

## Okinawan Environmentalists Put Robert Gates and DOD on Trial. The Dugong and the Fate of the Henoko Air Station

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The case: a synopsis

On September 25, 2003, in San Francisco, a coalition of U.S. and international conservation groups filed a lawsuit (Okinawa Dugong v. Rumsfeld C-03-4350) in U.S. District Court against the U.S. Department of Defense plans to construct a new air base on reclaimed land over a coral reef that would destroy the remaining habitat of the endangered Okinawa dugong, a marine mammal of cultural and historical significance to the Okinawa people. This new air base, known as “Futenma Replacement Facility” (FRF), is an initiative of central importance proposed in “United States-Japan Roadmap for Realignment Implementation” (“2006 Roadmap”).



Henoko Bay coral reef. Proposed site of the new air station

The plaintiffs alleged that the defendants had approved the plans for the construction of the FRF without **taking into account** the effect of the facility on the Okinawa dugong that was required under the National Historic Preservation Act (NHPA) of the United States. In Japan, because of its cultural significance, the dugong is listed as a “protected natural monument” on the Japanese Register of Cultural Properties. Henoko Bay of Okinawa, the dugong habitat, would be gravely affected by the construction of the FRF.

Video of the dugong grazing in Henoko Bay

The NHPA, in Section 402, says:

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**. (Emphasis added)

On January 24, 2008, the U.S. District Court in San Francisco granted the plaintiffs summary judgment that “defendants have failed to comply with the requirements of NHPA Section 402” and that “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 mitigating adverse effects to the dugong.” Further, “defendants are ordered to submit to the court, within 90 days, documentation describing what additional information is necessary to evaluate the impacts of the FRF on the dugong”. (Selectively quoted from “Conclusion,” which is reproduced in full later)

### **The plaintiffs :**

Originally, there were three groups of plaintiffs: (1) Okinawa Dugong, the lead plaintiff, (2) three individuals, and six associations. When the requirements of “standing” for litigation were examined, the dugong and two of the associations were found lacking “standing” and dismissed. (Further reference to “standing” in the next section) This left the following individuals and associations as plaintiffs with standing in the case:

Individuals: Takuma Higashionna  
(with Save the Dugong Foundation,  
Okinawa), Yoshikazu Makishi (with  
Okinawa Environmental Network),  
and Anna Koshishi

Associations: Save the Dugong  
Foundation, Okinawa,  
Center for Biological Diversity,  
Turtle Island Restoration Network,  
and  
Japan Environmental Lawyers  
Foundations

### **The defendants :**

Robert Gates, et al., U.S. Department of Defense  
(DOD)

## Arguments:

Since the NHPA does not provide an independent basis for judicial review of Federal agency actions, an aggrieved party must pursue its remedy under the Administrative Procedure Act (APA). This procedural requirement gave the DOD an opportunity to claim that the case of Okinawa Dugong be dismissed. The DOD asserted five bases for barring the court's review of this case such as: (1) lack of "final agency action" as required under the APA; (2) plaintiffs' lack of standing; (3) non-ripeness of the claims for judicial review; (4) act of state doctrine, and (5) failure to join the Government of Japan as a necessary and indispensable party. According to the thinking of the DOD, in the absence of standards or regulations directly applicable to foreign undertakings, the DOD might determine, in the reasonable exercise of its discretion, what requirements were necessary to comply with Section 402 of the NHPA.

The court analyzed each of the five bases and rejected them all. The Governments of the United States and Japan adopted the idea of FRF in 1996. Subsequently the DOD and its counterpart agency of Japan had closely cooperated in all stages of conceptualization and implementation of the project culminating in the 2006 Roadmap. According to the court, "the Roadmap was approved by the Secretary of Defense and embodies DOD's formal decision concerning

final plans for the FRF." The DOD's "action approving the 2006 Roadmap ... provides finality triggering the court's review now."

