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9 Okinawa Dugong (Dugong dugon), Center for Biological Diversity, Turtle Island  
10 Restoration Network, Japan Environmental Lawyers Federation, Save The Dugong  
11 Foundation, Dugong Network Okinawa, Committee Against Heliport Construction, Save  
12 Life Society, Anna Koshiishi, Takuma Higashionna, and Yoshikazu Makishi

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

OKINAWA DUGONG (Dugong Dugon); )  
CENTER FOR BIOLOGICAL DIVERSITY; )  
TURTLE ISLAND RESTORATION )  
PROJECT; JAPAN ENVIRONMENTAL )  
LAWYERS FEDERATION; SAVE THE ) Civil Action No.  
DUGONG FOUNDATION; DUGONG )  
NETWORK OKINAWA; COMMITTEE )  
AGAINST HELIPORT CONSTRUCTION, ) COMPLAINT FOR DECLARATORY AND  
SAVE LIFE SOCIETY; ANNA KOSHIISHI; ) INJUNCTIVE RELIEF  
TAKUMA HIGASHIONNA; and ) (National Historic Preservation Act, 16 U.S.C.  
YOSHIKAZU MAKISHI, ) §§ 470 *et seq.*)  
Plaintiffs, )  
v. )  
DONALD H. RUMSFELD, in his official )  
capacity as the Secretary of Defense; and U.S. )  
Department of Defense, )  
Defendants. )

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**INTRODUCTION**

1. This action is brought under the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, its implementing regulations and the Administrative Procedure Act, 5

1 U.S.C. §§ 701 *et seq.* Plaintiffs challenge the Department of Defense’s (DoD) activities related  
2 to the relocation of portions of the U.S. airbase Futenma in Okinawa, Japan, to a “sea-based  
3 facility” (SBF) proposed to be constructed off the coast of Okinawa. This plan would destroy  
4 the most important remaining habitat of the Okinawa Dugong, a genetically isolated and unique  
5 population of the Dugong protected under the NHPA.

6 2. Specifically, Plaintiffs challenge DoD’s failure to comply with the NHPA in preparing  
7 its “Operational Requirements and Concept of Operations for MCAS Futenma Relocation,  
8 Okinawa, Japan,” dated September 29, 1997 (OR), insofar as the preparation, approval and  
9 delivery of the OR constitutes an undertaking under the NHPA. Plaintiffs further challenge  
10 DoD’s contemporaneous and subsequent activities related to facilitating the Futenma relocation  
11 and implementing the OR, including funding the relocation, approving individual  
12 implementation decisions, and committing to fund on-going maintenance of the SBF. Because  
13 each of these activities constitutes an undertaking under the NHPA, DoD must take into account  
14 their effects on the Okinawa Dugong for purposes of avoiding or mitigating any adverse effects.  
15 5 U.S.C. §470a-2.

## 17 JURISDICTION

18 3. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 as this action arises under the  
19 laws of the United States.

20 4. An actual controversy exists between the parties within the meaning of 28 U.S.C. §  
21 2201(a). This Court may grant declaratory relief and additional relief, including an injunction,  
22 pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706.

23 5. DOD’s failure to comply with the requirements of the NHPA, 16 U.S.C. § 470a-2, is  
24 arbitrary, capricious, and not in accordance with procedures required by law pursuant to the APA  
25 and is thus subject to judicial review. 5 U.S.C. §§ 701 through 706.

26 6. DOD’s failure to comply with the requirements of the NHPA, 16 U.S.C. § 470a-2, also  
27 constitutes agency action that is unreasonably delayed and/or unlawfully withheld as provided by  
28 Section 706(1) of the APA and is thus subject to judicial review. 5 U.S.C. §§ 701 through 706.

1 **VENUE AND INTRADISTRICT ASSIGNMENT**

2 7. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) because Plaintiff Turtle Island  
3 Restoration Network (TIRN) resides in this judicial district. TIRN is incorporated and has its  
4 principle place of business in Marin County. Additionally, Plaintiff Center for Biological  
5 Diversity maintains an office in this judicial district.

6 8. Assignment to either the Oakland Division or the San Francisco Division of this Court  
7 is proper under Civil Local Rule 3-2 (c)-(d) because Plaintiffs reside in this judicial district.  
8

9 **PARTIES**

10 9. Plaintiff OKINAWA DUGONG (Dugong dugon) is a genetically isolated and unique  
11 member of the Dugong species, a threatened marine mammal species, listed as “endangered”  
12 under the U.S. Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* Fewer than fifty  
13 mature Okinawa Dugong remain. Preservation of the Okinawa Dugong depends entirely upon  
14 the preservation of its habitat. The Okinawa Dugong is a protected “Natural Monument” under  
15 Japan’s “Law for the Protection of Cultural Properties.” Because the list of protected cultural  
16 properties under Japan’s Cultural Properties Law is the “equivalent” of the U.S. National  
17 Register of Historic Places, the Okinawa Dugong is protected under the NHPA. *See* 16 U.S.C. §  
18 470a-2.

