International Journal of Cultural Property (2006) 13:235–240. Printed in the USA.

DOI: 10.1017/S0940739106060061

Creatures and Culture: Some Implications of *Dugong v. Rumsfeld*

Thomas F. King*

Abstract: *Dugong v. Rumsfeld*, a case charging the United States Department of Defense with violation of Section 402 of the U.S. National Historic Preservation Act, highlights the cultural importance of animals and the value of addressing this kind of significance in the intepretation of natural and cultural heritage legislation on both national and international levels.

BACKGROUND

The Okinawa dugong (*Dugong dugon*) is a marine mammal that lives in the waters of Okinawa, in the Ryukyu Islands of Japan. Sightings of dugongs, particularly females nursing their young, are deemed responsible for mermaid legends although only a sailor very long at sea would find a dugong an attractive companion. Be this as it may, dugongs figure prominently in the cultural traditions of Okinawa—for example, as elements in creation stories and as bringers of tsunamis.[1] As a result, as of 1972 the Okinawa dugong was included in Japan's Register of Historic Sites, Places of Scenic Beauty, and/or Natural Monuments. This register is maintained under the authority of Japan's Cultural Properties Protection

*SWCA Environmental Consultants, Inc. Email: TFKing106@aol.com

ACKNOWLEDGMENTS: I am grateful to Caleb W. Christopher of the Pace University School of Law for involving me in *Dugong* and for many helpful comments on the analysis presented here. Mr. Christopher points out that there are many other aspects of law, both domestic and international, that could be explored through analysis of *Dugong*, as well as philosophical and policy questions about the unity or segmentation of natural and cultural resource management systems. At the same time, he cautions that the case is not yet definitively resolved; the U.S. military may yet regroup and launch another assault on the beleaguered sea mammals. I look forward to an extended and updated analysis of the case by Mr. Christopher in the not-too-distant future. I am also grateful to Earthjustice San Francisco for assistance and advice, and to Australia's Great Barrier Reef Marine Park Authority for permission to use the dugong image included in this article.

Act of 1950, as amended, and includes five broad, overlapping types of cultural resource: tangible buildings, structures, and artifacts; intangible arts, drama, and song; folk culture and its associated material objects; historic building groups in their landscapes; and *monuments*, a large and diverse category including historic and archaeological sites, landscapes of great beauty, and culturally important plants and animals as well as their habitats.

The Okinawa dugong population is small, perhaps comprising as few as 50 individuals. The dugongs feed on sea grass in Henoko Bay, on the northeast side of the island of Okinawa near Nago City and Camp Schwab, a United States Marine Corps base. In the mid-1990s the U.S. and Japanese governments executed an agreement providing for replacement of another Marine Corps base, Futenma Air Station, with a new base constructed on platforms over a coral reef in the bay. This plan sparked vigorous protests on Okinawa and elsewhere in Japan, in large part because of its potential impact on the dugong population. As part of a multipronged effort to halt the project, a group of Japanese and American plaintiffs filed suit on behalf of the dugongs in U.S. Federal Court, with representation by Earthjustice, the American legal assistance organization. The case was argued in the district court for the Northern District of California before the Honorable Marilyn Hall Patel. I was privileged to serve as an expert witness for the plaintiffs.

Figure 1. Dugong and young. Photograph courtesy of the Great Barrier Reef Marine Park Authority

THE ISSUE

The plaintiffs in *Dugong v. Rumsfeld*[2] contended that the U.S. Department of Defense and its secretary, Donald H. Rumsfeld, violated Section 402 of the U.S. National Historic Preservation Act. Section 402 reads as follows:

> 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.[3] [emphasis added]

The national register referred to is the U.S. National Register of Historic Places, which includes "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."[4]

The term *take into account*, as used in Section 402, is the same term used in Section 106 of the statute, which requires agencies of the U.S. government to take into account the effects of their domestic actions on properties included in or eligible for the national register. As interpreted in the regulations[5] implementing Section 106, the term refers to identifying historic properties; determining a proposed action's effects on them; and seeking ways to *resolve* such effects through alternative selection, project redesign, data recovery or recordation, compensatory actions, or other means, all in consultation with stakeholders.

