

No. 15-15695

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,

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, No. 3:03-cv-04350
Honorable Edward M. Chen, District Judge

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GLOSSARY

APA	Administrative Procedure Act
ER	Excerpts of Record
CBD	Appellants Center for Biological Diversity <i>et al.</i>
EIA	Environmental Impact Assessment
ESA	Endangered Species Act
FISA	Foreign Intelligence Surveillance Act
FRF	Futenma Replacement Facility
MCAS	Marine Corps Air Station
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Security Treaty	Treaty of Mutual Cooperation and Security Between the United States of America and Japan
SER	Supplemental Excerpts of Record
SOFA	Status of Forces Agreement (Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America Regarding Facilities and Areas and the Status of United States Forces in Japan)

STATEMENT OF JURISDICTION

Plaintiffs-Appellants Center for Biological Diversity *et al.* (collectively “CBD”) alleged jurisdiction in the district court under 28 U.S.C. § 1331 (federal question) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act). Excerpts of Record (“ER”) 46.

The district court entered final judgment dismissing for lack of subject matter jurisdiction on February 13, 2015. ER 5. CBD filed its notice of appeal on April 9, 2015, within the 60 days required by Fed. R. App. P. 4(a)(1). ER 2. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Courts lack jurisdiction to decide political questions, which include issues committed by the Constitution to the political branches of government (such as decisions relating to foreign policy and national defense), and issues where there are no discoverable and manageable standards for a court to apply. In this case, CBD challenges actions of the Secretary of Defense in connection with a decision by the United States and the Government of Japan to replace an existing overseas military base with a new base. The new base is being built by the Government of Japan, at Japanese expense, on sovereign Japanese territory, for use by the United

States under longstanding agreements between the two countries. Do CBD's claims raise non-justiciable political questions?

II. To establish Article III standing, a plaintiff must demonstrate (among other things) that her injury is likely to be redressed by a favorable decision. Assuming arguendo that CBD's claims for declaratory relief are not barred by the political question doctrine, has CBD met its burden to demonstrate standing, where its assertions of redressability are unsupported and speculative?

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of the joint efforts of the United States and the Government of Japan, under a series of bilateral agreements and commitments, to build a new Marine Corps air base (the Futenma Replacement Facility or "FRF") to replace the existing Marine Corps Air Station Futenma in Okinawa, Japan. The Government of Japan has determined that the existing base has become incompatible with its surroundings due to significant urbanization and population growth since the base was first established after World War II. As a replacement for the existing base, the new base is essential to sustain U.S. forces in Japan in their mission to contribute to the peace and security in the Pacific region.

Accordingly, completion of the FRF has long been a matter of great importance to both the United States and the Government of Japan.

CBD's original complaint alleged that the Secretary of Defense and Department of Defense (collectively "the Secretary") violated Section 402 of the National Historic Preservation Act, 54 U.S.C. § 300101 ("NHPA"), by failing to take into account the effects of the FRF on the Okinawa dugong, a manatee-like marine mammal that is designated a "cultural property" under Japanese law. In 2008, the district court held, among other things, that Section 402 applied and that the Secretary was obliged to undertake an NHPA analysis. The court declined to issue a final remand order, however, and held the case in abeyance pending further action by the Secretary.

In response to the court's 2008 decision, the United States Department of the Navy (on behalf of the Secretary) undertook an NHPA analysis. That analysis included the commissioning of an independent study on the potential effects of the FRF on the Okinawa dugong, active engagement with the Government of Japan, and review of multiple biological, environmental, and historical studies relating to the impact on the dugong. The Navy considered the Environmental Impact Assessment ("EIA") prepared under Japanese law by the Government of Japan, the comments collected by the Government of Japan during its EIA process,

and all the materials provided by CBD in the course of the litigation, including the declaration of CBD's expert, Dr. Hines. The Navy also consulted with sixteen experts on the dugong drawn from the fields of archeology, biology, history, and folkloric and traditional knowledge, who were chosen after consideration of CBD's list of recommended experts and interested parties. As part of its NHPA analysis, the Navy recommended mitigation measures for the Government of Japan to consider during its design and construction of the FRF. The Navy also identified mitigation measures it would consider in operating the completed FRF. The Navy concluded its analysis and issued its NHPA Findings in April 2014, finding that FRF will have no adverse impact on the dugong. The Government of Japan reached the same conclusion in its EIA.

CBD then filed its Supplemental Complaint challenging the adequacy of the Navy's NHPA analysis. The Supplemental Complaint sought declaratory relief and an injunction barring the Secretary from undertaking "any activities in furtherance of the FRF project, including granting permits or approvals" allowing the Government of Japan's contractors to enter Camp Schwab – the existing U.S. base where Japan is building the FRF – until the Secretary "complies with" NHPA § 402.

The district court dismissed the action. The court held that CBD's claim for an injunction raised non-justiciable political questions. And while the court determined that CBD's claims for declaratory relief did not raise political questions, it concluded that CBD lacked standing to raise those claims because the declaratory relief CBD sought would not redress CBD's alleged injuries. As we demonstrate below, the court's determinations that CBD's claim for injunctive relief was barred by the political question doctrine and that CBD lacked standing for its claims for declaratory relief are correct. In addition (and contrary to the district court's finding), CBD's claims for declaratory relief raise non-justiciable political questions. Accordingly, the judgment of dismissal should be affirmed.

B. Legal and Factual Background

1. Post-War Administration of Okinawa

The United States has maintained military bases on Okinawa, Japan – including Marine Corps Air Station Futenma (“MCAS Futenma”) – since the end of World War II. ER 9, *Center for Biological Diversity v. Hagel*, 80 F. Supp. 3d 991, 995 (N.D. Cal. 2015). From 1945 through 1971, the United States administered Okinawa pursuant to the Treaty of Peace with Japan, signed at San Francisco on September 8, 1951, 3 U.S.T. 3169 (also known as the San Francisco Peace Treaty), while Japan retained residual sovereignty.

The United States relinquished its post-war administration of Okinawa and restored the island to Japanese administration in 1972, pursuant to the Agreement Between the United States of America and Japan Concerning the Ryukyu Islands and the Daito Islands, signed at Washington and Tokyo on June 17, 1971, 23 U.S.T. 446, (also known as the Okinawa Reversion Treaty). That treaty provides for the continued use of “facilities and areas” in the islands by the United States in accordance with two other treaties: the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, signed at Washington on January 19, 1960, 11 U.S.T. 1632 (the “Security Treaty”), and the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America Regarding Facilities and Areas and the Status of United States Forces in Japan, signed at Washington on January 19, 1960, 11 U.S.T. 1652 (the “Status of Forces Agreement” or “SOFA”).

2. The Security Treaty, the Status of Forces Agreement, and the Japan-U.S. Security Consultative Committee

The Security Treaty has “lasted longer than any other alliance between two great powers since the 1648 Peace of Westphalia.” George R. Packer, *The United States-Japan Security Treaty at 50*, Foreign Affairs, Mar./Apr. 2010. Among other things, the Security Treaty provides that “[e]ach Party recognizes that an armed attack against either Party in the

territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.” Security Treaty, art. V, 11 U.S.T. 1632. It also provides that “[f]or the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.” *Id.*, art. VI.

The use of facilities and areas granted by the Security Treaty is governed by the Status of Forces Agreement, two provisions of which are of particular relevance here. First, SOFA Article III provides that “[w]ithin the facilities and areas, the United States may take all the measures necessary for their establishment, operation, safeguarding, and control.” Art. III, 11 U.S.T. 16532. This authority generally includes the authority to control access of individuals to United States facilities and areas. SER 3. Second, SOFA Article XXV establishes a “Joint Committee” composed of one representative of the United States and one representative of the Government of Japan as the means for consultation between the two governments on “all matters requiring mutual consultation regarding the

implementation of [the SOFA],” including “determining the facilities and areas in Japan which are required for the use of the United States.” See SER 4.

