UNITED STATES DISTRICT COURT
For the Northern District of California

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

OKINAWA DUGONG (Dugong Dugon), *et al.*,

Plaintiffs,

v.

DONALD H. RUMSFELD, in his official capacity as the Secretary of Defense, *et al.*,

Defendants.
_____/

No. C 03-4350 MHP

**MEMORANDUM & ORDER**

Plaintiffs, consisting of the Okinawa dugong, American and Japanese environmental groups, and three individual Japanese citizens, brought this action against defendants Donald H. Rumsfeld, Secretary of Defense, and the United States Department of Defense, alleging that defendants failed to comply with the requirements of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470a-2, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Now before the court is defendants' motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Having considered the arguments of the parties and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

I. United States Military Bases and Okinawa

The United States has maintained military bases on Okinawa since 1945. First Am. Compl. ¶ 23; Am. Ans. ¶ 23. On June 17, 1971, Japan and the United States signed the "Agreement Between

the United States and Japan Concerning the Ryukyu Islands and the Daito Islands," under which the United States relinquished its post-war administration of these island chains, which include Okinawa, and restored them to Japanese control. First Am. Compl. ¶ 23; Am. Ans. ¶ 23. Under Article III of the agreement, Japan granted the use of facilities and areas in the islands to the United States in accordance with the Treaty of Mutual Cooperation and Security ("Treaty") and the Status of Forces Agreement ("SOFA") of 1960. See Treaty, Pls.' Exh. 4; SOFA, Pls.' Exh. 5. The Treaty also created the Security Consultative Committee ("SCC"), consisting of the Japanese Minister of Foreign Affairs, the Japanese Minister of Defense, the United States Secretary of Defense, and the United States Ambassador to Japan. See Hill Decl. ¶ 2. SOFA instructs that this committee "shall serve as the means of consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes of the Treaty of Mutual Cooperation and Security." SOFA, Art. XXV, Pls.' Exh. 5.

The United States Department of Defense maintains and controls a number of military bases on Okinawa, including the Marine Corps Air Station Futenma, which operates facilities and provides services and materials to support Marine Corps aircraft operations. First Am. Compl. ¶ 23; Pls.' Exhs. 6-7. In November 1995, the United States and the government of Japan established the Special Action Committee on Okinawa ("SACO"), a bilateral committee with the primary purpose of reducing the burden of the United States military presence on the Okinawans. First Am. Compl. ¶ 25; Am. Ans. ¶ 25; Hill Decl. ¶ 2. SACO recommended that Marine Corps Air Station Futenma be replaced by a sea-based facility, and in its Final Report, issued by the SCC on December 2, 1996, it created the Futenma Implementation Group ("FIG"), a bilateral Japan-United Statescommittee under the supervision of the SCC. First Am. Compl. ¶ 26; Ans. ¶ 26, Pls.' Exh. 8, at 1. The implementation group was charged with formulating a "detailed implementation plan" by December, 1997, encompassing "concept development and definition of operational requirements, technology performance specifications and construction method, site survey, environmental analysis, and final concept and site selection." Pls.' Exh. 8, at 1. Upon SCC approval of this plan, the FIG was engaged to work with the Joint Committee to "oversee design, construction, testing and transfer of assets" of the base, with the Japanese government "selecting, financing, designing, and building" the

new facility. Id.; Pls.' Exh. 11, at 29. The United States Department of Defense provided nearly four million dollars for the operation of the FIG in 1999. Dep't of the Navy, FY 1999 Am. Budg. Estimates, Pls.' Exh. 10, at 16.

On September 29, 1997, the United States Department of Defense released a document entitled "Operational Requirements and Concept of Operations for Marine Corps Air Station Futenma Relocation, Okinawa, Japan," ("1997 Operational Requirements") which outlined the Department of Defense's "functional requirements and concept of operations" for the replacement facility. Pls.' Exh. 12, at 1-1; Ans. at 4-5; Hill Decl. ¶ 3. The 1997 Operational Requirements set out the Department of Defense's requirement that the replacement facility be located in Henoko Bay, adjacent to Camp Schwab. 1997 Operational Requirements, Pls.' Exh. 12, at 2-6, 3-1. The 1997 Operational Requirements also set out the United States Department of Defense's requirements relating to the various surveys required before construction begins. Id. at 3-13 to 3-21. This document was updated and superceded by the 2001 Preliminary Operational Requirements dated February 15, 2001. Ans. ¶ 21; Defs' Mot. for In Camera Inspection.

In November 1999, the Governor of Okinawa announced a specific location for the replacement facility immediately offshore from Camp Schwab and thus in the area required by the 1997 Operational Requirements. See Hill Decl. ¶ 4; Pls.' Exh. 12. The Mayor of Nago City accepted this relocation decision in December, 1999. Id. In August, 2000, the Consultative Body of Futenma Relocation, composed exclusively of local and national officials from the Government of Japan, was established in order to produce a "Basic Plan" that identified the "location, size, construction method and runway orientation of the Futenma Replacement Facility." Id. ¶ 5. The Basic Plan issued by this body in July, 2002, approved the Governor of Okinawa's decision to relocate Marine Corps Air Station Futenma to Nago City's Henoko District, immediately offshore from the Marine Corps' Camp Schwab. Id. ¶ 6. This decision therefore satisfied the locational requirements announced in the 1997 Operational Requirements. See 1997 Operational Requirements, Pls.' Exh. 12, at 2-6, 3-1. The 2002 Basic Plan "preempted" the 1997 Operational

Requirements document, as well as the interceding 2001 Preliminary Operational Requirements document, Hill Decl. ¶ 7. The Consultative Body of Futenma Relocation has been succeeded by the Consultative Body on the Construction of the Futenma Replacement Facility, a body established for the purpose of minimizing construction impacts on the local community and natural environment. Id. ¶ 8.

The Naha Defense Facility Administration, a department of the Japanese Defense Agency, has, with the approval of the United States Department of Defense, constructed an office building within Camp Schwab to manage its on-site work relating to construction of the new facility. Pls.' Exh. 19, at 1. In addition, the facility is planning to carry out a technical survey that will include the boring of approximately 63 holes into Henoko Bay's coral reef and ocean floor. Id.; Pls.' Exh. 17, at 15; Pls.' Exh. 19, at 1.

II. The Okinawa Dugong

The dugong is an herbivorous marine mammal that inhabits tropical and subtropical coastal and island waters in the Indo-Pacific from East Africa to Vanuatu. Pls.' Exh. 3, at 129. The Okinawa dugong (*Dugong dugon*) is a small, isolated population of the Dugong species found in the waters off the eastern coast of Okinawa. Pls.' Exh. 1, at 46. One of the smallest known populations of dugong, it is thought to comprise "about 50 individuals," which feed on the "few remaining sea grass beds in that area," one of which is off the Henoko coast. Pls.' Exh. 3, at 129. The animal is central to the creation mythology, folklore, and rituals of traditional Okinawan culture. Maeda Dec. ¶¶ 6-34.