The DOD's objection to the plaintiffs' standing caused the court's examination of the standing of each plaintiff. To demonstrate standing, the plaintiffs had to show that they had suffered an injury traceable to the defendants' actions and that the injury would be redressed by the court's favorable decision. Moreover, a precedent conferred standing on "persons" such as individuals, partnerships, corporations, associations or public or private organizations. This definition of standing denied it to the dugong because it was an animal. The challenging individuals and associations (with the exception of one of them) easily proved injuries they would suffer in various forms as a consequence of the defendants' failure to comply with the NHPA. They therefore had standing in this case.

On the question of ripeness raised by the defendants with respect to the plaintiffs' claims, the court denied its relevance in this case on grounds of merits of the plaintiffs' claims.

Invoking the act of state doctrine, the DOD argued that "the court should not enjoin ... the [Government of Japan's] ability and sovereign right to site and construct the FRF" to satisfy the treaty requirements agreed upon between Japan

and the United States. The court pointed out the intertwined nature of decision-making in the process of site selection and construction. The working relationship of the DOD and Japan involved the DOD in the design and site selection for the FRF and allowed them to monitor and oversee the construction of the facility to ensure that it met their operational requirements. The court's jurisdiction had to do only with that part of the activities that involved the DOD as a U.S. federal agency and did not extend to any part that was under Japanese control. The act of state doctrine therefore had no role in this case.



Two planned runways at Henoko

As for the DOD's attempt to deny the merits of this case on grounds that the Government of Japan was not included as "a necessary and indispensable party," the court pointed out that "relief requiring DOD to take into account under section 402 can be fashioned without ...

interfering with any decision by the Government of Japan."

### Conclusion

Below, the conclusion of the Case: No. C 03-4350 MHP is quoted in full.

Plaintiffs' motion for summary judgment is GRANTED. Defendants' motion for summary judgment is DENIED. It is hereby ADJUDGED and ORDERED that:

1. Defendants have failed to comply with the requirements of NHPA section 402, 16 U.S.C. § 470a-2, and this failure to comply is agency action that is unreasonably delayed and unlawfully withheld, 5 U.S.C. § 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 mitigating 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 official or officials with authorization and responsibility for reviewing and considering the information for purposes of mitigation.

4. If plaintiffs desire to respond to this submission, they shall file their response within forty-five (45) days of defendants' filing.

Dated: January 23, 2008 /s/ Marilyn Hall Patel  
United States District Court Judge  
Northern District of California

### **The contents of the court document, "Memorandum & Order"**

The document is a substantial 46-page statement written in daunting legalese in accordance with rigorous legalism. General readers should be aware of risks of misunderstanding what the document is really about. An unguided interpretation of what looks like readable English might result in false hopes or disappointments. The summary and extracts presented above are by a layman, who though with good intentions to serve as a messenger for news of major importance, may have erred in the selection of topics and quotations. Professional readers of the original document may therefore rate his presentation as missing the point and conducive to wrong impressions. Since we cannot reproduce the whole document, we offer below a quick overview of its contents by assembling the text's major and minor headings. The table of contents will at least show how the court document looks. The source of the text is Earthjustice, an American environmental law firm, whose lawyers have helped litigate the Case of the Okinawa Dugong ([http://www.earthjustice.org/library/legal\\_docs/dugong-decision-12408.pdf](http://www.earthjustice.org/library/legal_docs/dugong-decision-12408.pdf)):

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

OKINAWA DUGONG (Dugong Dugon), et al.,  
 Plaintiffs,  
 v.  
 ROBERT GATES, et al.,  
 Defendants.