The Security Treaty and SOFA are implemented through various bilateral entities, including the Japan-U.S. Security Consultative Committee (also known as the “2 + 2”), which consists of four members: the Japanese Minister of Foreign Affairs, the Japanese Minister of Defense, the United States Secretary of Defense, and the United States Secretary of State. SER 4; *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1084-85 (N.D. Cal. 2008) (“*Gates*”).

3. The Futenma Replacement Facility

The United States and Japan have been working toward the construction of the FRF for two decades. SER 10. In 1995, in recognition of the impact of U.S. bases on the growing population on Okinawa, the United States and Japan began a review of the U.S. military presence on Okinawa. *Id.* In 1996, the Security Consultative Committee concluded that MCAS Futenma should be replaced with a sea-based facility off the less-populated eastern coast of Okinawa. *Id.* Thereafter, President Clinton and Prime Minister Hashimoto approved a plan to close MCAS Futenma and relocate many of its functions. ER 10.

Work began on engineering and construction plans, but due to local opposition and the complexities of constructing an offshore facility, there were significant delays in executing the plan. SER 10. The two governments eventually began developing alternative proposals for the FRF. This work culminated in the Security Consultative Committee's adoption, in 2006, of the "Roadmap for Realignment Implementation." *Id.*

The Roadmap has three critical components: (1) location of the FRF at Camp Schwab and adjacent water areas, including two runways aligned in a V-shape; (2) relocation of approximately 9,000 of Marines and their dependents from Okinawa to Guam and other locations; and (3) the United States' return to Japan of the land now used for MCAS Futenma and other bases following completion of the first two components. SER 10. The new FRF V-shape design took into account both U.S. operational requirements and the need to limit impacts on the environment and local communities. *Id.* The decision to locate the updated configuration of the FRF at Camp Schwab followed consideration of a broad range of alternative locations, including smaller islands and mainland Japan. SER 10-11.

Consistent with SOFA Article XXIV, 11 U.S.T. 1672, which provides that "Japan will furnish . . . without cost to the United States . . . all facilities and areas," Japan is responsible for the siting, design and construction of

the FRF, including any necessary reconfiguration of facilities at Camp Schwab and any construction in the waters surrounding Camp Schwab.

SER 4. To carry out these responsibilities, Japan and its contractors must access Camp Schwab. SER 4-6.

In 2007, the Joint Committee¹ formed the Alliance Transformation Implementation Panel to make recommendations on matters related to Alliance Transformation projects, including construction of the FRF. SER 5. The Joint Committee also approved the Alliance Transformation Implementation Panel Guidance, which states that the U.S. Army Engineering District of Japan and the Service Components “will extend full cooperation regarding necessary measures for entry, construction of temporary field offices, warehouses, utilities, etc. which are required for construction projects.” *Id.* The FRF is being constructed under this bilateral guidance. *Id.*

Since 2007, coordination and planning for the FRF have continued. At the April 2012 meeting of the Security Consultative Committee, then-Secretaries Clinton and Panetta reiterated their “resolve to continue to work toward the relocation of MCAS Futenma in a way that meets the

¹ As noted above, the Joint Committee is a bilateral entity established under SOFA Article XXV.

criteria: operationally viable, politically feasible, financially responsible, and strategically sound” SER 11, 20. They also “reconfirmed their view that the FRF . . . remains the only viable solution that has been identified to date.” SER 20. Finally, they “confirmed their commitment to resolve the issue of the FRF as soon as possible in order to avoid the indefinite use of MCAS Futenma, while maintaining Alliance capabilities.” *Id.*

In March 2013, the Japanese government requested a landfill permit from the Governor of Okinawa. SER 11. Approval of the permit was required for construction of the FRF to proceed. *Id.* At the Security Consultative Committee meeting in October 2013, Secretaries Kerry and Hagel and their Japanese counterparts reiterated their support for the FRF. *Id.* Additionally, “[t]he United States welcomed recent developments including the submission of the request for approval of public water reclamation permit to Okinawa Prefecture by the Government of Japan[.]” SER 29. In December 2013, the Governor of Okinawa, Hirokazu Nakaima, issued the permit, thus clearing the most significant remaining hurdle to construction. SER 11.² After over twenty years of negotiation, design, and

² As CBD notes (Br. 11), in October, 2015, Governor Nakaima’s successor, Takeshi Onaga, purported to revoke the permit. Onaga’s action has since been overturned. *See Eric Johnson, Okinawa Sues Japan Again Over U.S. Base Relocation*, Japan Times (Feb. 1, 2016),

study, construction of the FRF by the Government of Japan is now underway.

4. The dugong

The dugong is an herbivorous marine mammal related to the manatee. ER 8. It is listed as “endangered” under the U.S. Endangered Species Act, “vulnerable” by the World Conservation Union, and “critically endangered” under Japanese law. *Id.* It inhabits warm coastal waters from the western Pacific Ocean to the Persian Gulf, Red Sea, and the eastern coast of Africa. 68 Fed. Reg. 70185-86 (Dec. 17, 2003). The dugong is largely dependent on seagrass communities for subsistence and is thus restricted to coastal habitats that support seagrass meadows. *Id.* Worldwide dugong populations have declined due to fishing-related fatalities, habitat degradation and hunting. *Id.*

The Okinawa dugong, the northernmost dugong population in the world, is not a genetically-distinct subspecies but an isolated relict population. Once common, its numbers declined in the early twentieth century due to traditional hunting (which is now illegal) and fisheries

<http://www.japantimes.co.jp/news/2016/02/01/national/crime-legal/okinawa-sues-japan-again-over-u-s-base-relocation/#.VrjvNf8UW4Q>

bycatch. The primary threat to the Okinawa dugong today remains bycatch, followed by habitat destruction from coastal development and soil runoff that pollutes or kills seagrass beds. ER 8. In 1997, the Mammalogical Society of Japan estimated that fewer than 50 Okinawa dugongs survive in the wild. The Okinawa dugong is listed as a “cultural property” under the Japanese Law for the Protection of Cultural Properties based on its importance in native Okinawan mythology and culture. *Okinawa Dugong v. Rumsfeld*, 2005 WL 522106 at *6,*7 (N.D. Cal. 2005).

C. The National Historic Preservation Act

The NHPA, 54 U.S.C. § 300101 *et seq.*,³ generally requires federal agencies to “take into account the effect” of their “undertakings” on certain properties. Like the National Environmental Policy Act (“NEPA”), the NHPA is a procedural statute. It does not prohibit the approval of undertakings that result in adverse effects; rather, it requires agencies “to ‘stop, look, and listen’ before proceeding with agency action.” *Te-Moak*

³ The NHPA, previously codified at 16 U.S.C. § 470 *et seq.*, was recently recodified in title 54. Pub. L 113-287, 128 Stat. 3094 (Dec. 19, 2014). When discussing individual provisions of the statute, we follow the district court’s practice of using the section numbers of the original public law – for example, “NHPA § 402” or “Section 402” – with parallel citations to the U.S. Code as necessary.

Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior, 608 F.3d 592, 610 (9th Cir. 2010).

Within the United States, federal undertakings are governed by NHPA § 106, 54 U.S.C § 306108 (formerly 16 U.S.C. § 470f). Section 106 requires federal agencies to “take into account the effect” that a federal undertaking will have on any historic property and “afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking.” *Id.*

Implementing regulations establish a detailed four-step procedure to comply with Section 106. 36 C.F.R. pt 800. First, the agency identifies “consulting parties,” including the State Historic Preservation Office and interested Indian Tribes. Second, the agency identifies historic properties that might be affected by the undertaking. Third, the agency assesses whether there are adverse effects on those historic properties. Fourth, the agency endeavors to resolve any adverse effects. These steps occur in consultation with the consulting parties identified by the agency. *See, e.g.*, 36 C.F.R. §§ 800.4(3), 800.5(a).

Extraterritorial undertakings are addressed in NHPA § 402, which was added to the NHPA in 1980 to implement the U.N. Convention Concerning the Protection of the World Cultural and Natural Heritage.

H.R. Rep. 96-1457, 96th Cong., 2d Sess. 1980, 1980 USCCAN 6378. Section 402 provides:

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.

