

**FEDERATED STATES OF MICRONESIA
SUPREME COURT TRIAL DIVISION**
Cite as Pohnpei v KSVI No 3, 10 FSM Intrm. 53 (Pon. 2001)

**STATE OF POHNPEI,
Plaintiff,**

vs.

**KSVI NO. 3, NATIONAL FISHERIES CORPORATION, and DOES 1-50,
Defendants.**

**KITTI MUNICIPAL GOVERNMENT,
Plaintiff,**

vs.

**KSVI NO. 3, NATIONAL FISHERIES
CORPORATION, KOSRAE SEA VENTURES,
INC., and DOES 2-50,
Defendants.**

CIVIL ACTION NO. 1998-009
CIVIL ACTION NO. 1998-086

MEMORANDUM OF DECISION

Andon L. Amaraich
Chief Justice

Decided: February 16, 2001

APPEARANCES:

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HEADNOTES

Property - Tidelands

The customary and traditional rights of municipalities, clans, families and individuals to engage in subsistence fishing, and to harvest fish and other living marine resources from reef areas are recognized, but a municipality is not directly entitled to compensation when resources in a particular reef area of Pohnpei are damaged. Thus, absent any damage to municipal property besides the reef itself or the living marine resources, the municipality is entitled only to that amount which Pohnpei appropriates to the municipality to compensate it for damage to its traditional subsistence fishing rights. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 60-61 (Pon. 2001).

Property - Tidelands

The state owns the submerged reef areas, but this ownership carries with it certain responsibilities with respect to the people in whose trust these areas are held. It must preserve and respect the traditionally recognized fishing rights of the people of Pohnpei. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 61 (Pon. 2001).

Property - Tidelands

Submerged reef areas are government lands which passed from the Trust Territory to Pohnpei, and the rights of the municipalities to use these areas are subject to the state's ownership rights. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 61 (Pon. 2001).

Constitutional Law - Interpretation

When analyzing provisions of the FSM Constitution, a court must look first to the actual words of the Constitution. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 62 (Pon. 2001).

Statutes; Transition of Authority

Trust Territory statutes continue in effect except to the extent they are inconsistent with the Constitution, or are amended or repealed. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 62 (Pon. 2001).

Property - Tidelands

Under the Trust Territory Code the state has the power to control all marine areas below the ordinary high water mark, subject to a few notable exceptions. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 62 (Pon. 2001).

Statutes - Construction

The plain meaning of a statutory provision must be given effect whenever possible. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 62 n.7 (Pon. 2001).

Statutes - Construction

When statutes are pre-constitution, the statutes and constitutional provisions must be read together because the statutes are only effective to the extent they are not in

conflict with the constitution. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 63 (Pon. 2001).

Federalism - National/State Power

The states have the residual authority to regulate ownership, exploration and exploitation of natural resources within 12 miles from island baselines. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 63 (Pon. 2001).

Federalism - National/State Power; Property - Tidelands

The power of the states to regulate ownership, exploration and exploitation of natural resources in the marine area within 12 miles from the island baselines is not absolute as it is limited by the national powers to regulate navigation and shipping, and to regulate foreign and interstate commerce. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 63 & n.8 (Pon. 2001).

Property - Tidelands

Pohnpei has legal ownership of the submerged reef area as long as none of the relevant exceptions to 67 TTC 2 are applicable. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 63 (Pon. 2001).

Property - Tidelands; Statutes - Construction

The assertion that municipalities own submerged reef areas is not sound because 67 TTC 2(1) expressly states that the law established by the Japanese administration was that all marine areas below the ordinary high watermark belong to the government and because a finding that the municipalities were the underlying owners of all submerged reef areas, would render the statute granting them the right to use marine resources there superfluous and inconsistent with the rest of the statute. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 64 (Pon. 2001).

Statutes - Construction

A long-standing norm of statutory construction states that provisions of law must be read so as to be internally consistent and sensible. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 64 (Pon. 2001).

Property; Property - Tidelands

The German Land Code of 1912 applies only to land on Pohnpei, not to submerged areas. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 64 (Pon. 2001).

Property - Tidelands

The Japanese owned all areas below the high water mark during their administration, then ownership of this land passed to the Trust Territory, and subsequently to the State of Pohnpei. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 65 (Pon. 2001).

Federalism - National/State Power; Property - Tidelands

Control over areas within 12 miles from island baselines was reserved to the states, subject to the national government's control over foreign and interstate commerce, and navigation and shipping. Thus, under the transition clause, the "government" ownership referenced in 67 TTC 2 should be interpreted as "state" ownership within 12 miles from island baselines. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 65 n.13

(Pon. 2001).