According to a 2002 United Nations Environmental Programme report, the construction of a military base near Henoko could "destroy some of the most important known remaining dugong habitat in Japan," with "potentially serious" repercussions for such a small population. Pls.' Exh. 1, at 42. The report predicts that "unless measures are undertaken to protect dugongs in the Okinawan region they will soon be extinct in Japanese waters." Pls.' Exh. 1, at 46. The dugong is listed as "endangered" under the United States Endangered Species Act. 16 U.S.C. § 1531 et seq.; 50 C.F.R. § 17.11. The patterns of dugong feeding activity and the range of its active habitat are in dispute, but

it is agreed that Henoko Bay provides "viable sea grass areas" which are "potential dugong feeding areas." Getlein Dec. ¶ 8; Mollo Dec., Exh. 1. In Japan, the Okinawa dugong is a protected "natural monument" under that country's "Law for the Protection of Cultural Properties." Yonaha Dec. ¶ 4; Takamichi Dec. ¶ 16; Japanese Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments, Pls.' Exh. 31. Henoko Bay has not been designated for cultural protection nor listed as a natural monument. Yonaha Dec. ¶ 3.

III. Procedural History

In a Civil Pretrial Order on March 15, 2004, the court directed the parties to file motions for summary judgment limited to the issue of the application of the NHPA to this case. Defendants presently seek dismissal under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim and 12(b)(1) for lack of subject matter jurisdiction, having understood this reference to summary judgment motions "to pertain to an appropriate dispositive motion (whether styled as one to dismiss the complaint or for summary judgment), provided that the motion is confined to the application of the NHPA, per the court's directive." Defs.' Mot. at 10. Defendants answered plaintiff's complaint on December 9, 2003. Plaintiffs subsequently submitted forty-four affidavits and exhibits in support of their opposition, and defendants submitted several affidavits and exhibits in support of their reply. No objections have been made to any of those submissions.

Federal Rule of Civil Procedure 12(b)(6) provides that "if . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." See also Grove v. Mead School Dist., 753 F.2d 1528, 1532-33 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1985). Conversion is proper where the parties have fair notice that the matter may be considered as a motion for summary judgment and have the opportunity to submit materials pertinent to such a disposition. Rand v. Rowland, 154 F.3d 952, 958-59 (9th Cir. 1998). Such notice is implied to parties who submit matters beyond the pleadings for consideration. Grove, 753 F.2d at 1533 (holding that a represented party who submits matters outside the pleadings and invites consideration of them has notice that the judge may transform the motion into one for summary judgment). See also In re G. & A. Brooks, Inc., 770 F.2d

288, 295 (2d Cir. 1985) (holding that where a nonmoving plaintiff files exhibits outside the pleadings, references such material at the motion to dismiss hearing, and requests an extension of time to submit additional materials, the party had constructive notice of the possibility of a conversion to a motion for summary judgment).

In the present case, both parties have submitted documents beyond the pleadings which they referenced in the hearing on the motion to dismiss and supplemented following that proceeding. Both were on notice of the court's expectation, communicated through the Pretrial Order, to proceed as a motion for summary judgment. Following the hearing on defendants' motion, both parties supplemented the record with additional evidence. No objections have been made to the admissibility of any exhibit provided to this court. On that basis, the court will consider the submissions beyond the pleadings and convert the instant motion to dismiss to one for summary judgment. As specified by this court and understood by the parties, the question on review is limited to the issue of whether the NHPA is applicable to this case.

## LEGAL STANDARD

### I. Summary Judgment

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a

genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. Id.; Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). The court may not make credibility determinations, and inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991); Anderson, 477 U.S. at 249.

II. The National Historic Preservation Act

Congress enacted the NHPA in 1966 with the goal of preserving the "historical and cultural foundations of the Nation . . . in order to give a sense of orientation to the American People." 16 U.S.C. § 470(b)(2). The Act establishes that "[i]t shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals . . . [to] provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations." 16 U.S.C. § 470-1(2). The NHPA authorizes the Secretary of the Interior to maintain a National Register of Historic Places "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(1)(A).

Under section 470f of the Act, federal agencies are required, when undertaking any federally assisted action in the United States, to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included, or eligible for inclusion, in the National Register." 16 U.S.C. § 470f. Any such federal agency must provide the Advisory Council on Historic Preservation, established under the NHPA, with a "reasonable opportunity to comment with regard to such undertaking." 16 U.S.C. § 470f. The Act therefore imposes a dual obligation on federal agencies: the substantive duty to "weigh effects" in deciding whether to undertake the federal action and the procedural duty to consult with the Advisory Council. See Save Our Heritage v. Fed. Aviation Administration, 269 F.3d 49, 58 (1st Cir. 2001).

In 1980, Congress amended the NHPA to implement the United States' participation in the Convention Concerning the Protection of the World Cultural and National Heritage. The

amendment includes section 470a-2, which provides that:

> 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.

16 U.S.C. § 470a-2. In 1998, the Secretary of the Interior published suggested guidelines for federal agency responsibilities under the amended Act.[1] 63 Fed. Reg. 20,496 - 20,508 (April 24, 1998). According to these guidelines, "efforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, with affected communities and groups, and with relevant professional organizations." 63 Fed. Reg. 20,496 and 20,504 (April 24, 1998). Such consultation "should be undertaken early in the planning stage of any Federal action that might affect historic properties." Id. Therefore, as with domestic projects governed by section 470f, federal agencies are obligated under section 470a-2 to consider adverse effects, and they are guided by Secretary of the Interior guidelines to consult with foreign bodies.

III. Administrative Procedures Act

The NHPA does not provide an independent basis for judicial review of agency actions. However, the Administrative Procedures Act ("APA") authorizes judicial review of final agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Final agency actions are defined as actions which "mark the consummation of the agency's decisionmaking process," defined as not "merely tentative or interlocutory nature," and which determine "rights or obligations" or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 178 (1997). Ripeness of agency action for judicial review turns on the "fitness of the issue for judicial decision" and the "hardship to the parties of withholding court consideration," but in close questions, courts are "guided by a presumption of reviewability." See Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 434 (D.C. Cir. 1986); Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 757 (D.C. Cir. 2003). An agency action or decision may be set aside if the court finds it to be "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). A court's inquiry must be "searching and careful," but the standard of review is ultimately narrow. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (internal quotations and citation omitted).

DISCUSSION

I. The National Historic Preservation Act

Defendants assert that the NHPA does not apply to the circumstances of the present action. The language of section 470a-2 stipulates that the statute applies to "any federal undertaking" affecting "a property" that is "on the applicable country's equivalent of the National Register." 16 U.S.C. § 470a-2. Defendants contend that the Japanese Law for the Protection of Cultural Properties is not "equivalent" to the National Register of Historic Places, the dugong cannot constitute "property," and the United States Department of Defense has taken no action that could be considered a "federal undertaking." The court considers these issues in turn.

A. The Equivalence of Japan's Law for the Protection of Cultural Properties and the National Register

Section 470a-2 applies to properties which are included on the UNESCO World Heritage List or on "the applicable country's equivalent of the National Register." 16 U.S.C. § 470a-2. The applicability of the NHPA to the Okinawa dugong thus turns on whether the Japanese law which designates it for preservation, the Law for the Protection of Cultural Properties, is Japan's "equivalent" of the National Register.

