

DUGONG DEBACLE: LESSONS IN THE EXTRATERRITORIAL APPLICATION
OF SECTION 402 OF THE NATIONAL HISTORIC PRESERVATION ACT AS
ILLUSTRATED IN *DUGONG V. GATES*

A Thesis

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ABSTRACT

In September of 2003, a multi-national group comprised of Okinawan residents, international environmental groups, and Japanese environmental lawyers sued the U.S. Department of Defense declaring that it had violated Section 402 of the National Historic Preservation Act as it failed to take into account the potential adverse effects a new military base would have on the Okinawa dugong. This work simultaneously explores the legal proceedings and argumentation presented in lawsuit, *Dugong v. Gates*, and highlights the impacts of the long-time social and political relationship between Okinawans, the Government of Japan and the United States military as they relate to this unprecedented case.

BIOGRAPHICAL SKETCH

Nicole Moore was born and raised in Englewood, Colorado and a graduate of Englewood High School, 1999. She continued her studies at the University of Colorado at Boulder graduating in three years with a B.A. in History in 2002. Nicole worked in operations and marketing for several years before moving to Ithaca, New York to pursue a graduate degree in Historic Preservation Planning from Cornell University's City and Regional Planning Department. Nicole currently lives in Los Angeles, California.

This work is dedicated to Keith, Joyce, Audrey, Lydia and Sundi.
Without your loving support, my path would not have led so far.

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I cannot end without thanking my family, on whose constant encouragement and love I have relied throughout my studies and my life. I am grateful for the examples of my late mother, Joyce Ann Moore, who taught me to have faith in myself always, and my father, Keith Moore, who continually demonstrates that patience has reward. To my beautiful sisters, your spirits light up my life. I know what love it because of you. To my best friends, Sundi Ford and Karen Faulkner, simply being in your presence inspires me. I know what friendship is because of you. Last but not least, I must give an Englewood-style thank you to “the kids back home.” This shout-out goes to Josh, Lindsay, Jesse, Jay, Stephanie, Freddie, Elizabeth and Wes.

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LIST OF ABBREVIATIONS

APA.....	Administrative Procedures Act
AR.....	Administrative Record
ATARA.....	Alliance Transformation and Realignment Agreement
EIA.....	Environmental Impact Assessment
EIS.....	Environmental Impact Statement
ESA.....	Endangered Species Act
FIG.....	Futenma Implementation Group
FRF.....	Futenma Relocation Facility
GRI.....	Government of the Ryukyu Islands
HUD.....	Housing and Urban Development
IUCN.....	International Union of Conservation for Nature and Natural Resources
MCAS.....	Marine Corps Air Station
MMPA.....	Marine Mammal Protection Act
MOD.....	Ministry of Defense Japan
NCAS.....	National Conservation Society (Japan)
NHPA.....	National Historic Preservation Act
NEPA.....	National Environmental Policy Act
OEBGD.....	Overseas Environmental Baseline Guidance Document
SACO.....	Special Action Committee on Okinawa
SBF.....	Sea-Based Facility
SCC.....	Security Consultative Committee
SOFA.....	Status of Forces Agreement

USCAR.....United States Civil Administration
USMC.....United States Marine Corps



Figure 1.1 – “Location of the Ryukyu Islands.” East Asia Program. (Georgia Tech, n.d.) <http://www.eastasiaprogram.gatech.edu/img/maps/RyukyuCIA1.jpg> (accessed July 2, 2009).

INTRODUCTION

Long, long ago, out on a rocky point on the edge of the Nobaru village, located on the eastern shore of Ishigaki Island in the Ryukyu Islands, a group of young musicians were playing three-string instruments and blowing finger-whistles.¹ When they stopped they heard a beautiful song coming from the sea. Ever since, when the ocean was quiet and the moon bright, they could hear the evening song. On one such night, an old man who was out fishing caught a mermaid. The creature pleaded to the old man to set her free. The old man was so taken with her loveliness, he granted her request. To thank the old man for his kindness the mermaid warned him of a tsunami coming at dawn. The man hurried to the village to tell the others. The villagers moved to high ground but not before sending a small boy to tell the nearby Shiraho village of the coming wave. The people of Shiraho paid no heed to the boy's warning. As the dawn approached a strange calmness settled over the village and the sea. Then, at high tide, the waters suddenly receded leaving the sea-bed bare. The water offshore then swelled, and a monstrous tide crashed toward the island. All but the few Shiraho villagers working in the mountains were washed away, along with all of the houses and fields. The Nobaru villagers who listened to the mermaid's warning survived. They thanked the mermaid for their lives and returned to the village to rebuild and restore all that was lost. Legend has it that even today, if you stand out on the cape on

¹ *Encyclopædia Britannica*. "Ryukyu Islands." (Encyclopædia Britannica Online, 2009), <http://www.britannica.com/EBchecked/topic/514624/Ryukyu-Islands>. (accessed July 7, 2009).

The Ryukyu Islands, an archipelago consisting of 55 islands, spans 700 miles southwestward from Japan toward Taiwan. The majority of the islands are administratively in the Okinawan Prefecture of Japan, with a few in the Kagoshima prefecture.



Figure 1.2 - Dugong under water. (National Geographic website , n.d).
<http://animals.nationalgeographic.com/animals/mammals/dugong.html>. (accessed April 14 2009).

a calm moonlit night, you will hear the beautiful mermaid song. For the people of Okinawa, the dugong is that mermaid.²

The dugong as a harbinger of tsunamis is one of many mythologies surrounding the gentle, large marine mammal which traverse the pristine waters of

² The Association to Protect the Northernmost Dugong. “A Historical, Cultural, Comparative Study on the Appropriate Habitat of Endangered Dugong in Okinawa by Interviews and Literature Documentation.” (Tokyo: Pro Natura NACS-J Foundation Japan, 2005.) <http://sea-dugong.org/english/dugong%20pink%20report.pdf>. (accessed March 7, 2009)

Author has carefully interpreted the story from a simple or rudimentary Japanese to English translation, being especially mindful to honor the fundamental meanings and associations.

Henoko Bay in Okinawa. Dugongs are frequently associated with mermaid lore, fishing stories and as progenitors of the native people of the island.³ Also, “Dugong meat was traditionally offered to royalty as sacred food and medicine,” Dugong bones were used as early ornaments and tools and, until the 1900s, prayers to the dugong were believed necessary for fruitful fishing expeditions.⁴ The legend and lore surrounding the dugong is profoundly rich and has great significance among many people of Okinawa. In 1972 the Okinawa dugong was added to Japan’s Register of Historic Sites, Place of Scenic Beauty, and/or Natural Monuments.⁵

In addition to the dugong’s cultural associations, the animal is also on the radar of environmentalists. The Okinawa dugong is listed as *Endangered* by the United State Fish and Wildlife Service, *Critically Endangered* by the Japanese Ministry of the Environment, and classified as *Vulnerable* by the International Union for Conservation of Nature and World Conservation Union.^{6,7}

³ Declaration of Takuma Higashionna Support of Plaintiffs’ Motion For Summary Judgment; No. C-03-4350 (MHP). (U.S. District Court Northern District of California San Francisco Division, September 10, 2007).

Takuma Higashionna represents Save the Dugong Foundation, and Okinawan-based organization dedicated to protecting the dugong and is one of the plaintiffs listed in the case. Higashionna discusses the cultural importance of the dugong through his personal remembrances.

⁴ *Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment*, No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, May 18, 2007).

⁵ A register maintained under Japan’s Cultural Properties Protection Act of 1950.

⁶ Code of Federal Regulations, “Endangered and Threatened Wildlife and Plants,” 2008, U.S. Government Printing Office via GPO Access, 50 CFR17.11.

⁷ “Request for the Protection of the Dugong.” Japan Federation of Bar Associations. (Chiyoda-ku, Tokyo, Japan: Japan Federation of Bar Associations. July 14, 2006). <http://www.jelf-justice.org/english/essays/index.html>. (accessed March 31, 2009).

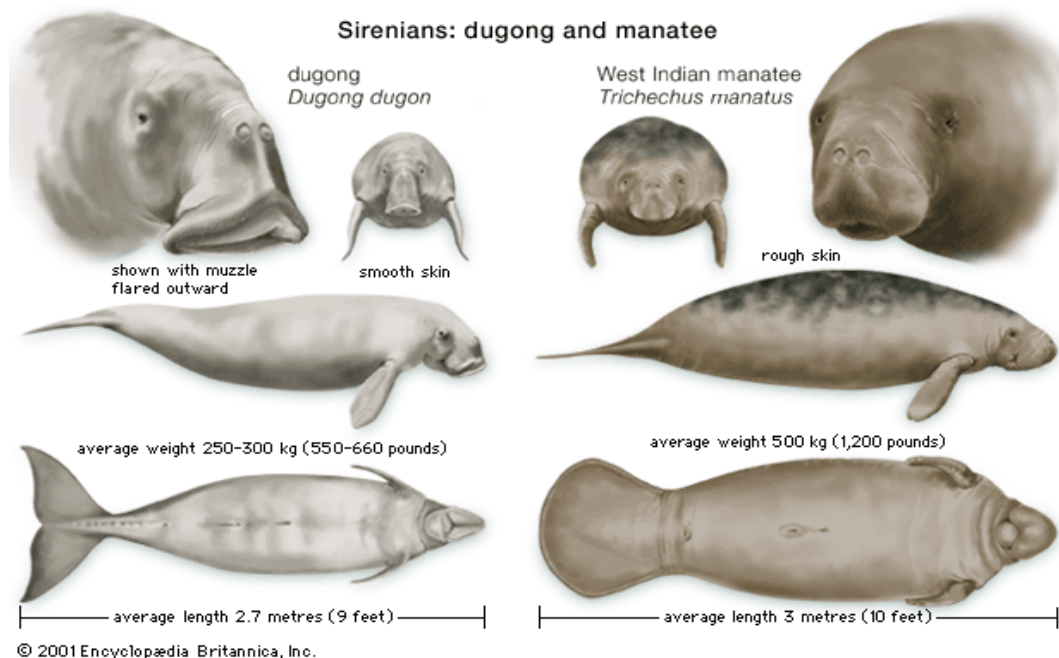


Figure 1.3 - Sirenians: Dugong and Manatee. (Encyclopedia Britannica, n.d.)
<http://www.britannica.com/EBchecked/topic-art/173182/57538/Features-of-dugongs-and-manatees-compared> (accessed April 14, 2009).

In 1996 the Minister of Japan and the United States Department of Defense approved the relocation of the Marine Corp Air Station Futenma (MCAS Futenma) to Camp Schwab near Henoko, a bay located in the northern region of mainland Okinawa. The plan met great opposition for many reason but particularly because of a plan to build an off-shore heliport in Henoko and Ouro Bays.⁸ From 1996 to 2002, the

⁸Marine Corp Air Station Official Website. (United States Department of Defense, n.d.)
<http://www.okinawa.usmc.mil/Major%20Command/Major%20Command%20Page.html> (accessed June 11, 2009).

According to the official website, "Marine Corps Air Station Futenma began in 1945 as a bomber base. The airfield was commissioned as a "Marine Corps Air Facility" in 1960 and became an Air Station in 1976. The air station is home to approximately 4,000 Marines and Sailors. It is capable of supporting most aircraft and serves as the base for Marine Aircraft Group 36, Marine Air Control Group 18, and Marine Wing

base relocation project went through several iterations in response to local protests. Shortly after abandoning the heliport plan in exchange for an airport with a sea-based extension, the Department of Defense experienced another unexpected setback in the plans upon the discovery of dugong in Henoko Bay. Given the cultural and biological importance of the dugong, this animal was acknowledged in the implementation plans of the massive construction project that would intrude into their habitat. Okinawans further protested the base relocation, this time rallying around the assertion that the impact the construction would have on the dugong was not adequately considered in the planning process for the base relocation. This assertion carried legal implications as Okinawans and their environmental allies found an obscure statue in the National Historic Preservation Act legally binding the United States military to review the dugong as a cultural property, a process requiring consultation and cooperation with Okinawans and resource specialists. A complaint filed in the United States District Court for the Northern District of California San Francisco Division on September 24, 2003, charged Donald H. Rumsfeld, in his official capacity as Secretary of Defense, and the Department of Defense (herein Rumsfeld) of violating Section 402 of the National Historic Preservation Act (NHPA), on account of the agencies' failure to take into account the impacts on the dugong as they relate to the MCAS Futenma relocation.^{9,10}

Support Squadron 172. Since 15 January 1969 MCAS Futenma has served as a United Nations air facility.”

⁹ The National Historic Preservation Act is the primary legislation by which the United States achieves national preservation goals. The details of this legislation will be further outlined in the next chapter.

¹⁰ Adina W. Kanefield. *Federal Historic Preservation Case Law, 1966-1996: Thirty Years of the National Historic Preservation Act*. (Washington, D.C.: Advisory Council on Historic Preservation, 1996), 5.

The lawsuit brought by several individual Japanese citizens and six environmental associations on behalf of the Okinawa dugong, charged Rumsfeld with failure to acknowledge that the planned “activities related to the relocation of portions of the U.S. airbase Futenma in Okinawa, Japan, to a ‘sea-based facility’ (SBF)” would negatively affect, or in this case “destroy the most important remaining habitat of the Okinawa Dugong....”¹¹ The lawsuit was tried in the Ninth Circuit District Court in San Francisco by judge Marilyn Patel and took nearly five years to conclude.¹² In the course of the five years, the case which began seeking injunctive relief, morphed into a summary judgment requesting the judge to determine if the Department of Defense did in fact fail to comply with NHPA. Also, the case title changed from *Dugong v. Rumsfeld* to *Dugong v. Gates*. When Donald Rumsfeld left the office of the Secretary of Defense, replaced by Robert Gates, the listed defendant had to change. After five years and several major changes to the lawsuit, the case ended with a summary judgment in favor of the dugong.

The case garnered a great deal of interest for a variety of reasons. First, it was the first time that Section 402, the “international hook” of the National Historic Preservation Act, came under judicial review. This case therefore set the legal precedent by which future Section 402 cases would be adjudicated. The judgment signified not only a victory for the Okinawa dugong but also a legal victory for preservationists and environmentalists world-wide. Yet, an additional story is also

Several federal statutes existed prior to the 1966 National Historic Preservation Act, namely the Antiquities Act of 1906, authorizing the President to designate historic landmarks, and the Historic Sites Act of 1935 which “declared it national policy to preserve for public use historic sites, buildings and objects of national significance.”

¹¹ *Defendants’ Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, May 17, 2004).

¹² District Courts are the lowest court in the Federal court structure. District courts are the first to hear a case and are responsible for making decisions based on the facts.

threaded throughout the Dugong case, a story illuminating the social and political relationships between the Okinawans, the Government of Japan and the United States military and how this relationship made its way into a United States courtroom.

The purpose of this paper is to evaluate these two stories, namely the practical application of international historic preservation law and policy and socio-political impact on preservation legislation as highlighted in *Dugong v. Gates*. In examining this pivotal case, this work hopes to illuminate how international preservation law works and answers questions such as, in what instances can the international clause of Section 402 apply? Who can bring a suit? How do we treat theoretical differences in the preservation practices of two sovereign nations? Is this an undertaking by the U.S. or the Government of Japan? If it is a Japanese project, can U.S. courts sit in judgment of foreign governmental action? Without precedent, how does a federal agency comply with the law? How does the social and political environment impact lawsuit and application of the National Historic Preservation Act?

Methodology

Qualitative, quantitative and spatial research techniques were employed to capture the story's richness and detail. These methods allow for the expansion of ideas, enlightening the one-sided or linear information found in single-method approaches.

The qualitative study combined information gleaned through literature review, key informant interviews and a focus group. This provided insight into the behavior of stakeholders involved in the *Dugong v. Gates* story and why certain outcomes were achieved.

A review of the primary legal documents published throughout the case provided the bulk of the raw data for this thesis. These works included the complaints,

motions, memoranda, decisions and accompanying declarations of injury by plaintiffs. Judge Patel's final opinion referenced past case law, which the author revisits and summarizes or excerpts in order to amplify on the ideas. Also, contemporary newspapers and essays provided a social and political context for the case as it evolved. The *Asia Times* and *Japan Focus* were the most heavily used periodicals, partly because of their being published in both Japanese and English.

There was an additional body of secondary literature analyzing cultural policy utilized in this work. It consisted of academic articles, special reports, and legal guides all pertaining to managing cultural heritage.

The key informant interviews elicited professional insight regarding the nature and progress of the case. The interview questions were developed by the author. Participants included Peter Galvin from the Center of Biological Diversity, who acted as the representative plaintiff for the organization; and Sarah Burt, the lead attorney at Earthjustice. Telephone interviews were recorded and the record is available from author.

The author also participated in a focus group at the Archeological Institute of America's 2009 Annual Meeting in Philadelphia January 8th -11th, 2009, consisting of cultural resource specialists, attorneys specializing in international cultural resource management, and military professionals. The focus group was designed to identify issues related to international compliance as it relates to cultural heritage. The discussion included the Dugong case but also examined measures necessary to ensure compliance by all Federal agencies with Section 402 and The Hague Convention.¹³

Qualitative research included information from the Statistics Bureau and the Director-General for Policy Planning (Statistical Standards), the Japanese equivalent

¹³ The group intends to meet each year at the same conference.

of the United States Census. This provided an initial understanding of the political and economic climate of Okinawa. The data came from the most recent *Population Census* taken on October 1, 2005, recording the responses of over 128 million people living in Japan, including resident foreigners.¹⁴ Although the data gathered does not fit directly into the framework of the paper, it informed the author's understanding of Okinawa's economic dependence on the United States bases, which affected the interests of the parties involved in the lawsuit.

Spatial information was gathered from historical, political, social and economic maps found in the Olin Library Maps and Geospatial Information Collection at Cornell University. Additional maps and GIS data were found online and in other secondary resources. The spatial information related to the changing physical presence of the U.S. military on Okinawa and the migratory patterns of the dugong.

Content

This work is an examination of the many issues that arose when an obscure and untested statute of the National Historic Preservation Act was employed to protect a foreign cultural resource. Many of the issues that proved problematic were in large part a result of incomplete legal framework of Section 402, the procedural nature of the law, incongruous or competing ideas over who has ultimate responsibility to protect historic resources affected by the extraterritorial activities of the United States, and the social and political relationship between the parties involved in the dugong case. As we will see in the following chapters, the law clearly states the

¹⁴ Statistics Bureau and the Director-General for Policy Planning (Statistical Standards). 2005 Population Census. (Tokyo: Ministry of International Affairs and Communications, 1996-2008).
http://www.stat.go.jp/english/data/kokusei/e_cen_en.htm. (accessed February 28, 2009).

responsibilities of Federal agencies but does not guide the agency the international compliance processes. The statute does not clearly define *when* the agency has responsibility to review cultural resources and *which* resources the agency needs to review in the international context. Furthermore, the law is procedural not substantive in nature. Procedural law is dictates how to deal with and enforce the law thus does not have any direct bearing on the duties or liabilities an agency or individual has in a specific case. Procedural law does not offer specific and definite protection of cultural resources. Thus the procedural legal framework of compliance law relies on an agency to appropriately self-monitor following a normative theory or logic. In other words, the law hedges on the federal agency's discretion in the protection of cultural resources. When the agency has obligations to multiple stakeholders and political interests, cultural resource protection may prove exceptionally problematic.

The work bases its inquiry within the context of *Dugong v. Gates* which is rooted in a long triangular history between Okinawans, the Government of Japan and the United States military . Chapter One provides a chronological overview of the island history and offers context for the events leading up to the lawsuit. This history highlights the way Okinawans have interacted with the Japanese government and the United States military in the past and how such actions are correlated with the initiation of *Dugong v. Gates*. Chapter Two continues to explore the more recent history specifically relevant the lawsuit. The chapter focuses on the event which drew the stakeholders involved in the lawsuit – namely the plaintiffs, the defendants, and the unnamed but relevant stakeholder, the Government of Japan and establishes the context in which each has legal standing in the case. Chapter Three discusses the legal standards cited in *Dugong v. Gates*; the National Historic Preservation Act, Administrative Procedures Act, Article III of the Constitution and the Act of State Doctrine. Chapter Four examines the argumentation submitted by the plaintiff,

defendants and judge that relate to issue of equivalence required by Section 402. In a similar fashion, Chapter Five explores argumentation relating to which parties are responsible for protecting the Okinawa dugong. Chapter Six evaluates the argumentation that comes after the judge denies the Defendants Motion to Dismiss. This argumentation involves legal requirements and standards to bring a NHPA suit to trial. The conclusion makes connections to the legal problems highlighted throughout *Dugong v. Gates* and the manner in which social and political issues impact this application of Section 402 of the National Historic Preservation Act.

CHAPTER 1

HISTORY OF OKINAWA

Even a sheet of paper has two sides.

Japanese Proverb

Introduction

One of the greatest challenges of understanding the *Dugong v. Gates* case is trying to grasp the number of players, their interests and the events leading up to the lawsuit. Distilling the who, what, where, and when of this story is the task of this chapter.

It was somewhat difficult to identify a starting jumping off point because several historic events are referenced throughout the legal documents. Should the history begin with the examination of native Okinawan animism and the origin of Dugong mythology? Or should it start with the Japanese annexation of the island shortly after the Meiji Restoration of mainland Japan? Or maybe it commences with the Battle of Okinawa (also referred to as *tetsu no ame* meaning "rain of steel"), which marked the beginning of Okinawa governance under U.S. occupation forces? Perhaps the story should begin with the 1972 reversion of Okinawa to Japan from the direct military rule by United States. Or maybe the story begins more recently with the decision to relocate MCAS Futenma. In the end, it would be imprudent to leave out any part of this story, so that this chapter this will briefly outline the major historic events that play a role in island's history that has bearing in the *Dugong vs. Gates* story.

