sup>

A third important source of new law during the Interior Department administration was the Palau District Legislature. The First Palau Legislature, chartered by the High Commissioner in January 1955, commenced later that year.<sup>246</sup> In 1966, the First Congress of Micronesia enumerated the Legislature's powers,<sup>247</sup> which were "subject to territory-wide laws," and extended to several matters of local concern including Land Law.<sup>248</sup> The sixteen Palauan Municipalities chartered under the

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American common law, including Lord Hale's Doctrine, and their similarity with Japanese law and the High Commissioner's Executive Order No. 71, which preceded and was replaced by Executive Order No. 81. *See* Ngiribiochel v. Trust Territory, 1 T.T.R. 485, 493 (Tr. Div. 1958).

<sup>238</sup> T.T.C. (1966) § 32.

<sup>239</sup> McCutcheon, *supra* note 20, at 46-47, 50.

<sup>240</sup> T.T.C. (1970), at Preface-3.

<sup>241</sup> T.T.C. (1970), at 523.

<sup>242</sup> T.T.C. (1970), at 595-623.

<sup>243</sup> 51 T.T.C. § 1. (1980). According to Stephen Robbins, an attorney practicing in California in the area of land development who served as General Legal Counsel for the State of Koror in 1993 and 1994, most of the text of this code section was adopted verbatim from the United States model planning ordinance material distributed by the American Planning Association and the National Institute of Municipal Law. The author worked with Mr. Robbins for one year. During that time he learned of this piece of information.

<sup>244</sup> 67 T.T.C. § 451 (1980).

<sup>245</sup> 67 T.T.C. § 501 (1980).

<sup>246</sup> *See generally* P.D.C. § 108 (1955); Charter of the Palau Legislature.

<sup>247</sup> P.D.C. § 47 (1955); Pub. L. 1-6 (Aug. 23, 1966).

<sup>248</sup> P.D.C. § 47(c) (1955).

Legislature were given little say in land matters.<sup>249</sup> On October 1, 1978, after Palau withdrew from the Congress of Micronesia,<sup>250</sup> the Palau District Legislature “succeed[ed] to the authority of the Congress of Micronesia” with respect to legislation applicable within the Palau District.<sup>251</sup>

A fourth important source of new law during the Interior Department administration was the Congress of Micronesia, of which Palau was initially a part. The Congress of Micronesia was chartered in 1964, perhaps as a legacy of the Kennedy administration’s program for territorial economic and social development.<sup>252</sup> The Congress was organized into two houses: a Senate and a House of Representatives.<sup>253</sup> Palau participated in its activities and remained a member until it rejected Micronesian unity in a July 12, 1978, referendum.<sup>254</sup> Other member states were Pohnpei (including Kosrae), Chuuk (Truk), Yap, and the Marshall Islands.<sup>255</sup> One authoritative commentator offers the observation that, once this first Micronesia-wide, locally-controlled political institution was created, “the Congress emerged as a countervailing force to the American-led Trust Territory Administration.”<sup>256</sup>

The Congress of Micronesia could make whatever laws it chose, so long as it did not interfere with the United States.<sup>257</sup> Once functioning, the Congress promptly focused on land problems, especially the TTPI’s long-standing failure to initiate the cadastral survey contemplated by Policy Letter P-1 in 1949.<sup>258</sup> On July 21, 1966, the House of Representatives adopted a resolution requesting the Trust Territory government to “budget the necessary funds to undertake promptly a cadastral survey and mapping

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<sup>249</sup> *Id.* § 48.

<sup>250</sup> Sec. Order No. 3027 § 3 (Oct. 1, 1978).

<sup>251</sup> *Id.* § 3(c).

<sup>252</sup> LAUGHLIN, *supra* note 73, at 471; HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 305 (stating that the Congress of Micronesia was “formally established by Washington in late 1964.”).

<sup>253</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 307.

<sup>254</sup> LAUGHLIN, *supra* note 73, at 471. For a detailed descriptions of Palau’s split from the other Micronesian states, *see* HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 346-64; and MELLER, *supra* note 8, 71-213.

<sup>255</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 306-07.

<sup>256</sup> MELLER, *supra* note 8, at 42.

<sup>257</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 54, at 305-06 (“No laws could be passed that conflicted with U.S. international treaties, executive orders issued by the U.S. president or the secretary of the Interior, or other U.S. laws in effect in the territory. Legislation even within these limits could be vetoed by the high commissioner, and the congress had no power to override the veto.”).

<sup>258</sup> H.R. RES. No. 13, Cong. of Micronesia (July 21, 1966).

program for all private lands in the Trust Territory.”<sup>259</sup> The next month, both houses adopted a joint resolution noting “considerable loss and deterioration”<sup>260</sup> of Japanese land records under the Trust Territory government’s care and requesting the High Commissioner to take steps to better preserve them and to help avoid “endless disputes concerning the boundaries and ownership of government and private land throughout the Trust Territory.”<sup>261</sup> Less than a month later, on September 2, 1966, the Congress enacted the Land Commission Act, providing for the registration of public and private lands throughout Micronesia.<sup>262</sup>

A fifth important source of new law was judicial precedent. The Trust Territory’s judicial branch was its High Court, consisting of a Chief Justice and several Associate Justices—all of whom were American citizens and American-trained lawyers—appointed by the Secretary of the Interior.<sup>263</sup> Although the High Court developed many important land-related doctrines, its most important contribution to Palauan law may have been its incorporation of Palauan customary law into its otherwise American jurisprudence. Not long after the Johnson administration’s push for racial and social justice, the High Court ruled that, pursuant to the Trust Territory Code, Palauan customary laws governing land matters remained operative and in effect in the state that they existed in 1941, except when changed by “express written enactment of law.”<sup>264</sup> Although the High Court considered customary land law to have been at all times subordinate to the land laws of each occupying power,<sup>265</sup> it did recognize and apply Palauan customary law as long as it had “existed long enough to have become generally known and have been peacefully and fairly uniformly acquiesced in by those whose rights would naturally be affected.”<sup>266</sup> To apply Palauan customary law, the Court heard testimony of land-tenure customs presented by litigants, made findings of fact as to those customs, and preserved those findings in published decisions.<sup>267</sup>

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<sup>259</sup> *Id.*

<sup>260</sup> H.R.J. Res. No. 43, Cong. of Micronesia (Aug. 9, 1966).

<sup>261</sup> *Id.*

<sup>262</sup> Congress of Micronesia Pub. L. No. 2-1 (Sept. 2, 1966) (codified at T.T.C. (1966) §§ 1025-1041); *see infra* Part III.C.

<sup>263</sup> *See, e.g.*, Sec. Order No. 2918, part IV (Mar. 24, 1976).

<sup>264</sup> *Rudimch v. Chin*, 3 T.T.R. 323, 328 (Tr. Div. 1967).

<sup>265</sup> *Ngiruhelbad v. Trust Territory*, 2 T.T.R. 631, 636 (App. Div. 1961).

<sup>266</sup> *Ngirmekur v. Municipality of Airai*, 7 T.T.R. 477, 483 (Tr. Div. 1976), *rev’d on other grounds*, 1 Palau Intrm. 22 (App. Div. 1982); *see also* *Lalou v. Aliang*, 1 T.T.R. 94, 99 (Tr. Div. 1954) (applying Palauan custom concerning clan membership as a rule of decision); *ROP v. Sakuma*, 2 Palau Intrm. 23, 35 (1990).

<sup>267</sup> *See, e.g.*, *Gibbons v. Kisaoli*, 1 T.T.R. 219, 221 (Tr. Div. 1955); *Dudiu v. Ngirakelau*, 1 T.T.R. 504, 508 (Tr. Div. 1958); *Gibbons v. Bismark*, 1 T.T.R. 372, 374 (Tr.

The last source of new laws applicable during the Interior Department administration was the Palau Constitution and the laws enacted under its authority. As noted above, the Trust Territory government continued to exist through September 30, 1994.<sup>268</sup> The Palau Constitution went into effect much earlier, on January 1, 1981.<sup>269</sup> The Constitutional government adopted the three governmental branches—legislative, executive,<sup>270</sup> and judicial—and many other features of the U.S. Constitution.<sup>271</sup> The new government legislated through a bicameral legislature, the Olbiil era Kelulau (“OEK”), with a presidential veto power on the U.S. model.<sup>272</sup>

All of these sources of new law during the Interior Department administration remain important in that, as discussed below, much of the law from these sources remains in effect, or shaped the laws that followed or superseded them.

#### 4. TTPI-Era Law Remaining Effective after Independence

Through an OEK enactment adopting portions of the Trust Territory Code as the Palau National Code (“PNC”), Palau gave both the Trusteeship Agreement and relevant Secretarial Orders the status of statutes, imparting to them the presumption of constitutionality normally accorded to statutes.<sup>273</sup> The PNC’s enacting statute states that the PNC was “not intended to effect any substantive changes to the law currently applicable in the Republic.”<sup>274</sup> Similarly, the Constitution provides that

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Div. 1958).

<sup>268</sup> Proclamation No. 6726, 59 Fed. Reg. 49777 (Sep. 27, 1994).

<sup>269</sup> PALAU CONST. art. XV, § 1.

<sup>270</sup> Notably, Palau’s executive branch includes a Council of Chiefs to advise the President on traditional laws and customs. PALAU CONST. Const. art. VIII, § 6.

<sup>271</sup> Article 4 of the Palau Constitution lists fundamental rights largely comparable to the U.S. Bill of Rights and the Thirteenth Amendment. *Compare* PALAU CONST. art IV, *with* U.S. CONST. amends. I-X, XIII. Article 7 of the Palau Constitution provides for a President who administers the executive functions through a cabinet and a concurrently elected Vice President as well as impeachment and an annual Presidential report to the legislative branch. Palau Const. art. VII. Article 9 provides for a bicameral legislature with the powers similar to those of the U.S. Congress, for Presidential veto of legislation and a veto override of two-thirds, legislative immunity, and the sole ability to judge the election and qualifications of its members. PALAU CONST. art. IX. Article 11 provides for state governments. Palau Const. art. XI. Notable differences include prohibitions of any taxation of land and non-Palauan land ownership. PALAU CONST. art. XI.

<sup>272</sup> PALAU CONST. art. IX, §§ 14, 15.

<sup>273</sup> 1 PNC § 301(b) (1986); *ROP v. Sisior & Tmol*, 3 Palau Intrm. 376, 381 (Tr. Div. 1991).

<sup>274</sup> RPPL No. 2-3, § 1 (Aug. 14, 1985); *see also* *Koror State v. Brel*, No 149-88,

“[a]ll existing law in force and effect in Palau immediately preceding the effective date of this Constitution shall, subject to the provisions of this Constitution, remain in force and effect until repealed, revoked, amended or until it expires by its own terms.”<sup>275</sup> In these and other ways, U.S.-promulgated Trust Territory law continued to directly affect Palauan land tenure until and after independent sovereignty commenced on October 1, 1994.

### III. TRUST TERRITORY ATTEMPTS AT RETURNING LAND TO INDIVIDUAL CLAIMANTS.

After the overly optimistic initial U.S. Naval decision that “[n]ative rights in lands must be especially protected,”<sup>276</sup> the United States found it exceedingly difficult to let go of Palau’s lands. For thirty years, the United States held all lands except for a small number of parcels given to individuals as a result of tight-fisted and doomed-to-fail procedures. Palauan efforts to get their land back during the Trust Territory administration were necessarily formed by Regulation No. 1, a Homestead Law, and a Land Registration Act enacted by the Congress of Micronesia. The judgment of Palauans on the shortcomings of these laws when applied to the Palauan goal of recovering all lands taken by the foreign occupying powers is embodied in their own Constitution.

#### A. Land Return Under Regulation No. 1

As mentioned above, under Regulation No. 1, the DLTO was empowered (1) to “determine . . . the ownership of any tract of land now or formerly used, or occupied, or controlled [by the U.S. or the Trust Territory government]” and (2) to “release to the owner of any tract of private land . . . no longer required for use or occupation [by the U.S. or the Trust Territory government],”<sup>277</sup> as long as a written claim was successfully filed during a one-year claim period.<sup>278</sup> Of the few written

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slip op at 5 (Tr. Div. Aug. 11, 1988) (“[T]he OEK adopted the views expressed by the Chairman [of the Code Commission] that no substantive changes had been effected by the Code.”); *Klai Clan v. Bedechal Clan*, 2 Palau Intrm. 84, 87 (1990).

<sup>275</sup> PALAU CONST. art. XV, § 3(a); *accord* RPPL No. 2-3 §§ 6, 10 (“Section 6. Laws unaffected. Nothing in this Act shall affect or preclude the continued validity of any law not specifically contained in the titles of the attached and incorporated manuscript . . . . Section 10. State law reaffirmed. The authority of the states of the Republic of Palau with regard to those provisions of the Trust Territory Code within the jurisdiction of the states is unaffected and hereby reaffirmed.”).

<sup>276</sup> RICHARD VOL. 2, *supra* note 2, at 75.

<sup>277</sup> REGULATION NO. 1, *supra* note 206, §§ 2, 3. The full text of Regulation No. 1 is also included in the Palau Code of Regulations. 6 PALAU CODE REG., at 1-6. The Code of Regulations was a fairly informal loose-leaf collection that appears to have been compiled over a period of years. As a result, it is difficult to date.

<sup>278</sup> REGULATION NO. 1, *supra* note 206, § 4.

claims made, some parcels were returned, and some parcels were not. In at least one instance, where a group of claimants lacked the resources to bring their claims, their municipal government brought their collective claims.<sup>279</sup> Many claims were denied on the basis of a judicially recognized ancient wrongs doctrine.<sup>280</sup> This theory posited was that if Japan had denied a prior claim, the TTPI should not overturn that decision.<sup>281</sup> The application of that doctrine by a foreign power for the purpose of retaining Palauan land for itself was unsatisfying and controversial, as the Palauans justifiably saw no reason why all unjustly taken lands should not be returned.<sup>282</sup> Using that doctrine for that purpose certainly seems inconsistent with the duty of the United States as Trustee to “protect the inhabitants against the loss of their lands and resources.”<sup>283</sup>

Other claims were denied on factual findings that adequate compensation had been paid for the claimed tract of land, that there had been no unjust taking or alienation of the land.<sup>284</sup> In either case, a formal determination was issued pursuant to Regulation No. 1 declaring the land to be the public land of the Trust Territory government.<sup>285</sup> In making his determinations under Regulation No. 1, the District Land Title Officer applied the rule in paragraph thirteen of Policy Letter P-1 that predicated

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<sup>279</sup> See *Ngatpang State v. Amboi*, 7 Palau Intrm. 12, 13 (1998).

<sup>280</sup> *e.g.* *Wasisang v. Trust Territory of the Pacific Islands*, 1 T.T.R. 14, 16 (Tr. Div. 1952) (stating the doctrine to provide that because the Trust Territory Government had “conquered” Micronesia from Japan, it “is entitled to rely upon and respect the official acts of the Japanese administration of these islands and is not required as a matter of right to correct wrongs which the former administration may have done, except in those cases where the wrong occurred so near the time of the change of administration that there was no opportunity for it to be corrected through the courts and other agencies of the former administration.”).

