

Jon M. Van Dyke
2515 Dole Street
Honolulu, HI 96822

IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION - STATE OF POHNPEI

STATE OF CHUUK, et al.,)	CIVIL ACTION NO. 1995-085
Plaintiffs,)	
v.)	ORDER GRANTING LEAVE TO
SECRETARY OF DEPARTMENT)	FILE SECOND AMENDED COMPLAINT,
OF FINANCE, et al.,)	DENYING MOTION TO DISMISS
Defendants.)	COMPLAINT, DENYING HEARING ON
)	MOTION TO DISMISS, AND
)	GRANTING MOTION TO STRIKE
)	

INTRODUCTION

In this action, the four states comprising the Federated States of Micronesia ("States") request a declaratory judgment that they are entitled to ownership of and control over the living marine resources in the FSM's Exclusive Economic Zone ("EEZ"), and that they are therefore entitled to revenues derived from the FSM's sale of fishing licenses¹ to entities conducting fishing operations in the EEZ. The EEZ is defined as the body of water extending out 200 miles from the outermost boundary of the States' territorial seas. 18 F.S.M.C. 104.

In support of their claims, the States assert that traditional and customary practices of the Micronesian people vest ownership of off-shore fishing resources in the island community adjacent to those waters. The States further contend that their right to ownership of these marine resources is supported by Article I, Section 1 of the FSM Constitution, which

¹ The Court's understanding is that these fees are also commonly referred to as "permit fees" under foreign fishing agreements.

defines the marine boundaries of each state, and by Article I, Section 2 of the Constitution, which establishes the principle of equidistance by which the boundaries between adjacent states are determined. Even if the FSM is found to have control over marine resources in the EEZ, the States argue that they are still entitled to 50% of the FSM's licensing fee revenues, because these revenues are taxes, and under Article IX, Section 5 of the FSM Constitution, not less than 50% of the revenue from national taxes is to be paid into the treasury of the state where collected.

Now before the Court are defendants' Motion to Dismiss plaintiffs' claims, pursuant to FSM Civ. R. 12 and plaintiffs' Motion for Leave to File Second Amended Complaint, pursuant to FSM Civ. R. 15(a). The Court will also address plaintiffs' Motion for a Hearing on defendants' Motion to Dismiss and Defendants' Motion to Strike Mr. Ramp's Affidavit.

DISCUSSION

I. Motion for Leave to File Second Amended Complaint

On September 19, 1995, defendants moved this Court to dismiss plaintiffs' declaratory judgment action for lack of subject matter jurisdiction and failure to state a justiciable claim. In response to that motion, plaintiffs moved for leave to amend their complaint to add requests for injunctive relief and damages, pursuant to FSM Civ. R. 15(a). Plaintiffs' proposed Second Amended Complaint seeks an injunction against the Secretary of the Department of Finance, requiring him to distribute revenues received from fishing licenses according to

the requirements of the FSM Constitution, and damages equal to the amount of revenues the National Government has received from the granting of fishing licenses in previous years which should properly have been distributed to the States. See Second Amended Complaint at 1-2.

Defendants oppose plaintiffs' motion for leave to amend. Defendants contend that allowing amendment of plaintiffs' complaint will not cure the Court's lack of jurisdiction over plaintiffs' claims. Regardless of whether plaintiffs' motion is granted, they argue, plaintiffs' action must be dismissed for jurisdictional reasons.

Under the FSM Rules of Civil Procedure, leave of Court to amend "should be freely given in order to effect the ends of justice." FSM Civ. R. 15(a). The Court finds that no prejudice will result from allowing plaintiffs to amend their complaint. Accordingly, Plaintiffs' Motion for Leave to File Second Amended Complaint is granted.

