

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

THE EIGHTH KOSRAE)	CIVIL ACTION NO. 2003-2000
LEGISLATURE,)	
)	
Petitioner,)	
)	
vs.)	ORDER AND MEMORANDUM
)	GRANTING MOTION TO DISMISS
FSM DEVELOPMENT BANK,)	
)	
Respondent.)	
_____)	

I. PROCEDURAL BACKGROUND

On March 25, 2003, this court, pursuant to a petition filed by the Eighth Kosrae State Legislature (“Petitioner” or “Legislature”), issued a temporary restraining order prohibiting the FSM Development Bank (“Respondent” or “FSMDB”) from disbursing any Investment Development Fund (“IDF”) earmarked subaccount funds for the State of Kosrae to any person or entity for the period extending to April 8, 2003.

On March 31, 2003, the Petitioner filed an amended verified petition for injunctive relief, a motion to convert the temporary restraining order to a preliminary injunction, and a motion for an expedited hearing on the aforementioned motion.

On April 2, 2003, the Respondent filed a motion to dismiss the amended verified petition for injunctive relief. The motion to dismiss was made pursuant to FSM Civil Rule 12(b)(1) for lack of standing and subject matter jurisdiction, and FSM Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

On April 3, 2003, the court, with agreement of the parties, extended the temporary restraining order for a 14 day period to April 22, 2003 pursuant to FSM Civil Rule 65(b), set a hearing on the

motion to convert the temporary restraining order to a preliminary injunction and the motion to dismiss on April 15, 2003, and denied the Petitioner's motion for expedited hearing.

On April 15 and 16, 2003, a hearing was held where evidence was submitted and oral argument heard on the Respondent's motion to dismiss and the Petitioner's motion to convert the temporary restraining order to a preliminary injunction.

The Kosrae Legislature's amended verified petition for injunctive relief seeks an injunction to prohibit the FSMDB¹ from taking any further action toward disbursement of Kosrae's IDF state earmarked subaccount funds² in contravention of the Investment Development Act³ and state policy as determined by the Legislature.

The Kosrae Legislature asserts that it has the power to set policy as a co-equal branch of the state government with the constitutional grant of legislative power. Kos. Const. art. IV. The Kosrae Legislature asserts that it has declared that the highest fiscal priority for the State of Kosrae at present is to utilize Kosrae's IDF state earmarked subaccount funds to fund the Compact II Trust Fund or as a contingency fund for operations, as is permitted by FSM Public Law No. 12-75 (2002). It oppose's utilizing those funds for providing an IDF loan to Tropical Water Kosrae, Inc. ("TWK"). TWK is a corporation whose three principal owners are Claude Phillip, Ronald P. Bickett and his wife

¹ The FSMDB was established by national law codified at Title 30, Chapter 1 of the FSM Code.

² The IDF was established by national law codified at Title 30, Chapter 2 of the FSM Code. The IDF was funded by a grant of \$20 million provided to the FSM by the United States Government. 30 F.S.M.C. 201(2). The grant was to further close economic and commercial relations between the United States and the FSM. 30 F.S.M.C. 304(1)(a)(v). The funds contained within the IDF are denominated as either "private sector reserve" funds or "state sub-account" funds, all of which are available for lending. The IDF has state subaccounts earmarked for each individual state.

³ The Investment Development Act was enacted by national law codified at Title 30, Chapter 3 of the FSM Code. The provisions of the Investment Development Act govern the administration of the IDF.

Jeanne E. Bickett. Ronald P. Bickett is the Attorney General of the State of Kosrae.

The Kosrae Legislature further asserts that the FSMDB's acceptance and submission of the TWK loan for approval and the Federated Development Authority's ("FDA")⁴ approval of the TWK loan deprives the Legislature of its constitutionally mandated power of setting policy for the State of Kosrae.

II. MOTION TO DISMISS

The Respondent challenges the Petitioner on the grounds of a lack of standing, failing to state a claim upon which relief can be granted, and additionally asserts that the Petitioner has failed to include an indispensable party to this action. The Respondent's motion to dismiss is based upon FSM Civil Rule 12(b)(1) for lack of subject matter jurisdiction and FSM Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. *Standing Requirements*

The standing issue is addressed first as it is a threshold issue going to this court's subject matter jurisdiction.

The standing requirement is not expressly stated in the FSM Constitution, but is implied as an antecedent to the "case or dispute" requirement found in Article XI, Section 6 of the Constitution, and should be interpreted so as to implement the objectives of that requirement. The issue of standing to sue is an area which calls for independent analysis by this court rather than adherence to decisions construing similar provisions in the United States Constitution. Innocenti v. Wainit, 2 FSM Intrm. 173, 178-79 (App. 1986).