<sup>281</sup> See PHILIP R. TOOMIN & PAULINE M. TOOMIN, *BLACK ROBE AND GRASS SKIRT* 256-57 (1963) (“There were also numerous cases in which lands had been taken for inadequate compensation many years earlier—before Japan fortified the islands and excluded foreigners from their boundaries. During this earlier period there was a way to present claims to a Japanese official and have the land restored to the clan, or else fix fair compensation. The [Trust Territory] government insisted that such claims arising before March 1935 [the month Japan withdrew from the League of Nations, and its consequent loss of authority under the Mandate] could not be considered—under international law which provides that where opportunity for challenge and relief had been available, a new sovereign power is not required to right the wrongs imposed by the earlier power.”).

<sup>282</sup> MELLER, *supra* note 8, at 59-60

<sup>283</sup> Trusteeship Agreement, *supra* note 5, art. 6(2).

<sup>284</sup> The author recalls this from representing the Koror Public Lands Authority in the post-Constitutional judicial review of these files in the early 1990s.

<sup>285</sup> REGULATION NO. 1, *supra* note 206, §§ 10, 13.

land return on a disgorgement by the claimant to the Trust Territory government any consideration the claimant or his ancestor had received.<sup>286</sup>

The District Land Title Officer's determinations could be appealed to the Trust Territory High Court within one year of issuance.<sup>287</sup> The Justice who presided over most of those appeals later wrote memoirs indicating a pronounced disinclination to use his judicial authority to evaluate the application of the ancient wrongs doctrine in light of the trustee's duty as trustee to protect Palau's inhabitants "from the loss or their lands."<sup>288</sup> Instead, he appears to have considered himself unable to question such acts by reference to the trust document placing that limit on the Trust Territory government's authority.<sup>289</sup> His choice may have been influenced by his apparent belief in the superiority of American law over the "primitive" nature of the Palauans' system of self-governance.<sup>290</sup>

Absent a showing that the DLTO failed to proceed in accordance with then-applicable regulations concerning public and private notice of hearings, the determinations he rendered pursuant to Regulation No. 1 were held conclusive as against all persons, whether or not a party to the proceedings was before him, unless such a person could show a failure to proceed in accordance with the public and private notice requirements of Regulation No. 1.<sup>291</sup> Likewise, such proceedings were ruled to be in the nature of *in rem* actions, and determinations properly rendered in them are therefore "conclusive as against the world."<sup>292</sup> The glaring limitation on the Regulation No. 1 claims process was its lack of a realistic mechanism for the return of public lands to the Palauan public, the vast majority of that land being held by the United States.<sup>293</sup>

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<sup>286</sup> See PALAU DISTRICT LAND TITLE OFFICE, CLAIM NO. 163 (mid-1950s) (determining in claimant Maria Obkal's favor but not returning land pending repayment to the Trust Territory of value received in form of Japanese Postal Savings Bonds); see also Policy Letter P-1, *supra* note 163, ¶ 13.

<sup>287</sup> REGULATION NO. 1, *supra* note 206, § 14.

<sup>288</sup> Trusteeship Agreement, *supra* note 5, art. 6(2).

<sup>289</sup> See TOOMIN & TOOMIN, *supra* note 281, at 257 ("Of the total land cases on the call, in about one-third the lands had been seized for public use prior to 1935 with no effective steps taken in protest. In these, I entered judgment orders applying the harsh rule of international law which I felt obligatory, and confirmed title in the Trust Territory Government.").

<sup>290</sup> *Id.* at 37 (describing the Trust Territory Code as "a skillful attempt to penetrate a primitive society with American concepts of civil government, law and institutions.").

<sup>291</sup> Uchellas v. Etpison, 5 Palau Intrm. 86, 88 (1995).

<sup>292</sup> *Id.* at 89.

<sup>293</sup> McCutcheon, *supra* note 20, at 93 ("The United States' victory over the Japanese in 1944 and 1945 and the ascension of the United States as administering authority under a United Nations Trusteeship agreement in 1947 meant resolving some of

One of a few attempts to achieve that result with this process was Claim No. 101. With this claim, the High Chief of Peleliu, on behalf of four local clans, sought the return of a number of rock islands located near Peleliu.<sup>294</sup> Noteworthy were the number and caliber of witnesses who appeared on behalf of the claimant at the February 29, 1956, hearing of that claim.<sup>295</sup> These witnesses included the Magistrates and several of the highest chiefs of both Peleliu and Koror Municipalities. Despite this presentation of this most respectable possible local authority, Claim No. 101 was sadly denied.<sup>296</sup> As a result, the Palau District Land Title Officer determined the entire group of claimed islands to be the property of the Trust Territory government,<sup>297</sup> and the Alien Property Custodian quitclaimed them to the Trust Territory government.<sup>298</sup>

*B. The Homesteading Program: An Ill-Considered Effort?*

During the westward movement of European immigrants across the continent of North America, the U.S. government used the homestead device<sup>299</sup> to populate vast tracts vacated by relocated and exterminated Native Americans.<sup>300</sup> Americans' familiarity with this method of putting vacant government lands into private hands was perhaps a factor in their attempt to use it for that purpose in Palau.

Although homesteading could theoretically be used to populate unused land in Palau, that country's cultural needs, its long history of reserving large areas of public lands for common use under village

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the problems of the public lands. The first action in the solution was to place all lands acquired by prior governments under the jurisdiction of the newly organized Trust Territory Government. By this time, it amounted to to some [sixty-eight percent] of Palau's total land area."').

<sup>294</sup> PALAU DIST. LAND TITLE OFFICE, STATEMENT CLAIM NO. 101 (Apr. 18, 1955).

<sup>295</sup> *Id.*

<sup>296</sup> PALAU DIST. LAND TITLE OFFICER DETERMINATION AND RELEASE NO. 101 (Nov. 27, 1956).

<sup>297</sup> *Id.*

<sup>298</sup> Palau Dist. Land Title Office, *Quitclaim Deed* (Mar. 22, 1957), recorded in RECORDATION BOOK 1 22-23 (Apr. 24, 1957). According to the author, Recordation Book 1 is missing, but there is a copy of the deed on file with the Palau Land Court in the Claim 101 file and on file with the author.

<sup>299</sup> Homesteading was a governmental process in United States Territories by which "people could obtain federal land virtually free if they met certain requirements, including living on the land and cultivating a portion of it." *Homesteading Frequently Asked Questions*, DEPARTMENT OF THE INTERIOR: BUREAU OF LAND MANAGEMENT, [http://www.blm.gov/ak/st/en/prog/cultural/ak\\_history/homesteading/homesteading\\_Q\\_and\\_A.html](http://www.blm.gov/ak/st/en/prog/cultural/ak_history/homesteading/homesteading_Q_and_A.html) (last visited May 20, 2013).

<sup>300</sup> See, e.g., S.C. GWYNNE, *EMPIRE OF THE SUMMER MOON* (2010).



control, and its historical disfavor for individually vested title, if thoughtfully considered, would certainly mitigate against such an endeavor. From Palau's perspective, it must have been hard to accept a foreign-administered program intended to entice its citizens to settle unpopulated areas that had always been publicly used public domain land by consensus.

The problem to be solved in Palau was not the population of land vacated by genocide. It was the return of land, public and private, to the persons, families, clans, villages, or peoples who had lost it during decades of exploitive practices by foreign powers, or at least to the descendants of the victims of those practices. The homesteading device, which pays no heed to the question of who had previously owned the land, did not return the land, and was ill-suited to achieve Palauan goals. This section will discuss the enactment and provisions of homestead law, then the attempts to put it into effect.

### 1. Homestead Law

The government administered its homesteading program under provisions of the Trust Territory Code that predated the Congress of Micronesia.<sup>301</sup> As such, the Code's homestead provisions were simply promulgated by the Office of the High Commissioner.<sup>302</sup> The homestead law allowed the High Commissioner to designate as homestead areas lands that were: (1) suitable for agriculture, grazing, or the establishment of community sites, (2) not required for government use, or (3) not reserved by law or the government for other purposes.<sup>303</sup> In Palau, lands could not be designated for homesteading "in disputed areas or where land claims had been filed."<sup>304</sup> Each District Administrator, with the advice of a District Land Advisory Board and the approval of the High Commissioner, could determine the actual application process, including claim size and occupation and development requirements.<sup>305</sup> He recorded those determinations with the Clerk of Courts of his district.<sup>306</sup> The Administrator's discretion in determining occupation requirements was limited by a minimum use and occupation period of three years.<sup>307</sup>

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<sup>301</sup> See T.T.C. § 952(b) (1966) (citing Exec. Order No. 44).

<sup>302</sup> *e.g.* Trust Territory of the Pacific Islands, Office of the High Commissioner, Exec. Order No. 44 (Jun. 24, 1954) (amending §§ 951(c) and 952 of the T.T.C. regarding homesteading procedures and applicant qualifications).

<sup>303</sup> 67 T.T.C. (1970) § 201.

<sup>304</sup> James A. Stanton, *An Appraisal of the Homesteading Program in the Palau District 3* (paper presented at Trust Territory of the Pacific Islands, Land Management Conference, Trust Territory Headquarters, Saipan, Mariana Islands, Apr. 1966).

<sup>305</sup> T.T.C. § 951 (1966).

<sup>306</sup> 67 T.T.C. (1970) § 202.

<sup>307</sup> *Id.* § 208.

Clans and lineages, as well as individuals, could acquire entry permits. Individuals could not obtain entry permits “if clan, lineage, family or group ownership of land is the custom of the specific area in question.”<sup>308</sup> Permit applications were made to the District Land Officer and subject to approval and issuance from the District Administrator.<sup>309</sup> The homesteader was required to enter and commence use of the property within 120 days, to mark the boundaries within six months, and to comply with all use and occupancy regulations for the duration of the homestead period.<sup>310</sup> A permittee's failure to timely enter voided the permit,<sup>311</sup> which was non-transferable.<sup>312</sup> Thus, a plaintiff could not sue for specific performance of an agreement by a permittee, made before the homestead had been perfected, to convey title to another at a later date.<sup>313</sup> On the other hand, after the homestead had matured and a deed was granted, the grantee could validly convey it to another who had entered during the homestead period.<sup>314</sup> Where an entryman died before a deed was issued to him, his rights could not be claimed by his heirs, unless he had designated them as such in writing at the District Land Office.<sup>315</sup> Absent such a written document, the permit dissolved upon the permittee's death by operation of law.<sup>316</sup> Within two years of a permittee's completion of the homesteading requirements, the High Commissioner was required to grant him a deed conveying “any and all rights of the Government of the Trust Territory to the property, excepting such rights as are reserved by law.”<sup>317</sup> The two-year limit on the time within which the High Commissioner had to grant the deed was instituted to provide the homesteader the right to compel issuance of the deed.<sup>318</sup> If the homesteader had complied with these requirements, the High Commissioner could not refuse a deed on the grounds of inadequate surveys or unreliable descriptions of the lands.<sup>319</sup>

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<sup>308</sup> *Id.* § 203.

<sup>309</sup> *Id.* §§ 204-206.

<sup>310</sup> *Id.* § 207.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* § 209 (“No rights in or to a homestead permit granted under the provisions of this Chapter shall be sold, assigned, leased, transferred or encumbered . . .”).

<sup>313</sup> *Romolor v. Igisaia*, 4 T.T.R. 105, 107 (Tr. Div. 1968). Note that section 958 of the T.T.C. (1966) was later recodified as 67 T.T.C. (1970) § 209.

<sup>314</sup> *Iisari v. Taroliman*, 7 T.T.R. 391, 393-94 (1976).

<sup>315</sup> 67 T.T.C. (1970) § 209; *Norman v. Eskar*, 4 T.T.R. 164, 166 (Tr. Div. 1968).

<sup>316</sup> T.T.C. § 958 (1966).

<sup>317</sup> 67 T.T.C. (1970) § 208.

<sup>318</sup> *Cruz v. Johnson*, 6 T.T.R. 354, 357 (Tr. Div. 1973).

<sup>319</sup> *Id.* at 357.

These procedures had no resonance with Palauan traditions, despite the U.S. duty to “give due recognition to the customs of the inhabitants in providing a system of law for the territory.”<sup>320</sup>

The implementation of this law, however, appears to have been inconsistent with the expectations of those who formulated it.

## 2. Homesteading Efforts

The Palau Land Advisory Board began considering homesteading on Babeldaob in 1954 and by November had recommended that 9300 hectares of that island, one of the largest and least developed in Micronesia, be designated for homesteading.<sup>321</sup> One goal was to slow the migration of Palauans into Koror.<sup>322</sup> Most areas selected were former Japanese agricultural areas, noted for their fertility, and all selected areas that fronted the water or had convenient access to it.<sup>323</sup> Areas most desirable to Palauans would presumably be subject to claims and disputes, and were, for that reason, not part of the homestead program.<sup>324</sup>

After 1954, the Land Advisory Board abruptly curtailed its homestead land designations.<sup>325</sup> Although there may have been some delay from staffing and administrative problems, the primary reason for this decision was likely because Palauan “demands for homesteading were not too great.”<sup>326</sup> Palau’s Land Management Officer later wrote:

In reviewing the correspondence and other records of this period you note that the administration was interested in “facilitating the early return (underscoring mine) of public lands to private use as expeditiously as possible and as nearly as practical in accordance with local systems of land tenure.” Yet, curiously, the responsible officials did not expect “a heavy rush of applicants” and, as mentioned above, the areas opened were believed too large to be utilized until after ten or twenty years had elapsed.<sup>327</sup>

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<sup>320</sup> Trusteeship Agreement, *supra* note 5, art. 6(1).

<sup>321</sup> Stanton, *supra* note 304, at 2.

<sup>322</sup> *Id.* at 3.

<sup>323</sup> *Id.* at 2-3.

<sup>324</sup> *Id.* at 3 (stating that in Palau, land “in disputed areas or where land claims had been filled” was not made available for homesteading).

<sup>325</sup> Compare *id.* at 3 (23,064 acres designated in 1954), with *id.* at 7 (409 acres in 1957, 553 acres in 1959, and 1013 acres in 1962, with no designations during the intervening years).

<sup>326</sup> Stanton, *supra* note 304, at 3.

<sup>327</sup> *Id.* Mr. Stanton, an official of the Trust Territory Government, does not provide citations to the precise “correspondence and other records” of the Trust Territory Government that he quotes in this passage.