Okinawan Pre-History

It is believed that the first inhabitants on Okinawa lived there about 32,000 years ago. Human fossils found near Naha date back more than 10,000 years and earthenware dates to 7,000 years ago. These early inhabitants likely migrated from China or Japan. Evidence suggests the inhabitants were hunters and gatherers until the Shell Mound Period which began around the 12th century. Shell and bone tools suggest a movement toward fishing. An agricultural culture emerged in the 14th century which is known as the *gusuku* period. The need to cultivate land engendered the movement away from local chieftains called *aji* to the formation of the Three Kingdoms, Hokuzan (Northern Kingdom), Chuzan (Central Kingdom) and Nanzan (Southern Kingdom). Each kingdom was ruled by an *aji* designated by the Ming Emperor of China. It was during this period that native religious beliefs were incorporated into the political structure.¹⁵

Early Okinawan Belief and Culture

Okinawa's indigenous religion is in origin animistic and shamanistic but is believed to be influenced by Shintoism, Buddhism, and Taoism which were transmitted through migration from Japan and China. According to the native religion, the world is inhabited by a multitude of spirits (*kami*) – ancestral, heart, well, spring, house, tree, and rock spirits. The *kami*, are sacrosanct, supernatural and require ritual to bring favor. Rituals are performed throughout the year and may occur in many places, although certain places hold particular significance. The *utaki* (sacred grove) and *uganju* (honorable praying place), located in hills and forests, are the most hallowed sites of worship in Okinawan animism.

¹⁵ Okinawa Prefectural Board of Education, eds. *The History and Culture of Okinawa*. (Naha City, Okinawa: Sun Printing, 2000).

The religion is matriarchal. The *kaminchu* and *yuta* are the two central figures of Okinawan shamanism. Both roles are assumed by women. In the Okinawan villages, the *kaminchu* is a priestess in charge of religious rites. *Yuta*'s are intermediaries between *kami* and the living and are able to see or understand the causes of misfortune and determine actions necessary to remedy the situation.

With the introduction of Buddhism, ancestor worship was incorporated into Okinawan religion in the fourteenth century and by the seventeenth century it was prevalent throughout Okinawa. The fundamental tenet of ancestor worship claims that ancestral spirits are always nearby, observing the life of their descendants. Regular performance of religious rituals to the ancestral spirits will elicit their munificence and



Figure 1.4 – “Okinawan tomb of the type that studded the hillsides of the island.” (United States Marine Corp, n.d).
<http://www.ibiblio.org/hyperwar/USMC/USMC-M-Okinawa/img/USMC-M-Okinawa-p8.jpg> (accessed May 28,2009)

compassion. Conversely, neglecting rituals will incur their wrath, resulting in misfortunes for the descendents. Rituals generally take place at the ancestral shrine, which may be indoors or outdoors in pavilions or in sacred places.¹⁶

In contrast with traditional, western, Judeo-Christian principles of site specific worship Okinawan religious practice is connected to vast landscapes. The spiritual world is embodied in and by many things thus defining what is culturally significant must be broad in order to truly celebrate the tradition.

The Okinawan people have a beautiful native tradition and spiritual practice that is slowly suffocating. The suffocation is due in large part to of lengthy periods of Chinese and Japanese imperial rule followed by United States military occupation. Subjected to a foreign occupation and the imposition of foreign political, social and spiritual paradigms, Okinawans have struggled to continue practicing their unique traditions.

The Meiji Restoration and Its Affect on Okinawa

The Meiji Restoration, marks the period in Japanese history (1868-1879 C.E.) when nobles and former samurai consolidated land and power to over-throw the Tokugawa government, restoring imperial power in Japan. Growing discontent stemming from the frustrations surrounding inequitable and forced treaties by Western powers gave rise to Japan's desire to assert itself as a respected nation.

¹⁶ James C. Robinson. *Okinawa: A People and Their Gods*. (Tokyo, Japan: Charles E. Tuttle Co. Publishers, 1969). Pp 13-35.



Figure 1.5 - "The Meiji Emperor" in Takahashi Tesuya. *Philosophy and Activism in Neo-liberal, Neo Nationalist Japan*. The Asia Pacific Journal. (Tokyo: Japan Focus, November 3, 2007). www.japanfocus.org/-Takahashi-Tetsuya/2566. (accessed July 31, 2009).

After seizing power, the young Emperor Meiji established court in Tokyo, dismantled the feudal system, and initiated broad reforms based on models of Western economy, military and society. The newly unified Japanese government also set off on an ambitious industrialization and militarization campaign. After a few decades Japan was a major player in the global trading markets. Also during this period, the new Japanese government, having recently annexed the Ryukyu Islands officially abolished the Ryukyu Kingdom. The island rulers who had peacefully complied with the annexation, had resisted the Meiji plan to station Japanese troops on the islands. The young Japanese government ignored the opposition and dispatched army units to the main island to scout and then expropriate land for "barracks, drilling grounds,

shooting ranges, hospitals and so on.”¹⁷ This event illustrates an early tendency of the Japanese government to suppress Okinawan interests in the name of Japanese defense.

The Restoration is exceptionally important to ideas of Okinawan national sovereignty. The annexation of the Ryukyu Islands hardened Okinawa as a strategic southeastern point of national defense during Japan’s territorial expansion. Hence, Okinawa became a primary access point for Allied forces military defeat of Japan in 1945.¹⁸

The Battle of Okinawa

The United States occupation of Okinawa began after the bloody Battle of Okinawa. Toward the end of World War II, Japan was in the midst of negotiating its surrender but needed additional time to name terms.

Even though the Emperor Hirohito knew in February 1945 that the war was lost, he ordered one last great battle not fought on the Japanese mainland so as to buy time to negotiate better surrender terms for the Imperial Institution. The strategy worked, but the Okinawans paid the price with over 200,000 of them killed, including many civilians who were killed by Japanese soldiers.¹⁹

The battle began on April 1, 1945. The largely amphibious assault occurred in four main phases mainly along the west side of the island where the water conditions are ideal. The first phase was an advance by 60,000 troops (two Army and two

¹⁷ Masahide Ota. “Governor Ota at the Supreme court of Japan.” In Johnson, Chalmers, ed. *Okinawa Cold War Island*. (Cardiff, California: Japan Policy Research Institute, 1999), 205-209.

¹⁸ Glenn D. Hook and Richard Siddle, eds. *Japan and Okinawa: Structure and Subjectivity*. (London, New York: Routledge Curzon, 2003), 28-29.

¹⁹ Steve Rabson. “Okinawan Perspectives on Japan’s Imperial Institution” (Japan Focus, February 16, 2008). <http://www.japanfocus.org/-Steve-Rabson/2667> (accessed July 27, 2009).

Marine divisions) to the eastern coast on April 1-4. There was relatively little opposition as the Japanese decided defending the beach would result in too many casualties. The second phase was the clearing of the island on the north end, on April 5-18. During this phase the kamikaze aircraft assault occurred. The Japanese planes sank 30 American ships and damaged over 150 more. The third phase took place on the outlying islands on April 10 – June 26. Overlapping was the fourth phase, the longest and most devastating battles took place on the mainland.²⁰



Figure 1.6 - New York Times article from Friday June 22, 1945 from "Timeline of Major Events in No Ordinary Time," (Meredith College: Raleigh, NC, 2009).

²⁰ "Battle of Okiawa." Global Security.org. Washington D.C, 2008. Retrieved on April 19, 2009 from <http://www.globalsecurity.org/military/facility/okinawa-battle.htm>.



Figure1.7 "Dress and physical appearance of typical Okinawan natives is shown in this photograph taken shortly after the Tenth Army landing." <http://www.ibiblio.org/hyperwar/USMC/USMC-M-Okinawa/img/USMC-M-Okinawa-p9.jpg> (accessed May 29, 2009).



Figure 1.8 - "Typical patchwork terrain of central Okinawa with its small fields, walled houses, and scattered woods appears in this pre-invasion aerial photograph. (Navy Photograph)" <http://www.ibiblio.org/hyperwar/USMC/USMC-M-Okinawa/img/USMC-M-Okinawa-p9.jpg> (accessed May 29, 2009).

In the end, the Battle of Okinawa was the largest and last invasion of the Pacific campaign. The damage was catastrophic. Casualties totaled more than 38,000 Americans soldiers, approximately 100,000 Japanese and Okinawan soldiers and over 150,000 Okinawan civilians – more than the all of the casualties caused by the atomic bombs in Hiroshima and Nagasaki.²¹

Shortly after the Battle of Okinawa the United States “turned the islands into a military colony.”²² Large areas of land were confiscated and farms, houses, natural landscapes were razed to build bases and barracks. Okinawans, or rather the Okinawans who survived the Battle of Okinawa, returned from detainment camps to discover their native villages, religious shrines and way of life destroyed.²³ The destruction was in part from the battle and in part to make way for an extensive build-up of U.S. military bases.

The 1945 battle marked the beginning of a twenty-seven year U.S. military occupation in which the U.S. would continue to claim land from Okinawans for military use. The U.S. military presence was validated on May 3, 1947 when Japan adopted its current Constitution, and declared in Article 9 that the nation, “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the

²¹ Laura Lacey. “A Brief History of the Battle of Okinawa.” Sixth Marine Division Association, Inc. (Quantico, VA, 1999)
http://images.google.ca/imgres?imgurl=http://www.sixthmarinedivision.com/images/MapOki_lg.jpg&imgrefurl=http://www.sixthmarinedivision.com/Okinawahistory.htm. (accessed June 14, 2009)

²² Miyume Tanji. “Okinawa Screaming.” (The Free Library, August 1, 2001).
<http://www.thefreelibrary.com/OKINAWA+SCREAMING.-a077808220>. (accessed April 15, 2009).

²³ Laura Hein and Mark Selden, eds. *Islands of Discontent: Okinawan Responses to Japanese and American Power*. Lanham, (Boulder, New York, Oxford: Rowman & Littlefield Publishers, Inc, 2003), 228.

nation and the threat or use of force as a mean of settling international disputes.”^{24,25} In renouncing war, the Japanese forged a security partnership with the United States. The Japanese would not engage in international warfare and the U.S. would come to its aid at the request of the Japanese government. By 1952, Japan and the U.S. signed the Mutual Security Treaty formally ending the U.S. occupation of Japan, but authorizing total control over Okinawa for U.S military purposes.^{26,27}

In 1954 the Japanese Diet, a bi-cameral legislature similar to the United States Congress, established the Self Defense Forces Law authorizing a purely defense Japanese military comprised of ground, air, and marine divisions. The Self Defense Agency, authorized under Article 66 of the law, worked with the United States to build an extensive network of military

²⁴ The Constitution of Japan (1947), Chapter II, Article 9. Tokyo, Japan: National Diet Library, 2009. Retrieved on June 15, 2009 at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

Based on the English edition by the Government Printing Bureau.

²⁵ The 1947 Japanese Constitution has been referred to as the "MacArthur Constitution," because General Douglas MacArthur directed its writing. The United States occupied Japan in part to ensure Japan engage in international conflict, and Article 9 was written to make certain of this, and also for U.S. strategic purposes. In 1947 General MacArthur envisioned a postwar Japan, overseen by the United Nations that would remain disarmed in perpetuity.

²⁶ Joseph Gerson, Bruce Birchard, American Friends Service Committee. Disarmament Program, American Friends Service Committee. *The Sun Never Sets--confronting the network of foreign U.S. military bases.* (New England Regional Office: South End Press, 1991), 187

²⁷ Aldous, Christopher . “Achieving Reversion: Protest and Authority in Okinawa, 1952-70.” (Cambridge University Press. *Modern Asian Studies*, Vol. 37, No. 2, May, 2003), 491.

The “land struggle,” as Christopher Aldous names it, became a major catalyst for the 1972 Reversion of Okinawa to Japan.

facilities on Okinawa.²⁸ The construction was overseen by the Defense Facilities Administration Agency, the agency responsible for procuring, building, and maintaining land spaces for Japanese Self-Defense Forces and the U.S. Forces in Japan. The facilities agency also has the responsibility of overseeing the living environment, labor management of Japanese employed by the U.S. military and any unlawful damage caused U.S. military personnel.²⁹

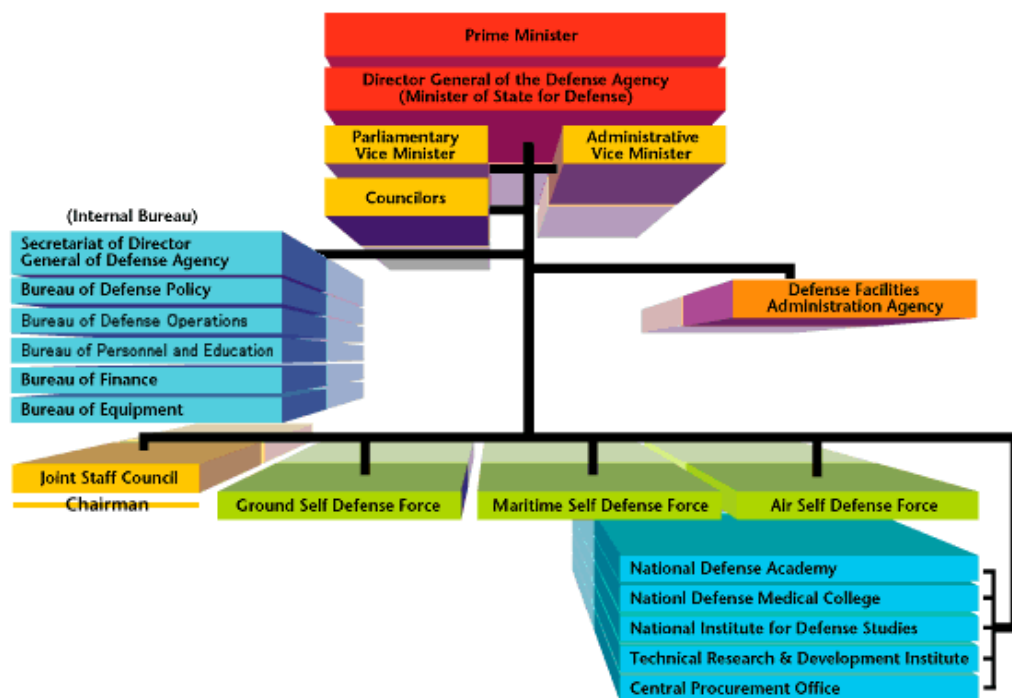


Figure 1.9 - Organizational Structure of Ministry of Defense, formerly Self Defense Agency. www.GlobalSecurity.org. (accessed June 11, 2009)

²⁸ The Self Defense Agency has since been changed to the Ministry of Defense.

²⁹ "Government Offices' Functions." Official Website of the Prime Minister of Japan and His Cabinet. (Tokyo, Japan, 2009).
<http://www.kantei.go.jp/foreign/link/link2.html>. (accessed June 14, 2009).

The Japanese and U.S. agreements and collaborative effort to construct military facilities were not exclusively beneficial to the Japanese. The U.S. determined Okinawa was a critical component in the Asian-Pacific and in 1954 President Eisenhower announced that the U.S. would permanently maintain military bases in Okinawa.

From 1953 to 1957 the U.S. military acquired significant acreage on the island, strategically along on the western coast where China and Taiwan could be actively watched. The land acquisition, or “land struggle” as it is often referred, was the occurred because the vast majority of the 600,000 Okinawan survivors were left homeless once the war ended. Confirmation of land titles was extremely difficult for Okinawans because many documents like family registers and land ledgers were destroyed in the fighting. In rare instances, when families refused to leave the land, Japanese and U.S. troops forcibly removed people.³⁰

The U.S. military and Japanese government expropriated a significant quantity of land to build military facilities, but even more land to re-build the infrastructure of the islands that had been devastated by the war. The construction was viewed as the first step toward building an Okinawa capable of self-governance. Within ten years of the Battle of Okinawa, vast modern cities had from rose the ruins. The islands roads, schools, hospitals, water and electrical networks were greatly expanded during the late 1940s and early 1950s.³¹ Hope A. Diffenderfer, the wife of an American civil service

³⁰ Chalmers Johnson, ed. *Okinawa: Cold War Island*. (Cardiff, California: Japan Policy Research Institute, 1999), 210.

³¹ Hope A. Diffenderfer. “Okinawa, The Island Rebuilt.” *National Geographic Magazine*. (National Geographic Society: Washington D.C., Vol. 107, No. 2, February 1955), 279.

employee stationed in Okinawa, recalls the massive relief efforts made by many Americans, like she and her husband, as a step toward progressing democratic ideals in Japan and Okinawa. The ultimate goal was to empower Okinawans by encouraging the islanders to participate in rebuilding the island and engaging in new economic structures such as financial lending. In 1949, 42,000 Okinawans were employed by U.S. forces.³² This is the origin of economic dependence on the U.S. military.

During the 1960s, the U.S. military interests shifted. Rebuilding Okinawa was still important but Okinawa became a major logistics and staging area for U.S. troops in Vietnam.³³ American interests were diverted and Okinawans, well into reconstruction began testing self-governance. The islanders immediately ran into problems because they politically crippled being so far from mainland Japan and totally reliant on the U.S. financially. Okinawans were “Japanese at heart and American at pocketbook.”³⁴ The island people needed to plan for the future but did not know how to exercise their political or social voice until the Japanese and U.S. governments worked out the islands fate.

The 1972 Reversion

The reversion of Okinawa from U.S. military rule to Japan was the result of twenty years of Japanese and Okinawan protest related mostly to the “land struggle.”

³² Ibid.

³³ Johnson, 1-3.

³⁴ Jules Billard. “Okinawa: The Island Without a Country.” *National Geographic Magazine*. (National Geographic Society: Washington D.C., Vol. 136, July-December, 1969), 426.

The reversion movement emerged in August 1951, when 72% of the electorate signed petitions for Okinawa's return to Japan in hopes that the bringing the petition to the San Francisco Peace Conference, the conference officially ending World War II, would raise awareness at of the problems associated with U.S. occupation. The peace treaty signed at the conference, the Mutual Security Treaty, did not reflect Okinawan concerns. In fact, "Article 3 of the treaty granted the US 'the right to exercise all and any powers of administration, legislation and jurisdiction' over the Ryukyu Islands." To administer these rights the United States Civil Administration (USCAR) was developed. The former indigenous Government of the Ryukyu Islands (GRI) maintained a fraught co-existence with USCAR from the beginning.³⁵

In an effort to ease some of the land problems, the GRI issued a resolution calling for the just compensation of land claimed by the U.S. military, annual rental payments on land, a halt to additional land reclamation, and compensation for losses or damages caused by U.S. military exercises or personnel.³⁶ The resolution had little effect. Landowners began to physically resist U.S. efforts to take land. In the late 1950s, images of landowners being forcibly removed from their homes made their way into mainstream media, garnering attention for the ACLU and prompting a visit in January of 1958 from General Moore, the High Commissioner of USCAR. In order to mitigate the increasing tensions in Okinawa, the general approved a Basic Education Law, authorizing Okinawans to be educated by the U.S. as Japanese nationals. General Moore eventually contended that reverting Okinawa should revert to Japanese authorities as the situation presented too great a liability for the U.S.³⁷

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid, 492.

In January of 1960, the United States signed the Treaty of Mutual Cooperation and Security guaranteeing the reversion of Okinawa to Japan in ten years. Under the treaty, the U.S. and Japan agreed to maintain and military capability to resist armed attacks. However, Article IX of the treaty acknowledged that Japan was constitutionally forbidden to come to the aid of the U.S. outside of Japan. The Status of Forces Agreement (SOFA) is also outlined in Article IV detailing the ways in which U.S. forces may be treated in Japan.³⁸

In April, the Council for the Return of Okinawa Prefecture to the Fatherland was founded. Shortly after U.S. intelligence reported several organizations joined the Council for the Return of Okinawa Prefecture to the Fatherland. Over the next decade, Okinawans engaged in internal political battles over trying to determine how the islands would be governed after reversion. Meanwhile, as a result of pressure from the anti-U.S. military movement, the United States reduced the power of USCAR and required greater civilian representation and deference to the GRI. Eventually it was understood that U.S., although unwavering in its commitment to maintain a military presence on the island, was committed to reversion.³⁹ The agreement of 1960 culminated in the final reversion of Okinawa to Japan on May 15, 1972.

³⁸ “Agreement under Article VI of the Mutual Cooperation and United States of America Regarding Facilities and Areas and the Status of United States Armed Forces in Japan.: June 23, 1960.

³⁹ Ibid, 494-96.

The Need to Relocate MCAS Futenma from Ginowan City

MCAS Futenma began as a bomber base for the Marine Corps Air Station in 1945. In 1958 the construction of hangars and barracks began and in 1960 the airfield was commissioned as a Marine Corps Air Facility. In 1976, the Marine Corps Air Facility was officially designated as an Air Station, housing approximately 4,000 marines and sailors. It includes a 2,800-meter-long and 46-meter-wide runway.



Figure 1.10 – Map of U.S. bases on Okinawa.
<http://www.okinawa.usmc.mil/About%20Okinawa/Okinawa%20Map%20Page.html> (accessed May 29, 2009).

