IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
APPELLATE DIVISION

FEDERATED STATES OF MICRONESIA DEPARTMENT OF FINANCE AND ADMINISTRATION FOR THE FSM, LEWIS OS, in his capacity as Mayor of Polle Municipality, TOLENSOM AUTHORITY, JAMES FRITZ, in his capacity as Executive Director of Chuuk State Commission on Improvement Projects,	)	APPEAL CASE NO. C2-2001
Appellants,	)	
v.	)	
UDOT MUNICIPALITY,	)	
Appellee.	)	

OPINION

Argued: October 28, 2002
Decided: August 6, 2003

BEFORE:

Hon. Andon L. Amaraich, Chief Justice, FSM Supreme Court
Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellants: (Lewis Os, Tolensom Authority, and James Fritz)
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COURT'S OPINION

PER CURIAM:

This is an appeal from a partial grant of summary judgment, the issuance of a permanent injunction, and a declaratory judgment for Udot Municipality[1] ("Udot"), which was the plaintiff below. This appeal involves millions of dollars of appropriated public funds and the legislative and executive processes by which they are allocated and disbursed. The FSM Supreme Court Trial Division, sitting in Chuuk, held that defendants Liwis Os and Tolensom Authority[2] ("Allottees") violated the Financial Management Act ("FMA")[3] and that the FSM National Government and its Department of Finance and Administration (collectively referred to as "FSM") failed to properly monitor the Allottees in executing the expenditure of certain public funds appropriated by public laws for the Faichuk area of the State of Chuuk. The trial court further held that it is unconstitutional for the Congress of the Federated States of Micronesia ("Congress") to require Allottees to consult with FSM Senators in deciding which projects are to be funded after the Congress has appropriated funds. The trial court enjoined the FSM from disbursing and obligating any undisbursed and unobligated funds, and from disbursing and obligating any future appropriations in Chuuk State Election District

[1] Udot is one of eight municipalities in the Faichuk region of the State of Chuuk and is in Chuuk State Election District No. 4. The population of Udot is approximately 3,600.

[2] Liwis Os was the Mayor of Polle Municipality. The other defendant/allottee in the case below was James Fritz, in his capacity as Executive Director of the Chuuk State Commission on Improvement Projects ("CSCIP").

[3] The Financial Management Act of 1979 is codified at 55 F.S.M.C. §§ 201 to 228.

No. 4 ("Chuuk Election Dist. No. 4"), until a fair and transparent application process is implemented. The trial court also ordered that the FSM conduct an accounting of the funds already disbursed. Finally, the trial court awarded to Udot its reasonable attorney fees based on a private attorney general theory,[4] as well as costs.

There are three parties to this appeal and each raises different issues. The FSM challenges the trial court decision to award attorney fees to Udot based on a private attorney general theory and whether those fees were reasonable. The Allottees assign error to the following trial court rulings: (1) that Udot has standing to sue the FSM, its departments, and the Allottees; (2) that Udot has standing to sue for an accounting of already expended public funds in lieu of the statutory requirements for accounting and reporting; (3) that requiring Allottees to consult with Senators before obligating appropriated funds violates the constitutional separation of powers doctrine; (4) granting an injunction prohibiting obligation and disbursement of unobligated funds and future appropriations for public projects for Chuuk Election Dist. No. 4, unless and until a fair and transparent application process is established; and (5) awarding Udot attorney fees under the private attorney general theory, and awarding costs against the Allottees on the basis that they are not part of the FSM. Udot raises the issue of whether the Allottees have standing to raise issues on appeal that were not challenged by the FSM.

We hold that: (1) Udot had standing to sue the FSM, its departments, and the designated

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[4] The private attorney general theory permits a party to receive reimbursement of its attorney fees from the government when it must hire its own attorney to enforce a right shared by a large number of people, when it is in the public interest. The theory recognizes that the government does not always adequately protect the rights of citizens, and that people who successfully defend the rights of the public at their own cost deserve to have their attorney fees paid for, as if they had been provided the services of a "private attorney general."

Allottees; (2) the issue, as presented by the Allottees, of whether Udot had standing to sue for an accounting of already-expended public funds is moot; (3) Allottees have standing to raise issues on appeal not raised by the FSM where they have interests distinct from the FSM and have redressible injuries; (4) the requirement that Allotees "consult" with a Congressional delegation before obligating appropriated public funds violates the doctrine of separation of powers and is therefore unconstitutional; (5) the trial court did not err when it enjoined the FSM from obligating and disbursing unobligated funds and any future appropriations for Chuuk Election Dist. No. 4 until a fair and transparent application process is established; (6) the trial court did not err in awarding Udot attorney fees under a private attorney general theory, and the amount of those fees was reasonable; and (7) the trial court did not err in awarding costs against the Allottees on the basis that they are not part of the FSM.

Accordingly, we affirm the judgment of the trial court.

I. BACKGROUND

On May 26, 2000, Udot Municipality filed a complaint seeking a declaration of its right to part of over $2.8 million in public funds appropriated by the Congress of the Federated States of

Micronesia under Public Laws ("P.L.") numbered 10-69[5], 10-120[6], 10-126[7], 11-27[8], and 11-29[9] (collectively the "Faichuk appropriations"). The action for declaratory judgment was initiated by Udot when it discovered that access to public project funding for Chuuk Election Dist. No. 4 required applying to the Member of Congress who represents that district and hoping that he would decide the project should be funded.[10] Udot also sought to enjoin the FSM from releasing to the Allottees

[5] P.L. No. 10-69 became law on December 27, 1997. This law was subsequently amended by P.L. No. 11-29. See footnote 9, below.

[6] P.L. No. 10-120 became law on November 12, 1998. This law appropriated $1,000,000 for infrastructure and other projects and programs in Chuuk Election Dist. No. 4. The FSM President or his designee was named the allottee. President Leo Falcam designated by letter dated June 8, 2000, Mayor Liwis Os as the suballottee.

[7] P.L. No. 10-126 became law on December 16, 1998. This law appropriated $175,000 for Faichuk and designated the Mayor of Polle, the allottee of these funds, which were for funding health, education, infrastructure and other public projects and programs in the State of Chuuk.

[8] P.L. No. 11-27 became law on January 26, 2000. This law appropriated $650,000 for Chuuk Election Dist. No. 4. The allottee of these funds was James Fritz, as CSCIP Executive Director. The laws establishing the CSCIP are codified at 55 F.S.M.C. §§ 801 to 804.

This was the only law where funds were not completely allotted at the time of the filing of the preliminary injunction. These funds were appropriated for infrastructure projects, roads, and other economic and social projects and programs in the State of Chuuk.

[9] P.L. No. 11-29 became law on February 17, 2000. This law appropriated $1,000,000 for the Faichuk area of Chuuk. The allottees of these funds were Liwis Os as Mayor of Polle ($540,000), and the Tolensom Authority ($460,000). These funds were appropriated for various infrastructure needs, transportation systems, and other economic and social projects, public projects for other purposes in Chuuk State, and for Chuukese living outside Chuuk.

[10] The declaratory judgment and memorandum of decision of July 27, 2001 stated:

> On April 27, 2000, the Mayor of Udot wrote to the Executive Director of the Chuuk State Commission on Improvement Projects asking for an accounting of funds already spent and for forms in order to seek disbursement. The Executive Director responded that he was not obligated to give an accounting and told him to ask Congress or the FSM Secretary of Finance and Administration for an accounting because he is required to report to those instrumentalities. As for asking for disbursement, the Executive Director said to ask the Senator representing Election District No. 4 (Faichuk). The Executive Director testified that that Senator tells him what projects are approved. The Director testified that the system and

any funds appropriated under the Faichuk appropriations, and to compel an accounting of the funds already disbursed.