The program finally began to function in 1957, when the first homestead area was officially opened in Ngchesar.<sup>328</sup> Shortly thereafter, twenty-nine entry permits were granted.<sup>329</sup> Areas in Ngiwal, Melekeok, and Ngaremlengui were opened in 1962.<sup>330</sup> In 1959, fifty-eight entry permits were granted in Ngiwal, six in Melekeok, and seventeen in Ngaremlengui.<sup>331</sup> Between 1960 and 1963, about 110 more entry permits were granted, almost all in the municipalities of Ngchesar, Airai, Ngarchelong, Ngatpang, Aimeliik, and Ngardmau as well as all rural areas of sparsely populated Babeldoab.<sup>332</sup> But Palauans had little interest in settling these areas.<sup>333</sup> This prompted an American administrator to comment, “[b]y industry a person can easily fulfill these requirements but this seems too tough for most Palauans.”<sup>334</sup> By 1966, in the nine areas that had by then been made part of the program, “only 132 entry permits [had] been granted and only 229 people [had] applied for permits.”<sup>335</sup> Most applicants for entry permits were individuals, rather than clans or lineages.<sup>336</sup>

By 1966, the Land Management Officer had to describe Palau’s homesteading program as “an ‘embarrassment’ to the administration,”<sup>337</sup> explaining that the embarrassment came not so much from possessing large tracts of land as it did from “the inability of the Government to properly administer a homesteading program.”<sup>338</sup> Apparently, a 1964 U.N. Report had been quite critical of the Palau program, finding that “insufficient funds had been allocated for the requisite surveying work and that surveyors were being pulled off homesteading projects for other construction projects,” and that the program had “been under fire from the

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<sup>328</sup> *Id.* at 4.

<sup>329</sup> TRUST TERRITORY LAND OFFICE, DISPOSITION OF PUBLIC LANDS IN THE PALAU DISTRICT—LIST NO. 2 (Oct. 1, 1966) [hereinafter DISPOSITION OF PUBLIC LANDS IN THE PALAU DISTRICT—LIST NO. 2].

<sup>330</sup> Stanton, *supra* note 304, at 4, 6.

<sup>331</sup> *Id.* at 6.

<sup>332</sup> DISPOSITION OF PUBLIC LANDS IN THE PALAU DISTRICT—LIST NO. 2, *supra* note 329.

<sup>333</sup> Stanton, *supra* note 304, at 5. In the author’s opinion the primary cause of this lack of interest would almost certainly be clan affiliations with traditionally clan owned parcels and similar social considerations.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 1.

<sup>338</sup> *Id.*

Congress of Micronesia and from the local Palau Congress for many of the same reasons.”<sup>339</sup>

A different and eventually difficult aspect of the homesteading program was a series of TTPI attempts to use the homestead law to return public lands to Palauan control.<sup>340</sup> The goals were to encourage cultivation, to influence population distribution, and to settle land disputes.<sup>341</sup> According to the Land Management Officer, “[t]he legal authority for such action [was found] in Section 960 of the Code [later 67 TTC 201] wherein the High Commissioner is granted discretion to ‘waive any requirement, limitation or regulations relating to homesteading when the public interest requires.’”<sup>342</sup> This was done when the government had no reason to use disputed land itself, but did not want to allocate the necessary administrative resources to properly adjudicate a claim made pursuant to Regulation No. 1, or did not want to defend an appeal by a dissatisfied claimant.<sup>343</sup> This approach was used to settle land disputes in Peleliu, Arakebesang, Aimeliik, Ngiwal, Ngardmau, and Angaur, in cases where “the Government’s title to the land was good but it was felt that no useful purpose would be served by exercising ownership and that it would be in the public interest to transfer the land to the present inhabitants.”<sup>344</sup> This process gave no consideration to the Palauans’ traditions or their desire that land be returned to the descendants of those from whom it had been taken.

### C. Land Return under the Registration Act

As noted *infra*, the Congress of Micronesia’s September 2, 1966, Land Commission Act, provided for registration of public and private lands throughout Micronesia.<sup>345</sup> It did not provide for claims for the return of unjustly taken lands, as Regulation No. 1 had, or as ROP Constitution Article XIII, § 10 would later provide. It did, however, give the Commissions the authority to “determine the ownership of any land” in their respective Districts.<sup>346</sup> Accordingly, the Palau Commission’s Land

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<sup>339</sup> *Id.*

<sup>340</sup> *See id.* at 7-9

<sup>341</sup> *Id.* at 7.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Congress of Micronesia, Pub. L. No. 2-1 (Sep . 2, 1966) (T.T.C. (1966) §§ 1025-41).

<sup>346</sup> *Id.* § 2.

Registration Team did, at times, assist Palauans in recovering land from the Trust Territory government.<sup>347</sup>

In sum, the United States, entrusted with title to most of Palau's land, generally failed to return land to private claimants. Instead, it limited private claimants by judicial doctrines and short claim periods. Well into the 1970s, it had done almost nothing to return public lands to control of either traditional or U.S.-sponsored local governing entities.

*D. Evidence of How Palauans Viewed the TTPI Land Claim Processes*

When Palau formulated its Constitution, it addressed the limited success of the TTPI's land claim efforts by establishing a broad constitutional right to regain title to public lands once taken by foreign occupying powers.<sup>348</sup> Specifically, the Constitution required the national government to "provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration."<sup>349</sup> It then created and empowered a Palau Land Claims Hearing Office ("LCHO") to proceed on a "systematic basis to hold hearings and make determinations with respect to ownership" of all non-registered lands, including the public lands subject to the claims process.<sup>350</sup> That tribunal was empowered to re-hear claims previously denied by the TTPI on the ground of the ancient wrongs doctrine.<sup>351</sup> It can thus be inferred that, from the perspective of the majority of Palauans who ratified the Palau Constitution, the TTPI land claims programs under Regulation No. 1, the homestead law, and the Land Registration Law, had been as inadequate as the prior effort to return lands under Policy Letter P-1.

And for the thirty years ending in 1979, looming over all of those mechanisms, each intended to resolve ownership of a single parcel of unjustly-taken, was the over-arching question of public land, *i.e.*, most of Palau.

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<sup>347</sup> See, e.g., *Espangel v. Tirso*, 2 Palau Intrm. 315 (1991).

<sup>348</sup> PALAU CONST. art. XIII, § 10.

<sup>349</sup> *Id.*

<sup>350</sup> 35 PNC § 1104(a) (1986).

<sup>351</sup> *Kirk v. Palau Land Claims Hearing Office*, Civ. No. 24-95, slip op. at 2 (Aug. 21, 1995) ("the mere fact that a claimant has tried and failed in the past to recover a piece of public land cannot bar him or her from trying again under the new constitutional and statutory regime.").

## IV. TRUSTEES, AND THE POLITICS PUBLIC-LAND RETURN

It is difficult to square the thirty-year delay in returning Palau's public lands with the requirements of the Trusteeship Agreement that the United States "give due recognition to the customs of the inhabitants in providing a system of law for the territory"<sup>352</sup> and "protect the inhabitants against the loss of their lands and resources."<sup>353</sup> Nonetheless, the vast majority of Palau's lands seized by the United States from Japan, undoubtedly well over ninety-five percent, remained unconveyed until 1970 through the mid-1980s.<sup>354</sup> This is precisely the moment in history when the United States succeeded in persuading the Palauan people to adopt a constitution quite similar to its own. The terms of land return, developed in the context of, and as part of, the negotiation of the terms of the relationships between the Micronesian states, developed in stages. The first stage was the formulation of a Department of Interior study that begat a Secretarial Order 2969. The second was legislation by the Palau Congress implementing that order in a way that allowed the preservation of some of Palau's tradition of allocating public lands at the village level. The final step was the formation of local land authorities in each Palauan state and the controversial conveyance of public lands to those local authorities.

A. *Secretarial Order 2969 and the Micronesian Public Land Trusts*

From the beginning, the Micronesians opposed the Trust Territory government's vesting title to public lands to itself, objecting to "the original acquisition of title in the previous colonial eras upon which the claim of the United States rested."<sup>355</sup> From the 1950s until the 1970s, the United States "delayed redressing what Micronesians considered a denial to them of their rightful lands,"<sup>356</sup> taking the position before the United Nations that "the lands were held in trust for all of the indigenous inhabitants."<sup>357</sup>

When it became apparent in the mid-1960s that homesteading was an inappropriate mechanism for returning public lands in Koror, the Palau District Land Management Officer broached the idea of using the trust concept as a land-return mechanism, stating at a territory-wide land management conference, "[p]erhaps the land could be put in a trust fund

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<sup>352</sup> Trusteeship Agreement, *supra* note 5, art. 4.

<sup>353</sup> *Id.* art. 6(2).

<sup>354</sup> See Quitclaim Deeds, referenced in Part IV.C., *infra*.

<sup>355</sup> MELLER, *supra* note 8, at 59.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*; accord McCutcheon, *supra* note 20, at 94-96.

with the public always holding title and ultimate control with the annual rents going for public purposes.”<sup>358</sup> Whether this is a consequence of that proposal, the creation of Micronesian public land trusts eventually became the Trust Territory government’s chosen solution to the problem of returning public lands to some Micronesian states, including Palau.

The terms of this solution were first publicly announced in response to the repeated public-land-return requests of Micronesians, led by Palau.<sup>359</sup> Announced on November 4, 1973, the Trust Territory government stated in a policy statement that:

[I]f it is the desire of the people in a [Micronesian] district that public lands in that district be turned over to the district now before the termination of the Trusteeship the United States is willing to accede [sic] to their wishes and to facilitate the transfer of title. This transfer, however, must be subject to certain limitations and safeguards set forth below designed to protect those individuals who have acquired property interests in public lands under the Trusteeship and to meet the continuing land needs of the Trust Territory for public use.<sup>360</sup>

The limitations included the retention of title to lands actively used by the Trust Territory, needed for capital improvement projects, assigned to homesteaders, or expected to be used for U.S. defense needs.<sup>361</sup> Title to lands the Trust Territory had leased or for which there were unresolved claims would be transferred subject to those encumbrances.<sup>362</sup> Title to

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<sup>358</sup> Stanton, *supra* note 304, at 17.

<sup>359</sup> When Micronesian political status negotiations with the United States resumed in 1972, it was on the condition that the public land issue would be addressed as a part of those negotiations. MELLER, *supra* note 8, at 58. The Micronesians countered U.S. claims that it was holding lands for their benefit with the charge that:

[T]he United States was more interested in retaining the land to further its own security needs. They particularly pointed to the retention lands in Micronesia under use and occupancy of the Defense Department, nearly fourteen thousand acres of public lands. Organized resentment over this surfaced in the Palau District in 1972, with the demand that all status negotiations be suspended until the public lands in the district were returned. The leaders in the Congress of Micronesia responded by adopting this position as applicable to all of the Trust Territory, and it became the ultimatum voiced by the Joint Committee on Future Status.

*Id.* at 59-60.

<sup>360</sup> OFFICE OF THE HIGH COMM’R, TRANSFER OF TITLE TO PUBLIC LANDS FROM THE TRUST TERRITORY OF THE PACIFIC ISLANDS TO THE DISTRICTS: U.S. POLICY AND NECESSARY IMPLEMENTING COURSES OF ACTION 2 (Nov. 4, 1973).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*



tidelands, filled lands, and submerged lands would be conveyed subject to the Trust Territory government's "right" to control activities there "in the public interest."<sup>363</sup>

According to the policy statement, the Congress of Micronesia was expected to enact enabling legislation.<sup>364</sup> For that purpose, the Secretary of the Interior tendered a draft bill to the Micronesian Congress to guide its lawmaking efforts.<sup>365</sup> Notwithstanding this attempted guidance, when the enabling legislation was "finally adopted by the 1974 Special Session, modifications insisted upon by the Congress over the strong objections of the administration assured a veto."<sup>366</sup> This was followed by an extraordinary meeting of Micronesian leaders in Hawaii, at which they put their case to no avail."<sup>367</sup>

On December 26, 1974, in the face of the Congress of Micronesia's failure to enact acceptable enabling legislation, the Secretary of the Interior issued Secretarial Order No. 2969 to implement the November 4, 1973, policy statement.<sup>368</sup> Secretarial Order 2969 authorized each District Legislature, instead of the Congress of Micronesia as contemplated in the policy statement, to create or designate a legal entity to receive and hold title to the lands to be conveyed.<sup>369</sup> That entity was to be empowered to administer and manage the lands "in trust for the people of the district."<sup>370</sup> It was to have the power of eminent domain and the ability to "sell, lease, exchange, use, dedicate for public purposes, or make other disposition of such public lands pursuant to the laws of the district in which the land is located."<sup>371</sup>

Secretarial Order 2969 also required the districts to establish adjudicatory bodies to resolve claims, and to follow through with the homesteading programs initiated by the Trust Territory government.<sup>372</sup> It directed the High Commissioner, upon request from a district's designated legal entity, but "subject to valid existing rights," to "transfer and convey, pursuant to the provisions of this Order," title to the requested lands.<sup>373</sup> It

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<sup>363</sup> *Id.* at 4-5.

<sup>364</sup> MELLER, *supra* note 8, at 60.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *See* Sec. Order No. 2969 (Dec. 28, 1974).

<sup>369</sup> *Id.* § 1.

<sup>370</sup> *Id.* § 3(a)(2)

<sup>371</sup> *Id.* § 3(a)(4).

<sup>372</sup> *Id.* § 1.

<sup>373</sup> *Id.* § 4.

reserved lands actively used<sup>374</sup> by the Trust Territory, needed for capital improvement projects, or assigned to homesteaders.<sup>375</sup> It prohibited the High Commissioner to convey land to a District that had not enacted laws satisfactorily providing for such an entity.<sup>376</sup> It reserved to the Trust Territory government a “paramount power” of eminent domain and the power to regulate tidelands, filled lands, and submerged lands.<sup>377</sup> It further required compliance with existing leases and recognition of existing land claims, gave limited continued use rights to tenants at will and tenants at sufferance, and provided for disposition of income generated by the conveyed lands.<sup>378</sup>

*B. Public Law No. 5-8-10, and the Palauan Public Land Authorities*

In response to the Requirements of Secretarial Order No. 2969, the Palau District Legislature fashioned the Palauan legal mechanism for facilitating the return of public lands to Palau—Public Law No. 5-8-10. The content of Public Law 5-8-10 was, for the most part, dictated by the requirements of Secretarial Order No. 2969.<sup>379</sup> The Fifth Palau District Legislature enacted the law on May 13, 1975, at its eighth regular session. Public Law 5-8-10 became effective upon its approval on June 17, 1975 by the High Commissioner.<sup>380</sup> These events were of such importance to Palau that each year, June 17 continues to be celebrated as Belau Day, a national holiday.<sup>381</sup> Public Law No. 5-8-10 is still in force as codified (and slightly amended) in Chapter 2 of Title 35 of the PNC.<sup>382</sup> Because Public Law No. 5-8-10, and the Secretarial Order that informed it, were a political solution to a political problem, it is not surprising that the return of public lands pursuant to Public Law No. 5-8-10 remained charged with politics.<sup>383</sup>

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<sup>374</sup> See *infra* notes 302, 304, and 305 for a discussion of what this vague standard came to mean in practice.

