FSM SUPREME COURT TRIAL DIVISION

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| MWOALEN WAHU ILEILE EN POHNPEI (Traditional Leaders Council of Paramount Chiefs of Pohnpei), by and through ISO NAHNKEN OF NETT SALVADOR IRIARTE, and the CONSERVATION SOCIETY OF POHNPEI,<br><br>Plaintiffs,<br><br>vs.<br><br>MARCELO PETERSON, in his official capacity as Governor of the State of Pohnpei, CASSIANO SHONIBER, in his capacity as Administrator of OFFICE OF FISHERIES AND AQUACULTURE, Pohnpei State Government, POHNPEI STATE GOVERNMENT, and YOUNG SUN INTERNATIONAL TRADING COMPANY,<br><br>Defendants. | CIVIL ACTION NO. 2016-014 |

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Mayceleen JD Anson
Specially Appointed Justice

Hearing: September 8, 2016
Decided: September 28, 2016

APPEARANCES:

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HEADNOTES

Constitutional Law – Case or Dispute – Standing; Jurisdiction – Subject-Matter

In any matter before the court, the issue of standing should be addressed first as it is a threshold issue going to the court's subject matter jurisdiction. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 639 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

Although not expressly stated in the FSM Constitution, the "case or dispute" requirement in Article XI, Section 6 of the FSM Constitution is interpreted to imply the requirement that a party has standing to bring a suit. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 639 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

A party has standing to sue when that party has a sufficient stake or interest in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 639 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

The implied requirement that a party have standing should be interpreted so as to implement the objectives of the constitutional requirement that a case or dispute exist. Thus, the opposing parties must have sufficiently competing contentions and adverse interests such that the adversaries will thoroughly consider, research, and argue the points of law at issue, and the controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 639-40 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

The two central factors for determining whether a party has standing are: 1) the party must allege a sufficient stake in the controversy's outcome and it must have suffered some threatened or actual injury resulting from the allegedly illegal action, and 2) the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision. Three additional prudential principles also need to be considered: 1) generalized grievances shared by substantially the whole population do not normally warrant standing; 2) even when an injury is sufficient to satisfy the constitutional requirement is alleged, the petitioner generally must assert its own legal rights and interests, and cannot rest its claim on the legal rights or interests of third parties; and 3) the petitioner's complaint must fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 640 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Constitutional Law – Judicial Guidance Clause

When deciding a question of standing, the FSM Supreme Court utilizes a case-specific analysis and as mandated by Article XI, Section 11 of the FSM Constitution, the court will first consult and apply sources from within the FSM. The overall goal is to develop principles of standing which are consistent with the Constitution's language and designed to meet the needs of our nation's people and institutions. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 640 (Pon. 2016).

Civil Procedure – Pleadings; Constitutional Law – Case or Dispute – Standing

Because it is the plaintiffs who invoke the court's jurisdiction, it is the plaintiffs' burden to prove that standing exists. Therefore, when the defendants challenge standing in a motion to dismiss or as

an affirmative defense, the plaintiffs' complaint must contain facts that, if true, would be sufficient to establish that standing exists. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 640 (Pon. 2016).

Custom and Tradition – Pohnpei; Evidence – Burden of Proof

In a civil case, the party advancing Pohnpeian customary practice or law must establish, by a preponderance of the evidence, the relevant custom and tradition. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 640 (Pon. 2016).

Custom and Tradition

Before the establishment of the FSM constitutional government, customary law was inferior in legal status to written law promulgated by the administering authority, or any official or legislative body, which often disregarded, or considered void, any custom or customary law in conflict with written law, but under FSM law, customary law is not placed in an exalted or overriding posture under the FSM Constitution and statues, but neither is it relegated to its previous inferior status. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 641 (Pon. 2016).

Property – Public Lands; Property – Tidelands

In Pohnpei, all marine areas below the ordinary high watermark belong to the government, and such lands are a part of the Pohnpei Public Lands Trust with certain exceptions reestablishing customary rights to the people in areas below the high watermark. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 641 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Custom and Tradition – Pohnpei; Marine Resources

The court recognizes the customary and traditional rights of municipalities, clans, families, and individuals to control the use of, or material in, marine areas below the ordinary high watermark and otherwise engage in the harvesting of fish and other marine resources from reef areas, but any traditional and customary right to control the use of, or material in, marine areas below the ordinary high watermark is subject to, and limited by, the inherent rights of the Pohnpei Public Lands Trust as the owner of such marine areas. Accordingly, the Mwoalen Wahu does not have standing on the basis that there exists a customary law that gives the traditional leaders the right to control the use of marine areas in their respective municipalities. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 641-42 & n.1 (Pon. 2016).

Constitutional Law – Pohnpei; Custom and Tradition – Pohnpei

The Pohnpei Constitution provides protection for custom and tradition, and mandates that the Pohnpei government shall respect and protect the customs and traditions of Pohnpei. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Constitutional Law – Pohnpei

An act of government in conflict with the Pohnpei Constitution is invalid to the extent of the conflict. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Constitutional Law – Judicial Guidance Clause; Custom and Tradition

The FSM Supreme Court is indisputably charged with the duty of considering customary law when relevant to a decision since the constitutional government works not to override custom, but to work in cooperation with the traditional system in an atmosphere of mutual respect. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Custom and Tradition – Pohnpei

To the extent a claimed customary right is still in effect, the Mwoalen Wahu members have a

legal right under the Pohnpei Constitution to institute legal proceedings in order to protect their constitutionally protected interests. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Constitutional Law – Pohnpei; Custom and Tradition – Pohnpei

In order to be protected by the Pohnpei Constitution, the customary law must still exist. Custom is a practice that by its common adoption and long, unvarying habit has come to have the force of law. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Custom and Tradition; Judgments

While Trust Territory High Court opinions are not binding precedent on the FSM Supreme Court, they serve as useful advisory precedent, especially considering they contain important information regarding the customs and traditions of the people of Micronesia. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 n.2 (Pon. 2016).

