Case No. 15-15695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, TURTLE ISLAND RESTORATION NETWORK, JAPAN ENVIRONMENTAL LAWYERS FEDERATION, SAVE THE DUGONG FOUNDATION, ANNA SHIMABUKURO, TAKUMA HIGASHIONNA, and YOSHIKAZU MAKISHI,

Plaintiffs-Appellants,
v.
ASHTON CARTER, in his official capacity as Secretary of Defense; and the UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Trust for Historic Preservation states that it is a not-for-profit organization and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.[1] The National Trust's interests in this appeal are set forth in its Unopposed Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiffs-Appellants.

[1] Pursuant to Fed. R. App. P. 29(c)(5), the National Trust certifies that its counsel authored this *amicus curiae* brief in its entirety. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The district court improperly ignored applicable law on the issue of standing and "redressability" in cases arising under the National Historic Preservation Act ("NHPA"). Among other reasons discussed in Appellants' Opening Brief [Dkt. Entry 17], the district court erred by denying standing to Plaintiffs based on the unfounded assumption that the plans by the Department of Defense to construct and operate an expanded Marine Corps air base in Okinawa, Japan were unalterable. To the contrary, compliance with Section 402 of the National Historic Preservation Act ("NHPA") has the potential to redress the Plaintiffs' injuries, because it has the potential to result in reducing or mitigating harm to the Okinawa dugong, an imperiled cultural resource. As such, the district court's ruling is wrong as a matter of law, and is contradicted by precedent from the U.S. Supreme Court and a number of federal appellate courts.

By setting an improperly high bar for standing, the district court's decision, if adopted by other courts, has the potential to preclude or undermine judicial enforcement of the NHPA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), even when violations of the law are clear. The district court adhered to a flawed assumption that, since the NHPA review process has no *guarantee* of protecting a threatened resource, the injury is not redressable. This is inconsistent with accepted case law. Courts have long held that it is inappropriate

to pre-judge the results of the NHPA review process, which depends on consultation to develop alternatives and modifications to the project that could avoid, minimize, or mitigate adverse effects.[2] By ignoring the way Congress intended the NHPA to operate, the district court disregarded the important function served by this law and undermined congressional intent. Furthermore, the district court's decision is inconsistent with reported decisions involving standing to sue and redressability under the NHPA. For these reasons, this Court should reverse the district court's decision.

THE DUGONG AND THE NATIONAL HISTORIC PRESERVATION ACT

The NHPA, which Congress passed in 1966, is the leading federal historic preservation law in the United States. Among other things, Section 106 of the NHPA requires that federal agencies "take into account" the effects of their undertakings on properties listed in or determined eligible for listing in the National Register of Historic Places, and to find ways to avoid, minimize, or mitigate adverse effects on those properties. 54 U.S.C. § 306108; 36 C.F.R. Part 800.

[2] In addition, the district court's assumption that the undertaking would not be altered under any circumstances has been called into question by the recent action of the Okinawa Governor revoking the necessary offshore landfill permit. *See* Appellants' Opening Brief [DktEntry 17] at 11 & n.5.

In addition, outside the United States, federal agencies must also "take into account" the effects of their undertakings "for purposes of avoiding or mitigating any adverse effects" to historic resources inscribed on the World Heritage List or under another country's equivalent of the National Register of Historic Places. 54 U.S.C. § 307101(e).[3] Section 402 of the NHPA provides:

> Prior to the approval of any undertaking outside the United States that may directly and adversely affect a property that 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 the undertaking shall take into account the effect of the undertaking on the property for purposes of avoiding or mitigating any adverse effect.

Id. (emphasis added).

Here, it is the law of the case that the Okinawa dugong qualifies as "an animal protected for cultural, historical reasons under a foreign country's equivalent statutory scheme for cultural protection." *Dugong v. Rumsfeld*, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005) (determining applicability of the NHPA and rejecting the Act of State doctrine as a litigation bar).[4] In addition, the district court

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[3] For a more complete discussion of the origins of Section 402, which was enacted as part of the 1980 amendments to the NHPA, in order to address the United States' participation in the World Heritage Convention, see Blanchard, Guy, "*National Historic Preservation Act § 402: Inception, Interpretation and Future Use*" (Masters Thesis, Vanderbilt University, 2006), *available at* https://getd.libs.uga.edu/pdfs/blanchard_guy_v_201105_mhp.pdf.

[4] As discussed in the Appellants' brief, the dugong have long been revered by native Okinawans as a significant part of their culture and history. In recognition of their significance, Japan has listed the Okinawa dugong since 1955 as a Natural Monument under Japan's Cultural Properties Protection Law, an equivalent of the National Register of Historic Places. Since 2007, the Japanese Ministry of

has already determined that the current adjudication is not barred by finality, standing, or ripeness grounds; that the federal agency's proposed expansion of its military base constituted an undertaking; and that the agency failed to "take into account" the effects of the proposed air base expansion on the dugong. *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1105 (N.D. Cal. 2008).[5] For the district court to now hold that the plaintiffs lack standing to sue because the NHPA cannot dictate the final outcome of the project is inconsistent with applicable law.