No. C 03-4350 MHP

**MEMORANDUM & ORDER**

**Re: Cross-Motions for Summary**

**Judgment**

BACKGROUND

- I. The Okinawa Dugong
- II. The Futenma Replacement Facility (“FRF”)
- III. Procedural History

LEGAL STANDARD

- I. Summary Judgment
- II. National Historic Preservation Act
- III. Administrative Procedures Act

DISCUSSION

- I. Limitations on Judicial Review [Thinking that this section is a good indicator of the DOD attitudes toward Okinawa’s “base problem” and of how the DOD argues for a maximum freedom of discretion regarding its Okinawa bases, we summarized it in our presentation above under the heading “arguments.”]
  - A. Final Agency Action Under the APA
  - B. Standing
    - 1. Okinawa Dugong
    - 2. Individuals
    - 3. Associations

- C. Ripeness
- D. Act of State
- E. Necessary and Indispensable Party
- F. Conclusion
- II. Applicability of NHPA Section 402 [See the quotation early in our presentation above.]
  - A. “Undertaking”
  - B. Compliance with “Take Into Account”

CONCLUSION

**Comments**

In Okinawa, the Japanese Ministry of Defense (JMOD) and the Government of Okinawa Prefecture are negotiating the siting of the FRF and the terms of methods and procedures of environmental impact assessment (EIA). As of the date of the U.S. District Court’s summary judgment respecting the case of Okinawa Dugong, the JMOD had not produced a documentation of the EIA methods and procedures (hÅ□hÅ□sho) required by the Prefecture. EIA work will not begin unless the JMOD and Prefecture agree on the hÅ□hÅ□sho. Once begun, EIA will take about a year. When this phase is over, the elaboration and review of construction plans will follow. Actual construction work will start when all the paperwork is done and all conditions are agreed upon between JMOD and Okinawa Prefecture. Curiously, the JMOD has already embarked on an extra-legal preliminary environmental investigation, hoping to incorporate its results

into the EIA proper to be undertaken later. The JMOD and Okinawa Prefecture are disputing the legality of the preliminary investigation, however. The Prefecture has denounced the JMOD idea of incorporating the results of the legally dubious preliminary investigation in the legally required IEA proper. In the 2006 Roadmap, the U.S. DOD and JMOD agreed on a deadline for the completion of the FRF. Wrangles between the JMOD and Okinawa may delay the work on the FRF, reportedly to the annoyance of the U.S. DOD.

In matters of US-Japan military alliance, America calls the shots; Japan follows; and Okinawa bears the brunt. One shudders to think that this structure of injustice to Okinawa has been in effect for more than 60 years since the Battle of Okinawa and shows every sign to remain in effect for many more decades. Okinawa wishes to be rid of the nightmare of “permanent” U.S. military bases. How to prevent the bases from becoming permanent has been top priority for the Government of Okinawa Prefecture under both conservative and reformist governors. In contrast, how to force Okinawa to learn to live with the bases has been the center piece of the joint U.S.-Japan policy toward Okinawa. An unending “Okinawa Problem” keeps spinning out endless human rights violations and environmental disasters. The Dugong decision of the U.S. District Court of Northern California sheds dazzling light over the darkest corner of

the U.S./Japan Empire of Bases that is Okinawa. Peter Gavan, Conservation Director for the Center for Biological Diversity (one of the association plaintiffs in the Dugong case) said in the wake of the court decision:

We are hopeful that the court-ordered review and public airing of the impacts of the project [the FRF construction] will cause the U.S. and Japanese governments to halt expansion plans and avoid driving the Okinawa dugong further toward extinction.

Unfortunately, the JMOD is hell bent on the pursuit of the project regardless of its cultural and environmental consequences. At present, there is no firm agreement between Okinawa and JMOD on the precise siting of the FRF facility. Nor is information made public on types of aircraft that will use the facility. Despite such uncertainties, the JMOD is engaged in a potentially illegal “preliminary investigation” into the environment and trying to force Okinawa to accept its flawed EIA methods and procedures. Since the U.S. DOD depends on the JMOD for information and documentation, the DOD may soon be submitting to the court piles of biased and misleading papers.

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