⁴ The FDA was established by national law codified at Title 55, Chapter 3, Subchapter III of the FSM Code. The FDA is managed and its powers exercised by a Policy Board composed of the FSM President and the governors of the four states of the FSM. 55 F.S.M.C. 326.

A party has standing to sue where that party has a sufficient stake or interest in an otherwise justiciable controversy to obtain judicial resolution of that controversy. 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. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 153 (Pon. 1993).

This court is mandated by Article XI, Section 11 of the Constitution to first consult and apply sources from within the FSM. Alfons v. FSM, 5 FSM Intrm. 402, 404-05 (App. 1992). The overall goal is to develop principles of standing which are consistent with the language of the Constitution and designed to meet the needs of the people and institutions of the nation. Aisek v. Foreign Inv. Bd., 2 FSM Intrm. 95, 98-99 (Pon. 1985).

The Aisek court held that 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. Id. at 101. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. Ponape Chamber of Commerce v. Nett Municipal Gov't, 1 FSM Intrm. 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. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560; 112 S. Ct. 2130; 119 L. Ed. 2d 351, 364 (1992).

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 sufficient to satisfy the constitutional requirement is alleged, the petitioner generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties. Third, the petitioner’s complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

B. Standing Analysis

The first factor to be addressed is whether the Kosrae Legislature has alleged a sufficient stake in the outcome of the controversy and whether it has suffered some threatened or actual injury resulting from FSMDB’s allegedly illegal action. The injury must be an invasion of a legally protected interest which is concrete and particularized, and actual or imminent.

The Kosrae Legislature asserts that it has a sufficient stake in the outcome of this controversy as it has the constitutional power to establish policy and that its policy decisions stated in Kosrae Legislature Resolution (“L.R.”) No. 8-4, L.D. 1 and Kosrae Legislature Bill (“L.B.”) No. 8-15, L. D. 1 have not been carried out. The Kosrae Legislature has established its position that, as permitted by FSM Public Law No. 12-75, the state should make a formal request to the FDA to distribute to Kosrae any funds not yet obligated in the Kosrae IDF state subaccount fund to be used to help meet its obligations to the Compact II Trust Fund or to be used to meet critical operational needs of the

state should Compact II funding not be available in a timely manner.⁵

The second factor is that there must be a causal connection between the injury and the conduct complained of. The injury must be fairly traceable to the challenged action of the FSMDB and not the result of the independent action of some third party not before the court. Thus, the Kosrae Legislature must have suffered some threatened or actual injury resulting from the allegedly illegal action of the FSMDB. The Legislature asserts that the FSMDB failed to comply with various sections of the Investment Development Act in not adequately evaluating the TWK project for commercial feasibility, infrastructure needs, and qualifications and financial ability of the loan applicants, and that these sections give it standing.

The court finds that it cannot fairly trace the Kosrae Legislature's alleged injury of not having its policy decisions abided by or its policy decisions infringed upon, to the challenged actions of the FSMDB under the Investment Development Act. The FSMDB has the responsibility to evaluate and comment upon the commercial feasibility and public infrastructure needs of a project, whether existing infrastructure is adequate or whether the government has committed to new or improved infrastructure, the qualifications and experience of the applicants with respect to managerial, technical, and marketing skills, the financial ability and past records of the applicants, and such other matters as it deems appropriate. 30 F.S.M.C. 312. However, the final approval for a loan is not made by the FSMDB, but rather by the FDA. 30 F.S.M.C. 303(3)(a) states: "(3) The Federated Development Authority shall be responsible for: (a) Approving financing for the projects submitted

⁵ Petitioner asserted in its amended verified petition that there is a possibility that the funding under Compact of Free Association II ("Compact II") may not be received in time to be used for Fiscal Year 2004 and that a contingency plan should be in place to fund governmental operations until Compact II funding is made available. The funds that would otherwise go to the TWK loan could be used for operations funding if Compact II funds are not available.

for funding pursuant to section 309 of this chapter.”

