Case No. 15-15695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, TURTLE ISLAND RESTORATION NETWORK, JAPAN ENVIRONMENTAL LAWYERS FEDERATION, SAVE THE DUGONG FOUNDATION, ANNA SHIMABUKURO, TAKUMA HIGASHIONNA, and YOSHIKAZU MAKISHI,

Plaintiffs-Appellants,

v.

ASHTON CARTER, in his official capacity as Secretary of Defense; and the UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Center for Biological Diversity, Turtle Island Restoration Network, Japan Environmental Lawyers Federation, and Save the Dugong Foundation certify that they have no parent corporations and that no publicly held corporation owns more than 10% of the Plaintiffs-Appellants.

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INTRODUCTION

This case, brought by Okinawan individuals and community groups and U.S. groups with close ties to Okinawa, challenges the United States Department of Defense's (DoD's) failure to comply with the requirements of the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*,[1] in designing, constructing and operating a Marine Corps air base in Okinawa, Japan. The planned base, the Futenma Replacement Facility (FRF), will include large runways built on landfill dumped into a pristine ocean bay. These waters are important habitat for a critically endangered and culturally significant population of manatee-like creatures, the Okinawan dugong.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought their case before the U.S. District Court for the Northern District of California, asserting that DoD's failure to comply with the requirements of section 402 of the NHPA, 54 U.S.C. § 307101(e), is arbitrary, capricious, and without observance of procedures required by law pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), and therefore subject to judicial review. *Id.* §§ 701-706. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under the laws of the United States.

On February 13, 2015, the district court granted DoD's motion to dismiss Plaintiffs' First Supplemental Complaint and entered final judgment dismissing all

[1] Formerly codified at 16 U.S.C. §§ 470 *et seq.*

Plaintiffs' claims with prejudice. ER 6. On April 9, 2015, pursuant to Federal Rule of Appellate Procedure 3(a) and within the time designated by Federal Rule of Appellate Procedure 4(a)(1)(b), Plaintiffs filed their Notice of Appeal. ER 1.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Do Plaintiffs-Appellants have standing to pursue their claim that DoD has failed to "take into account the effect" of the Futenma Replacement Facility on the Okinawa dugong "for purposes of avoiding or mitigating any adverse effects," as required by section 402 of the NHPA, 54 U.S.C. § 307101(e)?

Is Plaintiffs-Appellants' request for relief to remedy the harms caused by DoD's failure to comply with the requirements of section 402 of the NHPA barred by the political question doctrine?

Pursuant to Ninth Circuit Rule 28-2.7, section 402 of the National Historic Preservation Act provides as follows:

> Prior to the approval of any undertaking outside the United States that may directly and adversely affect a property that 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 the undertaking shall take into account the effect of the undertaking on the property for purposes of avoiding or mitigating any adverse effect.

54 U.S.C. § 307101(e).

STATEMENT OF THE CASE

The Okinawa dugong is a critically endangered marine mammal that holds a central place in the culture of Okinawa, Japan, and is protected as a cultural icon under Japanese law. This case arises out of the obligation of the U.S. Department of Defense (DoD), pursuant to the National Historic Preservation Act (NHPA), to respect and protect foreign cultural heritage by taking into account the effect on the dugong of DoD's participation in the construction and operation of a new Marine Corps air base, the Futenma Replacement Facility (FRF), in Okinawa. Construction of the FRF will require landfilling portions of two bays off the coast of Okinawa. These bays are important feeding grounds for the dugong. Because construction and operation of the FRF may harm the dugong, section 402 of the NHPA requires DoD to "take into account the effect [of the FRF on the dugong] for purposes of avoiding or mitigating any adverse effects." 54 U.S.C. § 307101(e).

In 2008, in earlier proceedings in this case, the district court held that Plaintiffs have standing to bring this suit, *see* CR 119 at 15-20; and that DoD failed to comply with the obligations of the NHPA. *Id.* at 36-44. The district court ordered DoD to take into account the effect of the FRF on the dugong and held the case 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." *Id.* at 45.

On April 16, 2014, DoD notified the district court that it had completed the "U.S. Marine Corps Recommended Findings" (Findings) under section 402, and an "Action Memo." CR 151. Although DoD provided Plaintiffs (but not the court) a copy of its Findings, it did not make available an administrative record or any of the information on which it based the Findings.

The Findings make evident numerous flaws in the process by which DoD purported to "take into account" the effect of its actions on the dugong. For example, DoD did not afford any opportunity for public comment or participation in the process, which the district court held was a "basic element" of the section 402 process, CR 119 at 35, and has not made public its Findings or any of the information on which they are based. Although section 402 is explicitly intended to address "any" adverse effects, DoD inappropriately limited its inquiry to a non-exhaustive list of possible adverse effects identified by the district court in its 2008 ruling, before DoD had undertaken any inquiry at all. ER 64-65; *Cf.* CR 119 at 28-29 ("These potential adverse effects include physical destruction of the Okinawa dugong resulting from contamination of seagrass feeding grounds and collisions with boats and vessels, as well as long-term immune and reproductive damage resulting from exposure to toxins and acoustic pollution. That the actual

consequences may be currently unknown is precisely the reason the NHPA requires defendants to gather, examine and assess information.").

DoD's Findings conclude that the FRF project will have "no adverse effect" on the dugong. ER 88. However, despite the absence of supporting information, it is evident from the Findings alone that the factual basis for this conclusion is inadequate. DoD admits that available data are "not sufficient" to evaluate essential questions such as the size, status and viability of the Okinawa dugong population. ER 73. The Findings also underestimate the importance to the dugong of the bays where the base will be located, the extent of habitat loss likely to occur, and the significance of the loss of that important habitat. *See* ER 57-58 at ¶¶ 45-46.

These flaws in DoD's "take into account" process made it impossible for DoD to generate adequate information about the effects of the Futenma Replacement Facility on the dugong, to carefully consider that information, and to weigh these effects in making decisions concerning mitigation or avoidance of adverse effects. For this reason, on July 31, 2014, Plaintiffs filed a supplemental complaint seeking a judgment declaring that DoD's Findings violate section 402, setting aside the Findings, and enjoining DoD activities in furtherance of the project until DoD remedies the flaws in its "take into account" process. ER 44

On September 29, 2014, DoD moved to dismiss Plaintiffs' supplemental complaint, arguing that, because this case concerns actions taken by the U.S. military in coordination with the Japanese government, Plaintiffs' claim is barred by the political question doctrine, CR 163, and on February 13, 2015, the district court entered an order dismissing Plaintiffs' action with prejudice. ER 6.

The district court held that "Plaintiffs' injunctive relief claim clearly presents a non-justiciable political question." ER 32. The district court further held that although "Plaintiffs' requests for declaratory relief and an order setting aside the NHPA Findings do not present political questions," ER 20, the Plaintiffs lack standing to pursue these claims. ER 36-43. The district court reasoned that it had

> already determined that no injunctive relief may be issued to prevent or halt construction of the FRF. Moreover, the NHPA "take into account" process is only hortatory, mandating no particular result. Hence, there is no likelihood that the United States government, in response to an adverse declaratory judgment, will voluntarily halt construction of the FRF. As a result, it cannot be said that declaratory relief "may" provide redress to Plaintiffs.

ER 41-42 (internal citation removed).

The district court mischaracterized the procedural requirements of the NHPA as "hortatory" and misapplied this Court's standards for standing—particularly the redressability requirement—when a government agency fails to follow procedures required by law. A declaration that DoD's Findings fail to

comply with the NHPA, vacatur of the Findings, and remand to the agency for reconsideration of the impacts of the FRF on the dugong with the benefit of information provided by Plaintiffs through a procedurally sound "take into account" process would provide DoD the opportunity to mitigate harms to the dugong. The possibility that compliance with the procedures required by the NHPA would lead DoD to make adjustments to its involvement in the FRF is sufficient to satisfy the redressability prong of this Circuit's standing analysis.

The district court also erred in ruling that the political question doctrine bars injunctive relief. Plaintiffs' legal claim—that DoD violated the NHPA—involves interpretation of a domestic statute, a practice which falls squarely within the competence of the federal courts. The declaratory and injunctive relief that Plaintiffs request would not supplant DoD's policy determination with the Court's, but instead would require DoD itself to revisit its Findings after gathering the information and following the procedures required by the NHPA. These remedies can be applied on the basis of clear and judicially manageable standards provided by the APA and the four-part standard for injunctive relief. Plaintiffs-Appellants therefore ask this Court to vacate the district court's order dismissing their NHPA claims and remand to the district court for consideration of the merits.

