Dugong vs. Rumsfeld Case Summary

Summary of Dugong vs. Rumsfeld Case

- The case is commonly known as Dugong vs. Rumsfeld. It was filed in the Northern District of the California Oakland Division. The plaintiffs were the Okinawa Dugong, Center for Biological Diversity, Turtle Island Restoration Project, Japan Environmental Lawyers Federation, Save the Dugong Foundation, Dugong Network Okinawa, Committee Against Heliport Construction, Save Life Society, Anna Koshisishi, Takuma Higashionna and Yoshikazu Makishi. The defendant in the case is Donald Rumsfeld and the U.S. Department of Defense.
- In November 1995, a special bilateral agency: Special Action Committee on Okinawa (SACO) was formed to reduce the burden of the U.S. military presence on the Okinawan people by closing Futenma. It issued its final report on December 2nd of 1996 which created the Futenma Implementation Group (FIG); this group charged with finding a suitable relocation site.
- On September 29th, 1997, the FIG recommended that the area off the coast of Camp Schwab, an area serving as the most important remaining habitat for the Okinawa Dugong was designated as the relocation site.
- Earth Justice filed a complaint against the Department of Defense on September 25th, 2003 seeking an injunction to prevent construction of the base. Its arguments and the DoD's counter arguments are presented below.
- The District Court ruled in the plaintiff's behavior, requiring that the DoD must take into account the potential effects of the construction of a base, above and beyond the environmental survey being done by the Japanese government.

Plaintiff/Dugong's Argument (located in Document 1: "Complaint for Declaratory and Injunctive Relief

- The action was filed under the National Historic Preservation Act (NHPA), not the Endangered Species act, although Peter Galvin of the Center for Biological Diversity believes that act may also apply.
- The NHPA stipulates 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 applicable country's equivalent of the National Register, the head of a Federal

Agency having jurisdiction must avoid or mitigate any adverse effects." The plaintiff doesn't believe this has been done.

- The suit argues that the Okinawa Dugong is protected as a "National Monument" under Japan's "Law for the Protection of Cultural Properties", Japan's equivalent of the NHPA. It further argues that the DoD failed to comply with the NHPA in preparing plans to move the base from Futenma to Henoko because it did not implement any studies to investigate and mitigate the potential impact of the base.

Defendant's Counterargument (located in Document 2: "Defendent's Reply Memorandum in support

- In the U.S., the NHPA lists historic districts, sites, building and objects, not animals or species. The Dugong is an animal, not a property, and therefore would not be protected under NHPA.
- It is Japan, not the DoD, which is implementing the relocation plan. Therefore, there is no "federal undertaking" by the U.S. government that can be regulated.
- Judicial restraint is required to avoid intrusions into foreign relations issues represented by ongoing diplomatic efforts between the U.S. and Japan about the Futenma Relocation Facility.
- While the Dugong may be designated as a cultural monument, Henoko Bay itself has not been listed and is thus not protected.
- Only one feeding trace of the Dugong was found in Henoko bay in 2003, and the Dugong have also been spotted elsewhere well north and South of Henoko Bay.

Final Decision by US District Court, Northern District of California (located in electronic Document 3: "Dugong Decision 12408" :

- On March 2nd, 2005, the court agreed with Earth Justice and held that the Okinawa dugong is "property" and thus protected under Japan's equivalent of the National Register.
- The very fact of planning a "final" plan constitutes "federal action" and is thus reviewable by the court.
- The FRF (Futenma Replacement Facility) construction does have the potential to adversely affect the habitat of the Dugong.
- The NHPA requires the federal agency to "take into account" the impact of a federal action. The DoD's argument that it didn't need to because Japan was implementing an environmental impact survey was denied. The court ruled that the DoD must also implement its own review.
- There is not currently enough information about Dugong habitat to conclude that Henoko Bay is not important and vital habitat for the Dugong.
- In conclusion, the DoD has failed to comply with NHPA section 402 which requires the U.S. to take into account important national monuments when starting a federal action such as the construction of a military base.

- The DoD must show proof that it is evaluating the effects of the FRF on the Dugong.

Select Bites from Oral Arguments (Document 5)

Plaintiff selections:

The language that, and I quote, states that in implementing the convention, Congress leaves it to each participating nation to identify and delineate the meritorious heritage property situated within its own territory. So in the first instance, the question of equivalence stops if another cultural deems something culturally significant. That's the intention of the convention.

The united nations environment program has concluded that that particular Henoko Bay habitat is, and I quote, some of the most important remaining dugong habitat in Japan.

The Department of Defense in the 1997 operational requirements has dictated the location. There is a diagram in there that includes the location of the facility. It is also asked for a 40-year useful life, suggesting a long-term intention to use the facility. The 1997 operational requirements were signed off on by several high ranking department officials on a signature page that says 'approved'.