54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2).

Unlike Section 106, Section 402 does not require the federal agency to afford the Advisory Council on Historic Preservation an opportunity to comment. Likewise, the regulations governing the take-into-account process for domestic undertakings under Section 106 do not apply to extraterritorial undertakings under Section 402. No separate implementing regulations for extraterritorial undertakings have been promulgated. *Gates*, 543 F. Supp. 2d at 1089.

The NHPA does not contain a provision authorizing judicial review. Agency compliance with NHPA § 106 is generally subject to judicial review under the Administrative Procedure Act. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005).

D. Proceedings Below – 2003 through 2012

CBD commenced this litigation in 2003. Its First Amended Complaint sought declaratory and injunctive relief based on the Secretary's alleged failure to comply with NHPA § 402 in connection with the "design, development and approval of the FRF." See ER 53. In an unpublished 2005 decision, the district court (Judge Patel) held, among other things, that: (1) Japan's "Law for the Protection of Cultural Properties . . . is an 'equivalent of the National Register' within the meaning of" Section 402; (2) the Dugong is a "property" within the meaning of Section 402; and (3) factual issues precluded findings on whether the FRF is a federal "undertaking" under Section 402 and whether Japan's degree of control over the siting of the FRF required judicial abstention under the act of state doctrine. *Rumsfeld*, 2005 WL 522106 at *8, *10-11, *19-20. The court withheld decision as to whether the FRF would "directly and adversely" affect the dugong and whether the Secretary had completed the take-into-account process required by Section 402. *Id.* at *16-18.

As the litigation continued, the United States and the Government of Japan continued their efforts to find a mutually acceptable solution to the Futenma relocation issue. In 2006, the two governments approved the Roadmap for Realignment Implementation (described above pp. 9-10).

In response to the Roadmap, CBD filed its Second Amended Complaint. ECF No. 69. In a 2008 decision, the court (again, Judge Patel) held that: (1) the Roadmap constituted “final agency action” under the APA, (2) most but not all of the Plaintiffs had standing, and (3) Plaintiffs’ claims were ripe. *Gates*, 543 F. Supp. 2d at 1091-97.

In addition, based on the purposes of Section 402 and the 36 C.F.R. pt 800 regulations (which describe the take-into-account process for *domestic* undertakings), the court held that to satisfy the requirements of Section 402, the take-into-account process must include, at a minimum,

(1) identification of 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 or no 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. The court noted that “a federal agency does not complete the take into account process on its own, in isolation, but engages the host nation and other relevant private organizations and individuals in a cooperative partnership.” *Id.* The court held that the Secretary had failed to satisfy these requirements and ordered that the Secretary “comply with NHPA section 402.” *Id.* at 1107-1112. But rather than remanding to the

agency, the court ordered that the case be “held in abeyance until the information necessary for evaluating the effects of the FRF on the dugong is generated, and until defendants take the information into account for the purpose of avoiding or mitigating adverse effects to the dugong.” *Id.* at 1112. The court further ordered the Secretary to submit to the court certain information and “documentation describing what additional information is necessary to evaluate the impacts of the FRF on the dugong[.]” *Id.*

In response, the parties submitted briefs and a series of status reports setting out their competing positions and seeking further guidance on the scope of the Secretary’s duties under the court’s decision. Both parties also requested that the court issue an appealable final order. ECF No. 130 at 4, 6. In particular, CBD requested that the court issue an order requiring Navy to follow detailed procedures similar to those required by section 106. The court declined to issue such a remand order. Instead, in 2012, based on news reports that the future of the FRF was uncertain, the court *sua sponte* directed the clerk to administratively close the case and provided that “when plans for [the FRF] become more finalized or are abandoned, the parties may seek reopening of the proceedings by letter without the necessity of a motion.” *Center for Biological Diversity v. Panetta*, February 10, 2012, Order re Status (ECF No. 147) at 1-2, 5.

E. The Secretary's Section 402 Process

With the district court litigation in limbo, the Secretary (acting through the Navy and the Marine Corps) undertook an NHPA take-into-account process in accordance with the district court's 2008 decision. ER 62. The Navy reviewed the declarations on file in the litigation and the information and documentation prepared by the Government of Japan, including both the draft and final environmental impact assessment prepared by the Government of Japan under Japanese law. ER 65-66, 83-86. The Navy also commissioned a study of potential effects on the dugong, and independently evaluated the results of that study. ER 73-78. The study team included an ethnographer, an archaeologist, archival researchers, and a marine biologist. ER 65. The study was initiated in July 2009 and a draft report was completed in March 2010. *Id.* Consultation between the contracted experts and Navy staff began in December 2009, and the Navy accepted the study from the contractors in April 2010. *Id.* The Marine Corps then commenced preparation of the Recommended Findings, which were approved in April 2014. ER 88, 90.

The Navy began by analyzing the Government of Japan's rationale for designating the Okinawa dugong as a natural monument. ER 70. Through a review of the historical designation documents, the Navy concluded that the

intrinsic elements of the dugong's cultural significance are biological, and that the cultural property of the dugong would be affected if the dugong itself or its population in Okinawa is harmed. *Id.* The Navy also evaluated the results of archival and ethnographic research, concluding that historically, the dugong was featured in myths and songs, and had a traditional role in Okinawa culture that included use of its meat for food and its bones for tool-making. ER 70-71. In modern times, after hunting dugongs was outlawed, these associations have largely faded, and myths, songs and traditional practices related to the dugong are encountered only within very small segments of the Okinawa population rather than society as a whole. ER 71-72.

The Navy defined the area of potential effect of both construction and operation of the FRF. ER 63. The affected area during construction would “include the construction footprint (inclusive of work yards and sea yards) and those portions of Henoko and Oura Bays around the construction site subject to vessel traffic, acoustic disturbance, runoff, or turbidity associated with the construction effort.” *Id.* The potentially-affected area during operations was deemed to include “those portions of Henoko Bay subject to vessel traffic to/from the FRF, acoustic disturbance from FRF operations, and discharge of effluent and storm water runoff from the FRF.” *Id.*

The Navy then reviewed studies conducted by the Government of Japan in 2000, 2001, 2003, 2008 and 2009, and monthly surveys conducted by the Government of Japan between June 2009 and December 2013, to determine whether the dugong was present within the area of potential effect. *Id.* The Navy concluded that individual dugongs are present only sporadically or intermittently within the affected area. ER 64, 70, 73.

To determine the potential of the FRF to affect the dugong, the Navy reviewed in detail the activities involved in the construction of the facility by the Government of Japan, and, in equal detail, the operations at the FRF once construction is complete and functions are transferred from the existing Futenma base. ER 66-68. Specifically, the Navy reviewed available information on the vulnerability of dugongs to human activities, including “(1) hunting; (2) bycatch/incidental catch; (3) vessel strikes; (4) acoustic disturbance resulting in injury to hearing systems, interference with acoustic communication signals, or causing behavioral changes; (5) habitat loss/degradation; and (6) chemical pollution.” ER 70.

The Navy concluded that construction of the FRF would have no adverse effects on the dugong. ER 74. Regarding potential vessel impacts, the Navy found that “[m]onitoring and mitigation measures such as

standoff and speed limits” would prevent potential adverse effects of vessel movements on the dugong. *Id.*

Regarding seagrass bed habitat loss due to land reclamation, the Navy concluded:

[W]hile the seagrass beds in Henoko and Oura bays are a potential natural habitat and food source for the Okinawa dugong, because these seagrass beds are not consistently or routinely used by resident dugong and there are other seagrass beds sufficient to maintain the current population of Okinawa dugong, the loss of some of the seagrass beds in Henoko and Oura bays is not considered an adverse effect on the Okinawa dugong

Id.

The Navy also analyzed the potential for chemical contamination resulting from soil runoff. It concluded that while the Navy “has no evidence that red soils at Camp Schwab contain [relevant] toxins,” the Government of Japan plans to implement a number of measures to reduce runoff, including: “[i]nstallation of contamination prevention covers and frameworks”; the use of seawalls covered with waterproof canvas to enclose reclamation areas and prevent soils from leaching out of the reclamation areas; storm water filtration; and the use of washed stone for break walls.