According to the language of the Japanese act itself, the Law for the Protection of Cultural Properties was motivated by an awareness that "the cultural properties of the country are indispensable to the correct understanding of its history, culture, etc., and that they form a foundation for its cultural development for the future." Art. VIII, Law for the Protection of Cultural Properties, Pls.' Exh. 20, at 1; Takamichi Dec. ¶ 8. The law seeks to "preserve and utilize cultural properties, so that the culture of the Japanese people may be furthered and a contribution . . . made to the evolution of world culture." Pls.' Exh. 20, at 1. Similarly, the NHPA was motivated by the belief that "the historical and cultural foundations of the Nation should be preserved as a living part of our

community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b)(2). The Law for the Protection of Cultural Properties is the only law concerned with the protection of cultural properties in Japan, just as the NHPA is the chief American law governing the issue in this country. See Takamichi Dec. ¶ 4. And like the NHPA, with its expansive scope, the plain language of the Japanese law covers a broad range of properties. Pls.' Exh. 20, at 1. The Japanese law stipulates that "cultural properties" may include historic buildings, works of art, archeological sites, gardens, places of scenic beauty, and other "natural monuments." Id. The National Register and the Law for the Protection of Cultural Properties thus reflect similar motives, share similar goals, and generally pertain to similar types of property.

Defendants argue that the Japanese law which protects the dugong as a "national monument" is not "equivalent" to the National Register because the former includes "both inanimate and animate things," whereas the latter "provides no legal recognition or protection whatever for any animal species." Defs.' Mot. at 15. There are several reasons why defendants are not entitled to summary judgment on this argument regarding lack of equivalence. First of all, by employing the word "equivalent," section 470a-2 does not require that the National Register and the foreign list in question be identical. Contemporaneously with the passage of the amendment in 1980, the noun form of "equivalent" was defined as "one that is equivalent (as in value, meaning, and effect)," and synonymous with the word "counterpart." Webster's Third New International Dictionary 769 (1971).[2] "Equivalent" as an adjective was then defined in relevant contexts as "like in signification or import" and "corresponding or virtually identical esp[ecially] in effect or function." Id. These definitions of the term thus focus on the effects, significance, and consequences of the objects compared; they do not require that the objects be identical, but rather that they be "counterparts."

As a result, the court interprets the section as requiring that the foreign list be "corresponding or virtually identical especially in effect or function." Both registers have corresponding and indeed virtually identical effects (to designate the cultural and historical heritage of the nation for special protections) and the same function (using the mechanism of a cultural protection register). An interpretation of section 470a-2 requiring that the foreign list be "identical" to the American one would, like the use of the NHPA's definition of "historic property" discussed below, contradict the

international aspect of the section. To require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture. See King Dec. ¶ 45(a). Defendants' restrictive reading of "equivalent" would mean that no nation in the world had an equivalent list, because each one inevitably differs in its identification and scope of protection. Id. To require identical definitions of culture would eviscerate section 470a-2's explicit recognition of "equivalent" foreign lists.

The National Register and the Japanese Register are also equivalent because their authorizing statutes serve parallel roles in each nation's statutory scheme for the protection of human and natural resources. The Law for the Protection of Cultural Properties developed independently from Japan's laws protecting wild animals for their biological value. See Pls.' Opp'n at 12; Takamichi Dec. ¶ 6. For an animal species to be listed under the Cultural Properties law, it must possess sufficient cultural value; whether or not it is endangered or biologically valuable is irrelevant. See Takamichi Dec. ¶ 12. Other Japanese statutes protect animals for their biological value or due to their endangered status, such as the Law for the Conservation of Endangered Species of Wild Fauna and Flora and various statutes protecting fisheries, natural parks, and mammals. Id. at ¶ 6. The Cultural Properties law is the only cultural protection law of its kind in Japan. Id. at ¶ 4. Similarly, the NHPA is the United States's cultural protection legislation, existing apart from other statutes protecting endangered species. Compare 16 U.S.C. § 470 et seq. with 16 U.S.C. § 1531 et seq. Both statutes have evolved in a similar direction towards greater inclusiveness of natural, as well as cultural, places and things. King Dec. ¶¶ 9-14, 45(b).

Lastly, the statutes demonstrate an equivalent commitment to protecting significant bridges between human culture and history, on the one hand, and wildlife, on the other. The presence of culturally significant animals has been the basis of many listings and determinations of eligibility for the National Register, including several animal habitats important in Native American tribal histories. See King Dec. ¶¶ 12, 34-35. The fact that the National Register classifies these listings using the name of a site, rather than the name of the culturally-significant animal species present there, does not undermine an argument for equivalence with the Japanese List.[3] On the contrary,

both lists have the same effect—the protection of animals in specific settings of cultural importance—rendering their different nomenclatures merely incidental. The dugong is protected in an equivalent way: the Law for the Cultural Protection of Properties lists one particular population, the Okinawa dugong, for protection because the animal has special importance in native Okinawan mythology and culture. Maeda Dec. ¶¶ 4, 6-20.

Indeed, this line of reasoning explaining the statutes' equivalence arguably reaches even further, as both the National Register and the Japanese Register list properties of biological value, without an explicit cultural dimension. Defendants argue that nature per se is not protected under the NHPA, absent some historical dimension. Yet in fact, wildlife refuges are included on the National Register without any cultural or historical links. See King Dec. ¶ 34. In addition, the UNESCO World Heritage List, which is expressly referenced as a benchmark for the coverage of section 470a-2, also lists marine wildlife habitat and sanctuaries for protection.[4] See Mollo, Supp. Dec. ¶¶ 1-7, Exh. 1. This is "equivalent" to the category of "natural monuments" under the Japanese law, which permits animals to be designated as cultural properties if they are "of great scientific-historic value" and "commemorate Japan's natural environment." Id. at 5.

In light of the many similarities between the lists generated by the Law for the Protection of Cultural Properties and by the NHPA, the Japanese law is an "equivalent of the National Register" within the meaning of section 470a-2.

B. The Dugong as "Property"

This court's inquiry could justifiably end with the finding of equivalence between the two lists at issue in this case, as well as the conceded fact that the Okinawa dugong is protected on the Japanese list. The language of section 470a-2 applies to "propert[ies]" which are "on the World Heritage List or on the applicable country's equivalent of the National Register." While reasonable jurists might dispute the degree to which "property" is intended as a restrictive term in the amendment, it will nevertheless pursue defendants' argument that section 470a-2 can only apply if the Okinawa dugong can be understood as property within the NHPA statutory scheme.

The term "property" is not defined in the NHPA. However, the statute defines the phrase "historic property" as "any prehistoric or historic district, site, building, structure, or object included

in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource." 16 U.S.C. § 470w(5). See also Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1230 (9th Cir. 1999). The National Register is to be "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A). According to the Code of Federal Regulations, such significance may derive from an association "with events that have made a significant contribution to the broad patterns of our history . . . or . . . with the lives of persons significant in our past. " 36 C.F.R. § 60.4. Additionally, such significance may be attained through "distinctive characteristics," "high artistic values," or a potential "to yield information important in prehistory or history." Id.

Rather than utilizing the phrase "historic property," section 470a-2 refers only to "property." 16 U.S.C. § 470a-2. The court must decide whether the section implicitly requires that the dugong be a "historic property" under the NHPA's definition or whether it need only be "property." The essence of the NHPA's definition is that a "historic property" is a "district, site, building, structure, or object" that is "significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470w(5); 16 U.S.C. § 470a(a)(1)(A) (emphasis added). This definition not only assumes, but also is explicitly limited to, the application of the statute in a domestic context. Thus, it can only serve to identify properties of value from an American perspective.