<sup>375</sup> Sec. Order No. 2969, § 5 (Dec. 28, 1974).

<sup>376</sup> *Id.* § 6(a).

<sup>377</sup> *Id.* § 6(b).

<sup>378</sup> *Id.* § 6(d).

<sup>379</sup> *Id.* § 3.

<sup>380</sup> Pub. L. No. 5-8-10 (Dec. 28, 1974).

<sup>381</sup> Pub. L. No. 5-3S-5 (Jun. 20, 1975).

<sup>382</sup> Note that the original text of Public Law No. 5-8-10 remains significant because it differs from its codification at 35 PNC §§ 201-219 in accordance with RPPL No. 2-3, § 3(2), (3) (Aug. 14, 1985).

<sup>383</sup> The politics described here are some of the internal politics of Palau. In many ways, however, Palau’s political strivings were a continuation of those that surfaced in the Congress of Micronesia in 1974 and 1975, which cost that body a significant loss of

The most intense arena of political maneuvering was associated with Palau's pre-colonial system of administering *chutem buai*, the traditional Palauan public land. As described at the outset of this article, *chutem buai* had been traditionally controlled at the village level, which, by the time of Public Law 5-8-10, had metamorphosed into the municipal level.<sup>384</sup> In a move apparently calculated to restore a modicum of the *status quo ante*, Public Law 5-8-10 went one step further than necessary to conform to Secretarial Order No. 2969. Not only did it create the Palau Public Lands Authority ("PPLA") as the entity contemplated by Section 3 of the Order, it further authorized each Palauan municipality to create its own municipal land authority.<sup>385</sup> The law further empowered PPLA to pass on title to, and administrative authority over, public lands to the municipal authority of the municipality in which the lands were located, provided that the municipal authority was properly constituted and the municipality had requested such a transfer.<sup>386</sup> Although the desirability of passing title on to municipal authorities was controversial, a significant majority of the public and their political leaders apparently favored such transfers.<sup>387</sup> Accordingly, those holding the minority view challenged the legality of such transfers in the courts.<sup>388</sup> The municipal authority proponents, however, had early luck with the courts.<sup>389</sup>

In accordance with the same Palauan traditions, Public Law No. 5-8-10 addressed another facet of the politics of land return—the degree to

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credibility. Those events are well described in HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 58, at 346-47.

<sup>384</sup> See *supra* Part II.A.

<sup>385</sup> Pub. L. No. 5-8-10, § 13.

<sup>386</sup> 35 PNC §§ 210(j), 215 (1986). During codification, which occurred after the Palau Constitution replaced municipalities with states, the words "municipal" and "municipality" were replaced with the word "state." Compare 35 PNC §§ 210(j), 215, with Pub. L. No. 5-8-10 §§ 10 and 13.

<sup>387</sup> See, e.g., PALAU CONSTITUTIONAL CONVENTION, STANDING COMM. REPORT NO. 44 (Mar. 8, 1979) [hereinafter STANDING COMM. REPORT NO. 44]; PALAU CONSTITUTIONAL CONVENTION, STANDING COMM. REPORT NO. 55 4 (Mar. 15, 1979) [hereinafter STANDING COMM. REPORT NO. 55].

<sup>388</sup> Complaint at 2, PPLA v. Silmai, Civ. No. 93-78 (Tr. Div. Oct. 26, 1978) (alleging to lack powers not enumerated in Sec. Order No. 2969 (Dec. 28, 1974) despite contrary provisions of Pub. L. No. 5-8-10); Kekelchad v. PPLA, Civ. No. 64-80 slip op. at 1 (Feb. 16, 1982) ("[T]his is a class action brought by plaintiffs to basically determine the constitutionality of Palau Public Law 5-8-10 as it relates to the creation and operation of the Koror Municipal Public Lands Authority.").

<sup>389</sup> *Writ of Mandamus*, Koror Municipality, v. PPLA, Civ. No. 121-79 (Jan. 31, 1980) (issuing a writ of mandamus compelling Palau Public Lands Authority ("PPLA") to transfer Koror public lands to Koror Municipal Public Lands Authority ("KMPLA") based on §§ 12 and 13 of Pub. L. No. 5-8-10—a highly questionable interpretation of the requirements of that statute); see Pub. L. No. 5-8-10, §§ 12-13.

which Palau's traditional leaders would regain control of the returned land. Public Law 5-8-10 resolved that issue through an apparent compromise that required the boards of trustees of municipal authorities to consist of a balance of traditional and non-traditional appointees. Specifically, Section 13 of that act provided:

Each Municipal authority shall be governed by a Board of Trustees consisting of the paramount hereditary chief and the mayor or magistrate of each municipality, three (3) persons to be appointed by said mayor or magistrate with the advice and consent of the Municipal Council, and three (3) persons to be appointed by said chief with the advice and consent of his traditional chief's council.<sup>390</sup>

Thus, insofar as lands might be conveyed by the PPLA to the municipal land authorities, the chiefs would have a voice in the control and management of the public lands held in trust at the municipal level. This was a natural though partial continuation of pre-colonial customs delegating control and administration of *chutem buai* to the traditional village councils. Since some mayors, magistrates, and municipal council members were also traditional chiefs, traditional leaders became the dominant force in some municipal authorities.<sup>391</sup>

This aspect of Public Law No. 5-8-10 was part of a Micronesia-wide movement. As part of land return demands made in the context of Micronesian political status negotiations, traditional chiefs throughout the region began to re-assert their traditional authority with the goal of becoming the recipients of the returned lands.<sup>392</sup>

If the return of public lands to Palau was political, their return from the Palau District's PPLA to the municipal authorities was doubly so,

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<sup>390</sup> Pub. L. No. 5-8-10, § 13.

<sup>391</sup> *e.g.* KOROR CONST. art. VI.

<sup>392</sup> MELLER, *supra* note 8, at 61 ("An additional element [of Micronesian political status negotiations], moreover—the role of the traditional leader—was also presaged by this controversy over land. The initiating action originating from Palau called for the return of the district's public lands to its traditional leaders. Later, when, in 1974 the Second Micronesian Traditional Chiefs Conference met in Truk, it had adopted a resolution 'that it is the sense of all the Micronesian Traditional Chiefs that titles to all public lands in Micronesia should be returned to them in their respective districts.' Neither American general principles of governance nor the more specific goals of the [Congress of Micronesia] Congressmen were congenial to such a resurgence in the role of the traditional leadership of Micronesia. Both the ill-fated Congressional legislation and the Secretarial Order that followed called for the creation of a custodial corporate entity in each district to opt for receipt of its area's public lands. It is possible that when the Palau District Legislature endorsed the traditional leaders as being qualified to accept title in trust for all people of Palau, it was only mirroring a byplay between Palau's two political parties for the support of the chiefs, and did not contemplate that implicit might be reestablishment of their political powers.").

especially in the case of public lands in Koror. One source of political pressure brought to bear on that question was the need of the district government itself to use many of those public lands to continue to operate.<sup>393</sup> Another source of such pressure was the desire of various powerful politicians, those from other states, as well as those from Koror, to acquire private leases of Koror's public lands.<sup>394</sup> Of those individuals, those who were not members of the chiefly councils but did have influence over district politics would naturally desire to keep the lands in the control of the district government entity, PPLA.<sup>395</sup> On the other hand, those who had influence at the municipal level (such as magistrates and incumbent chiefs whose predecessors had controlled public lands in pre-colonial times) desired their return to that level.<sup>396</sup>

The political dichotomy associated with these two views has been equated with the two major political parties of that era, the Liberals and the Progressives. Roughly speaking, the Liberals favored, and succeeded in bringing about, Palau's independence from the Federated States of Micronesia ("FSM") and the return of the public lands to the control of the Palauan municipalities (later states).<sup>397</sup> The Progressives were more inclined to favor Micronesian unity, and although that was still a possibility, wanted title to the public lands in Palau to be turned over to the FSM.<sup>398</sup> After the Palauan plebiscite rejecting Palau's unity with Micronesia, key Progressive figures worked to keep Palau's public lands in the hands of Palau's district government, and later, its national government.<sup>399</sup>

Given these goals, and the importance of land in Palau, it is not surprising that Progressive and Liberal factions acted more than once to

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<sup>393</sup> See QUITCLAIM DEED FROM TRUST TERRITORY OF THE PACIFIC ISLANDS CONVEYING PUBLIC LANDS IN KOROR TO PALAU PUBLIC LANDS AUTHORITY (July 24, 1979) (on file as recorded document in the custody of the Clerk of the Palau Supreme Court) [hereinafter KOROR QUITCLAIM DEED] (withholding buildings used by the Trust Territory from this initial conveyance, including those the Administration, OEK, and High Court buildings, the power plant, the sewage plant, and all other such properties).

<sup>394</sup> The author is well acquainted with these politics from his work litigating the validity of the eventual deed from PPLA to the Koror Municipal Public Lands Authority, and from preparing, and sometimes litigating, Koror State Public Lands Authority's leases and lease renewals of commercial, industrial, and residential leaseholds.

<sup>395</sup> See *supra* note 394.

<sup>396</sup> See *supra* note 394.

<sup>397</sup> For a discussion of Liberal and Progressive politics in Palau, see MELLER, *supra* note 8, at 73. In the author's experience, however, these camps were not organized into formal parties in the manner of the U.S. political parties.

<sup>398</sup> Dep. of Former Senator Lucius Malsol at 11-13, 27-30, *Wenty v. Koror State Government*, Civ. No. 70-93 (taken Dec. 10, 1996).

<sup>399</sup> *Id.*

legislatively alter the provisions of P.L. 5-8-10. The first such effort was the passage of P.L. 5-3S-2, signed into law on the same day as the Trust Territory began quitclaiming lands to the PPLA. P.L. 5-3S-2 limited the powers of the municipal authorities to those granted by PPLA, and limited such grants to powers PPLA itself possessed.<sup>400</sup>

The most politically significant of these legislative efforts were those aimed at altering the membership of the PPLA Board of Trustees. In its original form P.L. 5-8-10 provided that PPLA would be governed by a Board of Trustees consisting of seven members appointed by the Speaker of the District Legislature “with the advice and consent of the Legislature during its session or its duly authorized committee between sessions,” for staggered terms of one, two, and three years.<sup>401</sup> As PPLA began to act, pressure mounted to change its composition.<sup>402</sup>

By early 1980, PPLA’s members included Johnson Toribiong, West Saiske, Koshiha Basiou, and Minoru Ueki—all Liberals—as well as Alonzo Tellei, a Progressive.<sup>403</sup> In March 1980, in accordance with the Liberal preference for stronger municipal powers, this group began conveying lands to the municipalities.<sup>404</sup> In response, on April 29, 1980, the Progressive-dominated District Legislature passed Public Law 7-3-9, expanding the PPLA Board to sixteen Trustees, one to represent each municipality, all to be appointed by the then Speaker of the Legislature, Tosiwo Nakamura, a leading Progressive.<sup>405</sup> High Commissioner Adrian P. Winkel signed Public Law No. 7-3-9 into law on June 2, 1980.<sup>406</sup> The new scheme thus instituted favored the Progressive side, roughly associated with Babeldaob, over the Liberals, roughly associated with Youldaob (the southern Palauan states, including Koror and Peleliu)<sup>407</sup> because the

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<sup>400</sup> Pub. L. No. 5-3S-2, § 3 (Jun. 20, 1975).

<sup>401</sup> Pub. L. No. 5-8-10, § 4 (Dec. 28, 1974).

<sup>402</sup> This is the author's conclusion as a result of deposing former PPLA members Tadashi Sakuma and Demei Otobed, and former Senator Lucius Malsol, in *Wenty v. Koror State Government*, Civ. No. 70-93, and from interviewing former PPLA members Johnson Toribiong, West Saiske, Koshiha Basiou, and John O. Ngiraked for their affidavits in that case.

<sup>403</sup> See *supra* note 402.

<sup>404</sup> See *supra* note 402.

<sup>405</sup> Pub. L. No. 7-3-9 also prohibited the incumbent Board from deeding or leasing any more lands between the time it became effective and the time the new board took over. Pub. L. No. 7-3-9, § 2 (Jun. 2, 1980). The law did not become effective until June 2, 1980, when it was signed by the High Commissioner. *Id.* § 3. Most land transferred to the Municipalities was transferred via deeds executed after the April 29, 1980, passage of the law and its June 2, 1980, effective date. *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> Traditional Palau is composed of two basic halves: Youldaob, the lower sea, and Babeldaob, the upper sea. Youldaob was under the protection of Ibedul, the

former area is composed of more numerous, though less populous, states.<sup>408</sup>

At PPLA's first meeting, about two weeks after Winkel signed the law, its new sixteen-member board elected as its Chairman John O. Ngiraked, the legislator from the Babeldaob State of Ngaraard and the former head of the Progressive Party.<sup>409</sup> The 16,000 dollars appropriated to fund PPLA at that time was required to be "administered and expended by the Speaker of the Palau Legislature in consultation with the Chairman of the Authority."<sup>410</sup> Appropriations for almost all the district government's other boards and commissions were, at that time, required to be administered by the (Liberal) District Administrator.<sup>411</sup> Despite being taken over by the Progressives, the PPLA Board, under pressure from the chiefs and after a series of meetings presided over by Mr. Ngiraked, proceeded to follow through with the transfers to the municipal authorities, although it focused almost exclusively on returning lands to the Babeldaob States.<sup>412</sup>

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paramount High Chief of Koror, who outranked the highest chiefs of each other Youldoab village. His Babeldaob counterpart was Reklai, the paramount High Chief of Melekeok. *See generally* KANESHIRO, *supra* note 12, at 290; CIVIL AFFAIRS HANDBOOK, *supra* note 10, at 69; HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 43, at 111-12. Thus, the political split between Babeldaob Progressives and Youldoab Liberals during the 1970s had congruence with a traditional division of power, as observed by the author while in Palau, and as alluded to by MELLER, *supra* note 8, at 126-12; by Senator Malsol, *supra* note 274; and by McCutcheon, *supra* note 20, at 70 ("By 1922 a growing contingent of 'progressive' Palauans began pushing for the full individuation of lands").

<sup>408</sup> In this way, Pub. L. No. 7-3-9 increased the influence of the smaller number of Palauan's living in Babeldaob over the public land controlled by PPLA, most of which, and the most valuable of which, was located in the Youldoab state of Koror.

<sup>409</sup> Mr. Ngiraked's Progressive Party leadership credentials as a Congress of Micronesia Senator are noted in MELLER, *supra* note 8, at 73. Mr. Ngiraked was later sentenced to life imprisonment for his role in the assassination of Palau's first President, Liberal partisan Haruo Remeliik. *See, Pre-Bowl Anticipation*, BRING YOUR CHAMPIONS, THEY'RE OUR MEAT (Dec. 23, 2009), <http://bringyourchampionstheyreourmeat.blogspot.com/search?q=ngiraked> ("A later investigation led to the conviction of Remeliik's former Minister of State John O. Ngiraked for aiding and abetting the assassination.").

