



Department of Defense Legacy Resource Management Program

PROJECT NUMBER (09-422)

Background Research for NHPA Section 402 and 1954 Hague Convention

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NCPE Intern, Summer 2009

August 2009

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Research Methodology: Country list compiled using Base Structures Report FY 2008 and GlobalSecurity.org; database search using UNESCO and IFAR (International Foundation for Art Research) websites; European-heritage.net consulted for countries in Europe where laws in English were unable to be found; State Department/Embassy websites had little information with regards to actual preservation laws. Legal documents found through UNESCO/UN websites or Westlaw database; law journal articles found through Westlaw.

Task 1: Compile information relevant to DoD operations as effected by the court decision from *Dugong v. Gates*, 543 F. Supp. 2d. 1082 (2008).

Background:

In an effort to move the Futenma Air Base on Okinawa away from a densely populated residential area, the United States Department of Defense (DoD) and Government of Japan sought to expand the area adjacent to Camp Schwab on Henoko Bay in order to relocate the air base. A plan for the relocation (“Basic Plan”) was developed and a Consultive Body on the Construction of the Futenma Relocation Facility was created to minimize impacts on the local community and natural environment.¹ In 2002, a United Nations Environmental Programme report warned that construction of the proposed base could destroy some of the most important remaining habitat in Japan for the dugong, a manatee-like animal that feeds on sea grass.² The Okinawa dugong is endangered under the US Endangered Species Act and in Japan is listed as a protected “cultural monument” under Japan’s Law for the Protection of Cultural Properties due to its rarity and association with Okinawa mythology.³

Several environmental organizations and individuals brought action under the National Historic Preservation Act (NHPA), Section 402⁴, to prevent the DoD and Japan from constructing the base expansion. Section 402 was added to the NHPA in 1980 in order to implement the United States’ participation in the World Heritage Convention.⁵ Little was done in regard to Section 402 until 1998, when the Secretary of the Interior published guidelines for federal agency responsibilities under the amended NHPA, and stated that “efforts to identify and consider effects on historic properties in other

¹ *Dugong v. Rumsfeld*, 2005 WL 522106, 2 (N.D. Cal.)

² *Id.* at 3.

³ *Id.*

⁴ “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 [of Historic Places], 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.

⁵ *Dugong v. Rumsfeld*, 2005 WL 522106 at 5. See also World Heritage Convention, Art. 5, para. 3: “Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.”

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.”⁶ Additionally, consultation “should be undertaken early in the planning stage of any Federal action that might affect historic properties.”⁷

The focus of *Dugong v. Rumsfeld* (from 2005) consisted of determining the applicability of the NHPA to the issue of dugong/dugong habitat and the nature of the Basic Plan's encroachment on that habitat. Ruling against the DoD's argument that the dugong's listing is not an equivalent of the U.S. National Register, the judge explained that no country's list could be exactly like the United States', therefore Japan's list is the equivalent of the National Register.⁸ The dugong is consequently a protected item and the NHPA applies to the circumstances of the case. Finally, the court made no determination that a federal undertaking took place (as required by Section 402) using case law defining an “undertaking” based on NHPA Section 106.⁹ Instead, the court withheld judgment in order to give the parties an opportunity to address whether the actions by the DoD constituted an “undertaking,” whether there were any adverse effects on the dugong, and whether the DoD had “taken into account” these effects.¹⁰

In 2007, the case continued as *Dugong v. Gates* and was litigated to determine if the DoD had met the requirements set forth in Section 402 of the NHPA. The court determined that the DoD had not met its obligations. First, the court found that the actions by the DoD regarding the Futenma Replacement Facility constituted an “undertaking” under Section 402 of the NHPA even though the Government of Japan bears the full cost of construction.¹¹ Next, the court determined that because the habitat of the dugong is being affected, there was no question as to whether there would be an

⁶ *Id.*, quoting 63 Fed.Reg. 20,496-20,508.

⁷ *Id.*

⁸ *Id.* at 8.

⁹ *Id.* at 12-18. NHPA Section 106 states that:

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.” 16 U.S.C. § 470f.

¹⁰ *Dugong v. Gates*, 543 F. Supp. 2d. 1082, 1086-87 (N.D. Cal. 2008).