ER 74-75. The Navy’s Findings continue:

Despite these measures, some runoff is possible that could contribute to decline in the health of local seagrass beds. The

[Government of Japan] recognizes this potential and . . . has committed to establishing a monitoring system that enables swift implementation of environmental protection measures. [It] has also committed to conducting ongoing surveys of seagrasses and, based on the results of these surveys, will take appropriate action such as consulting with experts to identify methods for expanding the habitat of seagrasses and implementing those measures deemed to be feasible. With implementation of these avoidance, minimization and mitigation efforts, combined with very low and infrequent presence of Okinawa dugong in the [affected area, the Navy] finds there will be no adverse effects to the Okinawa dugong.

ER 75.

On the subject of acoustic or visual disturbances, the Navy reviewed the numerous “best management practices” that the Government of Japan planned to implement during construction. The Navy noted that the Government of Japan has committed to daytime construction only, which would minimize any adverse effects on the dugong because dugongs spend their days in deep waters and feed over the reef in shallow waters at night. ER 69, 75. In addition, the Navy concluded “that no adverse effects will occur due (1) to the limited use of Henoko and Oura bays by dugongs, (2) the implementation . . . of noise minimization techniques during construction, (3) the suspension . . . of noise-generating activities when Okinawa dugongs are present, and (4) the tendency for Okinawa dugongs to move to deeper waters when exposed to such noise.” ER 75-76.

Similar analyses were applied to the potential impacts from base operations leading to the conclusion of no adverse effects. In addition to reviewing Japan's plan to minimize runoff during construction, the Navy reviewed Japan's stormwater system design for the FRF, which is designed to release stormwater to the sea areas south and east of the FRF to avoid the seagrass areas in Henoko and Oura Bays. The analysis also considered the Navy's commitment to adopting best management practices after receiving the FRF, such as silt fencing, trench covers, and geo-textile matting to mitigate erosion, and routine inspections and monitoring to prevent any sediment runoff. ER 77. Vessel impacts were found "highly unlikely" due to limited vessel traffic. *Id.* The Navy concluded that there will be no adverse impacts from overflights because a dugong would have to be directly under the flight path of an aircraft to receive any significant sound exposure. ER 77-78. Lighting at night on the FRF will be limited to approach lights along the runway, and minimal impacts are expected because this lighting is generally low wattage and typically points upward and away from the water to facilitate viewing by aircraft conducting night operations. *Id.*

Summarizing the total impact on the dugong population in Okinawa, the Navy acknowledged the limitations of the available *total* population

data, but emphasized that it “do[es] have current and valid population data for Henoko and Oura bays,” ER 78, and that this information was sufficient to determine that there was only sporadic dugong activity observed directly in the area of potential effects. ER 70, 73. Based on the “current and valid population data” it possessed for dugong in Henoko and Oura bays,⁴ and the analyses summarized above, the Navy concluded that “the construction and operation of the FRF will not have adverse effects on the local Okinawa dugong population and consequently will not substantially contribute to the extinction of the entire Okinawa dugong.” ER 78. The Navy noted that this conclusion is consistent with the conclusions reached by the Government of Japan in its EIA. *Id.*

The Navy also considered in detail potential mitigation measures both for the Government of Japan to implement during construction and for the Navy to implement during operations.

⁴ Noting that the most recent study of the entire population of the Okinawa dugong dated back to 1997, the Navy recommended that the Government of Japan conduct a new comprehensive study and recommended expansion of surveys into Oura Bay. ER 78-79.

ER 79-81. Finally, the Findings describe the several methods the Navy used to engage the host nation and other relevant private organizations and individuals. ER 81-82.

F. Proceedings Below – 2014 through 2015

In April 2014, the Navy notified the court and CBD that it had completed its Section 402 process. ECF 151. In response, CBD moved to reopen the case and filed its First Supplemental Complaint seeking review of the agency's take-into-account process and no-effect finding. The Supplemental Complaint requests (1) a declaration that "DoD's Findings and failure to involve Plaintiffs and the public" in the take-into-account process violate Section 402 and the APA, (2) an order setting aside DoD's findings, and (3) "an order that DoD not undertake any activities in furtherance of the FRF project, including granting permits or approvals for contractor entry to Camp Schwab and/or the proposed FRF project area, and that DoD rescind any such permits or approvals already granted, until it complies with" NHPA § 402. ER 58-59.

The parties moved for summary judgment, and on February 13, 2015, the district court (Judge Chen, who was assigned the case due to Judge Patel's retirement) granted the Secretary's motion to dismiss. ER 5, 6. As described in more detail below, the court held that CBD's claim for

injunctive relief presents a non-justiciable political question and the declaratory claims are non-justiciable for want of redressability.

SUMMARY OF ARGUMENT

I. CBD's claims for injunctive and declaratory relief are barred by the political question doctrine. The injunction CBD seeks would block the Secretary's implementation of the FRF project and require the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory, effectively requiring the United States to violate bilateral commitments with the Government of Japan negotiated under the Security Treaty and the Status of Forces Agreement. Further, CBD's claims for declaratory relief seek to require the Secretary to reconsider commitments and decisions on the design and operation of the FRF that are part of the bilateral 2006 Roadmap, negotiated at the highest levels of the two governments. Thus, the relief CBD seeks would directly intrude upon issues of foreign policy and national defense – quintessential political questions – that are constitutionally committed to the political branches of government. CBD's claims for injunctive and declaratory relief are therefore barred under the under the first test of *Baker v. Carr*.

The relief CBD seeks also runs afoul of the second *Baker* test – the need for judicially discoverable and manageable standards. There are no

manageable standards by which the court can determine whether the balance of hardships tips in CBD's favor and whether the public interest would be served by an injunction against the implementation of a bilateral commitment for the construction of an overseas military base. Further, NHPA § 402 provides no substantive standards by which a court can review the procedures and conclusions of the Secretary's take-into-account process.

CBD's claims for relief are also barred under the fourth, fifth, and sixth *Baker* tests, because they would require the court to express a lack of respect for the Secretary's decision to enter into the bilateral arrangement with the Government of Japan. That is a "decision already made" on an issue on which there is an unusual need for deference to the Executive.

II. In the alternative, CBD lacks standing to assert its claims for declaratory relief, because it cannot demonstrate that the declaratory relief it seeks could redress its alleged injury. While a court could in theory set aside the Secretary's allegedly flawed NHPA Findings and take-into-account process, a court cannot set aside the Secretary's decision to commit to the 2006 Roadmap, or order the Secretary to withdraw from the Roadmap, or order the Secretary to negotiate a different understanding with the Government of Japan. As a result, CBD cannot demonstrate that

the declaratory relief it seeks could protect its concrete interest in protecting the dugong from the alleged impacts of the FRF.

STANDARD OF REVIEW

This Court reviews the district court's dismissal for lack of subject matter jurisdiction *de novo*. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). The Court may affirm on any basis fairly supported by the record. *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992).

ARGUMENT

I. CBD's claims for injunctive and declaratory relief are barred by the political question doctrine.

The political question doctrine originated in Chief Justice Marshall's observation that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). The doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). And it is jurisdictional: "if a case presents a political question, [courts] lack subject matter jurisdiction to decide that question." *Corrie*, 503 F.3d at 980-82.

Political questions are not justiciable even where a statute, such as the APA, would otherwise provide for judicial review. “[A] statute providing for judicial review does not override Article III’s requirement that federal courts refrain from deciding political questions.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc). *See also Sierra Club v. Morton*, 405 U.S. 727, 732 n. 3 (1972) (“Congress may not confer jurisdiction on Art. III federal courts . . . to resolve ‘political questions,’ because suits of this character are inconsistent with the judicial function under Art. III”) (internal citations omitted); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (no presumption of reviewability applies “[w]hen it comes to matters touching on national security or foreign affairs”).