II. Motion to Dismiss

Defendants have moved to dismiss plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a justiciable claim, under FSM Civ. R. 12.² They present three

² On June 14, 1996, plaintiffs moved for a hearing on defendants' Motion to Dismiss. The parties have thoroughly briefed the relevant issues. See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, filed September 19, 1996; Plaintiffs' Memorandum of Points and Authorities in Response to Defendants' Motion to Dismiss Amended Complaint, filed November 1, 1995; Defendants' Memorandum in Reply to Motion to Dismiss and in Opposition to Plaintiffs' Motion to Amend Complaint, filed November 15, 1995; and Plaintiffs' Response to Defendants' Reply Memorandum Dated

arguments in support of their motion. First, they contend that the FSM Government and the Secretary of Finance are immune from suit under the FSM Sovereign Immunity Act, 6 F.S.M.C. 702. Second, they argue that plaintiffs' ownership claim presents a political question, which is not justiciable by the FSM Supreme Court. Third, they argue that plaintiffs lack standing to assert their tax claim, because if fishing license revenues are taxes, they are unconstitutional taxes to which the States cannot be entitled.³ The Court will address each of these arguments in turn.

A. Sovereign Immunity

Defendants assert that the Court lacks subject matter jurisdiction over this action, because plaintiffs' claims do not fall within any of the five specific categories of cases to which the FSM Government has waived its sovereign immunity under 6 F.S.M.C. 702. Moreover, no statute requires the Secretary of Finance to distribute fishing license revenues in the manner plaintiffs request, or permits an action to be maintained against the Secretary in his official capacity for his failure to do so.⁴

November 15, 1995, filed December 4, 1995. Accordingly, the Court finds that a hearing is unnecessary, and plaintiffs' Motion for Hearing is therefore denied.

³ Defendants' Motion to Dismiss argues that plaintiffs lack standing to assert their claim of ownership over EEZ marine resources because the declaratory relief the States seek in their Amended Complaint would not provide the States with an effective remedy. The requests for injunctive relief and damages contained in plaintiffs' Second Amended Complaint cure any standing problem with respect to these ownership claims.

⁴ Footnote 3 of Defendants' Memorandum in Reply to Motion to Dismiss and in Opposition to Plaintiffs' Motion to Amend

Plaintiffs respond that Article XI, Section 6 of the FSM Constitution gives the FSM Supreme Court jurisdiction over suits against the National Government and its officers, and over cases arising under the Constitution or the national laws. They further argue that the States' right to bring this specific action against the National Government is implicit in the constitutional structure of the FSM, as well as in Article XIII, Section 3 of the Constitution, which provides that "{i}t is the solemn obligation" of the National Government "to uphold the provisions of this Constitution." Even if the States' right to bring this action were not implicit in the Constitution, the States argue, their claims would nevertheless fall within the explicit waivers of sovereign immunity contained in 6 F.S.M.C. 702.

It is clear from the pleadings that the parties disagree fundamentally over the proper interpretation and application of the constitutional provisions that bear on the States' claims. The States take the position that they are entitled to fishing license revenues because the individual states of the FSM own and control the marine resources of the EEZ, both under custom and tradition and under Article I,

asserts that, to the extent plaintiffs claim that the Secretary has not properly administered 24 F.S.M.C. 510, plaintiffs' claim is premature because they have not exhausted their administrative remedies. Plaintiffs respond that it would be unrealistic to expect that the constitutional issues raised could be resolved in the context of an administrative hearing. The Court agrees. Exhaustion is not required where it would be futile to pursue an administrative remedy. See generally, McCarthy v. Madigan, 112A S. Ct. 1081, 1087-88 (1992); Cutler v. Hayes, 818 F.2d 879, 890-92 (D.C. Cir. 1987).

Sections 1 and 2 of the FSM Constitution, which respectively define the territory of the FSM⁵ and the territory of the States.⁶ See Second Amended Complaint, ¶ 3. The States further allege that Article IX, Section 5 of the FSM Constitution, addressing taxation, gives them, at a minimum, a right to 50% of the fishing license fees collected by the National Government. *Id.* The FSM Government takes the contrary position that Article IX, Section 2(m) of the Constitution provides the National Government with exclusive authority over marine resources in the EEZ, which includes the power to control all revenues from the regulation of these resources.