On June 26, 2000, the Allottees filed their answer to the complaint. On July 5, 2000, the FSM filed its answer to the complaint.

On June 12, 2001, Udot filed a motion for summary judgment and asked for an award of attorney fees. On June 26, 2001, the FSM filed its opposition to the motion for summary judgment. On July 2, 2001, the Allottees filed responses to the motion for summary judgment, as well as a cross-motion for summary judgment, and a motion to dissolve the injunction. On July 11, 2001, Udot filed its opposition. On July 18, 2001, the motions for summary judgment were argued before the trial court.

On July 27, 2001, the trial court issued a judgment declaring that the involvement of Members of Congress in the administration and execution of the Faichuk appropriations violates the constitutional principle of separation of powers. The trial court entered judgment in favor of Udot, enjoining, *inter alia*, the FSM from disbursing any unobligated funds appropriated for Chuuk Election Dist. No. 4 and enjoining the CSCIP Executive Director from approving any further obligations from funds that remained under P.L. No. 11-27, and any funds appropriated in the future for that election district, until a fair and transparent application process was either legislated by Congress or properly promulgated and implemented by the appropriate agency. The trial court also ordered the FSM to complete an accounting of expended funds, and awarded attorney fees to Udot based upon a private

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> the procedure is that you apply to the Senator representing Faichuk, the Senator decides, and then he carries out the Senator's decisions.

Declaratory Judgment at 43-44 (July 27, 2001).

attorney general theory.

On August 17, 2001, Udot filed a motion for costs and attorney fees. On August 22, 2001, the FSM filed the instant appeal, challenging the award of attorney fees. On September 3, 2001, the FSM filed its opposition to Udot's motion. On September 10, 2001, the Allottees filed their notice of appeal.

On February 6, 2002, the trial court awarded Udot $15,210 in attorney fees, for which the FSM and the Allottees are jointly and severally liable, and $2,265.03 in costs, for which the Allottees are jointly and severally liable. On February 12, 2002, the FSM filed a notice of appeal of that order to the extent that attorney fees were awarded.[11]

II. ISSUES

The issues presented by the respective parties are as follows:

A. By the FSM:

1. Did the trial court err when it awarded attorney fees to Udot under a private attorney general theory and was the amount of attorney fees reasonable?

B. By the Allottees:

1. Did the trial court err when it found that Udot had standing to sue the FSM, its departments and the designated Allottees of Congress appropriated funds?

2. Did the trial court err in finding that Udot had standing to sue for an accounting of already expended funding in lieu of the statutory requirements for accounting and reporting of expended public funds?

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[11] The challenge to the trial court's award of attorney fees to Udot in the second notice of appeal filed by the FSM is addressed in this opinion. This second notice of appeal was not assigned a different appeal number and was based upon similar issues as the first notice of appeal.

3. Did the trial court err in finding that "consultation" with Members of Congress after the enactment of an appropriations law is unconstitutional as violative of the separation of powers doctrine?

4. Did the trial court err in granting an injunction against disbursement and obligation of unspent funds under P.L. No. 11-27 and future appropriated funds for improvement projects for Chuuk Election Dist. No. 4, unless and until a fair and transparent application process is established?

5. Did the trial court err in awarding attorney fees to Udot under the private attorney general theory, and costs against the Allottees on the basis that the Allottees are not part of the FSM National Government?

C. By Udot Municipality:

1. Did the Allottees have standing to raise issues on appeal that were not raised by the FSM?

III. DISCUSSION

1. Issues of Standing

We first discuss the standing of Udot Municipality to bring the case below, and the Allottees' standing to raise certain issues on appeal, for a party's standing is a potentially dispositive threshold issue going to the subject matter jurisdiction of the court.

At the trial court level, the Allottees raised the issue of whether Udot had standing to sue the FSM, its departments, and the Allottees regarding Udot's rights to apply for public funds appropriated under various public laws. The Allottees also challenged Udot's standing to sue for an accounting of already-expended funding, when Allottees are statutorily required only to account and report to the Secretary of Finance and the FSM Congress regarding expended public funds.

Udot challenges the standing of Allottees to raise issues on appeal that were not challenged

by the FSM.

A. Standard of Review and the Tests for Standing

Whether a party has standing is a question of law that we review *de novo* on appeal. Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995).

The standing requirement is not expressly stated in the 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. This Court has addressed the issue of standing to sue on numerous occasions, and when deciding a question of standing, this Court utilizes a case-specific analysis. As we are mandated to do by Article XI, Section 11[12] of the Constitution, we must first consult and apply sources from within the FSM. 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 our Nation. Aisek v. Foreign Investment Board, 2 FSM Intrm. 95 (Pon. 1985).

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 case or dispute requirement. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 153 (Pon. 1993).

In Aisek, *supra*, the court held that opposing parties must have sufficiently competing contentions and adverse interests such that the adversaries will thoroughly research and argue the

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[12] Article XI, Section 11 states:

> Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia.

points of law at issue. 2 FSM Intrm. 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 Municipality Government, 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 or erroneous court ruling. 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. 8th Kosrae Legislature v. FSMDB, Civ. Act. No. 2003-2000 (Kos. 2003).

While not constitutionally based, three additional rules need to be applied before the question of standing can be resolved. 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 party 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 interests which the party is seeking to protect must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Id. at 4-5.

B. Allottees' Standing to Raise Issues on Appeal Not Raised by FSM

We first address Udot's contention that the Allottees lack standing to raise issues on appeal that were not raised by the FSM, because we need not address the Allottee's issues if we hold that they do not have standing. The specific Allottees are Liwis Os, in his capacity as Mayor of Polle Municipality, the Tolensom Authority, and James Fritz, in his capacity as CSCIP Executive Director.

Inherent in Udot's argument that the Allottees do not have standing to raise certain issues on

appeal is the contention that the Allottees do not have any practical interest in the outcome of the appeal and that any impact, should the Allottees' appeal be successful, would be primarily on the FSM. Thus, Udot's argument is that the Allottees do not have any interests distinct from the FSM, and should not be permitted to appeal the trial court's findings that the FSM did not appeal.

The issue here is whether the interests of the Allottees are sufficiently distinct from those of the FSM, and whether the Allottees have suffered some injury which would be redressible by resolution of this appeal in their favor. We find that the Allottees do have interests distinct from the FSM and that they did suffer a redressible injury.[13]

We first recognize that the Allottees are specifically named defendants in the case below and are represented by their own legal counsel. The FSM, which was represented by the Office of the Attorney General ("OAG"), initially defended this case by opposing Udot's claims, but later changed its position on a number of issues. The OAG never purported to represent the Allottees, and ultimately the Allottees alone defended against Udot's claims. At oral argument, the Allottees' counsel characterized their position as being "left out in the cold."

As appointed allottees of FSM appropriation laws, the Allottees' actions are reviewable by the Department of Finance and Administration ("DFA"). The OAG can also review allottees' actions for compliance with FSM laws, and reject contracts or other obligations that allottees may attempt to enter into. It is clear that an allottee's interests do not always align with those of the FSM. *See e.g.,* Mackenzie v. Tuuth, 5 FSM Intrm. 78 (Chk. 1991)(action for declaratory judgment by FSM

[13] Udot also points out that Allottees do not have any vested right to serve as allottees over the funds that they were empowered to obligate, and that they are removable by the executive or by the legislature if the law is amended. The standing of Allottees at this time, in this particular action, is distinct from the legal status which they have *vis-a-vis* either of the branches that created that status.