ARGUMENT

The district court ignored an entire body of relevant case law that governs the duties of federal agencies to comply with the procedural requirements of the National Historic Preservation Act. If the district court had considered this precedent, we believe the court would have determined that the plaintiffs *do* have

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Environment has listed the Okinawa dugong as "critically endangered"—the most severely threatened category before "extinct." Henoko Bay, adjacent to Camp Schwab, is the primary habitat and feeding grounds for a small dugong population—possibly as few as 3 to 10—and is the site where a new military base would be built. Preservation of the dugong depends on maintenance of this habitat. Nevertheless, the Department of Defense issued a finding of "no adverse effect."

[5] The U.S. District Court held that the "take into account" process under Section 402 should "follow the basic outline of [Section 106 of the NHPA], which governs the process for taking into account the effects of agency actions on properties listed in the National Register of Historic Places. 543 F. Supp. 2d at 1105. The court explained that, "at a minimum, [the Section 402] 'take into account' process must include" (1) identification of the protected property; (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property; (3) a determination as to whether there will be adverse effects; and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects." *Id.* at 1104.

standing and that their injuries are redressable. This Court should reverse the district court's decision by recognizing the redressability of the plaintiffs' injuries, and thus their standing to bring this action.

A number of key cases that have specifically dealt with the redressability standard under the NHPA are instructive.

First, in *Tyler v. Cuomo*—decided by this Court—a group of historic homeowners sued HUD over the construction of a housing project, alleging violations of specific mitigation commitments under the NHPA and NEPA, which required the City of San Francisco to consult with interested parties to "take into account" their objections to the development. 236 F.3d 1124 (9th Cir. 2000). The district court dismissed the lawsuit, finding that the plaintiffs lacked standing. With regard to redressability, the district court assumed that there was "no reason to believe" that requiring the City to honor the consultation requirements would be likely to result in any changes to the project. *Id.* at 1133. As this Court recognized, however, it was improper for the district court to "pre-judge[] the outcome of consultation." *Id.* Accordingly, this Court reversed, and held that the plaintiffs did have standing to sue, because their injuries *could* be redressed.

In upholding the plaintiffs' standing in *Tyler v. Cuomo*, this Court relied strongly on *Vieux Carre Property Owners, Residents & Assoc's, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991), which involved a challenge to the Army Corps of Engineers' approval of a riverside park as part of a new aquarium complex immediately adjacent to New Orleans' historic French Quarter, on the grounds that the Army Corps failed to comply with the NHPA. The Army Corps argued that the

case was moot because the project had been completed and nothing would be changed. Even though the *Vieux Carre* opinion was issued in the context of a mootness argument rather than redressability for purposes of standing, this Court felt that the Fifth Circuit's reasoning in *Vieux Carre* was directly relevant and "instructive":

> At this point . . . it is impossible for us to known with any degree of certainty just what the end result of the NHPA process would be. For example, NHPA review could result in a determination . . . that at this late date nothing can be done, or should be done, to mitigate the adverse effects of the park project on the historic properties. . . . We find it inappropriate to prejudge those results as being limited to the extremes of either maintaining the status quo or totally demolishing the park. . . .
> Therefore, *a district should not pre-judge the result of the NHPA process by concluding that no relief is possible*. . . . Even though, in this NHPA case, [the plaintiffs'] possible relief may appear to some to be irrelevant, trivial, or prohibitively expensive, a district court should beware of shortcutting the process which has been committed in the first instance to the responsible federal agency.

Id. at 1446-47, *quoted in Tyler v. Cuomo,* 236 F.3d at 1134 (emphasis added).

More recently, in *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008), the U.S. Court of Appeals for the D.C. Circuit had the opportunity to consider standing under both the NHPA and NEPA, in the context of an army base closure. In that case, the court of appeals rejected the district court's conclusion that the plaintiffs lacked standing to sue because they could not "force" the Army to change its decision to close Fort Ritchie, an army base in Maryland, even if the Army prepared an Environmental Impact Statement. *Id.* at 1314-15. As the D.C. Circuit explained:

> We think the court misperceived the nature of plaintiffs' claim. The key word [from] the district court's opinion is "force." Preparation of an [EIS] will never "force" an agency to change the course of action it proposes. The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed. Countless lawsuits in which this court and others upheld a plaintiff's standing were predicated on that understanding. . . . The Supreme Court recognizes as much, as do we.

Id. at 1315 (citations omitted).