GlobalSecurity.org reports:

About 40 percent of the base is used for runways, taxiways, and aircraft parking. The remaining portions of the base are used for air operations, personnel support facilities, housing, and administrative activities. MCAS Futenma has a runway and parallel taxiway that are 9,000 feet long as well as an aircraft wash rack, maintenance facilities, vehicle maintenance facilities, fuel storage facilities, a hazardous waste storage and transfer facility, a control tower, an armory, and other facilities needed to operate a Marine Corps air station.⁴⁰

The primary mission of MCAS Futenma is to maintain and operate facilities and provide services and materials to support Marine aircraft operations including the forward deployment of the 1st Marine Air Wing, a component of the III Marine



Figure 1.11 – MCAS Futenma covers 1,188 acres of land. Aerial view of MCAS Futenma in Ginowan City from "Today's Military Bases in Okinawa." www.pref.okinawa.jp/summit/ (accessed April 27, 2009).

⁴⁰ Ibid.

Expeditionary Force. Since January 15, 1969 MCAS Futenma has served as a United Nations air facility and also a base for Air Force and Naval aircraft needing to divert while flying in the vicinity of the island.⁴¹

Ginowan City was founded in 1962 and developed around MCAS Futenma. Over the course of thirty years, both the city and military base grew. The base growth required expansion of the base footprint. According to GlobalSecurity.Org, an organization that houses a public database on all matters related to United States security, “The land at MCAS Futenma is leased from about 2,000 private landowners by the government of Japan.”



Figure 1.12 - October 22, 1995 protest march and rally from McCormack, Gavin. Abe and Okinawa: Collision Course? Tokyo: Japan Focus, 2007.

⁴¹ John Pike, administrator. Military: Futenma Marine Corps Air Station – Okinawa, Japan. (Alexandria, VA: National Security.Org, 2000-2009)
<http://www.globalsecurity.org/org/overview/index.html> (accessed March 31, 2009).

In September of 1995, three US Marines, in a rented van, kidnapped, beat and raped a 12-year old Okinawan girl igniting a wave of anger and anti-base sentiment among islanders. The incident triggered a massive organization and protest of base activities related not only to violent crime committed by U.S. servicemen but also to the prolific sex-worker industry, noise disturbances, destructive helicopter crashes and environmental degradation correlated directly or indirectly with the military presence on the island.⁴² As Tim Looney, a former U.S. Marine stationed in Okinawa, recalled in his remarks to participants attending an International Women's Day Conference, "The rape had fueled the largest protest ever against the presence of US military personnel in Okinawa. On October 21, 1995, 85,000 people gathered in a park in the city of Ginowan to demand the removal of all U.S. military personnel from their homeland." (Figure 1.7). Most unhelpful to the military cause, Admiral Richard C. Macke, then commander of all U.S. forces in the Pacific, responded to the protesters, "I think it (the rape) was absolutely stupid. I've said several times, for the price they paid to rent the [van], they could have had a girl."⁴³ While Macke was forced to resign over this response, his dismissal of such a violent act touches on some deep rooted issues between the U.S. military and Okinawan people, namely, the U.S. military is aware of the social problems created by, and in correlation with, the presence of thousands of U.S. servicemen on the island, but it does not take responsibility for finding solutions.

⁴² Miyume Tanji. *Myth, Protest and Struggle in Okinawa*. (New York: Routledge, 2006), 162.

Over fifty aircraft crashes have been recorded since 1972.

⁴³ Tim Looney. "Remarks: Masculinity and the U.S. Military." Chicago: International Women's Day Conference. (Chicago: May 2002).

http://www.prairiefire.org/Tim_Looney.shtml. (accessed April 26, 2009).

Looney used the word "car" but it was indeed a van that the servicemen rented.

In February of 1996, *Rengo Okinawa*, a 48,000 member branch of Okinawa's largest workers union, initiated a referendum at the prefectural level calling for more Okinawan voice in the decisions related to the U.S military bases. Although the referendum had no binding power on the Japanese government, formally asserted Okinawan desire "[t]o reform the current conditions of the US military bases, which prevent Okinawan citizens from enjoying the rights guaranteed by the [Japanese] Constitution...more specifically, to increase civic involvement and participation in decision-making processes, discussion, education, and checks on public administration." The referendum ultimately failed because Okinawans were divided along a pro-base and anti-base line.⁴⁴ Nonetheless, this political mobilization reflected a need to address the affects of U.S. military presence on the island.

Shortly after the protest and call for referendum, the Japanese and U.S. governments formed the Special Action Committee on Okinawa (SACO) to explore ways in which the governments could "reduce the burden on the people of Okinawa and thereby strengthen the U.S.-Japan alliance."⁴⁵ The SACO committee was to develop a plan and report to the U.S.-Japan Security Consultative Committee (SCC), whose members are the Japanese Minister of Foreign Affairs, the Japanese Minister of Defense, the U.S. Secretary of Defense, and the U.S. Ambassador to Japan. Chief among the recommendations stated in the April 15, 1996 interim report officially issued by the SCC was the recommendation to return the land occupied by Marine

⁴⁴ Miyume Tanji, Miyume. *The Enduring Myth of an Okinawan Struggle: The History and Trajectory of a Diverse Community of Protest*. (Perth, Australia: Murdock University, 2003) (Dissertation), 285.

⁴⁵ The Japan-U.S. Special Action Committee (SACO) Interim Report. (Tokyo: Ministry of Foreign Affairs Japan, April 15, 1996). <http://www.mofa.go.jp/region/n-america/us/security/seco.html>. (accessed March 18, 2009).

Corp Air Station Futenma to the Okinawan people.⁴⁶ The report states the intention

to:

Return Futenma Air Station within the next five to seven years, *after adequate replacement facilities are completed*. The airfield's critical military functions and capabilities will be maintained through relocations of facilities. *This will require construction of a heliport on other US facilities and areas in Okinawa*; development of additional facilities at Kadena Air Base; transfer of KC-130 aircraft to Iwakuni Air Base (see Implementation of Noise Reduction Initiatives); and a joint US-Japan study on emergency use of facilities in the event of a crisis. [Emphasis added]⁴⁷

As the report stated, the relocation required the construction of a heliport.

Okinawans viewed this as a betrayal. They were not seeing a reduction in military presence, they were seeing another long-term agreement between the Japan government and the U.S. which included the construction of additional facilities in Okinawa. To fully appreciate the sense of betrayal, it is important to note that while the islands constitute only .06 per cent of the land mass of Japan, the island prefecture hosts 75 per cent of the U.S. military facilities. Almost 20 per cent of the main island is used by the U.S. military and its facilities as illustrated in the Figure 1.13.⁴⁸ Of the 52,000 forces deployed in Japan, 25,000 were stationed in Okinawa.⁴⁹ The heliport

⁴⁶ *Defendants' Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, May 17, 2007).

⁴⁷ Minister Ikeda, Minister Usui, Secretary Perry and Ambassador Mondale. The Japan-U.S. Special Action Committee (SACO) Interim Report. (Tokyo: Ministry of Foreign Affairs of Japan, April 15, 1996).

⁴⁸ Miyume Tanji. *Myth, Protest and Struggle in Okinawa*. (New York: Routledge, 2006), 1-3.

Prefecture is a type of sub-national jurisdiction or regional division. They are larger than cities or towns and are distinguished by type through the use of the suffix To, do, fu and ken. Japan is divided into 47 prefectures.

⁴⁹ Ichiyo Muto. "U.S. Military Presence in Mainland Japan and Okinawa." People's Plan Study Group. (Okubo, Tokyo, 2007).



Figure 1.13 – Map of U.S. Military Bases on Okinawa.
www.geogweb.berkeley.edu/.../JEE/okinawa/map.gif. Over 20% of the main island is used by U.S. military. (accessed June 17, 2009),

construction signaled that there was no end in sight.^{50,51} This contributes to an unusually high density as “a population of approximately 1.4 million lives in 2,226 square kilometers (589 per square kilometer).”

⁵⁰ Embassy of Japan. “Press Release: Japan - U.S. Security Consultative Committee.” (Washington D.C.: Embassy of Japan, December 16, 2003). <http://www.us.emb-japan.go.jp/english/html/pressreleases/2002/121602.html>. (accessed April 13, 2009). The United States and Japan remain committed to retaining a presence in Japan as detailed by a 2003 press release. The statement declares:

Both sides reaffirmed the important role of their bilateral security arrangements as the cornerstone of peace and stability in the Asia-Pacific region and reaffirmed their commitment to those arrangements. The Ministers confirmed that the U.S. military presence in the region is

The Japanese and U.S. governments established a working group who were to examine the three options for the relocation, (1) Kadena Air Base, (2) Camp Schwab or, (3) a totally off-shore sea-based facility. The Department of Defense outlined the requirements that (1) there is a 4,200 foot runway the a sea-based facility, (2) the facility could house 66 helicopters and MV-22 aircraft with a gross weight of 59,305 pounds, (3) there is sufficient space for headquarters, logistics and operational facilities, (4) there is sufficient space for quality of life activities.⁵² As the agreement was shaping, it was determined that Japan would pay for the construction of the new facilities. The relocation and sea-based facility was estimated to cost Japan between \$2.4 billion and \$4.9 billion to design and build.⁵³

Okinawans organized a strong opposition to the relocating MCAS Futenma and the plan to build the heliport, particularly after the working group announced the new location for the facility would be in Nago within the limits of the already existing Camp Schwab. In short, the heliport would be built in the nearby waters of Henoko Bay.⁵⁴

essential for regional stability. They reiterated that Japan's Host Nation Support is vital to such a presence.

⁵¹ Donna Miles. "U.S., Japan Committed to Transformation Despite Delays, Admiral Says." (Washington D.C.: American Forces Press Service, November 7, 2008). <http://www.defenselink.mil/news/newsarticle.aspx?id=51838>. (accessed May 31, 2009).

Furthermore, Navy Admiral Timothy J. Keating stated in session of the Council of Foreign Relations that due to "budgetary challenges 'measured in the billions of dollars' that both countries face could cause slight delays in how quickly the relocation occurs... It'll take a little bit longer to effect – we won't be done by 2014, or maybe even 2015, but it's about a decade in execution..."

⁵² Johnson, 228 -230.

⁵³ Ibid, 230.

⁵⁴ Miyume Tanji. *The Enduring Myth of an Okinawan Struggle: The History and Trajectory of a Diverse Community of Protest.*, 283.



Figure 1.14 - Map displaying movement of the air station from Futenma to Henoko, SACO Final Report, 1996.

Henoko is a northern village of Nago City and is home to Camp Schwab. The camp was opened in the late 1950s to house the U.S. Marines. The current division hosted is the 4th Marine Regiment.⁵⁵ Camp Schwab had operated relatively quietly for fifty years, most likely due to the fact that Henoko, was sparsely populated in comparison to Ginowan City.⁵⁶ Henoko is one of thirteen districts in the Kushi region

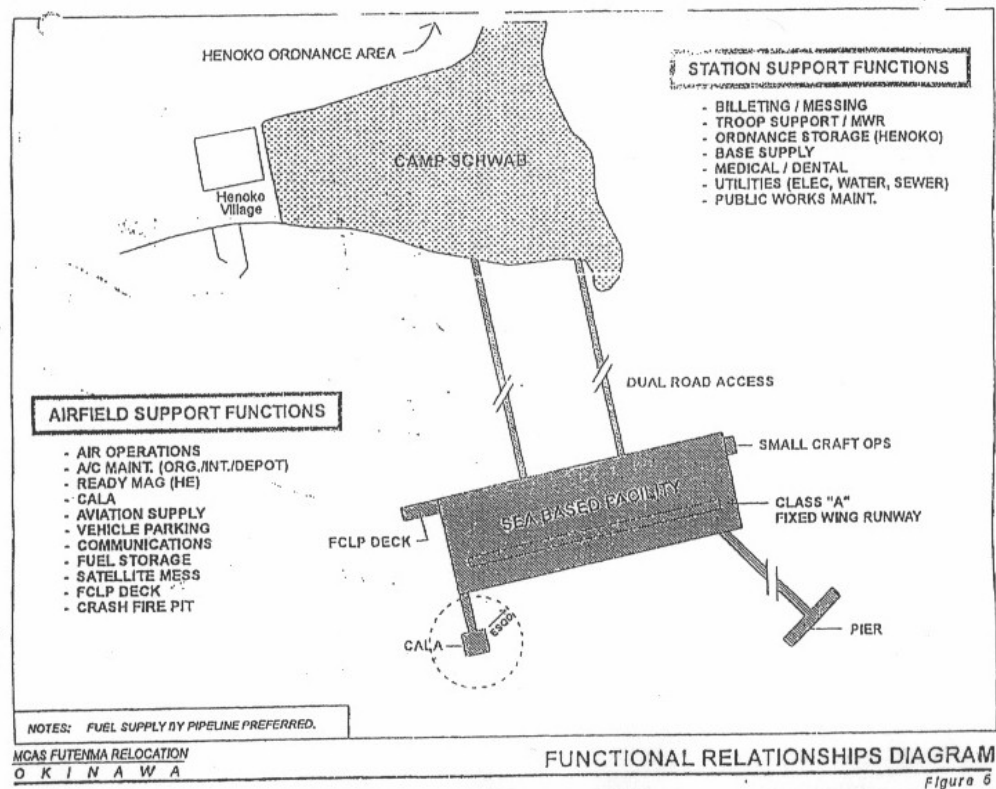


Figure 1.15 - Concept Plan from Japan Focus Article retrieved from http://ir.lib.uryukyu.ac.jp/bitstream/123456789/6967/12/gabe2_02.pdf on April 17, 2009

⁵⁵ U.S. Marines in Japan. "Major Commands". (United States Marine Corp Website, April 15, 2009).
<http://www.okinawa.usmc.mil/Major%20Command/Major%20Command%20Page.html>. (accessed on April 16, 2009).

⁵⁶ Tanji, *Myth, Protest and Struggle in Okinawa*, 163.
While there was initially resistance to the construction of Camp Schwab, the residents of Henoko softened as electricity, water and sewage systems construction boosted the local economy.

of Okinawa's east coast. When Henoko was announced as a possible location for the new facility, the population was 4600, but decreasing due to an aging population. The region was crippled economically by declining agriculture and dependant on special funding provided to communities near U.S. military bases.⁵⁷

After ruling out other locations in Okinawa, the U.S. and Japan determined in the December 1996 SACO agreement that Camp Schwab/Henoko Bay was the most suitable for the base. The concept plan gives a sense of what the base and heliport would look like in the new Henoko location. (Figure 1.10) In July 2002, the Japan Consultative Body, a group of specialists, designated by the Japanese Ministry of Defense, who were responsible for scoping the relocation sites, issued a document called the "Basic Plan of the Futenma Replacement Facility." The plan officially announced the governor of Okinawa's decision to relocate MCAS Futenma to "Nago City's Henoko District, immediately offshore from the U.S. Marine Corp's Camp Schwab."⁵⁸ The Basic Plan contained the plan for the Futenma Relocation Facility (FRF) and a Sea Based Facility (SBF) constructed using landfill.⁵⁹

Post 2003 Lawsuit Events of Consequence

Planning continued for the new base and heliport. In 2003, the First Amended Complaint engendering the Dugong v. Gates lawsuit was filed. Several important events took place thereafter.

⁵⁷ Ibid.

⁵⁸ *Defendants' Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

⁵⁹ Ibid.



Figure 1.16 - Aerial view with concept rendering from United States - Japan Roadmap for Realignment, 2006

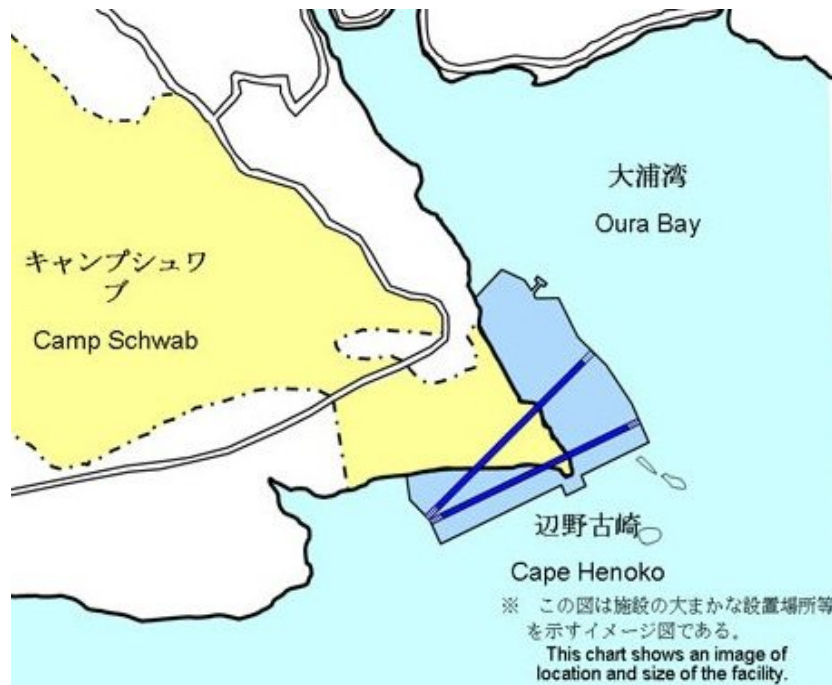


Figure 1.17- Concept Plan from United States - Japan Roadmap for realignment, 2006

In September of 2005, the United States and the Government of Japan jointly determined that the FRF had to be in Camp Schwab because of “the limited availability of U.S. facilities and areas on Okinawa that could safely support USMC aviation operational requirements.”⁶⁰ The Ministry of Defense (Japan) hosted a bilateral consultation named the Defense Policy Review Initiative (DPRI). In the DPRI meetings, the Japanese government recognized the potential impacts of the natural environment that might be caused by the FRF and SBF therefore the DPRI required the preservation of the seagrass in Henoko Bay. The consultative body believed this would mitigate the impacts of the construction and operation of the new facilities on the dugong.⁶¹

In October 2005, the SCC issued the “US-Japan Alliance: Transformation and Realignment for the Future,” commonly referred to as the Alliance Transformation and Realignment Agreement (ATARA), which officially abandoned the SBF concept. The FRF concept was designed in an “L-shaped” configuration to minimize impact on the seagrass. The new concept facility attempted to construct the base entirely on land but, given the operational and safety requirements, such attempts were deemed impossible. After additional site visits and consultation with local communities in the Henoko Bay and Oura Bay areas, the Government of Japan proposed a “V-shaped” runway that focused on “limiting the potential impact upon coral and seagrass (and therefore potential impact of the dugongs) to the best of its ability.”⁶²

On May 1, 2006 the United States and Japan SCC released the United States-Japan Roadmap for Realignment Implementation (Roadmap) which finalized the

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

realignment initiatives. The Roadmap represented a broad series of diplomatic and military agreements between the US and Japan. The agreement addressed “comprehensive regional and global security and defense issues in the Western Pacific Ocean and Asia.”⁶³ Relevant to *Dugong v. Gates* was the first implementation detail, “Realignment on Okinawa” which, using the Government of Japan’s “V-shaped” FRF proposal, makes the following declarations:

(a) Futenma Replacement Facility (FRF)

The United States and Japan will locate the FRF in a configuration that combines the Henoko-saki and adjacent water areas of Oura and Henoko Bays, including two runways aligned in a "V"-shape, each runway having a length of 1,600 meters plus two 100-meter overruns. The length of each runway portion of the facility is 1,800 meters, exclusive of seawalls....This facility ensures agreed operational capabilities while addressing issues of safety, noise, and environmental impacts.

In order to locate the FRF, inclusive of agreed support facilities, in the Camp Schwab area, necessary adjustments will be made, such as reconfiguration of Camp Schwab facilities and adjacent water surface areas.

Construction of the FRF is targeted for completion by 2014.

Relocation to the FRF will occur when the facility is fully operationally capable.

Facility improvements for contingency use at Air SDF bases at Nyutabaru and Tsuiki related to replacement of Marine Corps Air Station (MCAS) Futenma capabilities will be made, as necessary, after conducting site surveys and before MCAS Futenma is returned.

Requirements for improved contingency use of civilian facilities will be examined in the context of bilateral contingency planning, and

⁶³ Ibid.

appropriate arrangements will be made in order to realize the return of MCAS Futenma.

In principle, the construction method for the FRF will be landfill.

The USG does not have a plan to operate fighter aircraft from this facility.

...

(d) Relationships among Initiatives

Within the overall package, the Okinawa-related realignment initiatives are interconnected.

Specifically, consolidation and land returns south of Kadena depend on completing the relocation of III MEF personnel and dependents from Okinawa to Guam.

The III MEF relocation from Okinawa to Guam is dependent on: (1) tangible progress toward completion of the FRF, and (2) Japan's financial contributions to fund development of required facilities and infrastructure on Guam.⁶⁴

The Roadmap signified a joint U.S. and Japan final commitment to build the FRF and SBF. The document was issued well into the *Dugong v. Gates* lawsuit, which was initially filed in September of 2003. This fact becomes critical in the later part of the lawsuit as the Roadmap signifies an absolute commitment by the U.S. and Japan to build in Henoko Bay.

⁶⁴ “United States-Japan Roadmap for the Realignment Implementation.” United States-Japan Security Consultative Committee Document. (Tokyo, Japan: Ministry of Foreign Affairs of Japan, May 1, 2006). <http://www.mofa.go.jp/region/n-america/us/security/scc/doc0605.html>. (accessed April 17, 2009). Written by Secretary of State Rice, Secretary of Defense Rumsfeld, Minister of Foreign Affairs Aso, and Minister of State for Defense Nukaga.