On the other hand, section 470a-2 concerns the application of the NHPA to foreign arenas. Requiring that a foreign property meet the NHPA's definition of "historic property" would conflict with the statute's explicit reference to foreign law, refocusing the analysis on domestic considerations and criteria. Congress clearly intended a different standard to govern the eligibility of properties for protection under section 470a-2, as demonstrated by the wording of the section itself. In addition to utilizing the term "property" rather than the domestically-defined "historic property," the section sets out a foreign standard for determining those properties to which it applies, requiring that properties be on UNESCO's World Heritage List or on the foreign country's "equivalent of the National Register." Id. Thus, the focus is on the property's actual inclusion on a foreign list, rather than whether a particular property would be eligible under National Register criteria.

Congress's intention to set this different standard for historically significant properties under section 470a-2 is also supported by the legislative history. The section was enacted to provide "legislative implementation for United States participation in the [UNESCO-sponsored] Convention Concerning the Protection of the World Cultural and Natural Heritage." Pls.' Exh. 22, at 43. Congress acknowledged that the Convention, "leaves it to each participating nation to identify and delineate the meritorious heritage properties situated in its own territory." Id. In light of these considerations, the definition of "historic property" set out in the NHPA cannot be controlling in the section 470a-2 context. Accordingly, plaintiffs need only prove that the dugong is a "property."

It remains for the court to interpret the parameters of the term "property" as utilized in section 470a-2. Here, the NHPA and the federal regulations still provide guidance. Without the untenable focus on significance in American history, "property" becomes simply a "district, site, building, structure, or object." An "object" is defined as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j). Plaintiffs have satisfied their burden to show that the dugong fulfills each element of the CFR's definition. The dugong is indisputably a "material thing," as opposed to something of a spiritual or intellectual nature. The plaintiffs have provided evidence that the dugong possesses "functional, aesthetic, cultural, historical or scientific value," particularly a special cultural significance in Okinawa. See Maeda Dec. ¶¶ 6-34. Plaintiffs have provided uncontroverted evidence that in Okinawan creation mythology, the dugong is considered the ancestor of human beings, and that in traditional Okinawan folklore and ritual, the dugong is revered as a "female mermaid spirit," worshiped at special shrines as a deity responsible for successful fishing expeditions, and feared as an "ocean spirit" capable of creating tsunamis. Id. ¶ 6, 7, 8, 29, 30. Songs concerning the dugong are "regularly sung" by shamans and residents of the Henoko Bay area, further suggesting a contemporary cultural value beyond the dugong's status as a "wild animal." Id. at ¶ 34. Finally, there can be no dispute that the Okinawa dugong is "movable yet related to a specific setting or environment," namely, Henoko Bay, which is in the "middle" of the offshore area where "the dugongs and the seabeds they use for feeding and habitat are located." Pls.' Exh. 3, at 129-30.

Defendants contend that a wild animal cannot qualify as "property," and that there is no indication in the NHPA and its amendments, the accompanying legislative history, the implementing regulations and guidelines, or case law that Congress "sought to expand the NHPA's statutory coverage in order to protect or preserve wild animals." See Defs.' Mot. at 3, 13.[5] "Wild animals" fails to describe the relevant group of animals at issue here, namely those with special cultural significance protected under foreign historical preservation laws which are deemed "equivalents" of the National Register of Historic Places. Taking defendants' point, nonetheless, very little precedent exists governing the question of whether a living thing can constitute a property eligible for the National Register. The decision of the one district court that has dealt with the issue undermines defendants' argument that the dugong is automatically disqualified. In Hatmaker v. Georgia Department of Transportation, 973 F. Supp. 1047 (M.D. Ga. 1995), plaintiffs sought a preliminary injunction against continued construction of a federally-funded road widening project that involved destruction of an oak tree of significance in Native American history. The court held that the tree was at least potentially eligible for placement on the National Register and granted the preliminary injunction. Id. at 1056-57. In a subsequent case, in which the Department sought to have the injunction dissolved, the court again rejected the defense's argument that an unaltered tree could not qualify for the National Register. See Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1058, 1066 (M.D. Ga. 1997). In assessing the applicability of the statute, the court emphasized the verifiable nature of the contested object's historic qualities. Id. at 1067.

Hatmaker is analogous to the present case. While animals obviously differ from trees, their distinguishing qualities are not significant under the plain language of the statute. The dugong may, like a tree, fall under the category of "object," as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j).

Defendants' remaining arguments against the dugong's status as property are equally unavailing. Defendants argue that the Ninth Circuit has held that the state and federal governments cannot "own" wild animals, and therefore that such animals cannot be property. See Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988). Whether the government owns the property is

irrelevant to a determination of eligibility for the National Register. See 36 C.F.R. § 60.2. But even inferring a broader point by defendants, a mere lack of ownership or possibility of ownership does not disqualify a thing from constituting property. As the Tenth Circuit has noted, while it is "well settled that wild animals are not the private property of those whose land they occupy," they "are instead a sort of common property whose control and regulation are to be exercised [by the government] 'as a trust for the benefit of the people.'" Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) (emphasis added) (quoting Geer v. Connecticut, 161 U.S. 519, 528-29 (1896), overruled on other grounds, Hughes v. Oklahoma, 441 U.S. 322 (1979)).

Besides the issue of whether the Okinawa dugong, as an animal, can qualify as property under the Register, both parties have raised arguments regarding the eligibility of the sea grass feeding grounds of the dugong. Defendants have argued that such areas are too ill-defined to be eligible for inclusion, because protected places in the NHPA context must be "concretely bounded" and defined by actual, physical, and contemporary markings. Similarly focusing on the eligibility of dugong habitat, plaintiffs have provided evidence that the dugong would also be eligible for protection under the NHPA as an element that contributes to the cultural significance of its habitat. Pls.' Opp'n at 14; King Dec. ¶ 15. Plaintiffs have provided this court with several examples of protected places whose significance is derived from the animal species occupying the sites; for instance, wildlife refuges and sites culturally associated with certain species. See King Dec. ¶ 34-35; Pls.' Notice of Supplemental Exh. at 1.[6]

The first argument regarding dugong habitat, raised by defendants, is that the lack of any precise boundaries of dugong habitat disqualifies such areas from the status of eligible property because the Ninth Circuit has held that the words "'district, site, building, structure, or object'" in the NHPA context "all connote something more concretely bounded and defined than a general area." See Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1231 (9th Cir. 1999).[7] Yet, in Hoonah the location of the culturally-significant area had proven impossible to determine even after extensive research and the plaintiffs' own submission referred to the site as a "'symbolic' location as opposed to an 'actual' one." See id. at 1231-32. By contrast, the site of the dugong's habitat is determinable through present-day observation of the dugong itself, the location of the sea grass meadows on which

it depends for food, and indications of feeding activity. Plaintiffs provided maps documenting the location of the sea grass beds, providing uncontroverted evidence that these meadows are physically definable and confined to specific areas along 10% of the overall Okinawan coastline.[8] See Pls.' Opp'n at 14, n.13; Pls.' Exh. 1, at 42; Mollo Dec., Exh. 1, at 1-3. Such evidence of the dugong's habitat meets Hoonah's requirement of an actual site known by contemporary physical markings. Hoonah, 170 F.3d at 1232.