Property - Tidelands

Because the state has assumed the duty of regulating exploration, exploitation and conservation of natural resources within the 12 mile zone from island baselines, and it is presumably the state which bears the costs associated with enforcing state laws related to such natural resources within state waters, it is logical that the state should recover the damages flowing from injury to these resources. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 65 (Pon. 2001).

Property - Tidelands; Transition of Authority

Title 67, Section 2 of the Trust Territory Code continues in effect under the transition clause of the FSM Constitution, is consistent with other provisions in the FSM and Pohnpei Constitutions, and clearly confirms that all marine areas below the ordinary high water mark belong to the government. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

Property - Tidelands

Pohnpei does not have a proprietary ownership interest in the tideland, as it is public land which is intended to benefit the public. Thus, Pohnpei may not sell submerged reef areas, or destroy or waste these resources with impunity because such actions would violate the public trust, and any damages recovered by Pohnpei should be returned in kind to the people in accordance with Pohnpei's obligation to protect and preserve the natural resources for the people's use. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

Property - Tidelands

The ownership of submerged land and marine resources has a public character, being held by all of the people for purposes in which all of the people are interested. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

Custom and Tradition - Pohnpei; Property - Tidelands

The people of Pohnpei's traditional and customary rights to freely navigate the reef, engage in subsistence fishing in that area, and control the use of and materials in that marine environment is recognized in 67 TTC 2(1)(e), in the FSM Constitution, and the Pohnpei Constitution. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

Constitutional Law - Judicial Guidance Clause; Custom and Tradition

The FSM Constitution requires court decisions be consistent with Micronesian customs and traditions, and provides that the FSM Congress may enact statutes to protect the traditions of the people of the FSM. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

Civil Procedure - Dismissal

Dismissal is only appropriate if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 67 (Pon. 2001).

Property - Tidelands

A municipality is precluded from recovering damages for injury to the submerged lands and living marine resources damaged by a fishing vessel grounding, but will be provided an opportunity at trial to prove any damage to other municipal resources. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 67 (Pon. 2001).

* * * *

COURT'S OPINION

ANDON L. AMARAICH, Chief Justice:

BACKGROUND

On or about April 9, 1997, the National Fisheries Corporation ("NFC") fishing vessel KSVI #3 grounded on the seaward side of a reef barrier surrounding Pohnpei State, located in the area of Kitti municipality. Both Pohnpei State and the Kitti Municipal Government ("Kitti") seek damages as a result of the grounding. On March 17, 1998, Pohnpei State filed its complaint seeking compensation for damage to the reef, submerged lands, and marine resources as a result of the grounding. Kitti filed a separate complaint on November 13, 1998, alleging that Kitti also was damaged by the grounding.¹ On September 17, 1999, Pohnpei State filed a Motion to Dismiss Kitti's complaint, stating that Pohnpei State, not Kitti, was entitled to any damages from the grounding, because Pohnpei State is the owner of the reef, submerged lands, and marine resources affected.

The parties requested that the Court determine before trial the legal issue of ownership of the submerged areas allegedly damaged by the grounding of the KSVI #3. On November 4, 1999, the Court ordered the parties to submit legal briefs on the following issues:

1. Who if anyone has legal ownership of the submerged land allegedly damaged by the grounding of the KSVI No. 3 . . . and,
2. Who if anyone has legal rights to the living marine resources, plant or animal, allegedly damaged by the grounding of the KSVI No. 3

All three parties submitted their legal briefs on December 17, 1999.

I. Pohnpei State and NFC Arguments²

¹ Kitti's complaint states that it seeks compensation for damage to the reef, submerged lands, and resources of the Kitti Municipal Government. Kitti later claimed that it seeks damages only for the loss or destruction of its traditional subsistence fishing rights. Kitti Opp'n to Pohnpei State Mot. to Dismiss at 3 (Sept. 27, 1999).

² NFC concurs with the position of Pohnpei State, and submitted as its legal brief a copy of Pohnpei State's Motion to Dismiss, which was filed in Case No. 1998-009 on September 17, 1999. Pohnpei State makes the same arguments in its December 17, 1999 submission as it made in its Motion to Dismiss, although the December 17, 1999 submission is more comprehensive.

Pohnpei State submitted a memorandum of points and authorities in which it argues that Pohnpei State rather than Kitti municipality is the owner of all submerged land and living marine resources which allegedly were damaged by the grounding of the KSVI #3.

Pohnpei State argues that it owns the reef, submerged lands, and resources under (1) the FSM Constitution, (2) the Pohnpei State Constitution, (3) the Ponape State Charter, (4) statutes emanating from the Trust Territory Code, and (5) applicable case law.