While the planning for the FRF and SBF were underway, Nago residents began to organize what will become a cooperative, multi-national anti-base campaign. The public outcry that came from this small village and grew into an international resistance effort, came as somewhat of a shock to Japanese government and U.S. military officials who were hoping to garner local support for the construction. The military bases were, and still are, the region's primary economic driver and the overarching belief was that this development would be welcomed. In the Monday evening December 9, 1996, edition of *Okinawa Times Weekly*, the Japanese Prime Minister, Hashimoto, contended that in regard to murmurs of protest surrounding the SACO decision to relocate Futenma and the heliport near Nago “the government would not force the issue, but try to solicit the consensus of local municipalities.”⁶⁵ Much to the dismay of the Japanese government officials' consensus was not given, in fact quite the opposite happened. Local residents began staging daily protests and demonstrations near the heliport's proposed site. According to Hideki Yoshikawa, activist and author of “Dugong Swimming in Uncharted Waters”, the opposition demonstrations by the residents of Nago marked the beginning of a larger social movement to halt any and all base construction in Okinawa and spawned many of the organizations who became the plaintiffs in case. The next chapter will explore the resistance in Nago because the individuals and organizations responsible for the resistance will become the plaintiffs in *Dugong v. Gates*.

Conclusion

This history presented in this chapter helps to understand the relationship dynamic between Okinawa, the Japanese Government, and the United States military. The relationships are marred by decades of death, destruction, and loss. The forced

⁶⁵ Tanji, *Myth, Protest and Struggle in Okinawa*, 162

subjugation of Okinawan interests to military interests have given rise to a need for the islanders to assert their human and constitutional rights. One such avenue for protest was found in the United States court system, a place where the people of Okinawa were able to legally challenge United States military's treatment of their cultural heritage if not their political interests directly.

CHAPTER 2

STAKEHOLDERS

We've arrived, and to prove it we're here.

Japanese Proverb

Introduction

On September 30, 2003, one week after Earthjustice filed a complaint on behalf of the dugong in the United States District Court of San Francisco, Miriam Kagan summarized the impending lawsuit for readers of the *Asia Times Online* in an article entitled “Don vs dugong: Rummy's new Okinawa woe.” The article reported:

The lawsuit, filed by a coalition of groups from both sides of the Pacific Ocean, asks the [Department of Defense] to comply with the US National Historic Preservation Act (NHPA) and conduct a complete public analysis to assess the impacts of the proposed heliport project on the dugong. The NHPA requires government agencies to complete a full public evaluation before undertaking activities outside the United States that might impact the cultural and natural resources of other nations.

Within Kagan’s exquisitely succinct analysis readers can get a sense of the complexity of the case. In only two sentences Kagan identifies fourteen different nouns and nine different verbs – and does not mention the role of the Japanese government.⁶⁶

At a glance the plaintiff and defendant are the Okinawa dugong and the Secretary of Defense, first Donald Rumsfeld then Robert Gates, respectively. Obviously, a dugong did not bring suit against one of the most powerful men in the

⁶⁶ Miriam Kagan. “Don vs dugong: Rummy's new Okinawa woe.” (Hong Kong: *Asia Times Online*, 2003). <http://www.atimes.com/atimes/Japan/EI30Dh03.html>. (accessed December 6, 2008).

military; a man who, incidentally had a very minor role in the relocation of MCAS Futenma. This chapter will identify who the plaintiffs, defendants and additional stakeholder are and explore how they came to be involved with *Dugong v. Gates*.

The best way to understand each stakeholder is to learn how they relate to the overall *Dugong v. Gates* story. The previous chapter examined the large scale or macro events that placed the United State military on the island of Okinawa and set-up the relationships between the United States, Japan and Okinawa. This chapter narrows the historical focus to the individual stakeholders who became involved in the lawsuit. The story began with the decision to relocate Futenma to Henoko and Oura Bay.

Plaintiffs Emerge

The SCC, which was authorized by the SACO agreement, issued the interim report that declared the intention to relocate of MCAS Futenma and the search for the appropriate place to relocate began shortly after. In April of 1996, the Naha Defense Facility Administration Bureau, a bureau of the Defense Facilities Administration Agency, responsible for overseeing the living environment surrounding defense facilities, sent delegations to Nago City to begin an initial investigation of a potential heliport site. The mayor of Nago, Higa Tetsuya, criticized the Japanese government's relocation or "base rotation" policy stating that, "passing unwanted US military facilities over the northern region, without obtaining consent from the local residents' was not acceptable. Tetsuya refused to cooperate with the investigation."⁶⁷

⁶⁷ Miyume Tanji. *The Enduring Myth of an Okinawan Struggle: The History and trajectory of a Diverse Community of Protest*, 285.

Nago residents took action by calling for a local referendum to determine whether or not Nago residents supported the purposed base relocation and heliport.⁶⁸ Japan's Self Defense Forces were sent to Nago to go house to house and persuade residents to support the facility construction.⁶⁹ Not everyone was opposed. The Prime Minister of Japan personally promised Nago residents lucrative construction contracts and other economic stimulus which appealed greatly to the people suffering in a depressed rural economy. The final result of the vote was 2,562 in support of the construction and 16, 254 opposing the construction.

Strangely, despite his earlier criticism, Tetsuya, likely under great pressure from the Government of Japan, ignored the opposition votes and offered support for the heliport.⁷⁰ Tetsuya abruptly resigned his office and Tateo Kishimoto, who was backed by democratic party, the Defense Agency and the Pentagon was voted into office. Kishimoto did not offer openly support the heliport construction but rather declared military policy was the responsibility of the entire prefectural government, namely the governor of Okinawa.

⁶⁸ Miyagi Yasuhiro. "Okinawa and the Paradox of Public Opinion: Base Politics and Protest in Nago City, 1997 -2007." (Tokyo: Japan Focus, August 3, 2007). Translated by Miyume Tanji.

⁶⁹ Johnson, 219.

⁷⁰ Miyume Tanji. *The Enduring Myth of an Okinawan Struggle: The History and trajectory of a Diverse Community of Protest*, 286.

Unconvinced that constitutional channels of protest were going to work, Okinawans began to organize. The first major opposition to the heliport began in 1996 by twenty-seven, primarily older Nago residents who formed the Henoko Life Protection Society (*Henoko Inochi o Mamoru Kai*). The group organized 24-hour sit-ins on the beach across from the planned construction site. The sit-ins are housed in so-called “struggle huts,” which were the temporary structures Henoko Life Protection Society erected, many of which remained along the shoreline through most of the lawsuit.⁷¹ (Figure 2.1) Shortly afterwards, the Five Party Coalition, which was



Figure 2.1 - Sit-in tent from Greenpeace.org
www.greenpeace.or.jp/info/features/okinawa/blog_eng/monthlist.html%3Fyear%3D2005%26month%3D3. (accessed on March 24, 2009)

⁷¹ Yasuhiro, 164.

made up of four labor unions from the Nago district and was later joined by several more Okinawa wide labor unions, merged with Henoko Life Protection Society to form the Okinawa Peace Center. The Okinawa Peace Center expanded yet again after a community center hosted an informal discussion titled “Absolutely No Heliport.” During the discussion, members of labor unions from Ginowan city spoke of their experiences living near Futenma. They recalled the noise, the traffic and the problems with service men which compelled even more people to join the struggle. As the numbers expanded, the group renamed itself the Society of Nago Citizens Opposed to the Heliport (*Heliport Iranai Nago Shimin no Kai*).⁷² This organizations would become the Save Life Society and Committee Against Heliport Construction, one of the first associations named as plaintiffs in *Dugong v. Gates*.

Yet another important association was *Jukkuno Kai*, a younger group of activists concerned with sustainable development in Okinawa. Among their members was plaintiff Makishi Yashikazu. Because of their age, mostly 20 and 30 year olds, this group was increasingly confronted with the dilemma of how to develop non-military based industry in an unsustainable rural economy, without relying on the state-funded public works, patronage from the military or special subsidies tied to military bases.”⁷³ The *Jukkuno Kai* believed that the natural landscape of the region was the area’s primary asset, and that government funded industrialization would contribute to the natural degradation of Nago’s primary asset. In response they started an eco-tourism company called Eco-Net Chura which guided visitors on mountain hikes, sleeping in gorges, and sea turtle watching. The company also hosted yanbaru

⁷² Ibid, 165.

⁷³ Ibid, 166.

folk music lessons and lessons in traditional methods of making tofu with stone tools. Plaintiff Anna Koshiishi works for Eco-Net Chura.

The efforts of all of these associations to halt MCAS relocation and heliport construction were rewarded in a most surprising way when The Naha Defense Facilities Administration Bureau reported that they had sighted a dugong in Henoko and Oura Bays. Many people believed the Okinawan dugong to be extinct. Local base opposition groups immediately capitalized on this new information:

Local environmental groups such as Love Dugong Network (later Dugong Network Okinawa) and the *gyugon hogo kikin* (Dugong Protection Fund) were formed. Some of them had exclusively environmental agendas while others were more politically oriented. These groups began to conduct research, call for the protection of surviving dugongs, and were vocal against the construction plan. National environmental organizations such as WWF-Japan and the Natural Conservation Society-Japan (NACS) also came to support the local environmental groups.⁷⁴

Although there were only a few subsequent sightings, the presence of the dugong fueled the protest and further legitimized the local concerns about the impact of the base relocation.

Also important to note, the environmental groups started reaching out to international organizations like International Union of Conservation for Nature and Natural Resources (IUCN). The IUCN is a NGO, with over 1,000 membership countries, that helps members develop and implement environmental policy and law.⁷⁵

⁷⁴ Yoshikawa, 3.

⁷⁵ “About IUCN.” International Union of Conservation for Natural Resources. (Gland Switzerland, March 24, 2009). <http://www.iucn.org/about/>. (accessed June 14, 2009).

At the organization's 2000 summit in Jordan, the IUCN Congress issued Recommendation 2.72 which stated:

UNDERSTANDING that the options for a military airport for the U.S. Marine Corps include a central part of the dugong's habitat or an adjacent terrestrial area (a relocation site for the current Futenma Airport);

CONCERNED that if the construction of the airport is to be implemented in this area, it risks destruction of coral reefs and sea grass beds in the coastal area of Henoko, which are important resting and feeding areas for Dugongs, and may pose grave threats to the survival of the small local population;

ENDORISING the recent decision of the Japanese Government to undertake voluntarily an Environmental Impact Assessment to determine the likely impact of construction on terrestrial and coastal habitats, including the coral reefs and sea grass beds on which the Dugong population depends for its survival...

The issuance of Recommendation 2.72 by such a large international environmental watch group prompted the Government of Japan, in conduction its Environmental Impact Assessment to establish a geographical area of impact for the proposed project which would include the migratory routes of the dugong. Both Japanese Self Defense Agency and the United States military issued formal statements acknowledging support for a “comprehensive and transparent environmental impact assessment.”⁷⁶

⁷⁶ “Conservation of Dugong (Dugongdugon), Okinawa Woodpecker (Sapheopiponoguchii) and Okinawa Rail (Gallirallus okinawae) on and around Okinawa Island. “ (Amman, Jordan: World Conservation Congress, October 4 – 11, 2000).

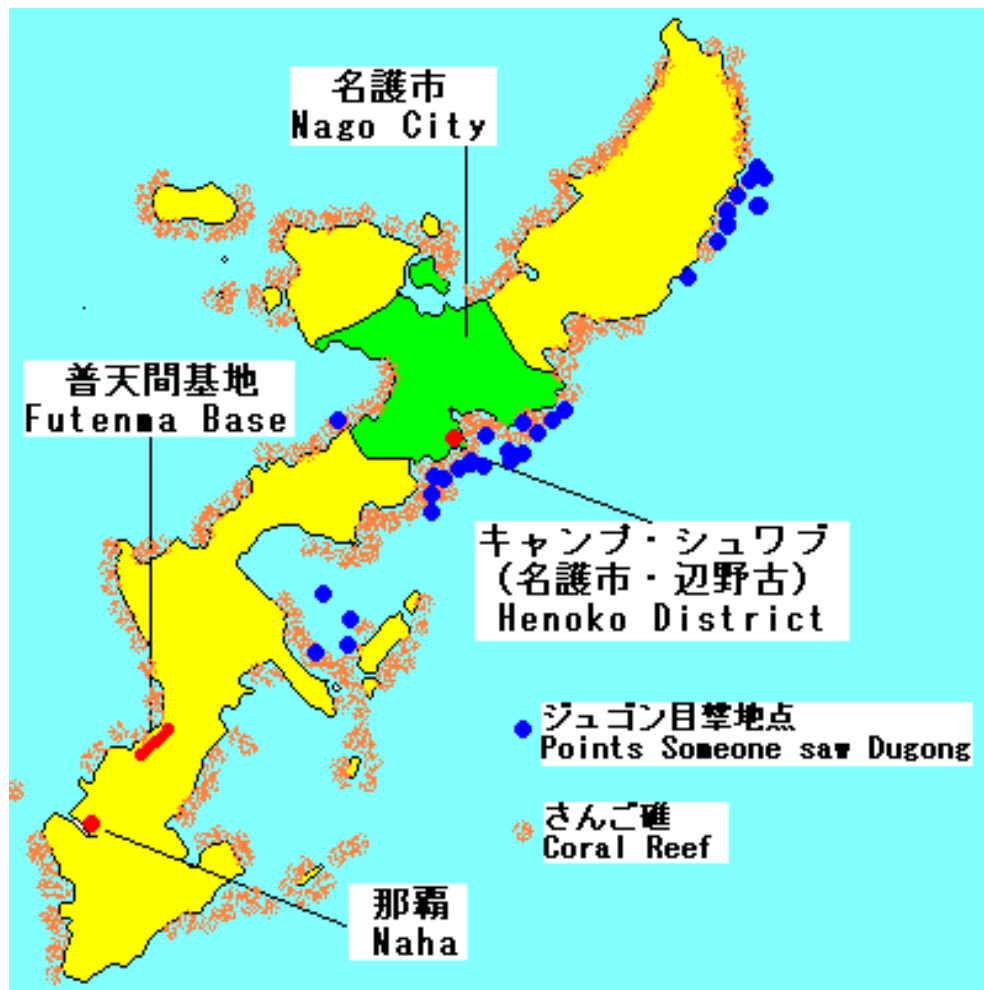


Figure 2.2 - Map of Dugong sightings from 1979 to 1997 recorded by Dugong Network Okinawa. <http://www.bekkoame.ne.jp/~pyonpyon/nago/eco/dugong1.htm>. (accessed June 6, 2009).

In late 2000, the Japanese Environmental Lawyers Federation (JELF) entered the picture with the intention of filing a lawsuit against the Department of Defense in a U.S. court claiming the federal agency violated the U.S. Endangered Species Act. The idea was dismissed, however, because there is no international clause attached to the Endangered Species Act and also because of concern that the Bush administration, having abated environmental legal responsibilities in the past, would do so again setting unfavorable

precedent.⁷⁷ This sentiment was echoed by Earthjustice attorney Sarah Burt, who noted her concern that in litigation the Department of Defense can throw up walls in the name of international security ultimately weakening the law.⁷⁸

In July of 2002, it seemed as though JELF would not need to pursue actions after all. Japan's Ministry of Defense and the Department of Defense officially abandoned the heliport plan. The excitement over this development however was short-lived. The Japanese and U.S. governments proposed a new plan to build an airport, officially called the Sea Based Facility (SBF), at the edge of Camp Schwab with proposed runways to be built into Henoko Bay and Oura Bay on top of the coral reef beyond the point of the camp. (Figures 2.3 and 2.4).

With a new sense of urgency, the JELF lawyers contacted Peter Galvin from the Center for Biological Diversity. Galvin had been involved in lawsuits against the Department of Defense "halting military exercises on the Northern Marianas."⁷⁹ When he flew to Naha in early 2003 to meet with JELF, he noticed in the legal briefs prepared in Japan that the Dugong was listed as a "natural monument" on the Japanese Register of Cultural Properties, a register mandated by the Japanese Law for the Protection of Cultural Properties.⁸⁰ Peter learned of an explicit international clause in the United States National Historic Preservation Act (NHPA), 16 U.S.C 470a-2, more commonly known as Section 402, while working in Mt. Graham, Arizona on joint University of

⁷⁷ Yoshikawa, 3.

⁷⁸ Sarah Burt. Interview with author. March 26, 2009.

⁷⁹ Yoshikawa, 3.

⁸⁰ Peter Galvin. Interview with author. March 17, 2009.

Arizona and U.S. Forest Service project involving the replacement of a microwave communication system atop Mount Graham. The Forest Service claimed the proposed project would have no adverse effects on but local tribes disagreed. According to the Federal Register:

Mount Graham is sacred to the Western Apache tribes and one of four such mountains in Apache cultural tradition. The tribes believe that the mountain, known as Dzil nchaa si 'an, is home to the ``gaan" or mountain spirits, source of sacred powers, and a place of prayer and traditional practices. In addition, the mountain is a source of plants and other materials used in Apache traditional practices and ceremonies. Following a formal request from the FS in 2002, the National Park Service determined that the Mount Graham Traditional Cultural Property (MGTCP) was eligible for listing on the National Register of Historic Places, and therefore a ``historic property" under the scope of the section 106 review process.⁸¹

Investigating this case Galvin became familiar with the National Historic Preservation Act, Section 402 and the idea of Traditional Cultural Property, all of which informed his suggestion that the dugong case be filed in U.S. courts under this statute. Galvin researched the applicability of Section 402 in greater detail and by mid 2003, convinced a lawsuit would hold in court, he joined the effort as a plaintiff representing the Center for Biological Diversity. Around the same time, a final plaintiff emerged, The Turtle Island Restoration Network.

Only one more player was necessary, United State's attorneys. The Center for Biological Diversity recommended Earthjustice, a non-profit environmental law firm based out of San Francisco with whom the Center for Biological Diversity had previously worked. Attorneys J. Martin Wagner and Marcello Mollo (who was replaced by Sarah Burt after he left the firm) filed the lawsuit on September 25, 2003

⁸¹ From the Federal Register Online via GPO Access (wais.access.gpo.gov) [DOCID:fr09ja06-9]. N.d.

in the United States District Court for the Northern District of California, Oakland Division.⁸²

In the end, the total lists of plaintiffs included on the First Initial Complaint were: Center for Biological Diversity, Turtle Island Restoration Network, Save the Dugong Foundation, Dugong Okinawa Network, Committee Against Heliport Construction/Save Life Society, Japan Environmental Lawyers Federation (JELF), Anna Koshiishi, Takuma Higashionna, Yoshikazu Makishi and the Okinawa dugong.

Once the First Amended Complaint for Declaratory Injunctive Relief was filed, the Department of Defense attorneys from the Department of Justice responded by filing a the Defendant's Motion to Dismiss on May 17, 2005, thus began the formal proceedings of *Dugong v. Gates*.

Conclusion

There were many additional people and organizations interested in the MCAS Futenma base relocation issue however this chapter limited the discussion to highlight only those directly related to the *Dugong v. Gates* case. This is particularly important because in order to satisfy the United State's legal requirements to bring, or be named, in a lawsuit, these stakeholders must meet certain legal conditions of standing. Plaintiffs must be able to claim a defendant's action directly causes injury. As detailed in this chapter, there are the local residents like Anna Koshiishi, Takuma Higashionna, Yoshikazu Makishi, who believe their livelihood will be affected by the presence of the dugong in Henoko Bay. Is that sufficient for the U.S. court system requirements of standing? There are associations such as Center for Biological Diversity and JELF. They must meet the same requirements. Additionally, the United

⁸² *First Amended Complaint for Declaratory and Injunctive Relief*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, November 24, 2003).

States Department of Defense, though hopelessly entangled with the Japanese Ministry of Defense, is named as a defendant. What actions by the Department of Defense require it conduct a survey to determine the affects of the new base on the dugong?

When reading the remaining work, the events detailed in this chapter inform the legal standards necessary to participate in a lawsuit.

CHAPTER 3

THE LEGAL ISSUES OF LAWSUIT AND THE APPLICABLE LAWS

Only lawyers and painters can turn white to black.
Japanese Proverb

Introduction

Under the U.S. legal system, lawsuits are brought by one party seeking remedy for damages or injury caused by the action or actions of others. As a matter of law, the party seeking remedy must adhere to certain legal standards. The legal proceedings of lawsuits are recorded for future reference. In most lawsuits the final opinion or order does not reflect all of the legal issues debated by the plaintiff(s) and defendant(s). The vast majority of argumentation in *Dugong v. Gates* occurred in the form of legal motions. Legal motions are requests for a judgment or resolution related to procedural issues that come up during litigation. The arguments put forth in the motions inform the final outcome. For the purpose of this work, the legal motions provide the best insights into the way in which Section 402 was interpreted in *Dugong v. Gates*, not only by the judge, but by the litigants and legal strategists involved.

The following chapter provides a chronological overview of the legal proceedings intending to give the reader a clear sense of how the issues and arguments unfolded over time. Understanding the legal proceedings at the beginning is critically important to understanding the subsequent chapters which will evaluate the arguments put forth by the litigants in greater detail.

This chapter will also explore legislation under which the lawsuit was brought, the constitutional provisions of such legislation and guiding doctrine related international sovereignty, namely, (1) The National Historic Preservation Act

(NHPA), (2) the Administrative Procedures Act (APA), (3) Article III of the United States Constitution and, (4) the Act of State Doctrine. The legal issues in *Dugong v. Gates* rely on the interpretation of technical aspects of these laws.