19 10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (CBD) is a non-profit  
20 environmental organization dedicated to protecting endangered species and wild places and  
21 environmental health through science, policy, education, and environmental law. It has offices  
22 in Oakland, Idyllwild, and San Diego, California; Phoenix and Tucson, Arizona; Silver City,  
23 New Mexico; Portland, Oregon; Buxton, North Carolina; and Sitka, Alaska. CBD is actively  
24 involved in species and habitat protection issues throughout the western United States and  
25 abroad. It has 7,500 members, including some who reside in Japan and others who have a strong  
26 interest in the Okinawa Dugong ranging from educational, cultural, scientific, and recreational.  
27 These staff and members care deeply about the Okinawa Dugong, have observed its native  
28 habitat and derive aesthetic, recreational, scientific, inspirational, conservation, educational, and

1 other benefits from the existence of the Okinawa Dugong. They do so on a regular and  
2 continuing basis and they intend to continue to do so in the near future.

3 11. Plaintiff TURTLE ISLAND RESTORATION NETWORK (TIRN) is a non-profit  
4 corporation committed to the study, protection, enhancement, conservation, and preservation of  
5 the world's marine and terrestrial ecosystems and the wild life that inhabit the oceans, including  
6 marine mammals. TIRN, has its principal place of business in Forest Knolls (Marin County),  
7 California. TIRN has approximately 4,000 members throughout the United States and the world,  
8 including research biologists, eco-tour operations, professional photographers and videographers,  
9 all of whom rely on healthy populations of marine mammals in order to conduct their businesses.  
10 TIRN's members and staff regularly use the marine ecosystems of the world for observation,  
11 research, aesthetic enjoyment, and other recreational, scientific, and educational activities. TIRN  
12 brings this action on behalf of itself and its adversely affected members and staff.

13 12. Plaintiff JAPAN ENVIRONMENTAL LAWYERS FEDERATION (JELF) is the  
14 only non-profit, non-governmental lawyers' organization in Japan dedicated to the protection of  
15 the environment. JELF is comprised of approximately 540 members including 400 attorneys and  
16 academics. The members litigate and lobby for wildlife preservation and prevention of toxic  
17 contamination. JELF was founded in 1996 in Tokyo and currently has its office in Nagoya,  
18 Japan. JELF staff and members regularly visit the habitat of the Okinawa Dugong and work  
19 extensively for its protection.

20 13. Plaintiff SAVE THE DUGONG FOUNDATION is a non-profit organization  
21 based in Okinawa, Japan, formed by Okinawan locals and their supporters in 1999. Currently, it  
22 has 21 members. The organization's main goal is to protect the Okinawa Dugong and its habitat.  
23 To achieve this aim, members conduct joint research with scientists and local residents and study  
24 the dugong and its habitat. To advocate the importance of conserving dugongs, the organization  
25 has also participated in the general meeting of International Union for Conservation of Nature  
26 and Natural Resources (IUCN), an international environmental organization comprised of  
27 members from over 140 countries. It has also organized numerous symposia on dugong  
28 conservation and local community empowerment.

1           14.     Plaintiff DUGONG NETWORK OKINAWA is a non-profit organization in  
2 Okinawa, Japan, dedicated to the protection of the Okinawa Dugong and its habitat. In the past,  
3 the organization's members appealed to the general assembly of The World Conservation Union  
4 (IUCN) to protect a coral reef off the island of Ishigaki, Japan, from the construction of an  
5 airport to the general assembly of the IUCN.

6           15.     Plaintiff COMMITTEE AGAINST HELIPORT CONSTRUCTION, SAVE LIFE  
7 SOCIETY is an organization based in Okinawa dedicated to halting the construction of new  
8 military bases on and around Okinawa, and to the protection of the sea and coral reefs  
9 surrounding the island. Members regularly gather seaweed and shellfish and catch fish from the  
10 reef at issue here for subsistence.

11           16.     Plaintiff ANNA KOSHIISHI grew up and continues to live in Nago City, located  
12 approximately seven miles from the site of the proposed SBF. The sea of Kayou, which is the  
13 Okinawa Dugong habitat at issue here, was her childhood playground. Koshiishi has a keen  
14 interest in the protection of all organisms that inhabit this habitat, including the Okinawa Dugong  
15 and sea turtles. Since April of 1999, she has been an eco-guide around the eastern coast of Nago  
16 City with the eco-tour group called "Econet: Chura," a company established in 1998 to provide  
17 nature guiding services in Yambaru (the northern part of Okinawa).