Supreme Court Administrator, on behalf of Chief Justice as allottee of appropriations to Judiciary, against Secretary of Finance, challenging constitutionality of FMA as applied to Judiciary).

Udot challenges the Allottees' standing to appeal the following trial court decisions: (1) granting Udot's request for an accounting of already-expended public funds from the Faichuk appropriations; (2) ruling that the requirement for "consultation" with Members of Congress, after an appropriation is made, is unconstitutional; and (3) issuing injunctions against disbursement of unspent funds and future appropriated funds for public projects for Chuuk Election Dist. No. 4.

First, Udot argues that Allottees should not be permitted to challenge the trial court order requiring the FSM and the DFA to complete a proper accounting of the Faichuk appropriations, because the Allottees were not aggrieved by that order, the order was not directed at them, and the trial court found that it would be futile to order the Allottees to provide an accounting due to the state of their records.[14] The Allottees state in their reply brief that:

> *[t]he Allottees are essentially arguing on this point that they are not required to perform any non-statutory accounting when requested by an entity outside of the statutory scheme*, and this is now obviated by the voluntary undertaking, completion and provision of an accounting by the FSM. Thus, the relief sought by the Allottees– that is, to prevent the undertaking and provision of an accounting not required by statute is no longer available. Reply Br. p. 3. (Emphasis added.)

Allottees have argued that the issue was not necessarily moot to the extent that Udot had indicated it would be objecting to the accounting submitted by the FSM, and a more thorough accounting may be required by the trial court. It is for the trial court to evaluate the accounting submitted; however, we find that the issue, as presented by Allottees, is moot as they have not in fact

[14] The trial court specifically found that Tolensom Authority and Os did not have any records from which they could provide an accounting, and that the CSCIP's records were already in good order and were sufficient to determine where funds it handled went. App. p. 55-56.

been required to perform any non-statutory accounting and the FSM has already submitted an accounting. This Court has previously stated that a dispute becomes moot when the parties lack a legally cognizable interest in the outcome and if any relief it could grant would be ineffectual. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1996).

Udot argues that Allottees do not have standing to challenge the trial court's decision that requiring consultation with a Congressional delegation, after an appropriation has been enacted, was unconstitutional. The trial court also issued an injunction prohibiting the FSM and the Allottees from disbursing unobligated funds and any future appropriations to Chuuk Election Dist. No. 4, unless and until a fair and transparent application process was in place. For the reasons discussed below, we hold that the Allottees have standing to challenge these rulings and orders of the trial court.

It is clear that Allottees have interests, responsibilities, and functions that are distinguishable from the FSM, and that they have been injured in the performance of their duties by the trial court's order. Congress has delegated to the Allottees the authority to create legally enforceable financial obligations in the execution of certain public laws pursuant to the FMA. 55 F.S.M.C. §§ 201 to 228. Specifically, 55 F.S.M.C. 215 states:

> (1) For purposes of this chapter, 'allotment' means the delegation of authority to a person to *create legally enforceable financial obligations in accordance with applicable law on behalf of the Federated States of Micronesia, within specific limits set forth in an appropriation act of the Congress of the Federated States of Micronesia* or as may be required by the terms of the funding available from other sources.
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> (2) For purposes of this chapter, 'allot' means to make an allotment.
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> (3) For purposes of this chapter, 'allottee' means a person to whom an allotment is made. (Emphasis added.)

Allottees for public projects of the states are often chosen because they have a special role

to play in the implementation of public projects. This is especially important in situations where, as here, a lump sum appropriation is made with no delineation of specific public projects to be funded and in what amounts.

The CSCIP is an example of an entity with a significant role in implementing public projects in the State of Chuuk. Allottee James Fritz was sued below in his capacity as Executive Director of the CSCIP. The CSCIP is composed of the following: a representative of each election district, or his designee; the Director of the Office of Planning and Statistics of Chuuk State; and a person from within the district selected from a majority of the mayors. CSCIP has authority, under 55 F.S.M.C. 803, to:

> (1) Obligate funds appropriated and allotted to the commission by the Congress for projects in Chuuk;
>
> (2) Award and enter into contracts for projects, giving priority to bids by Micronesian citizens or corporations qualified and capable of performing fully and without delay such projects;
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> (3) Assess damage to private property caused by projects and negotiate written settlements on amounts of compensation, such written settlements to be treated as obligations for purposes of the Financial Management Act of 1979;
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> (4) Establish priorities for the performance of projects, ensuring that each district is treated as equally as possible;
>
> (5) Submit all reports required by applicable law, including, but not limited to, the Financial Management Act of 1979; and
>
> (6) Appoint an executive director, who may carry out such duties of the commission as the commission deems advisable; the commission may authorize the executive director to hire staff.

In accord with subsections (2), (3), and (4) above, James Fritz, in his capacity as CSCIP Executive Director, has responsibilities in addition to his role as Allottee. Depending upon the

circumstances, these could include carrying out decisions in awarding and entering into contracts for projects, making assessments and negotiating settlements, and establishing priorities for the performance of projects.

Allottee Liwis Os, as Mayor of Polle, is also an Allottee who is in a position to make decisions on the implementation of various public projects within his municipality. Allottee Os was sued in his capacity as Mayor. As Chief Executive of Polle, he has input into the public projects being planned and carried out in his municipality that may be funded by appropriations of Congress.

Both of these Allottees are in a position to do more than act as extensions of the FSM, as they have additional responsibilities as CSCIP Executive Director and Mayor of Polle that are related to the implementation of public projects. While the FSM is responsible to ensure that appropriations are expended according to the FMA and related regulations, the Allottees are directly involved with their respective communities, taking actions to plan and implement public projects.

As Allottees they must know whether the procedures by which they administer funding under public project appropriations are proper. When the legality of the procedures used by Allottees and related to their responsibilities is directly challenged, they have a sufficient stake in the outcome of the controversy to have standing.

Further, when the procedures which they have used are challenged and found unlawful, the Allottees incur injury since they cannot carry out their Allottee functions and also cannot carry out their responsibilities for implementing public projects as CSCIP Executive Director and Mayor of Polle. The injunction issued by the trial court halted the Allottees' performance of these functions with regard to the subject appropriations.

This injury is such that it can be traced to the challenged action, as the procedures by which

public projects are selected, funded, and implemented have been found to be unlawful. A decision by this Court reversing the trial court's decision on the challenged procedures would redress the Allottee's injuries, as it would permit them to proceed with executing and implementing public projects as Allottees, as well as in their capacities as CSCIP Executive Director and Mayor of Polle.

The Allottees' grievance is not a generalized grievance shared by substantially the whole population, which would not warrant standing. The Allottees here are asserting their own legal rights and interests, and are not resting their claim to relief on the legal rights or interests of third parties. The Allottees have interests that are distinct from and in addition to the ones they share with the FSM. The Allottees are attempting to protect their interest to properly administer funding under the public laws for which they are Allottees, and also protect their interests in planning and implementing suitable public projects for the geographic areas for which they are responsible.

From the submissions of counsel, the parties in this action have proven to have competing contentions and are adversaries having a sufficient interest in the outcome to have thoroughly researched and argued the issues. For all of the aforementioned reasons, we hold that the Allottees have standing to challenge the trial court rulings set forth above.