STATEMENT OF FACTS

I. Futenma Relocation and the FRF

Since 1945, the United States has maintained military bases on the island of Okinawa, Japan, one of which is the Marine Corps Air Station Futenma. CR 119 at 3. The U.S. military presence in Okinawa has long been a source of contention with the Okinawan civilian population. *See* CR 164 at 3, ¶ 6 (Declaration of James P. Zumwalt in Support of Defendants' Motion to Dismiss) ("there were significant delays in executing the plan first identified in 1996" in part due to local opposition).[2]

On December 2, 1996, the bilateral Special Action Committee on Okinawa issued a Final Report recommending the return of the Futenma airbase to Japan after replacement facilities were constructed and operational. CR 97-1 at 6. On September 29, 1997, DoD presented its "Operational Requirements and Concept of Operations for MCAS Futenma Relocation, Okinawa, Japan" (1997 Operational Requirements) to the Government of Japan. CR 119 at 4. The 1997 Operational Requirements detailed design specifications for the replacement facility that, according to DoD, must be followed by the Government of Japan to facilitate the Futenma relocation. *Id.*

[2] *See also* E. Chanlett-Avery & I.E. Rinehart, Congressional Research Service, R 42645, *The U.S. Military Presence in Okinawa and the Futenma Base Controversy* 5-6 (2014) [hereinafter CRS Report].

On May 1, 2006, the Government of Japan and DoD issued a joint statement (the Roadmap) announcing final agreement on the plan for the Futenma Replacement Facility. The Roadmap calls for relocation of MCAS Futenma to expanded facilities at Camp Schwab on Cape Henoko. The expansion would extend runways with landfill more than a mile into the waters and seagrass beds of Oura and Henoko Bays. *Id.* at 5. The Roadmap included a map of the proposed runway placement, showing that the proposed Cape Henoko runways would fill in areas of Henoko Bay that are rich in seagrass beds critical for dugong survival, *id.*, and where tracks indicating ongoing dugong use have been found. ER 69-70.

The Government of Japan is responsible for funding and completing construction of the FRF. CR 119 at 4. DoD exercises direct or indirect control over the location, operation, size, and environmental impact of the FRF. DoD develops design specifications for the FRF that must be met before return of Marine Corps Air Station Futenma to Japanese control. DoD also approves individual implementation decisions, funding for the relocation and subsequent maintenance of the FRF, and other activities. *Id.* at 23 ("[T]he United States has been substantially involved in the design and site selection for the FRF, will continue to monitor and oversee the construction of the facility to ensure that it meets U.S. requirements, and will have exclusive authority to operate the facility once it is completed."); 27 (setting out facts supporting finding that FRF is a

"federal undertaking" under the National Historic Preservation Act). *See also* CR 165-3 at 5-6 (Memorandum for: The Joint Committee, Establishment of the Alliance Transformation Implementation Panel (ATIP), 24 April 2007) (U.S. safety standards take precedence over Japanese when they are more stringent, but do not necessarily give way to Japanese standards when less stringent).

In December 2013, despite substantial local opposition, Okinawa governor Hirokazu Nakaima approved an offshore landfill permit required for construction of the FRF to begin. CR 164 at 4, ¶ 8; *see also* CRS Report, Summary ("Most Okinawans oppose construction of the new U.S. base for a mix of political, environmental, and quality-of-life reasons.").

On July 2, 2014, Okinawan media reported that the Okinawa Defense Bureau had begun demolishing buildings within the proposed FRF area at Camp Schwab, a first step in the FRF's construction.[3] Construction of the FRF requires DoD work-entry permits for access to Camp Schwab and to adjacent U.S.-controlled waters, CR 119 at 27-28, and the demolition suggests that DoD has already issued those permits. According to local media reports, the Okinawa Defense Bureau planned to carry out undersea drilling in late July 2014 and to

[3] *See Defense Bureau Starts Removing Buildings Within Camp Schwab in Henoko to Build a New Air Base*, Ryukyu Shimpo (July 2, 2014), http://english.ryukyushimpo.jp/2014/07/09/14546/ (last visited Nov. 18, 2015).

begin reclamation of the nearshore area early in 2015. ER 51 at ¶ 26.[4] However, in 2015, Takeshi Onaga was elected to replace Hirokazu Nakaima as governor and, on October 13, 2015, Governor Onaga revoked the offshore landfill permit.[5] Before Governor Onaga's revocation of the permit, the new base was expected to be completed no earlier than 2022. CRS Report at 3.

II. The Okinawa Dugong and the National Historic Preservation Act

The dugong (*Dugong dugon*) is a marine mammal similar to the manatee. CR 119 at 2. The dugong is a globally threatened species listed as "endangered" under the U.S. Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq*. The waters surrounding Okinawa are home to the few remaining Okinawa dugong, a rare, genetically isolated, and unique population of the dugong species. *See* CR 85-14 at 5-6, ¶¶ 14-15 (Declaration of Ellen Hines, PhD., in Support of Plaintiffs' Motion for Summary Judgment). The Okinawa dugong was already highly

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[4] *See also Okinawa OKs Seafloor Drilling Survey for U.S. Base Relocation Work*, Kyodo News (July 17, 2014), http://www.globalpost.com/dispatch/news/kyodo-news-international/140717/okinawa-oks-seafloor-drilling-survey-us-base-relocatio (last visited Nov. 15, 2015).

[5] *See* Eric Johnston, *Okinawa Elects Anti-U.S. Base Governor, In Rebuke To Abe*, Japan Times (Nov. 16, 2014), http://www.japantimes.co.jp/news/2014/11/16/national/politics-diplomacy/okinawa-elects-anti-u-s-base-governor-rebuke-abe/#.VkcNqYXyelh (last visited Nov. 15, 2015); *Okinawa Governor Revokes Approval for U.S. Base Relocation Work at Henoko*, Japan Times (Oct. 13, 2015), http://www.japantimes.co.jp/news/2015/10/13/national/okinawa-revokes-predecessors-approval-u-s-base-relocation-work-henoko/#.VkogO3arTIX (last visited Nov. 15, 2015).

endangered by the 1930s and has not substantially recovered. The Japanese Ministry of the Environment has listed the Okinawa dugong as "critically endangered" in Japan. CR 119 at 2. In 1997, the Mammalogical Society of Japan estimated the population at fewer than 50 individuals. ER 68. The most recent surveys by the Government of Japan concluded there are at least three remaining Okinawa dugongs. *See* ER 51-52 at ¶ 27; ER 69.

Dugongs hold a deep significance in Okinawan culture. CR 119 at 2. They are central to the creation mythology, folklore, and rituals of Okinawa, and are sometimes considered the progenitor of the local people. *Id*. Because of their cultural significance, the dugong is a protected "Natural Monument" under Japan's Law for the Protection of Cultural Properties. *Id*.

Preservation of the Okinawa dugong depends on the preservation of its habitat. *See generally* CR 85-14. The proposed construction and operation of the FRF will harm Okinawa dugong habitat and food sources, directly and adversely affecting the Okinawa dugong. *Id.* at 12-15, ¶¶ 30-35. Specifically, landfill from the construction of the facility, stormwater runoff, water pollution, air pollution, noise, and light from the operation of the FRF will directly and adversely affect the continued survival of the Okinawa dugong. *Id*. at12-14, ¶¶ 30-33.

Pursuant to the NHPA, it is "the policy of the Federal Government, in cooperation with other nations" to "provide leadership in the preservation of the

prehistoric and historic resources of the United States and of the international community of nations." 54 U.S.C. § 300101(2).[6]

As part of the NHPA Amendments of 1980, Congress enacted section 402, 54 U.S.C. § 307101(e), to comply with U.S. obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and to mitigate the adverse effects of Federal undertakings outside the United States. Section 402 requires that

> [p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is 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."

54 U.S.C. § 307101(e). This requirement is intended to

> "generat[e] information about the impact of federal actions on the environment," and to "require[] ... the relevant federal agency [to] *carefully consider* the information produced," *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (emphasis added), and to "*weigh* effects in deciding whether to authorize" a federal undertaking, *Save Our Heritage v. Fed. Aviation Admin.*, 269 F.3d 49, 58 (1st Cir. 2001) (emphasis added).

