

Dugong vs. Gates

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On January 24, 2008 the United States District Court in San Francisco issued a decision in the case of *Dugong v. Gates*, handing a major victory to the Okinawa dugong and to the people of Okinawa. In an order that grants the plaintiffs' motion for summary judgment and denies the Department of Defense's cross motion for summary judgment, the Judge holds that the NHPA applies fully to DOD's actions, finds that DOD is in violation of its obligations under the statute, and orders DOD to submit to the court documentation describing how it plans to go about complying with the "take into account" requirement. The Judge has also given the plaintiffs the opportunity to respond to DOD's submission, so there is an ongoing roll for JELF and the plaintiffs in Okinawa in the assessment process.

THE OPINION

The opinion begins with a comprehensive summary of the factual background, a description of the procedural history of the case, and an explanation of the statutes under which we bring our case – the National Historic Preservation Act and the Administrative Procedures Act. Judge Patel then turns to the legal arguments. Her discussion of the legal issues is divided into three sections: DOD's jurisdictional arguments; applicability of the NHPA; and the merits of our NHPA claim.

I. Jurisdiction of the Court

The Judge rejects all of DOD's arguments challenging the right of the plaintiffs to bring this action in the U.S. District Court.

Final Agency Action: The Administrative Procedures Act permits a court to review only "final agency actions." DOD argued that there has not been final agency action, but the court disagreed, concluding "that DOD has not taken into account the effects of the military facility on the dugong, yet has already established operational requirements which the facility must satisfy and has also approved the Roadmap containing final plans for the facility's design and construction, implies that the failure to take into account is 'final' for purposes of triggering review under the APA." (Opinion p. 14)

Standing: DOD argued that the plaintiffs do not have standing to bring the case. The Judge found that the plaintiffs all have “concrete interests [that] are directly linked to the procedural injury caused by defendants’ failure to comply with the NHPA because to the extent that compliance with the ‘take-into account’ process leads to avoidance or mitigation of harm to the dugong, the very object of plaintiffs’ interest may be preserved and protected. Moreover ... plaintiffs’ interest in the preservation of dugong as historical and cultural property is precisely the zone of interests protected by the NHPA.” (p. 17) The Judge found that “the NHPA places the responsibility to consider and assess on the DOD and the DOD alone. Plaintiffs’ injury, therefore, is directly traceable to DOD, not the Government of Japan.” (p. 19)

Ripeness: A U.S. court may only hear a claim that is ripe for review. The Judge finds that “where a statute, like the NHPA, simply guarantees a particular procedure, not a particular result, a claim is ripe when the agency fails to comply with the procedure” and agrees that because plaintiffs allege that DOD has failed to comply with a statutory procedure required under the NHPA, “now is the appropriate time to complain that the agency failed to do its duty.” (p. 21)

Act of State: Under this doctrine, a U.S. court may not sit in judgment of the actions of a foreign sovereign. However, the Judge agrees that the act of state doctrine is not implicated in this case because the court is not required to invalidate the sovereign acts of the Government of Japan. “This court’s review is directed solely at DOD’s compliance with the NHPA.” (p. 24)

Necessary and Indispensable Party: DOD attempted to argue that Japan was a necessary party to this lawsuit. As the court discussed in its analysis of the act of state doctrine, because relief requiring DOD to “take into account” under the NHPA can be fashioned without directly or indirectly interfering with any decision by the Government of Japan, the court’s review is not barred by the procedural rule requiring joinder of necessary and indispensable parties.

II. Applicability of the NHPA

Judge Patel then goes on to discuss the applicability of the NHPA to this case. DOD’s obligation to “take into account” under the NHPA is triggered when there is (a) a federal undertaking outside the U.S., which (b) may directly and adversely affect (c) a property on the applicable country’s equivalent of the National Register. In its 2005 denial of DOD’s motion to dismiss the court held that the dugong is a protected property under the act. In this decision, the judge also found that DOD’s activities related to the FRF are a “federal undertaking” and that the FRF “may directly and adversely affect” the dugong. Thus the court concluded that the NHPA is applicable to our case.

III. Merits of the NHPA Claim

Having concluded that the court's review is proper and that the NHPA is applicable, Judge Patel finally examines whether DOD has complied with its obligation under the NHPA to "take into account" the impacts on the dugong.

Judge Patel notes that the meaning of "take into account" under the extraterritorial provision of the NHPA is an issue of first impression for the courts. She goes on to endorse the plaintiffs' argument that the regulations defining "take into account" in the domestic provisions should shape the meaning of the same phrase in the extraterritorial provision. Thus she holds that "the process, at a minimum, must include (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 not adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects." (p. 32) She also found 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." (p. 32)

Finally, Judge Patel examines the evidence in the record to determine whether DOD has complied with the "take into account" requirement and concludes that it has not. The Judge emphasizes that "the obligation to take into account lies with the DOD and the DOD alone ... The fact that Japan will conduct an environmental assessment pursuant to Japanese law does not relieve DOD of its independent obligation to take into account under the NHPA." (p. 37). She goes on to conclude that "The current record contains no evidence that a single official from the DOD with responsibility for the FRF has considered or assessed the available information on the dugong or the effects of the FRF." (p. 37) In strong language, she says that "the court is unconvinced that DOD has expressed concern for, let alone taken steps to consider the effects of the FRF on the dugong. As plaintiffs argue 'it is disingenuous for DOD to now claim Japan's environmental concerns as their own.'" (p. 38).

THE ORDER

In her final Order, Judge Patel grants our motion for summary judgment and denies defendants' cross-motion for summary judgment and:

1. Holds that "defendants have failed to comply with the requirements of the NHPA section 402, and this failure to comply is agency action that is unreasonably delayed and unlawfully withheld,

2. Orders defendants to comply with NHPA section 402 and holds the case 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 mitigate adverse effects to the dugong,” and

3. Orders the defendants to submit to her within 90 days “documentation describing what additional information is necessary to evaluate the impacts of the FRF on the dugong; from what sources, including relevant individuals, organizations, and government agencies the information will be derived; what is currently known or anticipated regarding the nature and scope of Japan’s environmental assessment and whether that assessment will be sufficient for meeting defendants’ obligations under the NHPA; and identifying the DOD officials with authorization and responsibility for reviewing and considering the information for purposes of mitigation.” Plaintiffs have the opportunity to respond to this submission within 45 days of the defendants’ filing.

SIGNIFICANCE OF THE RULING

This victory is significant in two respects. First, and most importantly, the opinion and order hold DOD responsible for their participation in the construction of the Futenma Replacement Facility. The Judge does not let DOD hide behind the actions of its partner – the Government of Japan. Moreover, by retaining jurisdiction over DOD’s plan to meet the “taken into account” standards, the Judge not only indicates that she will monitor DOD’s compliance, but also ensures an ongoing roll for the plaintiffs in this process.

This case is also exciting because it is the first time that the extraterritorial provision of the NHPA has ever been applied. To the extent that there are other species or places around the world that are protected under a country’s historic or cultural preservation laws but adversely impacted by a US agency acting overseas, the NHPA may be applicable. Holding the U.S. government accountable for its actions, regardless of whether it acts within the United States or abroad, is a major victory for the rule of law.