Custom and Tradition

Custom is a law established by long usage and is by common consent and uniform practice so that it becomes the law of the place, or of the subject matter, to which it relates. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Custom and Tradition; Evidence – Judicial Notice

It is only when a local custom is firmly established and generally known and been peacefully and fairly uniformly acquiesced in by those whose rights would naturally be affected that it will be judicially noticed by the court. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642 (Pon. 2016).

Custom and Tradition; Evidence

When there is a dispute about the existence or effect of a local custom, and the court is not satisfied about either its existence or its applicability, such custom becomes a mixed question of law and fact, and the party relying upon it must prove it to the court's satisfaction. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 642-43 (Pon. 2016).

Custom and Tradition – Pohnpei; Evidence – Judicial Notice

The traditional and customary right of the Nahnmwarki of each established municipality of Pohnpei to receive offerings from their respective subjects is firmly established in history and still widely known and peacefully accepted by the citizens of Pohnpei, thereby making it a judicially noticeable fact. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 643 (Pon. 2016).

Custom and Tradition – Pohnpei; Evidence – Expert Opinion

Even assuming *arguendo* that wide recognition and practice of the custom has disappeared so as to preclude judicial notice of its existence, testimony given by the Iso Nahnken of Nett provides a sufficient basis to conclude that the custom is still practiced today when he testified that the custom is still practiced and the defendants failed to sufficiently rebut that testimony and a conclusory argument to the contrary was not evidence. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 643 (Pon. 2016).

Custom and Tradition

Rare is the case where the court benefits from clear, uncontradicted evidence of custom on point in a given matter presented by knowledgeable authorities. The great difficulty in applying custom is that unlike other sources of law, it is uncodified. Custom is revealed through human practice and oral description, and owing to the diversity of cultures and languages in the FSM, the court must rely almost entirely on witness testimony to elucidate particular customs and traditions. Mwoalen Wahu Ileile en

Pohnpei v. Peterson, 20 FSM R. 632, 643 (Pon. 2016).

Custom and Tradition – Pohnpei

The custom that Mwoalen Wahu members receive from their constituents various marine life that inhabit Pohnpei waters, allegedly threatened by the proposed harvesting scheme, remains an active customary law. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 643 (Pon. 2016).

Constitutional Law – Judicial Guidance Clause; Custom and Tradition

Under the FSM Constitution's Judicial Guidance Clause, the FSM Supreme Court's decisions must be consistent with, *inter alia*, Micronesian customs and traditions. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 643 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

Standing to sue was an unsettled area of United States law when the FSM Constitution was ratified and the issue of standing to sue within the FSM is one that calls for independent analysis rather than rigid adherence to the decisions of United States courts construing that Constitution. Based on this, the court will continue applying the prudential standing principles in determining whether a particular plaintiff has standing. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 644 n.3 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

For there to be standing, the plaintiff must have suffered some threatened or actual injury resulting from the defendants' allegedly illegal action, and the injury must be an invasion of a legally protected interest which is concrete and particularized, and actual or imminent. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 644 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

For there to be standing, the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 644 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

The first prong of the test for standing is satisfied when the customary right to receive oferings from their constituents and subjects is shared among each member of the Mwoalen Wahu, is protected by the Pohnpei Constitution, and is imminently threatened by the defendants' allegedly illegal conduct because it has been shown that sea cucumber declines pose an intensified threat to Pohnpei's nearshore coral-reef ecosystem and thus all marine life within that ecosystem, thereby posing an increased threat to the Mwoalen Wahu members' rights to receive offerings from marine life that inhabit that ecosystem. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 644 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Environmental Protection

The plaintiffs' reasonable fears of environmental pollution is sufficient injury-in-fact to support standing. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Constitutional Law – Judicial Guidance Clause

Although the court is mandated to first consult and apply sources from within the FSM, it is appropriate to look to United States case law for guidance on a complex standing issue, while proceeding against the background of pertinent aspects of Micronesian law, society, and culture. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 n.4 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

For there to be standing, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

When, without a sea cucumber harvest, the Mwoalen Wahu will remain in the same posture as in the past and its members will continue to receive offerings by their constituents and subjects whereas a sea cucumber harvest threatens to reduce the structure and habitat of Pohnpei's reefs and negatively impact marine life, including marine life that Mwoalen Wahu members have a customary right to receive from their people, the threatened injury is directly traced to the challenged action and would be redressed by a decision in the plaintiffs' favor. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

Standing's prudential principles do not necessarily go to the core of the court's jurisdiction based on the "case or dispute" constitutional principle, but rather reflect an effort by the court to determine whether it should exercise judicial self-restraint when it seems wise not to entertain a case. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 n.5 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

Generalized grievances shared by substantially the whole population do not normally warrant standing and the petitioner generally must assert its own legal rights and interests, and cannot rest its claim on the legal rights or interests of third parties, but organizational standing to sue based on the rights of its members is proper. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 645 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

For there to be standing, the petitioner's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 646 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

When the customary right the Mwoalen Wahu seek to protect is clearly within the zone of interests sought to be protected under Article 5 of the Pohnpei Constitution which upholds, respects, and protects the customs and traditions of the traditional kingdoms of Pohnpei and when sea cucumber commercialization is regulated by Pohnpei statute, the plaintiffs' complaint has fallen within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 646 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

If the requirement of standing is given a narrow construction when constitutional rights are involved, then there is, in effect, no practical remedy for anyone with an interest in enforcing the right – and the right becomes a mockery. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 646 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

The plaintiffs have standing to bring the matter before the court when they have alleged facts establishing a concrete injury and a sufficient causal relationship between the injury and the alleged violation and if the injury can be remedied by a judicial decree. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 646 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing; Environmental Protection

Under the Pohnpei Marine Sanctuary and Wildlife Refuge Act of 1999, any person may commence a civil suit on his own behalf to enjoin any person who is alleged to be in violation of § 5-107 of that Act, and "person" includes any individual, corporation, partnership, association or other entity, and any governmental entity including, but not limited to, the FSM or any of the FSM states or any political subdivision thereof, and any foreign government, subdivision of such government, or any entity thereof. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 647 (Pon. 2016).