¹¹ *Id.* at 1101.

adverse effect on the dugong.¹² Finally, the court discussed the meaning of “take into account” and whether or not the DoD met those requirements. Using the language of Section 402 with legislative intent, the court in *Dugong v. Gates* determined several “take into account” requirements:

(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 no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.¹³

Additionally, the court stated that compliance with the process must occur before the undertaking is approved, and that a federal agency must engage the host nation and other relevant private organizations and individuals in a cooperative partnership.¹⁴ The process set forth by the Advisory Council on Historic Preservation (ACHP) to handle Section 106 created the basic structure for applying Section 402, yet the Section 106 process does not apply verbatim to Section 402.¹⁵

Describing DoD’s role in the planning the process for the Futenma Replacement Facility, the court determined that the DoD had not met its obligations under Section 402. Specifically, the court noted that Japan’s environmental impact study does not relieve the DoD from its Section 402 requirements, and the DoD must determine for itself if the information provided is sufficient and what additional information may be needed.¹⁶ In short, the court determined--based on the information provided by the DoD and plaintiffs--that the DoD failed to “take into account” the effects of its undertaking in order to mitigate possible adverse effects on the dugong.¹⁷

Discussion:

The Overseas Environmental Baseline Guidance Document, May 2007 (OEBGD) includes language more closely related to that of Section 402 of the NHPA than previous

¹² *Id.* at 1102.

¹³ *Id.* at 1104.

¹⁴ *Id.*

¹⁵ *Id.* at 1105.

¹⁶ *Id.* at 1108-09.

¹⁷ *Id.* at 1111.

versions of the OEBGD. Specifically, the guidelines define adverse effects, mitigation, and historical or cultural resources (comparing them to equivalents of the National Register), as well as address measures to be taken by installation commanders in regards to addressing historic or cultural resources.

An omission in the OEBGD, however, is a method of consultation with affected communities and groups as set forth by the Secretary of the Interior's 1998 Guidelines for Federal Agencies and mentioned again by Judge Patel in the *Dugong v. Gates* ruling. Also, no formal process exists for Section 402 as it does through the ACHP for Section 106, thus making it difficult for a federal agency to determine whether or not it has sufficiently met its Section 402 obligations. The court, however, did state that the basic structure of Section 402 follows that of Section 106.

The ACHP created the following steps to adhere to Section 106:

1. Initiate Section 106 Process
2. Identify Historic Properties
3. Assess Adverse Effects
4. Resolve Adverse Effects
5. Implementation¹⁸

The "Initiate Process" step includes identifying whether or not the federal agency action is an "undertaking" within the definition, and if so, taking the proper consultation steps as required by the NHPA. "Identify[ing] Historic Properties" requires making an assessment of National Register-eligible properties possibly affected by the federal undertaking. Under Section 402, the federal agency is required instead to consult the World Heritage List as well as the applicable country's equivalent of the National Register; the OEBGD additionally requires an inventory of historic and cultural resources under DoD control following consultation with appropriate host nation authorities.¹⁹

Next, the federal agency should make a determination of "adverse effects" or "no adverse effects." If the agency finds no adverse effects, then the agency may proceed with the undertaking; if adverse effects are found, the agency then begins consultation to avoid, minimize, or mitigate the adverse effects. The agency seeks ways to resolve these

¹⁸ ACHP Section 106 Regulations Summary, <<http://www.achp.gov/106summary.html>> accessed Aug. 5, 2009. "Section 106" may be substituted with "Section 402" for applicability.

¹⁹ Overseas Environmental Baseline Guidance Document, May 2007, C. 12.3.5-12.3.5.1.

adverse affects with consultation not only with the appropriate government officials, but also with the public or other effected parties. This process concludes with a Memorandum of Agreement (MOA) addressing the agreed-upon measure to mitigate adverse effects. The federal agency then initiates its undertaking.

Analysis:

In order to determine the use of a similar Section 106-type process for Section 402, a general analysis of foreign historic preservation laws was undertaken to determine similarities in processes, terminology, and equivalents to the National Register.

- Only two countries where the DoD operates²⁰ specifically include animals on their respective equivalents to the National Register. (Japan, Republic of Korea)
- Many countries compile lists of historic or cultural property, but do not name or publish the list except through an Official Gazette released at varying times depending on the country. (Bahrain, Bulgaria, Egypt, Iraq, Kenya, Kuwait, Thailand)
- Few countries include a comparable Section 106 process that calls for public consultation or input. (Australia, Turkey) Other countries limit public input in terms of recommending properties for designation or objecting to designation. (United Kingdom, Thailand, Spain, Romania, Philippines, Netherlands, Luxembourg, Kenya, Italy, Indonesia, India, Honduras, Greece, Bosnia and Herzegovina)
- Most countries require approval for projects that may affect historic properties, regardless if it's a federal agency, state or province, municipality, or individual.

²⁰ Locations of DoD operations based on DoD Base Structure Report Fiscal Year 2008 Baseline and <www.globalsecurity.org/military/facility/index.html> accessed Aug. 5, 2009.