Section 309 is on FDA approval of financing from the State subaccounts. 30 F.S.M.C. 309 states:

No financing shall be funded from the State-earmarked subaccounts created pursuant to section 316 of this chapter without written approval from the Federated Development Authority. In reviewing each application for financing, the Federated Development Authority shall consider the contents of the application and the comments, if any, of the sponsoring State, the Development Bank, the Board of Advisors and the Department of Resources and Development of the Federated States of Micronesia. If the Federated Development Authority denies the financing sought in an application, it may at the same time approve a lesser or alternative financing, or approve a financing upon condition that the project proposal be amended in some respect. The financing approval shall specify the type of financing approved, the rate of interest, if any, and the length of payment grace periods, if any, and the property to be hypothecated to secure repayment of the financing. In each case, the approval is conditioned upon the recipient’s execution of definitive legal documentation of the financing, in form and substance acceptable to the Development Bank.

The Chief Executive Officer (“CEO”) of the FSMDB testified that the FDA and not the FSMDB is the approving authority for loans from IDF state earmarked subaccounts.

The alleged injury of the Kosrae Legislature that its policy making function is being infringed upon cannot be traced to the allegedly faulty or incomplete reports by the FSMDB that may or may not have led to the approval of the TWK loan. The approval of the TWK loan is the result of independent action of the FDA who is not a party before the court.

The other factor to be addressed is redressability. Will the relief requested make any legal difference that will redress the Petitioner’s injury? The Petitioner’s amended verified petition requests only that the FSMDB be enjoined from taking any further action regarding loan applications for and disbursement of Kosrae IDF state subaccount funds. No other relief is sought. The injunctive relief, if granted, does not directly redress Petitioner’s injury to its policy making functions.

The Petitioner also alleged several other possible injuries that might arguably provide the basis

for standing. This includes: (1) the State of Kosrae's noncompliance with 30 F.S.M.C. 305 since the Investment Development Act allows funds from the Kosrae IDF state subaccount to be loaned only for projects submitted by the state; (2) the Governor's actions that were inconsistent with the Legislature's policy decisions set forth in a resolution requesting the Governor to submit a request to the FDA to transfer the remaining balance of the funds in the Kosrae IDF state earmarked subaccount to the state; L.R. No. 8-4, L.D. 1 and (3) the Governor's inconsistent actions in regard to L.B. No. 8-15, L.D. 1, a bill to establish fiscal policies and to obtain distribution of funds in the Kosrae IDF state earmarked subaccounts. Each of these possible injuries will be examined in turn with regard to Petitioner's standing to bring this action.

1. State Submittal of TWK Project

The court examines a possible injury to the Petitioner that was caused by the submittal of the TWK loan because the Petitioner did not support the TWK project. A loan from the Kosrae IDF state earmarked subaccount can only be obtained if it was submitted by the State. The applicable statutory provision is found at 30 F.S.M.C. 305 that states: "All projects submitted for financings from the State earmarked subaccounts in the Investment Development Fund shall be submitted by a State government or the National Government for review and approval. All projects shall be initially submitted to the Development Bank for review pursuant to section 306 of this chapter."

The FSMDB Kosrae branch manager testified that the procedure utilized for submitting a project for an IDF state subaccount loan was by communication from a state's governor. Testimony was given that a letter was received from the Governor of the State of Kosrae on the TWK project and that such a letter constituted the submittal of the TWK project for a loan.

The language of 30 F.S.M.C. 305 states only that a project shall be submitted by a State

government. No evidence was offered by the Petitioner that the Kosrae Legislature had any formal role in the submittal process, either by way of formal approval or the ability to disapprove a project. The court, therefore, can find no legally delineated role for the Kosrae Legislature in the submittal process and therefore no injury to Petitioner from the submittal.

2. Contravention of L. R. No. 8-4, L.D. 1

The Petitioner also asserts that it has provided its policy determination in L.R. No. 8-4, L.D. 1 and that the TWK loan is in contravention to the policies expressly stated in this resolution. The problem with this position is that this legislative resolution is an expression of the will of the Kosrae Legislature, but that a legislative resolution in general and this resolution in particular, does not create any legally enforceable right in the legislature to enforce its will and does not carry the force of law.

This resolution submits a request to the Governor which the Governor may or may not carry out at his discretion. The court, therefore, finds that the Kosrae Legislature has no legally enforceable rights created by the passage of this resolution to compel compliance by the Governor. Additionally, the Governor is not a party to this action.

3. Contravention of L. B. No. 8-15, L.D. 1

A law enacted by the Kosrae Legislature is the highest form of setting forth the legislature's policy decisions and such laws can create legal rights that may be enforceable in the courts. The subject bill, however, is not yet law and was reported as being vetoed by the Governor on April 11, 2003. Additionally, the bill requires action by the Governor who is not a party to this action.

For these reasons, the court finds that there is no injury to the Petitioner created from the provisions of L.B. No. 8-15, L.B. 1.