Baker sets out six independent tests for determining whether a case presents a political question:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already

made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

As this Court has noted, the *Baker* tests “are more discrete in theory than in practice, with the analyses often collapsing into one another.” *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). The first two tests – a textual commitment to another branch of government and a lack of judicially manageable standards – are “the most important,” *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), but in order for a case to be nonjusticiable, the court “need only conclude that one factor is present, not all.” *Schneider*, 412 F.3d at 194.

To be sure, not every case or controversy that touches on political matters lies beyond judicial cognizance. *Baker*, 369 U.S. at 211. The political question doctrine applies to “‘political questions,’ not . . . ‘political cases,’” *id.* at 217, and must be applied narrowly based on careful case-by-case analysis of the claims at issue. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“*Zivotofsky I*”); *Corrie*, 503 F.3d at 982.

Here, CBD’s Supplemental Complaint seeks declaratory and injunctive relief, including an order setting aside the Secretary’s Findings and “[a]n order that DoD not undertake any activities in furtherance of the

FRF project, including granting permits or approvals for contractor entry to Camp Schwab and/or the proposed FRF project area, and that DoD rescind any such permits or approvals already granted” until the Secretary complies with Section 402 by taking various steps that CBD contends are required by that section. ER 58-59. As we demonstrate below, application of the *Baker* tests demonstrates that these claims for relief are non-justiciable.

- A. The relief CBD seeks raises political questions under the first *Baker* test – a constitutional commitment of the issue to the political branches.

No areas of federal activity are more firmly committed to the political branches than foreign policy and national defense. *Schneider*, 412 F.3d at 194-95 (discussing U.S. Const. art. I, § 8 and art. II, §§ 2, 3). Indeed, the political question doctrine is universally recognized to apply with unique force where matters of foreign policy and national security are at play. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (“the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court”) (citations omitted); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“*Waterman*”) (“the very

nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative”); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision”); *see also Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999).⁵

The relief sought by CBD runs afoul of the first *Baker* test. This is particularly apparent with respect to CBD’s request for an injunction prohibiting the Secretary from undertaking “any activities in furtherance of

⁵ The Constitution’s commitment of foreign policy and national security issues to the political branches is also reflected in decisions applying the APA’s limitation on judicial review of agency actions that are “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2). *See, e.g., Jensen v. National Marine Fisheries Service*, 512 F.2d 1189, 1191 (9th Cir. 1975) (Secretary of State’s decision to approve fishing regulation adopted under a bilateral treaty with Canada not subject to APA review); *Saavedra*, 197 F.3d at 1162 (visa determinations are unreviewable under 5 U.S.C. § 701(a)(1) and § 702(1); no presumption of reviewability applies to “matters touching on national security or foreign affairs”); *Dep’t of Navy v. Egan*, 484 U.S. 518, 528-29 (1988) (whether granting security clearance would be “consistent with the interests of national security” was unreviewable under 5 U.S.C. § 701(a)(2)).

the FRF project” until the Secretary complies with Section 402 in the manner CBD contends is required. ER 59. This injunction would effectively require the United States to violate its bilateral commitments with the Government of Japan regarding the FRF – commitments negotiated at the highest levels of the two governments under the Security Treaty and the Status of Forces Agreement. Not only would the injunction block the Secretary’s implementation of the FRF project, it would also *require the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory*. Thus, as the district court found (ER 7, 32-36), the injunction CBD seeks would directly implicate foreign policy and national defense issues that are constitutionally committed to the political branches of government.

CBD’s argument to the contrary (Br. 41-54) is not persuasive. CBD acknowledges that “political [and] national security decisions . . . are properly the domain of the executive or legislative branches,” but contends that its claim “does not require the court to second-guess or supplant such decisions.” Br. 41. CBD maintains that it does not seek review of “DoD’s ultimate policy decisions concerning the location, design, construction, or operation of a military base,” but only seeks review of the Secretary’s “consultation, information-gathering, and evaluation process pursuant to

the National Historic Preservation Act’s ‘take into account’ requirement[.]” Br. 43-44; *see also* Br. 52 (“Plaintiffs’ claims and the relief they request do not ask the court to opine on the decision to build the FRF.”). But these characterizations of the case are not credible. CBD’s challenge to the Secretary’s NHPA procedures and Findings may not be a direct challenge to the Secretary’s “ultimate policy decisions” concerning the FRF, but the *relief* CBD seeks strikes at the heart of those policy decisions. An injunction blocking the Secretary’s implementation of the FRF project and requiring the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory would be a gross intrusion into issues of foreign relations and national defense – issues committed to the political branches. *See Corrie*, 503 F.3d at 984 (“Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interests and judgment of the United States government itself.”).

Earth Island Institute v. Christopher confirms this conclusion. 6 F.3d 648 (9th Cir. 1993). In *Earth Island*, plaintiffs sought to compel the State Department to comply with a congressional mandate “to initiate

negotiations with foreign countries to develop treaties to protect sea turtles[.]” 6 F.3d at 650. This Court held that it

has not and cannot lawfully order the Executive to comply with the terms of a statute that impinges upon power exclusively granted to the Executive Branch under the Constitution. Plaintiffs here ask us to compel the Secretary of State to initiate negotiations with foreign nations on the protection of sea turtles. Because “the Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic” affairs, we cannot enforce the statute.

Id. at 653 (quoting Laurence H. Tribe, *American Constitutional Law* § 4–4, at 219 (2d ed. 1988)). For the same reasons that the Court could not “compel the Secretary of State to initiate negotiations with foreign nations” in *Earth Island*, the Court cannot prohibit the Secretary of Defense from implementing the FRF project – and allowing the Government of Japan and its contractors access to Camp Schwab, sovereign territory of Japan – in accordance with the United States’ commitments under the 2006 Roadmap and related joint announcements by cabinet-level national security officials. *Cf. Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) (decision whether to enter into or

withdraw from a fisheries treaty with Canada “is a decision committed to the Executive Branch” and thus nonjusticiable).⁶

Likewise, the first *Baker* test also bars CBD’s claims for declaratory relief. The declaratory relief that CBD seeks – a declaration that the Secretary’s take-into-account process was unlawful and an order setting aside the Secretary’s Section 402 Findings – would, at a minimum, call into question the United States’ ability to fulfill its commitments to the Government of Japan regarding the FRF.⁷ The issues raised by CBD’s requested declaratory relief are thus inextricably intertwined with the implementation of the Security Treaty, the Status of Forces Agreement, the 2006 Roadmap, and other bilateral commitments – matters of foreign policy and national security that are the province of the political branches, not the courts. Thus, like the injunctive relief, the declaratory relief that CBD seeks is non-justiciable.

⁶ As discussed below, *Salmon Spawning* also supports the district court’s holding that CBD lacks standing to assert its claims for declaratory relief.

⁷ For example, CBD argues (Br. 32, 38) that a remand is required so that the Navy may consider altering flight paths, despite the fact that flight paths are a function of the V-shaped runway and configuration of the FRF, which have been bilaterally approved since 2006.

CBD contends (Br. 47-49) the declaratory relief it seeks would not require the court to supplant the Secretary's foreign policy decisions and would not interfere with relations between the United States and Japan. In support of those propositions, CBD quotes the district court's statement, in its 2008 decision, that "[r]elief requiring DOD to [carry out a take-into-account process] . . . in no way invalidates Japan's decision to locate the FRF in the particular area and configuration it has chosen and in no way interferes with Japan's ability to conduct its own environmental assessment according to Japanese law." Br. 48, quoting CR 119 at 24 (*Gates*, 543 F. Supp. 2d at 1099). CBD's reliance on the 2008 decision is misplaced, however. The 2008 decision pre-dates the Navy's NHPA Findings and Japan's EIA, and has been superseded by the 2015 Order that is the subject of this appeal.⁸ Further, there is now substantial evidence in the record

⁸ At pages 4-5 of its brief, amicus curiae National Trust for Historic Preservation describes the district court's 2005 and 2008 orders as "law of the case." Those orders are not law of the case, however, because they were partial, not final, and were superseded by the court's February 13, 2015 Judgment (ER 5) and Order (ER 6) dismissing for lack of jurisdiction. See *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 888-889 (9th Cir. 2001); Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims"). Accordingly, if the case is remanded, Appellees may ask the district court to reconsider that issue and any other issues addressed in the interlocutory

documenting that vacatur and remand would cast doubt on the Secretary's ability to fulfill the United States' commitments regarding the FRF in accordance with our bilateral agreements and commitments with the Government of Japan. SER 6, 12-14.

