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13 IN THE UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION
16

17 OKINAWA DUGONG (*Dugong dugon*), *et al.*,

18 Plaintiffs,

19 v.

20 DONALD H. RUMSFELD, Secretary of Defense,
et al.

21 Defendants.

No. C-03-4350 MHP

DEFENDANTS' ANSWER TO FIRST
AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

22 Defendants Donald H. Rumsfeld, *et al.*, hereby plead and answer in response to the
23 numbered paragraphs of the Complaint for Declaratory and Injunctive Relief filed by the
24 plaintiffs, Okinawa Dugong (*Dugong dugon*), *et al.*

25 1. The first two sentences of ¶ 1 describe the nature of the action, requiring no
26 response. Defendants deny the allegations of the third sentence of ¶ 1.

27 2. The first two sentences of ¶ 2 describe the nature of the action and plaintiffs'
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contentions, requiring no response. The third and fourth sentences of ¶ 2 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations.

3-6. The allegations of ¶¶ 3-6 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations.

7. The allegations in the first sentence of ¶ 7 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations. Defendants lack information sufficient to admit or deny the remaining allegations of ¶ 7 and, therefore, deny those allegations.

8. Defendants admit the allegations in the first sentence of ¶ 8 that this case is assigned to the Honorable Chief Judge Marilyn Hall Patel in the San Francisco Division. The allegations in the second sentence consist of legal conclusions, requiring no response. To the extent that a response is required, defendants lack information sufficient to admit or deny allegations regarding the plaintiffs' residence.

9. Defendants admit that the Okinawa Dugong is listed as an endangered species of marine mammal under the Endangered Species Act, but otherwise lack information sufficient to admit or deny the allegations of the first three sentences of ¶ 9 and, therefore, deny those allegations. The allegations of the fourth and fifth sentences of ¶ 9 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations.

10-18. Defendants lack information sufficient to admit or deny the allegations of the ¶¶ 10-18 and, therefore, deny those allegations.

19-20. Defendants deny the allegations of ¶¶ 19-20.

21. Defendants admit the allegations of ¶ 21 to the extent that the Department of Defense is an agency of the United States Government (United States) and has drafted a "Marine Corps Air Station (MCAS) Futenma Relocation Preliminary Operational Requirements" document, forwarded to the Government of Japan on February 15, 2001. Defendants aver that this "2001 Preliminary Operational

Requirements” document is the best evidence of its contents and deny any allegations contrary to the language and plain meaning of that document. Defendants deny that portion of ¶ 21 alleging that the defendants are solely responsible for funding and construction of any future relocation of MCAS Futenma and aver that the Government of Japan (Japan) would be responsible for funding any future relocation of MCAS Futenma. The remaining allegations in ¶ 21 are vague and ambiguous and, therefore, denied.

22. Defendants admit the allegations of ¶ 22.

23. The allegations in ¶ 23 are vague and ambiguous and, therefore, denied. To the extent a response is required, defendants admit that, since 1945, the United States has maintained a military presence on Okinawa, Japan. Furthermore, an Agreement between the United States and Japan concerning the Ryukyu Islands (Okinawa is within the Ryukyu Islands chain) and the Daito Islands (the Ryukyu Agreement) was signed by both nations on June 17, 1971, and became effective May 15, 1972. Under the Ryukyu Agreement, the United States relinquished to Japan all rights and interests under Article III of the Treaty of Peace signed by both nations on September 8, 1951, and Japan assumed full responsibility and authority for the exercise of all and any powers of administration, legislation, and jurisdiction over the territory and inhabitants of the Ryukyu Islands. Defendants aver that Japan granted the use of facilities and areas in the Ryukyu Islands in accordance with the Treaty of Mutual Cooperation and Security between the United States and Japan signed on January 19, 1960, and its related arrangements (the Treaty) and further aver that the Ryukyu Agreement and Treaty are the best evidence of their contents, and defendants deny any allegations contrary to the language and plain meaning of these documents.

24. Defendants admit the allegation in ¶ 24 that the Treaty was signed on January 19, 1960. The remaining allegations of ¶ 24 constitute plaintiffs’ characterization of the Treaty, which constitutes the best evidence of its contents, and defendants deny any allegations contrary to the language and plain meaning of the Treaty.