The dugong habitat, as opposed to the animal itself, does not obviously qualify as a property eligible for application of the NHPA for an additional reason. It is the dugong itself, not its habitat, which is listed as a natural monument under the Cultural Resources Protection Law. Defendants have provided uncontroverted evidence that Japanese law does not name Henoko Bay, or any part thereof, for any form of cultural protection. See Yonaha Dec. ¶ 3. Given the fact that the Japanese law does not protect Henoko Bay for its cultural or historical significance, it is not "property" protected under another country's "equivalent" to the National Register. See 16 U.S.C. § 470a-2. Plaintiffs do not explore the argument that the Japanese statute (i.e., the Law for the Protection of Cultural Properties), by stipulating that the form of "cultural property" known as a "natural monument" encompasses "animals (including their habitats . . . )," already explicitly covers the dugong's habitat. Agency for Cultural Affairs, Government of Japan, Law for the Protection of Cultural Properties (July 2003), Pls.' Exh. 20, at 1. Such an interpretation is supported by the statute's instruction to government officials to alert the Minister of the Environment "if it is deemed necessary for the protection and improvement of natural environment related to the . . . natural monument." Id. at 28. However, because plaintiffs do not make this point, and because the court finds that the dugong is potentially eligible as a property under section 470a-2, the court need not attempt to ascertain the meaning and intent of the Japanese statute.

The Okinawa dugong is movable, yet related to a specific setting or environment. It is protected under Japanese law on the basis of its cultural and historical importance to the Okinawan people. Therefore, section 470a-2 of the NHPA can apply to the Okinawa dugong, an animal protected for cultural, historical reasons under a foreign country's equivalent statutory scheme for cultural preservation.

C. The Marine Corps Air Station Futenma Relocation As a "Federal Undertaking"

Section 470a-2 applies to "any Federal undertaking outside the United States." 16 U.S.C. § 470a-2. The term "undertaking" is defined in the NHPA as:

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

16 U.S.C. § 470w(7). To this court's knowledge, no case law specifically interprets the NHPA definition of "undertaking" in the context of section 470a-2. However, precedent interpreting "undertaking" in the domestic application of NHPA provides an important guide in the present action. The two statutes are governed by the same definition of "undertakings" under the NHPA. See 16 U.S.C. § 470w(7). The one notable difference between the provisions governing federal undertakings conducted domestically and those that are undertaken abroad is that "undertakings" in the domestic context are triggered by the more restrictive event of "the approval of the expenditure of any Federal funds . . .or the issuance of any license" rather than, in the case of section 470a-2, "the approval of any Federal undertaking." Compare 16 U.S.C. § 470f, with 16 U.S.C. § 470a-2. The triggering clause for section 470a-2 is thus more broad, indicating that Congress may have intended a less restrictive definition of undertakings to apply to federal projects abroad.

The standards for identifying "undertakings" under the NHPA have been widely held to be "similar" to those for identifying "major federal actions" under the National Environmental Protection Act. See Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) (distinguishing the two acts' compliance requirements but noting the "similarities between the demands and goals" of the two statutes). See also Sugarloaf Citizens Ass'n v. Fed. Energy Regulatory Comm'n, 959 F.2d 508, 515 (4th Cir. 1992); United States v. 162.20 Acres of Land, 639 F.2d 299, 304, n.5 (5th Cir. 1981). Major federal actions have been described as "legal condition[s] precedent." Ringsred v. City of Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987). Factors to consider in evaluating major federal actions include: (1) the agency's degree of discretion over the federal

aspects of the project, (2) whether federal aid has been given, and (3) whether the overall level of federal involvement is sufficient to transform "essentially private action into federal action." Id.

Courts have construed the NHPA's broad definition of "undertakings" to include a wide range of direct and indirect means of federal support, such as financing, licensing, construction, land grants, and project supervision.[9] See Tyler v. Cuomo, 236 F.3d 1124, 1128 (9th Cir. 2000) (finding a development funded in part by federal financing to be reviewable under the NHPA); Native Americans for Enola v. U.S. Forest Serv., 832 F. Supp. 297 (D. Or. 1993) (finding issuance of a permit to haul logs across federal property reviewable under the NHPA); Sierra Club v. Clark, 774 F.2d 1406, 1408, 1410 (9th Cir. 1985) (finding the approval of a racecourse on federal land to be reviewable under the NHPA). See also Historic Green Springs, Inc., v. Bergland, 497 F. Supp. 839, 853 (E.D. Va. 1980) (finding that "case law interpreting the scope of the term 'Federal or federally assisted undertaking,' suggest a very broad reading"); Nat'l Indian Youth Council v. Andrus, 501 F. Supp. 649, 676 (D.C. N. M. 1980) (noting that the NHPA regulations "define '[u]ndertaking' in a broad sense").

Important factors to consider in identifying undertakings within the meaning of the NHPA include the agency's "initiation, its funding, or its authorization" of the alleged undertaking. Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 120 (D.D.C. 1986). Federal involvement in construction is a classic fit with NHPA covered undertakings, including federal efforts to coordinate, plan, and fund non-covered entities executing construction projects. See, e.g., Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153 (9th Cir. 1998) (finding that a project built by a concessioner on federal land was subject to NHPA review). Cases cited by both parties indicate that either a federal agency's decision-making authority over a project or actual expenditure is sufficient to constitute an undertaking pursuant to the NHPA in the domestic context. See, e.g., Clark, 774 F.2d at 1410; Presidio Golf Club, 155 F.3d at 1156, 1162 (9th Cir. 1998) (reviewing agency's proposed funding of construction by concessionaire of golf house on federal property).

While section 470a-2 refers to a time frame "[p]rior to the approval of any Federal undertaking," three circuits have held that the same "prior to" language of section 470f applies to on-going federal activities as well as fully executed ones. See Morris County Trust for Historic

Preservation v. Pierce, 714 F.2d 271, 280 (3d Cir. 1983) (holding that the NHPA is applicable to "an ongoing project at any stage where a Federal agency has authority to approve or disapprove federal funding and to provide meaningful review of. . . historic preservation. . . goals"); CA 79-2516 Watch v. Harris, 603 F.2d 310, 319-23 (2d Cir 1979) (considering the legislative history of section 470f of the NHPA and holding that Congress intended for the provision to apply until the agency finally approved the expenditure of funds at each stage of an undertaking); Romero-Barcelo v. Brown, 643 F.2d 835, 859, n.50 (1st Cir. 1981) (noting that the NHPA should be construed to include on-going federal activities in parallel to interpretation of the NEPA).[10]

Plaintiffs allege and argue that the following activities constituted federal undertakings for the purposes of the NHPA: the Department of Defense's approval of the plan for the replacement facility; drafting of a preliminary document to establish location and design requirements for the facility; approval of requests to enter Camp Schwab to conduct technical surveys, construct a facility planning building, and permit the regular use of such a building; funding the preparation of the 1997 Operational Requirements and funding the FIG; and constructing the replacement facility on behalf of the Department of Defense, pursuant to its requirements, and for its use. See First Am. Compl. ¶¶ 2, 25-31; Pls.' Opp'n at 18-21. Plaintiffs have provided documentary evidence of each of these endeavors. See Pls.' Exhs. 8-19, 38-40.