<sup>410</sup> Pub. L. No. 7-4-8 § 3; *see also* Pub. L. No. 7-5-9 (Aug. 31, 1980) (repealing Public Law No. 7-4-8 and increasing PPLA's budget to \$65,653 for the following two fiscal quarters).

<sup>411</sup> Pub. L. No. 7-4-9 §3.

<sup>412</sup> The only deed to a Youldoab state was the highly controversial February 17, 1983, deed to Koror, made in response to intense political pressure. Interestingly, this same John O. Ngiraked, as the former District Land Title Officer for the Trust Territory Government, had embarked on a program of leasing public lands in Koror to Progressive partisans and other non-Koror supporters and allies. Interview with John O. Ngiraked, former Palau Public Lands Authority Chairman, IN KOROR, REPUBLIC OF PALAU (1995). By law, PPLA's deeds were subject to such leases pursuant to Sec. Order No. 2969 (Dec.

Efforts to change the composition of the PPLA Board continued after inauguration of Palau's constitutional government on January 1, 1981.<sup>413</sup> On November 3, 1981, Mitchungi Solang, the Senator from the Youlodaob State of Peleliu, attempted to break the apparent Progressive lock on PPLA by introducing Senate Bill 192.<sup>414</sup> If it had become law, it would have reduced the number of PPLA Board members to eight, one representing each Senatorial District, and would thereby have made PPLA more responsive to Liberal desires to have all the lands returned to the municipalities.<sup>415</sup> Senate Bill 192 apparently died in the Committee for Judicial and Governmental Affairs.<sup>416</sup>

On May 6, 1982, Senator Victor Rehuher, a Progressive as well as a newly appointed PPLA Trustee, introduced Senate Bill 312.<sup>417</sup> Had it passed, the chief executives of the sixteen states then being formed from the former municipalities would have each appointed one of the sixteen PPLA Trustees.<sup>418</sup> Although that would not have changed the Babeldaob/Youlodaob imbalance of power, it might have tended to facilitate the passage of public land to the state authorities.<sup>419</sup>

The OEK then enacted RPPL 3-39, signed into law by President Etpison on November 28, 1990.<sup>420</sup> This measure kept the number of PPLA's Board of Trustees at sixteen, one representing each state, but shifted the power to appoint them from the Legislature to the President, "with the advice and consent of the [OEK]."<sup>421</sup> This change decreased the

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28, 1974) and Pub. L. No. 5-8-10 (Dec. 28, 1974), which meant that recipients of these leases from Mr. Ngriraked would keep them despite the subsequent transfer of title to Koror State Public Lands Authority ("KSPLA"), which would be bound to those leases.

<sup>413</sup> PALAU CONST. art XV, § 1.

<sup>414</sup> S.B. 192, 4th Reg. Sess. (Palau 1981).

<sup>415</sup> S.B. 192; *see also* First Olbiil era Kelulau, *Journal of the Senate*, 4th Reg. Sess., at 24-25 (bill introduced and referred to committee).

<sup>416</sup> First Olbiil era Kelulau, *Journal of the Senate*, 4th Reg. Sess., at 447 (SB 192 made no progress after referral to committee); First Olbiil era Kelulau, *Journal of the Senate*, 6th Reg. Sess., at 614 (SB 192 made no progress after referral to committee).

<sup>417</sup> S.B. 312, 6th Reg. Sess. (Palau 1982); First Olbiil era Kelulau, *Journal of the Senate*, 6th Reg. Sess., at 343 (S.B. 312 introduced and referred to committee May 6, 1982); *Id.* at 633 (S.B. 312 made no progress after committee referral).

<sup>418</sup> S.B. 312.

<sup>419</sup> This was so because state governors, regardless of the political affiliation, would likely seek to increase their own control over their state's lands. Pursuant to Pub. L. No. 5-8-10, § 13, these governors would be *ex officio* trustees of the public land authorities in their nascent states, and would have the power to appoint half of the appointed seats on those boards of trustees. Pub. L. No. 5-8-10, § 13 (Dec. 28, 1974).

<sup>420</sup> RPPL 3-39 (Nov. 28, 1990).

<sup>421</sup> 35 PNCA § 204 (2005). The Palau National Code Annotated ("PNCA") was first published about this time by a private entity. *See generally* PNCA (2005). After that,



incentive to convey PPLA's remaining public lands to the state authorities, by moving control over the PPLA farther from local influence.

Finally, on May 18, 1998, President Nakamura signed RPPL 5-12 into law, providing that the President's appointment of PPLA members was subject to the advice and consent of only the Senate, rather than the entire OEK.<sup>422</sup> Historically, the Senate has been less prone to the influence of Palau's traditional leadership than has the House of Delegates.<sup>423</sup> Nonetheless, in the context of 1998, this change would probably be better viewed as a sensible efficiency measure than as an effort to edge control of PPLA membership further from chiefly influence.

There have also been sporadic efforts to do away with PPLA altogether. On March 18, 1982, for example, the Senate Committee on Judicial and Governmental Affairs introduced Senate Bill 260, designed to transfer PPLA's powers to the Minister of State.<sup>424</sup> The bill was apparently abandoned in the face of vigorous opposition from the High Chiefs of each state, each of whom, it should be recalled, serves as a state land authority trustee along with three of his appointees.<sup>425</sup> On April 30, 1996, Ngiwal Delegate Elia Tulop introduced House Bill No 4-267-14, proposing to abolish PPLA altogether and turn all administration of public lands over to the state land authorities.<sup>426</sup> Delegate Surangel Whipps introduced a similar bill the following year, soon after the inauguration of the fifth Olbiil Era Kelulau.<sup>427</sup> Although it might seem from the long time period between the first and the second of these bills that the OEK was, for a time, generally satisfied with the activities of PPLA, this lapse of bills expressing dissatisfaction with the Authority is better explained by its virtual disappearance during that period. PPLA had neither a budget nor a meeting between 1985 and 1989.<sup>428</sup> After 1989 after which it slowly began

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according to the author's recollection, the earlier compilation, the Palau National Code ("PNC") ceased to be regularly updated, and later laws and amendments were not made, making it necessary in some instances to cite to PNC and in some instances to cite to PNCA. The Palau National Code Annotated is available at the Guam Territorial Law Library.

<sup>422</sup> RPPL No. 5-2 (May 19, 1998).

<sup>423</sup> At least that was the author's perception while working in Palau.

<sup>424</sup> First Olbiil era Kelulau, *Journal of the Senate*, 6th Reg. Sess., at 625 (Apr. 13-May 7, 1982) (S.B. 260 introduced March 18, 1982 by the Judicial and Government Affairs Committee providing for public land to be held by the Ministry of State).

<sup>425</sup> 35 PNC § 215(b) (1986).

<sup>426</sup> H.B. 4-267-14, 4th Olbiil era Kelulau (Palau 1996).

<sup>427</sup> H.B. 5-13-1, 5th Olbiil era Kelulau (Palau 1997).

<sup>428</sup> The author recorded this in his notes around the time that he took the Deposition of former PPLA Chairman John O. Ngiraked in *Wenty v. Koror State Government*, No. 70-93, 105-08 (Jan. 18, 1997) and likely had this pointed out to him by Mr. Ngiraked or one of the other PPLA members who were deposed or provided

to resurrect itself. This change occurred during the vice-presidency and subsequent presidency of Kuniwo Nakamura, the first Progressive partisan to be elected President.<sup>429</sup> President Nakamura was the brother of Senator Tosiwo Nakamura, who, as Speaker of the Seventh Palau District Legislature, had appointed the 1980 PPLA board.<sup>430</sup>

The politics of land return were by no means confined to the jostling over the terms and conditions of Public Law No. 5-8-10's amendment and implementation. In early 1979, shortly before the Trust Territory conveyed the first public lands to PPLA, the delegates to the Palau Constitutional Convention debated whether PPLA should retain title to Palau's public lands.<sup>431</sup> In a provision that did not become part of the Constitution, the Convention Delegates concluded the debate by resolving that title to all such lands should be passed on by PPLA to the land authorities of each state.<sup>432</sup>

The Committee on General Provisions, chaired by Tosiwo Nakamura, made the initial proposal from which that resolution arose. The proposal was for a constitutional provision that title to all lands would be conveyed to the states in which located *except* that lands then being actively used by the national government would be retained by PPLA so long as they continued to be so used.<sup>433</sup> This proposal was debated by the entire Convention at its meeting of March 10, 1979.<sup>434</sup> At that time it was pointed out that this provision was unfair to the Municipality of Koror.<sup>435</sup> Almost all of the numerous parcels of public land actively used by the national government were located in Koror, and the Convention was by that time already contemplating that the capital of Palau was to be relocated to Babeldaob from Koror.<sup>436</sup> The Committee then revised the

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affidavits in that action.

<sup>429</sup> This is the author's recollection from his work in Palau during the Nakamura Administration.

<sup>430</sup> This is the author's recollection, as confirmed by Pub. Law 7-3-9 (Jun 2, 1980).

<sup>431</sup> See STANDING COMM. REPORT NO. 44, *supra* note 387; STANDING COMM. REPORT NO. 55, *supra* note 387, at 4.

<sup>432</sup> STANDING COMM. REPORT NO. 55, *supra* note 387, at 4.

<sup>433</sup> PALAU CONSTITUTIONAL CONVENTION, CONSTITUTIONAL PROPOSAL NO. 21, DRAFT 1 (Jan. 30, 1979) [hereinafter CONSTITUTIONAL PROPOSAL NO. 21, DRAFT 1]; STANDING COMM. REPORT NO. 44, *supra* note 387.

<sup>434</sup> PALAU CONSTITUTIONAL CONVENTION, FORTY-SECOND DAY SUMMARY JOURNAL 4 (Mar. 9, 1979).

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* Note that the proposal to move the capital to Babeldaob was adopted as PALAU CONST. art. XIII, § 11, which provides that the capital shall move from Koror to Babeldaob "not later than ten (10) years after the effective date of this Constitution." *Id.*

proposal to provide that *title* to all public lands would be transferred to the municipalities, but the national government would have the right to continue to *use* the actively used public lands as long as it needed to do so.<sup>437</sup> The convention then adopted the revised proposal on second reading by a vote of twenty-one to two.<sup>438</sup> The proposal appears also to have passed third reading.<sup>439</sup>

As further evidence of the Progressive/Liberal split on whether land control should return to the village level as during pre-occupation times, during the Constitutional Convention, or “Con-Con,” debate, the title-transfer provision appears to have been championed by Liberal partisans such as Johnson Toribiong and resisted by the former Progressive partisans, such as Tosiwo Nakamura and Sadang Silmai.<sup>440</sup>

*C. The Quitclaim Deeds and the Return of Public Lands to Palau.*

On July 24, 1979,<sup>441</sup> the PPLA and some municipal public land authorities<sup>442</sup> having been created, the Trust Territory government began returning Palau’s public lands by executing a first round of quitclaim deeds to PPLA.<sup>443</sup> It is significant that, although PPLA was the grantee, a

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<sup>437</sup> PALAU CONSTITUTIONAL CONVENTION, CONSTITUTIONAL PROPOSAL NO. 21, DRAFT 2 (1979); *accord* STANDING COMM. REPORT NO. 55, *supra* note 387, *adopted* Mar. 15, 1979; PALAU CONSTITUTIONAL CONVENTION, FORTY-SEVENTH DAY SUMMARY JOURNAL 11 (Mar. 15, 1979).

<sup>438</sup> PALAU CONSTITUTIONAL CONVENTION, FORTY-FOURTH DAY SUMMARY JOURNAL 2 (Mar. 12, 1979).

<sup>439</sup> PALAU CONSTITUTIONAL CONVENTION, STANDING COMM. REPORT NO. 76 (Mar. 27, 1979); PALAU CONSTITUTIONAL CONVENTION, FIFTY SECOND DAY SUMMARY JOURNAL 4-6 (Mar. 28, 1979) (indicating that Draft 4 of Proposal No. 21 was considered upon final reading with the transfer of title language intact, and that this language thus presumably had passed third reading).

<sup>440</sup> *Compare* CONSTITUTIONAL PROPOSAL NO. 21, DRAFT 1, *supra* note 433, (proposed by the Committee of General Provisions, chaired by Nakamura), *with* STANDING COMM. REPORT NO. 55, *supra* note 387, at 4 (prepared by the Committee on Style and Arrangement, chaired by Silmai); PALAU CONSTITUTIONAL CONVENTION, FORTY-SECOND DAY SUMMARY JOURNAL 4 (Mar. 10, 1979).

<sup>441</sup> Although that is the date the deeds were made conveying the lands in most Municipalities to PPLA, Ngaraard may somehow have managed to have its public lands conveyed earlier, in May 1977. The author recalls seeing evidence that this may have happened while reviewing the land return deeds on file as recorded documents in the custody of the Clerk of the Palau Supreme Court.

<sup>442</sup> As discussed *infra*, Public Law No. 5-8-10, § 13, provided that Palau’s Municipalities could create their own public land authorities to hold public land at the Municipal level. By June 1, 1980, some municipalities had created municipal public lands authorities. Affidavit of John O. Ngiraked (Jul. 13, 1994) (on file with the author); Affidavit of West Saiske (Aug. 17, 1994) (on file with the author). Koror’s Land Authority was legislatively created in 1979. Koror Mun. Ord. No. 112-79 (Feb. 26, 1979).

<sup>443</sup> *e.g.* KOROR QUITCLAIM DEED, *supra* note 393.

separate deed was prepared for the public lands conveyed in each municipality.<sup>444</sup> As a matter of formality, this could have been recognition of the provision in Public Law No. 5-8-10 that contemplated the creation of the municipal authorities. It also may have been in recognition of a recent Con-Con victory by Liberals on the issue of whether title to all the returned public lands, actively used or not, would pass to the municipal level.<sup>445</sup> As a practical matter, the Trust Territory government's conveyance by separate deeds for the lands in each municipality made transfer of title to the municipal authorities much easier, because PPLA was thus enabled to (and did) merely re-type the deeds, changing only the grantor and grantee, in order to pass the lands on to the municipal lands authorities.<sup>446</sup> It is also worth noting the appropriateness of the choice of the quitclaim instrument. That choice was an apparent recognition of the presumed position of many Palauans that the previous occupying powers, and thus the Trust Territory as the successor of those powers, never had legitimate title to those lands arbitrarily appropriated, especially *chutem buai*, the purported taking of which was apparently not even mentioned to the owners.<sup>447</sup>

Each of the July 24, 1979, deeds withheld several parcels in each municipality: typically, those being used by the government, those for which homestead entry permits had been granted, and, in some cases, lands that had been leased to various Palauan individuals and entities by the Trust Territory government.<sup>448</sup> Although the theory behind the retention of these lands was that they were in "active use" by the Trust Territory government, that proposition does not withstand close scrutiny with respect to several properties.<sup>449</sup>

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<sup>444</sup> *Id.*

<sup>445</sup> This is the author's admitted speculation, though it appears to fit with the other circumstances described here.