Civil Procedure – Injunctions; Constitutional Law – Case or Dispute – Standing; Environmental Protection

Since, unlike 26 Pon. C. § 5-115 which expressly grants to the Attorney General the right to bring a suit to enjoin a person who is in "imminent violation," the citizen suit provision of 26 Pon. C. § 5-117 only allows a person to commence a civil suit to enjoin a person who is "alleged to be in violation" of § 5-107," the plain statutory language can only be read to allow the Attorney General the power to seek equitable relief for an imminent violation but not private persons who do not allege facts that are sufficient to grant traditional constitutional standing when it has not asserted injury to itself. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 647 (Pon. 2016).

Constitutional Law – Case or Dispute – Standing

When a plaintiff has not alleged a concrete injury and a sufficient causal relationship between the injury and the alleged "violation," its claims will be dismissed because standing must be found for each count of a complaint or that count will be dismissed. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 632, 648 (Pon. 2016).

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## COURT'S OPINION

MAYCELEEN JD ANSON, Specially Appointed Justice:

Now before the court are the defendants', Marcelo Peterson, in his official capacity as Governor of the State of Pohnpei, Casiano Shoniber, in his capacity as Administrator of the Office of Fisheries and Aquaculture, Pohnpei State Government (collectively, "state defendants"), and Young Sun International Trading Company ("Young Sun"), Motions to Dismiss.

### I. PROCEDURAL POSTURE

On July 20, 2016, this court, pursuant to a petition filed by the plaintiffs, Mwoalen Wahu Ileileen Pohnpei ("Mwoalen Wahu") and the Conservation Society of Pohnpei ("CSP") filed on July 12, 2016, issued a temporary restraining order prohibiting the state defendants and Young Sun from continuing any ongoing harvest or marketing of sea cucumber in the State of Pohnpei for the period extending to August 3, 2016.

On August 3, 2016, the state defendants filed a motion to dismiss this matter pursuant to FSM Civil Rule 12(b)(1) for lack of standing and subject matter jurisdiction.

On the same day, the court extended the temporary restraining order from the bench for the period extending to August 10, 2016 and issued an order memorializing same on August 4, 2016.

During the hearing on August 9, 2016, the court, with the agreement of the parties, ordered the temporary restraining order further extended pursuant to FSM Civil Rule 65(b) for an additional two weeks, or until August 24, 2016. The court set a hearing on the motion for preliminary injunction on

August 23, 2016.

On August 11, 2016, defendant Young Sun filed its Answer, affirmative defenses, and counterclaims.

On August 23, 2016, during the scheduled hearing on plaintiffs' motion for a preliminary injunction, the court granted defendant Young Sun's motion to stay proceedings on the hearing for plaintiffs' motion for a preliminary injunction pending the appellate division's ruling on the writs of prohibition regarding the presiding justice's denial of the defendants' motions for recusal in this matter. The court set a hearing on the state defendants' motion to dismiss for August 25, 2016. Shortly before that hearing, the plaintiffs filed a Motion for Relief from Order Granting TRO and Order Granting Evidentiary Hearing on Motion to Dismiss. On September 8, 2016, arguments were heard on that motion and the court denied it. Addressing that issue, the court wishes to note that it found it appropriate to accelerate the hearing on the motion and hold a preliminary hearing on the issue of standing. *See, e.g.*, Doherty v. Rutgers Sch. of Law-Newark, 651 F.2d 893, 898 n.6, 60 A.L.R. Fed. 598, 605 n.6 (3d Cir. 1981); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978); NAACP v. Harris, 607 F.2d 514, 526 n. 15 (1st Cir. 1979); Marchezak v. McKinley, 607 F.2d 37, 40 (3d Cir. 1979) ("[T]o avoid an unnecessary trial, the district court may conduct a preliminary evidentiary hearing on standing.").

The court then moved on to the hearing on the state defendants' motion to dismiss for lack of standing. This Order follows. As a preliminary note, defendant Young Sun filed its own Motion to Dismiss on September 7, 2016, one day before the hearing on the state defendants' motion to dismiss. The plaintiffs filed their opposition on September 19, 2016. Because the arguments are substantially similar to those of their co-defendants, its argument was heard during the hearing, and this court does not feel the need to hold further hearings on the issue, this order also discusses and applies to Young Sun's pending motion to dismiss.

## II. Discussion

### A. *Standing Requirements*

In any matter before the court, the issue of standing should be addressed first as it is a threshold issue going to the court's subject matter jurisdiction. FSM v. Udot Municipality, 12 FSM R. 29, 39 (App. 2003); Sipos v. Crabtree, 13 FSM R. 355, 362 (Pon. 2005); Eighth Kosrae Legislature v. FSM Dev. Bank, 11 FSM R. 491, 496 (Kos. 2003).

Although it is not expressly stated in the FSM Constitution, the "case or dispute" requirement in Section 6 of Article XI of the FSM Constitution has been interpreted by this court to imply the requirement that a party has standing to bring a suit. Innocenti v. Wainit, 2 FSM R. 173, 178-79 (App. 1986); Udot Municipality, 12 FSM R. at 40; Kallop v. Pohnpei, 18 FSM R. 130, 133 (Pon. 2011); Eighth Kosrae Legislature, 11 FSM R. at 496.