CBD's reliance (Br. 48-49) on *Zivotofsky I* is misplaced as well. *Zivotofsky I* involved a statute providing that Americans born in Jerusalem may elect to have "Israel" listed as their place of birth on their passports. The State Department declined to follow the law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by the parents of a child born in Jerusalem who invoked the statute, the Secretary of State argued that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals agreed, but the Supreme Court reversed. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *vacated by Zivotofsky I*, 132 S. Ct. 1421. The Court held that the question presented was not whether Jerusalem should be recognized as part of Israel (as the lower courts had reasoned), but whether the statute was constitutional – which, of course, is a decision for the courts. *Zivotofsky I* at 1428.

orders that are not resolved in this appeal, and to seek appellate review if warranted.

Discussing *Zivotofsky I*, CBD asserts that “[d]espite the Secretary’s assertions of the foreign policy and national security effects of an order requiring the agency to implement the statute, the Court *did not find that the interpretation and application of the statute was barred by the political question doctrine.*” Br. 49 (emphasis added). This is true but beside the point. There was no dispute in *Zivotofsky I* regarding the interpretation of the statute. 132 S. Ct. at 1427 (“Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional.”) Moreover, in a subsequent decision, the Supreme Court held the statute unconstitutional because it infringed on the President’s exclusive power to recognize foreign sovereigns. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Ultimately, *Zivotofsky I*’s holding – that determining whether the passport statute was constitutional was a question for the courts – has no bearing on the question presented in this case: whether the injunctive and declaratory relief that CBD seeks against the Secretary’s implementation of the FRF project raises a political question.

B. CBD’s claims for relief are political questions under the second *Baker* test – lack of manageable standards.

CBD’s requested relief also implicates the second *Baker* test: a lack of judicially discoverable and manageable standards. To obtain an injunction,

CBD would have to prevail on the merits and show that (1) it suffered an irreparable injury; (2) its remedies at law are inadequate; (3) the balance of hardships tips in its favor; and (4) the public interest would not be disserved by the injunction. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011). Yet as the district court explained (ER 32), “there are no judicially administrable standards” by which a court could decide whether CBD satisfied the third and fourth elements of the injunction test. To evaluate the balance of hardships and the public interest, the court would have to weigh the harms asserted by CBD against the United States’ foreign policy and national security interests. As the D.C. Circuit has explained, there are “no standards by which [a court] can measure and balance” such foreign policy considerations. *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006). *See also Schneider*, 412 F.3d at 196; *See also El-Shifa Pharma. Indus.*, 607 F.3d at 845 (“We could not decide this question [whether U.S. attack on Sudanese pharmaceutical plant was mistaken] without first fashioning out of whole cloth some standard for when military action is justified. The judiciary lacks the capacity for such a task.”).⁹

⁹ In *Bancoult*, the plaintiffs alleged torture and genocide in connection with their forced relocation from an island in the Indian Ocean to make way for a military base. 445 F.3d at 430-31. In *Schneider*, plaintiffs brought

In response to the district court’s well-founded concern about the lack of judicially administrable standards, CBD blithely asserts (Br. 51-52) that “the district court is fully capable” of weighing the balance of harms and the public interest, and that the court can do so *after* it decides the merits of CBD’s NHPA claim. But that approach is backwards. The political question doctrine is jurisdictional, *Corrie*, 503 F.3d at 982, and “[w]ithout jurisdiction the court cannot proceed at all in any cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCordle*, 7 Wall. 506, 514 (1868)). And while CBD notes (Br. 51) the “inherent flexibility of the courts’ equitable jurisdiction,” CBD does not even attempt to proffer a substantive standard that the district could use to

claims against the United States and the former National Security Advisor for the alleged kidnapping, torture, and death of their decedent, a Chilean general. 412 F.3d at 191. Yet despite the weighty nature of the plaintiffs’ asserted interests in these cases, their claims were held non-justiciable. Here, the interests asserted by CBD are not nearly so weighty: procedural rights under the NHPA to protect asserted aesthetic, cultural, and recreational interests in the conservation of the dugong in Japan as an historic property under Japanese law. As a result, there is even less need for the courts to step in here than in *Bancoult* and *Schneider*. See *Bancoult*, 445 F.3d at 437 (“[W]hile the presence of constitutionally-protected liberties could require [a court] to address limits on the foreign policy and national security powers assigned to the political branches, no such constitutional claims are at issue in this case.”). Indeed, under any conceivable standard, the United States’ foreign policy and national security interests would trump CBD’s claimed interests. See, e.g., *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24-27 (2008).

decide whether the balance of harms and the public interest require that the Secretary be enjoined from carrying out “any activities in furtherance of” the bilateral FRF project.

This lack of manageable standards also extends to CBD’s claims for declaratory relief. As noted, CBD seeks (1) a declaration that the Secretary’s take-into-account process was unlawful, (2) an order setting aside the Findings that were the product of that process, and (3) a remand to the agency for further proceedings. Ordinarily, interpreting legislation and reviewing agency action are “familiar judicial exercise[s].” ER 22 (district court decision, quoting *Zivotofsky I*, 132 S. Ct. at 1427). But here, NHPA § 402 provides no substantive standard by which to review either the procedures the Secretary used to consider the impacts of the FRF or the substance of his conclusion.¹⁰ Section 402 merely provides that the head of an agency “shall take into account the effect” of its overseas undertakings

¹⁰ As described above (pp. 3-4, 19-20) the Secretary’s Findings are the product of a robust process that included active engagement with the Government of Japan and consideration of multiple studies, reports, and comments, including the Government of Japan’s EIA, the comments collected by the Government of Japan, and the declaration of CBD’s expert.

on certain types of historic property “for purposes of avoiding or mitigating any adverse effects.” 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2). Neither Section 402 nor any other provision of the NHPA defines the requirements of that take-into-account process for foreign undertakings. Indeed, unlike Section 106, Section 402 does not even require the federal agency to afford the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. *Compare* 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f) *with* 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2).

Moreover – and contrary to the reasoning of the district court’s superseded 2008 decision – the regulations implementing the take-into-account process for *domestic* undertakings under NHPA § 106 are inapposite to foreign undertakings under Section 402. For example, the Section 106 regulations contemplate a consultation process that includes (in addition to the Advisory Council) the relevant (1) State Historic Preservation Officer, (2) Indian tribes and Native Hawaiian organizations, (3) representatives of local governments, and (4) “the public.” 36 C.F.R. § 800.2. The first two are, by definition, domestic organizations, *see* 36 C.F.R. §§ 800.16(m), (s), (s), (w), and thus generally have no role to play in foreign undertakings. They are certainly irrelevant in this case. And the

requirements to consult with representatives of local governments and “the public” are highly problematic in the context of foreign undertakings.

Action of the United States in a foreign jurisdiction is subject to diplomatic constraints and the requirements of foreign law. Traditionally, the Executive Branch determines the activities of Executive Branch officials overseas, in consultation with foreign governments as appropriate.

As the district court observed, the second *Baker* test asks whether the court “has the legal tools to reach a ruling that is principled, rational and based upon reasoned distinctions.” ER 23 (quoting *Alperin*, 410 F.3d at 552). And though the district court concluded otherwise with respect to CBD’s claims for declaratory relief (ER 23-24), those legal tools are lacking here, because there are no applicable statutory or regulatory standards by which a court can review the Secretary’s implementation of Section 402 in this case. Moreover, the process the Secretary used to take into account the effects of the FRF on the dugong is inextricably linked to the implementation of the bilateral arrangements with the Government of Japan to carry out the FRF project. CBD’s request for declaratory relief would require the court to supplant the Secretary’s national security and foreign policy judgments with “the court’s own unmoored determination” of how the Secretary should conduct a take-into-account process where the

relevant undertaking is a bilateral project on foreign territory and involves sensitive matters of national defense and foreign policy. *See Zivotofsky I*, 132 S. Ct. at 1427; *cf. Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence” than “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force”). Accordingly, CBD’s claims for declaratory relief are non-justiciable political questions under the second *Baker* test. *See Schneider*, 412 F.3d at 197.