First, Pohnpei State argues that it owns the reefs, waters and resources allegedly damaged by the KSVI #3 under the Constitution of the Federated States of Micronesia. Article VIII, Section 2 provides that, "[a] power not expressly delegated to the national government or prohibited to the states is a state power." FSM Const. art. VIII, § 2. Accordingly, Pohnpei State argues, the states have the power to regulate the ownership, exploration, and exploitation of natural resources in the marine space within twelve miles from island baselines.³ In further support of this position, Pohnpei State cites case law which recognizes state exercise of control over marine areas within 12 miles from island baselines. *See M/V Hai Hsiang v. Pohnpei*, 7 FSM Intrm. 456, 459 (App. 1996); *FSM v. Oliver*, 3 FSM Intrm. 469, 473 (Pon. 1988).

Pohnpei State also relies upon the boundary definitions set forth in the FSM and Pohnpei State Constitutions. *See Pohnpei State Mem.* at 4-5. In addition, Pohnpei State maintains that state ownership of the reefs and submerged lands is mandated by statute. According to the FSM Constitution, "[a] statute of the Trust territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed." FSM Const. art XV, § 1. The FSM Code states that:

The law concerning ownership, use, inheritance, and transfer of land in effect in any part of the Trust Territory on December 1, 1941, shall remain in full force and effect to the extent that it has been or may hereafter be changed by express written enactment made under authority of the Trust Territory.

1 F.S.M.C. 205.

One provision of the Trust Territory Code directly relates to ownership of all marine areas below the ordinary high water mark. 67 TTC 2 states, in relevant part: "[t]hat portion of the law established during the Japanese administration of the area which is

³ The term "baseline" is generally defined as follows: The baseline of an island lacking a barrier or fringing reef is "the low water line of the island as marked on large-scale charts officially recognized by the government of the Federated States of Micronesia." *See* 18 F.S.M.C. 101(1). The baseline of an atoll or island with a barrier or fringing reef is "a line following the contour of the seaward edge of the reef system, which connects those outermost elevations of the reef which are above the water at low tide, and which exist as marked on large-scale charts officially recognized by the government of the Federated States of Micronesia." *See* 18 F.S.M.C. 101(2).

now the Trust Territory, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Trust Territory" 67 TTC 2(1).

Pohnpei State maintains that, under this statute, Pohnpei State is the ultimate owner of all of the marine resources affected by the grounding of the KSVI #3. Pohnpei State then claims that, as the owner, it is entitled to all of the damages from defendants.

II. Kitti's Argument

Kitti divides its argument into two sections. The first discusses Kitti's legal right to living marine resources, plants and animals, allegedly damaged by the grounding of KSVI #3, and the second discusses Kitti's legal right to the submerged lands and reef allegedly damaged.

A. Kitti arguments regarding legal ownership of the submerged land

Kitti advances the argument that it owns the submerged land that allegedly was damaged by the KSVI #3. Kitti relies on State of Pohnpei v. Damarlane, PCA No. 025-91, Declaratory Judgment, decided March 14, 1991 [4 Pon. L.R. 288 (Tr. 1991)] ("Damarlane I"), and Damarlane v. United States, 7 FSM Intrm. 56 (Pon. S. Ct. App. 1995) ("Damarlane II").

Damarlane I was an action brought by the Pohnpei Transportation Authority ("PTA") seeking a declaratory judgment. Damarlane II involved a subsequent suit brought by the defendants in Damarlane I, seeking compensation from the PTA for damage to submerged land and fish traps, or weir, due to the PTA's dredging activities. In Damarlane II, the following issues were certified to the Pohnpei Supreme Court Appellate Division by the FSM Supreme Court Trial Division:

1. Under Pohnpei State law, do owners of the land adjacent to the lagoon or do persons having a permit in the lagoon pursuant to a permit . . . have sufficient property rights in the reef and in the lagoon to entitle them to monetary or other relief for damage to the reef caused by unauthorized dredging activity in the lagoon near their land?

and,

2. Under Pohnpei State law, including Article XII, Section 6 of the Pohnpei State Constitution, if reef or fish trap (maii) is damaged by persons carrying out dredging activities pursuant to authorization of state officials for a public purpose, are adjacent or nearby coastal landowners entitled to payment of just compensation for the depreciation of the value of the value of the reef and fishing grounds or damage to a fish maii which they had constructed in the lagoon?

Damarlane II, 7 FSM Intrm. at 58. The Appellate Division of the Pohnpei Supreme Court in Damarlane II, consisting of Chief Justice Edwel Santos and Associate Justice

Judah Johnny,⁴ found that private landowners were not entitled to damages from the State under such circumstances.

Kitti relies upon the "Court's Opinion," written by then Chief Justice Santos in Damarlane II. Chief Justice Santos, in turn, relies upon his trial division opinion in Damarlane I, in which he stated that (1) ownership of land below the high water mark is vested in the people of the various municipalities by Article 6 of the German Land Code and 67 TTC 2; and, (2) that management and administration (not ownership) of these areas was entrusted to the PTA through Pohnpei Public Lands Trust, by the implicit recognition of the municipalities when the citizens adopted the Pohnpei Constitution.