THE ARGUMENTS

The U.S. government filed a motion to dismiss the case. The primary basis for this filing was the argument that the U.S. Department of Defense had no obligation to consider effects on the dugongs, because Japan's register was not that country's *equivalent* of the U.S. National Register. The key aspect of this nonequivalence, according to the defense, was that Japan's register can include animals, while the U.S. register does not.[6]

The plaintiffs responded that the two registers are in fact equivalent, based on several lines of reasoning:

- First, both registers have the same broad purpose: to encourage protection of the cultural environment.[7]
- Second, it would have been absurd for the U.S. Congress to intend for an *equivalence* of registers to demand that they be constructed in precisely the same way. No other historic register in the world is precisely the same as the U.S. National Register.[8]

Third, although the U.S. National Register may not explicitly include animals as such, it does include animal *habitats*, in which the animals themselves are contributing or character-defining elements. The plaintiffs offered several examples of wildlife refuges, rivers, and other natural areas either included in the national register or regarded as eligible for inclusion based on, in whole or in part, their association with culturally significant animals. If it were in the United States, it was argued, the Henoko Bay dugongs themselves might be ineligible for the national register but the bay could be eligible, with dugongs as its character-defining element.[9] As a result, the U.S. Department of Defense would have been required to consider the effects of its actions under Section 106, the domestic equivalent of Section 402.

THE DECISION

On March 2, 2005, the court denied the defendants' motion to dismiss, in the process promulgating an opinion strongly supportive of the plaintiffs' arguments and giving the U.S. government little reason to expect to prevail at trial. In the context of continuing public protests and growing political opposition in Japan, the proposed Henoko Bay base project has apparently collapsed, and relocation of the Futenma facility to an on-land site is under consideration.

In her opinion Judge Patel essentially endorsed the plaintiffs' arguments for the applicability of Section 402 and the equivalence of the U.S. and Japanese registers. Interestingly, however, she went on to discuss whether an animal could, in theory, itself be a "property" eligible for the U.S. National Register as an "object significant in American history, architecture, archaeology, engineering, and culture"[10] rather than merely contributing to the eligibility of its habitat. In the national register regulations, the National Park Service defines *object* as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." The court wrote

> Defendants contend that a wild animal cannot qualify as a "property" and that there is no indication in the NHPA (National Historic Preservation Act) and its amendments, the accompanying legislative history, the implementing regulations and guidelines, or case law that Congress "sought to expand the NHPA's statutory coverage in order to protect or preserve wild animals." See Def. Mot. At 3, 13. "Wild animals" fails to describe the relevant group of animals at issue here, namely those with special cultural significance protected under foreign historical preservation laws which are deemed "equivalents" of the National Register of Historic Places. Taking defendants' point, nonetheless, very little precedent exists governing the question of whether a living thing can constitute a property eligible for the National Register. The decision of the one district court that has dealt with the issue undermines defendants' argument that the dugong is automatically disqualified. In *Hatmaker v. Georgia*

Department of Transportation, 973 F. Supp. 1–47 (M.D. Ga. 1995), plaintiffs sought a preliminary injunction against continued construction of a federally-funded road widening project that involved destruction of an oak tree of significance in Native American history. The court held that the tree was at least potentially eligible for placement on the National Register and granted the preliminary injunction. Id. At 1056–57. In a subsequent case, in which the Department sought to have the injunction dissolved, the court again rejected the defense's argument that an unaltered tree could not qualify for the National Register. See *Hatmaker v. Ga Dep't of Transp*. 974. Sup. 1058, 1066 (M.D. Ga. 1997). In assessing the applicability of the statute, the court emphasized the verifiable nature of the contested object's historic qualities. Id. At 1067.