[6] On December 19, 2014, Public Law 13-287 moved the NHPA's provisions from title 16 of the United States Code to title 54, with minimal and non-substantive changes to the text of the Act and a re-ordering of some of its provisions.

CR 119 at 31. Because the list of protected cultural properties under Japan's Cultural Properties Law is the "equivalent" of the U.S. National Register of Historic Places, the Okinawa dugong is protected under the NHPA. CR 119 at 26.

III. Procedural History

On September 25, 2003, Plaintiffs filed suit challenging DoD's involvement in the design, development, and approval of the FRF, claiming that DoD's failure to "take into account" adverse effects of the proposed FRF on the Okinawa dugong violated the NHPA, 54 U.S.C. § 307101(e), and APA, 5 U.S.C. §§ 706(1), (2)(A), and (2)(D). CR 1.

On May 17, 2004, DoD moved to dismiss the case, arguing that Plaintiffs had failed to state a claim upon which relief could be granted because the dugong is not "property" within the meaning of the NHPA, in part because the Japanese Law for the Protection of Cultural Properties is not "equivalent" to the U.S. National Register of Historic Places. CR 17 at 2-3.

On March 2, 2005, the district court denied the motion, holding that the NHPA applies to protect the Okinawa dugong, CR 51 at 18, that section 402 applies extraterritorially, *id.* at 27, and that Plaintiffs' complaint did "not thrust this court into issues of foreign affairs; rather, it summons the court's attention to matters under the control of the United States Department of Defense." *Id.*

Following discovery on whether DoD's activities constituted a "federal undertaking" under the NHPA, the parties filed cross-motions for summary judgment. CR 85, 90. On January 24, 2008, the district court granted Plaintiffs' summary judgment motion and denied DoD's motion. CR 119. The district court held that because the FRF "may directly and adversely affect" the Okinawa dugong, *id.* at 28-29, Section 402 of the NHPA requires DoD to "take into account" effects of the proposed FRF on the Okinawa dugong. *Id.* at 29-36. DoD's failure to do so constituted agency action unreasonably delayed and unlawfully withheld. *Id.* at 42.

The district court further held that the "take into account" process under section 402 should "follow the basic outline of [NHPA] section 106," which governs the process for taking into account the effects of agency actions on properties listed on the U.S. National Register of Historic Places. *Id.* at 33 (citing 16 U.S.C. § 470(f) (NHPA section 106);[7] 36 C.F.R. § 800 *et seq.* (regulations implementing section 106)). The district court explained that, "at a minimum, [the section 402 'take into account' process] must include"

> (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

[7] 16 U.S.C. § 470(f) is now 54 U.S.C. § 306108.

> and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.

Id. at 32. In completing this process, the district court held, a federal agency must "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." *Id.* *See also id.* at 35 ("Congress' intent that the section 402 take into account process [include] … consultation with interested parties and organizations … is evident.").

The district court ordered DoD to comply with section 402 of the NHPA, including by "produc[ing], gather[ing], and consider[ing]" the necessary information for "taking into account the effects of the FRF on the Okinawa dugong and for determining whether mitigation or avoidance measures are necessary and possible." *Id.* at 43. The district court held the case in abeyance "until defendants take the information into account for the purpose of avoiding or mitigating adverse effects to the dugong." *Id.* at 45.

IV. DoD's 2014 NHPA "Findings" and Plaintiffs' First Supplemental Complaint

On April 16, 2014, DoD notified the district court that it had completed its Findings under the NHPA, as well as an "Action Memo." CR 151. This was the first time Plaintiffs learned that DoD had undertaken a "take into account" process concerning the FRF project. DoD did not consult with Plaintiffs during the process and provided no public notice that it intended to undertake the process at all. ER

55 at ¶ 40. Nor did DoD disclose how it selected those with whom it did consult or whom it allowed to participate. *Id.* at ¶ 41. DoD did not make the Findings or supporting documents public, or file them with the court.[8] However, DoD provided the Findings to Plaintiffs' counsel, along with two memoranda from the Deputy Assistant Secretary of the Navy approving the Findings. Plaintiffs attached all three documents as exhibits to their supplemental complaint. ER 61-90.

In its Findings, DoD determined that its "undertaking" has "'no adverse effect' on the Okinawa dugong." ER 73. To reach this conclusion, DoD relied heavily on a 2010 study referred to as "Welch 2010," which DoD apparently commissioned, ER 64, and the Government of Japan's EIS. *See* ER 83-85 (table correlating each topic in Findings with sections from "Welch 2010" study). DoD also relied on "additional literature and informative data," ER 65-66, and a "bi-lateral Expert Study Group," convened in 2010 to examine environmental impacts of the FRF. ER 82. Although the Findings refer to the Welch 2010 study and the additional information as "enclosures," ER 64-65, DoD has not made these documents public, has refused to provide them to Plaintiffs, and has refused to disclose the names of the experts or other contributors.

[8] DoD also did not submit to the district court a copy of the final Japanese EIS, which DoD relied on in its Findings, *see* ER 66, n.2, despite the district court's specific request that "a copy with a translation" be submitted once the EIS was completed. CR 140 at 1.

On July 31, 2014, Plaintiffs filed their First Supplemental Complaint, in which they challenged two aspects of DoD's compliance with the NHPA "take into account" process. ER 44. First, Plaintiffs challenged DoD's failure to satisfy the consultation and public participation requirements of section 402, including by consulting Plaintiffs as interested parties and by making the Findings and supporting data public. ER 58 at ¶¶ 48-50. Second, because of numerous flaws in DoD's process of gathering and assessing information, Plaintiffs challenged DoD's conclusion that the construction and operation of the FRF will not adversely affect the Okinawa dugong.

Plaintiffs argued that DoD did not consider the full range of possible adverse effects on the dugong, and challenged the factual basis for DoD's "no adverse effect" conclusion. *See* ER 56-58 at ¶¶ 42-46. For example, DoD admitted that the available data "are not sufficient to establish population size, status, and viability" of the Okinawa dugong. ER 73. However, "[n]otwithstanding the absence of recent total population data," DoD found no adverse effect based on the unsupported claim that it had "current and valid population data for Henoko and Oura bays." ER 78. Plaintiffs also challenged DoD's Findings as underestimating both the value of the Henoko and Oura Bay habitat to the Okinawa dugong, ER 57 at ¶ 45, and the extent of habitat loss that construction and operation of the FRF will cause. ER 57-58 at ¶ 46.

In light of these concerns, Plaintiffs requested a judgment declaring that DoD's Findings, and the process used to develop them, violate NHPA section 402. ER 58-59. Plaintiffs also requested an order setting aside DoD's Findings, and an order "that DoD not undertake any activities in furtherance of the FRF project … until it complies with section 402." *Id.*

On September 29, 2014, DoD moved to dismiss Plaintiffs' supplemental complaint, arguing that, because this case concerns actions taken by the U.S. military in coordination with the Japanese government, Plaintiffs' claim is barred by the political question doctrine. CR 163. Plaintiffs opposed the motion, CR 167, and the district court held a hearing on December 12, 2014. CR 173. In January, the parties submitted supplemental briefing on remedies. CR 181, 182.

On February 13, 2015, the district court dismissed Plaintiffs' action with prejudice. The district court held that "Plaintiffs' injunctive relief claim clearly presents a non-justiciable political question." ER 32. The district court further held that although "Plaintiffs' requests for declaratory relief and an order setting aside the NHPA Findings do not present political questions," ER 20, the Plaintiffs lack standing to pursue these claims. ER 36-43. Plaintiffs now appeal the district court's ruling.

SUMMARY OF ARGUMENT

When a government agency fails to follow a procedure required by law, the resulting procedural injury is sufficient to confer Article III standing so long as the plaintiff also asserts a "concrete interest" that is threatened by the failure, such as the use or observation of an animal species for cultural, aesthetic or recreational purposes. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–563 (1992); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). Once a plaintiff establishes a procedural injury, the causation and redressability requirements for standing are relaxed and plaintiffs must only show that they have "a procedural right that, if exercised, *could* protect [their] concrete interests." *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, No. 12-cv-17530, 2015 WL 5451484 at *8 (9th Cir. Sept. 17, 2015) (emphasis in original).