Chronological History of Lawsuit

September 25, 2003 – Complaint for Declaratory and Injunctive Relief

The initial complaint was filed in the United States District Court for the Northern District of California San Francisco Division. In the complaint Earthjustice attorneys declared that they were representing a group of plaintiffs in bringing civil action under the NHPA, through its implementing regulation outlined in the Administrative

Procedures Act. The plaintiffs claimed that:

- 1) The Department of Defense's activities related to the relocation of the U.S. airbase Futenma to a sea-based facility" (SBF) would "destroy the habitat of the Okinawa Dugong, "a genetically isolated and unique population of the Dugong protected as a cultural property under the NHPA."
- 2) The Department of Defense's failed to comply with the NHPA in the preparation, approval and delivery MCAS Futenma Relocation. The Department of Defense's activities constituted an undertaking under the NHPA, and therefore the Department of Defense must take into account their effects on the Okinawa Dugong for purposes of avoiding or mitigating any adverse effects and which it did not.⁸³

November 24, 2003 - First Amended Complaint for Declaratory and Injunctive Relief

The First Amended Complaint for Declaratory and Injunctive Relief restated the original complaint, but also, as required by the National Historic Preservation Act, claimed that the plaintiffs were entitled to judicial review under the Administrative Procedures Act (APA).

⁸³*First Amended Complaint for Declaratory and Injunctive Relief*, Case No. C-03-4350MHP. (U.S. District Court Northern District of California San Francisco Division, November 23, 2003).

May 17, 2004 – Defendant’s Motion to Dismiss

The Department of Defense attorneys entered a Motion to Dismiss the lawsuit.

The motion requested that the lawsuit be dismissed on the grounds that:

- 1) the plaintiffs failed to state a claim on which relief may be granted because there was no federal undertaking -- the Okinawa Dugong is NOT “property” protected by the NHPA nor is Japan’s Cultural Properties Law “Equivalent” to the National Register.
- 2) the NHPA did not apply extraterritorially to matters of foreign policy and the Act of State Doctrine warrants dismissal on prudential grounds.⁸⁴

June 21, 2004 – Memorandum of Points and Authorities in Support of Plaintiffs

Opposition to Defendant’s Motion to Dismiss

The counsel for the Plaintiffs issued a Memorandum of Points and Authorities in Support of Plaintiffs Opposition to Defendant’s Motion to Dismiss claiming:

- 1) The Japanese Register of Cultural Properties is the equivalent of the U.S. National Register.
- 2) There Are Numerous “Federal Undertakings” For Purposes of the NHPA
- 3) The presumption against extraterritorial application of US law does not apply to the NHPA therefore, the Act of State Doctrine does not apply to this case.

July 15, 2004 - Defendants’ Reply Memorandum in Support of Motion to Dismiss

The counsel for the Defendants offered a reply to the plaintiffs stating:

- 1) Plaintiffs Allegations Fail to State a Claim for Relief Under the NHPA
- 2) The Dugong is Not Eligible for Consideration Under the NHPA
- 3) There is No APA Final Agency Action or “Federal Undertaking” under the NHPA
 - a. The 1996 SACO Report on the Plan for a Sea-Based Facility
 - b. The 1997 Operational Requirements for the Sea-Based Facility
 - c. Access to Camp Schwab to Conduct Surveys
 - d. Funding of the 1997 Operations Requirements and FIG
 - e. Construction of the Replacement Facility

⁸⁴ *Defendant’s Motion to Dismiss*, No. C-03-4350MHP. (U.S. District Court Northern District of California San Francisco Division, May 17, 2004).

- 4) The Court Should Not Construe the NHPA to Interfere with Foreign Policy and “the Act of State Doctrine warrants dismissal on prudential grounds.”

March 2, 2005 – Memorandum and Order Regarding Motion to Dismiss

Judge Marilyn Patel issued a final order on the Motion to Dismiss denying the motion. The court determined that the Okinawa dugong constitutes a “property” under NHPA Section 402 and that “Japan’s cultural resource protection law designating the Okinawa dugong as a natural monument is equivalent to the U.S. National Register of Historic Places.”⁸⁵ Additionally, the court ruled that Department of Defense’s participation in the planning of the facility to replace MCAS Futenma constitutes an “undertaking” for purposes NHPA.⁸⁶

July 19, 2006 – Plaintiffs Second Amended Complaint for Declaratory and Injunctive Relief

The Second Amended Complaint modified the First Amended Complaint only in that it claimed that the Department of Defense’s involvement in the 2006 Roadmap and Futenma Relocation Facility violated NHPA.

August 1, 2006 – Defendant’s Answer to the Second Amended Complaint for Declaratory and Injunctive Relief

The *Defendant’s Answer to the Second Amended Complaint for Declaratory and Injunctive Relief* denied any violation of the NHPA or the APA and raised jurisdictional defenses of lack of subject matter jurisdiction, lack of standing, lack of a

⁸⁵ *Memorandum and Order Regarding Motion to Dismiss*, No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 25, 2005).

⁸⁶ *Ibid.*

ripe case, and failure to join necessary and indispensable parties. To expedite the litigation and provide a proper basis for judicial review under the APA, the defendants provided documents for the Roadmap and several other parts of the SBF/FRF planning process from 1996 to 2006. The defendants produced a series of four separate document compilations to the plaintiffs to avoid the need for formal discovery.⁸⁷

May 18, 2007 – Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment

The counsel for the plaintiffs outlined why, under the Second Amended Complaint the plaintiffs were entitled to a summary judgment because the Department of Defense violated Section 402 of the National Historic Preservation Act. Section 402 is a statute that requires federal agencies or parties using any federal money for project or “undertaking” abroad to review historic properties that may be potentially affected by the project. The counsel first established the court has jurisdiction to review the complaint. To establish jurisdiction, the counsel for the plaintiffs declared they had meet the legal standards of subject matter jurisdiction, ripeness and standing. Moreover, the Act of State Doctrine did not bar the U.S. courts from reviewing this complaint.

The counsel alleged that the “Department of Defense’s approval of the Roadmap without taking into account the effect of the plan for Futenma relocation on the dugong for purposes of avoiding or mitigating any adverse effects violates the NHPA” was a federal undertaking. Furthermore, this undertaking may directly have adverse affects on the dugong as it will destroy seagrass the dugong feed upon, contaminate the water, and disturb the animal with noise and acoustic pollution.

⁸⁷ *Defendants Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

The Department of Defense is the responsible party because it (1) had direct jurisdiction over the base relocation, (2) did not consider the effects of dugong while planning the facility relocation and, (3) the Department of Defense did not consult specialists or affected communities as required by the NHPA.

June 29, 2007 – Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment

Counsel for the defendants filed a memorandum supporting a summary judgment. The defense countered the plaintiffs by asserting that the “Okinawa Dugong” does not have legal standing, nor do the individuals or associations listed as plaintiffs. Even if the plaintiffs did have standing, the actions of the Department of Defense are not finalized so it is too early to determine if any injury to the dugong or plaintiffs might occur. Also, the Act of State Doctrine prohibits the court from reviewing the complaint because the Government of Japan is responsible for building the base, therefore, the court would be reviewing actions of a sovereign nation.

August 10, 2007 - Plaintiffs’ Reply in Support of Plaintiffs’ Motion for Summary Judgment

Plaintiff’s attorneys respond to the Defense’s arguments put forth in the Defendant’s Motion for Summary Judgment in claiming:

- 1) The Court has jurisdiction to review Plaintiffs’ claims
 - a. Plaintiffs have demonstrated standing under Article III
 - b. Plaintiffs’ claims are ripe for review
 - c. The Act of State Doctrine does not bar judicial review
 - d. The Government of Japan is not a necessary and indispensable party
- 2) Department of Defense’s approval of the Roadmap without taking into account the effect of the plan on the dugong for purposes of avoiding or mitigating any adverse effects violates section 470a-2 of the NHPA
- 3) Department of Defense's undertaking “may directly and adversely affect” the dugong

- a. Defendants have not taken adverse impacts into account for the purpose of avoiding or mitigating any adverse effects, in violation of section 470a-2 of the NHPA
 - b. Department of Defense's internal policies do not meet the requirements of the NHPA
 - c. Department of Defense did not take the effect of the Roadmap on the dugong into account for purposes of avoiding or mitigating any adverse effects
 - d. Defendants have not assessed the impacts of the FRF on the dugong
 - e. Defendants did not consult with the public, interested organizations, or knowledgeable local experts
- 4) Japan's actions do not satisfy Defendants' obligations under the NHPA

August 31, 2007 - Defendants' Reply Brief in Support of Cross-Motion for Summary Judgment

The counsel for the defense replied to the Plaintiff's support of a summary judgment reiterating that the plaintiffs lack subject matter jurisdiction as they do not satisfy requirements for standing, there was no final agency action thus the actions are too ripe for review, the plaintiffs continue to fail at establishing the Department of Defense as the party responsible for the relocation. In regard to the final claim, if the Department of Defense is not the responsible party then the Government of Japan is the responsible party and the United States courts may not review the actions of this government.

January 24, 2008 – Memorandum and Order Regarding Cross-Motions for Summary Judgment

Judge Patel issued a formal order declaring the Department of Defense has failed to comply with the NHPA.

The National Historic Preservation Act

The purpose of the 1966 Act was to support and encourage the “preservation of prehistoric and historic resources for present and future generations” through the direction of Federal Agencies to “assume responsibility for considering such resources in their activities.”⁸⁸ The act authorized the Secretary of the Interior (SOI) to maintain a National Register of Historic Places which is an inventory of districts, sites, buildings, structures and objects that are formally designated as significant historically, architecturally, archeologically, culturally and / or structurally. The National Register outlines specific criteria for the eligibility of listing.⁸⁹ Of importance to this is case the criteria defining what may be designated as a historic property, a topic which will be explored in depth at a later point in this work.

The key statutory provisions of NHPA relevant to *Dugong v. Gates* are Section 106 and Section 402. Section 106 requires that all federally-funded and permitted projects are reviewed to insure that federal actions will not adversely impact sites listed on, or eligible for listing on, the National Register of Historic Places. The review process allows interested parties an opportunity to comment on projects. The process is a “stop,” “look,” “listen” effort designed to temper the destruction of culturally significant properties; either because the federal agency did not know there were historic properties in the

⁸⁸ Adina Kanefield. *Federal Historic Preservation Case Law, 1966 – 1996: Thirty Years of the National Historic Preservation Act*. (Washington D.C.: Advisory Council on Historic Preservation : A Special Report Funded in Part by the United States Army Environmental Center, 1996).

⁸⁹ Ibid.

area of impact, or because the federal agency did not know the properties were significant to anyone.⁹⁰

In order to achieve the desired results of Section 106 the NHPA authorized the Advisory Council on Historic Preservation to develop implementing regulations or guidelines outlining a structured process in which a project, activity or program receiving federal funds (1) establishes if a federal “undertaking” has occurred, (2) identifies historic properties that may be effected by undertaking, (3) assesses if the properties are adversely effected, and 4) mitigates adverse effects.⁹¹ The Council promulgated guidelines, 36 Code of Federal Regulations 800, in 1976 and revised them every ten years since. Most critical to the Section 106 process is consultation. This process is an identification effort whereby the Federal Agency must, “solicit the views of public and private organizations, Native Americans, local governments, and others likely to have knowledge of, or concerns with, the [potentially effected] historic properties.”⁹²

Section 402 is the international version of Section 106. Section 402 was part of an amendment to NHPA in 1980 as a response to growing awareness of the need for the U.S. to take an active leadership role in world heritage. On October 26, 1973, the United States Senate, Secretary of State, Smithsonian Institution and Advisory Council on Historic Preservation approved amendments to NPHA that authorized the SOI to direct and

⁹⁰ Advisory Council on Historic Preservation. “Participant Handbook for 2008 Training Course The Section 106 Essentials.” (Washington D.C.: Advisory Council on Historic Preservation, 2008).

⁹¹ Ibid.

⁹² Kanefield, 11.

coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage. In 1980, after the Convention was adopted, the U.S. approved statute 16 U.S.C. 470a-2 or Section 402. The statute reads in its entirety:

[16 U.S.C. 470a-2 — International Federal activities affecting historic properties]

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.⁹³

Since 1966, the vast majority of historic preservation case law at the federal level has involved compliance with Section 106 of the NHPA. The courts typically have to address (1) whether or not Section 106 applies given the facts of the case, and if so, (2) whether and agency complied with Section 106 or the regulations attached to Section 106. *Dugong v. Gates* addressed the same issue under Section 402 of the NHPA. The similarities and differences between Section 106 and Section 402 play an important role throughout the case.

The Administrative Procedures Act

Dugong v. Gates relied on the Administrative Procedures Act (APA) because the NHPA does not provide an independent basis for judicial review of Federal agency

⁹³ Legislation. “National Historic Preservation Act of 1966 as amended through 2000 [with annotations].” (Natchitoches, LA: National Center for Preservation Technology and Training, 2008).

actions.⁹⁴ The APA was enacted in 1946 as “a remedial statute designed to ensure uniformity and openness in the procedures used by federal agencies.”⁹⁵ A significant number of federal agencies have their origins the 1930s and 1940s as a response to the need of federal government to aid in the social and economic welfare of the country. The federal agencies of Great Depression and World War II era exercised great power and discretion in order to accomplish federal agency objectives. The APA affords oversight of abuse of people or resources resulting from federal agency actions. Claiming violation of the APA is very common in NHPA and other procedural law but does prove problematic as illustrated by *Dugong*.

At issue in *Dugong v. Gates* was if there was a “final agency action” under the APA. According to the definitions outlined in the APA, to qualify as a final agency action the action must (1) mark consummation of the agency’s decision making process and (2) be an action by which ‘right or obligations have been determined’ thus having the potential for legal action. The plaintiffs bore the burden of proving that there was a “final agency action” on the part of the Department of Defense and thus a “federal undertaking” did in fact occur. The process of proving that a “final agency action” and “federal undertaking” occurred is complex.⁹⁶

⁹⁴ *Memorandum and Order Regarding Cross-Motions for Summary Judgment*, No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

⁹⁵ *Administrative Law: Administrative Agencies: an overview*. (Ithaca, New York: Legal Institution Institute, Cornell University, 2009).
http://topics.law.cornell.edu/wex/Administrative_law. (accessed June 1, 2009).

⁹⁶ Administrative Procedures Act. 5 U.S.C. §701 – 706

Article III of the United States Constitution

The United States Constitution requires that certain jurisdictional prerequisites are met in order to bring a lawsuit. Under Article III, persons wishing to sue must have standing. Standing applies when a person can show or claim that they have an interest or have suffered an injury as a result of another's action.⁹⁷

The Constitution requires a party have standing but the rules regarding standing have been defined by case law. The case law that helped define standing in *Dugong v. Gates* was *Lujan v. Defenders of Wildlife*. The Defenders of Wildlife brought suit in federal district court seeking a declaratory judgment that the new section of the Endangered Species Act constricting geographic scope of the law. The plaintiffs sought injunction requiring the defendants to promulgate a new rule restoring an earlier interpretation of the law that extended the section's coverage to include actions taken abroad.⁹⁸ In this United States Supreme Court ruling, Justice Scalia held:

(1) In order to establish standing, a party invoking federal jurisdiction bears the burden of establishing, among other things, that they have suffered an injury in fact; i.e., a concrete and particularized, actual or imminent invasion of a legally-protected interest. (2) To survive a motion for summary judgment for lack of standing, a party must set forth by affidavit or other evidence specific facts to support its claim. (3) In addition to the above, in order to show standing, a party that is not an object of government action must show facts that the choices made by the independent actors not before the courts have been or will be made in such a manner as to produce causation and permit redressability of injury. (4) No. Congress cannot pass legislation that

⁹⁷ U.S. Const. art. III.

⁹⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130; 119 L. Ed. 2d 351 (1992).

allows for the creation of citizen suits that confer standing upon citizens who would not be able to allege an injury in fact.

The Department of Defense attorneys from the Department of Justice claim that the plaintiffs in *Dugong v. Gates* lack standing based on Scalia's standing doctrine.

The Act of State Doctrine

Finally, the defense maintained that the court should not engage the lawsuit based on the Act of State Doctrine.⁹⁹ The Act of State Doctrine received its classic expression in the case *Underhill v. Hernandez*. In this case, an American citizen, Underhill ran a waterworks system in the city of Bolivar, Venezuela. In 1892, a revolution led by General Jose Manuel Hernandez ousted the Venezuelan government. Underhill wished to leave the country but Hernandez denied his requests to leave and required Underhill remain in the country and continue to run the waterworks. Years later, Underhill was allowed to leave. Upon returning to the United States, Underhill sued Hernandez in order to recover damages from his forced stay in Venezuela. The court found in favor of Hernandez because the General was acting in official capacity of the Venezuelan government, therefore, could not be tried in the United States.¹⁰⁰ The Court held, "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."¹⁰¹

⁹⁹ *Defendant's Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 17, 2004).

¹⁰⁰ *Underhill v. Hernandez*, 168 [U.S. 250](#) (1897)

¹⁰¹ *Ibid*.

The defense recognized the Act of State Doctrine is not a jurisdictional limit on courts, but cautions the court from sitting in judgment of the actions of a sovereign nation.¹⁰² According to the defense, The Act of State Doctrine “reflects the prudential concern that the courts, if they question the validity of sovereign acts take by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.”

Major Issues Summarized for the Purposes of this Work

The complaint filed by the plaintiffs has remained throughout, in very simple terms -- the United States Department of Defense violated Section 402 of NHPA by failing to take into account the effects of their action on the dugong, a natural monument of Japan. The Department of Defense maintained it was not in violation of the law. In response to the initial complaint the Department of Defense attorneys filed a Motion to Dismiss citing issues with initial allegation. The issues are:

- 1) “Equivalence Issues” -- Okinawa Dugong is NOT “property” protected by the NHPA nor is Japan’s Cultural Properties Law “Equivalent” to the National Register
- 2) “You’ve Got the Wrong Guy (Government) Issues” – There is no federal “undertaking” necessitating a review; and, if there was NHPA did not apply extraterritorially to matters of foreign policy.
- 3) “Procedural Issues” – Once the Motion to Dismiss was denied the motion for summary judgment introduced the requirements of the APA Doctrine to the legal proceedings. APA requirements are issues of standing, subject matter jurisdiction and ripeness.

¹⁰² *Defendant’s Motion to Dismiss*, No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 17, 2004).

The first two issues remained relatively intact from the initial complaint, through all of the motions, to the formal opinion. Typical in the legal system, however, the technicalities of each issue varied in response to the opposing side's arguments. The third issue was only argued once the proceedings entered into the motion for summary judgment. The arguments are developed from a strict legal basis of the law and judicial review bound by legal precedent. Each time the National Historic Preservation Act is under review by law, the interpretation and outcome of the lawsuit is recorded as case law. Judges are to review all of the facts of the case and refer to prior case law with great deference to insure continuity of application of the law over time. The statute under review in the Dugong case does not have legal precedent.

Conclusion

With a firm understanding of the (1) nature of the lawsuit, (2) chronology of legal actions and, (3) the legal basis of the NHPA, APA, Article III and Act of State Doctrine established, this work will continue to review in detail the three major issues within the law in hope to glean a better understanding of the strengths and weaknesses associated with the international application of Section 402 of the National Historic Preservation Act.

CHAPTER 4

EQUIVALENCE ISSUES PRESENTED IN DUGONG V. GATES

A round egg can be made square according to how you cut it; words would be harsh according to how you speak them.

Japanese Proverb

Introduction

In the *First Amended Complaint for Declaratory and Injunctive Relief* filed on September 24, 2003, the plaintiffs assumed that the dugong, as a “natural monument,” was a property adversely affected by the relocation of MCAS Futenma and thus should be afforded protection under Section 402. Peter Galvin, the first person to suggest the lawsuit, believed the case was possible only after learning the dugong was listed on Japan’s register of cultural properties which was assumed equivalent to the United States National Register. The initial complaint did not belabor the validity of the above assumptions. The defense, however, did. In the May 17, 2004 *Defendant’s Motion to Dismiss*, the attorneys for the Department of Defense developed a two arguments, based in semantics, that Section 402 of the NHPA did not apply to the base relocation. First, the Okinawa dugong, an animal, is NOT an equivalent “property” type based on NHPAs definitions of “property.” Second, Japan’s cultural properties law is NOT equivalent to the United States National Register. This chapter evaluates the merits of each of the nonequivalence arguments as argued in the motions and finally determined by Judge Patel in the *Memorandum and Order Regarding Motion to Dismiss*.

Nonequivalence: The Defense's Argument

The first argument entered by the defendant sought to counter the plaintiffs claim that the National Historic Preservation Act had been violated was the lack of definitional equivalence. The attorneys for the Department of Defense used previous case law to illustrate the differing ideas held by the United States and Japan in regard to what can be considered “historic property.” The argument opened with the assertion that Section 402 might expand the geographic scope of the applicability of NHPA but it does not expand the “legal statutory definition of ‘historic properties’ that are eligible for inclusion on the National Register.”¹⁰³ Therefore, if the property in question would not be eligible for the United States register, it would not be eligible for review; thus the Japanese definition of historic property must be equivalent to the United States definition of historic property in order to be eligible for review.