Justice Johnny issued a "Companion Opinion" in Damarlane II, in which he states that 67 TTC 2 was an assertion of ownership by the Trust Territory government, and subsequently Pohnpei State, in all areas below the high water mark. Thus, he did not express agreement with Chief Justice Santos regarding municipal ownership of submerged lands.

Kitti contends that the Court's Opinion in Damarlane II represents a definitive statement that the municipalities own submerged reef areas, and that Damarlane II requires that this Court find that Kitti is the owner of the reef area on which the KSVI #3 grounded.

B. Kitti argument regarding living marine resources

As for living marine resources, Kitti states that it seeks damages for the loss or destruction of its traditional subsistence fishing rights with respect to these resources: the right to use, control, and harvest living marine resources in the reef adjacent to the municipality. Kitti maintains that this right is protected by the Pohnpei State Constitution, by statute, and by Pohnpei custom and tradition.

Article 5 of the Pohnpei State Constitution states:

Section 1. Customs and Traditions. This Constitution upholds, respects, and protects the customs and traditions of the traditional kingdoms in Pohnpei.

Section 2. Protection of Customs and Traditions. The Government of Pohnpei shall respect and protect the customs and traditions of Pohnpei. Statutes may be enacted to uphold customs or traditions. If such a statute is challenged as violating the rights guaranteed by this Constitution, it shall be upheld upon proof of the existence and regular practice of the custom or tradition and the reasonableness of the means established for its protection, as determined by the Pohnpei Supreme Court.

Pon. Const. art. 5, §§ 1, 2.

⁴ The third member of the panel passed away before the decision was finalized. Thus, under the rule of necessity, only two judges signed the opinion.

Kitti relies upon two statutes which it claims recognize the traditional rights of municipalities over living marine resources.

First, the "Pohnpei State Fisheries Protection Act of 1995" states: "Section 6. Submerged Reefs. Traditionally recognized subsistence fishing rights in submerged reef areas wherever located within state waters shall be preserved and respected." Pon. S.L. No. 3L-114-95, § 6.

Also, Kitti relies upon 67 TTC 2, the same statute under which Pohnpei State claims ownership of the reef and submerged lands. Kitti cites a portion of 67 TTC 2(1)(e) which states that "[n]othing in the foregoing subsections of this section shall withdraw or disturb the traditional and customary right of the . . . municipality to control the use of, or material in, marine areas below the ordinary high water mark" 67 TTC 2(1)(e) (1970).

Kitti also relies upon an affidavit signed by Emensio Eperiam ("Eperiam Affidavit"), in which Mr. Eperiam states that, under Pohnpei custom, the right to harvest and control fish and living marine resources belongs to the municipality adjacent to a particular area.

Additionally, Kitti relies upon a treatise entitled *Micronesian Navigation, Island Empires, and Traditional Concepts of Ownership of the Sea* (M. Nakayama & F. Ramp, 1974) ("Micronesian Navigation Article"). In part, this treatise states that, "[e]ach island and atoll has such a submerged reef area . . . [e]ach is named and exclusively owned by a particular family, clan, municipality, island and group of islands or atoll." *See* Kitti Br. at 3-4.

The Court recognizes the customary and traditional rights of municipalities, clans, families and individuals to engage in subsistence fishing, and to harvest fish and other living marine resources from reef areas. However, none of the authorities cited by Kitti lead the Court to conclude that Kitti directly is entitled to compensation when resources in a particular area of Pohnpei State are damaged. While municipalities, clans, families and individuals have definite rights with respect to marine resources in certain areas, it is the state that ultimately owns the area allegedly damaged by the KSVI #3, and the state that is responsible for maintaining and regulating its use. Thus, absent any damage to municipal property besides the reef itself or the living marine resources allegedly damaged by the grounding of the KSVI #3,⁵ the municipality is entitled only to that amount which is appropriated by Pohnpei State to the municipality to compensate the municipality for damage to its traditional subsistence fishing rights.

The two statutes cited by Kitti are entirely consistent with this approach. As discussed below, the state owns the submerged reef areas allegedly damaged, but this ownership carries with it certain responsibilities with respect to the people in whose trust these

⁵ Kitti is not precluded from proving other damages it might have sustained, e.g. if the municipality invested in traps, nets, lines, buoys or other structures which were destroyed, or if the municipality expended money because of the grounding, e.g. by dispatching boats or employees to remediate the site on which the KSVI #3 grounded.

areas are held. It is incumbent upon Pohnpei State to preserve and respect the traditionally recognized fishing rights of the people of Pohnpei State. As stated in the Pohnpei State Fisheries Protection Act of 1995, "[t]raditionally recognized subsistence fishing rights in submerged reef areas wherever located within state waters *shall be* preserved and respected." Pon. S.L. No. 3L-114-95, § 6 (emphasis added). Recognition of State ownership of the submerged reef areas at issue also is consistent with 67 TTC 2, as discussed below.