This Court has inherent subject matter jurisdiction over plaintiffs' claims. The FSM Constitution places upon the

⁵ Article 1, Section 1 of the Constitution defines the territory of the FSM as follows:

The territory of the Federated States of Micronesia is comprised of the Districts of the Micronesian archipelago that ratify this Constitution. Unless limited by international treaty obligations assumed by the Federated States of Micronesia, or by its own act, the waters connecting the islands of the archipelago are internal waters regardless of dimensions, and jurisdiction extends to a marine space of 200 miles, measured outward from appropriate baselines, the seabed, subsoil, water column, insular or continental shelves, airspace over land and water, and any other territory or waters belonging to Micronesia by historic right, custom, or legal title.

⁶ Article I, Section 2 of the Constitution provides that Each state is comprised of the islands of each District as defined by laws in effect immediately prior to the effective date of this Constitution. A marine boundary between adjacent states is determined by law, applying the principle of equidistance. State boundaries may be changed by Congress with the consent of the state legislatures involved.

judicial branch ultimate responsibility for interpretation of the Constitution. Suldan v. FSM, 1 FSM Intrm. 339, 343 (Pon. 1983). The States allege that the National Government has misinterpreted the language of the FSM Constitution, and based on that misinterpretation, has acted unconstitutionally in withholding fishing license fee revenues. As this Court has explained,

the words of the Constitution independently establish this Court's responsibility to review statutes enacted by Congress and other actions of officials governed by the Constitution and to refrain from enforcing or supporting any law or action which we find to be violative of the Constitution.

Id. at 344. Under the Supremacy Clause,

[The FSM] Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict.

FSM Const., art. II, § 1. If the Court were to accept defendants' erroneous interpretation of the reach of the FSM Government's implied immunity, in the future the executive and legislative branches of the National Government could interpret the Constitution in any manner they wished, and then utilize the doctrine of sovereign immunity to insulate themselves from challenge. To quote again from Suldan,

{A}ll persons purporting to exercise governmental powers available through governments established under [the FSM Constitution] are bound to act in accordance with the provisions of the Constitution. Officials, whether they be in the legislative, executive, or judicial branch, may not rely upon the Constitution for their powers while simultaneously disregarding the limits of those powers as provided in the Constitution.

1 FSM Intrm. at 344.

Even if the FSM Supreme Court's jurisdiction over the

States' claims were not implied under the Constitution itself, plaintiffs' Second Amended Complaint alleges sufficient facts to state a claim within the FSM's waiver of sovereign immunity. Under the Sovereign Immunity Act, the National Government has expressly waived its sovereign immunity in cases involving the following categories of claims:

- (1) Claims for recovery of any tax or penalty alleged to have been erroneously or illegally collected, or any penalty claimed to have been collected without or beyond legal authorization, or any sum alleged to have been excessive or improperly collected under applicable tax laws of the Federated States of Micronesia.
- (2) Claims for damages, injunction or mandamus arising out of alleged improper administration of statutory laws of the Federated States of Micronesia, or any regulations issued pursuant to such statutory laws.
- (3) Claims, whether liquidated or unliquidated, upon an express or implied contract with the Federated States of Micronesia.
- (4) Claims for injury or loss of property . . . caused by the negligent or wrongful act or omission of an employee of the National Government while acting within the scope of his office or employment . . .
- (5) Claims for any injuries suffered consequent upon conduct of a National Government employee or agent acting under color of authority which violates . . . individual rights secured under article IV of the [FSM Constitution].

6 F.S.M.C. 702. The Court finds that plaintiffs' Second Amended Complaint alleges sufficient facts to state a claim within Section 702(1), for recovery of a sum alleged to have been excessively or improperly collected by the FSM government under the applicable tax laws of the FSM, and within Section 702(2), for claims arising out of the improper administration of

statutory laws.⁷

Accordingly, the Court denies defendants' motion to dismiss to the extent that motion is based on defendants' sovereign immunity.

B. Political Question

Defendants next assert that the States' claimed entitlement to fishing license fee revenues presents a political question which is not justiciable by this Court. Defendants contend that the FSM Constitution commits the issue of marine resource ownership exclusively to Congress. They base this argument on Article IX, Section 2(m) of the Constitution, which provides that

The following powers are expressly delegated to Congress:

* * *

(m) [the power] to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines.