4. Other Possible Injuries

The Petitioner has asserted injuries stemming from FSMDB's conduct that may have led to FDA approval of the loan to TWK and that such a loan is inconsistent with their policy determinations. These go to FSMDB's actions of allegedly submitting inadequate or incomplete reports to the FDA. The Petitioner's contention is that if the reports were more accurate and complete, the loan to TWK would not have been approved. The Petitioner's conclusions are entirely speculative as to the effect of better prepared and/or more complete reports by the FSMDB on the decision making of the FDA, especially since the FDA "pre-approved" the loan before the FSMDB made its report or proposed conditions for the loan.⁶

The court's examination of the three additional factors to be examined for determining standing also supports the conclusion of Petitioner's lack of standing. The three additional factors are: (1) generalized grievances shared by substantially the whole population do not normally warrant standing; (2) the petitioner generally must assert its own legal rights and interests, and cannot rest its claim to relief on the legal rights or interests of third parties; and (3) the petitioner's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

First, the Petitioner's grievances with regard to possible harmful ramifications of not placing some of the Kosrae IDF state earmarked subaccount funds for paying into the Compact II Trust Fund or reserving some amount for possible government operations should Compact II funding not be made available in a timely manner, is the type of generalized grievance shared by substantially the

⁶ Evidence was received from the CEO of the FSMDB of conditions placed on the TWK loan that addressed a number of concerns of the FSMDB regarding the TWK project.

whole population. Such generalized grievances do not warrant standing.

Second, the Petitioner's grievances with regard to the inadequate and incomplete reporting of the FSMDB to the FDA go to the legal rights or interests of the FDA and not to the Kosrae Legislature. Further it is purely speculative as to what effect more accurate and complete reports might have had on the FDA's decision making with regard to the TWK loan. Since the FDA had "pre-approved" the loan before the report was made, it is likely that the result would not be different.

This action is similar to Guerrero v. Clinton, 157 F.3d 1190 (9th Cir. 1998), cited by Respondent. That case involved a challenge by a member of the Guam Legislature, the Government of Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and the State of Hawai'i to the failure of the Director of the Office of Insular Affairs to issue annual reports required by the Compact of Free Association Act, and to the failure of the cumulative report submitted in 1996 to adequately address Compact impact.

The Ninth Circuit Court of Appeals held that the adequacy of the 1996 and subsequent reports was not reviewable and the injury asserted by the governments is not redressable because the U.S. Congress asked for those reports primarily as a tool for its own use, without cognizable legal consequences. The same could be said for the reports called for under 30 F.S.M.C. 312, these are evaluations and comments of the FSMDB that the law required for the primary use of the FDA, without cognizable legal consequences. In this action, the submission of the section 312 reports does not have any predictable effect on the decision making of the FDA to approve or disapprove of the loan for a state submitted project. Thus, the report has no effect on any right or obligation of anyone.

Third, the Petitioner's complaint does not fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Neither the statute or constitutional

provisions involved in this action provide support for Petitioner's standing. The Petitioner's complaint does not fall within the zone of interest to be protected by the provisions of the Investment Development Act. Further, nothing in the statute can be said to provide Petitioner a cause of action and no evidence was received that there was any intent by the FSM Congress in enacting Title 30, Chapter 3 to do so.

The Petitioner's complaint also does not fall within the zone of interest to be protected under the Kosrae Constitution. The Kosrae Legislature has the ability to set forth its policies through the enactment of legislation. Such legislation if passed into Kosrae State law may provide rights enforceable in the courts, but there is no such law yet.

The Petitioner also argued that it should be the party to protect the state's interest since, in this unique case, the Attorney General was personally involved in the matter and could not do so and since the Legislature is a co-equal branch of the state government. Independent legal advice was offered by another attorney in the Attorney General's office and this other attorney could be used to protect the state's interest. Alternatively, outside counsel could be retained for the same purpose.

Finally, the facts of this action are distinguishable from Udot Municipality v. FSM, 10 FSM Intrm. 354 (Chk 2001). In Udot, Udot Municipality sued the FSM Finance Department and a number of allottees of certain appropriations laws asserting that they were entitled to apply for funding under certain appropriations and that they were denied this right because no fair and transparent application procedure was in place to allow them to do so. The municipality was an intended beneficiary of the appropriations laws. The injury to Udot Municipality was the deprivation of its right to apply for funding intended to benefit it under certain appropriations laws. The injury was directly traceable to the alleged illegal actions of the defendants in administering the appropriations laws. That is unlike