DoD's failure to comply with the "take into account" requirements of section 402 of the NHPA causes a procedural injury that threatens Plaintiffs' concrete interests in observing the dugong for cultural, educational, aesthetic, inspirational, conservation and economic purposes. At a minimum, Plaintiffs' harms would be redressed by an order from the court (1) declaring that DoD has failed to comply with the "take into account" requirement of section 402 of the NHPA, (2) vacating the Findings, and (3) remanding to DoD to reconsider whether the FRF would adversely affect the dugong following the procedures required by

the NHPA. Reassessing the impacts of the FRF on the dugong with the benefit of information provided by Plaintiffs and others through a procedurally sound "take into account" process will give DoD the opportunity to make adjustments to the design and operation of the FRF that would mitigate harms to the dugong, thereby redressing Plaintiffs' injuries. These remedies are sufficient to confer standing on the Plaintiffs to bring their NHPA claim.

Neither is Plaintiffs' NHPA claim barred by the political question doctrine. A case involves a political question "where there is a textually demonstrable constitutional commitment of the *issue* to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (emphasis added). The district court correctly determined that the legal issue in this case—whether DoD's Findings comply with the standards of the NHPA—does not raise political question concerns, ER 20-32, but erroneously held that injunctive relief would present nonjusticiable political questions. ER 32-35.

As the Supreme Court made clear in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 211 (1962). Instead, the political question doctrine is only implicated if the courts are called on "to supplant a foreign policy decision of the political branches with the courts'

own unmoored determination of what United States policy … should be." *Zivotofsky*, 132 S. Ct. at 1427. Here, the Court is not being asked to supplant DoD's ultimate policy decisions concerning the location, design, and construction of a military base. Rather, this case concerns whether, in formulating those policy decisions, DoD followed the proper procedures for consultation, information gathering, and evaluation of the impacts on the dugong. Moreover, the "take into account" provision of the NHPA provides "judicially discoverable and manageable standards for resolving" this question. *Id.* (quotations omitted). Because that provision provides "a basis to adjudicate meaningfully the issue with which [the Court] is presented," *Id.* at 1435 (Sotomayor, J., concurring in part and concurring in judgment), the political question doctrine does not bar the district court from resolving Plaintiffs' NHPA claim.

The relief Plaintiffs seek does not overstep the constitutional boundaries that the political question doctrine is intended to protect. Vacatur and remand to the agency for further action in compliance with the NHPA would not supplant DoD's policy decisions. Instead, it would require DoD itself to revisit its Findings after gathering the information and following the procedures required by the NHPA.

Plaintiffs' request for injunctive relief also does not raise political question concerns. The standard for injunctive relief provides clear, judicially manageable

standards for determining whether such relief is appropriate. The balance of harms and consideration of the public interest that the standard entails allows courts to exercise their equitable powers judiciously, while observing the principles underlying the separation of powers doctrine.

As this Court has recognized, even in the context of the political question doctrine,

> in our system of separation of powers, we should not abdicate the court's Article III responsibility—the resolution of 'cases' and 'controversies'—in favor of the Executive Branch.... Although the parties have multiple procedural and substantive challenges to overcome down the road, they are entitled to their day—or years—in court on the justiciable claims.

Alperin v. Vatican Bank, 410 F.3d 532, 538 (9th Cir. 2005). Because Plaintiffs have standing to bring this claim, and because the legal issue that the court is asked to resolve in this case does not raise a political question, Plaintiffs are entitled to their day in court.

STANDARD OF REVIEW

This Court reviews a district court's decisions on standing and political question doctrine *de novo*. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1079 (9th Cir. 2015) (standing); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (political question). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in

favor of the complaining party." *Tyler v. Cuomo,* 236 F.3d 1124, 1131 (9th Cir. 2000) (quoting *Graham v. FEMA,* 149 F.3d 997, 1001 (9th Cir.1998)). This Court may affirm on any ground supported by the record. *Levine v. Vilsack,* 587 F.3d. 986, 991 (9th Cir. 2009) (quoting *Pritikin v. U.S. Dep't of Energy*, 254 F.3d 791, 796 (9th Cir.2001).

ARGUMENT

I. Plaintiffs Have Standing.

To establish Article III standing "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). An organization has standing to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181.

When a government agency fails to follow a procedure required by law, a person harmed by this failure has suffered a procedural injury. Such an injury is

sufficient to confer Article III standing "so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with that requirement." *City of Sausalito*, 386 F.3d at 1197. The desire to use or observe an animal species for cultural, aesthetic or recreational purposes is a concrete interest for purposes of standing. *See id.* at 1197; *Lujan*, 504 U.S. at 562–563 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

Recognizing that correcting a deficient procedure may not alter the outcome of the agency's underlying action, the Supreme Court has held that once injury in fact has been established based on a procedural harm, the causation and redressability requirements for standing are relaxed. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007); *Ctr. for Biological Diversity*, 2015 WL 5451484 at *8 ("A showing of procedural injury lessens a plaintiff's burden on the last two prongs of the Article III standing inquiry, causation and redressability.") (citations omitted). Thus Plaintiffs "'must show only that [they have] a procedural right that, if exercised, *could* protect [their] concrete interests.'" *Ctr. for Biological Diversity*, 2015 WL 5451484 at *8 (quoting *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir.2008)) (emphasis in original).

A. Plaintiffs Assert a Procedural Injury.

This Court has held that the NHPA is a procedural statute "similar to NEPA except that it requires consideration of historic sites, rather than the environment."

Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006). Thus, DoD's failure to comply with the "take into account" requirements of section 402 of the NHPA causes a procedural injury that threatens Plaintiffs' concrete interests.

The three individual Plaintiffs in this case are Okinawan citizens who have made and will continue to make ongoing trips to Henoko Bay to observe the dugong. *See, e.g.*, ER 111-12 at ¶¶ 1, 5 (Declaration of Takuma Higashionna). These ongoing trips are concrete plans, not indefinite intentions to visit "some day" in the future. *Cf. Lujan*, 504 U.S. at 564. Takuma Higashionna was born and raised near Henoko Bay and has been visiting the area and observing the Okinawa dugong since his childhood. ER 111 at ¶ 3. He leads weekly snorkeling and scuba-diving tours to view dugongs and their habitat. *Id.* Yoshikazu Makishi was also born and raised in Okinawa and has been frequenting the Henoko coast and observing the Okinawa dugong for over a decade. ER 95 at ¶ 2 (Declaration of Yoshikazu Makishi). Anna Shimabukuro[9] moved to the coast of Okinawa when she was eight years old and has lived there ever since. ER 107 at ¶ 2 (Declaration of Anna Koshiishi). Like Higashionna, she also leads eco-tours to view the dugong. *Id.* at ¶ 3. As averred in their affidavits, these plaintiffs have a concrete interest to preserve the dugong for cultural, educational, aesthetic, inspirational and

[9] In previous proceedings, Ms. Shimabukuro was identified as Anna Koshiishi. She has since married and changed her family name from Koshiishi to Shimabukuro.

economic benefits to themselves and their descendants. For example, Higashionna states that the dugong has particular cultural and historic significance because it is part of the creation beliefs of the people of Okinawa. ER 111 at ¶ 4. He hopes to preserve the dugong "so that it may enrich the lives of [his] descendants, as it has enriched [his own] life." *Id. See also* ER 95 at ¶ 3, ER 107-08 at ¶ 5.

Save the Dugong Foundation member Takuma Higashionna is an individual plaintiff, and as described above, Higashionna has standing to sue in his own right. Center for Biological Diversity member Jeff Shaw lives in Okinawa, is married to an Okinawan family that holds religious and spiritual beliefs based on the dugong, holds those same beliefs himself, has written articles and a book based on his research of the dugong, and is an avid scuba diver who has seen firsthand the seagrass beds on which the dugongs feed and hopes one day to view the dugong itself. ER 103-04 at ¶¶ 1-4 (Declaration of Jeff Shaw). Both Turtle Island Restoration Network member and director Todd Steiner and Japan Environmental Lawyers Foundation[10] member Masato Murata aver that they and their fellow members make regular trips to observe, study, photograph, and film the dugong.