<sup>446</sup> Compare KOROR QUITCLAIM DEED, *supra* note 393, with e.g. QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO KOROR MUNICIPAL PUBLIC LANDS AUTHORITY (May 14, 1980) (on file as recorded document in the custody of the Clerk of the Palau Supreme Court).

<sup>447</sup> KANESHIRO, *supra* note 20, at 308 ("The German administration apparently considered all lands not occupied or cultivated to be government lands although it does not appear that this status was widely known among Palauans"); McCutcheon, *supra* note 20, at 91 ("Early in the German administration, all of the lands not regularly used were labeled government 'public land'"); McCutcheon, *supra* note 20, at 92 (stating that the Japanese treated the German Administration's government lands as Japanese Administration's government lands); Vesting Order, *supra* note 9, ¶ 1 (stating that public land held by the Japanese Administration deemed by the Trust Territory Administration to be vested in its Area Property Custodian).

<sup>448</sup> E.g., KOROR QUITCLAIM DEED, *supra* note 393.

<sup>449</sup> As examples, Quarter Nos. 15 and 17 in Koror, withheld as needed by Trust Territory of the Pacific Islands ("TTPI") from the KOROR QUITCLAIM DEED, *supra* note

In late 1982, by a second series of quitclaim deeds, the Trust Territory government conveyed to PPLA most of the properties withheld from the July 24, 1979, deeds.<sup>450</sup> It appears that the conveyance of these remaining properties was delayed until an agreement had been executed between the local land authority in Koror, where the bulk of the withheld lands were located, and the national government, which had by then succeeded the Trust Territory government as the “active user” of most of the withheld lands.<sup>451</sup> Such an agreement was executed with respect to the Koror lands by President Remeliik, PPLA Chairman John O. Ngiraked,<sup>452</sup> and Koror Municipal Public Lands Authority (“KMPLA”) Chairman Ibedul Yutaka M. Gibbons, at a public ceremony on June 17, 1982, the seventh anniversary of Belau Day.<sup>453</sup> President Remeliik, PPLA Chairman Ngiraked, and Angaur Magistrate Esteban Augustin executed another agreement with respect to Angaur’s public lands on July 2, 1982.<sup>454</sup> A third agreement was prepared with respect to the public lands in Ngaraard, but

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393, were being provided free of charge to Marilyn Whipps, a politician’s wife, and Peter Tsao, a private capitalist and leading retailer in Palau, respectively; the Malakal port facility was withheld as being “actively used” even though it was under lease to a private firm, Belau Transfer and Terminal Company; the Page communication site in Meyuns was withheld as being “actively used” even though it had long been abandoned and was not “actively,” or even passively, used by TTPI. The author recalls these matters well, and preserved his notes of these matters, from the time he was engaged in litigation and settlement negotiations based on these facts in *Wenty v. Koror State Government*, Civil Action No. 70-93 (Tr. Div. 1993), *Ngirmang v. ROP*, Civ. No. 596-89 (Tr. Div. 1989), and *Koror State Government v. Republic of Palau*, Civil Action No. 21-97 (Tr. Div. 1997).

<sup>450</sup> *E.g.*, QUITCLAIM DEED FROM TRUST TERRITORY OF THE PACIFIC ISLANDS CONVEYING PUBLIC LANDS IN KOROR TO PALAU PUBLIC LANDS AUTHORITY (Dec. 6, 1982) (on file as recorded document in the custody of the Clerk of the Palau Supreme Court) [hereinafter SECOND KOROR QUITCLAIM DEED].

<sup>451</sup> Letter from Patrick Smith, Koror Municipality Legal Counsel, to Janet McCoy, High Commissioner, Trust Territory of the Pacific Islands (June 21, 1982) (on file with the office of the Legal Counsel for Koror State Government).

<sup>452</sup> Mr. Ngiraked was the former head of the Progressive party, which opposed the return of lands to the municipal level. MELLER, *supra* note 8, at 73. At a 1997 deposition, he testified that his change of heart was based on the victory of the Liberal faction over the Progressive faction at the Constitutional Convention. Dep. of John O. Ngiraked, *Wenty v. Koror State Government*, No. 70-93, 105-08 (Jan. 18, 1997).

<sup>453</sup> AGREEMENT BETWEEN THE REPUBLIC OF PALAU, PALAU PUBLIC LANDS AUTHORITY, AND KOROR MUNICIPAL PUBLIC LANDS AUTHORITY (Jun. 17, 1982) (on file at Koror State Public Lands Authority); Conversation with Ibedul Yutaka M. Gibbons, Ibedul, in KOROR, REPUBLIC OF PALAU (December 1995); Conversation with John O. Ngiraked, former Palau Public Lands Authority Chairman, in KOROR, REPUBLIC OF PALAU (1997).

<sup>454</sup> The author came across these documents while working on *Wenty v. Koror State Government*, Civil Action No. 70-93 (Tr. Div. 1997), and cited them in a brief supporting summary judgment filed in that case in December 1995. The agreements may be on file as recorded documents in the custody of the Clerk of the Palau Supreme Court.

appears to have been recorded, or at least deposited with the other agreements and deeds of that era in the custody of the Clerk of Courts, without having been executed.<sup>455</sup>

The Belau Day and Angaur Agreements provided that the Republic and PPLA would transfer to those municipalities title to all public lands within their boundaries “immediately” upon receipt of the same from the Trust Territory government.<sup>456</sup> In return, KMPLA and Angaur obligated themselves to allow the national government to use all public lands in those municipalities (previously deeded or otherwise) that the Republic legitimately needed for necessary government purposes on behalf of the people of Palau.<sup>457</sup> On December 6, 1982, in apparent reliance on those agreements,<sup>458</sup> the Trust Territory conveyed nearly all of its remaining claim to title of Palauan lands to PPLA.<sup>459</sup>

*D. The PPLA Quitclaim Deeds to the Municipal Land Authorities.*

Of the lands received by PPLA in the 1979 quitclaim deeds, the bulk of those lands located in most Palauan municipalities were in turn

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<sup>455</sup> The author's notes made in 1995 working on *Wenty v. Koror State Government*, Civil Action No. 70-93 (Tr. Div. 1993) show that he came across such a document while doing so. That agreement may be on file as recorded documents in the custody of the Clerk of the Palau Supreme Court.

<sup>456</sup> These documents are on file with the Koror State Public Lands Authority. A copy of the Belau Day Agreement was filed by the author as Exhibit A to Affidavit of KSPLA Director Alexander Merep filed December 20, 1995 in the case of *Wenty v. Koror State Government*, Civil Action No. 70-93 (Tr. Div. 1993) supporting a summary judgment motion and on file with the Clerk of the Palau Supreme Court.

<sup>457</sup> AGREEMENT BETWEEN THE REPUBLIC OF PALAU, PALAU PUBLIC LANDS AUTHORITY, AND KOROR MUNICIPAL PUBLIC LANDS AUTHORITY, *supra* note 453, at 1.

<sup>458</sup> On June 21, 1982, just after the Belau Day Agreement was executed, Koror's attorney transmitted it to the High Commissioner under cover of a letter to her stating:

During your visit to Palau in March, you urged the national government and the State of Koror to settle their differences regarding the return of public lands. I am pleased to inform you that the parties have entered into an agreement (a copy of which is enclosed) which resolves the questions that confronted us. We are hopeful that the Trust Territory will complete its transfer of public lands to the Palau Public Lands Authority as quickly as possible.

Letter from Patrick Smith, Koror Municipality Legal Counsel to Janet McCoy, High Commissioner, Trust Territory of the Pacific Islands (June 21, 1982). The author typed this passage from Mr. Smith's letter in 1997 into his notes while employed by Koror State Government, where this letter should remain on file, and, in 1996, the author conferred about these matters with Mr. Smith in Del Mar, California, as Mr. Smith by then practiced law in San Diego, California.

<sup>459</sup> SECOND KOROR QUITCLAIM DEED, *supra* note 450.

deeded by PPLA to the land authorities of those municipalities.<sup>460</sup> Of the lands received by PPLA in the 1982 deeds, PPLA made a second series of controversial deeds, executed by PPLA's Chairman Ngiraked, conveying title to those previously-withheld lands to the municipal lands authorities of Koror, Airai, Angaur, and Ngaremlengui.<sup>461</sup> This February 17, 1983 deed to Koror was made specifically "pursuant to" the June 17, 1982, Belau Day Agreement, which, again, provided that PPLA would pass title to all public lands to the Koror Authority, but that the Republic would be able to use such public lands in Koror that it legitimately needed for necessary government purposes.<sup>462</sup> This second round of deeds conveyed all previously non-conveyed lands, with the exception of the very few lots still retained by the Trust Territory government.<sup>463</sup> Although title to many

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<sup>460</sup> Compare KOROR QUITCLAIM DEED, *supra* note 393, and other contemporaneous deeds from Trust Territory of the Pacific Islands to Palau Public Lands Authority (all on file as recorded documents with the Clerk of the Supreme Court), with QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO KOROR STATE PUBLIC LANDS AUTHORITY (May 14, 1981) [QUITCLAIM DEED, TO KOROR STATE PLA, May 14, 1981] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court), QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO AIMELIK PUBLIC LANDS AUTHORITY (May 16, 1980) [hereinafter QUITCLAIM DEED, TO AIMELIK PLA, May 16, 1980] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court), QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO MELEKEOK PUBLIC LANDS AUTHORITY (May 16, 1980) [hereinafter QUITCLAIM DEED, TO MELEKEOK PLA, May 16, 1980] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court), QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO NGEREMLENGUI PUBLIC LANDS AUTHORITY (May 21, 1980) [hereinafter QUITCLAIM DEED, TO NGEREMLENGUI PLA, May 21, 1980] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court), QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO AIRAI PUBLIC LANDS AUTHORITY (May 21, 1980) [hereinafter QUITCLAIM DEED, TO AIRAI PLA, May 16, 1980] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court), and QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO NGARCHELONG PUBLIC LANDS AUTHORITY (May 28, 1980) [hereinafter QUITCLAIM DEED, TO NGARCHELONG PLA, May 16, 1980] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court).

<sup>461</sup> *E.g.*, QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY AND KOROR STATE PUBLIC LANDS AUTHORITY (Feb. 17, 1983) [hereinafter QUITCLAIM DEED, TO KOROR STATE PLA, Feb. 17, 1983] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court). The author has reviewed similar, contemporaneous deeds from PPLA to the Public Lands Authorities of Airai and Ngaremlengui, and to the State of Angaur, on file as a recorded document in the custody of the Clerk of the Palau Supreme Court, in the course of defending the validity of the February 17, 1983 Koror Deed in *Ngirmang v. ROP*, Civ. No. 596-89 (Tr. Div. 1989); *Wenty v. Koror State Government*, Civ. No. 70-93 (Tr. Div. 1993); and *Luii v. Meriang Clan*, Civ. Nos. 210-90, 227-90, 242-90, 275-90 (Tr. Div. 1990).

<sup>462</sup> QUITCLAIM DEED, TO KOROR STATE PLA, Feb. 17, 1983, *supra* note 461, at 1.

<sup>463</sup> QUITCLAIM DEED, TO KOROR STATE PLA, Feb. 17, 1983, *supra* note 461. In 1996, in the course of defending the validity of the February 17, 1983 Koror Deed in *Ngirmang v. ROP*, Civ. No. 596-89 (Tr. Div. 1989); *Wenty v. Koror State Government*, Civ. No. 70-93 (Tr. Div. 1993); and *Luii v. Meriang Clan*, Civ. Nos. 210-90, 227-90, 242-

lots actively used by the national government thus passed to these municipalities, pursuant to the Belau Day Agreement and similar agreements, the national government retained the right to use state public lands it legitimately needed to perform necessary government functions, regardless of whether or not actively used, and even if previously deeded in the first round of deeds in 1980 and 1981.<sup>464</sup>

All the PPLA conveyances to the municipal and state land authorities were, from the outset, politically charged and controversial. The initial opponents of the deeds began by questioning PPLA's ability to deed lands to the municipal land authorities at all. Their early efforts are visible in a curious<sup>465</sup> 1978 lawsuit by PPLA seeking a declaration that it could keep revenues from public lands for its own use without remitting them to the treasury's general fund.<sup>466</sup> The Court, through an American Judge apparently troubled by the possibility that revenue from Koror public lands might eventually inure to the municipality of Koror, decided to challenge the modest measure of Palauan self-rule embodied in Public Law 5-8-10.<sup>467</sup> He did this with the judicially unnecessary and politically loaded observation that, "[o]f course, overriding the above questions is whether the formation of municipal land authorities is provided for or permitted in Secretarial Order No. 2969."<sup>468</sup>

Accordingly, a Palauan citizen, apparently dissatisfied with the governing statute, Public Law 5-8-10, commenced a class action lawsuit against PPLA seeking, among other things, a ruling that PPLA exceeded its authority under Secretarial Order 2969 by deeding lands to KMPLA.<sup>469</sup> He argued that Secretarial Order No. 2969 did not provide for the creation of the municipal land authorities, as did Public Law No. 5-8-10, and that that provision of Public Law No. 5-8-10 therefore had no effect.<sup>470</sup> The

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90, 275-90 (Tr. Div. 1990), the author reviewed the PPLA Quitclaim Deeds from PPLA to the Public Lands Authorities of Airai and Naremlengui, and to the State of Angaur, and noted that they all served to convey to those local entities almost all lands that TTPI had initially withheld then finally conveyed to PPLA.

<sup>464</sup> *Id.*

<sup>465</sup> It is not clear that PPLA had by 1978 received title to any public lands at all from the Trust Territory. The KOROR QUITCLAIM DEED, *supra* note 393, was not executed until the following year.

<sup>466</sup> Complaint, Palau Public Lands Authority v. Sadang M. Silmai, Civil Action No. 93-78 (T.T.H.Ct. Tr. Div. Aug 22, 1978).

<sup>467</sup> *Id.*

<sup>468</sup> PPLA v. Silmai, Civ. No. 93-78, 6, Judgment (T.T. H. Ct., Tr. Div. Dec. 5, 1978).

<sup>469</sup> Kekerelechad v. PPLA, Civ. No. 64-80, Judgment (T.T. H. Ct., Tr. Div. Feb 16, 1982).

<sup>470</sup> *Id.* at 1-2.