It is commonly accepted that wild animals posit major problems in procedural review processes such as those required by the National Historic Preservation Act. They move, they die, and they act in unpredictable ways. Nonetheless, animals are symbolically and irrevocably connected to human political, social, ethnic and spiritual groups. The American Bald Eagle is a prime example of an animal associated with a political concept of humans. Yet, animals are not “property” in United States unless captured or domesticated.¹⁰⁴ The counsel for the plaintiffs did not defer to the United States commonly accepted idea that a wild animal could not be designated as a cultural property. The plaintiff’s attorneys assumed that the dugong would be

¹⁰³ *Defendant’s Motion to Dismiss*, No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 17, 2004).

¹⁰⁴ *Ibid.*

afforded protection by virtue of the fact that it, regardless of its classification, was listed on the Japanese register.¹⁰⁵

The defense claimed that ownership was a critical component of the concept of property, and since a wild animal by definition was not owned by the government or anyone else, it was not property. The defense pointed to *Christy v. Hodel* (which cited *Douglas v. Seacoast Products, Inc*) where a federal judge wrote, “[I]t is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the States nor the Federal Government...has title to these creatures until they are reduced to possession by skillful capture.” A wild animal is not “property” therefore, according to the defense, the Okinawa dugong should not be considered “property” potentially affected by a federal “undertaking” necessitating a NHPA consultative process.¹⁰⁶

In the June 21, 2004 *Memorandum of Points and Authorities in Support of Plaintiffs Opposition to Defendant’s Motion to Dismiss*, the plaintiffs, later supported by Judge Patel, asserted that whether or not a government owns property is irrelevant to a determination of its eligibility for inclusion on the National Register. Moreover, the plaintiffs pointed out that many courts have in the past deferred to previous precedent stating that wild animals may not be private property but they are a “sort of common property” and the government shall control and regulate the habitats of animals as a trust for the benefit of the people.¹⁰⁷

¹⁰⁵ *First Amended Complaint for Declaratory and Injunctive Relief*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, November 24, 2003).

The dugong is listed on the Japanese register as a “natural monument.”

¹⁰⁶ *Ibid.*

¹⁰⁷ *Memorandum of Points and Authorities in Support of Plaintiffs Opposition to Defendant’s Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 21, 2004).

In response to this last point the defense continued in the *Motion to Dismiss* that, even if a wild animal could be considered “property,” it could not be considered “historic property.” The legislators writing NPHA, when directing federal agencies to take into account “historic properties,” stated that the agency should “take into account the effects of the undertaking on any district, site, building structure or object” on the National Register. To this the defense suggested that Congress intended to protect “historic properties” that have a definition equal to “district,” “site,” “building,” “structure” or “object.” It was attempting to construct the idea that *anything* other than these specific items would not be eligible for the National Register and thus could not be a “historic property.” NPHA only requires the federal agency to review “historic properties.”

The defense reiterated that there were no animals on the National Register and then strangely, proceeded to point out that in *Hatmaker v. Georgia Department of Transportation*, “one district court did rule...that a tree (the Friendship Oak in Dougherty County, Georgia) with potential significance in Native American history, might qualify, subject to the requirement that the tree...’must inhere the appropriate historic characteristics and associations, defined in [the Federal Regulations],... for inclusion on the National Register.’”¹⁰⁸ Why the defense used this strategy is perplexing since the *Hatmaker* case actually worked in the favor of the plaintiff. In

¹⁰⁸ *Hatmaker v. Ga. Dept’ of Transp.*, 973 F. supp. 1058, 1067 (M.D.Ga 1997) In the *Hatmaker* case, licensed arborists alleged that the Georgia Department of Transportation and United States Department of Transportation, failed to consider the cultural and environmental significance of an oak tree during a road widening project, which specified the removal of the tree. Ultimately the court opined in favor of the Secretary Georgia Transportation concluding that the agency did consider the tree but determined that the tree was not significant. Nevertheless, the judge made an important statement in asserting a historically significant tree could be included on the Register.

the *Memorandum and Order Regarding the Motion to Dismiss* issued by Judge Marilyn Patel, she stated:

Hatmaker is analogous to the present case. While animals obviously differ from trees, their distinguishing qualities are not significant under the plain language of the statute. The dugong may, like a tree, fall under the category of “object,” as “a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.”

The judge then cited the federal implementing regulations outlined in the Code of Federal Regulations.¹⁰⁹

As Thomas King points out in “Creatures and Culture,” Judge Patel’s order was significant not only because it dismissed part of the defense’s equivalent criteria requirement, but more so because it asserted that a living, breathing creature “might meet criteria of eligibility for inclusion in the National Register.”¹¹⁰ By committing federal agencies to protect animate objects important to human culture, the judge’s decision set precedent that broadened the scope of “historic objects.” King furthers this idea, “Cultural resource managers need to be reminded from time to time, as the Dugong decision reminds us, that our business is not only the management of the built environment or its archeological remnants but of culturally valued nature as well.”¹¹¹ The consideration of animals and plants poses new challenges to identification and

¹⁰⁹ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

¹¹⁰ Thomas K. King. “Creatures and Culture: Some Implications of *Dugong v. Rumsfeld*.” *International Journal of Cultural Property*. (US: International Cultural Property Society, 2006), 239.

¹¹¹ *Ibid*, 240.

mitigation. One such challenge arises in the next argument posited by the Department of Defense.

Along the same lines of the “district”, “site,” “building,” “structure” or “object” equivalence, the defense argued that the dugong habitat ranges widely from Okinawa throughout the majority of the Indian and western Pacific Ocean, thereby lacking a precise boundary and precluding it from being considered a “site.” The plaintiffs had anticipated this argument and responded by claiming NHPA applied to the dugong habitat.¹¹²

To achieve their aim of dismissing the notion that the habitat was a “site” the Department of Defense cited *Hoohna Indian Ass’n v. Morrison* in the *Defendants Motion to Dismiss*. In the late 1990s, the Forest Service gave notice of its intent to conduct timber sales in the Tongass National Forest in Southeast Alaska. The Forest Service initiated a Section 106 review but determined no historic properties would be adversely affected by the sale. Several Native American tribes argued this was untrue. According the tribes, at the turn of the 17th century Russians colonized Sitka, home of the native Tlingits. The relationship between the Tlingits and Russians were fraught from the start and once the American and British traders supplied low-cost guns to the natives, the fighting escalated. In 1802, the Tlingits defeated the Russians at the settlement. The Russians later returned and after a seven-day battle retook the fort. The Tlingits retreated north. The route of retreat after is called the Kiks.adi Survival

¹¹² *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

Although Judge Patel recognized habitats are eligible for the National register, the judge pointed out that she would not consider a dugong habitat a site because the dugong habitat was not the historic property in question -- the dugong is the “property” in question.

March according to tribal record. The area in which the survival march took place was not among the sites listed as eligible.¹¹³

The Forest Service determined in the initial Section 106 review, that the route of the survival march might be eligible for inclusion because of its cultural importance but it was not designated because the Forest Service was unable to determine just where the Kiks.adi Survival March occurred. The tribe argued that the determination was “arbitrary and capricious.” According to the tribe, oral history suggested the march took place on multiple routes, at least one for the strong men and another for the women, children, and old people, which covered the entire area. The tribe believed it inappropriate to require a site to have a boundary and “observable physical identification.”¹¹⁴

The judicial district hearing the *Hoohna Indian Ass’n v. Morrison* case, the Ninth Circuit, (same as the district hearing *Dugong v. Gates*) disagreed with the tribes. The court stated:

That important things happened in a general area is not enough to make the area a "site." There has to be some good evidence of just where the site is and what its boundaries are, for it to qualify for federal designation as a historical site. The Historian of the National Register of Historic Places wrote, in opposition to listing the Kiks.adi route, that his staff consistently rejected "nominating such a wide swath of land with little if any identified physical features." The Historian noted that when trails had been designated, such as the Lewis and Clark Trail, only those particular rock formations, ruts, and other identified physical features where the trail was "confined to a very narrow corridor" were listed. That a general unbounded and imprecisely located area has important cultural significance is not enough. Abraham's tomb is an identifiable site, but the wanderings of the Jews in the Sinai Desert after

¹¹³ *Hoohna Indian Ass’n v. Morrison* 170 F.3d 1223, 1231 (9th Cir, 1999)

¹¹⁴ *Ibid.*

the Exodus did not leave any accurately identifiable path that could be a "site."¹¹⁵

The Defendants in *Dugong v. Gates* used the National Register Historian's statement from the *Hoohna* case to underscore that a "site" should be concretely bounded. The statement supported the defense's claim that the dugong habitat was similar to the Survival March site; it was neither bounded nor identifiable as a site with special features. Judge Patel, however, disagreed that the cases were congruent. In the *Memorandum and Order Regarding the Motion to Dismiss*, she concluded that, unlike the Kiks.adi or the Jew in Sinai, the dugong habitat is clearly defined because it is presently observable. She cited the plaintiffs' documentation of sea grass beds or meadows and restates that there is "uncontroverted evidence that the meadows are physically definable and confined to specific areas along 10% of the overall Okinawan coastline."¹¹⁶

While Judge Patel's determined that the habitat was potentially a "site," she also determined the question to be moot stating that she would consider the habitat in the application of NHPA in the case because it was not the habitat that is listed on the Japanese register, but rather the animal itself. In determining that the habitat was not the historic property under consideration, the judge was forcing the Department of Defense to consider the cultural aspects of the dugong in relation to humans, not to the environment. Thus, simply planting more sea grass elsewhere along the coast will not be sufficient mitigation because it takes the "natural monument" away from the traditional historical context, Henoko Bay and Oura Bay.

¹¹⁵ Ibid.

¹¹⁶ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

Japan's Cultural Properties Law is Not "Equivalent" to the National Register

Another argument regarding equivalence was raised in the *Defendants Motion to Dismiss*. The argument asserted that that Japan's Cultural Properties Law is not "equivalent" to the National Register. To set up the argument, the defense outlined its concerns:

The crux of the plaintiffs' claim depends entirely on the assertion that the "Okinawa Dugong is a protected 'Natural Monument' under Japan's Law for the Protection of Cultural Properties"....From this unsubstantiated allegation, with no citation to the "Cultural Properties Law," the [First Amended] Complaint leaps to the legal conclusion that "the list of protected cultural properties on Japan's Cultural Properties Law is the 'equivalent' of the U.S. National Register of Historic Places"...From this unsupported conclusion, the plaintiffs make a further leap to conclude that "the Okinawa Dugong is protected under the NHPA."¹¹⁷

The defense disagreed with the plaintiffs' assumption that the Japanese and U.S. National Registers were equivalent because first, Japan, unlike the U.S., includes a "a wide range of flora and fauna as 'natural monuments'" among its culturally significant properties, and second, Japan's statutory system has only one law conferring protection on inanimate and animate objects while the United States has many that each afford protection to a distinct classification of objects.¹¹⁸ In the *Defendant's Motion to Dismiss*, the defense included the *Webster's New Riverside*

¹¹⁷ *Defendant's Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 17, 2004).

¹¹⁸ *Ibid*.

The defense cited the Endangered Species Act, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, and the Magnuson-Stevens Fisheries Conservation and Management Act among the US's laws aimed at distinct classes of protected animals.

University Dictionary definitions of “equivalent” and “monument” to further the idea that the registers were not equal for purposes of applying NHPA to the base relocation or to the dugong as a “natural monument.”¹¹⁹ This argument was an attempt to assert vagueness in the language of Section 402.

In response to the defense’s points, Patel considered the statutes in terms of “equivalence” and crafted a counter view by explaining the plaintiffs were correct to assert that the statutes were equal. First, after looking at the essence or intention of the Japanese statutes she concluded that the laws had similar motives and similar goals. The Japanese law was enacted in recognition of the idea that cultural properties are essential to a society to correctly understand history and culture and, according to Patel, forms a ““foundation for its cultural development for the future”” and thus seeks to ““preserve an utilize cultural properties, so that the culture of the Japanese people may be furthered and a contribution...made to the evolution of world culture.”¹²⁰ Similarly, the NHPA was enacted to preserve a living part of the Nation’s historical and cultural foundations and to “give a sense of orientation to the American people.” The chief concern of each law is cultural preservation as a reference to the past and a guide for the future. The plaintiffs were correct to assume equivalence in this regard.

In terms of the definitions Judge Patel addressed “equivalence” and “monument” together by focusing on “equivalent.” She stated that the “equivalent” in

¹¹⁹ Ibid.

Equivalent -- “1a. Equal, as in force, value or meaning. B. Having identical or similar effects. 2. Corresponding or practically equal in effect.”

Monument -- “1. A structure, as a building or sculpture, erected as a memorial. 2. An inscribed stone or other marker at a grave: Tombstone. 3. Something venerated for its aesthetic or historic significance. 4. A natural monument. 5a. An enduring and outstanding achievement. B. An exceptional example; a monument of ignorance; 6. A boundary marker, as a stone or post. 7. A written document, esp. a legal one.”

¹²⁰ *Memorandum of Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

reference to Section 402 did not mean to require the lists be identical. In 1980, when the Section 402 of the NHPA was enacted, Webster's Third New International Dictionary defined "equivalent," as "one that is equivalent (as in value, meaning, and effect)," and that the term was synonymous with the word "counterpart." The adjective form was defined as "'like in signification or import' and 'corresponding or virtually identical especially in effect or function.'" Evoking the definitions contemporaneous with the amendment, the court determined that, "These definitions of the term thus focus on the effects, significance, and consequences of the objects compared; they do not require that the object be identical, but rather that they be 'counterparts.'"¹²¹ Deconstructing the semantic debate over "equivalence," the judge moved on to "monument" and simply reiterated that "equivalent" does not mean, identical, therefore, the fact that the English definition of "monument" does not connote animate objects does not make tenable the argument that the registers cannot be compared.¹²²

As to the argument that the Law for the Protection of Cultural Properties and NHPA are not equivalent because the Japanese law protects such a wide range of properties such as "natural monuments," Judge Patel pointed to Japan's Law for the Conservation of Endangered Species of Wild Fauna and Flora to highlight (1) Japan did have distinctive statutes protecting animals, and (2) Japan considered the cultural associations of flora and fauna separately from the environmental and biological value. In the *Memorandum and Order Regarding the Motion to Dismiss*, this idea was articulated in the statement, "For an animal species to be listed under the Cultural

¹²¹ Ibid.

¹²² Ibid.

Properties law, it must possess sufficient cultural value; whether or not it is endangered or biologically valuable is irrelevant.”

As a final note, Judge Patel’s order underscored the absurdity of the claim of non-equivalence by noting:

To require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture....Defendants’ restrictive reading of “equivalent” would mean that no nation in the world had an equivalent list, because each one inevitably differs in its identification and scope of protection. To require identical definitions of culture would eviscerate section [402]’s explicit recognition of “equivalent” foreign lists.¹²³

As a result of these findings, Patel was able to determine that “equivalence” would not be further evaluated in her summary judgment, as the Japanese register *would be* considered “equivalent” to the United States register.

Conclusion

Of great consequence in the equivalence argument is the judge’s determination that an animal could be considered a historic property afforded protection under the NHPA. This might open the door to new nominations domestically by broadening the traditional definitions of what may be considered culturally significant therefore eligible for the National Register. An animal could be eligible for placement on the Register if the animal’s presence in the area has cultural significance. The American bald eagle or California bear are two such examples. The presence of these two animals in the United States and California, respectively, is significant to human history of the area as opposed, or in addition, to the area’s ecology. The mitigation

¹²³ Ibid.

treatment is different in that the measures taken to counter adverse affects apply to protecting the resource so that it remains in a particular area versus simply protecting the existence of the resource.

The implications of allowing animals to be eligible for the National Register might encourage greater cooperation between environmental and cultural reviewers.

CHAPTER 5

NO FEDERAL UNDERTAKING BY THE DEPARTMENT OF DEFENSE

One cannot quarrel without an opponent
Japanese Proverb

Introduction

Which government is legally responsible for protecting the dugong, Japan or the United States? The Defendant's argued that they were not the party responsible for protecting the dugong in Henoko Bay. Protecting the dugong was the responsibility of the Japanese government. The Department of Defense therefore argued that they should not have been named the defendant in the lawsuit. The reason offered was that, according to the law, in order for a domestic version of NHPA to apply, there must be a "federal undertaking" in effect. This requirement is outlined in Sections 106 and 402 of NHPA. The statutes do not define "undertaking" but the Code of Federal Regulations, or implementing regulations associated with Section 106, do. The term "undertaking" as it applies to the NHPA is:

- ...a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—
- (A) those carried out by or on behalf of the agency;
 - (B) those carried out with Federal financial assistance;
 - (C) those requiring a Federal permit, license, or approval; and
 - (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.¹²⁴

¹²⁴ Kanefield, 12.

If there is no federal undertaking on behalf of the Department of Defense, there is no need for a review and the subsequent mitigation of adverse effects on historic properties affected by the undertaking.

The two main lines of inquiry in the “you’ve got the wrong guy” argument are: (1) was there a federal “undertaking” by which a NHPA review would be required had occurred, and (2) if there was a federal undertaking, would NHPA apply extraterritorially to matters of foreign policy. This chapter will explore the merits of the arguments and the judge’s interpretation of the validity of each argument.

No Federal Undertaking by Which a NHPA Review is Required

In the *Defendants Motion to Dismiss*, the defense attorney’s maintained that there “is no statutory duty for the defendants to conduct the type of assessment that the plaintiffs demand regarding potential adverse impacts on the Okinawa dugong” because no “federal undertaking” has triggered such a claim. The defense maintained that in the absence of a “federal undertaking” the lawsuit must be dismissed. The defense pointed to *Environmental Protection Information Center v. Pacific Lumber*, a 2003 lawsuit in which the Environmental Protection Information Center (EPIC) brought action under the Administrative Procedures Act and Clean Water Act charging Pacific Lumber and the Environmental Protection Agency (EPA) for discharging pollutants into a creek. The EPIC claimed the EPA knew of the illegal dumping. The EPIC sought declaratory and injunctive relief, civil penalties, and restitution from the named defendants. The case was dismissed because the judge hearing the case determined that the Administrative Procedures Act, which provided judicial review of Pacific Lumber and the EPA’s final actions, had not been violated because Pacific Lumber was still in the process of seeking public comment.

Therefore, there was no final agency action by which the court could make a determination.¹²⁵

Dugong v. Gates similarly relied on the Administrative Procedures Act (APA) because the NHPA does not provide an independent basis for judicial review of Federal agency action. According to the definitions outlined in the APA, for an action to qualify as “final,” it must (1) mark consummation of the agency’s decision making process and (2) be an action by which ‘right or obligations have been determined’ thus having the potential for legal action. The plaintiffs bore the burden of proving that there was a “final agency action” on the part of the Department of Defense and thus a “federal undertaking” did in fact occur. The process of proving that a “final agency action” and “federal undertaking” occurred is complex.

Final Agency Action?

The concept of ripeness and “final agency action” are natural bedfellows. Ripeness of final agency action hinges on the idea that there are many unknowns and a lack of final commitment surrounding a federal project or program. If “things are still up in the air” so to speak, there is a possibility that the final outcome has many trajectories. A court cannot determine if a federal agency is in violation of the law if there is not a clear course of action defined, or the outcome is too ripe to merit judicial review. The first question the court must answer is, do the plans for the MCAS Futenma Relocation evidence a final course of action?

After the defense filed the *Motion to Dismiss* and the plaintiffs responded to the motion, the judge ordered additional discovery which required the Department of Defense to furnish the court with documentation pertaining to its activities in

¹²⁵ *Environmental Protection Information Center v. Pacific Lumber*, 266 F. Supp.2d 1101 (N.D. Cal. 2003)

Okinawa. Upon review, the judge determined a final agency action was committed. As outlined in the 2005 Memorandum and Order Regarding the Motion to Dismiss, the judge ruled that the Department of Defense was fully committed to the course of action in Okinawa as it: (1) established requirements for the replacement facility and (2) approved the Japanese government's final plans for the facility.¹²⁶

The 1992 Master Plan of MCAS Futenma highlighted a gross inability to sufficiently and effectively perform base functions primarily because the facility was outdated. Combined with the Ginowan residents' pressure to mitigate negative externalities resultant of the base the presence, the decision to move the base began. The new base had to meet the needs of the functional mission of the base.¹²⁷ The terms were dictated to the Japanese government in planning the new base. The requirements by the defendants were met in the Japanese Government's Basic Plan in 2002, thus constituting a final action.¹²⁸

Japanese Law requires that in the event there is potential risk and irreparable harm to a site slated for construction, an Environmental Impact Assessment must be completed. Judge Patel contended that the fact that the Department of Defense signed off on the Japanese government's scoping project, the legally required review of environmental impacts that will result from a certain action, is further indication that

¹²⁶ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

¹²⁷ Group 70 International, Inc. Master Plan Marine Corps Air Station Futenma. (Department of Navy: Pearl Harbor, Hawaii, June 1992). http://ir.lib.u-ryukyu.ac.jp/bitstream/123456789/6967/12/gabe2_02.pdf. (accessed July 27, 2009).

¹²⁸ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

the base building will be completed. As such, the agency decisions at issue are reviewable by the court.

Federal Undertaking?

As reviewable actions, the court then had to determine if a “federal undertaking” had occurred. The opinion that a final agency action occurred similarly formed the basis of Judge Patel’s recognition that the Department of Defense’s *role* in the MCAS Futenma planning was the “federal undertaking.” While the opinion relied on the same logic of the final agency action determination the determining facts were different and merit evaluation.