A party has standing to sue when that party has a sufficient stake or interest in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Urusemal v. Cappelle, 12 FSM R. 577, 583 (App. 2004). The implied requirement that a party have standing should be interpreted so as to implement the objectives of the constitutional requirement that a case or dispute exist. Udot Municipality, 12 FSM R. at 40; *In re Parcel No. 046-A-01*, 6 FSM R. 149, 153 (Pon. 1993). Thus, the "opposing parties must have sufficiently competing contentions and adverse interests such that the adversaries will thoroughly consider, research, and argue the points of law at issue." Sipos, 13 FSM R. 355, 363 (Pon. 2005); Aisek v. Foreign Inv. Bd., 2 FSM R. 95, 101 (Pon. 1984). It follows that

"[t]he controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." Sipos, 13 FSM R. at 363; Ponape Chamber of Commerce v. Nett Mun. Gov't, 1 FSM R. 389, 401 (Pon. 1984).

> Two factors are central to the determination of whether a party has standing. First, the party must allege a sufficient stake in the outcome of the controversy and it must have suffered some threatened or actual injury resulting from the allegedly illegal action. Second, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision.
>
> While not constitutionally based, three additional factors or prudential principles need to be considered before the question of standing can be resolved. *See*, David J. Oliveiri, Annotation, *Requirements of Article III of Federal Constitution as Affecting Standing to Challenge Particular Conduct as Violative of Federal Law – Supreme Court Cases*, 70 L. Ed. 2d 941, 947 (1983). First, generalized grievances shared by substantially the whole population do not normally warrant standing. Second, even when an injury is sufficient to satisfy the constitutional requirement is alleged, the petitioner generally must assert its own legal rights and interests, and cannot rest its claim on the legal rights or interests of third parties. Third, the petitioner's complaint must fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.

Eighth Kosrae Legislature, 11 FSM R. at 498; Sipos v. Crabtree, 13 FSM R. 355, 363 (Pon. 2005); *see, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 351, 364 (1992).

When deciding a question of standing, the FSM Supreme Court utilizes a case-specific analysis and as mandated by Section 11 of Article XI of the FSM Constitution, the court will first consult and apply sources from within the FSM. The overall goal is to develop principles of standing which are consistent with the Constitution's language and designed to meet the needs of our nation's people and institutions. Udot Municipality, 12 FSM R. at 40.

Because it is the plaintiffs who invoke the court's jurisdiction, it is the plaintiffs' burden to prove that standing exists. Therefore, where, as here, the defendants challenge standing in a motion to dismiss or as an affirmative defense, the plaintiffs' complaint must contain facts that, if true, would be sufficient to establish that standing exists.

The Mwoalen Wahu allege standing under their constitutionally protected rights under Pohnpeian customs and traditions and CSP alleges standing based on a threatened violation of Pohnpei's Marine Sanctuary and Wildlife Refuge Act of 1999. The court will address each plaintiffs' standing in turn, starting with the Mwoalen Wahu

B. *Existence of the Custom and Tradition Today*

Before moving onto an analysis of Mwoalen Wahu's standing, the court must first determine the threshold issue of whether the customs and traditions it seeks to protect still exists today.

In a civil case, the party advancing Pohnpeian customary practice or law must establish, by a preponderance of the evidence, the relevant custom and tradition. Narruhn v. Aisek, 16 FSM R. 236, 240 (App. 2009); Phoenix of Micronesia, Inc. v. Mauricio, 9 FSM R. 155, 158-59 (App. 1999). The Mwoalen Wahu contend that testimony given by Iso Nahnken of Nett, Salvador Iriarte, at the hearing

on their motion for a temporary restraining order is sufficient for the court to conclude that the claimed custom still exists and is practiced to this day.

The defendants make several contentions, which the court will address in turn. Quoting from several opinions from the Trust Territory High Court, the defendants contend that although control over land and marine areas by the Nahnmwarkis and their right to traditional offerings of marine life from their respective constituents may have been a part of custom at one time in Pohnpei's history, that customary right has been supplanted by the introduction of the concepts of democracy and religious freedom.

i. *The Traditional and Customary Rights of the Members of the Mwoalen Wahu to Control and Regulate Marine Areas*

First, the defendants contend that the German administration permanently changed customary land law, thereby depriving the traditional leaders exclusive control and ownership of public land. The court does not disagree with the defendants and, based on a review of the record, the Mwoalen Wahu has seemingly abandoned its assertion of standing based on the traditional right to control the use of marine areas below the high watermark. Nonetheless, the court will address the issue.

"Prior to the establishment of the constitutional government of the Federated States of Micronesia, customary law was inferior in legal status to written law promulgated by the administering authority, or any official or legislative body[,]" which often disregarded, or considered void, any custom or customary law in conflict with written law. FSM v. Mudong, 1 FSM R. 135, 138 (Pon. 1982). However, "the question is more difficult under Federated States of Micronesia law. Customary law is not placed in an exalted or overriding posture under the Constitution and statues of the Federated States of Micronesia, but neither is it relegated to its previous inferior status." *Id.* at 139.

Title 67 of the Trust Territory Code set forth ownership and reestablished customary rights in areas below the high watermark and, as codified in the Pohnpei Code, states "[t]hat portion of the law established during the Japanese administration of the area which was the Trust Territory, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of Pohnpei and such lands are now declared a part of the Pohnpei Public Lands Trust . . . ." 42 Pon. C. § 8-101. That provision in the Pohnpei code goes on to list exceptions, reestablishing customary rights to the people in areas below the high watermark, 42 Pon. C. § 8-101(1)-(6), none of which are applicable in this matter and none of which the Mwoalen Wahu have brought to the attention of the court. Nor has the Mwoalen Wahu presented to this court any other exception recognized in the FSM or Pohnpei Constitutions, Pohnpei statutory law, or otherwise that the State of Pohnpei, by and through the Pohnpei Public Lands Trust, owns and therefore has the ability to control areas below the high watermark.