The parties do not dispute whether the activities described by plaintiffs constitute a "project, activity, or program." See 16 U.S.C. § 470w(7). Similarly, defendants do not contest that they have funded the replacement facility planning process (evidence suggests that the United States spent millions of dollars funding the FIG), nor that they will fund the military base's relocation to the replacement facility upon completion. See Pls.' Exhs. 10, 12-13, 15. Such expenditure indicates that the activities at issue were funded "in whole or in part" by defendants. See 16 U.S.C. § 470w(7). Thus, in construing whether defendants' conduct amounts to one or more reviewable federal undertakings, this court turns to the details of each alleged undertaking and their eligibility for coverage under the statutory definition as activities "under the direct or indirect jurisdiction of a Federal agency," including those that are "carried out by or on behalf of the agency," "carried out with federal assistance," or "requiring a Federal. . . approval." See 16 U.S.C. § 470w(7).

As a preliminary matter, defendants argue that the 1996 SACO Report and 1997 Operational Requirements cannot constitute federal undertakings, because they have been superceded by the 2002 Basic Plan. See Hill Dec. ¶¶ 5-7. This court finds a compelling reason to deny defendants the right to object to the currentness of the 1996 and 1997 documents: the classification of the updated Operational Requirements document, dated in 2001, as top secret.[11] Defendants cannot, on the one hand, point to a superceded planning document as moot, and on the other, shroud the more current document in top secret classification. For defendants to omit any reference to the updated 2001 document and insinuate that American involvement in the relocation project ended with the 1997 document is disingenuous at best. See Hill Dec., ¶¶ 3-7. The SACO Report and the 1997 Operational Requirements established the core requirements for the replacement facility, and in the absence of access to the updated document, plaintiffs are entitled to proceed with discovery on the basis of these foundational reports. See Pls.' Exhs. 13-14. Until this court takes up the issue of plaintiffs' entitlement to the 2001 document during regular discovery, plaintiffs are entitled to conduct depositions and other discovery on the basis of the content in the 1996 and 1997 documents.

In addition, the undertakings at issue here—the drafting of federal agency requirements for its replacement military facility—are not moot in the jurisdictional sense, such that there is no longer a meaningful, live controversy to be decided by this court. See American Rivers v. National Marine Fisheries Service, 126 F.3d 1118, 1123 (9th Cir. 1997) (citing American Tunaboat Ass'n v. Brown, 67 F.3d 1404, 1407 (9th Cir. 1995)). These documents will presumably serve as the benchmark for future federal approval of the air base. Construction of the facility has not yet begun, and the consultation required by the NHPA can still occur. As plaintiffs note, review of agency decisions under the NHPA must by definition occur prior to the completion of building projects in order for the statute to effectuate consultation and preservation. An interpretation of the NHPA in which completed stages of a federal undertaking cannot constitute justiciable federal actions is untenable, as it would conflict with the APA requirement that courts confine their review to "final agency actions." See 5 U.S.C. § 704. Under this interpretation, the APA and NHPA would cumulatively deny any judicial review whatsoever.

Yet, as defendants offhandedly note in their reply, the 1996 document raises the issue of the statute of limitations. See Rep. at 7-11; 28 U.S.C. § 2401(a). Challenges brought under the APA are subject to the six-year statute of limitations governing civil actions against the United States. See Wind River Min. Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir.1988). Defendants failed to raise a statute of limitations defense in any of their three amended answers to plaintiffs' complaint or in their motion to dismiss. See Rep. at 11 (first mentioning this issue). Federal Rule of Civil Procedure 8(c) requires defendants to raise all affirmative defenses, including the statute of limitations, in their responsive pleadings. The Ninth Circuit has held that failure to raise the six-year statute of limitations bar applicable to the federal government is not a jurisdictional defect, and that such failure can thus constitute waiver. See Cedars-Sinai Medical Center v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997). Based on defendants' failure to raise this affirmative defense in any of their three responsive pleadings or in their motion to dismiss, prejudicially denying plaintiffs the right to respond to the issue, this court finds that defendants have waived the defect.[12] This holding is particularly defensible given the bar to accessing more current documents due to secrecy classifications.

Beyond the operational requirements planning stages, disputed issues of material fact also remain as to whether the Department of Defense has engaged in subsequent and on-going federal undertakings relating to the military base. While plaintiffs have not yet engaged in discovery to investigate their allegation that defendants are involved in supervising the design and construction of the replacement air base, they have produced several recent documents demonstrating that the United States has exercised regulatory oversight of the planning and construction of the new military base, including granting approval for preliminary engineering and environmental surveys. See Pls.' Opp'n, Exhs. 38-40. Plaintiffs have described and provided evidence of several million dollars of federal funding for the replacement facility requirements planning process, the granting of access to Japanese officials conducting surveys of the Camp Schwab offshore area, and the construction of a building and planning office within Camp Schwab. Pls.' Exhs. 10, 17-19, 38-40. While defendants are correct that permission to enter federal land is not an undertaking for purposes of the Endangered Species Act, and thus arguably not sufficient for the NHPA either, they have not produced evidence

demonstrating that passage onto federal land is the only remaining involvement of the United States government—an assumption that this court is not prepared to make. See Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) (holding that permission to access federal land did not constitute federal agency action under the Endangered Species Act). The current record in this case lacks any evidence that the United States will not exercise regulatory enforcement in order to enforce the Department of Defense's requirements for the facility.

The final potential grounds for finding a reviewable federal undertaking is the overarching fact that the replacement facility is being built according to the Department of Defense's specifications and primarily for United States military use. See Defs' Exh.2, Pls' Exhs. 12-13. See also Status of Open Recommendations, Feb. 1999 Report of the General Accounting Office, Pls' Exh. 14 (stating that "The United States has established requirements that Japan must meet before Futenma is closed and operations are moved to the sea-based facility"); Statement at the Committee on International Relations, United States House of Representatives, June 26, 2003, Pls' Exh. 15 (describing that "[e]fforts continue to implement the Special Action Committee on Okinawa (SACO) Final Report . . . GOJ approval of a Basic Plan for the off-shore portion of the [Futenma Replacement Facility] highlights the progress in the SACO process"). It would amount to a legal absurdity for this court to hold that, as a matter of law, a facility constructed on behalf of and for the use of the United States is not a federal undertaking, given the statutes explicit inclusion of any "project, activity, or program. . . carried out by or on behalf of the agency." See 16 U.S.C. § 470w(7). The fact that the United States will not be performing the construction directly cannot bar a finding of a federal undertaking, as projects undertaken on behalf of the federal government by non-federal entities may be held federal undertakings if the federal agency has exercised discretion and provided aid for the project to an overall degree that it has transformed "essentially private action into federal action." See Ringsred v. City of Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987). Defendants' productions for the present motion, including their in camera submissions for review to this court, only serve to confirm that there are disputed facts about the nature and extent of the DoD's recent involvement in the project.

Plaintiffs are thus entitled to discovery to investigate whether the planning, construction, and final approval processes constitute federal undertakings. Many questions remain unanswered in the current record: Did the United States approve the site selection prior to the issuance of the 2002 Basic Plan or the Okinawa Governor's public site selection announcement? What is the approval process in the future, i.e. what on-going role will the United States have in ensuring compliance with their Operational Requirements? Given the scale of the 1997 requirements' identification of the need for a site offshore from Camp Schwab, how much choice did Japan really have in locating a 1500 by 800 meter air base offshore? See Pls.' Exh. 12. The record is also currently silent on funding, though defendants did fund the planning process and at the very least will presumably incur substantial costs relocating their base to the new facility built for their use. See Pls.' Exh. 10 (uncontroverted evidence that the United States spent several million dollars in federal funds on the early planning process for the replacements facility). Information regarding the funding arrangements will provide an essential basis for determining whether the United States funded the alleged undertaking "in whole or in part," as required by section 470a-2. In sum, at this time, questions of material fact remain as to the role of the Department of Defense in planning, funding, and using the replacement facility.

