

Save the Okinawa Dugong

Background

The construction of a new US military facility off the coast of the Japanese island of Okinawa threatens to harm the last remaining members of the Okinawa dugong, a genetically distinct species of marine mammal. The Okinawa dugong is significant in Okinawan culture and it is included in Japan's official list of protected cultural properties.



Case Summary

In 2003 a coalition of US and Japanese organizations and individuals, represented by Earthjustice, filed a lawsuit in the United States District Court for the Northern District of California seeking to compel the US Department of Defense to assess the impacts of constructing a sea-based airbase off the coast of Okinawa, Japan on the last remaining feeding grounds of the endangered Okinawa dugong. The lawsuit alleged that the Defense Department's involvement in the construction of the facility violates the National Historic Preservation Act ("NHPA"), which requires that US agencies take certain actions "[p]rior to the approval of any federal undertaking outside the United States which may directly and adversely affect a property which is on ... the applicable country's equivalent of the National Register." 16 U.S.C. § 470a-2.

In March 2005, the court denied the Defense Department's motion to dismiss, holding that the NHPA requires US agencies to assess the impacts of their overseas activities on the officially recognized cultural properties of foreign governments. On January 25, 2008, the district court granted the Plaintiffs' motion for summary judgment, holding that the Defense Department's violated the National Historic Preservation Act by failing to take into account the impact of the project on the Okinawa dugong. The court upheld the law's applicability to actions abroad and found that the law requires not only identification, but also mitigation, of adverse impacts to heritage sites abroad caused by U.S. agency actions. The contexts of the decision are as below.



Decision of the District Court

Dugong v. Gates, 453 F.Supp.2d 1082 (N.D. Cal. 2008)

As a conclusion, the judge holds: "In sum, the current record reflects a failure by the DOD to comply with NHPA section 402. This failure constitutes agency action that is unreasonably delayed and unlawfully withheld as provided by the APA. Defendants have failed to produce, gather, and consider information necessary for "taking into account" the effects of the Futenma Replacement Facilities on the Okinawa dugong and for determining whether mitigation or avoidance measures are necessary and possible." Therefore, the court's "CONCLUSION", on the last page of its judgment is as follows:

1. Defendants have failed to comply with the requirements of the NHPA section 402, 16 U.S.C. sec.470a-2, and this failure to comply is agency action that is unreasonably delayed and unlawfully withheld, 5 U.S.C. sec. 706 (1).

2. Defendants are ordered to comply with NHPA section 402 and this case is 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 mitigate adverse effects to the dugong.

3. Defendants are ordered, within ninety (90) days of the date of this order, to submit to the court 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.

According to the court, the above “taking into account” 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.

At the end of this summary, it is worth noting the following warning which the court dared to make clear: “Satisfaction of defendants' obligation under section 402, therefore cannot be postponed until the eve of construction when defendants have made irreversible commitments making additional review futile or consideration of alternatives impossible.” This is exactly why the NHPA requires the take into account process “prior to approval of an undertaking,” at the time early in the planning stages of a federal undertaking when there is still a meaningful opportunity to consider adverse impact and mitigation measures.

Current Status

On April 23, 2008, the Defense Department submitted a plan for compliance with the requirements of the law, and Plaintiffs filed a response. The parties now await a final decision from the court regarding compliance.

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