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Center for Biological Diversity v. Esper—DOD did not violate National Historic Preservation Act's foreign property provision

Section 402 of the National Historic Preservation Act, 54 U.S.C. § 307101(e), requires covered agencies "to take into account" the effects of actions on foreign property. Here, the Department of Defense determined that its construction of a replacement facility in Okinawa, Japan would not have an adverse impact on Okinawa dugong, an endangered mammal possessing cultural significance for many Okinawans. A group of individuals and environmental organizations sued the Department in 2003 alleging violation of Section 402. Following a 2008 district court decision, the agency conducted a "take into account" analysis that involved considering five reports addressing the dugong's biological and cultural status. One of those reports was translated excerpts from a final and draft environmental impact statement dealing with the project's effect on the mammal. The Department reached a "no adverse effect" determination as a result of this review. The district court concluded that the agency had satisfied Section 402's procedural requirements and that the determination was not arbitrary or capricious under Administrative Procedure Act standards. *Okinawa Dugong v. Mattis*, 330 F. Supp. 3d 1167 (N.D. Cal. 2018). The plaintiffs appealed, and the Ninth Circuit affirmed with one panel member concurring separately. *Center for Biological Diversity v. Esper*, No. 18-16836, 2020 WL 2182175 (9th Cir. May 6, 2020).

The panel's analysis addressed two discrete issues: whether the Department's complied with the "take into account" procedural requirement, and whether its determination that the project would have no adverse effect on dugong was arbitrary or capricious. As to the first issue, it agreed with the district court that the Section 402

> process must include (1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the protected property, (3) a determination as to whether there will be adverse effects or no adverse effects on the protected property, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects on the protected property.

The panel found each of these requirements satisfied:

> The Department clearly complied with the first requirement that it identify the protected property at issue. The district court's 2005 order made it explicit that the Okinawa dugong was property protected by Section 402. To comply with the second requirement that it generate, collect, consider, and weigh information pertaining to how the new base may affect the dugong, the Department commissioned multiple studies, reviewed others that had previously been completed, and issued a final report of its findings. Studies conducted by the Department analyzed both potential biological and cultural impacts from constructing the new base. ... For the third requirement, based on

> the information the Department collected about the impact the new base would have on the dugong, it determined there would be no adverse effects on the dugong, which relieved the Department of the obligation to enact mitigation measures under the fourth requirement for Section 402 compliance.

It also rejected the appellants' argument that consultations regulations adopted under NHPA Section 106, 54 U.S.C. § 3014108, which applies to undertakings in the United States, did not apply to foreign property and that Section 402's duties were limited to those in its text since agencies had no authority to promulgate implementing regulations. Construing the statutory provision to demand only "reasonable consultation with outside entities to determine how an undertaking may impact a protected property and what may be done to avoid or mitigate any adverse effect[,]" the panel held that "because the nature of reasonable consultation will naturally vary based on the agency involved and the scope of the undertaking, we also find Section 402 delegates to federal agencies the specific decisions of which organizations, individuals, and/or entities to consult (or not consult) and the manner in which such consultation occurs." Thus, "an agency's choice not to engage the public directly will be upheld unless the decision was arbitrary and capricious." The Department's choice not to do so did not violate that standard given its compliance with the four Section 402 procedural requirements.

As to the Department's substantive "no adverse effect" determination, the panel found non-dispositive the absence of baseline dugong population data. "Baseline population data, although preferable," it stated, "is 'not an independent legal requirement.'" In this dispute, "[b]ased on the limited presence of the dugong in the new base site area, the Department reasonably concluded that the dugong's presence was sporadic and intermittent, at best, and, as a result, that there would be no adverse effects on the dugong as a result of the new base." There were also "no data suggesting that the construction and operation of the new base would further fragment the dugong population or interfere with existing dugong travel routes to their habitats and/or potential feeding groups."

Judge Bea concurred in the judgment and joined in the majority opinion except for a footnote that declined to "consider the Department's challenge to the district court's 2005 ruling that Section 402 applies to the dugong"—i.e., that the mammal was not "property" subject to the statutory provision. The majority reasoned that "the Department should have filed a notice of cross-appeal on this issue given the unique circumstances of this litigation." The concurrence argued that "[a]n appellee does not need to file a notice of cross-appeal to seek affirmance on an alternative ground" and that, contrary to the majority's view that holding "Section 402 does not apply to the dugong would lessen CBD's rights[,]" appellants "had no 'rights under the judgment' that was totally in the Department's favor." The concurrence then discussed the "property" issue and "would [have held] that it is not, and that 'property' protected by Section 402 is limited to a 'district, site, building, structure, or object,' 54 U.S.C. § 300308, or to items that meet the definition of 'cultural heritage' or 'natural heritage' as the terms are defined in the United Nations World Heritage Convention, see Convention Concerning the Protection of the World Cultural and Natural Heritage." Those definitions "limit protection to specific locations and to tangible, inanimate objects." In sum,

> [b]ecause Section 402's definition of "property" does not include animals, the district court's decision to the contrary misstated the law, and the Department was entitled to judgment in its favor resulting from its 2005 motion for summary judgment. Eventually, the district court correctly entered judgment for the Department in 2018, after it found the Department complied with Section 402. I would affirm the district

court's judgment but do so on the ground that Section 402 does not apply to the dugong as a matter of law.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/06/18-16836.pdf