Nor do the Micronesian Navigation Article or the Eperiam Affidavit provide any basis for the Court to determine that Kitti is entitled to receive damages for any harm to living marine resources in this case. First, the Court notes that the Micronesian Navigation Treatise was authored before the Micronesian Constitutional Convention, and before the people of Pohnpei ratified the FSM and Pohnpei State Constitutions.⁶ Thus, the current governmental framework was not in place at that time. Also, the Treatise sets forth generalized ownership principals that demonstrate no particular claim of Kitti to the resources allegedly damaged in this case. Finally, it is clear that the submerged reef areas at issue are government lands which passed from the Trust Territory to Pohnpei State, and that the rights of the municipalities to use these areas are subject to the State's ownership rights.

Kitti also relies upon Chuuk v. Secretary of Finance, 8 FSM Intrm. 353 (Pon. 1998), as authority on the issue of who owns fishing rights in the FSM. In that case, the Court rejected the four FSM States' claim that they had standing to represent their respective citizens' claims against the national government on the basis of custom and tradition. The Court stated that:

[a]llowing the States to invoke the doctrine of "in parens patriae" [in which the state sues on behalf of its citizens] would extinguish potentially valid claims of individuals, clans, or families who are not parties to this action. . . .

. . . .

The Court finds that any claims to resources in the EEZ based upon custom and tradition must rest with clans, families and individuals rather than with the States.

Id. at 378-79 (footnote omitted). In a footnote, the Court further stated that "a claim of ownership based on custom and tradition made by individuals, clans, or families likely would be restricted to areas within lagoons or near reef areas." Id. at 379 n.21.

The issues raised in Chuuk v. Secretary of Finance are entirely different than the issues currently before the Court. In that case, the four States attempted to claim ownership of fishery resources in the EEZ, which extends from 12 to 200 miles from island baselines, by asserting the customary fishing rights of the residents of each of the four States. The Court rejected that claim, because it found that regulation of the

⁶ The FSM Constitution was ratified on July 12, 1978. In Pohnpei, 75 percent of the voters voted to ratify the Constitution. See Alan B. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L.R. 419, 429 (1986). The Pohnpei State Constitutional Convention was held in 1984, and the Constitution was ratified thereafter.

EEZ was distinctly non-local and non-customary. 8 FSM Intrm. at 353, 377. That case did not recognize the validity of any claim based on custom and tradition, it merely determined that such claims were not properly asserted by the States.

DISCUSSION

I. Ownership of the Submerged Lands and Living Marine Resources

The FSM Constitution, the Pohnpei State Constitution, and relevant case law support the conclusion that Pohnpei State is the owner of both the submerged lands and the living marine resources allegedly damaged by the KSVI #3.

When analyzing provisions of the FSM Constitution, a court must look first to the actual words of the Constitution. Tafunsak v. Kosrae, 7 FSM Intrm. 344, 347 (App. 1995). Article XV, Section 1 provides that "[a] statute of the Trust Territory continues in effect except to the extent it is inconsistent with this Constitution, or is amended or repealed." Because Title 67, Section 2 of the Trust Territory Code was enacted by the Trust Territory government before the FSM Constitution was adopted, it only continues in effect to the extent that it does not conflict with provisions of the FSM Constitution. FSM Const. art. XV, § 1.

Title 67, Section 2 of the Trust Territory Code makes it clear that the state has the power to control all marine areas below the ordinary high water mark, subject to a few notable exceptions.⁷

67 TTC 2 states:

Rights in areas below high watermarks. - (1) That portion of the law established during the Japanese administration of the area which is now the Trust Territory, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Trust Territory, with the following exceptions:

....

(e) Nothing in the foregoing subsections of this section shall withdraw or disturb the traditional and customary right of the individual land owner, clan, family or municipality to control the use of, or material in, subject only to, and limited by, the inherent rights of the government as the owner of such marine areas. . . .

(f) Any legal interest or title in marine areas below the ordinary high watermark specifically granted to an individual or group of individuals by the Trust Territory or any previous administering authority, or recognized as a

⁷ The plain meaning of a statutory provision must be given effect whenever possible. Setik v. FSM, 5 FSM Intrm. 407, 410 (App. 1992). The exceptions referred to in this opinion are those that specifically relate to this case, and this decision should not be construed to limit the rights of owners of land abutting the ocean or lagoon, which specifically are addressed in and protected by 67 TTC 2(1)(b) and (c).

legal right or rights, shall not be affected by this section.