As the court began to deliberate, the first problem encountered was that there was no precedent examining the definition of “undertaking” of Section 402 in the international context. To this end, the court declared the assumption that “undertaking” in Section 402 is equal to “undertaking” in Section 106. The basis of the assumption was that the same legislators who amended NHPA in 1980 included the international statute, used the same language to assert continuity of intention. Thus, the same regulations used to implement the domestic version of the law are applicable to the international version of the law. The court essentially adopted Section 106 regulations as a guide for how to proceed in Section 402. One major problem was the discovery that the “notable difference between the provisions governing federal undertakings conducted domestically and those that are undertaken abroad is the ‘undertakings’ in the domestic context are triggered by the more restrictive event of ‘the approval of expenditure.’” The financial hook was problematic because Japan was paying for the base. This meant that the determination that a “federal undertaking” had occurred hinged requirement (A) of “undertaking” listed above – “those carried out by or on behalf of the agency.” Judge Patel acknowledged

the problem by the admission of her belief that Congress likely intended a less restrictive definition of undertaking in federal activities abroad.

Maintaining the connection between the intentions of the two statutes while also pursuing the logic that Congress intended a broader interpretation of “undertaking,” the court looked to precedent in the domestic courts to prove the Department of Defense’s initiation of approval constituted an undertaking. The court cited *Morris County Trust for Historic Preservation v. Pierce*. This was a 1968 case in which the Department of Housing and Urban Development (HUD) approved an urban renewal plan submitted by the town of Dover, New Jersey that allowed the demolition of a number of buildings in the town which included the Old Stone Academy. In 1969, HUD and the town entered into a loan and capital grant contract funded by HUD. In the contract the town was required to furnish documentation concerning any proposed actions pertaining to the project to HUD. The work was completed and the grant contract was closed on April 16, 1982. The Old Stone Academy was determined to be eligible for the National Register of Historic Places and was listed in the Register on May 21, 1982.¹²⁹

The Morris County Trust for Historic Preservation alleged that HUD did not comply with the NHPA or the National Environmental Policy Act, arguing that, “[the] NHPA did not apply because at the time the renewal plan was approved, the academy was neither listed nor eligible for listing in the National Register and that NEPA did not apply because it had been enacted after the grant contract was executed.”¹³⁰ Plaintiffs sought to enjoin demolition of the academy until the agency complied with these two statutes. In the *Morris* decision, the court determined that NHPA is

¹²⁹ Kanefield, 122-123.

¹³⁰ Ibid.

applicable if an ongoing project, at any stage, relies on Federal agency approval or disapproval of funds OR if a Federal agency “provide[s] meaningful’ review of the project where historic properties might be affected.¹³¹

The Department of Defense provided meaningful review of the MCAS Futenma Relocation in any number of ways.¹³² As the plaintiffs alleged, the undertakings included:

the Department of Defense’s approval of the plan for the replacement facility; drafting of preliminary document to establish location design requirements for the facility; approval of request to enter Camp Schwab to conduct technical surveys, construct a facility planning building, and permit the regular use of such a building; funding the preparation of the 1997 Operational Requirements and funding the [Futenma Implementation Group]; and constructing the replacement facility on behalf of the Department of Defense, pursuant to its requirements, and for its use.¹³³

The defendants took issue with every alleged undertaking, and the court reviewed each one. Although there was uncertainty related to several of the actions applicability as “undertakings” the court ultimately made the decision based on the aggregate of the allegations. Judge Patel wrote:

¹³¹ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

¹³² A large part of the *Memorandum and Order Regarding Motion to Dismiss* evaluates which specific agency actions constitute “undertaking.” The order lists agreements and documentation such as the 1996 SACO, 1997 Operational Requirements and 2002 Basic Plan to demonstrate that the U.S. military is directly involved in the planning process thus responsible for meeting NHPA obligations.

¹³³ *First Amended Complaint by Plaintiffs*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, September 25, 2003).

It would amount to a legal absurdity for this court to hold that, as a matter of law, a facility constructed on behalf of and for the use of the United States is not a federal undertaking, given the statutes explicit inclusion of any “project, activity or program” carried out by or on behalf of the agency...The fact that the United States will not be performing the construction directly can not bar a finding of a federal undertaking , as projects undertaken on behalf of the federal government by non-federal entities may be held federal undertakings if the federal agency has exercised discretion and provided aid for the project to an overall degree that it has transformed “essentially private action into federal action.”¹³⁴

NHPA Does Not Apply Extraterritorially to Matters of Foreign Policy

The final “you’ve got the wrong guy (government)” argument put forth by the Department of Defense was that the United States courts may not sit in judgment of United States actions *related to* the actions of a foreign sovereign government or the actions of a foreign. The assertion is made on the grounds that Congress did not intend the application of NHPA to apply in extraterritorially when sensitive matters of United States-Japanese foreign and military relations are at stake.

The Department of Defense argued that it was not the appropriate party to be named in this lawsuit. The argument is based on the premise that compliance would “risk intruding upon a long standing treaty relationship” between the United States and Japan.

According to the defense, when Congress amended NHPA in 1980 in order to be complicit with international ideals of cultural awareness and sensitivity, the legislators were not dealing with the same world. As the provision had not been reviewed in the 24 years since it was enacted, the intention of the statute might not apply today. The defense argues that in the last few years a significant number of

¹³⁴ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

National Environmental Policy Act lawsuits have failed on the presumption that Congress did not intend to impose of foreign powers and Congress did not for domestic cultural resource responsibility to intrude on the relationships of the United States.

While this claim has a feeling of absurdity, the defendants were clever to point out the failed NEPA lawsuits. It points to the inherent weakness in procedural regulation when applied extraterritorially. Because the statutes have no substantive power, it is easy for Department of Defense to view the law as impediments to the greater goals of national security. During George W. Bush's administration, cultural and environmental reviews required by procedural laws such as the NEPA, the NHPA, and the ESA were dismissed in the name of national security. The procedural versus substantive nature of the laws seem to diminish the value attached to the law.

In response to the defense's claim that the law treads on U.S. Japanese relations, the court simply responded that unlike NEPA, *Dugong v. Gates* deals with a statute that "explicitly demonstrates Congress's intent that it apply abroad where a federal "undertaking" promises to have direct or adverse effects on protected foreign properties."¹³⁵

The Act of State Doctrine Warrants Dismissal on Prudential Grounds

Finally, the defense maintained that the court not engage the lawsuit based on the Act of State Doctrine. According to the defense, The Act of State Doctrine "reflects the prudential concern that the courts, if they question the validity of

¹³⁵ *Memorandum and Order Regarding Motion to Dismiss*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2005).

sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.”

Judge Patel responded by stating that the court is not authorizing or passing validity on the actions of the Japanese government or the United States government’s decisions made in Japan, Okinawa, or local Okinawan municipalities. If the relocation of MCAS Futenma is solely the decision of Japan the court would not be in a position to declare Japan’s actions invalid. Yet, the plaintiffs’ allegation is that the United States is deeply entangled in this process, therefore, this case is not about the Japanese actions but about the actions of the United States in an intertwined process of decision making.¹³⁶

Conclusion

The court’s logical adoption of Section 106 regulations help guide the legal process in the absence of past precedent, particularly in determining if a “federal undertaking had, in fact, occurred. Judge Patel’s determination that the Department of Defense’s participation in the planning process amounted to a federal undertaking may have been viewed differently in another court. Also, the court’s refusal to dismiss the lawsuit based on the Act of State doctrine carefully avoids setting precedent in such a new and complex case. These two determinations highlight a need for regulations specifically for matters of foreign affair.

¹³⁶ Ibid.

CHAPTER 6

JURISTICTIONAL STANDARDS: FAILURE TO STAKE A CLAIM, RIPENESS, ACT OF STATE DOCTRINE

If man has no tea in him, he is incapable of understanding truth and beauty.
Japanese Proverb

Introduction

After Judge Patel issued the March 2, 2005 Memorandum and Order Regarding the Motion to Dismiss in which she denied the motion, the plaintiffs filed a Second Amended Complaint claiming the Roadmap for Realignment sanctioning the plan for FRF violated the NHPA. The Department of Defense submitted four administrative records (AR) to the plaintiffs: AR 1, which covered the Futenma Annex; AR 2, which covered the 1997 Operational Requirements (OR) for the abandoned proposal to replace MCAS Futenma; AR 3, which covered issues related to the access of Camp Schwab; and AR 4, which covered the development of the Roadmap.¹³⁷ The Department of Defense hoped to avoid lengthy disputes over pre-trial discovery. On May 18, 2007 the plaintiffs filed a Motion for Summary Judgment regarding the alleged violation of the NHPA in the Department of Defense's involvement in the planning of the FRF. The plaintiffs used the documents to determine if they were entitled to a summary judgment regarding the Department of Defense's actions in Okinawa.

Since Patel's March 2, 2005 decision determined that the Okinawa dugong was property afforded protection under NHPA, the Japanese Register satisfied the Section

¹³⁷ *Defendant's Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

402 requirement that the foreign government have a register equivalent to the United States National Register, the Department of Defense actions in Okinawa constituted a federal undertaking, and the court was not sitting in judgment of the Government of Japan's role in the FRF, the summary judgment was to determine if the plaintiffs are entitled to a judgment as a matter of law. The decision is to apply legal standards to make such a determination. The legal standards relate to whether or not there is subject matter jurisdiction, standing, ripeness and the court's jurisdiction on the case. Subject matter jurisdiction is defined under the APA and requires a final agency action. Standing, as addressed earlier in this work, is afforded to litigants under Article III of the United States Constitution and defined through standing doctrine determined in previous case law.

This chapter explores the arguments presented by the plaintiffs and defendants and Judge Patel's interpretation of each argument.

The Plaintiffs are Entitled to a Summary Judgment

On May 18, 2007, Earthjustice attorneys filed a *Motion for Summary Judgment* on behalf of the plaintiffs declaring the plaintiffs met all the legal standards which entitle them to a summary judgment and asked the court to rule determine if the Department of Defense violated the NHPA when it issued the Roadmap to Realignment on May 1, 2006.¹³⁸

The Court Lacks Subject Matter Jurisdiction

The Department of Defense at first took issue with the plaintiff's claim that they fulfilled the legal standards requiring proper subject matter jurisdiction. The

¹³⁸ *Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, May 18, 2007).

Department of Justice attorneys held that before considering the merits of the case, the court had to determine whether the plaintiffs have subject matter jurisdiction under Article III of the Constitution. Further the Department of Justice legal team found this and unusual case, with exceptional importance. The plans for relocation outlined in the Roadmap reflect years of security negotiations with an important ally. The Roadmap and subsequent plans are sensitive in nature and thus many negotiations are not, nor could they be, without compromising secure information, understood by the plaintiffs or the court.¹³⁹

The Defense first challenged the plaintiffs standing in federal court. Under Article III of the U.S. Constitution litigants must satisfy the standing inquiry defined by *Lujan v. Defenders of Wildlife*. The inquiry requires plaintiffs meet three criteria: (1) injury-in-fact (not conjectural or hypothetical); (2) existence of a fairly traceable link or causal connection between the challenged action and alleged injury; and (3) the likelihood that the injury will be redressed by a favorable court decision.¹⁴⁰ At the summary judgment stage, the plaintiffs bear the burden of proving their standing. The defense asserts that the plaintiffs listed cannot meet the standing criteria. The defense stated that the Okinawa dugong and other five plaintiffs lack standing claiming the APA only provides a person the right to action if the individual has suffered a legal wrong due to agency action.¹⁴¹

The Department of Justice attorneys emphasized that the dugong lacks standing as it is an animal. The defense invoked a recent ruling involving animals and

¹³⁹ *Defendants' Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

the Department of the Navy in which the Ninth Circuit held “that animals (including marine mammals) lack standing and cannot maintain an action in their own name under the ESA, MMPA, NEPA, and the APA.” The case, *Cetacean Community v. Bush*, was a lawsuit filed against President George W. Bush and the Secretary of Defense over the United States Navy’s use of Surveillance Towed Array Sensor Systems (SURTASS) Low Frequency Active (LFA) sonar. The sonar system detects quiet submarines at long range, which is critical to today’s underwater warfare strategy. The sonar emits a loud sonar pulse. The Cetacean Community (Cetaceans), the name given to the world’s whales, dolphins and porpoises by their attorney, claims that the SURTASS LFA sonar harms the animals “by disrupting biologically important behaviors, including feeding and mating, and causing tissue damage.” *Cetacean Community v. Bush* did not challenge the temporary injunction issued earlier by a district court, but instead sought an order asking for (1) the Secretary of Defense to consult with NOAA Fisheries under the Endangered Species Act (ESA), (2) a letter of authorization be sought under the Marine Mammal Protection Act (MMPA) and, (3) and an EIS under the National Environmental Policy Act (NEPA) be conducted for the SRTASS LFA sonar use during wartime.¹⁴²

Attorneys representing the defendant moved to dismiss the lawsuit because the plaintiffs lacked of subject matter jurisdiction and failed to state a claim upon which relief could be granted. The defense for the plaintiffs claimed the Cetaceans had standing to sue in their own name. The plaintiffs’ attorneys made this assertion “based on of a Ninth Circuit decision in which the court stated the Hawaiian Palila bird, ‘has

¹⁴²Danny Davis. “Ninth Circuit Denies Standing to World’s Whales and Dolphins.” (The National Sea Grant Law Center. University: Mississippi, 2009). <http://www.olemiss.edu/orgs/SGLC/National/SandBar/3.4cetacean.htm>. (accessed May 29, 2009).

legal status and wings its way into federal court as a plaintiff in its own right.”¹⁴³ The district court disagreed with the plaintiffs, as it maintained that animals “have many legally protected rights, animals unfortunately, like artificial persons such as corporations and ships and judicially incompetent persons such as infants, cannot speak for themselves or function as a plaintiff in the same manner as a judicially competent person.” None of the statutory provisions named in *The Cetacean Community v. Bush*; the APA, the ESA, the MMPA, nor NEPA allows animals to bring suit in their own names. The APA provides that a person “suffering legal wrong” because of a federal administrative action is entitled to judicial review. “Person” is defined as “an individual, partnership, corporation, association, or public or private organization other than an agency.”¹⁴⁴ The Department of Defense in *Dugong v. Gates* mimicked the claim that animals are not included in the APA definitions of “person” thus According to the Department of Defense, the Cetacean Community lawsuit precludes dugongs, including the “Okinawa dugong,” from bringing suit under the APA.¹⁴⁵

In response to the Defendant’s claim the plaintiffs conceded that the Dugong lacked standing based on the Cetacean lawsuit.¹⁴⁶ In the Memorandum and Order

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ *Defendants Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

¹⁴⁶ *Plaintiffs Reply in Support of Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, August 10, 2007).

Regarding Motion for Summary Judgment issued on January 24, 2008, Judge Patel agreed and dismissed the Dugong as a plaintiff.¹⁴⁷

Standing of Remaining Plaintiffs

Although successful in dismissing the Dugong as a party lacking standing the Department of Defense was not successful in dismissing the remaining plaintiffs. The attorneys for the plaintiffs claimed that each had standing to bring this action because they have suffered an injury in fact, and the injury is traceable to the construction plans of FRF. The attorneys further claimed that a favorable decision by US courts would redress the injury. The injury for each plaintiff was individually summarized in the *Plaintiffs Memorandum and Points and Authorities in Support of Summary Judgment*.¹⁴⁸

The Department of Defense challenged each plaintiff to meet the standing criteria. Judge Patel evaluated each plaintiff against the Lujan criteria for standing. She opined:

The three individual plaintiffs in this case are Okinawan citizens who have made and will continue to make ongoing trips to Henoko Bay to observe the dugong. These ongoing trips are concrete plans, not indefinite intentions to visit ‘some day’ in the future. Takuma Higashionna was born and raised near Henoko Bay and has been visiting the area and observing the Okinawa dugong since his childhood. He leads weekly snorkeling and scuba-diving tours to view dugongs and their habitat. Yoshikazu Makishi was also born and raised in Okinawa and has been frequenting the Henoko coast and observing

¹⁴⁷ *Memorandum and Order Regarding Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

¹⁴⁸ *Plaintiffs Memorandum and Points and Authorities in Support of Summary Judgment*. (U.S. District Court Northern District of California San Francisco Division, May 18, 2007).

the Okinawa dugong for over a decade. Anna Koshiishi moved to the coast of Okinawa when she was eight years old and has lived there ever since. Like Higashionna, she also leads eco-tours to view the dugong. As averred in their affidavits, these plaintiffs have a concrete interest to preserve the dugong for cultural, educational, aesthetic, inspirational and economic benefits to themselves and their descendants. For example, Higashionna states that the dugong has particular cultural and historic significance because it is part of the creation beliefs of the Japanese and especially the people of Okinawa. He hopes to preserve the dugong so that it may enrich the lives of his descendants, as it has enriched his own life

These concrete interests are directly linked to the procedural injury caused by defendants' failure to comply with the NHPA because to the extent that compliance with the "take-into-account" process leads to avoidance or mitigation of harm to the dugong, the very object of plaintiffs' interest may be preserved and protected. Moreover, as required under the prudential standing requirements, plaintiffs' interest in the preservation of dugong as historical and cultural property is precisely the zone of interests protected by the NHPA. In passing the NHPA, Congress declared that the purpose of the statute was to preserve a nation's 'irreplaceable heritage . . . so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations.' While this preservation interest arguably is shared by the public at large, it is held with particular acuteness by plaintiffs in this case, long-time residents of Okinawa who benefit from the dugong in direct and palpable ways. The court concludes, therefore, that plaintiffs have alleged a sufficient injury in fact because they seek to 'enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.'¹⁴⁹

As for the associations, they too had to meet certain criteria. For an association to have standing it must show that (1) its members would have standing to sue "in their own right" and, (2) the interests at stake in the lawsuit are critical to the organization's purpose, and (3) neither the claim nor the relief sought requires members to participate individually in the litigation. To this end the judge found the Save the Dugong

¹⁴⁹ *Memorandum and Order Regarding Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

Foundation, Center for Biological Diversity, Turtle Island Restoration Network, and JELF met the criteria. The Dugong Network Okinawa and Committee Against Heliport Construction/Save Life Society did not submit evidence regarding standing and thus were dismissed as plaintiffs.¹⁵⁰

Injury or Causation/Redress for Standing Can Not Come From the Department of Defense

In the *Second Amended Complaint*, the plaintiffs claimed that “‘harm to the marine mammals, and to Plaintiffs’ interests in them will be a result of the Department of Defense’s failure to comply with the requirements of the NHPA.’”¹⁵¹ The defendant’s attorneys responded in the *Defendant’s Memorandum in Support of Cross-Motion for Summary Judgment* claiming that all evidence provided by the Department of Defense clearly demonstrated that the Government of Japan was solely responsible for the base relocation because (1) Japan based all decisions on its evaluation of environmental, engineering, political and cost factors; and (2) Japan provides facilities and areas in accordance with Japanese law. In return, as outlined in the 1960 Treaty of Mutual Cooperation and Security, United States forces commit to defend Japan and maintain peace and security in the surrounding region. The Department of Defense cannot redress injury because it is not responsible for building FRF. The defense claims “[a]ny alleged injury to the plaintiffs resulting from that

¹⁵⁰ Ibid.

¹⁵¹ *Second Amended Complaint*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, November 24, 2003).

FRF sitting decision would result from the ‘independent action of some third party not before the court,’ specifically the Government of Japan.”¹⁵²

Furthermore, “While the decision for the FRF location certainly was the product of bilateral negotiations, the plaintiffs cannot deny the critical and ultimately dispositive role” that the Japanese government had in selecting the site. The decision to locate in Futenma was ultimately made by the Ministry of Defense therefore the plaintiffs cannot claim injury as a result of the actions of Department of Defense.¹⁵³ Japan was responsible for conducting both the EIA and constructing FRF under the Roadmap. Injury subsequent to the Roadmap would due to the actions of the Government of Japan, a party not before the court.¹⁵⁴

For Judge Patel, this argument was unavailing. She dismissed the defendant’s claim by pointing to the list of relocation requirements outlined by the Department of Defense. In issuing requirements to the Japanese government, the Department of Defense limited the options for base relocation. This made the directly Department of Defense responsible for determining the new location of MCAS Futenma in Henoko Bay.¹⁵⁵

Ripeness

In order for a court to hear a case the case must be ripe for review. The doctrine of ripeness, like standing, exists “to ensure that a federal court’s Article III

¹⁵² *Defendants Memorandum in Support of Cross-Motion for Summary Judgment*. . No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

power has been properly invoked.” Determining whether an agency action is ripe for judicial review requires the court to evaluate (1) the hardship to the parties of withholding court consideration, and (2) the fitness of the issues for judicial decision. The “fitness factor” requires the court to consider (a) whether judicial intervention would inappropriately interfere with further administrative action and (b) whether the courts would benefit from further factual development of the issues presented. In the *Memorandum of Points and Authorities in Support for Summary Judgment*, the plaintiffs claimed that harm to “their cultural, scientific, recreational, conservation, professional and aesthetic interests in the dugong will only be redressed ‘if Department of Defense complies with the procedural and substantive requirements of the NHPA – and consequently takes the necessary steps to avoid and mitigate the mortality and serious injury of Okinawa Dugong.’”¹⁵⁶

The defense countered the claim by pointing out that the claim applies to future construction activity of FRF. The claim is not ripe or fit for review because “the court cannot gauge whether the construction project would have any impact on the dugong or whether mitigation measures could minimize or avoid harm.” The government of Japan intended to conduct a investigation of the seagrass and dugong habitat in its EIA at which time the plaintiffs, local officials, and the public and other interested parties would have an opportunity to comment. The defense suggested it would be entirely premature to issue a ruling based on the speculation of the effectiveness of possible mitigation measures.¹⁵⁷ The defense cites the *Ohio Forestry Ass’n v. Sierra Club* finding that a challenged to the Forest Service’s land resource

¹⁵⁶ Ibid.