C. Udot's Standing

Udot's standing was determined by the trial court in Udot Municipality v. FSM, 9 FSM Intrm. 560, 562 (Chk. 2000), in which the trial court stated:

> The Preliminary Injunction sets out the procedures under which the funds appropriated by Public Law No. 11-27 were distributed in Faichuk. I found that procedure unconstitutional for purposes of reaching a decision on that motion. [Citation omitted.] *Concerning standing, I cannot say that one municipality out of eight eligible to receive development funds does not have standing to raise whether it has been fairly allowed to apply for some of them.*

(Emphasis added.) The trial court further ruled on the standing issue in Udot Municipality v. FSM, 10 FSM Intrm. 354, 358 (Chk. 2001), in which it stated:

> The allottee defendants again raise the issue of the plaintiff's standing to sue. . . . they contend that since all eight municipalities are in the same boat, Udot is not singled out and thus suffers no irreparable harm peculiar to itself. This, however, would not indicate a lack of standing on Udot's part, but rather that any of the eight municipalities of Faichuk would also have had standing to sue if it so chose.

The Allottees challenge the trial court's ruling that Udot had standing, asserting that the trial court erroneously created a cause of action or right in a municipality to a fair opportunity to apply for public funding, even though such a cause of action does not exist by law or the Constitution.

Udot counters that, as one of eight municipalities in an area for which public funds were appropriated, it has a right to challenge the legality of the process by which the funds are allocated and distributed. Udot also argues that, as a municipality ostensibly eligible to receive a portion of the Chuuk Election Dist. No. 4 appropriations, it also has standing to compel the FSM and the Allottees to comply with the FMA and regulations with respect to these appropriations.

We hold that the trial court did not err by finding that Udot does have standing to challenge the legality of the process by which funds were allocated and distributed under the Chuuk Election Dist. No. 4 appropriations. Udot has standing to challenge both the legality of the process and the FSM's and Allottees' compliance with the FMA and related regulations, to the extent that such compliance impacts upon the relief that Udot requests.

Here, Udot questions the legality of the allocation and distribution process for public funds that have been appropriated to the Faichuk region. Udot has more than a general interest in the legality of this process as it contends that, under a fair and transparent application process, it would receive at least the opportunity to apply for and receive some of the funds for its own projects. Thus,

the trial court properly recognized and focused on the threatened economic injury to Udot when the process by which the Faichuk appropriations were being administered were alleged to be unlawful.

This case is similar to the Aisek case, *supra*. In Aisek, the court found that the plaintiff had standing to challenge the legality of the issuance of a foreign investment permit to a dive operation that would compete with plaintiff's dive shop. In raising his challenge, Aisek questioned the legality of the process by which the foreign investment permit was issued, alleging that the makeup of the Foreign Investment Board ("FIB") that issued the permit was illegal. Aisek's interest in the issuance of the permit was not a generalized interest in the legality of the FIB's activities, but that of a competitor for dive shop operations in Chuuk. Aisek, therefore, raised a threatened economic injury.

The FMA creates statutory duties for the Secretary of Finance, 55 F.S.M.C. 205, and Allottees, 55 F.S.M.C. 226. The Secretary of Finance is required to keep a complete set of double entry books in which he shall open or cause to be opened government accounts for the allotments as shown by appropriations laws. He is required to keep such books so that the income and expenditures of all FSM funds may at any time be ascertained and known. *See* 55 F.S.M.C. 205(2). The Allottees are required to submit reports to the Congress twice annually, providing an "accounting of each line item, or subsection apportioning funds . . . detailing obligations incurred against all sums appropriated by the Congress . . . or made available to an allottee from other sources, to include a detailed explanation and full justification for each major deviation from a line item, or subsection apportioning funds." 55 F.S.M.C. 226.[15]

The FMA does not create a private right of action for parties in general to contest violations

[15] Regulation 3.5 of the Financial Management Regulations requires that these reports also be submitted to the Secretary of Finance, and that Allottees provide the Secretary with any other reports, information, or documentation as the Secretary may from time to time request in furtherance of the FMA.

of its provisions. However, in this case Udot requests the opportunity to seek funding from the challenged public laws without participating in an unlawful process and the FSM's failure to comply with the FMA and its related regulations impacts upon the relief that Udot requests. In order for Udot to seek funding, it was necessary to determine what portion of funds remained unobligated and might still be available to Udot. An accounting was a necessary and appropriate tool to achieve this.

Allottees also challenge Udot's standing on the basis that it is not an ordinary "person" entitled to assert personal rights, but is a municipality whose ability to bring suit against its paternal governments with respect to such rights is, as a general rule, impermissible. As support for this argument, the Allottees rely on United States cases that hold that a municipal corporation, created by a state for the better ordering of government, cannot invoke privileges or immunities under the U.S. Constitution in opposition to the will of its creator. *See, e.g.* Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933).

Udot has demonstrated a threatened economic injury and a sufficient stake in the outcome of this controversy because it stands to lose potential funding for its projects. This threatened economic injury is a direct result of, and can be traced to, the illegality of the subject provision in the appropriation and the manner in which it was being implemented. Udot's injury would be redressed by a favorable decision, as the injunction and the establishment of a fair and transparent application process will allow it the opportunity to apply for funding.

Udot's injury is not a generalized injury shared by substantially the whole population. Udot is asserting its own legal rights and interests, and is not resting its claim to relief on the legal rights or interests of third parties. Lastly, Udot's complaint falls within the zone of interest to be protected by the statutory and constitutional provisions in question.

This Court's review of case law from other jurisdictions reveals that other courts have reached a similar conclusion regarding the standing of a municipality to sue other government entities or officials for constitutional violations. In Santiago Collazo v. Franqui Acosta, 721 F.Supp. 385 (D. Puerto Rico 1989), the U.S. District Court in a well reasoned decision held that the Municipality of Vieques had standing to sue various officials of the Commonwealth of Puerto Rico. In its opinion, the District Court stated:

> . . . this case alleges that, between program years 1985-88, the Municipality of Vieques, under a New Progressive Party (NPP) administration, has received less money under the HCDA [Housing and Community Development Act of 1974] than other comparable municipalities administered by the Popular Democratic Party (PDP). This alleged economic loss clearly constitutes a 'threatened or actual injury.' 'These palpable economic injuries have long been recognized as sufficient to lay the basis for standing.' *Sierra Club v. Morton*, 405 U.S. 727, 733 [remainder of citation omitted]. Discrimination on the basis of the political affiliation of the municipal administration, within the 'zone of interest' protected by the first amendment, is alleged as the cause of the injury, thus making it 'fairly' traceable to the challenged action. This Court could enjoin future discrimination . . . which would provide plaintiff a remedy.

Id. at 388-89.

For the aforementioned reasons, we hold that the trial court did not err when it concluded that Udot has standing to bring this action.

2. The Separation of Powers Issue

The Allottees contend that the trial court erred in finding that "consultation" with a Congressional delegation for public project funding after an appropriation was enacted is unconstitutional as a violation of the separation of powers doctrine.[16]

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[16] The trial court's declaratory judgment and memorandum of decision stated:

"The allottee defendants . . . contend that any constitutional defect is cured because the current law only requires that those seeking funds for improvement projects are only required to consult with the Faichuk congressman before the funds are obligated. See Pub. L. No. 11-27,

The Supreme Court has the power to review legislative enactments of the Congress, and the implementation of those enactments, and it has the responsibility to set aside any national statute to the extent that it violates the Constitution. Constitutional Convention 1990 v. President of FSM, 4 FSM Intrm. 320 (App. 1990); Suldan v. FSM (II), 1 FSM Intrm. 339 (Pon. 1983); FSM Const. art. XI, §§ 6, 7.