- Many countries' cultural preservation laws separate cultural property into movable, immovable, and archaeological types within a single law. Other countries have separate laws for immovable (buildings, structures, landscapes) property and movable (artifacts, objects, artwork) property.

Conclusion:

Judge Patel's ruling in *Dugong v. Gates* made it clear that the DoD did not do enough to fulfill its obligations under Section 402 of the NHPA. Regardless of Japan's large role in the planning and funding of the Futenma Replacement Facility, the court's ruling states that Japan's cooperation did not relieve the DoD of its responsibilities under Section 402. Thus, DoD's responsibilities are *in addition to* whatever the applicable country/host nation requires by its laws and regulations.

It is highly unlikely that another dugong-like situation would occur (especially considering few countries list animals on their National Register equivalent). Had the DoD followed a Section 106-type process for Section 402, as outlined by the ruling in *Dugong v. Gates*, it is possible that the DoD would have better proved it fulfilled its "take into account" obligations. Through the Section 106 process, the DoD is able to provide a "checklist" of completed activities to prove it has followed what is required by law. In contrast, the lack of a standard "checklist" for Section 402 hurts the DoD by creating uncertainty as to what is exactly required by the Section 402 process and how far the agency must go in order to completely "take into account" all adverse effects.

Resources:

Brostrom, Ingrid. "The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species," from *Hastings West-Northwest Journal of Environmental Law, Policy* (Spring 2006)

Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (1972)

Department of Defense Base Structure Report, Fiscal Year 2008 Baseline

Overseas Environmental Baseline Guidance Document (2007) DoD 4715.05-G

Schoenbaum, Lauren Jensen. "The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law," from *Texas International Law Journal* (Spring 2009)

Takahashi, Mitsuhiro A. "Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act," from *Environs Environmental Law and Policy Journal* (Fall 2004)

Tanji, Miyume. "U.S. Court Rules in the 'Okinawa Dugong' Case: Implications for U.S. Military Bases Overseas," from *Critical Asian Studies* (2008)

Legal Documents:

Dugong v. Rumsfeld, 2005 WL 522106 (N.D. Cal.) (2005).

Dugong v. Gates, 543 F. Supp. 2d 1082 (N.D. Cal.) (2008).

Defendant's Response to Court Order (April 2008)

Plaintiff's Response to Court Order (June 2008)

Defendant's Reply to Plaintiff's Response to Court Order (July 2008)

Seventh Joint Status Report (December 2008)

Task 2: Compile information relevant to DoD operations as effected by the ratification of the 1954 Hague Convention on the Protection of Cultural Property During Times of Armed Conflict.

Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments as far as war allows.

Gen. Dwight D. Eisenhower, Italy, December 29, 1943

Background:

On September 25, 2008, the Senate voted to ratify the 1954 Hague Convention on the Protection of Cultural Property During Times of Armed Conflict.²¹ The U.S. has long followed a code of conduct during armed conflict beginning with the Lieber Code (drafted during the Civil War) and continuing with the Hague Convention of 1907 on the Laws of War.²² The U.S. additionally helped draft the 1954 Hague Convention following the destruction of cultural property during World War II.²³ The Cold War, however, kept the US from ratifying the document due to the possibility of widespread damage caused by a nuclear bomb.²⁴ Following the fall of the Soviet Union, however, the Cold War fears subsided and the DoD no longer rejected the ratification of the convention.

Little attention came to ratifying the 1954 Hague Convention until the looting at the Iraq Museum in Baghdad and damage to archaeological sites in southern Iraq.²⁵ The renewed interested paved a way for the convention's push in the Senate and a vote to ratify in September 2008, however the First (1954) and Second (1999) Protocols to the 1954 Hague Convention were not ratified.

²¹ The First and Second Protocols, however, were not ratified. See US Ratifies Treaty to Protect Cultural Property in Time of War, <<http://www.sha.org/documents/USRatifiesTreatytoProtectCulturalPropertyinTimeofWar.pdf>>, accessed Aug. 17, 2009.

²² Hays Parks, "Protection of Cultural Property From the Effects of War," Ch. 3, 5-9.

²³ *Id.* at 14-15.

²⁴ US Ratifies Treaty to Protect Cultural Property in Time of War, <<http://www.sha.org/documents/USRatifiesTreatytoProtectCulturalPropertyinTimeofWar.pdf>>, accessed Aug. 17, 2009.