For similar reasons the *Lemon* court ruled that the plaintiffs had standing to sue under the NHPA because the Army failed to properly consider the effects of its decision to close an Army base that contained historic properties. In noting the similarities between NEPA's EIS requirements and the requirement under the NHPA that the Army "take into account" the effects of its undertaking, the court reasoned that, if the Army had complied with the law, it might have altered its decision, or modified the terms of the land transfer agreement in a way that would have ameliorated what the plaintiffs viewed as harm to a historic site that they visited and enjoyed. *Id.* at 1315. Therefore, the court of appeals reversed the district court's dismissal for lack of standing and remanded the case for further proceedings.[6]

In addition to *Lemon* and the other D.C. Circuit cases, this Court should find

[6] *See also Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014) (reversing the district court's denial of standing to plaintiffs, including the National Trust, challenging the unlawful delisting of the Blair Mountain Battlefield in West Virginia from the National Register of Historic Places); *City of Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741 (D.C. Cir. 2012) (reversing the district court's denial of standing to the City and others in their efforts to protect and acquire the historic Harsimus Embankment elevated railroad corridor).

instructive the decision from the U.S. Court of Appeals for the Fourth Circuit in *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001). The *Pye* case involved a lawsuit against the Army Corps for permitting a road and small culvert to be constructed on a plantation in Charleston County, South Carolina, and in close proximity to an historic African American cemetery that would likely have been exposed to an increased likelihood of trespassing, damage, and looting. *Id.* at 467. The Army Corps approved the permit after issuing a finding of "no effect." The district court dismissed the lawsuit for lack of standing. On appeal, however, the court held that adjacent property owners did have standing to sue to require the Army Corps to comply with the Section 106 review process under the NHPA. The Fourth Circuit explained that refusing to recognize standing would render the NHPA "merely a 'procedural calisthenic.' We decline to so hold." *Id.* at 468.[7]

The *Pye* court also found for plaintiffs on the issue of redressability, noting that plaintiffs need only show "that there is a procedural remedy by which the plaintiffs' concerns may be aired before the agency." *Id* at 471. In reaching its decision, the Fourth Circuit noted that the plaintiffs "need not show that the result of the agency's deliberations will be different if the statutory procedure is followed." *Id.* at 471 n.7 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998)) (emphasis added).

The cases cited above are directly on point. They are factually similar in

[7] On remand, the Charleston District of the Army Corps initiated Section 106 consultation, and ultimately revoked the permit and required the applicant to remove the work that had previously been installed when the permit had been in place.

terms of the nature of the Appellants' claims, as well as the flawed reasoning used by the district courts. In each case, the courts of appeal rejected any argument from the district courts that injuries arising from violations of the NHPA are not redressable merely because the protections afforded by the NHPA (or NEPA) are procedural in nature. If the district court had considered these cases, we believe the court would have reached the opposite result and found that the Appellants had standing to enforce procedural compliance with NHPA. Likewise, the district court would have concluded that the Appellants' injuries are redressable by requiring the Department of Defense to follow the NHPA as Congress intended it to do.

Even though the Appellants cannot control the outcome of the NHPA review process, there is always the possibility that consultation could alter the project in a way that could reduce harm to the dugong. This is particularly true with respect to operational plans such as aircraft flight paths, nighttime illumination, and protocols for controlling discharge into Henoko Bay, as Appellants point out. In this case, however, by issuing a finding of "no adverse effect" that lacks any basis in fact, the Department failed to take into account—as required by Section 402—any of the harmful effects to the Okinawa dugong that its military base expansion will have. Because of this, the Department failed to consider any variation in its plans that might reduce adverse effects to an undeniably important cultural property in Japan.

CONCLUSION

The district court's decision is inconsistent with settled law on the issue of standing and redressability for procedural harms in cases arising under the National Historic Preservation Act. The NHPA—contrary to the district court's erroneous

assertion that it is merely hortatory—was intended by Congress to provide a public process by which federal agencies take into account the effects of their undertakings on historic resources that are listed in or determined eligible for listing in the National Register of Historic Places (Section 106) or another country's equivalent inventory (Section 402). And to the extent that adverse effects on those resources are identified, then federal agencies are required to consider ways to avoid, minimize, or mitigate those harms. 36 C.F.R. §§ 800.3-800.6.

In this case, the fact that the Appellants may ultimately be unsuccessful in achieving a relocation of the proposed air base expansion is irrelevant. To the contrary, the possibility that the Department of Defense through its compliance with the NHPA might adjust its plans in a way that could avoid or mitigate harm to the Okinawa dugong is enough to satisfy this Court's standing requirements as set forth in the cases discussed above. Therefore, this Court should reverse the decision of the district court and remand the case for a determination on the merits.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 2,824 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: December 11, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 11, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 11, 2015

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