[10] The purpose of each of these organizations—Save the Dugong Foundation, Center for Biological Diversity, Turtle Island Restoration Network and Japan Environmental Lawyers Federation—is to preserve and protect the dugong through research, fund-raising and advocacy, and thus the concrete interests at stake in the lawsuit are germane to the organizations' purposes. ER 111 at ¶ 2; ER 116 at ¶ 2 (Declaration of Peter Galvin); ER 99 at ¶ 2; ER 92 at ¶ 2. Neither the NHPA claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

ER 99-100 at ¶¶ 1-6 (Declaration of Todd Steiner); ER 92 at ¶ 4 (Declaration of Masato Murata).

These concrete interests are directly linked to the procedural injury caused by DOD's failure to comply with the NHPA because to the extent that compliance with the "take into account" process leads to avoidance or mitigation of harm to the dugong, the very object of Plaintiffs' interest may be preserved and protected. Therefore, as the district court held in a prior ruling in this case, the Plaintiffs "have alleged a sufficient injury in fact because they seek to 'enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.'" CR 119 at 18 (quoting *Lujan*, 504 U.S. at 572).

B. Plaintiffs' Harms are Redressable.

When Plaintiffs assert a procedural injury, they can establish redressability "with little difficulty, because they need to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision of whether to take or refrain from taking a certain action. This is not a high bar to meet." *Salmon Spawning*, 545 F.3d at 1226-27 (citation omitted).

Here, the relief Plaintiffs request—a declaration that DoD has failed to comply with the "take into account" requirement of section 402 of the NHPA, vacatur of the Findings and remand to the agency to reconsider whether the FRF would adversely affect the dugong following the procedures required by the

NHPA—would redress Plaintiffs' harms. *See, e.g. Pit River Tribe*, 469 F.3d at 779 (quoting *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1040 (9th Cir. 2006)) (explaining that a "'procedural injury would be redressed if the [agency] followed proper procedures'"). By reassessing the impacts of the FRF on the dugong with the benefit of information provided by Plaintiffs and others through a procedurally sound "take into account" process, DoD has the opportunity to make adjustments to its role in the design and operation of the FRF that would mitigate harms to the dugong. Of course, an injunction halting DoD's actions in furtherance of the Futenma project until the agency has completed its new NHPA process would provide further redress for Plaintiffs' harms.

The district court, having ruled out the possibility of injunctive relief on political question grounds,[11] held that declaratory relief and an order setting aside DoD's Findings would not provide an effective remedy for Plaintiffs' harms. In doing so, the district court fundamentally misunderstood redressability in cases, such as this one, involving procedural harms. The district court characterized the NHPA as "only hortatory" because it mandates no particular result, ER 41, and concluded that even if it ordered DoD to comply with the (mandatory) procedures prescribed in the NHPA "there is no likelihood that the United States government,

[11] See Plaintiffs-Appellants' argument on the district court's political question analysis below on pages 49-54.

in response to an adverse declaratory judgment, will voluntarily halt construction of the FRF." ER 42.

However, it is no obstacle to establishing redressability for procedural injuries that the "take into account" process does not mandate a particular result. On the contrary, this Court has repeatedly held that procedural injuries can be redressed by satisfactory completion of the procedure required by law, regardless of the result eventually reached. *E.g.*, *City of Sausalito v. O'Neill*, 386 F.3d at 1197 ("For purposes of Article III standing, we do not require a plaintiff to demonstrate that a procedurally proper EIS will necessarily protect his or her concrete interest...."); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) ("[W]e have held that to establish redressability plaintiffs asserting procedural standing need not demonstrate that the ultimate outcome following proper procedures will benefit them."); *see also Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2004) (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) ("A plaintiff ... who asserts inadequacy of a government agency's [procedural analysis] need not show that further analysis by the government would result in a different conclusion. It suffices that ... the [government's] decision could be influenced by the environmental considerations that NEPA requires an agency to study.").

Tyler v. Cuomo, an NHPA case concerning construction of a low-income

housing project in San Francisco, is instructive. There, the plaintiffs alleged that the city had failed to consult with the public as required by a Memorandum of Agreement (MOA) entered into pursuant to NHPA regulations. 236 F.3d at 1129-30. The MOA required the city to "take ... into account" any objection by a member of the public concerning the manner in which the MOA is implemented, and "consult as needed." *Id.* at 1133. The district court decided that the plaintiffs' injuries could not be redressed because there was "no reason to believe that requiring ... the City to honor the consultation provisions ... would be likely to result in a new color scheme, different landscaping or any other change to the … Project." *Id.* This Court reversed, holding that the district court wrongly "pre-judged the outcome of consultation." *Id.* (citing *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir.1994)) ("[T]he mere fact that, on remand, the Secretary might again [take the challenged action] does not defeat plaintiffs' standing."). In reaching this decision, this Court quoted approvingly from the Fifth Circuit's "well-reasoned" opinion in *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*:

> [I]t is impossible for us to know with any degree of certainty just what the end result of the NHPA process would be . . . We find it inappropriate to pre-judge those results as being limited to the extremes of either maintaining the status quo or totally [abandoning the project].
>
> Therefore, a district court should not pre-judge the result of the NHPA process by concluding that no relief is possible.... Even though, in this NHPA case, Vieux Carre's possible relief may appear to some to be irrelevant, trivial, or prohibitively

> expensive, a district court should beware of shortcutting the process which has been committed in the first instance to the responsible federal agency.

236 F.3d at 1134 (quoting *Vieux Carre*, 948 F.2d 1436, 1446–47 (5th Cir. 1991) (another NHPA challenge in which the contested project, a riverside park, was already completed)).

The district court in the present case made the same mistake when it concluded that, because the "take into account" process "mandate[es] no particular result," there was "no likelihood" that DoD would "voluntarily halt construction." ER 42. Like the district court in *Vieux Carre*, the district court here erred first by limiting the possible results of the NHPA process to "the extremes" of either the status quo (the FRF continuing under existing plans) or a total halt to the project. *See* 236 F.3d at 1134 (quoting *Vieux Carre*, 948 F.2d at 1447). But redress for Plaintiffs' injuries does not require complete abandonment of the FRF project. To the contrary, DoD could make alterations to the project or to its operational plans, for example by making changes to aircraft flight paths, protocols for controlling run-off and other discharges into Henoko Bay, or levels of night-time illumination. These changes would not require DoD to abandon the project entirely, but would meet the purpose of the statute by avoiding or mitigating adverse impacts on the dugong, *see* 54 U.S.C. § 307101(e), and would effectively redress the harms to Plaintiffs' concrete interests in the dugong. *See Ocean Advocates*, 402 F.3d at 875

(remanding to the agency to "prepare a full EIS" on the impacts of the projects' *operation* so that it could modify the terms of operation, even though construction was already complete); *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008) (holding that plaintiffs had standing to bring NHPA claim because compliance with the statute might lead to conditions on a project that would protect plaintiffs interests even if the project still goes forward).

The district court's second error was its assertion that the government was unlikely to change its mind based on an order to revise the NHPA findings. *See* ER 42. Such an assumption is foreclosed by *Tyler*, described above, in which this Court makes clear that a district court should not "pre-judge" the outcome of an agency's "take into account" process, 236 F.3d at 1134, particularly when the very purpose of that process is to gather stakeholder input and relevant information that would inform and improve the agency's decision. *See* CR 119 at 31; 36 C.F.R. § 800.2 ("The views of the public are essential to informed Federal decision-making in the [take into account] process."); *see also Lemon*, 514 F.3d at 1315.

The district court relied on *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010), to support its redressability analysis. *See* ER 42 ("Where an independent actor 'retains broad and legitimate discretion' to act that the court 'cannot presume either to control or predict,' the Court lacks constitutional power to adjudicate the merits of the controversy, *Mayfield II*, 599 F.3d at 972, especially where, as here,

there is no likelihood the Government will change its conduct in response to a declaratory judgment.") However, the facts of *Mayfield* are distinguishable from the present case.