Court, quoting a U.S. Department of the Interior study of Secretarial Order No. 2969<sup>471</sup> for the proposition that the order specifically contemplated that “[a] sub-entity may for example, hold land in trust for the people of a single municipality,” held that “the establishment of the Koror Municipal Public Lands Authority is not an attempt to contravene said Secretarial Order.”<sup>472</sup> The outcome of that case apparently settled the question to the satisfaction of the national government at the time, which, from January 1981 to June 1985, was presided over by Haruo Remeliik, a Liberal partisan from Peleliu.<sup>473</sup>

Then, in a 1985 case, the Trial Division of the Palau Court attempted to void all deeds from PPLA to Koror’s land authority by holding that PPLA was unable to pass on its duty as trustee over public lands to state land authorities.<sup>474</sup> That there was a degree of judicial activism embodied in this decision finds support in the fact that both litigants—the Republic of Palau and Koror State—appeared to have shared the view that the February 17, 1983, deed from PPLA to KMPLA—was *valid*.<sup>475</sup> Not surprisingly, the Appellate Division overturned this holding. That restoration of the validity of the deeds to Koror, however, was based on the narrow ground that all the voided transactions were not before the court.<sup>476</sup> Because the court’s holding was on that narrow basis, and because the holding expressly contemplated that “the same issues may be properly presented to the court in future litigation,” the court did not bring the desired finality to this issue.<sup>477</sup> The court did, however, find that the February 17, 1983, deed from PPLA to KMPLA was sufficient to convey the one lot at issue in that case.<sup>478</sup> In that respect, the court explicitly held that PPLA could legally pass on *some* of its trusteeship duties to the local level.<sup>479</sup> The court for that reason must necessarily have believed that there

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<sup>471</sup> U.S. DEP’T OF THE INTERIOR, OFFICE OF TERRITORIAL AFFAIRS, STAFF STUDY ON ADMINISTRATION CONCERNS REGARDING THE TRANSFER OF TRUST TERRITORY PUBLIC LANDS IN ACCORDANCE WITH SECRETARIAL ORDER NO. 2969 2 (1975), at 2.

<sup>472</sup> *Kekerelchad*, Civ. No. 64-80, at 2-3.

<sup>473</sup> This is the author’s recollection from his work on *Ngirmang v. ROP*, Civ. No. 596-89; *Wenty v. Koror State Government*, Civ. No. 70-93; and *Luii v. Meriang Clan*, Civ. Nos. 210-90, 227-90, 242-90, 275-90.

<sup>474</sup> *ROP v. Pacifica Development Corp. v. KSG*, 1 Palau Intrm. 214, 219-21 (Tr. Div. 1985).

<sup>475</sup> Appellee ROP’s Responding Brief, at 1, *KSG v. ROP v. Pacifica Development Corp.*, Civ. App. No. 24-91, (“Malakal quarry site . . . was deeded . . . by the Republic to Koror State Public Lands Authority.”) (on file with the Clerk of the Palau Supreme Court).

<sup>476</sup> *ROP v. Pacifica Development Corp.*, 1 Palau Intrm. 383 (Tr. Div. 1987).

<sup>477</sup> *Id.* at 396.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

was no reason to render that particular deed ineffective or prevent KMPLA from administering the parcel at issue at that time.

Three years later, when the Appellate Division next considered “the state of the law pertaining to transfer of public lands from ROP to the various states,”<sup>480</sup> it finally confirmed that Public Law 5-8-10 gave PPLA the power, but not necessarily the duty, to convey title to lands, *along with all or part of its duty to administer those lands*, to the land authority of the state where the lands are located.<sup>481</sup> In another three years, the Appellate Division confirmed that, under Public Law 5-8-10,<sup>482</sup> PPLA “may assign to a state authority all of the ‘rights, interests, powers, responsibilities, duties, and obligations’” that PPLA, as opposed to the national government, possesses by statute.<sup>483</sup>

Despite the assassination of Liberal President Remeliik in 1985,<sup>484</sup> Liberals held the Presidency for eight more years.<sup>485</sup> During those administrations, PPLA, once having conveyed most of the public lands back to the municipal, and later state, authorities,<sup>486</sup> was allowed to languish. The President-appointed Attorney General, when the occasion arose, affirmed the validity of the PPLA deeds to the municipalities.<sup>487</sup>

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<sup>480</sup> ROP v. Francis Toribiong v. Airai State Public Lands Authority, 2 Palau Intrm. 43, 46 (1990). By contrast, in a prior action, the Trust Territory Court had issued a writ of mandamus necessarily based on the premise that PPLA had a *duty* to convey lands to KSPLA. See Petition for Writ of Mandate and for Injunctive Relief, Koror Municipality v. PPLA, Civil No. 121-79 (T.T.H.Ct. Tr. Div. Oct. 15, 1979); *Writ of Mandamus*, Koror Municipality v. PPLA, Civil Action No. 121-79 (T.T.H.Ct. Tr. Div., Jan. 31, 1980).

<sup>481</sup> ROP v. Francis Toribiong v. Airai State Public Lands Authority, 2 Palau Intrm. 43, 46 (1990).

<sup>482</sup> Particularly the portion now codified at 35 PNCA §210(j) (2005).

<sup>483</sup> KSG v. ROP v. Tmetuchl, 3 Palau Intrm. 314, 315 (1993).

<sup>484</sup> *Palau Assassination*, ORLANDO SENTINEL, Jul. 2, 1985, available at [http://articles.orlandosentinel.com/1985-07-02/news/0310180194\\_1\\_assassin-of-president-haruo-election-to-replace](http://articles.orlandosentinel.com/1985-07-02/news/0310180194_1_assassin-of-president-haruo-election-to-replace).

<sup>485</sup> The next two Presidents of the Republic were Lazarus Salii and Ngiratkel Etpison both of whom the author understands to have been affiliated with the Liberal stance on public lands.

<sup>486</sup> After 1981, the effective date of the Palau Constitution, the Palauan Municipalities formed themselves into States under PALAU CONST. art. XI. Koror's State Constitution, for example, became effective October 21, 1983. Koror Const. art XII, § 1. As each state that had formed a municipal authority became a state, its land authority changed its name from Municipal Public Lands Authority to State Public Lands Authority in accordance with the revision and codification of Pub. L. No. 5-8-10 § 10 (Dec. 28, 1974) at 35 P.N.C. § 215 (1986).

<sup>487</sup> See, e.g., Appellee ROP's Responding Brief at 1, KSG v. ROP v. Pacifica Development Corp., Civ. App. No. 24-91 (“Malakal quarry site . . . was deeded . . . by the Republic to Koror State Public Lands Authority”); Motion to Dismiss at 2, Ngirmang v. ROP, Civ. No. 592-89, (Nov. 8, 1989) (“The ROP does not claim ownership of the

When a Progressive partisan became President in 1993, the controversy revived as the Attorney General and PPLA began a new attempt to have the courts void the final February 17, 1983, deed from PPLA to KMPLA.<sup>488</sup> In addition, the new administration made more general efforts to increase PPLA's control over the municipal, now state, authorities by promulgating regulations limiting the powers of the state public land authorities to administer and manage the public lands entrusted to them.<sup>489</sup> The Attorney General advised the President to revive the PPLA, which had ceased to function after quitclaiming most of the public lands to the municipalities, and to hire legal counsel for PPLA to help it assess its statutory rights and duties.<sup>490</sup> Once the Nakamura administration retained counsel for the PPLA, the PPLA began a fairly aggressive legal and political campaign to recover already-transferred lands.<sup>491</sup>

On the legal front, PPLA intervened in a number of semi-somnolent, long-pending lawsuits between the Republic and Koror, asserting that the February 17, 1983, PPLA/KMPLA deed was void.<sup>492</sup> The resulting uncertainty over title to actively used and previously used public lands in Koror was not resolved until a 1997 agreement settling those claims.<sup>493</sup> On the political front, PPLA promulgated regulations<sup>494</sup> that allowed the Republic to assert its regulatory powers to assert a degree

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hospital land. It believes the land belongs to the State of Koror.”).

<sup>488</sup> Note that President Nakamura's interest in Belau Transfer and Terminal Company, which leased the Port Facility through a TTPI lease set to expire during his Presidency and by then in the hands of KMPLA, may have motivated him as well as his political philosophy. The Belau Transfer and Terminal lease is on file with Koror State Public Lands Authority. The author has this knowledge from representing KSPLA in negotiations with President Nakamura to negotiate a renewal or extension of the lease.

<sup>489</sup> PALAU PUBLIC LANDS AUTH., PROPOSED REGULATIONS AFFECTING NATIONAL AND STATE PUBLIC LANDS AUTHORITIES (Mar. 24, 1995).

<sup>490</sup> Memorandum from Palau Attorney Gen. on Pub. Lands in Koror State to President Nakamura (Jan. 27, 1993).

<sup>491</sup> President Nakamura first hired Scott Pinsky, Esq., then Ariel Steele, Esq. as PPLA Legal Counsel. Mr. Pinsky and Ms. Steele caused PPLA to intervene in *Ngirmang v. ROP*, Civ. No. 592-89, *Wenty v. Koror State Government*, Civ. No. 70-93; *Luii v. Meriang Clan*, Civ. Nos. 210-90; 227-90; 242-90 & 275-90; and Mr. Pinsky initiated litigation concerning other properties conveyed by PPLA to KMPLA in the SECOND KOROR QUITCLAIM DEED, *supra* note 424. This is from the author's personal knowledge gained from defending Koror State Government and KSPLA from these actions.

<sup>492</sup> *Ngirmang v. ROP*, Civ. No. 596-89; *Wenty v. Koror State Government*, Civ. No. 70-93; *Luii v. Meriang Clan*, Civ. Nos. 210-90; 227-90; 242-90 & 275-90.

<sup>493</sup> LAND SETTLEMENT AGREEMENT BETWEEN THE REPUBLIC OF PALAU, PALAU PUBLIC LANDS AUTHORITY, KOROR STATE GOVERNMENT, AND KOROR MUNICIPAL PUBLIC LANDS AUTHORITY (Feb. 3, 1997).

<sup>494</sup> PALAU PUB. LANDS AUTH., PROPOSED REGULATIONS AFFECTING NATIONAL AND STATE PUBLIC LAND AUTHORITIES (issued Mar. 25, 1995, reissued Aug. 19, 1996).

of control over the manner in which the state authorities chose to handle the public lands entrusted to them.<sup>495</sup>

#### V. PALAUAN ENTITIES HOLDING LAND IN TRUST

As a result of the TTPI deeds, and the prior history of Palauan land tenure, public lands came to be held by PPLA and the state land authorities in at least the following five ways: lands received but not conveyed by PPLA; lands received by the state authorities directly from the Trust Territory government; lands received by the state authorities from PPLA; *chutem buai* and *chutem beluu* retained by the traditional villages despite the foreign occupations; and fill lands, or *umetate*.<sup>496</sup>

##### A. Lands Held in Trust by Palau Public Land Authority

Even after the 1983 deeds to the municipal authorities, PPLA held title to some public land.<sup>497</sup> Again, all lands in Palau held by Japanese persons or entities vested in the Trust Territory Alien Property Custodian by the 1951 Vesting Order.<sup>498</sup> Through proceedings under Regulation No. 1, many such lands were formally “released,” piece-by-piece, to the Trust Territory government, which, of course, already held title to the released lands pursuant to the Vesting Order.<sup>499</sup> Most, but not all, of the Trust Territory government’s public lands were conveyed to PPLA in two sets of quitclaim deeds.<sup>500</sup> The first set was made on July 24, 1979, and the second on December 6, 1982.<sup>501</sup> The few lands that were retained by the Trust Territory government were either conveyed to PPLA by later separate deeds, or became the property of the Republic by operation of law on October 1, 1994, the effective date of Palauan independence.<sup>502</sup>

Of the lands received by PPLA in 1979, most public lands in Airai, Aimeliik, Koror, Melekeok, Ngarchelong, Ngatpang, Ngiwal, Ngchesar,

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<sup>495</sup> *Id.* at Part IV, § 3(a).

<sup>496</sup> *See infra* Part V.B.4.

<sup>497</sup> Public lands in some States, such as Pelelieu, had not been conveyed by PPLA. The deeds showing what was and was not conveyed were recorded with the Clerk of the Supreme Court and in most cases remain on file there as public records.

<sup>498</sup> Vesting Order, *supra* note 9.

<sup>499</sup> *See, e.g.*, PALAU DIST. LAND TITLE OFFICER, DETERMINATION AND RELEASE NO. 74 (Nov. 30, 1956); PALAU DIST. LAND TITLE OFFICER, DETERMINATION AND RELEASE NO. 187 (Jan. 22, 1962); Itpik Martin v. Trust Territory of the Pacific Islands, Civ. No. 112 (Tr. Div. Sept. 4, 1958); Ebil v. Trust Territory of the Pacific Islands, Civ. No. 101, slip op. at 2 (Sept. 24, 1958); Ngirameriang v. Trust Territory of the Pacific Islands, Civ. No. 105 slip op. at 3 (Tr. Div. Sept. 4, 1958).

<sup>500</sup> *See supra* Part IV.C.

<sup>501</sup> *See supra* Part IV.C.

<sup>502</sup> PALAU CONST., art. XV, § 4.

and Ngaremlengui were in turn deeded by PPLA to the land authorities of those municipalities.<sup>503</sup> Based on the records of these transactions available from the Clerk of Courts, no such lands appear to have been conveyed to the Ngaraard<sup>504</sup> or Peleliu authorities.<sup>505</sup> Of the lands received by PPLA in the 1982 quitclaim deeds, only Koror and Airai appear to have received all the lands within their boundaries.<sup>506</sup> Thus, PPLA continued to hold title to some public lands in other states. Although the Republic and PPLA signed an agreement binding them to convey remaining public lands to Angaur, the agreed deed, if executed, may not have been promptly recorded with the Clerk of Courts.<sup>507</sup> If such a deed was made, and if it

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<sup>503</sup> QUITCLAIM DEED, TO KOROR STATE PLA, May 14, 1981, *supra* note 460; QUITCLAIM DEED, TO AIMELIUK PLA, May 16, 1980, *supra* note 460; QUITCLAIM DEED, TO MELEKEOK PLA, May 16, 1980, *supra* note 460; QUITCLAIM DEED, TO NGEREMLENGUI PLA, May 21, 1980, *supra* note 460; QUITCLAIM DEED, TO AIRAI PLA, May 21, 1980, *supra* note 460; QUITCLAIM DEED, TO NGARCHELONG PLA, May 28, 1980, *supra* note 460; QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO NGCHESAR PUBLIC LANDS AUTHORITY (Feb. 11, 1981) [hereinafter QUITCLAIM DEED, TO NGCHESAR PLA, Feb. 11, 1981] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court); QUITCLAIM DEED FROM PPLA TO NGIWAL PLA (Feb. 12, 1981) [hereinafter QUITCLAIM DEED, TO NGIWAL PLA, Feb. 12, 1981] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court); QUITCLAIM DEED FROM PALAU PUBLIC LANDS AUTHORITY TO NGATPANG PUBLIC LANDS AUTHORITY (Mar. 11, 1981) [hereinafter QUITCLAIM DEED, TO NGATPANG PLA, Mar. 11, 1981] (on file as recorded document in the custody of the Clerk of the Palau Supreme Court).

<sup>504</sup> The author has personal knowledge of these matters from reviewing the deeds and associated agreements on file with Palau's Clerk of Courts, and Court, and documents on file with KSPLA. That review by the author also revealed evidence in the form of a draft deed that PPLA Chairman John O. Ngiraked prepared a deed for Ngaraard, but apparently never executed it.