The trial court in Suldan II stated:

> While all public officials are sworn to uphold the Constitution, the Constitution places upon the courts the ultimate responsibility for interpreting the Constitution. We are forsworn by the Supremacy Clause from enforcing national laws or treaties contrary to the Constitution itself. *In a case such as this, where a party before the Court insists that a particular national law contains provisions contrary to the Constitution, we are required by the Constitution to consider that assertion. If we determine that the statutory provision is indeed repugnant to the Constitution, we may not enforce the statutory provision nor permit its enforcement by others.* Such

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§ 5 (as amended by Pub. L. No. 11-65, § 3). They contend that mere consultation, instead of consultation and approval, does not violate constitutionally mandated separation of powers. . . .

Involvement by the 'relevant' congressman in the administration and execution of the appropriation laws in this manner still violates the constitutional principle of separation of powers. The time for consultation with a Congressman concerning which projects should be funded is before Congress has voted the appropriation, so that it can be put in the appropriation bill for Congress to consider and vote upon and for the President to approve or veto. If Congress wishes to appropriate money for projects without designating by legislation the projects to be funded, it must then leave the administrative and executive decision-making as to which projects to fund to those whose duty it is to faithfully administer and execute the laws. Congress can give as much guidance as it wishes in the appropriation legislation about which projects will be funded, and much of this guidance will, no doubt, be the product of individual congressman's consultation with their constituents. But this consultation takes place before the appropriation bill becomes law, not afterwards. After the appropriation bill has become law, it is the duty of those who execute the law and administer the funds to follow the guidance Congress has given them by consulting the language Congress put in the public law, and any applicable regulations, not by consulting individual congressmen. Congress may appropriate funds for specific improvement projects, or it may legislate rules for determining which projects are appropriate, or a combination of the two. What Congress, or individual congressmen, may not do is involve themselves in the administrative and executive process of determining which projects are to be funded after the money had already been appropriated." Declaratory Judgment at 9-10 (July 27, 2001).

> a statute, in the words of the Supremacy Clause, would be 'invalid to the extent of the conflict.'

Id. at 344 (Emphasis added.)

A. The Constitutional Provisions Regarding the Separation of Powers

The legislative power is established in Article IX, Section 1 of the Constitution, which states: "The legislative power of the national government is vested in the Congress of the Federated States of Micronesia."

The executive power is established in Article X, Section 1 of the Constitution, which states: "The executive power of the national government is vested in the President of the Federated States of Micronesia." The Constitution in Article X, Section 2(a) expressly delegates to the President the power "to faithfully execute and implement the provisions of this Constitution and all national laws."

The judicial power is established in Article XI, Section 1 of the Constitution, which states: "The judicial power of the national government is vested in a Supreme Court and inferior courts established by statute."

The doctrine of separation of powers among the three branches of the national government is built into the Constitution by its very structure and the explicit language in Articles IX, X, and XI. These articles provide each branch its own specific powers and this structure provides for the independence of each branch in a system of checks and balances wherein no one branch of government may encroach upon the domain of another.

> On its most fundamental plane, the separation of powers doctrine protects the whole constitutional structure by requiring that each branch retain its essential powers and independence . . . *The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system.* (Citation omitted.)

(Emphasis added.) Mackenzie v. Tuuth, 5 FSM Intrm. 78, 84 (Chk. 1991).

B. The Constitutional Analysis

The separation of powers question presented to us is whether a requirement in an appropriations law that there be "consultation" between the Allottee and the relevant Congressional delegation before obligation of funds, is constitutional. For purposes of clarification, this opinion is not about informal, voluntary consultation that may occur as Allottees engage in consensus building regarding funding of projects, or otherwise seek input from community leaders, including Senators, according to custom and tradition.[17] Rather, it is about consultation with a Congressional Delegation that is mandated by law as a prerequisite to the Allottees' obligation of appropriated funds.

The challenged language, found in Section 5(1) of P.L. No. 11-27, as amended by Section 3 of P.L. No. 11-65 states:

> The allottees *shall not obligate funds* appropriated under this act *without consultation on the most appropriate usage of said funds between allottee and the relevant Congressional Delegation*.

(Emphasis added.)

We recognize here that P.L. No. 11-78, which was signed into law on April 16, 2001, removed the consultation requirement from the law. None of the parties below brought to the trial court's attention the amendments made by P.L. No. 11-78 and none of the parties below raised mootness issues based on the enactment of P.L. No. 11-78. The Allottees did claim below that the

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[17] Allottees assert that consultation is a key element in the customary way decisions are made throughout the Nation and that consultation is part of Micronesian custom and tradition. Therefore, Allottees argue, we should recognize consultation as a legitimate part of the process for determining the most appropriate usage of the subject funds. FSM Const. Art. XI, § 11.

enactment of P.L. No. 11-65 rendered the case moot.[18] In addressing this issue, the trial court stated:

> . . . the allottee defendants contend that matters are changed because Public Law No. 11-65, § 1(5)(a)(iii) specifically earmarked $50,000 of the Faichuk appropriation for Udot, thus taking away whatever standing Udot had by making its claim moot. Udot retorts that this sum was spent on a meeting house on Udot without the municipality's, or its mayor's, knowledge or involvement. The allottee defendants' argument is not convincing. Although Public Law No. 11-65 amends Public Law No. 11-29 by making the Faichuk appropriations more specific, it still has an undifferentiated category called "other needs," Pub. L. No. 11-65, § 1(5)(k). The "other needs" category, Udot's past inability to apply for funds already spent, and the likelihood that the situation would arise again, but be incapable of review, all favor a finding of continuing standing. An argument that a party once had standing but no longer does is an argument that the case is now moot. One exception to the mootness doctrine is that the court retains jurisdiction when the problem will arise again, and would otherwise be incapable of review. FSM v. Louis, 9 FSM Intrm. 474, 483 (App. 2000) ("The most notable exception [to the mootness doctrine] . . . is a situation in which an otherwise moot case may have a continuing effect on future events, including future litigation.")

Udot Municipality v. FSM, 10 FSM Intrm. 354, 358 (Chk. 2001). Even if Allottees had raised the issue of mootness based on the enactment of P.L. No. 11-78, we find that this case falls within the exception to the mootness doctrine discussed above, because it may have a continuing effect on future events, including future litigation and may be capable of repetition, yet evading review. FSM v. Louis, 9 FSM Intrm. 474, 483 (App. 2000). Were we not to review this matter, Congress could insert consultation requirements in appropriation laws, and amend such laws that were challenged before a court could review them. Accordingly, we address the issue of whether the requirement that Allottees consult with a Congressional delegation before obligating appropriated

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[18] P.L. No. 11-27 was first amended by P.L. No. 11-65 on December 12, 2000. This law amended P.L. No. 11-27 such that the "and agreement" portion of "consultation and agreement" was removed from the allotment section of the law. P.L. No. 11-78 further amended P.L. No. 11-27, by deleting the requirement for the Allottees to consult with the relevant Congressional delegation on the most appropriate usage of funds.

funds violates the separation of powers doctrine.

The trial court held that the consultation requirement was unconstitutional because consultation with the Senators should have taken place prior to the enactment of the public law. Once a public law is enacted, the responsibility for the execution and implementation of the law rests with those who have a duty to execute and administer the law, and Senators can have no further role in its execution.