C. The relief sought by CBD is barred under the fourth, fifth, and sixth *Baker* tests.

CBD’s claims for relief implicate the final three *Baker* tests as well. Those tests address “[4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217. On the facts here, these three tests overlap with one another and confirm the problematic nature of CBD’s claims under the first *Baker* test. *See Alperin*,

410 F.3d at 544 (*Baker's* tests “are more discrete in theory than in practice, with the analyses often collapsing into one another”).

Both the injunction and the declaratory relief sought by CBD would express a lack of respect for the Secretary’s decision to enter into the bilateral arrangement with the Government of Japan to implement the FRF project – a decision made in the exercise of the Executive’s broad foreign policy and national security powers. The decision to build the FRF is also a “political decision already made” on an issue of foreign policy – an area where it is imperative that the government speak consistently and with one voice. *See Baker*, 369 U.S. at 211 (many question touching on foreign relations “uniquely demand single-voiced statement of the Government's views”). And there is an “unusual need” to defer to the Executive Branch here. *See Powell v. McCormack*, 395 F.2d 577, 594 (D.C. Cir. 1968) (the “unusual need” test will typically involve “a specific foreign policy determination within the scope of Executive power”) (citations omitted), *aff'd in part, rev'd in part*, 395 U.S. 486 (1969). The understanding reached by the two governments on the location and layout of the FRF was exceptionally difficult to achieve, has been decades in the making, and has absorbed the energies of several Presidents and their Secretaries (State and Defense) and their counterparts in Japan. SER 10-12; *Dugong*, 2005 WL

522106 at *1-2. The United States has made commitments to facilitate Japan's construction of the FRF, and any failure to live up to those commitments "would be called into question by the [Government of Japan] as a significant failure of the alliance and a departure from the established norms of the relationship of the two Governments." SER 6. An injunction or declaratory relief setting aside the Secretary's decision could "seriously damag[e]" the U.S.-Japan relationship and harm the United States' broader foreign policy interests." SER 14.

This Court addressed similar concerns in *Corrie*, which involved a suit by Palestinians for injuries sustained when Israel used bulldozers, built and sold by defendant Caterpillar, to demolish homes in the occupied territories. The bulldozers were paid for by the United States. Even though the United States was not a defendant and plaintiffs were not seeking relief against the United States, this Court held that the suit raised a political question beyond the courts' jurisdiction:

Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members.

Corrie, 503 F.3d at 980-82; *see also id.* at 983 (“Plaintiffs’ action also runs head-on into the fourth, fifth, and sixth *Baker* tests because whether to support Israel with military aid is not only a decision committed to the political branches, but a decision those branches have already made.” (citation omitted)).

Here, as in *Corrie*, allowing CBD’s suit to proceed would “necessarily require the judicial branch . . . to question the political branches’ decision” to go forward with the bilateral FRF project. *See also Bancoult*, 445 F.3d at 436 (“the policy and its implementation constitute a sort of Mobius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken”); *Schneider*, 412 F.3d at 198.

II. CBD lacks standing to assert its claims for declaratory relief.

A party seeking to invoke the jurisdiction of a federal court bears the burden of establishing that it has Article III standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). To demonstrate standing, a plaintiff must establish that it has suffered “injury in fact” – that is, the “invasion of a legally protected interest which is . . . concrete and particularized” and “actual or imminent, not conjectural’ or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and

citations omitted). The injury must be fairly traceable to defendant's challenged action, and not the result of "the independent action of some third party not before the court." *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). And it must be likely (as opposed to merely speculative) that a favorable judicial decision will prevent or redress the injury. *Id.* These elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Id.*

Furthermore, "[a] plaintiff must demonstrate standing separately for each form of relief sought." *Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 655 (9th Cir 2011) (citation omitted). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984), *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976), and *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

In cases where the plaintiff alleges procedural injury, the standard for establishing causation and redressability is somewhat relaxed. "The person who has been accorded a procedural right to protect his concrete interests

can assert that right without meeting all the normal standards for redressability and immediacy.” *Defenders of Wildlife*, 504 U.S. at 572 n. 7. Plaintiff must show “only that the relief requested – that the agency follow the correct procedures – *may* influence the agency’s ultimate decision of whether to take or refrain from taking a certain action” that impacts their concrete interests. *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). Nevertheless, “the redressability requirement is not toothless in procedural injury cases.” *Id.* at 1227. Parties do not have standing to insist that procedural rules be followed simply for the sake of enforcing conformity with legal requirements. *Id.* “Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.” *Steel Co.*, 523 U.S. at 107.

As the district court recognized (ER 38-39), this case closely parallels *Salmon Spawning*. There, plaintiffs challenged actions of the National Marine Fisheries Service and the Secretary of State in connection with the United States’ decisions to enter into, and remain a party to, a fisheries treaty with Canada. Plaintiffs’ first claim, a procedural claim, alleged that the Fisheries Service violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, (“ESA”) when it conducted a consultation with the State Department and issued a biological opinion finding that entry into the

treaty would not jeopardize listed species. 545 F.3d at 1225-27. This Court held that that claim was not redressable, explaining that while a court could, in theory, set aside the allegedly flawed ESA consultation and biological opinion,

a court could not set aside the next, and more significant, link in the chain – the United States’ entrance into the Treaty. While the United States and Canada can decide to withdraw from the Treaty, that is a decision committed to the Executive Branch, and we may not order the State Department to withdraw from it. . . . So, while the groups correctly allege that they have a right to a procedurally sound consultation, they cannot demonstrate that “that right, if exercised, *could* protect their concrete interests.”

Id. at 1226 (quoting *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005)) (emphasis in *Defenders*).

Plaintiffs second claim in *Salmon Spawning* was substantive: that the agencies’ continued participation in the implementation of the treaty jeopardized listed salmon in violation of ESA § 7(a)(2) and the APA. Plaintiffs argued that a court order declaring that the agencies violated the ESA and APA would require the agencies to exercise their authority to reduce take by U.S. fisheries. *Id.* at 1228. After noting the higher showing required to establish redressability for claims for substantive rather than procedural injury, this Court held that this claim, too, was unredressable. “[T]his claim hinges on agency action vis-à-vis the Treaty. The court cannot

order renegotiation of the Treaty, and discretionary efforts by the agencies are too uncertain to establish redressability.” *Id.* at 1228.

The plaintiffs’ third claim was procedural: that the State Department and the Fisheries Service were required by ESA § 7 to reinitiate consultation on the biological opinion due to new information. The Court held that plaintiffs had standing to raise this claim in part because “a court order requiring the agencies to reinitiate consultation would remedy the harm asserted. *Unlike the other claims, this claim is a forward-looking allegation whose remedy rests in the hands of federal officials and does not hinge on upsetting the Treaty.*” *Id.* at 1229 (emphasis added).

CBD’s claims in this case are indistinguishable from the first claim in *Salmon Spawning*. As the district court explained (ER 42), while a court could in theory set aside the Secretary’s allegedly flawed Findings and take-into-account process, a court cannot set aside the Secretary’s decision to commit to the 2006 Roadmap, or order the Secretary to withdraw from the Roadmap, or order the Secretary to negotiate a different understanding with the Government of Japan. Nor, of course, could a court order the Government of Japan to halt its implementation of the FRF. The location and design of the FRF have been established through the bilateral commitments of the two governments. The Government of Japan has

completed its environmental analysis and finalized its stormwater management design, and is in the process of constructing the FRF. As a result, even assuming that CBD has a cognizable right under Section 402 to a procedurally sound take-into-account process, CBD cannot demonstrate that that procedural right, if exercised, could protect its concrete interest in protecting the dugong from the alleged impacts of the FRF.¹¹ *See Salmon Spawning*, 545 F.3d at 1226-27; ER 42.

