

*Dugong v. Rumsfeld*, [2005 WL 522106 \(N.D. Cal. 2005\)](#).

Location: Outside the United States –Okinawa, Japan

Applicable Laws: [National Historic Preservation Act](#) (NHPA) [16 U.S.C. §§ 470a et seq.](#)  
Japan’s Law for the Protection of Cultural Properties and Natural Monuments.

Where Laws Apply: *National Historic Preservation Act:* Requires federal agencies to consider the effects of their undertakings on historic properties wherever located, including outside the United States. Section 110 (16 U.S.C. § 470h-2) sets out the broad responsibilities of Federal agencies to ensure that historic preservation is fully integrated into the ongoing programs of all federal agencies. Section 106 requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment. In addition, Federal agencies are required to consult on the effects of their undertakings on historic properties with State Historic Preservation Officers, Tribal Historic Preservation Officers (THPOs), Indian tribes (including Alaska Natives), and Native Hawaiian Organizations. (Section 106, 16 U.S.C. § 470f). Section 402 requires Federal agencies to take into account the adverse effects of their undertakings outside of the United States on sites inscribed on the World Heritage List or on the foreign nation’s equivalent of the National Register for the purpose of avoiding or mitigating adverse effects. 16 U.S.C § 470a-2.

Holding: The court held that the Okinawa Dugong (a marine mammal) was protected by Japan’s Law for the Protection of Cultural Properties, the “equivalent” of the U.S. National Register of Historic Places, and is “property” within the meaning of section 402 of the NHPA. 16 U.S.C. § 470a-2. The court withheld judgment and ordered discovery on the two remaining issues of whether the Department of Defense’s involvement in the military facility could constitute a (1) “federal undertaking” that (2) “may directly and adversely affect” the dugong.

*General Facts:*

The dugong is an herbivorous marine mammal in the same family as the manatee. The Okinawa dugong is a small, isolated population of the dugong species found in the waters off the eastern coast of Okinawa. The animal is central to the creation mythology, folklore, and rituals of traditional Okinawan culture. In Japan, the Okinawa dugong is a protected “natural monument” under the country’s “Law for the Protection of Cultural Properties.” The United States lists the dugong as “endangered” under the Endangered Species Act. [16 U.S.C. § 1531](#).

In 1997, the U.S. Department of Defense (DOD) released a document requiring that the Marine Corps Air Station Futenma be replaced by a sea-based facility in Henoko Bay. Henoko Bay is located in the northeastern part of Okinawa Prefecture, near the current location of Camp Schwab. According to a [2002 United Nations Environmental Programme Report](#), the construction of a military base near Henoko could destroy the remaining dugong habitat in Okinawa, endangering the small population.

*Procedural Posture:*

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 U.S. Department of Defense (DOD), alleging defendants failed to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 and section 402 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470a-2, which states:

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.

Defendants, the DOD, made three arguments as to why section 402 of the NHPA did not apply in this case: 1) the Japanese Law for the Protection of Cultural Properties is not "equivalent" to the National Register of Historic Places; 2) the dugong, a marine mammal, cannot constitute "property" under the NHPA; and 3) the DOD has taken no action that could be considered a "federal undertaking" under the NHPA.

*Court Holding and Reasoning:*

First, the court held that the Japanese law in this case is "equivalent" to the National Register of Historic Places within the meaning of Section 402. The court explained that the word "equivalent" does not require the National Register and the foreign list in question to be identical, but rather that they are merely "counterparts" that are "corresponding or virtually identical especially in effect or function." Turning to the second argument, the court noted that plaintiffs need only prove that the dugong is "property", and not "historic property" and since the dugong itself is listed as a natural monument under the Cultural Resources Protection Law, the court held that Section 402 of the NHPA can apply to the Okinawa dugong as an animal protected for cultural and historical reasons under a foreign country's equivalent statutory scheme for cultural preservation. Third, the court considered whether the federal undertaking in this case fell within the meaning of the NHPA. The court explained that 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 (NEPA). After giving consideration to both the plaintiffs' and defendants' arguments, the court held that Section 402 can, as a matter of law, apply to the federal undertakings alleged in this case.

The defendants argued that plaintiffs' complaint should be dismissed for a lack of subject matter jurisdiction because the NHPA "does not apply extraterritorially to matters of foreign policy." The court, however, pointed out that the NHPA, unlike NEPA, explicitly states Congress' intent that it apply abroad where a federal "undertaking" will likely have a direct or adverse effect on protected foreign properties.

In conclusion, the court converted the defendant's motion to dismiss into a motion for summary judgment on the issue of the applicability of the NHPA to the circumstance of the present case and denied the motion. The court withheld judgment and ordered discovery on the two remaining issues of whether DOD's involvement in the military facility could constitute a (1) "federal undertaking" that (2) "may directly and adversely affect" the dugong.

Additional Resources:

- [ORDER RE STATUS](#): Signed by Judge Marilyn Hall Patel on Feb. 10, 2012.
- [STIPULATION AND ORDER](#) extending submission date of joint status report to Sept. 8, 2011: Signed by Judge Marilyn Hall Patel on Aug. 24, 2012.
- [ORDER RE STATUS](#): A joint supplemental CMC statement due by Aug. 25, 2011: Signed by Judge Marilyn Hall Patel on Aug. 11, 2011.