In *Mayfield*, the plaintiff brought statutory and constitutional claims against the Federal government for conducting surveillance and searches before imprisoning him for two weeks based on incorrect fingerprint identification. 599 F.3d at 966-68. After a settlement that resolved most of the claims, the plaintiff could only seek a declaratory judgment that two provisions of the Foreign Intelligence Surveillance Act (FISA) were unconstitutional. *Id.* at 968. The plaintiff's asserted injury was the ongoing violation of his right to privacy caused by the government's retention of materials derived from the seizures carried out under FISA. This Court held that a declaratory judgment would not redress this injury because nothing in a declaratory judgment that the FISA provision is unconstitutional "would make it unlawful for the government to continue to retain the derivative materials." *Id.* at 971. The plaintiff thus could not show a "substantial likelihood" that the relief would redress his injury when redress depended on a voluntary action that was not legally required and which the government had stated it did not intend to take. *Id.* at 971-72. Because the settlement agreement left no other remedy open, and the district court had no

separate authority to insist that the government return or destroy the materials in question, this Court held that Mayfield did not have standing. *Id.* at 973.

Mayfield is distinguishable from this case for three important reasons. First, the harms asserted in *Mayfield* were substantive constitutional injuries, not procedural harms. Thus, Mayfield was required to show a substantial "likelihood" that the declaratory judgment would relieve the harms he complained of. *See id.* at 971. Here, because Plaintiffs assert procedural injuries, they need only show "that the relief requested—that the agency follow the correct procedures—*may* influence the agency's ultimate decision of whether to take or refrain from taking a certain action." *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). Second, in *Mayfield* the government had "no legal obligation" to return or destroy the materials the plaintiff sought, and it had stated its intent not to do so. 599 F.3d at 972. Here, however, the government has a legal obligation to comply with the "take into account" requirement of the NHPA. *See* CR 119 at 45. This is true regardless of whether the district court could enjoin DoD from participating in the undertaking while it complies with the statute.

The third reason *Mayfield* does not apply here is that in *Mayfield*, declaratory relief was the only remedy available to the plaintiff because of the terms of a settlement agreement. In the present case, the district court has the authority under the APA to hold unlawful and set aside agency action, such as the

DoD's NHPA Findings, that is arbitrary and capricious, or not in accordance with law. 5 U.S.C. § 706(2). Accordingly, Plaintiffs seek not only a declaration that DoD has failed to comply with the law, but also an order setting aside DoD's Findings and remanding to the agency for further action in compliance with the NHPA. *See* ER 58-59. Under these very different circumstances, *Mayfield* does not support the district court's conclusion.

Even if the district court had been correct that injunctive relief is not available, Plaintiffs would still have standing for claims based on procedural violations. In *Cottonwood Environmental Law Center*, this Court affirmed the district court's denial of injunctive relief under the Endangered Species Act (ESA), but held that the Forest Service was required to reinitiate ESA consultation regardless of whether a different result would be reached. 789 F.3d at 1084-88 (citing *Salmon Spawning*, 545 F.3d at 1229). The unavailability of injunctive relief did not undermine the plaintiffs' standing to bring claims based on the agency's failure to follow the procedures required by the ESA. *Id.* at 1088.

In *Cottonwood*, this Court relied heavily on *Salmon Spawning* in upholding the plaintiffs' standing. *See id.* at 1083. The district court in the present case relied on the same case in support of its opposite conclusion. It is useful to discuss *Salmon Spawning* in some depth to explain how the district court misapplied the case.

Salmon Spawning v. Gutierrez arose from a challenge to several federal actions relating to the 1999 Pacific Salmon Treaty between the United States and Canada. 545 F.3d at 1222-23. The treaty set up annual management regimes for chinook salmon in the Pacific Northwest, a number of populations of which are listed as threatened or endangered under the ESA. *Id.* at 1223. The plaintiffs brought three distinct claims. First, plaintiffs challenged the adequacy of a 1999 Biological Opinion (BiOp) that informed the United States' entry into the treaty. Second, plaintiffs argued that the agencies violated the ESA by continuing to implement the treaty while Canada's "excessive" harvest levels jeopardized the listed salmon. Third, plaintiffs asserted that the agencies had failed to fulfill a procedural obligation under the ESA to reinitiate consultation when certain conditions were met.

This Court held that the plaintiffs lacked standing to bring the first two claims on grounds that are distinguishable from the present case. *See id.* at 1225-1229. This Court held that the plaintiffs' first claim was not redressable because the Pacific Salmon Treaty set Canadian salmon harvest levels for its duration, and those levels could not "be re-visited except as may otherwise be agreed by both countries." *Id.* at 1226. Thus, the agencies' discretion to amend harvest levels as a result of changes to a BiOp was limited by the terms of the treaty. While the court could set aside the flawed BiOp, it "could not set aside the next, and more

significant, link in the chain"—the harvest levels set by the treaty itself. *Id.* In the present case, DoD has direct and unilateral control over aspects of design and ongoing operation of the FRF. Plaintiffs' challenge encompasses DoD's actions in relation to the entire FRF project including design, construction and ongoing operation of the facility. *See* CR 119 at 27. Unlike in *Salmon Spawning*, where the treaty simply set harvest levels that could not be unilaterally adjusted by either nation, DoD retains oversight authority for the ongoing project. "DoD will oversee and monitor the design, engineering, and construction of the new facility to ensure that it meets U.S. operational requirements." CR 112 at 6, ¶ 13 (Joint Statement of Undisputed Facts). Furthermore, operation of the FRF will be exclusively within DoD's control, *id.*, which allows DoD to adjust many aspects of FRF operations that could affect the dugong, such as flight paths and frequency. Whereas in *Salmon Spawning* the U.S. government could not have adjusted salmon harvest levels without renegotiating the treaty, undertaking a complete NHPA "take into account" process or implementing changes to FRF operations as a result of such a process does not require involvement of the Government of Japan.

The second *Salmon Spawning* claim is also distinguishable. The basis of the Court's decision that it could not redress the harm was, again, that it could not order the agency to renegotiate the treaty with Canada, and that any remedial actions the agencies could take to regulate U.S. fisheries were discretionary and

"too uncertain to establish redressability." 545 F.3d at 1228-29. However, this Court pointed out the crucial distinction: that claim alleged a substantive violation of the ESA, not a procedural violation. *Id.* at 1227 ("[I]n contrast to its first claim, which focused on alleged procedural flaws…, Salmon Spawning's second claim challenges the agencies' decision to continue allowing excessive Canadian harvesting…."). The plaintiffs therefore faced a higher bar on redressability.

> This argument highlights the key difference between asserting substantive and procedural violations of the ESA: a plaintiff alleging procedural violations of the ESA must show only that the procedural right could protect their interest, whereas a plaintiff alleging a substantive violation must demonstrate that its injury would likely be redressed by a favorable court decision.

Id. at 1228. The present case alleges procedural, not substantive, injuries, and Plaintiffs are not required to meet this higher bar.

Although this Court held that the plaintiffs in *Salmon Spawning* did not have standing to bring their first two claims, it held that the plaintiffs *did* have standing to bring their third claim. *Id.* at 1229-30. The reasoning for this holding, which the Court reiterated in *Cottonwood*, 789 F.3d at 1083, is important to the present case, but was overlooked by the district court.

In the third *Salmon Spawning* claim, the plaintiffs argued that the agencies had failed to fulfill a procedural obligation under the ESA to reinitiate consultation when certain conditions were met. 545 F.3d at 1229. Although the factual context

for the third claim was the same as for the first (involving a treaty, renegotiation of which was committed to the executive), this Court held that reinitiating consultation would remedy the procedural harm by putting information before the agency that it would be able to use as appropriate to make informed decisions. *Id.* Applying the relaxed causation and redressability requirements for procedural injuries, the Court held that the asserted injury—the risk of harm to a listed species due to procedural lapses—was "not too tenuously connected" to the failure to reinitiate consultation. *Id.* An order to complete the procedure would provide a remedy, so the plaintiffs had standing. *Id.*

Similarly, the injury alleged in the present case, the risk of harm to a listed cultural property due to procedural lapses, is "not too tenuously connected" to the failure to adequately complete the "take into account" process. Plaintiffs in this case seek the same thing as the plaintiffs in *Salmon Spawning*: for DoD to properly complete the NHPA procedure so that it can decide the appropriate way to use the information and make informed decisions regarding its ongoing involvement in the construction and operation of the FRF. Like in *Cottonwood* and *Salmon Spawning*, the possibility that the agency might make adjustments to the project's infrastructure or operations on the basis of information generated through such procedures is sufficient remedy to confer standing.