- 1 25. Defendants admit the allegation in ¶ 25 that the Special Action Committee on
2 Okinawa (SACO) was established in November 1995 by Japan and the United
3 States. Defendants aver that the purpose of the SACO was to strengthen the
4 Japan-United States alliance. Defendants further admit that on April 15, 1996, the
5 SACO issued an Interim Report recommending the return of MCAS Futenma to
6 the people of Okinawa – after replacement facilities are constructed and have
7 become operational. Defendants aver that the SACO recommended a total of 27
8 initiatives in its Interim Report was 27, rather than 26 initiatives, as alleged.
- 9 26. Defendants admit the allegation in ¶ 26 that the Security Consultative Committee
10 (SCC) approved the SACO Final Report (Final Report) on December 2, 1996.
11 Defendants admit the Final Report established the Futenma Implementation
12 Group (FIG), but aver the Final Report is the best evidence of its contents and
13 deny any allegations contrary to the language and plain meaning of that document.
14 The remaining allegations of ¶ 26 constitute plaintiffs’ characterization of the
15 Final Report, which provides the best evidence of its contents and deny any
16 allegations contrary to the language and plain meaning of the Final Report.
- 17 27. Defendants deny the allegations of ¶ 27 of the Complaint. Defendants aver that
18 the “Occupational Requirements and Concept of Operations for MCAS Futenma
19 Relocation, Okinawa, Japan” document – dated September 29, 1997 – referenced
20 in ¶ 27 of the Complaint, has been superseded by the “MCAS Futenma Relocation
21 Preliminary Operational Requirements” document, forwarded to Japan on
22 February 15, 2001. Defendants aver that this “2001 Preliminary Operational
23 Requirements” document is the best evidence of its contents and deny any
24 allegations contrary to the language and plain meaning of that document.
25 Defendants further aver that the “2001 Preliminary Operational Requirements”
26 document does not identify any potential relocation sites for MCAS Futenma.
- 27 28. The allegations of ¶ 28 consist of plaintiffs’ characterization of the “1997
28 Operational Requirements” document, which provides the best evidence of its
 contents and which has been superseded by the “2001 Preliminary Operational

Requirements” document. To the extent that a response is required, defendants deny those allegations. Defendants aver that, in July 2002, Japan and the Okinawan Prefecture Government issued a “Basic Plan” that rejects the Sea-Based Facility concept discussed in the “1997 Operational Requirements” document and calls instead for the MCAS Futenma replacement facility to be constructed via landfill method. The “Basic Plan” issued by Japan and the Okinawan Prefecture Government provides that the final location of the facility will be selected based upon an environmental impact assessment, which Japan currently is preparing in accordance with Japanese law.

29. The allegations of ¶ 29 are vague and ambiguous and, therefore, denied.

30. The allegations of ¶ 30 constitute plaintiffs’ characterization of alleged congressional testimony, which can be documented by reference to the Congressional Record or other congressional documents and which provide the best evidence of the testimony. Defendants deny any allegations contrary to the language and plain meaning of the relevant congressional documents.

31. The allegations of ¶ 31 are vague and ambiguous and, therefore, denied.

Defendants deny that any surveys are planned for December 2003 and aver that any “underwater construction surveys,” if conducted, would represent action taken by the Government of Japan pursuant to Japanese law.

32-34. The allegations of ¶¶ 32-34 consist of legal conclusions, requiring no response.

To the extent that a response is required, defendants aver that the National Historic Preservation Act (NHPA) is the best evidence of its contents and deny any allegations contrary to the language and plain meaning of that statute.

35. Defendants admit the allegation in ¶ 35 that the Okinawa Dugong is listed as an “endangered” species of marine mammal under the Endangered Species Act (ESA), but aver that the allegation in the first sentence of ¶ 35, to the effect that the species is “globally threatened,” is too vague and ambiguous to enable defendants to admit or deny the allegation, which defendants, therefore, deny.

Defendants lack information sufficient to admit or deny the allegations of the

remaining sentences of ¶ 35 and, therefore, deny those allegations.

36. The allegations of ¶ 36 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations.

37. The allegations in the first two sentences of ¶ 37 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations. Defendants deny the allegations in the third sentence of ¶ 37.

38. Defendants incorporate by reference their responses to the allegations of all foregoing paragraphs ¶¶ 1-37 as if fully set forth herein.

39-41. The allegations of ¶¶ 39-41 consist of legal conclusions, requiring no response. To the extent that a response is required, defendants deny those allegations.

RELIEF

Defendants deny that plaintiffs are entitled to the relief requested or to any relief.

GENERAL DENIAL

Except as specifically admitted, defendants deny all allegations in the Complaint.

AFFIRMATIVE DEFENSES

1. The court lacks subject matter jurisdiction over the allegations, claims, and causes of action contained in the First Amended Complaint.
2. Plaintiffs lack standing under Article III of the United States Constitution.
3. The First Amended Complaint is not ripe for judicial review.
4. The First Amended Complaint is moot with respect to allegations concerning the 1997 Operational Requirements document, which no longer remains in effect.
5. Plaintiffs have failed to join necessary and indispensable parties to this litigation.
6. The First Amended Complaint must be dismissed as nonjusticiable and prudentially for reasons of comity under the Act of State doctrine with respect to actions taken within Japan by the Government of Japan and the prefectural and municipal governmental entities of Japan.
7. The First Amended Complaint must be dismissed for reasons of sovereign immunity.
8. Plaintiffs have failed to state a claim upon which relief can be granted.
9. Plaintiffs have failed to exhaust their administrative remedies.

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Respectfully submitted,

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