¹⁵⁷ *Defendant’s Memorandum in Support of Cross-Motion for Summary Judgment*. . No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

management plan was not ripe where “immediate judicial review directed at the lawfulness of logging and clear-cutting could hinder agency efforts to refine its policies” through revision or implementation.¹⁵⁸

Judge Patel responded by observing that Department of Defense had, by approving the 2006 Roadmap plans for construction of a military facility engaged in a final agency action. She states:

The 2006 Roadmap is not an abstract proposal. It sets forth detailed specifications regarding the location and configuration of the replacement military facility. Two runways aligned in a V-shape will be built largely on landfill adjacent to the existing Camp Schwab, but will also extend more than a mile into the waters of Oura and Henoko Bays. Moreover, where a statute, like the NHPA, “simply guarantees a particular procedure, not a particular result,” a claim is ripe when the agency fails to comply with the procedure.¹⁵⁹

The court stated the Ohio Forestry case did not apply because the statute was results driven. Hence, Judge Patel concluded that plaintiffs’ claims are ripe for review.

The Act of State Doctrine Counsels Persuasively Against Judicial Review

In the *Second Amended Complaint* the plaintiffs asserted that the Act of State doctrine should not apply because the Department of Defense has been involved in the consultation process thus “the actions of the Government of Japan are not ‘unilateral’ foreign sovereign actions.”¹⁶⁰

¹⁵⁸ Ibid.

¹⁵⁹ *Memorandum and Order Regarding Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

¹⁶⁰ *Second Amended Complaint*. . No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, November 24, 2003).

In the 2004 Motion to Dismiss, defendants requested that the court apply the Act of State doctrine and decline to make a judgment on the initial claim because the court would be questioning the validity of acts by the sovereign state of Japan. In the Memorandum and Order Regarding the Motion to Dismiss in 2005, the court found insufficient evidence on the record to invoke the Act of State doctrine concluding that the relocation of Futenma ““does not currently describe an ‘official act of a foreign sovereign performed within its own territory, but rather a process intertwined with United States Department of Defense decision-making.’”¹⁶¹ The court did not disbar the defendants from renewing this contention at the appropriate time therefore the defense claimed the Act of State doctrine applies at this juncture in the legal proceedings.

Ministry of Defense officials, Foreign Minister Aso and Minister of State for Defense Nukaga, acted as authorized agents of Japan to carry out the nation’s security and defense treaty obligations with the United States. The Roadmap represents a bilateral agreement between the United States and Japan and its approval by the two governments underscores the highest-level diplomatic, political, and military nature of the their plan. This, in turn, reinforces the need for the federal courts to avoid undue interference in diplomatic and military decisions that are committed to the political branches of government. According to the attorneys for the defendants, an order from the court requiring The Department of Defense to conduct a survey of potential

¹⁶¹ *Memorandum and Order Regarding Motion to Dismiss*. . No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, March 2, 2007).

impacts on the dugong, would infringe on Japan's legal measures designed to protect and manage the nation's environment and its cultural resources.¹⁶²

Furthermore issuing a summary judgment in favor of the plaintiffs would be tantamount accusing the Japanese government of failing to protect its sovereign interests. Moreover, Japan would be regarded as both a necessary party and an indispensable party in the *Dugong v. Gates lawsuit*. Since the Government of Japan is entitled to sovereign immunity, it is not possible to involuntarily implicate this government in this litigation. As such, the court was required to dismiss the action.

In the courts evaluation, Judge Patel reiterated that it was determined previously that the planning process for the FRF was a cooperative, bilateral activity that was to satisfy the military needs of the United States. The court did note, however, that further discovery would assist in resolving future disputed issues questioning the role of the Department of Defense in the planning of MCAS Futenma. Defense instigated the Futenma relocation and established the requirements for fulfilling that relocation. Additional discovery has indeed revealed the scope of the Department of Defense's involvement in locating the replacement air station.¹⁶³

According to the Administrative Records provided by the Department of Defense, Japan's responsibility for selecting the site was "constrained by operational requirements" and the location was "chosen and determined by the United States

¹⁶² *Defendant's Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

¹⁶³ *Memorandum and Order Regarding Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

Department of Defense.” In fact, the Government of Japan “preferred a plan that utilized the land area of Camp Schwab, rather than placing the facility into the waters of Henoko Bay.” Ultimately the facility was planned on the proposed off-shore location “because the United States preferred that location for operational reasons.”¹⁶⁴

Summary Judgment as Matter of Law

In the *Memorandum and Order Regarding Motion to Dismiss*, the court ruled that the NHPA applies to this case, based on its review of the SBF proposal then under consideration. In September 2005, however, the SBF was withdrawn. A new set facts regarding the current FRF proposal was now before the court. The defendants requested that the court consider all the new facts and revisit the previous ruling regarding the applicability of the NHPA in connection with the *Defendants Memorandum in Support of Cross-Motions for Summary Judgment*.¹⁶⁵

The defense contended that the Department of Defense did indeed comply with NHPA Section 402 regarding the 2006 Roadmap contrary to the plaintiffs claims in the Second Amended Complaint. First, the plaintiffs did not prove that the Department of Defense “acted in an arbitrary and capricious manner by approving the 2006 Roadmap” nor did the plaintiff prove that the defendants “otherwise acted in violation of NHPA [Section 402].” The Administrative Record demonstrated that studies and considerations were given to the Okinawa dugong and its habitat both

¹⁶⁴ Ibid.

¹⁶⁵ *Defendant’s Memorandum in Support of Cross-Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

before and during the bilateral negotiation process that resulted in the 2006 Roadmap.¹⁶⁶

Furthermore, the Department of Defense had adopted appropriate procedures to comply with the NHPA by taking into account the potential impacts on the dugong. For example the Department of Defense did apply the Overseas Environmental Baseline Guidance Document (OEBGD) during planning.¹⁶⁷ The OEBGD, a set of objective standards and management practices designed to protect human health and the environment by providing a minimum standard applicable to overseas Department of Defense installations for protecting human health and the environment.¹⁶⁸ Many of the criteria used in the OEBGD satisfy NHPA requirements as the NHPA is a procedural statute, requiring agencies to “stop, look, and listen.” Since there are no specific standards outlined for compliance with Section 402, the OEBGD or other studies and assessments jointly conducted by the Department of Defense and Government of Japan should satisfy the compliance requirements.¹⁶⁹

Judge Patel again sided with the plaintiffs as she concluded that the court’s review is proper and that the NHPA is applicable to the facts of this case, that DOD has violated the NHPA by failing to “take into account” the effect of their undertaking

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Lieutenant Colonel John F. McCune, J.D., LL.M. 2008. “Environmental Law at Overseas Locations.” 2008 Environmental, Safety, and Occupational Health (ESOH) Training Symposium. (Reno, Nevada: March 3-7).

¹⁶⁹ *Defendant’s Memorandum in Support of Cross-Motion for Summary Judgment*. . No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, June 29, 2007).

on the Okinawa dugong. The process of taking into account must at a minimum, include: (1) an identification of cultural resources in need of protection, (2) information pertaining to the identified properties, (3) an identification of adverse effects on cultural properties, if any, and (4) a plan to avoid or mitigate adverse effects.¹⁷⁰ The Department of Defense has not met these requirements in full. While the agency has gathered scientific evidence about the dugong behavior, migratory patterns, and feeding habits, it has not taken measures to mitigate the effects the base relocation will have on the cultural aspects of the dugong as they relate to Henoko Bay.¹⁷¹

In the end Judge Patel granted the plaintiffs motion for a summary judgment and ordered the Department of Defense to comply with Section 402 of the NHPA.

Conclusion

The judge determined Department of Defense failed to comply with Section 402 under each of the legal standards necessary to for the NHPA to apply. Procedurally, the international statue held throughout the lawsuit even though the base will still be built.

In granting the plaintiffs motion Judge Patel formally concluded *Dugong v. Gates*. Because the judged ordered the defendants to furnish, within ninety days,

¹⁷⁰ *Memorandum and Order Regarding Motion for Summary Judgment*. No. C-03-4350-MHP. (U.S. District Court Northern District of California San Francisco Division, January 24, 2008).

¹⁷¹ *Ibid.*

documentation outlining its plan for compliance, including a statement of the impacts of the FRF on the dugong the final opinion has not yet been issued. The final opinion will likely be issued before the end of 2009.

CONCLUSION

In the Memorandum and Order Regarding the Motion for Summary Judgment, Judge Patel has ordered the Department of Defense to report the findings regarding the determination of adverse effects and subsequent mitigation actions to the court. The findings reports are expected in the next few months. The Environmental Impact Assessment conducted by the Japanese Government was recently released and might yield even more information impacting the dugong and the impacts of the relocation of MCAS Futenma on Henoko Bay. Still, the final outcome is unknown. The discussion and speculation over the implications of *Dugong v. Gates* has generated a significant amount of literature on which preservationists, environmentalists, social and political activists, Japanese and United States Governments, and the people of Okinawa can continue to explore. Despite the unknown outcome, there are several conclusions that can be made that address the questions raised throughout this work.

The Practical Application of the Law

Throughout the lawsuit, the judge, plaintiffs and defendants argued over when and how to apply Section 402. There was no guiding precedent or regulation by which to refer so the questions over who can bring a suit and the statutes of limitations in bringing such a lawsuit were in large part decided for the first time in *Dugong v. Gates*. It was in the legal proceeding of case that many of the questions regarding the practical application of Section 402 were determined.

In regard to who can bring a case, when, and under which conditions was explored in the argumentation this work deemed the “you’ve got the wrong government argument.” The argument resulted in Judge Patel adopting the ACHPH’s Section 106 Code of Federal Regulations to guide the Section 402 process. While this worked in

favor of the plaintiffs in the *Dugong v. Gates* case, there are clearly problems with using the regulations in future cases. The mere fact that the regulations reference only the domestic statute, and thus domestic definitions of “undertakings,” does limit the idea of a federal undertaking for the purposes of Section 402. The introduction of the Act of State Doctrine into the defendant’s argument rightly questions the responsibilities of a federal agency when working with another sovereign state. There is a great need for a separate set of regulations, specific to Section 402.

Another issue regarding the practical application was that of legal standing in the international context. First, jurisdiction involving living creatures such as was the case in *Dugong v. Gates* has yet to find a common ground in the US court system. Evidenced by the dugong case and *Cetacean Community v. Bush*, standing made on behalf animals will not hold under Article III of the Constitution. Additionally, injury of individual parties is weighed against the collective interests of public good as was demonstrated in the case following-up *The Centacean Community v. Bush*. In *National Resources Defense Council v. Winter*, the court ruled that benefits conferred to U.S. citizens by Navy training exercises trumped the interests of protecting wildlife in the sea.¹⁷² If a cultural resource a living creature, the adverse effects of an agency action must adversely affect humans in such a way that a human with legal standing can seek relief. In the U.S. where animals are not listed on the National Register this would not be an issue, however because other countries do list living creatures on their registers, injury to a human must also be established.

Somewhat related is the issue of reconciling difference in cultural resource preservation practices between other countries. The U.S. court hearing *Dugong v. Gates* reaffirmed deference to the nation of Japan’s ideas of cultural property. Judge

¹⁷² *National Resources Defense Council v. Winter*. No. CV 05-7513 FMC. (C.D. Cal. filed Oct. 19, 2005).

Patel's reading of the Department of Defense's argument that the Okinawa dugong is a "property" afforded protection under NHPA sets up precedent that animate objects might be eligible for the United States National Register. Furthermore, by Patel denying defense's argument that the Japanese register and United States Register are not the same, the court set a precedent that supports a broad interpretation of what is considered an "equivalent to the United States National Register" under Section 402 of NHPA. The equivalence argument employed by the defense did not successfully anticipate the specific facts of the Dugong suit, namely Patel's deference to Japanese ideas of property. In fact, the case law referenced in the *Defendant's Motion to Dismiss* underscored the notion that definitions of non-traditional property are gaining widespread acceptance. As shown Chapter 4, protection of cultural resources, whether it be a tree or a wild animal, if proven culturally significant, will liberally be afforded "stop, look, and listen" review processes and consultation in the event an undertaking has occurred.¹⁷³

This is certainly not without challenge, particularly because living creatures move unpredictably. Interestingly, in the debate over the dugong's eligibility as an historic property, the judge noted in the *Memorandum and Order Regarding the Motion to Dismiss* the movable nature of the dugong and how it raised additional issues relating to mitigation. Living cultural property poses unique protection problems that underscore the need for guiding principles relating to cultural resources that move. The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris in 1978, issued a set of recommendations related to movable cultural property noting that this type of property needs safeguarding just as

¹⁷³ While the process will be liberally and generally upheld, the ultimate outcome may not be affected, which is an entirely different discussion.

does immovable property.¹⁷⁴ Of relevance to the dugong case are the following recommendations:

- (a) 'movable cultural property' shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including items in the following categories: ...
 - (xi) zoological, botanical and geological specimens;
- (b) 'protection' shall be taken to mean the prevention and coverage of risks as defined below:
 - (i) 'prevention of risks' means all the measures required, within a comprehensive protection system, to safeguard movable cultural property from every risk to which such property may be exposed, including those resulting from armed conflict, riots or other public disorders;
 - (ii) 'risk coverage' means the guarantee of indemnification in the case of damage to, deterioration, alteration or loss of movable cultural property resulting from any risk whatsoever, including risks incurred as a result of armed conflict, riots or other public disorders whether such coverage is effected through a system of governmental guarantees and indemnities, through the partial assumption of the risks by the State under a deductible or excess loss arrangement, through commercial or national insurance or through mutual insurance arrangements.

As the Department of Defense moves forward in the NHPA process its proposed treatment of movable property may provide insight into how recommendations and guiding principles work in actuality.

In the end, the strength of the Section 402 is held in the interpretation of the intentions of Congress to protect historic resources domestically and abroad. The judge was able to clearly cite and connect the intention of the law to the facts in *Dugong v. Gates*. The statutes are clearly written and logical. The weakness of Section 402 resides in the fragility of the factual interpretation of each individual case.

¹⁷⁴ "Recommendation for the Protection of Movable Cultural Property." The General Conference of the United Nations Educational, Scientific and Cultural Organization. (UNESCO: Paris, 1978).

If *Dugong v. Gates* was heard in a less sympathetic court, the outcome of the lawsuit might be very different. For this reason, the precedent set by Judge Patel is of critical importance. The more precedent working in favor of NHPA, the more likely future lawsuits involving the law will yield successful outcomes.

The Political and Social Implications of Dugong v. Gates

The vast majority of human interaction is accompanied by social or political views which impact the way in which people work together. Varying interests, social, political, or cultural, fact into how people make decisions as to what courses of action are best in a certain situation. The relocation of MCAS Futenma is no exception. There were conflicting ideas as to what was the best course of action for Okinawans, the Government of Japan, and the United States military. The more politically powerful, the Government of Japan and the Department of Defense, acted with their interests in mind. Seemingly powerless, Okinawans were searching for a greater voice in the MCAS planning processes and they found it in the National Historic Preservation Act,

While the cultural significance of the dugong is undeniable, the dugong is a marginal entity in the long legal proceedings as well as the overall *Dugong v. Gates* story. Many of the documentation and testimony upon which the case was based detailed the planning of a military base and how the planners failed to consider Okinawan concerns of environment, social, economic, political as well as physical and cultural. In short, the dugong was overshadowed by a story of social and political oppression of Okinawans. In such a case, the social and political underpinnings of the lawsuit affect the way the law is applied.

The Department of Defense has had a presence in Okinawa for over fifty years and it would be unfair to assert that in that time no measures to improve the agencies relations with the Okinawan people regarding culture have occurred. It is fair to claim, however, the improvements are not proportional to the negative impacts the military has had on the island's cultural traditions. After decades of inequitable relations, Okinawans were looking for a way to exercise power.

Granted, the negative effects of the military on traditional cultural practices in Okinawa are not intentional, they are however a result of a long standing process of marginalization of local interests in order to fulfill the U.S. military mission. The mission in Okinawa, which is part of Pacific Command, is:

U.S. Pacific Command protects and defends, in concert with other U.S. Government agencies, the territory of the United States, its people, and its interests. With allies and partners, U.S. Pacific Command is committed to enhancing stability in the Asia-Pacific region by promoting security cooperation, encouraging peaceful development, responding to contingencies, deterring aggression, and, when necessary, fighting to win.¹⁷⁵

There is often an assumption that the United States Department of Defense efforts on Okinawa are only concerned with Okinawa when directives dictate so and the relationship between the United States and Japan depends on action. It seem then that a legal battle is a way to exercise some power over the United States military. Yet, as discussed, procedural law does not stop a federal agency or party receiving federal funds from completing a project. If that party follows the NHPA procedure and satisfies all legal requirement outlined in the law, the final actions do not have to protect cultural resources at all. Ultimate protection of cultural property is not the intention of the law. To a federal agency, compliance becomes a nuisance and those

¹⁷⁵ "Mission Statement." United States Pacific Command. (Washington D.C., n.d.) <http://www.pacom.mil/about/mvp-statements.shtml>. (accessed July 27, 2009).

demanding compliance become viewed as meddlesome as was the case in the 1967 Snail Darter controversy in which the discovery of a small fish in the area was viewed as a way to stop the Tennessee Valley Authority from constructing the Tellico Dam. Ultimately, the dam was built, but the project was held up by several years while a legal battle that was more about politics played out on the environmental stage.¹⁷⁶ The more recent case of the Delta Smelt in California suggests this legal strategy is commonplace. This is not a healthy or productive way to achieve better preservation. NHPA is not designed to be a mechanism for political sparring but is one of the few mechanisms that allows for voice through consultation.

The *Dugong v. Gates* case seems to be complex and extremely nuanced. In the six years multitude of people became involved and their interests included health, safety and welfare of the Okinawan people; economic independence from Japan and the U.S. military bases; environmental sustainability; and the preservation of cultural heritage. International cultural preservation is not simple and it does not take place in vacuum. It is difficult, if not impossible to divorce the social and political leanings of interested people or governments from the legal process of protecting cultural resources but preservation law must withstand the influence of such leanings in order to consistently achieve intended results.

Continued Exploration

There are some arguments and information that were not covered in the proceeding chapters. How this precedent might affect the preservation policy of the Department of the Defense is beyond the scope of this work. Though the conclusion

¹⁷⁶ Valerie Jan Gunter and J. Stephen Kroll-Smith. *Volatile Places: A Sociology of Communities and Environmental Controversies*. (Thousand Oaks, CA: Pine Forge Press, 2007), 196-97.

does offer suggestions related to improving compliance with National Historic Preservation Act obligations, designing prescriptive policy is also left from here.

There is a great deal more work to be done in examining the effects this case may have on the anti-base movement as the construction plans move forward. This would require a more in-depth examination of the triangular and asymmetrical political, social and economic structure of the relationships between the U.S., Japan and Okinawa and the history of protest in Okinawa. There is a substantial amount of literature on this subject, and volumes could be added should one wish to explore, for example, *Dugong v. Gates* as a form of Okinawan protest and resistance -- including ways in which islanders have claimed the dugong as an iconographic representation of their current power struggles and developed a more contemporary historical significance related to this animal.¹⁷⁷

Finally, it is quite clear that the Department of Defense did not intentionally neglect Section 402 obligations; this responsibility just seems not to have been on the agency's radar. The Department of Defense is the largest and most far-reaching federal agency. In order to function quickly and efficiently, operational directives are issued from the top of the organization down. If there is not a top-down directive for action, there will likely be no action as was the case in *Dugong v. Gates*. To explore cultural resource directives already instituted with the Department of Defense may provide a jumping off point which the Department of Defense could integrate into its cultural resource practices abroad. For example, the Department of Defense might solicit the help of historic preservation professionals who can demonstrate that

¹⁷⁷ Hook and Siddle, eds., 28-29.

A wonderful resource on these matters, the editors, both faculty in the School of East Asian Studies at the University of Sheffield, have put together a two-part book analyzing Japanese social and economic framework the effects on identity in Okinawa. This book is one component of a larger series evaluating socio-political issues in Japan.

protection of cultural resources and natural resources, domestically and internationally, is as critically important to the security and well-being of the United States of America as any foreign military facility.

There are many examples of agency-wide preservation programs, recognition programs and collaborative efforts with other federal entities that work to achieve better preservation practices on a federal level. The scope of this work did not allow for the exploration of institutional preservation policy of the Department of Defense but the subject is ripe for further inquiry.

Summary

To summarize, the lawsuit was by all accounts, tremendous success and a pivotal win for preservation. There were an extraordinary number of people and interests at work to bring the lawsuit, and the execution of their work resulted in an order for the Department of Defense to comply with NHPA in an extraterritorial setting. In bringing a suit under NHPA, a law that is procedural in nature, the plaintiffs could not rightfully hope to stop the construction of the FRF yet through the successful argumentation made in the case; the people of Okinawa were allowed voice in the actions that will affect the people and resources of region. Also, the Department of Defense is more aware of its responsibility to consider the cultural implications of their actions of the people and environments of its host nations.

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