And actually, the U.S. Department of Defense would enhance its stature with foreign governments and foreign cultures by doing its job and taking into account the effect of its impacts on those host nations. It's one thing for a host nation to determine that it doesn't mind destroying a cultural property. It's quite another for the Department of Defense to make that decision for them.

From the quotes that counsel excerpted, what this proposal says is things like if we see a dugong while we are doing the boring survey we will stop and mitigate. That's it. That's a very unrealistic way to mitigate impact. It doesn't come close to the early in the process

requirement under the NHPA. Once the boring surveys are occurring, the dugong are likely to stay away.

The department says that the 1997 requirements document is no longer in effect. At least three times, perhaps more, the department has dictated the intended location for proposed use of the facility. As far back as 1966 there was a proposal done by a U.S. engineering firm so this idea has been in the background.

Defendant Quotes:

Our concerning and the reason for objecting and moving to dismiss the complaint is that we believe the Japanese law also includes a number of other kinds of what Japan refers to as cultural properties that go considerably beyond anything that we think Congress ever intended to recognize or protect through historic preservation laws in the United States. And the two primary examples I suppose are animals, which we think has no counterpart in the U.S. law, and intangible properties, including things like recognition of drama and arts and calligraphy and books and pictures, things like this that are important culturally to the people of Japan, and that they are certainly recognized and permitted to protect under their system of law. But the fact that they have defined cultural properties far broader than historic properties as defined in the U.S. law in our view does not mean that Congress intended for the United States automatically to be required to protect everything that Japan recognizes as important for its own culture.

Our view is that the key difference is that the U.S. law protects areas, defined geographic areas, and those areas may be habitat to some animals or birds or what have you. But it is the recognition and that is consistent with the statutory terms in the NHPA that talk about locations and sites. And I think that is comparable to what appears at least in these couple of pages on the world heritage list.

I think this would be a much different case if what had been identified and listed by Japan were a particular area of Henoko Bay for the purpose of protecting dugong and dugong habitat. But that's not what's happened. And to our knowledge, we think we've done a thorough investigation of Japanese law. There is no such designation of Henoko Bay as an important cultural area associated with the dugong.

The plaintiff attorney was suggesting the Department of Defense has not conducted the necessary examination. And the reason for that is that there has not been a federal undertaking that the Department of Defense has engaged in that would require that, even assuming that the law would apply to the dugong or to Henoko Bay.

The government of Japan will design, survey, construct and fund any new base that is built. It is not -- there is no action as there typically would be in an NHPA or ESA or MMPA or NEPA case. There is no action in our view that triggers any requirement on behalf of the Department of Defense merely because we have done some preliminary planning.

I disagree flatly with the plaintiff attorney's statement that the United States has dictated the location. At no time in no document has the United States dictated the location. And in fact, the declaration of Mr. John Hill that we submitted makes very clear apart from saying the 1997 operational requirement is no longer being used.

There may be a question on standing in terms of whether the plaintiffs can get meaningful relief, whether they have some redress that could be accomplished. Because again, our view is even if you were to order the Department of Defense to conduct whatever may be required under this provision of the national historic preservation act, the only thing that we believe we're doing at this point is providing some limited access to Camp Schwab. We are not -- you can't enjoin us from constructing a base that we're not constructing and enjoin us from funding it because we're not funding it. You can't enjoin us from designing it because we're not designing it.

Whatever undertaking the plaintiffs believe we may have engaged in is we believe is very peripheral, very preliminary. The fact that we may be planning on doing something somewhere down the road certainly does not mean that we have taken the sort of final agency action that entitles them to judicial review of that as the supreme court recently made clear in the Southern Utah Wilderness Association vs. Morton case. And we don't think it would be appropriate for the Court to intervene and order any kind of injunctive relief.

Select quotes from the judge

THE COURT: But what would be the point of doing an environmental study if you aren't going to do something to mitigate or halt or change the activities that are going to be engaged in because they may in fact endanger the dugong?

THE COURT: Could not then that action of the Japanese government given that it is hand-in-hand with the U.S. whether we have a contract agreement treaty or just a negotiation, but if they have already engaged in an undertaking could that not also be considered an undertaking of the United States given this relationship?

Defendant attorney: I think that is stretching the term undertaking to or beyond the breaking point. I'm not aware of any comparable case under the NHPA where that sort of very limited peripheral activity has been considered to be an undertaking.

THE COURT: They're doing it at the behest of the U.S. government, aren't they? And they are acting on your behest and you're acting on their behest. And the answer is if you are doing it at the behest or in conjunction with, you are doing it as an agent of the United States.

List of associated documents

- Document 1: “Complaint for Declaratory and Injunctive Relief” by plaintiff
- Document 2: “Defendant’s Reply Memorandum in support”
- Document 3: “Memorandum & Order Re: Cross-Motions for Summary Judgment”
- Document 4: “DoD Operational Requirements and Concept of Operations for MCAS Futenma Relocation, Okinawa, Japan. 29 September 1997.