We agree that the process by which laws should be executed as discussed by the trial court in its declaratory judgment is proper, and we also agree with the trial court's conclusion that the challenged language in P.L. No. 11-27, as amended by P.L. No. 11-65, is unconstitutional and must be stricken. In doing so, we set forth further basis for our conclusion that the language of the law as then written violated the doctrine of separation of powers.

The basic constitutional principle involved is that the execution and implementation of the laws is an executive rather than a legislative function. The language of the challenged public law specifically provided that a Congressional delegation must be consulted on the most appropriate usage of the funds before an obligation could occur. This means that if the Congressional delegation was not consulted, then no obligation could be made.

This requirement runs afoul of the Constitution because it empowers the Congressional delegation to engage in an executive function by formally involving itself in executing and implementing the appropriation. Congress cannot pass laws and vest in itself or its Members the power to control how that law is executed.

The Constitution affords the Congress great latitude in making policy decisions through the process of enacting legislation. However, once Congress enacts legislation, its role ends: Congress

can thereafter formally affect the execution of its enactment only by enacting appropriate new legislation. While Congress may inform itself on how legislation is being implemented through the normal means of legislative oversight, public hearing, and investigation, it cannot directly insert a Congressional delegation into the process of executing and implementing the law.

The problem, therefore, is not with consultation *per se*, but with making the obligation of funds contingent upon "consultation." Consultation may be widely used on an informal basis, and may be an important component in the process of decision making throughout our Nation. However, the legal requirement of consultation inserted in P.L. 11-65 went beyond mere consultation because it placed a condition on the Allottees' ability to obligate funds: that they must consult with a Congressional delegation before making any obligation. This provided the Congressional delegation the ability to control or, if it so chose, to impede the execution and implementation of the line item.[19]

The consultation requirement approved by Congress in P.L. 11-65 presented some of the same dangers that arose with the original language of P.L. No. 11-27.[20] P.L. 11-27 permitted Congressional delegation or Member(s) of Congress to control the approval of specific projects and the break down of the funding amounts under the line-item involved without going through the constitutional legislative process.[21] The formal legislative process set forth in the text of the

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[19] When Congress makes the obligation of funds conditioned upon "consultation" with the relevant Congressional delegation, it gives those Members of Congress the potential power to render the line-item ineffective, for the relevant Congressional delegation could simply refuse to consult on the most appropriate usage of the funds.

[20] The language of P.L. No. 11-27 called for "consultation and agreement" before obligation, while the amended version in P.L. No. 11-65 only called for "consultation" before obligation.

[21] The actual implementation of P.L. No. 11-27, prior to its amendment by P.L. No. 11-65, was revealed by the trial court when it described the testimony of the CSCIP Executive Director that implementation was by a procedure where you apply to the Senator representing Faichuk, the Senator decides and tells him what projects are approved, and then he carries out the Senator's decision.

Constitution requires formulating and introducing an appropriations bill,[22] passing that bill in two separate readings of the Congress,[23] and then transmitting that bill to the President for approval or veto.[24] Significantly, the process of introducing and passing a bill takes place in public sessions in which a journal is kept and votes are entered in the journal. To permit Congressional delegations or Members of Congress to effectively legislate without following constitutionally mandated procedures eliminates any transparency in the governmental process, and reduces the accountability of the Members of Congress to those whom they represent.

Congress has its constitutional role of carrying out its legislative power by enacting national laws. Once national laws are enacted, the Executive Branch then has its constitutional role of carrying out its executive power by seeing to the execution and implementation of these laws. Allottees, either specifically designated in an appropriations law or in the FMA, have their role in

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Declaratory Judgment at 43-44 (July 27, 2001).

[22] Article IX, Section 21(a) states:

> (a) The Congress may make no law except by statute and may enact no statute except by bill. The enacting clause of a bill is "*BE IT ENACTED BY THE CONGRESS OF THE FEDERATED STATES OF MICRONESIA*:" A bill may embrace but one subject expressed in its title. A provision outside the subject expressed in the title is void.

[23] Article IX, Section 20 states:

> To become law, a bill must pass 2 readings on separate days. To pass first reading a 2/3 vote of all members is required. On final reading each state delegation shall cast one vote and a 2/3 vote of all the delegations is required. All votes shall be entered on the journal.

[24] Article IX, Section 22 states:

> A bill passed by Congress shall be presented to the President for approval. If he disapproves of the bill, he shall return it with his objections to Congress within 10 days. If Congress has 10 or less days remaining in its session, or has adjourned, he shall return the bill within 30 days after presentation. If the President does not return a bill within the appropriate period, it becomes law as if approved.

administering the law. The Allottees' role in the execution, implementation, and administration of the law is executive in nature and must be considered as such.

The constitutional demarcation of powers to the three branches of the National Government was established with deliberate design and purpose. The intended effect was to create a system of checks and balances between the branches of the National Government such that no one branch could encroach upon the power of another branch and thereby dominate over the others. *Cf.* Sohl v. FSM, 4 FSM Intrm. 186, 194 (Pon. 1990).

The standard for determining whether there is an improper interference with the independent power of a branch of government is whether the action of one branch substantially impairs another branch's performance of its essential role in the constitutional system. Mackenzie v. Tuuth, 5 FSM Intrm. 78, 84 (Chk. 1991).

Here Congress' enactment, which prevented obligation of funds unless and until the allottees engaged in "consultation" with the relevant Congressional delegation, substantially impaired the performance of the Allottees, acting in an executive capacity, in executing and implementing this law, which is the executive's essential and exclusive role under our Constitution. By legislating the "consultation" before obligation requirement into the law, the Congress encroached upon an executive function and assumed more power than it is allowed in our constitutional system of checks and balances, thus violating the separation of powers doctrine.

3. Requiring Accounting of Funds

As set forth above, we find that this issue, as raised by the Allottees, is moot because the accounting of expended funds has already been completed by the FSM and because the Allottees have not been compelled to complete any non-statutorily required accounting.

4. Injunctions for Obligating and Disbursing Unobligated Funds and Future Appropriations

We review the issue of whether the trial court erred in issuing its injunction using an abuse of discretion standard. *Cf.* Onopwi v. Aizawa, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

We hold that the trial court did not abuse its discretion when it enjoined the obligation and disbursement of unobligated funds and any future appropriations for Chuuk Election Dist. No. 4 until a fair and transparent application process is established.[25]

In addressing Udot's claims, the trial court determined that there needed to be a fair and transparent application process for the selection and break down of funding for specific projects within the broad line item for Chuuk Election Dist. No. 4. The trial court, therefore, deemed it necessary to order an injunction on the obligation and disbursement of unobligated funds and future appropriations until such a process was put in place by legislation or regulation.

The trial court ordered an injunction to prevent further dissipation of existing funds appropriated for Chuuk Election Dist. No. 4 where it found the following: (1) that the broad

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[25] The Judgment and Permanent Injunction issued by the trial court on July 27, 2001 stated in pertinent part:

> ...the FSM and the Department of Finance and Administration are enjoined from disbursing any unobligated funds appropriated for Chuuk Election District No. 4 remaining under Public Law No. 11-27 and any funds appropriated in the future for Chuuk Election District No. 4, and the Executive Director of the Chuuk State Commission on Improvement Projects and the Chuuk State Commission on Improvement Projects itself are enjoined from approving any further obligations against funds appropriated by Congress under Public Law No. 11-27 for Chuuk Election District No. 4 and any funds Congress appropriates in the future for Chuuk Election District No. 4, until such time as either Congress has legislated rules for a fair and transparent application process for improvement funds for Faichuk, or rules and regulations for a fair and transparent application process for improvement funds for Faichuk have been properly promulgated and implemented by the appropriate agency, with the categories for expenditures to be determined after the process has been established and implemented, and it is further ORDERED that such rules, process, and procedures shall not include consultation with member(s) of Congress once funds have been appropriated.

language in the Faichuk appropriations contained little guidance as to what specific projects were to be funded; (2) that there were no fair and transparent procedures to apply for such funds; (3) that an unlawful implementation procedure was being used; and (4) that there was a lack of oversight and compliance with the FMA and related regulations.