The court recognizes the customary and traditional rights of municipalities, clans, families, and individuals to control the use of, or material in, marine areas below the ordinary high watermark and otherwise engage in the harvesting of fish and other marine resources from reef areas. Pohnpei v. KSVI No. 3, 10 FSM R. 53, 60 (Pon. 2001). However, no authority cited by the Mwoalen Wahu leads this court to conclude that it is directly imbued with the power to regulate and control marine areas, especially to the exclusion of the state government.[1] Accordingly, the court finds the Mwoalen Wahu

[1] Any traditional and customary right "to control the use of, or material in, marine areas below the ordinary high watermark [is] subject to, and limited by, the inherent rights of the Pohnpei Public Lands Trust as the owner of such marine areas." 42 Pon. C. § 8-101(5).

do not have standing on the basis that there exists a customary law that gives the traditional leaders the right to control the use of marine areas in their respective municipalities.

*ii. The Traditional and Customary Rights of the Members of the Mwoalen Wahu to Receive Offerings from their Constituents*

The defendants further contend that the right of the members of the Mwoalen Wahu to receive offerings from their respective people is a customary law that is also no longer recognized. They further claim that, notwithstanding that the custom has dissipated, the edible species of sea cucumber will not be harvested pursuant to the terms of the contract and prohibition pursuant to Pohnpei S.L. No. 8L-58-14. However, this does not discount the imminent threat that harvesting non-edible species will have on the edible species and other marine life occupying the same reef ecosystem as argued by the plaintiffs and as discussed *infra*.

The defendants conclude that there is no constitutional or statutory provision that affords the Mwoalen Wahu standing to bring this matter before this court. The court, however, finds that the Pohnpei Constitution provides a legally recognizable interest for the Mwoalen Wahu to the extent that the customary right has been preserved. The Pohnpei Constitution provides protection for custom and tradition, stating that the "Constitution upholds, respects, and protects the customs and traditions of the traditional kingdoms in Pohnpei," Pon. Const. art. 5, § 1, and mandates that "[t]he government of Pohnpei shall respect and protect the customs and traditions of Pohnpei." Pon. Const. art. 5, § 2. The Constitution further states that "[a]n act of government in conflict with this Constitution is invalid to the extent of the conflict." Pon. Const. art. 2.

This court is also indisputably charged with the duty of considering customary law where relevant to a decision. FSM Const. art. XI, § 11; Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 50 (App. 1995); Wito Clan v. United Church of Christ, 6 FSM R. 129, 132, *reh'g denied*, 6 FSM R. 291 (App. 1993) ("Courts in the FSM must consider 'customary law where relevant to a decision.'"). "[T]he constitutional government works not to override custom[,] but to work in cooperation with the traditional system in an atmosphere of mutual respect." Senda v. Semes, 8 FSM R. 484, 497 (Pon. 1998); In re Iriarte (II), 1 FSM R. 255, 271 (Pon. 1982). Thus, to the extent the claimed customary right is still in effect, the members of the Mwoalen Wahu have a legal right under the Pohnpei Constitution to institute legal proceedings in order to protect their constitutionally protected interests.

The defendants are correct in stating that in order to be protected by the Pohnpei Constitution, the customary law must still exist. Custom is "[a] practice that by its common adoption and long, unvarying habit has come to have the force of law." BLACK'S LAW DICTIONARY 413 (8th ed. 2004). The Trust Territory High Court[2] similarly stated that "[c]ustom is a law established by long usage and is by common consent and uniform practice so that it becomes the law of the place, or of the subject matter, to which it relates." Ngirmekur v. Municipality of Airi, 7 TTR 477, 483 (Pal. 1976); Lalou v. Aliang, 1 TTR 94 (Pal. 1954). It is only when a local custom is firmly established and "generally known and been peacefully and fairly uniformly acquiesced in by those whose rights would naturally be affected" that it will be judicially noticed by the court. Ngirmekur, 7 TTR at 483; Lajutok v. Kabua, 3 TTR 630, 634 (App. 1968).

When, however, there is a dispute as to the existence or effect of a local custom, and the

[2] While opinions of the Trust Territory High Court are not binding precedent on this court, they serve as useful advisory precedent, especially considering they contain important information regarding the customs and traditions of the people of Micronesia.

> court is not satisfied as to either its existence or its applicability, such custom becomes a mixed question of law and fact, and the party relying upon it must prove it to the satisfaction of the court.

Lajutok, 3 TTR at 634 (quoting Kenyul v. Tamangin, 2 TTR 648, 650 (App. 1964)); Ngirmekur, 7 TTR at 483; Mutong v. Mutong, 2 TTR 588 (Pon. 1964); Basilius v. Rengiil, 2 TTR 430 (Pal. 1963).

The court is satisfied that the traditional and customary right of the Nahnmwarki of each established municipality of Pohnpei to receive offerings from their respective subjects is firmly established in history and still widely known and peacefully accepted by the citizens of Pohnpei, thereby making it a judicially noticeable fact.

Even assuming *arguendo* that wide recognition and practice of the custom has disappeared so as to preclude this court from taking judicial notice of its existence, the court finds that the testimony given by the Iso Nahnken of Nett, Salvador Iriarte, at the hearing on the plaintiffs' motion for a temporary restraining order provides the court with a sufficient basis to conclude that the custom is still practiced today. He testified that the custom is still practiced; the defendants failed to sufficiently rebut that testimony and a conclusory argument to the contrary is not evidence. *See* Livaie v. Weilbacher, 13 FSM R. 139, 144 (App. 2005); *cf.* In re Attorney Disciplinary Proceeding, 9 FSM R. 165, 172 (App. 1999).