A. *Survival of 67 TTC 2 after Ratification of the FSM Constitution*

First, the Court must determine the extent to which 67 TTC 2 continues in effect. Statutes and constitutional provisions must be read together when the statutes are pre-constitution because they are only effective to the extent they are not in conflict with the constitution. FSM Const. art. XV, § 1.

Article IX, Section 2(m) of the FSM Constitution clearly grants to the FSM Congress the power "to regulate the ownership, exploration, and exploitation of natural resources . . . beyond 12 miles from island baselines." FSM Const. art. IX, § 2(m). Under Article VIII, Section 2, any power not expressly delegated to the national government, or prohibited to the states, is a state power. FSM Const. art. VIII, § 2. According to the plain meaning of the words of the FSM Constitution, the states have the residual authority to regulate ownership, exploration and exploitation of natural resources within 12 miles from island baselines.

Several cases explicitly or implicitly have recognized this power of the states to regulate ownership, exploration and exploitation of natural resources in the marine area within 12 miles from the island baselines under Article VIII, Section 2 of the FSM Constitution.⁸ *Chuuk v. Secretary of Finance*, 8 FSM Intrm. 353 (Pon. 1998), *aff'd*, 9 FSM Intrm. 424 (App. 2000); *M/V Hai Hsiang*, 7 FSM Intrm. at 459; *Oliver*, 3 FSM Intrm. at 473. Offshore resources specifically were addressed by the Standing Committee on Government Functions in the Journal of the first Micronesian Constitutional Convention. The Committee stated that:

[y]our Committee carefully considered the questions related to the regulation of offshore living and mineral resources. Mindful of the fact that Micronesian custom generally recognizes family, clan or island ownership of fishery resources within lagoons and for several miles beyond reefs, your Committee concluded that the *state governments* ought to regulate the ownership and use of such resources.

SCREP No. 33, II J. of Micro. Con. Con. 819 (emphasis added).

A review of the applicable provisions of the FSM Constitution, and case law interpreting the Constitution, reveals that 67 TTC 2 is entirely consistent with the separation of powers that was intended by the framers of the FSM Constitution when they reserved to the states the authority to regulate ownership, exploration, and exploitation of marine resources within 12 miles from island baselines.

Thus, 67 TTC 2 affirms that Pohnpei State has legal ownership of the submerged reef area at issue in this case, as long as none of the relevant exceptions to 67 TTC 2 are

⁸ The Court notes that, while this power of the states is generally recognized, it is not absolute as it is limited by other national powers found in Article IX, Section 2 of the FSM Constitution, e.g. to regulate navigation and shipping, FSM Const. art. IX, § 2(h), and to regulate foreign and interstate commerce, FSM Const. art. IX, § 2(g).

applicable.

B. Application of 67 TTC 2 in this case

Pohnpei State and Kitti both assert that they are the rightful owner of submerged reef areas under 67 TTC 2. Pohnpei State relies upon the general statement in 67 TTC 2(1), that all marine areas below the ordinary high water mark belong to the government. Kitti asserts that the exceptions to that general statement (contained in 67 TTC 2(1)(e) and (f), *supra*) apply, with the result that Kitti is the appropriate owner.

In its legal brief, Kitti urges the Court to adopt the rationale set forth in the Damarlane cases. In Damarlane I and Damarlane II, then Pohnpei State Chief Justice Santos concluded that: (1) the German Land Code of 1912, Section 6, granted all undeveloped land, or *luhen wei*, to the citizens of the municipalities; (2) that the subsequent Japanese administration never affirmatively declared that all submerged lands were public lands; and that, therefore, (3) under 67 TTC 2(1)(f), the grant of undeveloped land to the municipalities in the German Land Code is not affected by 67 TTC 2(1). Thus, Kitti argues, the municipality is the owner of the submerged lands and natural resources allegedly affected by the KSVI #3 grounding.

The Court finds that the Damarlane cases are not applicable to this case for several reasons, and rejects Kitti's argument made in reliance upon Damarlane. First, the conclusion that the municipalities are the underlying owners of submerged lands and natural resources was not necessary for resolution of the issues in the Damarlane cases, and that conclusion is not controlling in the case before this Court. The discussion of who owns submerged reef areas was *dicta*, not part of the holding in Damarlane II. Additionally, it is appropriate to distinguish between the location of the submerged reef at issue in the Damarlane cases and this case: the Damarlane cases dealt with areas in the lagoon abutting the island of Pohnpei, where dredging was being undertaken directly adjacent to the land. In this case, the vessel grounded on the outside edge of the barrier reef surrounding Pohnpei. The Court takes judicial notice of the fact that the fringe reef around Pohnpei, upon which the KSVI #3 grounded, can be at some points over four miles from the island of Pohnpei.⁹