Defendants assert that the National Government's exclusive power to regulate the ownership and exploitation of these resources carries with it, in turn, the exclusive power to control revenues received from the granting of licenses to vessels to fish in the

⁷ Paragraph 13 of plaintiffs' Second Amended Complaint alleges that the States are entitled to 50% of the revenues the FSM Government derives from fines and forfeitures under 24 F.S.M.C. 510, and that some of these revenues have not been distributed to the States. Title 55 of the FSM Code is also relevant to plaintiffs' claims. Title 55 provides for the deposit of taxes and other revenues based on fines, fees and licenses into the General Fund, and then provides a mechanism for allotment of certain funds to the States. See 55 F.S.M.C. 209; Plaintiffs' Response to Defendants' Reply Memorandum Dated November 15, 1995, ¶ 2.

EEZ. Accordingly, they assert, the Court cannot resolve plaintiffs' claims without making a political decision.

Defendants further rely on Article XII, Section 1(a) of the Constitution, which states that "public money raised or received by the national government shall be deposited in a General Fund or special funds within the National Treasury. Money may not be withdrawn from the General Fund or special funds except by law." In the absence of a provision in the FSM Constitution or FSM statutory law for the distribution of revenues from the regulation of marine resources, they argue, any attempt by the Court to direct the allocation of these revenues will intrude upon an area reserved to the legislature.

The Court finds that the issues in this action do not present a purely political issue. Plaintiffs' Second Amended Complaint alleges a conflict between provisions of the FSM Constitution: Article I, Sections 1 and 2; Article IX, Section 2(m); and Article XI, Section 11. As the ultimate interpreter of the meaning of the FSM Constitution, the FSM Supreme Court must reconcile any conflict between sections of the Constitution if necessary for the resolution of a case or controversy properly before the Court. Innocenti v. Wainit, 2 FSM Intrm. 173, 179 (App. 1986); Suldan, 1 FSM Intrm. at 343-350. As we explained in Suldan, "the Constitution allocates powers between state and national governments and among the executive, legislative and judicial branches of the national government[,] but exercise of those powers must be consistent with the Constitution itself." See 1 FSM Intrm. at 343. The Court finds that plaintiffs have

alleged a justiciable claim.

C. Standing

Finally, defendants argue that plaintiffs have no standing to assert their claim that fishing license fees are taxes. First, they contend, the FSM is only entitled to impose two types of taxes under the Constitution -- import taxes and income taxes -- and fishing license fees fit into neither category. Second, fishing license fees are not uniformly imposed, so that even if these revenues were found to be taxes, they would be unconstitutional taxes which the States could not assert a right to recover. In order to be constitutional, "{n}ational taxes must be imposed uniformly." See FSM Const. art. IX, § 5.

The Court finds that the States have standing to assert their tax claim. In ruling on a motion to dismiss under Rule 12(b), the Court is to assume the allegations in the complaint are true and give the plaintiff the benefit of all reasonable inferences. Jano v. King, 5 FSM Intrm. 388, 390 (Pon. 1992). A motion to dismiss for failure to state a claim may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support of that claim. Faw v. Faw, 6 FSM Intrm. 33, 36 (Yap 1993); Jano, 5 FSM Intrm. at 390; Mailo v. Twum-Barimah, 2 FSM Intrm. 265, 267 (Pon. 1986).

Plaintiffs' Second Amended Complaint alleges that entities fishing in Micronesian waters are charged license fees based on certain agreed formulae, and that the current fee level

is 5% of the value of landed catch. Second Amended Complaint ¶ 20.⁸ A tax is any revenue collected by the government for any public purpose, where the amount collected substantially exceeds the cost of administering and regulating the activity for which the revenue is collected. *Id.* ¶ 21. Revenues from fishing licenses exceed the cost of administration, and are used for general governmental purposes. *Id.* ¶¶ 14-24. Under Article IX, Section 5 of the Constitution, the States are therefore entitled to fifty percent of these revenues. *Id.* The Court cannot say that these allegations fail to state a claim upon which relief may be granted.