<sup>505</sup> Peleliu did not create its public lands authority until 1989. *See* PSPL No. 059-89 (1989). However, according to the author's notes from his work in Palau, an exception to the statement that Peleliu had not yet received its public lands would be the island of Ngedbus, which was deeded by the Trust Territory Government directly to Peleliu Municipality in 1959, much earlier than the conception of the public lands authority scheme, under authority of the Homestead Law, as outlined in Stanton, *supra* note 304, at 7-8.

<sup>506</sup> Compare KOROR QUITCLAIM DEED, *supra*, note 393, and SECOND KOROR QUITCLAIM DEED, *supra*, note 450, with QUITCLAIM DEED, TO KOROR STATE PLA, May 14, 1981, *supra* note 460, QUITCLAIM DEED, TO AIMELIUK PLA, May 16, 1980, *supra* note 460, QUITCLAIM DEED, TO MELEKEOK PLA, May 16, 1980, *supra* note 460, QUITCLAIM DEED, TO NGEREMLENGUI PLA, May 21, 1980, *supra* note 460, QUITCLAIM DEED, TO AIRAI PLA, May 21, 1980, *supra* note 460, QUITCLAIM DEED, TO NGCHESAR PLA, Feb. 11, 1981, *supra* note 503, QUITCLAIM DEED, TO NGIWAL PLA, Feb. 12, 1981, *supra* note 503, and QUITCLAIM DEED, TO NGATPANG PLA, Mar. 11, 1981, *supra* note 503.

<sup>507</sup> In investigating recorded evidence of Quitclaim Deeds at the office of the Clerk of Courts, the Division of Lands and Surveys, and the Koror State Public Lands Authority in November and December 1997, the author found an unrecorded agreement between the Municipality of Angaur, the Republic of Palau, and PPLA to convey all

was, like the July 2, 1982, agreement binding PPLA to make it, made to the Municipality of Angaur rather than a properly-constituted land authority, as required by law,<sup>508</sup> it may have been beyond the authority of PPLA to make it. In that case, PPLA may have retained lands in Angaur.

### *B. Lands Held In Trust By State Land Authorities*

As the Republic was established, its state land authorities acquired title to public lands in a number of ways. These different ways can be grouped into the four categories discussed below.

#### 1. Public Lands Received by Deed Directly from TTPI

In at least one instance, the Trust Territory government deeded public lands directly to a municipality. The Island of Ngedbus was deeded directly to the Municipality of Peleliu in 1959,<sup>509</sup> long before Secretarial Order 2969 or Public Law No. 5-8-10 set up the present system of state public lands authorities to administer such lands on the public's behalf. Other land appears to have been conveyed directly by the Trust Territory government to the former municipalities.<sup>510</sup> In such cases, the states created by the Palau Constitution should have succeeded in title to such lands.<sup>511</sup> If so, those lands should be recognized as held in trust by the land authorities in whose jurisdiction they lie.

#### 2. Public Lands Received by Deed from PPLA

The bulk of the public lands held in trust by the state authorities was conveyed by PPLA to the municipal public lands authorities pursuant to Public Law 5-8-10, § 10.<sup>512</sup> Title to this category of public land was subject to claims of previous owners or their heirs pursuant to the Palau

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Angaur public land to the Municipality of Angaur and noted its terms at that time. PPLA lacked authority to do that. Pub. L. No. 5-8-10 (Jun. 17, 1975) at § 10(12). The author could not find evidence that such a deed was ever given or recorded with the Clerk of Courts.

<sup>508</sup> Pub. L. No. 5-8-10, § 10(12) (Jun. 17, 1975); 35 PNC §§ 210(j), 215(b) (1986).

<sup>509</sup> See Palau Dist. Land Title Office, *Ngedbus Quitclaim Deed* (Feb. 25, 1959), recorded in BOOK 1, 44-45 March 3, 1959). According to the author, Recordation Book 1 is missing, but there is a copy of the deed on file with the Palau Land Court in the Claim 101 file.

<sup>510</sup> Stanton, *supra* note 304, at 9

<sup>511</sup> See Tebelual v. Magistrate Omelau, 2 T.T.R. 540, 544 (Tr. Div. 1964) (“[T]he Municipality has succeeded to whatever rights in the land the community formerly held under its traditional leaders.”); accord PALAU CONST. art. XV, § 6.

<sup>512</sup> From the author's notes, dated 1995-1997, of the Quitclaim Deeds from PPLA to those Municipal Lands Authorities on file with the Clerk of the Supreme Court.

Constitution and the land claims process.<sup>513</sup> Title held in trust to such lands also was subject to existing leases or agreements entered into by the Trust Territory government or the PPLA.<sup>514</sup> By contrast, a citizen successfully claiming such land from the state authority would receive it free and clear of any encumbrances except existing rights of way and leases or use rights of a term of less than one year.<sup>515</sup>

### 3. Chutem Buai and Chutem Beluu

As discussed at the outset,<sup>516</sup> in aboriginal Palau, most land was *chutem buai*, undeveloped land used for hunting, gathering, lumber, and so forth.<sup>517</sup> Similarly, *chutem beluu* was publicly owned lands developed to serve a particular village community, such as meeting houses, abandoned meeting houses, cemeteries, and stone pathways.<sup>518</sup> Both types of land were usually controlled by the village council, or *klobak*, but in some areas a district council or group of villages are said to have held control.<sup>519</sup> Ownership of such village land, if not taken under a foreign administration, should have devolved upon the municipality having jurisdiction over that area during the Trust Territory era, and then upon the successor state during the present Constitutional era.<sup>520</sup>

Whether or not conveyed to the municipal government by any means, this type of land could not be properly claimed by individuals,

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<sup>513</sup> PALAU CONST. art. XIII, § 10.

<sup>514</sup> 35 PNC § 213 (1986).

<sup>515</sup> 35 PNC § 1114(a) (1986); RPPL No. 4-43, § 13(a) (Mar. 5, 1996).

<sup>516</sup> See *supra* notes 20-28 and accompanying text.

<sup>517</sup> See, e.g., BARNETT, PALAUAN SOCIETY, *supra* note 50, at 96 (“in aboriginal days the only land that was given much attention was that within the village which provided homesites, and that close by which provided the taro fields in the swamp areas. The vacant land of the forest and the land of the denuded foothill area (*ked*) was neither clan property nor individually owned. Its status compared with our public lands. Its control was entrusted to the village council when any question of use arose. It never left this status of trust property. If a person wished to use it, he could get permission, but it remained public land. Normally there was little demand for it.”).

<sup>518</sup> See McCutcheon, *supra* note 20, at 47, 54, 90.

<sup>519</sup> KANESHIRO, *supra* note 20, at 296-297, 311-12; McCutcheon, *supra* note 20, at 50; see also Memorandum from Palau Congress for Civil Admin’r, *supra* note 55.

<sup>520</sup> See Tebelual v. Magistrate Omelau, 2 T.T.R. 540, 544 (Tr. Div. 1964) (“[T]he Municipality has succeeded to whatever rights in the land the community formerly held under its traditional leaders.”); see also Rechurudel v. PPLA, 8 Palau Intrm. 14, (1999) (“[T]he land in question was registered as Japanese government land in the Tochi Daicho, was thereafter acquired as public land by the Trust Territory, and duly conveyed to the PPLA by Secretarial Order 2969. Once in the custody of PPLA, the law contemplates public land being disposed of in only two ways—by a citizen’s successful claim for return of the land under 35 PNC § 1304(b), or by transfer to a duly established state public land s authority under 35 PNC § 215(a).”).

families, lineages, or clans under the Palau Constitution, the Palau Land Registration Act, or the Land Claims Reorganization Act of 1996.<sup>521</sup> Such claims require proof of prior ownership by the claiming person or kinship entity.<sup>522</sup> *Chutem buai* and *chutem beluu* were publicly owned in pre-colonial times.<sup>523</sup>

It remained unclear at independence whether the traditional chiefs' councils that had administered unjustly taken *chutem buai* and *chutem beluu* prior to their being taken by a foreign occupying entity might reclaim them pursuant to the Republic of Palau Constitution, article 13, section 10. Or whether title would simply remain vested in either the state public lands authorities as successor in interest to the administrative powers once held by the councils. On this point, the Palau Supreme Court held that, where the Land Commission had previously determined that land is *chutem buai*, and the traditional council of chiefs did not intervene during the Land Commission proceedings, title to the land rests with the state land authority.<sup>524</sup> Koror's land authority did file a claim in 1988 for this purpose pursuant to the Palau Lands Registration Act of 1987.<sup>525</sup> In addition, in January 1997, the State of Koror, as successor in interest to the old Koror Council of Chiefs, brought an action to recover Malakal Island and other areas of *chutem buai* under Article XIII, Section 10 of the Constitution.<sup>526</sup> That case was dismissed without prejudice by Koror as part of a global settlement of land matters between Koror and the Republic in 1997.<sup>527</sup>

#### 4. Umetate

During and after the foreign administrations, land was created by fill projects adjacent to coastal lands.<sup>528</sup> Such land in Palau is often

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<sup>521</sup> See PALAU CONST. Const. art. XIII, § 10; 35 PNC § 1104(b) (1986); RPPL No. 4-43, § 4.

<sup>522</sup> See PALAU CONST. art. XIII, § 10; 35 PNC § 1104(b); RPPL No. 4-43, § 4.

<sup>523</sup> See *supra* notes 18-30 and accompanying text.

<sup>524</sup> ROP v. Ngara-Irrai, 6 Palau Intrm. 159, 163 (1997); *accord* Tebelual, 2 T.T.R. at 544.

<sup>525</sup> The author recalls claim this from his representation of KSPLA with respect to this claim in proceedings before the Palau Land Claims Hearing Office. KSPLA's claim is on file with Koror State Public Lands Authority and the Palau Land Court.

<sup>526</sup> Koror State Government v Republic of Palau, Civ. No. 21-97 (Tr. Div. 1997).

<sup>527</sup> *Id.* The author recalls personally filing this dismissal with the Clerk of the Supreme Court shortly after the February 3, 1997 Land Settlement Agreement was executed.

<sup>528</sup> One such fill area supports the seaward portion of the Palau National Hospital, and was litigated in Ngirmang v. ROP, Civ. No. 596-89. Others include T-Dock and M-Dock, in Koror.



identified by the Japanese term *umetate*.<sup>529</sup> When the Japanese Navy occupied Palau in 1914, it issued a declaration that all land below the high water mark belonged to the Imperial Navy.<sup>530</sup> *Umetate* acquired by the Trust Territory government, and all “lands” located below the high water mark were all deemed to be “public lands” of the Trust Territory government,<sup>531</sup> and fill land became government land.<sup>532</sup> Notable areas added to Koror by Japanese reclamation efforts include much of Kemur and the Palau Pacific Resort area on Arakebesang, areas near Ice Box and the present Shell tank farm on Malakal, and the northern shore of Malakal, as well as many other areas that were individually owned during the Japanese occupation.<sup>533</sup> Because *umetate* was public land owned by the Trust Territory government, it was conveyed to PPLA in the 1979 and 1982 quitclaim deeds, as those deeds were structured to convey all land excluding a list of actively used parcels.<sup>534</sup> Using deeds of the same structure, PPLA conveyed that *umetate* to the state land authorities.

## VI. CONCLUSION

In pre-colonial times, most Palauan land was not “owned,” in that traditional leaders granted non-permanent use rights as the common good required.<sup>535</sup> Between 1899 and 1945, Germany and Japan took most Palauan land. The United Nations then appointed the United States to be the trustee of Palau pursuant to a strategic trust. The resulting Trust Territory government failed to convey lands to Palau during the 1940s, 1950s, 1960s, and most of the 1970s, despite its duty as trustee to “protect the inhabitants against the loss of their lands.”<sup>536</sup> While it withheld those lands, the Trust Territory administration, by stages, required the establishment of councils and congresses patterned on those of the United States, and the Trust Territory High Court imported American legal precedents and principles. Between January 28 and April 2, 1979, Palau’s constitutional convention crafted a constitution substantially resembling

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<sup>529</sup> KANESHIRO, *supra* note 20, at 309.

<sup>530</sup> *Id.*

<sup>531</sup> 67 T.T.C. (1970) §§ 1-2; *see also* Ngiraibiochel v. Trust Territory, 1 T.T.R. 485 (1958) (“Under what became known as Lord Hale’s Doctrine, it was conceived that land along the sea below the high watermark belonged to the Crown . . . in trust for the benefit of all the people.”).

<sup>532</sup> T.T.C. § 32 (1966).

<sup>533</sup> CIVIL PROP. CUSTODIAN, GEN. HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED FORCES, JAPANESE ASSETS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS 2-4, map (Jul. 31, 1949).

<sup>534</sup> *See supra* Part IV.C.

<sup>535</sup> *See supra* notes 18-30 and accompanying text.

<sup>536</sup> Trusteeship Agreement, *supra* note 5, art. 6(2) (1947).

that of the United States's. Promptly thereafter, the United States, as trustee, began returning the public lands it had held for so long. This suggests that acceptance by the Palauans of U.S. law was a necessary predicate to three overriding Palauan goals: obtaining the return of public lands, reestablishing Palau as a sovereign nation, and obtaining economic concessions from the United States. In that sense, Palau's adoption of U.S. laws, concepts, and democratic governance forms should not be uncritically accepted as voluntary.

There was no consultation with the Micronesians about the establishment of the Trust Territory in the first place. There was no Micronesian participation in the Vesting Order by which the American administrators came to hold public lands in trust for the Micronesians. The Micronesians did not choose those circumstances, and it can be said with much confidence that they would not have voluntarily done so.<sup>537</sup>

Nor does it appear that there was much Micronesian participation in the choice to formalize and perpetuate the public-land trust concept through the November 4, 1973, policy statement and Secretarial Order No. 2969. That concept came from the American administrators. From the apparent dissatisfaction of the Congress of Micronesia with the policy statement, reflected in their refusal to enact implementing legislation acceptable to the High Commissioner, it might be surmised that the Micronesians objected to the return of the lands being conditioned on the institution of the District land authorities to administer the returned lands. Nevertheless, through Secretarial Order 2969, over the objections of the Micronesian leadership, the United States did impose the land-trust system on Palau and the other Micronesian States as the *sine qua non* for the return of the public lands the United States had been charged to "protect" the Micronesians from losing.<sup>538</sup>

The ultimate choice by the United States to require the formation of the land trusts was almost certainly more benevolent than the acts of the German and Japanese administrations, especially toward the end of their respective jurisdictions. Nonetheless, the price paid by Palau for the recovery of its land included its adoption of American government forms and its acceptance of a land-trust system, resulting in a significant forfeiture of their traditional culture.

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<sup>537</sup> See *supra* Part IV.A.

<sup>538</sup> See *supra* Part IV.A.