Further, the Court finds that the assertion in the Damarlane cases, that the municipalities own submerged reef areas, is not sound for several reasons. First of all, 67 TTC 2(1) expressly states that the law established by the Japanese administration was "that all marine areas below the ordinary high watermark belong to the government." Secondly, there would be no need to explicitly recognize the rights of municipalities in 67 TTC 2(1)(e) to *use* the marine resources if the municipalities were presumed to be the owners of the submerged lands. A long-standing norm of statutory construction states that provisions of law must be read so as to be internally consistent and sensible. McCaffrey v. FSM Supreme Court, 6 FSM Intrm. 279, 281 (App. 1993). A finding that municipalities are the underlying owners of all submerged reef areas would render 67 TTC 2(1)(e) superfluous and inconsistent with 67 TTC 2(1). The interpretation of 67 TTC 2(1)(f) advanced in the Damarlane opinions disregards the law regarding submerged reef areas as established in the Trust Territory

⁹ See U.S. Geological Survey Map of Pohnpei (1981).

and Japanese administrations, and instead arbitrarily relies upon the German Land Code of 1912. In addition, the German Land Code of 1912 does not explicitly refer to submerged areas. Indeed, various translations of the text of section 6 of the German Land Code suggest that it was intended to apply only to land, not to submerged areas.¹⁰

Furthermore, the basis for the conclusion in the Court's Opinion in Damarlane that the Japanese never declared or treated submerged lands as public or government lands is contrary to the Trust Territory court's repeated findings.¹¹ Several Trust Territory cases determined that private landowners were not entitled to damages from states for dredging activities, because the government owned the marine areas below the high water mark under 67 TTC 2, as successors to the Japanese government. In reaching this conclusion, the Trust Territory court held that "as a matter of law . . . the Japanese owned all marine areas below the high watermark during their administration of the islands." Simiron v. Trust Territory, 8 TTR 615, 621 (App. 1988); *see also* Tulenkin v. Government of Utwe, 5 TTR 628, 629 (Pon. 1972) ([67 TTC] section 2 "is controlling as to the ownership of land below the high watermark"); Teresis v. Neikina, 5 TTR 228, 230-31 (Truk 1970); Protestant Mission of Ponape v. Trust Territory, 3 TTR 26, 32 (Pon. 1965) ("It is very clear . . . that the Japanese Administration claimed . . . below [the] high-water mark.").¹² Thus, since the Japanese owned all areas below the high water mark during their administration, ownership of this land passed to the Trust Territory, and subsequently to the State of Pohnpei under 67 TTC 2.¹³

¹⁰ See 1 J.L. FISCHER, "CONTEMPORARY PONAPE ISLAND LAND TENURE": LAND TENURE PATTERNS, TRUST TERRITORY OF THE PACIFIC ISLANDS 87-92 (pt. 2) (1958). The translation of the German text states that "[a]ll *land* of which no title document is issued belongs to the 'tribe' also called 'state' in Ponape. . . ." (emphasis added). The translation of the Pohnpeian text states that "[a]ll places which are genuinely uncultivated . . . belong to the district." Cultivation generally implies dry land.

¹¹ The judicial guidance clause in the FSM Constitution is intended to insure that, among other things, this Court does not simply accept decisions of the Trust Territory Courts without independent analysis. FSM v. Oliver, 3 FSM Intrm. 469, 478 (Pon. 1988). After analyzing the relevant Trust Territory cases, the Court agrees with those cases concluding that the government owns the marine areas below the high water mark under 67 TTC 2, as successors to the Japanese government.

¹² The only decision to the contrary by a Trust Territory court, Ungeni v. Trust Territory, 8 TTR 366 (1983), relied upon in the Damarlane cases, was explicitly overruled by Simiron v. Trust Territory, 8 TTR 615 (1988).

¹³ As discussed above, under the FSM Constitution, control over areas within 12 miles from island baselines was reserved to the states, subject to the national government's control over e.g. foreign and interstate commerce, and navigation and shipping. *See supra*, note 8. Thus, under the transition clause, the "government" ownership referenced in 67 TTC 2 should be interpreted as "state" ownership within 12 miles from island baselines. FSM Const. art. XV.

Another consideration is that the state is the entity which has assumed the duty of regulating exploration, exploitation and conservation of natural resources within the 12 mile zone from island baselines, and it is presumably the state which bears the costs associated with enforcing state laws related to such natural resources within state waters. *see, e.g.*, Pon. S.L. No. 3L-114-95 ("Pohnpei State Fisheries Act of 1995"); *see also* Pon. Const. art. 7, § 1 (stating that Pohnpei State "shall establish and faithfully execute comprehensive plans for the conservation of natural resources and the protection of the environment"). Thus, it is logical that the state should recover the damages flowing from injury to these resources.