A party has standing to sue when it has a sufficient stake or interest in an otherwise justiciable controversy. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 153 (Pon. 1993). Plaintiffs' Second Amended Complaint alleges sufficient facts to

⁸ In response to defendants' motion to dismiss, on November 1, 1995, plaintiffs filed an affidavit from Fred Ramp, which addresses the formula used by the Micronesia Maritime Authority ("MMA") to assess license fees under foreign fishing agreements. On November 15, 1995, defendants moved to strike Mr. Ramp's affidavit under F.S.M.C. 602, for lack of personal knowledge. Because Mr. Ramp's affidavit does not satisfactorily explain how it is that he has personal knowledge of the facts set forth in his affidavit, the Court now grants defendants' motion to strike.

On June 14, 1996, plaintiffs asked the Court to take judicial notice, under F.S.M.C. 201(b), of the terms of the foreign fishing agreement which had originally been submitted as an attachment to Mr. Ramp's affidavit. Plaintiffs contend that the terms of this agreement support their argument that fishing license fees are taxes, and that plaintiffs' claims therefore fall within the FSM's waiver of sovereign immunity under F.S.M.C. 702(1). In view of the Court's previous finding that the FSM does not have sovereign immunity from plaintiffs' claims, there is no need for the Court to take judicial notice of the terms of this foreign fishing agreement. See Section II. A., above.

present a controversy which is "definite and concrete," and which "touch[es] upon the legal relations of parties having adverse legal interests." See Ponape Chamber of Commerce, 1 FSM Intrm. 389, 400 (Pon. 1984). Plaintiffs' Second Amended Complaint also sufficiently establishes the States' stake in the outcome of this controversy. Accordingly, the Court finds that plaintiffs have standing to assert their tax claims under Article IX, Section 5 of the Constitution.

III. Motion to Compel Discovery

On November 7, 1995, plaintiffs moved the Court to compel defendants to respond to plaintiffs' Request for Production of Documents, served on defendants on August 17, 1995. Defendants' September 18, 1995, response objected to each of plaintiffs' requests on various grounds.

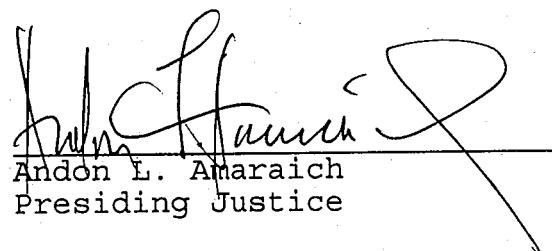
The Court has reviewed the arguments of both parties. Under Rule 26 of the FSM Rules of Civil Procedure, plaintiffs are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. In light of the large number of documents which may fall within the scope of plaintiffs' document request, the Court directs the parties to meet and confer for the purpose of establishing a discovery plan which will minimize the burden of discovery for all concerned. If the parties are unable to agree on a discovery plan, they are to so advise the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Leave to File Second Amended Complaint is GRANTED. Defendants shall

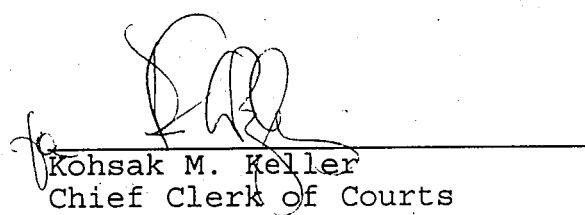
have 30 days from the date of entry of this order in which to answer or otherwise plead. Defendants' Motion to Dismiss is DENIED. The stay of discovery previously granted in this matter is now lifted. The parties are directed to meet and confer for the purpose of establishing a workable discovery plan. Plaintiffs' Motion for a Hearing on defendants' Motion to Dismiss is DENIED. Defendants' Motion to Strike Mr. Ramp's Affidavit is GRANTED.

So ordered the 30th day of August, 1996.



Andon L. Amaraich
Presiding Justice

Entered this 30th day of August, 1996.



Kohsak M. Keller
Chief Clerk of Courts