CBD argues that the district court erred by “limiting the possible results of the NHPA process to ‘the extremes’ of either the status quo (the FRF continuing under existing plans) or a total halt to the project” and failing to recognize the possibility that “DoD could make alterations to the project or its operational plans.” Br. 32, citing *Tyler v. Cuomo*, 236 F3d 1124, 134 (9th Cir. 2000), and *Vieux Carre Property Owners v. Brown*, 948

¹¹ For purposes of its justiciability analysis, the district court assumed that CBD has procedural rights under NHPA § 402. *See* ER 37. We do not concede that Section 402 creates such procedural rights; in any event, Section 402 certainly does not create procedural rights comparable to those created by Section 106 and the 36 C.F.R. pt. 800 regulations. As described above (pp. 14-15), Section 402 merely provides that the head of the relevant agency must “take into account” the effect of certain foreign undertakings. In contrast, Section 106 expressly requires the responsible federal agency to afford the Advisory Council on Historic Preservation an opportunity to comment on domestic undertakings. In addition, the consultation procedures for domestic undertakings set out in the Section 106 implementing regulations do not apply to foreign undertakings.

F.2d 1436, 1447 (5th Cir. 1991). The district court made no such error. To the contrary, the court recognized the theoretical possibility that the Secretary might seek modification of the FRF as a result of additional NHPA procedures. But the court correctly concluded that that outcome was “highly unlikely”:

As in *Salmon Spawning*, the “ultimate agency decision” to agree to the Roadmap and build the FRF at Camp Schwab has already been made, and it is highly unlikely that an order requiring the DoD to *revise or reconsider* its NHPA Findings will change that decision. . . . And for the reasons stated above, this Court cannot issue an injunction ordering the Government to pull out of the Roadmap *or otherwise alter its plans for the FRF*.

ER 42 (emphasis added).

Nor is there merit to CBD’s assertion (Br. 33) that the court erred in finding it “highly unlikely” that a new NHPA process would lead to a change in the Secretary’s decision to commit to the Roadmap with the Government of Japan. To the contrary, the district court’s decision is consistent with *Salmon Spawning*. The district court correctly recognized that, like the decision to enter into the fisheries treaty in *Salmon Spawning*, the decision to undertake the FRF project is a bilateral decision that has already been made and cannot be undone by court order, and thus is highly unlikely to

be altered by further NHPA procedures. ER 42; *see Salmon Spawning*, 545 F.3d at 1226-27.

The record supports the court's finding. The Government of Japan and the United States have been working towards a solution to the Futenma issue "[f]or almost 20 years." SER 12. In December 2013 the most significant roadblock to the FRF was lifted through the "historic" step of the Okinawa Governor's approval of the landfill permit. SER 11. Work by the Government of Japan is finally underway. SER 11-12. "If, after all these efforts, the United States is prevented from fulfilling its end of the bargain – even temporarily – as a result of a court order preventing DoD from moving forward, [the United States'] relationship with Japan will be seriously damaged." SER 12-13; *see also* SER 6, 14.¹²

¹² CBD argues that on remand the Navy could "make adjustments to its role in the design and operation of the FRF that would mitigate harms to the dugong," Br. 29, 54, by "making changes to aircraft flight paths, protocols for controlling run-off and other discharge into Henoko Bay, or levels of night-time illumination." Br. 32. But flight paths are largely dictated by the location and design of the FRF – factors that are controlled by the 2006 Roadmap. SER 36, 38. Any adjustment of air traffic patterns outside U.S. facilities would have to be negotiated with the Government of Japan. ER 67. Likewise, stormwater management and night-time illumination are part of the Government of Japan's design, and were analyzed by Japan in its EIA after consideration of the mitigation measures the Navy submitted to Japan during the Navy's Section 402 consultation process. As a result, it is extremely unlikely that a remand for "reconsideration" of these issues would redress CBD's alleged injury.

The district court also relied on *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010) (“*Mayfield II*”). The plaintiff in that case (Mayfield) was identified as a suspect in a terrorist attack based on an erroneous fingerprint match. After Mayfield was exonerated, he sued the United States seeking damages, injunctive relief, and a declaration that certain provisions of the Foreign Intelligence Surveillance Act (“FISA”) were unconstitutional. *Id.* at 967-86. After Mayfield and the government settled all but the declaratory judgment claims, the district court held that Mayfield had standing to pursue his declaratory relief claim. The district court reasoned that the government’s continued retention of “derivative materials” – that is, copies of documents seized from Mayfield’s home and business under FISA – was a constitutionally significant ongoing injury. *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1034 (D. Or. 2007) (“*Mayfield I*”). The district court found that that injury was likely to be redressed by a declaration that FISA was unconstitutional, because it was “reasonable to assume” that the United States would make all reasonable efforts to return or destroy the derivative materials if the statute were declared unconstitutional. *Id.*

This Court reversed. A declaration that the challenged portions of FISA are unconstitutional would be of “no direct consequence” to Mayfield,

because the government would not necessarily be required by a declaratory judgment to destroy or otherwise abandon the derivative materials.

Mayfield II, 599 F.3d at 971-72. Accordingly, Mayfield lacked standing to maintain his declaratory judgment claim, because there was no reasonable likelihood that the relief he sought would redress his injury. *Id.* at 971.

CBD argues that *Mayfield* is distinguishable for three reasons, but its arguments are unpersuasive. First, CBD notes (Br. 35) that the injury alleged by Mayfield was substantive, and thus the standard for demonstrating redressability was higher than in a case alleging procedural injury. But the district court here recognized this difference and applied the correct standard in its analysis. *See* ER 37, 42. Moreover, the fact that *Mayfield* involved a claim of substantive injury does not render its analysis of redressability irrelevant. When a plaintiff alleges procedural injury, the standard for demonstrating redressability is relaxed, but it is not eliminated: plaintiff still must show that the requested relief may influence the agency's ultimate decision on the action that impacts the plaintiff's concrete interests. *Salmon Spawning*, 545 F.3d at 1226-27.

Second, CBD notes that in *Mayfield* the government had “no legal obligation” to return or destroy the derivative materials that Mayfield sought, whereas here “the government has a legal obligation to comply with

the ‘take into account’ requirement of the NHPA.” Br. 35. But the question for purposes of redressability is not whether the Secretary has an obligation to comply with the NHPA; it is whether it is likely that the relief CBD seeks – that is, the additional NHPA procedures that CBD contends are required – could result in changes to the FRF’s alleged impacts on CBD’s members’ ability to observe and study the dugong. *See Salmon Spawning*, 545 F.3d at 1226 (“while [plaintiffs] correctly allege that they have a right to a procedurally sound consultation, they cannot demonstrate that that right, if exercised, *could* protect their concrete interests.”) (internal quotation marks omitted, emphasis in original). As the district court found, the answer to that question is a resounding no. ER 42.

Third, CBD notes (Br. 35-36) that in *Mayfield*, the only remedy available was declaratory relief, whereas here the district court (purportedly) has the authority under the APA to set aside the Secretary’s Findings and remand to the agency for further proceedings. But again, that distinction does not alter the analysis here. The district court recognized that CBD seeks vacatur and remand in addition to a declaratory order, *see* ER 20-21, but correctly concluded that CBD’s assertion that its injury could be redressed if the Secretary were ordered to “conduct a renewed and more

fulsome inquiry under the NHPA” was “completely unsupported and speculative.” ER 42.

In sum, like the plaintiffs in *Salmon Spawning* and *Mayfield*, CBD lacks standing because it has failed to demonstrate that the relief it seeks could remedy its alleged injury.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellees are unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6 that are pending in this or any other court.

s/Mark R. Haag

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,120 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Mark R. Haag

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users who will be served by the appellate CM/ECF system.

s/Mark R. Haag