This is not to say that the customary and traditional rights of municipalities to access the submerged land and living marine resources are not recognized. However, individual land owners, clans, and families also have the same customary and traditional subsistence fishing and other rights as the municipalities. It seems inconsistent to say that one can recover to the exclusion of others, but it is also problematic to say that all should recover separately, when the families, clans, and municipalities make up the State of Pohnpei. Because the citizens of the municipalities are also citizens of Pohnpei, they presumably will receive some measure of the benefit from compensation received by the State. Therefore, the Court concludes that Kitti municipality does not have a separate cause of action against the KSVI #3 and NFC for damage to these resources, because Pohnpei State is the legal owner of the submerged lands and living marine resources allegedly affected by the grounding of the KSVI #3.¹⁴

Title 67, Section 2 of the Trust Territory Code is dispositive in this case, as it continues in effect under the transition clause of the FSM Constitution, it is consistent with other provisions in the FSM and Pohnpei State Constitutions, and it clearly confirms that "all marine areas below the ordinary high water mark belong to the government." 67 TTC 2(1).

II. Pohnpei State's Ownership of the Submerged Land and Living Marine Resources is in the Nature of a Public Trust

Having determined that Pohnpei State is the legal owner of the submerged lands and living marine resources allegedly damaged by the KSVI #3, the Court must define the nature of this ownership. It cannot be said that Pohnpei State has a proprietary ownership interest in this land, as it is public land which is intended to benefit the public. Thus, Pohnpei State may not sell submerged reef areas, or destroy or waste these resources with impunity. Such actions would violate the public trust. Any damages recovered by Pohnpei State should be returned in kind to the people in accordance with Pohnpei State's obligation to protect and preserve the natural resources for use by the people. The ownership of submerged land and marine resources is a subject of public concern to all of the people. This ownership has a public character, being held by all of the people for purposes in which all of the people are interested. *See Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-56, 13 S. Ct. 110, 118-19, 36 L. Ed. 1018, 1042-44 (1892) (invalidating a state grant of

¹⁴ This decision is not intended to preclude Kitti from asserting claims for other damages it may have suffered or costs it may have incurred, as set forth *supra* note 5.

submerged land in a United States harbor as violating the public trust). Title to public lands is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction of private parties. *Id.* at 452, 13 S. Ct. at 118, 36 L. Ed. at 1042. It is the duty of Pohnpei State to maintain the public lands and insure that the public may continue to use public lands for these purposes.

Since the real issue in this case is who deserves to be compensated for damage to public lands, the Court concludes that the public should benefit by having damages received for injury to such property placed in trust for the people, and the funds used to repair the harm done to the affected public lands.

In this case, a fishing vessel became grounded on public lands, allegedly interfering with the ability of the people of Pohnpei State to freely navigate the reef, engage in subsistence fishing in that area, and control the use of and materials in that marine environment. The traditional and customary rights of the people of Pohnpei to engage in such activities is recognized in 67 TTC 2(1)(e), in the FSM Constitution, and the Pohnpei State Constitution. Article 5, Section 2 of the Pohnpei State Constitution states that, "[t]he Government of Pohnpei shall respect and protect the customs and traditions of Pohnpei. Statutes may be enacted to uphold customs or traditions." The Pohnpei State Fisheries Protection Act of 1995 states that, "[t]raditionally recognized subsistence fishing rights in submerged reef areas wherever located within state waters shall be preserved and respected." The FSM Constitution requires this Court to issue decisions that are "consistent with . . . Micronesian customs and traditions," FSM Const. art. XI, § 11, and provides that the FSM Congress may enact statutes to protect the traditions of the people of the FSM, FSM Const. art. V, § 2. Title 67, Section 2 of the Trust Territory Code clearly was intended to protect customary and traditional fishing rights of the people of the FSM in marine areas below the normal high tide.

III. Pohnpei State's Motion to Dismiss

In reviewing Pohnpei State's motion to dismiss, along with Kitti's initial complaint, the Court cannot grant Pohnpei State's motion at this time. Dismissal is only appropriate if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. *Latte Motors, Inc. v. Hainrick*, 7 FSM Intrm. 190, 192 (Pon. 1995). Based on the preceding, Kitti is precluded from recovering damages for injury to the submerged lands and living marine resources allegedly damaged by the grounding of the KSVI #3. However, if Kitti is able to prove damage to other municipal resources, it shall be provided that opportunity at trial.

CONCLUSION

The Court finds that Pohnpei State is the legal owner of the submerged lands and living marine resources allegedly damaged by the grounding of the KSVI #3, and that Pohnpei State is the party entitled to recover for any injury to these resources. The Court hereby schedules a status conference in this case for April 3, 2001, at 10:00 a.m. at the FSM Supreme Court in Palikir.

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