The defendants contend that this court cannot uphold the testimony of the plaintiffs' witness during the proceeding on the motion for a temporary restraining order because to do so would be tantamount to court-made custom. Def.'s Mot. to Dismiss at 9-10.

> Rare is the case, however, where the Court benefits from clear, uncontradicted evidence of custom on point in a given matter presented by knowledgeable authorities. The great difficulty in applying custom is that unlike other sources of law, it is uncodified. Custom is revealed through human practice and oral description, and owing to the diversity of cultures and languages in the FSM[,] the Court must rely almost entirely on witness testimony to elucidate particular customs and traditions.

Wito Clan, 6 FSM R. at 132. Based on the testimony of Iso Nahnken of Nett, Salvador Iriarte, the court concludes that the custom the members of the Mwoalen Wahu claim to retain – receiving from their constituents various marine life that inhabits the same waters allegedly threatened by the proposed harvesting scheme – remains an active customary law. This does not amount to court-made custom, as the defendants fear, because, under the FSM Constitution's Judicial Guidance Provision, FSM Const. art. XI, § 11, this court's decisions must be consistent with, *inter alia*, "Micronesian customs and traditions." *See* Ray v. Electrical Contracting Corp., 2 FSM R. 21, 26 (App. 1985). As the court concludes the customary law exists today, it now proceeds with the core analysis, Mwoalen Wahu's standing to sue based on that customary law, followed by an analysis of CSP's alleged standing.

C. *Standing Analysis – Mwoalen Wahu Members' Customary Right to Receive Offerings from their Respective Constituents*

Having recognized the existence and practice of the custom today, the court must now move to the Udot Municipality court's standing factors and prudential principles.[3] The first factor to be

[3] In their Response to Plaintiffs Opposition to Dismissal, the state defendants contend that the United States Supreme Court, as evidenced by the opinion in Lexmark Int'l, Inc. v. Static Control Components, Inc.,

addressed is whether the Mwoalen Wahu has alleged a sufficient stake in the outcome of the controversy and whether it has suffered some threatened or actual injury resulting from the defendants' allegedly illegal action. The injury must be an invasion of a legally protected interest which is concrete and particularized, and actual or imminent. Sipos, 13 FSM R. at 363; Eighth Kosrae Legislature, 11 FSM R. at 497.

In its Opposition to Defendants' Motion to Dismiss, the Mwoalen Wahu asserts that it has a sufficient stake in the outcome of this controversy because it has the right, under Pohnpei custom and tradition, to receive offerings at certain times, including feasts, funerals, kamidipw and pekpwel, that include marine resources such as reef fish and that it intends to prove that the current law authorizing the marketing contract at issue for the large scale harvesting and marketing of sea cucumbers, as it is currently planned, will severely negatively impact the reef marine ecosystem, thus directly adversely affecting the legally cognizable customary right of the members of the Mwoalen Wahu to receive such offerings because, presumably, there will be less of, or possibly a complete lack of, such offerings as a result of the negative consequences of the harvest on marine life in Pohnpei waters. The defendants argue, as discussed and resolved *supra*, that because the custom is not recognized today, they do not have a sufficient stake in the outcome of the matter. The defendants further contend that the plaintiffs have failed to prove that they have been, in fact, injured by the acts committed by the defendants. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Lujan, 504 U.S. at 563, 112 S. Ct. at 2137, 119 L. Ed. 2d at 365-66; Sierra Club v. Morton, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 1366, 31 L. Ed. 2d 636, 643 (1972).

The court is satisfied that the Mwoalen Wahu has a sufficient stake in the outcome of the controversy, that it has suffered an imminent threatened harm to its constitutionally protected interest, and that the Mwoalen Wahu, including Iso Nahnken of Nett Salvador Iriarte, is among the injured. Moreover, the named plaintiff bringing suit on behalf of the Mwoalen Wahu, Iso Nahnken of Nett Salvador Iriarte is found to fairly and adequately represent the interests of the unincorporated association known as Mwoalen Wahu Ileile en Pohnpei and its members. *See* FSM Civ. R. 23.2. The customary right to receive offerings from their constituents and subjects, shared among each member of the Mwoalen Wahu, as protected by the Pohnpei Constitution, is imminently threatened by the defendants' allegedly illegal conduct because it has been shown that sea cucumber declines pose an intensified threat to Pohnpei's nearshore coral-reef ecosystem and thus all marine life within that ecosystem, thereby posing an increased threat to the Mwoalen Wahu members' rights to receive offerings from marine life that inhabit that ecosystem. Thus, the first prong of the test for standing is satisfied by the Mwoalen Wahu. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (ruling that any level of injury is

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134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014), appears to be doing away with the Lujan court's adoption of the prudential standing principles. Notwithstanding the fact that the Lexmark court was assessing standing in a false advertising claim under the Lanham Act, and thereby distinguishable from this case, the FSM Supreme Court has held that standing to sue was an unsettled area of United States law when the FSM Constitution was ratified and the issue of standing to sue within the FSM is one that calls for independent analysis rather than rigid adherence to the decisions of United States courts construing that Constitution. Innocenti v. Wainit, 2 FSM R. 173, 178-79 (App. 1986). Based on this discretion, the court chooses to continue applying the prudential standing principles in determining whether a particular plaintiff has standing. Alaphonso v. FSM, 1 FSM R. 209, 212-13 (App. 1982) ("[T]his court can and should consider decisions and reasoning of courts of the United States and other jurisdictions, including the Trust Territory courts, in arriving at its own decisions. What is clear from the Constitution, however, is that we are not to consider ourselves bound by those decisions and must not fall into the error of adopting the reasoning of those decisions without independently considering suitability of that reasoning for the Federated States of Micronesia.").