²⁵ *Id.*

Discussion:

The significance of ratifying the 1954 Hague Convention in the U.S. has been mentioned by several cultural resource specialists:

Cori Wegener (US Committee of the Blue Shield) - “Ratification of the Hague Convention provides a renewed opportunity to highlight cultural property training for U.S. military personnel at all levels, and to call attention to cultural property considerations in the early stages of military planning. The U.S. Committee of the Blue Shield will continue its commitment to offering cultural property training and coordination with the U.S. military and to increase public awareness about the 1954 Hague Convention and its international symbol, the Blue Shield.”²⁶

Patty Gerstenblith (Lawyers’ Committed for Cultural Heritage Preservation) - “Most importantly, it sends a clear signal to other nations that the United States respects their cultural heritage and will facilitate U.S. cooperation with its allies and coalition partners in achieving more effective preservation efforts in areas of armed conflict.”²⁷

John Russell (Archaeological Institute of America) - “By ratifying the 1954 Hague Convention, the U.S. has affirmed its commitment to protecting cultural property during armed conflict. The Archaeological Institute of America will continue to work with the Department of Defense to integrate the Convention’s provisions fully and consistently into the U.S. military training curriculum at all levels.”²⁸

The emphasis on educating service men and women on cultural resources can also be seen in the Army’s “Civil Affairs: Arts, Monuments, and Archives Guide” distributed in 2005 prior to the U.S. ratification of the 1954 Hague Convention.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

With the Lieber Code, the famous words of General Dwight D. Eisenhower from World War II, and involvement in drafting the 1954 Hague Convention, the United States has throughout its history made an effort to protect cultural property. The importance of the United States to ratify the Hague Convention is clearly expressed by the experts above.

Analysis/Conclusion:

Efforts to educate soldiers on cultural heritage have already begun. The 1954 Hague Convention went into effect in March 2009 for the United States, but the Convention can be said to have existed as international custom for some time. Thus, the United States intentionally or unintentionally abided by the 1954 Hague Convention without ever ratifying the document, and as a result, little change in DoD operations is likely to occur. Educating soldiers to better protect cultural resources during armed conflict (with Iraq becoming the lead example), however, is inevitable.

Two Protocols of the 1954 Hague Convention were not ratified by the United States. The First Protocol, included as a separate document in 1954, discusses the protection of movable cultural property (artifacts, etc.) during armed conflict as well as a prohibition on the transport of those items. State parties who have not ratified this protocol expressed concern over limitations on international trade of cultural property.²⁹ The Second Protocol, created in 1999, provides more details for implementation of the 1954 Hague Convention and includes instructions for peacetime protections of cultural property (including creating inventories of cultural property). Additionally, the Second Protocol gives instructions on criminal responsibility and jurisdiction and gives parties the ability to extradite criminals.³⁰

DoD actions would likely not be effected by ratification of either Protocols, however ratification of the First Protocol may have an impact on

²⁹ Patrick J. Boylan, Implementing the 1954 Hague Convention and Its Protocols: Legal and Practical Implications, from <<http://culturalpolicy.uchicago.edu/protectingculturalheritage/papers/Boylan.paper.pdf>> accessed Aug. 18, 2009.

³⁰ *Id.* See also Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Ch. 4, 1999.

domestic laws regarding the purchase and sale of cultural property. The Second Protocol and its criminal provisions are of greater concern for U.S. international policy and may effect DoD operations. It is possible that soldiers may be held accountable for their actions during armed conflict if a cultural property is destroyed or taken from a site. The United States' opposition to this Protocol also reflects its current stance to not ratify the Rome Statute of the International Criminal Court³¹—a stance taken by the former Bush Administration. With a new administration in place, the United States may take a softened approach to both Protocols of the 1954 Hague Convention as well as the International Criminal Court.

³¹ The complete text of the Rome Statute can be found at <<http://untreaty.un.org/cod/icc/statute/romefra.htm>>. Concerns with the Rome Statute are largely focused on a concern for a lack of protections in the document to prevent infringing on national sovereignty. See also David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State (1998-07-23). "Testimony Before the Senate Foreign Relations Committee, Washington, DC."

Resources:

Corn, Geoffrey S. "The Law of War and the Protection of Cultural Property: A Complex Equation," from *The Army Lawyer*, (2005)

Nafziger, James A. R. "Art Loss in Iraq: Protection of Cultural Heritage in Time of War and its Aftermath," from IFAR.org, Vol. 6, Nos. 1 & 2 (2003)

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UNESCO. "Final Report on Damage Assessment in Babylon," International Coordination Committee for the Safeguarding of the Cultural Heritage of Iraq, (2009)

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Wegener, Cori. "Civil Affairs: Art, Monuments, and Archives Guide," US Army (2005)

Legal Documents

Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954 (1954 Hague Convention and First Protocol) (1954)

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1999 (1999)