II. The Political Question Doctrine Does Not Deprive The Federal Courts of Jurisdiction to Decide this Case.

The claims and requests for relief in Plaintiffs' First Supplemental Complaint are not barred by the political question doctrine. Resolving Plaintiffs' NHPA claim does not require the court to second-guess or supplant political or national security decisions that are properly the domain of the executive or legislative branches. Instead, the court need only apply clear statutory requirements, interpretable through sources familiar to this Court, to determine the legal sufficiency of the processes DoD used to gather and consider information to assess the effects of its actions on the Okinawa dugong.

Nor does the relief Plaintiffs request require the Court to overstep its judicial role. Vacating DoD's findings and remanding to the agency for further action in compliance with the requirements of the NHPA leaves the ultimate policy decision in the hands of DoD. The familiar standard for determining whether injunctive relief is warranted allows for balancing of the hardships between parties and consideration of the public interest, which ensures that the courts do not improperly override the decisions of the political branches when those branches are acting on matters within their constitutional jurisdiction. Plaintiffs' claim and their requests for relief are justiciable.

A. Plaintiffs' NHPA Claim Is Not Barred by the Political Question Doctrine.

"The judiciary has a responsibility to decide cases properly before it." *Zivotofsky*, 132 S. Ct. at 1427. Nonetheless, there is a "narrow exception" for claims that raise nonjusticiable political questions. *Id.* "[A] controversy involves a political question ... where there is a textually demonstrable constitutional commitment of the *issue* to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (quotations omitted) (emphasis added). The political question doctrine must be applied carefully to avoid overbroad application, and courts must "examine each of the *claims* with particularity." *See Alperin*, 410 F.3d at 544-45, 547(emphasis added); *see also Baker*, 369 U.S. at 211 (requiring "a discriminating analysis of the particular question posed"); *El-Shifa Pharmaceutical Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (applicability of the political question doctrine "turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action").

Not every case that touches on foreign affairs or national security presents a non-justiciable political question. *See, e.g.*, *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

> A court may not refuse to adjudicate a dispute merely because a decision may have significant political overtones or affect the conduct of this Nation's foreign relations. Nor may the courts decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches.

Zivotofsky, 132 S. Ct at 1432 (Sotomayor, J., concurring in part and concurring in judgment) (quotations and citations omitted). *See also id.* at 1428 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)) ("[C]ourts cannot avoid their responsibility merely 'because the issues have political implications'"). "Indeed, from the time of John Marshall to the present, the [Supreme] Court has decided many sensitive and controversial cases that had enormous national security or foreign policy ramifications." *El-Shifa Pharmaceutical Indus. Co.*, 607 F.3d at 856 n.3 (Kavanaugh, J., concurring) (citing numerous Supreme Court decisions).

The question before this Court is not whether this case arises in the context of activities that fall within the broad categories of foreign relations or national security, but rather whether the precise claim presented in Plaintiffs' Supplemental Complaint requires the Court "to supplant" DoD's "foreign policy decision … with the [Court's] own unmoored determination of what United States policy … should be." *Zivotofsky*, 132 S. Ct. at 1427. DoD's ultimate policy decisions concerning the location, design, construction, or operation of a military base are not under review in this case. Rather, this case concerns DoD's consultation, information-

gathering, and evaluation process pursuant to the National Historic Preservation Act's "take into account" requirement, which is intended to inform such decisions. *See* 54 U.S.C. § 307101(e); CR 119 at 30-31, 34-35. Instead of supplanting DoD's decisions, enforcing the statute would simply ensure that DoD's decisions are informed by accurate information about the effect of its actions on the dugong.

Moreover, the NHPA provides "judicially discoverable and manageable standards for resolving" Plaintiffs' claim. 132 S. Ct. at 1427. In *Zivotofsky*, the Court noted that the existence of "textual, structural and historical evidence … regarding the nature of the statute" supported the conclusion that the political question did not pose a bar to judicial review of the case, because examining such evidence "is what courts do." *Id.* at 1430. When presented with such evidence, the question for a court is "whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes." *Id.* at 1435 (Sotomayor, J., concurring in part and concurring in judgment).

Applying the political question doctrine as oulined in *Zivotofsky*, the district court correctly concluded that Plaintiffs' claim—that DoD has violated the NHPA—"presents a purely legal question of statutory application ... [and] does not warrant dismissal" on political question grounds. ER 22. *See also id.* (citing *Zivotofsky*, 132 S. Ct. at 1427) ("As the Supreme Court explained in *Zivotofsky I*,

this type of statutory analysis—not dissimilar to more typical environmental cases such as those brought under NEPA—is a 'familiar judicial exercise.'").

The district court also correctly held that "there is no reason to believe the standards for the inquiry here would not entail judicially 'discoverable' or 'manageable' standards." ER 24. The court reasoned that resolution of Plaintiffs' NHPA claim

> would not require this Court to assess the Executive's weighty appraisal of such issues as how to best "maintain international peace." Instead, this Court would need to determine whether the DoD's specific NHPA findings violated the APA. At this juncture, neither party has demonstrated that the critical "take account" requirement of NHPA is qualitatively different from the analysis of the adequacy of an environmental impact statement under NEPA or the quality of biological assessments under the Endangered Species Act. Although the NHPA is different inasmuch as it applies to foreign sites and may involve the obligation to secure the input of foreign agencies and citizens (as Judge Patel assumed, see *Okinawa Dugong*, 543 F. Supp. 2d at 1104), neither party has argued and established that the "take account" element of the NHPA incorporates any political (as opposed to scientific and procedural) criteria and concerns which would implicate justiciability questions.

ER 23-24. Because there is "a basis to adjudicate meaningfully the issue with which [the Court] is presented," 132 S. Ct. at 1435 (Sotomayor, J., concurring in part and concurring in judgment), the political question doctrine does not bar the district court from resolving Plaintiffs' NHPA claim.

B. The Political Question Doctrine Does Not Barr The District Court From Ordering the Relief Plaintiffs' Request.

Remand and vacatur are the standard remedies for statutory violations reviewed pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 706(2) (Authorizing the district courts to "hold unlawful and set aside" agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("[W]here a regulation is promulgated in violation of the APA and the violation is not harmless, the remedy is to invalidate the regulation."); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("If an appellant … prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order. . . . "). Equitable relief in the form of an injunction is an alternative to statutory remedies but is not required. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course").

Despite the district court's conclusion that Plaintiffs' NHPA claim does not raise political questions, the court found that injunctive relief is barred in this case by the political question doctrine. As demonstrated below, neither statutory remedies under the APA, nor injunctive relief would involve the court improperly in the affairs of the Executive Branch.

1. Statutory Remedies Do Not Present Political Question Concerns.

The statutory remedies that Plaintiffs request pursuant to the APA—a declaration that DoD has violated the NHPA, vacatur of DoD's Findings, and remand to the agency for a complete "take into account" process that meets the requirements of the statute—would not overstep the district court's constitutional authority. Vacatur and remand to the agency would not require the Court "to supplant" DoD's "foreign policy decision … with the [Court's] own unmoored determination of what United States policy … should be." *Zivotofsky*, 132 S. Ct. at 1427. The Court is not being asked to review DoD's ultimate decisions concerning the location, design, construction, or operation of a military base. Nor would this Court's directive to complete the take into account process mandate a particular result. Rather, the Court must determine whether the procedures that DoD used to assess the impacts on the dugong comply with the consultation, information gathering, and evaluation requirements of the "take into account" provision of the NHPA. Instead of supplanting DoD's decisions, requiring DoD to implement the statute would simply ensure that DoD's decisions are informed by accurate information about the effect of its actions on the dugong.

Nor would vacatur and remand interfere with relations between the United States and Japan. In its 2008 ruling, the district court correctly concluded that

> the only activities upon which the court sits in judgment are

> those obligations placed upon the United States under provisions of U.S. domestic law. The court's jurisdiction in this case is premised on the NHPA and the APA and therefore, the only activities which this court reviews are DoD's obligations related to the section 402 process of taking into account. …[T]he obligation to take into account lies with the DoD and the DoD alone. Relief requiring the DOD to take into account, therefore, in no way invalidates Japan's decision to locate the FRF in the particular area and configuration it has chosen and in no way interferes with Japan's ability to conduct its own environmental assessment according to Japanese law. Again, the court reiterates that the NHPA compels a particular process, not a particular result. The NHPA requires and the court can only mandate that the DOD engage in an information gathering process which may eventually lead to such modifications and alterations if, as a result of the information gathering process, it is determined that those changes may mitigate adverse effects on protected property.