sufficient to satisfy the requirement that a person be aggrieved); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (stating that threatened injury is sufficient to provide injury in fact); Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1151-52; Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610, 626-27 (fully adopting the analysis of the *en banc* Fourth Circuit decision in Gaston Copper, 204 F.3d at 155-61); Maine People's Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc., 471 F.3d 277, 279-83 (1st Cir. 2006) (stating that "[i]t is the *threat* that must be close at hand, even if the perceived *harm* is not [and] probabilistic harms are legally cognizable" as injuries in fact for purposes of determining a party's standing); Baur v. Veneman, 352 F.3d 625, 635 (2d Cir. 2003) ("noting that some Supreme Court precedent 'suggest[s] that increased risk will satisfy the requirement of injury in fact'"); Jerry L. Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129, 1168 (1983). The United States Court of Appeals for the First, Second, Fourth, and Ninth Circuits, following the United States Supreme Court decision in Friends of the Earth, Inc. holding that the plaintiffs' "reasonable fears" of environmental pollution is sufficient injury-in-fact to support standing, have explicitly allowed injury-in-fact based on increased risk or threatened injuries.[4]

Second, the injury must be such that it can be traced to the challenged action and must be of the kind likely to be redressed by a favorable decision. Udot Municipality, 12 FSM R. at 40. The threatened injury here is directly traced to the challenged action and redressed by a decision in favor of the plaintiffs because, without a sea cucumber harvest, the Mwoalen Wahu will remain in the same posture as in the past and the members thereof will continue to receive offerings by their constituents and subjects whereas a sea cucumber harvest threatens to reduce the structure and habitat of Pohnpei's reefs and negatively impact marine life, including marine life that members of the Mwoalen Wahu have a customary right to receive from their people. Declaratory relief, as requested in the plaintiffs' Verified Complaint for Injunctive and Declaratory Relief, if granted by this court, would redress the harms the plaintiffs seek to avoid. Thus, the Udot Municipality court's second factor weighs in favor of Mwoalen Wahu's standing to bring suit.

The first prudential principle[5] to consider states that "generalized grievances shared by substantially the whole population do not normally warrant standing" and the second principle, closely related to the first, states that "the petitioner generally must assert its own legal rights and interests, and cannot rest its claim on the legal rights or interests of third parties." Udot Municipality, 12 FSM R. at 40. Organizational standing to sue based on the rights of its members is proper. *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9 (2d ed. 1984) ("If the same activity injures both the interests of the organization as such and related interests of its members, it is a natural extension to rule that the organization can assert the rights of its members."); Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343, 362 (1975) ("[I]n attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). As discussed extensively

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[4] Although the court is mandated by Article XI, Section 11 of the Constitution to first consult and apply sources from within the FSM, the court finds it is appropriate to look to United States case law for guidance on this complex issue, proceeding, however, against the background of pertinent aspects of Micronesian law, society, and culture. *See* Alaphonso v. FSM, 1 FSM R. 209, 212-13 (App. 1982).

[5] The prudential principles do not necessarily go to the core of the court's jurisdiction based on the constitutional principle of "case or controversy," but rather reflect an effort by the court to determine whether it should exercise judicial self-restraint when it seems wise not to entertain a case. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984).

*supra*, the Mwoalen Wahu is asserting the individual customary rights of the members of the council which are not shared by the general population of Pohnpei.

The third prudential principle requires that "the petitioner's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Udot Municipality, 12 FSM R. at 40; Eighth Kosrae Legislature, 11 FSM R. at 498. The statute in question is Pohnpei S.L. No. 8L-58-14, the commercialization of sea cucumber and the constitutional guarantees invoked by the Mwoalen Wahu are found in Pohnpei Constitution Article 5, sections 1 and 2 (customs and traditions and protection of customs and traditions) and Article 2 (supremacy). The customary right the Mwoalen Wahu seek to protect here is clearly within the zone of interests sought to be protected under Article 5 of the Pohnpei Constitution which "upholds, respects, and protects the customs and traditions of the traditional kingdoms of Pohnpei."

If the requirement of standing is given a narrow construction when there is involved constitutional rights, then there is, in effect, no practical remedy for anyone with an interest in enforcing the right – and the right becomes a mockery. Continental Micronesia, Inc. v. Chuuk, 17 FSM R. 152, 159 (Chk. 2010); *see* Tammow v. FSM, 2 FSM R. 53, 57 (App. 1985) ("Interpretations which strip constitutional clauses of substance and effect run against the norms of constitutional interpretation and are greatly disfavored."). The Mwoalen Wahu have alleged facts establishing a concrete injury and a sufficient causal relationship between the injury and the alleged violation, *to wit*, whether the statutory authorization of Pohnpei S.L. No. 8L-58-14 has exceeded constitutional limitations, and that the injury can be remedied by a judicial decree.

Accordingly, having applied the appropriate test for standing, this court determines that the Mwoalen Wahu has standing to bring this matter before this court.

D. *Standing Analysis – Conservation Society of Pohnpei*

CSP alleges it has standing on a different ground than its co-plaintiff, claiming that it has a specific right of action existing under Pohnpei statutory law. CSP contends it has standing to bring this matter pursuant to a citizen suit provision in the Marine Sanctuary and Wildlife Refuge Act of 1999, which states, *inter alia*, that "[a]ny person may commence a civil suit on his own behalf to enjoin any person who is alleged to be in violation of § 5-107." 26 Pon. C. § 5-117(1). Section 5-107 of Title 26 of the Pohnpei Code states:

> (1) Within the boundaries of an area designated as part of the System:
>
> > (a) No person shall disturb, injure, cut, burn, remove, destroy or process any part of the real or personal property of the state, including mangrove and forested areas, natural growth and minerals, in any area of the System;
> >
> > (b) No person shall take or possess any fish, bird, mammal or other wild vertebrate or invertebrate animals or part, nest, or egg thereof within any such area unless otherwise allowed by regulations issued under this chapter;
> >
> > (c) No person shall engage in fishing, unless otherwise allowed by regulations issued under this chapter;
> >
> > (d) No person shall engage in dredging, mining, or other removal of minerals, rock, sand, coral or other natural resources;

> (e) No person shall use or possess, any explosive, toxic chemical, firearm, bow and arrow or other weapon, or any trap capable of taking fish, birds, mammals or any other types of wildlife, unless otherwise permitted by the regulations issued under this chapter; and
>
> (f) No person shall enter, use or otherwise occupy any area of the System for the purpose of engaging in any activity prohibited under this section, unless such activities are otherwise permitted under this chapter or regulations issued under this chapter.
>
> (2) Commercial exploitation of resources within the boundaries of the System is prohibited. Qualified institutions and individuals shall be permitted to conduct nondestructive forms of scientific investigation within the state reserve system, upon receiving the prior written approval from the Director pursuant to regulations issued under this chapter.

CSP alleges that it has standing to bring suit under this citizen suit statute because the definition of "person" as it is used in 26 Pon. C. § 5-117 is defined as "any individual, corporation, partnership, association or other entity, and any governmental entity including, but not limited to, the Federated States of Micronesia or any of the states of the Federated States of Micronesia, or any political subdivision thereof, and any foreign government, subdivision of such government, or any entity thereof." 26 Pon. C. § 5-104(6). Thus, it is clear to the court that CSP has the right to bring a citizen suit pursuant to 26 Pon. C. § 5-117.

CSP claims that the marine protected areas are suffering from an imminent violation of 26 Pon. C. § 5-107 under the current harvest as it is planned. In support of its position, it argues that

> an imminent risk is well within the scope of the private right cause of action encompassed in 26 PC § 5-117.26 [because 26] PC § 5-115 states [that] "[t]he Attorney General may bring actions for relief under §§5-112or 5-113 and for equitable relief to enjoin an imminent or continuing violation of this chapter, regulations promulgated under this chapter or a permit issued under this chapter."

Pls.' Opp'n to Def. Young Sun's Mot. to Dismiss at 12-13. CSP concludes that, since the Pohnpei Attorney General's office has not taken action to prevent imminent violations under 26 Pon. C. § 5-115, "it follows logically that CSP, as a private person, is able to sue on its own behalf to prevent such imminent violations of the MPAs and sanctuaries around Pohnpei." Pls.' Opp'n to Def. Young Sun's Mot. to Dismiss at 13.

However, the citizen suit provision of 26 Pon. C. § 5-117 only allows a person to commence a civil suit to enjoin a person who is "alleged to be in violation of § 5-107." 26 Pon. C. § 5-117(1). There is no similar provision, like the one expressly granted to the Attorney General under 26 Pon. C. § 5-115, granting a private citizen the right to bring a suit to enjoin a person who is in "imminent violation" of Chapter 26 of the Pohnpei State Code. The plain statutory language can only be read to allow the Attorney General the power to seek equitable relief for an imminent violation. The citizen suit provision under 26 Pon. C. § 5-117 clearly limits private enforcement where a current violation of 26 Pon. C. § 5-117 is alleged and CSP does not allege facts in the complaint or otherwise that tend to show a violation of 26 Pon. C. § 5-107.

The court also notes that the facts alleged in the complaint are insufficient to grant traditional constitutional standing to CSP because it has not asserted injury to itself. *Compare* Sierra Club v.

Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (denying standing for an organization because a mere longstanding interest and concern in the protection of natural resources was found insufficient to justify standing as a representative of the public interest where it had failed to allege that either it or its members would be affected by the allegedly illegal conduct), *with* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 1124, 71 L. Ed. 2d 214, 229 (1982) (granting standing to an organization where there was no question that the organization itself had suffered injury in fact and brought suit to redress the injuries to itself as opposed to alleging a setback to the organization's abstract social interests), *and* Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343, 362 (1975) (recognizing that organizations are entitled to sue on their own behalf for injuries they have sustained). CSP has not alleged a concrete injury and a sufficient causal relationship between the injury and the alleged "violation."

Because the court reaches the same desired result on a different basis, the defendants' estoppel by acquiescence argument is not addressed. CSP does not have standing to bring this matter and is hereby dismissed as a plaintiff in this matter.

Standing must be found for each count of a complaint or that count will be dismissed. Kallop v. Pohnpei, 18 FSM R. 130, 133 (Pon. 2011). Thus, the court dismisses the cause of action brought by CSP under 26 Pon. C. § 5-117 as set forth in the Verified Complaint for Injunctive and Declaratory Relief.

## III. Conclusion

The defendants' Motions to Dismiss are hereby GRANTED insofar as the Conservation Society of Pohnpei is HEREBY DISMISSED as a party plaintiff, but remains a counter-defendant, in this matter and the motions DENIED as to the Mwoalen Wahu Ileileen Pohnpei because the court finds that it has established standing.

IT IS HEREBY ORDERED that the FSM Supreme Court Clerk of Courts notify and serve the members of the Mwoalen Wahu Ileilien Pohnpei who currently reside, or are otherwise present, on the island of Pohnpei a copy of this Order and the court's Order Granting Motion to Stay, Extending Temporary Restraining Order, and Setting Hearing on Defendants' Motion to Dismiss entered on August 24, 2016 pursuant to FSM Civil Procedure Rule 23.2 and 23(d).

Notice is hereby given to the members of the Mwoalen Wahu Ileile en Pohnpei that they are invited, but not required, to signify to this court whether they consider the representation by Iso Nahnken of Nett, Salvador Iriarte fair and adequate, to intervene and present claims or defenses, or otherwise come into the action.

* * * *