18           17.     Plaintiff TAKUMA HIGASHIONNA was born and grew up in Sedake, close to  
19 Henoko, Okinawa. Since 1994, he has frequented the reef at issue here and enjoyed catching  
20 shellfish, octopuses and sea urchins. In 1998, he started working as a tour guide, guiding visitors  
21 through the coasts of Henoko, visiting Okinawa Dugong and exploring the underwater world.  
22 He leads these tours about three times a week. He has a strong interest in the protection of all  
23 living organisms that inhabit Henoko, including the Okinawa Dugong.

24           18.     Plaintiff YOSHIKAZU MAKISHI is a Japanese architect who has visited the site  
25 of the proposed SBF monthly since 1997 for research and recreation. He is one of the founders  
26 of Plaintiff Save the Dugong Foundation.

27           19.     Defendant DEPARTMENT OF DEFENSE is the agency responsible for  
28 preparation, approval and delivery of the OR, as well as contemporaneous and subsequent

1 activities related to facilitating the Futenma relocation and implementing the OR, including  
2 funding the relocation, approving individual implementation decisions, and committing to fund  
3 on-going maintenance of the SBF.

4 20. Defendant Donald H. Rumsfeld is the Secretary of Defense and is sued in his  
5 official capacity.

## 7 **FACTS**

### 8 The Futenma Relocation and the Sea-Based Facility

9 21. Since 1945, the United States has maintained military bases on Okinawa.  
10 Although Okinawa reverted from U.S. to Japanese control in 1972, the United States retains  
11 control of most of the U.S. military bases in that existed in Okinawa at that time.

12 22. In 1960, the United States and the Government of Japan (GoJ) entered into the  
13 Treaty of Mutual Cooperation and Security (Security Agreement), which secures U.S. presence  
14 and involvement in the Asia-Pacific region and forms a political foundation for wide-ranging  
15 Japan-U.S. cooperative relations in the international community. The Security Agreement  
16 created the Security Consultative Committee (SCC) to provide a forum for diplomatic and  
17 military officials to meet on a regular basis to discuss issues surrounding implementation of the  
18 treaty, as well as regional and global security developments of mutual interest. Decisions taken  
19 by the SCC under the Security Agreement require the approval of the U.S. government.

20 23. In November 1995, the United States and the GoJ formed the bilateral Special  
21 Action Committee on Okinawa (SACO) to reduce the burden of U.S. military presence on the  
22 Okinawan people. On April 15, 1996, SACO issued an Interim Report approved by the SCC,  
23 which recommended 26 initiatives including the return of the Futenma Marine Corps Air Station  
24 to Japan after replacement facilities were constructed and operational.

25 24. On December 2, 1996, SACO issued its Final Report, which was approved by the  
26 SCC. Pursuant to this Final Report, SACO created the Futenma Implementation Group (FIG), a  
27 bilateral committee charged with identifying the relocation site for Futenma and preparing an  
28 implementation plan for the relocation. The FIG would oversee design, construction, testing and

1 the transfer of assets associated with construction of the replacement facility. The Final Report  
2 concluded that a sea-based facility was the best option for the Futenma relocation, and that FIG  
3 would recommend a candidate sea-based facility to the SCC no later than December 1997.

4 25. On September 29, 1997, DoD presented its “Operational Requirements and  
5 Concept of Operations for MCAS Futenma Relocation, Okinawa, Japan,” (OR) to the GoJ. On  
6 November 5, 1997, pursuant to DoD’s OR, the area serving as the most important remaining  
7 habitat for the Okinawa Dugong was formally designated as the SBF site.

8 26. The OR details the non-negotiable design specifications which, according to DoD,  
9 must be followed by the GoJ to facilitate the Futenma relocation. According to the OR, once the  
10 SBF is built according to the U.S. specifications, the SBF will “become the new home” of certain  
11 DoD divisions. The OR indicates that the SBF “shall be designed for a 40 year operational life  
12 with a 200 year fatigue life.” The OR mandates approval of SBF design criteria according to  
13 U.S. standards. The OR dictates that the SBF will be built off the east coast of the island of  
14 Okinawa, Japan, on top of and/or adjacent to a coral reef that provides the most important  
15 remaining habitat for the Okinawa Dugong.

16 27. The DoD, through the Army Corps of Engineers, funds and operates a special  
17 office to work on the design and implementation of military construction projects in Japan,  
18 including the implementation of the SACO Agreement.

19 28. In June 2003, DoD testified before Congress that “we continue to emphasize to  
20 the GoJ that our requirements have not changed, and a complete replacement facility is required  
21 before returning Futenma.”