Factual information yielded through discovery will also inform defendants' next contention—that the agency decision making is not finalized. Defendants argue that plaintiffs have failed to identify any final agency actions which would trigger judicial review under the APA. Plaintiffs properly rely on the APA as the basis for their claims, as the NHPA does not contain a waiver of sovereign immunity, provide a cause of action, or contain standards for judicial review. See 5 U.S.C. § 701-706, et seq. Final agency actions must "mark the consummation of the agency's decisionmaking process," and must trigger legal consequences. Bennett, 520 U.S. at 178. Ripeness of agency action for judicial review turns on the "fitness of the issue for judicial decision" and the "hardship to the parties of withholding court consideration," but in close questions, courts are "guided by a presumption of reviewability." See Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 434 (D.C. Cir. 1986); Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 757 (D.C. Cir. 2003). The controversy in the present case turns on matters of site selection for the relocated air base. According to the

evidence submitted to this court, the Department of Defense's role in site selection is twofold: establishing requirements for the replacement military base, including its location offshore from Camp Schwab, and approving the Japanese government's final plans for the facility.

The first action is completed, and defendants' requirements for the site (promulgated through the 1996, 1997, and 2001 requirements reports) remained the primary organizing documents through the adoption of those requirements by the Japanese Government's Basic Plan in 2002. Defendants' requirements, including those pertaining to the location of the replacement air base, are completed, and thus constitute final agency actions. They triggered important legal consequences, because they established the benchmark by which the latter decision to approve or reject Japan's final implementation plans are to be judged. See Bennett, 520 U.S. at 178. The decision to give Japanese officials permission to use and access the existing federal military base for further location inquiries and scientific testing of the proposed site may similarly represent a final decision, though the record is currently incomplete on the degree to which that decision-making process is completed in full or in part. At the present time, guided by the presumption of reviewability and the risk of irreparable harm posed by the Japanese government's proposed site surveys in furtherance of the United States military air base relocation, this court finds that the agency decisions at issue are reviewable.

The second issue is whether defendants are entitled to summary judgment on the question of whether the agency actions or decisions at issue cannot, as a matter of law, be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983) (holding that an agency decision may be arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem"). Plaintiffs allege that, in establishing their requirements for the replacement facility, defendants violated the consultation requirements of section 470a-2, which require federal agencies to "take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects," and to undertake such consultation prior to approval of the undertaking. 16 U.S.C. § 470a-2. Adjudication of this issue would be premature at this time. The present motion was limited to the narrow issue of the applicability of the NHPA to the unique circumstances of this case. Neither party has yet been given the opportunity to submit

evidence of consultation efforts. While the present order establishes this court's jurisdiction to hear the present case, review of the agency decisions at issue in this case is reserved until after discovery.

As a final matter, the question of whether the "undertakings" alleged by plaintiffs "may directly and adversely affect" the dugong, as also required under section 470a-2, is outside the scope of the present pre-discovery motion. See Save Our Heritage, Inc. v. Fed. Aviation Admin., 269 F.3d 49, 58 (1st Cir. 2001) (holding that a federal undertaking is not reached by section 470f where it poses only de minimus impact). Defendants have not yet taken up this argument and neither party has briefed the issue, though Stephen Getlein, the Natural Resources Manager for the Marine Corps Base Camp Butler in Okinawa, attested that there have not been sightings of the Okinawa dugong in Heneko Bay in recent years. Getlein Dec., ¶¶ 3-9. He noted that the bay contains viable sea grass beds that could be potential dugong feeding areas, but does not believe that the bay provides active habitat for the species. Id., ¶¶ 8-9. This is certainly a key issue for pursuit during discovery and future dispositive motions.

Therefore, section 470a-2 can, as a matter of law, apply to the federal undertakings alleged in this case. However, disputed issues of material fact remain regarding the scope and contours of these undertakings, as well as the nature of defendants' on-going influence on the location, survey methods, design, and construction of the replacement facility. Defendants will be permitted to renew their motion for summary judgment on these factual issues following the close of discovery.

II. Lack of Subject Matter Jurisdiction

Defendants argue that plaintiffs' First Amended Complaint should be dismissed for lack of subject matter jurisdiction because the NHPA "does not apply extraterritorially to matters of foreign policy." Defs.' Mot. at 16. Defendants contend that the exercise of judicial review "concerning the Government of Japan's possible plans . . . to replace" Marine Corps Air Station Futenma would "thrust the court into the midst of sensitive issues of foreign affairs between the United States and Japan," and that Congress "did not intend" such interference by the courts. Id. at 4, 17. Defendants rely on NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993), in which the court held that the United States Department of Defense was not required to conduct an Environmental Impact

Assessment pursuant to the National Environmental Policy Act (NEPA) at a United States military base in Japan. In NEPA Coalition, the court was applying a statute (NEPA) whose extraterritorial application has "remained an open question in the courts." Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345, 1384 (D.C. Cir. 1981). The NEPA Coalition court noted the lack of evidence that Congress intended NEPA to apply abroad and found that the general presumption against extraterritorial application of United States statutes applied to the case. NEPA Coalition, 837 F. Supp. at 468. This case, however, deals with a statute that, unlike NEPA, explicitly demonstrates Congress's intent that it apply abroad where a federal "undertaking" promises to have direct or adverse effects on protected foreign properties. See 16 U.S.C. § 470a-2. The court must construe section 470a-2 in accordance with the statutory text—to preclude enforcement as a blanket rule based on the act of state doctrine would empty section 470a-2 of any meaning.

Plaintiffs in the present action have alleged and provided evidence to show that the contested actions and decisions were undertaken by the United States Department of Defense and thus constitute a "federal undertaking. . . which may directly and adversely affect a property." The substance of plaintiff's complaint does not seek to thrust this court into issues of foreign affairs; rather, it summons the court's attention to matters under the control of the United States Department of Defense. "'When the plaintiff bases his cause of action upon an Act of Congress jurisdiction cannot be defeated by a plea denying the merits of his claim.'" Arc Ecology v. U.S. Dept. of Air Force, 294 F. Supp. 2d 1152, 1156 (N.D. Cal. 2003) (Ware, J.) (quoting Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670 (S.D.N.Y.1991)). "A claim that a right exists under federal law is enough for jurisdiction unless the claim is insubstantial or frivolous." Id. Here, plaintiffs' claim alleges, on its face, "that a right exists under federal law"; such a claim is sufficient to confer jurisdiction. See id.

III. The Act of State Doctrine

Defendants argue that the act of state doctrine "warrants dismissal" of this case "on prudential grounds." Defs.' Mot. at 18. The act of state doctrine "strongly discourages courts in the

United States from determining the validity of actions taken by a foreign state within its own borders" out of concern that United States courts not "'interfer[e] with the conduct of American foreign policy by the Executive and Congress.'" Id. (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 707 (9th Cir. 1992)). The doctrine bars an action "only if: (1) there is an 'official act of a foreign sovereign performed within its own territory'; and (2) 'the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.'" Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997) (quoting W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990)).