CR 119 at 24.

Even if Plaintiffs' claims or the relief requested had some effect on U.S.-Japanese relations, the Supreme Court has recognized that such effect alone does not compel the conclusion that an issue presents a nonjusticiable political question. "A court may not refuse to adjudicate a dispute merely because a decision 'may have significant political overtones' or affect 'the conduct of this Nation's foreign relations.'" 132 S. Ct. at 1432 (Sotomayor, J., concurring in part and concurring in judgment) (citing *Japan Whaling Assn. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). In *Zivotofsky*, the Secretary of State attested that requiring the government to list Israel as the place of birth on the passports of Americans born in Jerusalem would have "significant[] adverse foreign policy effects" because it

"would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty" and "would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." *Id.* at 1440 (Breyer, J., dissenting) (citations to the respondent's brief omitted).

Despite the Secretary's assertions of the foreign policy and national security effects of an order requiring the agency to implement the statute, the Court did not find that the interpretation and application of the statute was barred by the political question doctrine. The same is true here, where any effect on U.S.-Japanese relations of DoD's implementation of the statutory requirement to "take into account" the impacts of its actions on the dugong would be far less direct than the explicit contradiction of U.S. policy regarding Jerusalem embodied in the statute at issue in *Zivotofsky*.

2. Injunctive Relief Does Not Present Political Question Concerns.

Plaintiffs requested a narrowly crafted injunction on any activities in furtherance of the FRF project until DoD remedies the shortcomings in its section 402 "take into account" process. ER 59 at ¶ 3. The district court held that injunctive relief is barred because there are no clear, judicially manageable standards for determining whether injunctive relief is appropriate. ER 32-34. However, as the district court acknowledged, there is a well-established legal

standard that courts regularly apply to determine whether injunctive relief is warranted. ER 32 (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011). "In order to obtain an injunction in this case, Plaintiffs concede that they would have to prevail on the merits and then show that: (1) they suffered an irreparable injury; (2) their remedies at law are inadequate; (3) the balance of the hardships tips in Plaintiffs' favor; and (4) the public interest would not be disserved by the injunction."[12] *Id.* This standard for injunctive relief allows courts to exercise their equitable powers judiciously, while observing the principles underlying the separation of powers doctrine.

The district court argued that applying the third and fourth injunctive relief factors to the present case would require it to evaluate harms "for which the Judiciary has neither aptitude, facilities nor responsibility." *Id.* at 27-28 (quotations omitted). However, courts regularly exercise their equitable jurisdiction to weigh hardships and consider whether injunctive relief would be in the public interest, even in the context of cases that explicitly implicate foreign affairs and national security. *See, e.g., Winter*, 555 U.S. 7, 20-31 (applying standard for injunctive relief in case challenging the Navy's use of sonar in training

[12] Neither parties briefed remedies in their arguments on this motion to dismiss. Plaintiffs had not requested preliminary injunctive relief and because there has not yet been a decision on the merits of Plaintiffs' NHPA claim, the question whether injunctive relief was warranted was not yet ripe. The district court raised the question of the standard for injunctive relief *sua sponte* at oral argument. *See* CR 180 at 2-3(Hearing Transcript).

exercises, where use of sonar is "essential to national security"); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, (1982) ("the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue" in case seeking to enjoin the Navy from carrying out training operations in Puerto Rico); *National Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 200-06 (4th Cir. 2005) (applying standard for injunctive relief in NEPA case against DoD concerning construction of aircraft landing field within five miles of national wildlife refuge, implicating "national security matters"); *Ground Zero Center for Nonviolent Action v. Dep't of Navy*, 918 F. Supp. 2d 1132, 1155-56 (W.D. Wash. 2013) (balancing harms and public interest in NEPA and ESA case seeking to enjoin the Navy's construction of an explosive-handling wharf to maintain submarines and service missiles). The inherent flexibility of the courts' equitable jurisdiction, enshrined in the balancing of harms and the weighing of the public interest in the standard for injunctive relief, allows courts to address concerns over appropriate remedies in the application of that standard. *See Weinberger*, 456 U.S. at 312(quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)) ("The essence of equity jurisdiction has been the power of the Chancellor . . . to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). Like in *Winter* and *Weinberger*, the district court is fully capable of giving the appropriate weight and deference to DoD's national security

and foreign policy interests in the application of the standard for injunctive relief. The standard itself provides clear, judicially manageable standards for determining when a court should issue injunctive relief.

The district court also expressed concern that "an injunction that ascribes more importance to saving the Okinawa dugong than the Executive has chosen to afford in the context of constructing a foreign military base would inevitably express a lack of respect for the Executive Branch's handling of U.S.-Japan relations," ER 34 (quotations omitted), and that "the decision to build the FRF is a political decision already made that requires an unusual need for unquestioning adherence." ER 35 (quotation omitted). However, Plaintiffs' claims and the relief they request do not ask the court to opine on the decision to build the FRF. Moreover, these concerns, like the district court's concern about its ability to weigh harms that implicate national security or foreign affairs, can—and should—be factored into the general consideration of the public interest under the fourth factor of the standard for injunctive relief. *See Weinberger*, 456 U.S. at 312, (holding that a court should "pay particular regard for the public consequences of employing the extraordinary remedy of injunction") (quotation omitted.)); *see also Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most

appropriate if appellants prevail at the trial."). Indeed, in certain circumstances, such as when a case challenges wartime activity, the courts give particular deference to the government's alleged hardships or interests. *See, e.g.*, *Winter*, 555 U.S. at 9 ("Military interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); *National Audubon Soc'y*, 422 F.3d at 203 (after ruling in plaintiff's favor on the merits, rejecting request for injunction on ground that "[d]istrict courts should not substitute their own judgments for those of the Executive Branch in such national security matters as pilot training, squadron readiness, and safety."). Thus, judicial practice in balancing the hardships between parties ensures that the courts do not improperly override the decisions of the political branches when those branches are acting on matters within their constitutional jurisdiction. Here, if Plaintiffs were to succeed on the merits of their NHPA claim, the district court would give all due deference to DoD's national security concerns given DoD's authority and expertise in the realm of military and foreign affairs. This would adequately preserve the appropriate allocation of powers between the judiciary and the executive.

As this Court has recognized, even in the context of the political question doctrine,

> in our system of separation of powers, we should not abdicate the court's Article III responsibility—the resolution of "cases" and "controversies"—in favor of the Executive Branch.... Although the parties have multiple procedural and substantive challenges to overcome down the road, they are entitled to their day—or years—in court on the justiciable claims.

Alperin, 410 F.3d at 538. Because neither the legal claim nor the relief requested are barred by political question concerns, the district court has a responsibility to decide the merits of Plaintiffs' NHPA claim. Any concerns about the propriety of issuing an injunction (in addition to other forms of relief) can—and should—be addressed in the application of the familiar four-part standard for injunctive relief should Plaintiffs' succeed on the merits.

CONCLUSION

The district court's standing decision in this case runs counter to this Court's and the Supreme Court's long-held redressability standard for procedural harms. A declaration that DoD's Findings fail to comply with the NHPA, vacatur of the Findings, and remand to the agency for reconsideration of the impacts of the FRF on the dugong with the benefit of information provided by Plaintiffs and others through a procedurally sound "take into account" process would provide DoD the opportunity to make adjustments to its role in the design and operation of the FRF that would mitigate harms to the dugong. The possibility that compliance with the procedures required by the NHPA could lead DoD to adjust its involvement in the FRF is sufficient to satisfy the redressability prong of this Circuit's standing

analysis. Moreover, such a remedy does not present any separation of powers concerns. Neither standing nor the political question doctrine prevents the district court from adjudicating Plaintiffs' claim. Plaintiffs-Appellants therefore ask this Court to vacate the district court's order dismissing their NHPA claims and remand to the district court for consideration of the merits.

Dated: November 24, 2015

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants Center for Biological Diversity *et al.* state that they are unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing opening brief is proportionately spaced, has a typeface of 14 points, and contains 13,084 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 24, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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