Hatmaker is analogous to the present case. While animals obviously differ from trees, their distinguishing qualities are not significant under the plain language of the statute. The dugong may, like a tree, fall under the category of "object" as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3(j).[11]

DISCUSSION

The court's discussion of the issues involved in *Dugong v. Rumsfeld* suggests that agencies of the U.S. government would be well advised to take seriously their responsibilities under Section 402: a requirement of law that has often been honored only in the breach (as, for example, in the U.S. military's prosecution of the Iraq war). However, there is probably little hope for systematic attention to Section 402's requirements in the absence of implementing regulations and an agency to perform the advocacy functions fulfilled with respect to Section 106 implementation by the Advisory Council on Historic Preservation.[12] The effectiveness of Section 402 is also limited by requiring attention only to places and things already formally *listed in* a host nation's equivalent of the U.S. National Register. Section 106, in contrast, requires equal attention to properties *eligible for* the register. This gives agencies an affirmative responsibility to identify historically, culturally, and architecturally significant resources threatened by their domestic actions. Lacking a similarly prescribed planning responsibility with respect to their overseas actions, it is relatively easy for agencies simply to forget about Section 402. Still, *Dugong v. Rumsfeld* suggests that Section 402 can be a useful addition to the tool belt of a would-be litigant against U.S. government actions in other countries.

The most novel feature of the *Dugong* decision, of course, is the court's observation that a living, breathing animals might meet the criteria of eligibility for inclusion in the U.S. National Register. I think, however, that the Court's more significant finding was more general. In concluding that the Japanese and U.S. preservation laws are equivalent the court noted, "The (Japanese and U.S.) stat-

utes demonstrate an equivalent commitment to protecting significant bridges between human culture and history, on the one hand, and wildlife, on the other."[13]

Cultural resource management and natural resource management have grown out of somewhat separate historical traditions, but they meet in the management of places where animals and plants important to human culture live, grow, congregate, spawn, flower, and fruit. Whether focused on the creatures themselves as in Japan or on their habitats as is more usual in the United States, significance evaluations and management strategies increasingly address the interface between nature and culture. Cultural resource managers need to be reminded from time to time, as the *Dugong* decision reminds us, that our business is not only management of the built environment or its archaeological remnants but of culturally valued nature as well. Just as Japanese environmentalists reached out to the U.S. historic preservation community in framing the *Dugong* litigation, the cultural heritage community must be prepared to work intimately with biologists, ecologists, and traditional communities to protect the natural environments on which so much culture depends.

ENDNOTES

1. Declaration of Isshu Maeda in support of plaintiffs' opposition to defendants' motion to dismiss. August 4, 2004: 6–12.

2. Okinawa Dugong (*Dugong Dugon*); Center for Biological Diversity; Turtle Island Restoration Network; Japan Environmental Lawyers Federation; Save the Dugong Foundation; Dugong Network Okinawa; Committee Against Heliport Construction, Save Life Society; Anna Koshiishi; Takuma Higashionna; and Yoshikazu Makishi v. Donald H. Rumsfeld, in his official capacity as the Secretary of Defense; and U.S. Department of Defense; U.S. District Court for the Northern District of California, Civil Action No. C-03–4350 (MHP).

3. 16 U.S.C. 470a-2. Rather confusingly, the statute includes another Section 402, codified at 16 U.S.C. 470x, comprising definitions pertaining to Title IV, creating the National Center for Preservation Technology and Training.

4. 16 U.S.C. 470a(a)(1)(a).

5. 36 C.F.R. 800.

6. Defendants' Reply Memorandum in Support of Motion to Dismiss. August 4, 2004: 3–5.

7. Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, August 4, 2004: 15.

8. Memorandum of Points: 19.

9. Memorandum of Points: 20.

10. 16 U.S.C. 470a(a)(1)(a).

11. Memorandum and Order, No. C 03–4350 Mhp, filed March 2, 2005: I.B.

12. For information on the Advisory Council and Section 106, see www.achp.gov, accessed April 20, 2006.

13. Memorandum and Order: I.A.