Given the trial court's findings set forth above, we find that the trial court acted entirely within its discretion in enjoining the Allottees from obligating funds and the FSM from disbursing funds until such time as new procedures were put in place. For all of the aforementioned reasons, we hold that there was no abuse of discretion in issuing the injunction.

The Allottees characterized the injunction by stating that the trial court erred and abused its discretion by enjoining all future improvement funding appropriations to Faichuk. Opening Br. at 21. We do not read the injunction in this way. The injunction does not prevent the Congress from making future appropriations for Chuuk Election Dist. No. 4, but rather prevents obligation or disbursement of such appropriated funds until a fair and transparent application process is established.

While we hold that the injunction applying to existing appropriations was not an abuse of discretion, the Allottees also raised the concern that the injunction was vague. The injunction could be read as overly broad in that it enjoins approving *any* further obligations and disbursements against *any* funds Congress appropriates in the future for Chuuk Election District No. 4. We clarify that the injunction only applies to future lump sum appropriations for Chuuk Election Dist. No. 4 which are similar to the one found in P.L. No. 11-27, and which require further identification of specific projects to be funded and a delineation of the funding amounts for the projects. The injunction should not be read to apply to appropriations for specific projects funded for specific amounts in Chuuk Election Dist. No. 4 or any area within that district.

The Allottees also argue that the trial court failed to define with precision the threshold standards and minimum procedures for the fair and transparent application process. We leave that determination to the trial court's discretion, but note that the process must not include mandatory consultation with Members of Congress.

5. Award of Attorney Fees to Udot and Charging of Costs to Allottees

Both the FSM and the Allottees challenge the trial court's award of attorney fees to Udot under the private attorney general theory. The Allottees (who alone were held liable for costs) assert that they, like the FSM, should be immune from imposition of costs.

The following issues are presented for *de novo* review: (1) whether sovereign immunity bars imposition of attorney fees against the FSM, and imposition of attorney fees and costs against the Allottees; and (2) whether the FSM should adopt a private attorney general theory as a basis for awarding attorney fees.

We hold that sovereign immunity does not bar imposition of fees and costs against the FSM and Allottees. We also hold that the private attorney general theory is available to Udot in this case, and that the trial court correctly found that Udot had satisfied the requirements justifying an award of attorney fees based on that theory. Thus, the trial court did not abuse its discretion in awarding attorney fees and costs to Udot.

A. Sovereign Immunity

The FSM and the Allottees (incorporating the FSM's brief by reference) both raise the issue of whether sovereign immunity bars imposition of fees and costs against them.

6 F.S.M.C. 702 contains the limited circumstances in which the FSM has waived sovereign immunity. It states, in relevant part:

> Actions upon the following claims may be brought against 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 . . .

Udot argues that under the above provision, as well as 6 F.S.M.C. 702(5), the FSM has waived its immunity to suit. Thus, Udot argues, the FSM should be liable for the fees and costs that are awarded incident to such suits. Udot sued the FSM and the Allottees for a declaratory judgment of rights under appropriations laws, the Constitution, the FMA and related regulations. We find that those claims do fall within the waiver set forth in 6 F.S.M.C. 702(2).

The FSM argues that, because the FSM has not specifically waived its immunity from the imposition of attorney fee awards, they should not be held liable for them. They point to other statutes in which the FSM has authorized the award of fees to prevailing parties (*e.g.* civil rights claims, 11 F.S.M.C. 701(5)), and argue that a determination of whether fee awards against the FSM should be made is more appropriately a Congressional decision. *See* Semens v. Continental Airlines, Inc. II, 2 FSM Intrm. 200, 208 (Pon. 1986)("we could consider awarding attorney fees on a "private attorney general" theory, although that approach was rejected by the United States Supreme Court . . .. Of course, Congress has provided for awards of attorney fees in connection with civil rights litigation, 11 F.S.M.C. 701, and could identify additional types of litigation in which attorney fees should be awarded to the prevailing party).

The Allottees claim that they should be cloaked with the same protection as the FSM, on the basis that the Allottees were conducting functions of the National Government, and were designated by Congressional Acts and presidential authority. We reject both of these arguments. The claims

advanced by Udot do fall within the FSM's statutory waiver of sovereign immunity to suit. Accordingly, we need not decide whether the Allottees are part of the National Government within the meaning of 6 F.S.M.C. 701[26], or whether they are cloaked with sovereign immunity, because the claims in this case clearly fall within the exception enumerated in 6 F.S.M.C. 702(2).

B. Application of the Private Attorney General Theory

1. Should it apply in the FSM?

Next we determine whether the trial court erred when it awarded attorney fees to Udot based upon the private attorney general theory. This doctrine has been discussed by this Court, but neither applied, nor rejected. For the reasons discussed below, we hold that the trial court did not err when it adopted the private attorney general theory, and that it was within the trial court's discretion to award attorney fees to Udot under the circumstances of this case.

We hold that the private attorney general theory should be available for prevailing litigants who meet the criteria set forth herein to recover their attorney fees in bringing an action. When the acts of government officials are contrary to the Constitution, and these same government officials have access to the significant resources of the National Government to defend their actions, there is a danger that the courts may become inaccessible to members of the public. The government does have finite and scarce resources, but these are not wasted on litigation that benefits the public interest

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[26] Additionally, 6 F.S.M.C. 701 states:

> Implicit in the sovereignty of a Nation is the right and power to determine whether, how, when, and under what circumstances civil actions of any nature may be brought against it. The Constitutional Convention determined that the National Government be accountable for civil wrongs to its citizenry at such time and under such terms and conditions as found appropriate from the national experience. It is, therefore, at this time in our National history the policy of the National Government of the Federated States of Micronesia to grant redress for civil wrongs by waiving sovereign immunity to the extent prescribed in this chapter.

and vindicates important societal rights. The standards for application of the private attorney general theory are rigorous, and only in cases where a litigant is successful in pursuing a case that confers a substantial benefit on the public will the government be liable for attorney fees.

The only FSM case (besides Semens, *supra*) which discusses the equitable theory of private attorney general is Damarlane v. United States, 8 FSM Intrm. 45 (App. 1997). The trial court in Damarlane noted that the appellate court did not apply the theory, nor did it prohibit its application in the future. The appellate court in the Damarlane case stated:

> The private attorney general theory has never been applied in the FSM and we will not adopt it in this case. . . . even if the Court were inclined to consider application of the theory . . . appellants have not shown that they meet the criteria . . .. See, e.g., Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468 (N.D. Cal. 1993) (section 1021.5 of the California Code of Civil Procedure provides that a court may award attorneys fees to a successful party in a private attorney general action which (a) enforces an important right affecting the public interest and (b) confers a significant benefit upon the general public or a large class of persons, if (c) the necessity and cost to plaintiff in bringing its private enforcement action outweighs its stake in the action); Yslava v. Hughes Aircraft Co., 845 F. Supp. 705 (D. Ariz. 1993) (the "private attorney general doctrine" allows a prevailing party to recover attorneys' fees absent statutory authority or agreement; the doctrine is an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance). Id. at 55.