22 29. Underwater construction surveys, including acoustic surveys that use high  
23 intensity noise sources and boring activities are planned to begin as early as December 2003.  
24 These activities are likely to inflict serious and irreparable harm to the Okinawa Dugong. Noise  
25 and other disruptive aspects of these activities are believed to adversely affect marine mammals,  
26 sometimes causing severe injury including deafness, tissue damage, and disorientation.

1 The Okinawa Dugong and the NHPA

2 30. The NHPA was enacted in 1966 to preserve the “historical and cultural  
3 foundations of the Nation . . . in order to give a sense of orientation to the American People.” 16  
4 U.S.C. § 470(b)(2). Pursuant to the NHPA, it is “the policy of the Federal Government, in  
5 cooperation with other nations” to “provide leadership in the preservation of the prehistoric and  
6 historic resources of the United States and of the international community of nations.” 16 U.S.C.  
7 § 470-1(2).

8 31. Congress enacted 16 U.S.C. § 470a-2 as part of the NHPA Amendments of 1980  
9 to comply with U.S. obligations under the Convention Concerning the Protection of the World  
10 Cultural and Natural Heritage (“World Heritage Convention”) and to mitigate the adverse effects  
11 of Federal undertakings outside of the United States.

12 32. The NHPA requires that “[p]rior to the approval of any Federal undertaking  
13 outside the United States which may directly and adversely affect a property which is on . . . the  
14 applicable country’s equivalent of the National Register, the head of a Federal agency having  
15 direct or indirect jurisdiction over such undertaking take into account the effect of the  
16 undertaking on such property for purposes of avoiding or mitigating any adverse effects.” 16  
17 U.S.C. § 470a-2.

18 33. The Dugong is a globally threatened marine mammal species, listed as  
19 “endangered” under the U.S. Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* The  
20 Okinawa Dugong is a genetically isolated from other Dugong populations. Fewer than fifty  
21 mature Okinawa Dugong remain. Preservation of the Okinawa Dugong depends entirely upon  
22 the preservation of its habitat.

23 34. The Okinawa Dugong is a protected “Natural Monument” under Japan’s “Law for  
24 the Protection of Cultural Properties.” Because the list of protected cultural properties under  
25 Japan’s Cultural Properties Law is the “equivalent” of the U.S. National Register of Historic  
26 Places, the Okinawa Dugong is protected under the NHPA. *See* 16 U.S.C. § 470a-2.

27 35. In order to comply with the NHPA, DoD must take into account, and avoid or  
28 mitigate, any adverse effects that its actions relating to the Futenma relocation might have on the



1 Okinawa Dugong. In taking such effects into account, DoD must at a minimum engage in a  
2 consultative process with local preservation authorities, relevant experts and local communities.  
3 *See* 63 Fed. Reg. 20496, 20504 (April 24, 1998). DoD has failed to comply with these  
4 requirements.

### 6 **CLAIM FOR RELIEF**

7 36. Plaintiffs incorporate by reference the allegations of all the foregoing paragraphs  
8 as if fully set forth herein.

9 37. DoD's failure to take into account the adverse effects of the design, preparation,  
10 approval, funding and delivery of the OR for purposes of avoiding or mitigating any adverse  
11 effects of such actions prior to the approval of such actions violates the NHPA and is unlawful.

12 38. DOD's failure to take into account the adverse effects of its activities  
13 contemporaneous and subsequent to the preparation, approval, finding and delivery of the OR,  
14 including appropriating Futenma relocation implementation funding, violates the NHPA and is  
15 unlawful.

### 17 **RELIEF**

18 WHEREFORE, for all the foregoing reasons, Plaintiffs request that this Court issue:

19 1. A judgment declaring that DoD's activities connected to the OR and implementation  
20 of the Futenma relocation fail to comply with the requirements of the NHPA, 16 U.S.C. § 470a-  
21 2;

22 2. A judgment declaring that DOD failed to comply with the requirements of the NHPA,  
23 16 U.S.C. § 470a-2, and that such failure is arbitrary, capricious, and not in accordance with  
24 procedures required by law pursuant to the APA, 5 U.S.C. §§ 701 through 706.

25 3. A judgment declaring that DOD failed to comply with the requirements of the NHPA,  
26 16 U.S.C. § 470a-2, and that such failure constitutes agency action that is unreasonably delayed  
27 and/or unlawfully withheld as provided by Section 706(1) of the APA.

1 4. A judgment and order setting aside the illegally issued OR pending compliance with  
2 the NHPA, including compliance with the DOI guidelines, 63 Fed. Reg. 20496, 20504 (April 24,  
3 1998).

4 5. A judgment and order for costs of suit herein, including attorneys fees, pursuant to the  
5 Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and

6 6. For such other and further relief as the court deems proper and just.  
7

8 Respectfully Submitted,  
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