In this case, defendants contend, the court is asked to pass on the validity of decisions made in accordance with Japanese law by the Japanese government, the Okinawan Prefectural Government, and local Okinawan municipalities. Defs.' Mot. at 19. Defendants are correct that the scope of Japan's involvement in locating the replacement air station may prove to exceed the prudential limitations on this court's authority under the act of state doctrine. Like defendants' argument regarding jurisdiction, however, this argument relies on the conclusion that the challenged activities are exclusively those of foreign governmental bodies. Disputed issues remain on this question. If, as plaintiffs allege and their pre-discovery evidence suggests, the actions in question substantially involve the United States Department of Defense, a federal agency, this court will not be in a position to "declare invalid" a foreign sovereign's act. See Credit Suisse, 130 F.3d at 1346. As with the consideration of a federal undertaking, plaintiffs have submitted documents which raise disputed issues of material fact on the question of whether the United States Department of Defense instigated the Futenma relocation, established the requirements for fulfilling that relocation, and continues to aid logistically, and potentially financially, in the implementation of the project. See Pls.' Mot., Exhs. 8-19.

On the current record, defendants have not shown that the Department of Defense is untangled in the actions alleged by plaintiff. Defendants' declaration from John D. Hill, which defendants site as conclusive of the United States's absence from the planning process after the year 2000 is silent on a number of key factual issues which plaintiffs have alleged, such as the drafting of

the 2001 operational requirements report, the degree of similarity between the location recommendations of the United States and the plan adopted by Japan, the participation of the United States in aiding the survey work necessary to implement the plan, or the ongoing federal expenditures which may be required to plan and build the replacement facility for United States Department of Defense use. Indeed, the Hill declaration confirms plaintiffs' description of the Futenma planning process as a cooperative and bilateral venture undertaken to satisfy American military needs. Hill Dec. ¶¶ 2-3. The declaration's failure to mention the 2001 operational requirements document indicates that his chronological leap from the 1997 planning document to the 2002 Basic Plan drafted by Japan left material gaps in his portrayal of federal involvement in the planning process.

The record before this court does not currently describe an "official act of a foreign sovereign performed within its own territory," but rather a process intertwined with United States Department of Defense decision-making. See Credit Suisse, 130 F.3d at 1346. Where a court evaluates the actions of a federal agency, the act of state doctrine is not implicated. See Kirkpatrick, 493 U.S. at 409-10 (holding that the act of state doctrine "has no application" when "the validity of no foreign sovereign act is at issue"). Therefore, at this time, defendants are not entitled to summary judgment on the basis of the act of state doctrine.

## CONCLUSION

Defendants' motion to dismiss, converted into a motion for summary judgment on the issue of the applicability of the NHPA to the circumstances of the present action is DENIED.

IT IS SO ORDERED.

Dated: March 1, 2005

MARILYN HALL PATEL
United States District Court
Northern District of California

## ENDNOTES

1. As defendants point out, the guidelines state that they "have no regulatory effect," they are merely "the Secretary's formal guidance to each Federal agency on meeting the requirements of section 110 of the Act." 63 Fed. Reg. 20496, 20500 (April 24, 1998); Defs.' Mot. at 9.

2. This court has selected the Webster's Third New International Dictionary because it is the source most often relied upon by the Supreme Court for federal statutory interpretation. See Samuel A. Thumma and Jeffrey L. Kirchmeier, The Lexicon has Become a Fortress: the United States Supreme Court's Use of Dictionaries, 47 Buff. L. Rev. 227, 262-63 (1999). Were this court to apply the definition of "equivalent" advocated by defendants, the definition would focus to an even more direct extent on similar effects. See Defs' Mot., n. 12. The defendants argue the definition as: "1.a. Equal, as in force, value, or meaning. B. Having identical or similar effects. 2. Corresponding or practically equal in effect." Id. (citing Webster's New Riverside University Dictionary (1984)). This definition also focuses on effects and similarity, as opposed to identical replication. However, the edition cited by defendants was not available at the time of section 470a-2's passage.

3. See King Dec. ¶ 14 ("Species are entitled to protection for their cultural value in many nations. Some, like Japan, protect culturally significant species directly; others, like the United States, protect culturally significant species by protecting the locations in which that significance is expressed.")

4. No animals are individually listed on the UNESCO World Heritage List, although several natural areas do appear on that list because they provide marine mammal habitat or breeding grounds. See generally Pls.' Supp. Exh. 1. The Shark Bay of Western Australia and the Great Barrier Reef of Australia, for instance, are listed in part due to their sea-grass beds and dugong populations. Though the listing of the wild animals themselves on the UNESCO list would have strongly indicated Congress's intention to protect wild animals (and include them under the definition of property) through the NHPA, their absence from this list is not dispositive to the case at hand for the reasons discussed herein.

5. The legislative history for section 470a-2 of the NHPA, cited by defendants in support of their position that the section does not apply to wild animals, is inconclusive. See H.R. Rep. No. 96-1457 at 44, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 6378, 6407. As defendants admit, the legislative history "simply restates the text of the enrolled bill," thus shedding no light on Congress's intent explicitly to exclude or include living things. Defs.' Mot. at 14.

6. The National Register includes three wildlife refuges: the Lower Klamath Wildlife Refuge, the Lake Merritt Wild Duck Refuge, and the Pelican Island Wildlife Refuge. See King Dec., ¶ 34, Pls.'s Exh. 30. In addition, sites such as Devil's Tower in Montana and Massacre Canyon in Nebraska are listed based on cultural traditions and events associated with animals living at the site. Id.

7. In Hoonah, the court held that a march in 1804 by 1,000 members of the Tlingit tribe through a "large wilderness" along a variety of unknown paths could not qualify the total wilderness area as a "historical site." Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1232 (9th Cir. 1999). The fact

that "important things happened in a general area is not enough to make the area a 'site,'" because "there has to be some good evidence of just where the site is and what its boundaries are, for it to qualify . . . ." Id. Hoonah requires that there be evidence of a site's location, such as "identified physical features," but it does not require that the site's boundaries be delineated with absolute certainty. Id.

8. Plaintiffs concede that dugongs "occasionally roam" beyond their regular feeding areas and do not seek protection of the dugong in the "vast unspecified seas" beyond these areas. Pls.' Opp'n at 14 n.13.

9. The Navy/Marine Corps Installation Restoration Manual issued in 1997 gives the following definition of undertakings: "a broad range of activities including construction, rehabilitation and repair projects, demolition, licenses, Federal property transfers, testing during environmental investigation (e.g. borings through floors of historic buildings, sampling for asbestos, etc.) and many types of remedial actions." See Pls.' Exh. 26, at 146.

10. Interpretation of NEPA undertakings to include ongoing activities is a well-established principle. See T.V.A. v. Hill, 437 U.S. 153, 188, n.34 (1978); Jones v. Lynn, 477 F.2d 885, 889 (1st Cir. 1973); Env'l Def. Fund v. T.V.A., 468 F.2d 1164, 1176-81 (6th Cir. 1972).

11. This court finds it curious that the 2001 Preliminary Operational Requirements document was classified as top secret after the commencement of this litigation, whereas the 1997 version of that document was made publically available.

12. The Ninth Circuit has held that affirmative defenses like the statute of limitations may be raised in motions to dismiss filed before the first responsive pleading. See, e.g., Bacon v. City of Los Angeles, 843 F.2d 372 (9th Cir.1988).