The trial court noted that, in the United States, this theory has been codified in many jurisdictions, and in other jurisdictions it has been applied as an equitable rule. The FSM argues that it would be against public policy to adopt the private attorney general rule. It argues that paying attorney fees for all those who have grievances about the way public funds are appropriated or spent would be a waste of scarce resources.

Udot counters that only in cases in which rigorous standards are met will the government be liable for attorney fees. Udot also points out that, in this case, it was demonstrated that over

$2,000,000 of public funds was spent, yet were unaccounted for by the FSM and the Allottees.[27] We do not agree with the FSM's position that the award of attorney fees in a case such as this would be a waste of scarce resources. Indeed, if this litigation results in greater accountability of public project funds, then its value to the general public is immense.

We agree with Udot's position, and find that the private attorney general theory should apply in the FSM, provided that the criteria set forth in Damarlane are strictly met, because it is necessary in certain cases for parties to hire private attorneys to enforce important rights of significant societal and public importance.

2. Did the trial court abuse its discretion in applying the theory in this case?

Having determined that the trial court did not commit legal error by adopting the private attorney general theory, we next determine whether the trial court abused its discretion in awarding attorney fees to Udot under the circumstances of this case. We conclude that it did not.

First, Udot was required to demonstrate that it vindicated a right that benefits a large number of people. Second, Udot was required to demonstrate that the right sought to be enforced required private enforcement. Finally, Udot had to prove that the right is of societal importance. The trial court found that Udot did prove each of these factors, and we concur:

> . . . Udot, as the prevailing party, has vindicated and enforced an important right affecting the public interest that will potentially benefit the general public and a large number of people, which required private enforcement, and which was of societal importance. Furthermore, the cost to Udot appears to outweigh the potential benefits it achieved. This case is a suitable one for the equitable application of the "private attorney general" doctrine and it is proper to adopt the principle. (App. at 57-58).

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[27] In its brief at page 32, Udot points out that "[t]he allottee Os kept no records but was responsible for over $1.7 million dollars. The Tolensom Authority does not even exist, signed no records and still $460,000 was spent."

The FSM argues that Udot did not meet the test because, in Kaufman, the court stated that a party cannot recover under the private attorney general theory when its own pecuniary interest is its primary motivation. The FSM also argues that the largest number of people that possibly could benefit are those in Udot, which has a population of about 3,600. The FSM compares the Udot case to the Yslava case, in which the plaintiffs sought medical testing for potentially thousands of people affected by hazardous waste dumping, and argues that Udot's claims were motivated by its own funding interests, which at most benefits a small municipal population. Finally, the FSM argues that Udot has not demonstrated that its cost was out of proportion to its stake in the outcome.

Allottees argue that the private attorney general theory is premised on providing indigent individuals with some ability to pursue legitimate cases against the national, state, or local government. Here, Udot is a government entity, and Allottees argue that it should not be permitted to recover its attorney fees for suing "its own superior or paternal governments." Allottees' Br. at 23. Allottees also point to FSM Const. Art. XIII, § 1 (right of "people," not municipal government, to legal representation) and Art. VII, setting forth the three levels of government, stating:

> It turns the entire concept of our three levels of government on its head to ever consider that a level of government should be permitted to recover attorney's fees based on the equitable, non-statutory principle of private attorney general's award . . . as against another level of the government . . . .

Allottee Br. at 24. We are not persuaded by the Allottees' argument set forth above and, therefore, do not find it an impediment for Udot, as a municipality, to receive reimbursement of attorney fees from the National Government. As to the FSM's argument, Udot points out that the FSM is taking a contrary view to what it stated throughout the litigation below. It points to several statements in the record where the Assistant Attorney General handling this case acknowledged its

great public importance. We concur with Udot, that this case addresses significant constitutional and other issues of public importance.

The FSM argues that this case affects only the small population of Udot. To the contrary, the whole population of the FSM benefits from requiring greater accountability in the use of public project funds and requiring the Congress to legislate within constitutional limitations, especially when the legislation involves appropriation of large sums of funds intended for public projects.

Further, it is clear that this case required private enforcement, as municipal governments in the FSM do not have the resources or facilities to maintain legal offices on the same scale as the state or national governments. When the rights of the residents of a municipality are affected, they must spend municipal funds to hire a private attorney.

3. Should it be applied retroactively?

Allottees cite Nimeisa v. Department of Public Works, 6 FSM Intrm. 205, 211-12 (Chk. St. Tr. 1993) for the proposition that, if the court adopts the private attorney general theory, it should do so only prospectively:

> When rendering judgments on new constitutional rules, there is an extensive body of case law dealing with the issue of whether the new rule should be applied retroactively from the date of the Court's judgment, or prospectively. In deciding this issue, Courts are to be guided by the following three factors: 1) the purpose to be served by the particular new rule; 2) the extent of reliance which had been placed upon the old rule; and 3) the effect on the administration of justice of a retroactive application of the new rule. Id. (citations omitted).

Nimeisa, however, refers to rendering judgments on new constitutional rules. The fee award is not a constitutional ruling, but is based upon a common law equitable theory. Although this is a case of first impression, equity favors Udot in this case, having successfully established all of the factors to meet the test for application of the private attorney general theory. Because Udot has

undertaken to litigate this important case which is of vital interest to the Nation and has expended resources which are substantial in proportion to its gain, we conclude that Udot should be reimbursed for its reasonable expenses in litigating.

We also hold that the trial court did not abuse its discretion in determining the reasonableness of the attorney fees. Accordingly, we affirm the trial court's award of attorney fees jointly and severally against the FSM and the Allottees, including the amount of those fees.

4. Award of Costs against Allottees

We also hold that the trial court correctly determined that costs could not be awarded against the FSM, but that Allottees are chargeable with costs of this action. We found that in this case, the Allottees have interests sufficiently distinct from the FSM to confer them standing in their own right. Accordingly, the rule prohibiting the trial court from charging the FSM with costs of this action does not prohibit the trial court from charging Allottees with costs. FSM Civ. R. 54(d). The trial court's award of costs against Allottees is also affirmed.

IV. CONCLUSION

This appeal involved the legislative and executive processes used for the allocation and disbursement of millions of dollars of public project appropriations for Chuuk Election Dist. No. 4. From this case arose important constitutional and other legal issues of first impression for this Court. In our determination of the issues, we hold that: (1) Udot had standing below to sue the FSM, its departments, and the designated Allottees; (2) the issue, as presented by the Allottees, of whether Udot had standing to sue for an accounting of already-expended public funds, is moot; (3) Allottees have standing to raise issues on appeal not raised by the FSM where they have interests distinct from the FSM and have redressible injuries; (4) the requirement that Allotees "consult" with a

Congressional delegation before obligating appropriated public funds violates the doctrine of separation of powers and is therefore unconstitutional; (5) the trial court did not err when it enjoined the FSM from obligating and disbursing unobligated funds and any future appropriations to Chuuk Election Dist. No. 4 until a fair and transparent application process is established; (6) the trial court did not err in awarding Udot attorney fees under a private attorney general theory and in finding the amount of fees reasonable; and (7) the trial court did not err in awarding costs against the Allottees on the basis that the Allottees are not part of the FSM Executive Branch.

Accordingly, we affirm the judgment of the trial court, and remand this case to the trial court to take any appropriate action not inconsistent with this decision.