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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15 \_\_\_\_\_ )  
16 OKINAWA DUGONG (Dugong Dugon), )  
17 *et al.*, )

18 Plaintiffs, )

19 v. )

20 DONALD H. RUMSFELD, in his official )  
21 capacity as the Secretary of Defense, *et al.*, )

22 Defendants. )

23 Civil Action No. C-03-4350 (MHP)  
24 Honorable Marilyn Hall Patel  
25 Courtroom 15

26 August 4, 2004, 2:00 p.m.

27 MEMORANDUM OF POINTS AND  
28 AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS

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1 Plaintiffs file the instant memorandum in opposition to Defendants' May 17, 2004  
2 Motion to Dismiss Plaintiffs' First Amended Complaint. In their First Amended Complaint,  
3 Plaintiffs allege that numerous Department of Defense (DoD) actions threaten to adversely  
4 impact the critically threatened Okinawa dugong and its habitat in violation of the National  
5 Historic Preservation Act (NHPA). Pursuant to this Court's Civil Pretrial Order dated March 16,  
6 2004, DoD presently seeks dismissal under Federal Rules of Civil Procedure 12(b)(6) (failure to  
7 state a claim), and 12(b)(1) (lack of subject matter jurisdiction), based on the argument that the  
8 NHPA does not apply to DoD's actions in this case.

### 9 INTRODUCTION

10 The construction of a new US sea-based military facility off the coast of the Japanese  
11 Island of Okinawa threatens to harm the last remaining members of the Okinawa dugong, a  
12 genetically distinct species of marine mammal. Plaintiffs filed this action, asserting that, in their  
13 activities associated with this project, Defendants must comply with the National Historic  
14 Preservation Act (NHPA), which requires US agencies to take certain actions "[p]rior to the  
15 approval of any Federal undertaking outside the United States which may directly and adversely  
16 affect a property which is on ... the applicable country's equivalent of the National Register." In  
17 their complaint, Plaintiffs alleged that the dugong is listed on the Japanese Register of Cultural  
18 Properties because of the species' substantial significance to traditional Okinawan culture, that  
19 the Japanese Register is the equivalent of the US National Register, and that numerous of  
20 Defendants' actions constitute "undertakings" for the purpose of the NHPA. Defendants have  
21 moved to dismiss the action for failure to state a claim, arguing that the Japanese list is not  
22 equivalent to the US list, that the dugong would not be eligible for inclusion on the US National  
23 Register, and that there is no US "undertaking" for the purposes of the statute.

24 The Japanese Cultural Register and the US National Register are each intended to  
25 preserve places and objects (referred to collectively as "properties" in both systems) that are  
26 significant to their respective nations' culture and history. Neither nation's cultural protection  
27 regime is intended to protect non-cultural values, such as the biological value of threatened  
28 animal species; each nation has a complex system of environmental laws intended to achieve

1 these other objectives. As the only list in Japan dedicated to protecting culturally significant  
2 cultural properties, the Japanese Register is equivalent to the US National Register for purposes  
3 of the NHPA.

4 In the NHPA, Congress intended to respect the right of each nation to identify the places  
5 and objects entitled to cultural protection. For this reason, the statute focuses on the equivalence  
6 of each nation's cultural protection *list, not* whether a particular property would be eligible for  
7 inclusion on the US National Register. Nevertheless, the NHPA, its implementing regulations  
8 and the Department of Interior's guidance documents all make clear that the Okinawan dugong  
9 would satisfy the criteria for eligibility for the US list. Among other things, the NHPA applies to  
10 culturally significant movable "objects" that are related to a specific setting, and many locations  
11 have been determined to be eligible for inclusion on the US Register because of cultural  
12 significance imparted by species associated with them.

13 The NHPA applies to activities "funded in whole or in part under the direct or indirect  
14 jurisdiction of a federal agency." Plaintiffs' complaint identifies numerous such undertakings.  
15 For example, alone or in collaboration with Japanese government officials, Defendants  
16 developed and approved the plan for the sea-based facility, specifying the facility's location and  
17 numerous requirements related to design and construction. Defendants provided funding for all  
18 these activities. In addition, because the sea-based facility will be for the use of the US military,  
19 these activities are carried out "on behalf of" Defendants, and are thus within the NHPA  
20 definition of "undertaking."

21 Contrary to Defendants' arguments, the presumption against the extraterritorial  
22 application of US statutes does not apply in this case because the relevant provision of the NHPA  
23 expresses Congress's explicit intent that the statute apply abroad. Similarly without avail is  
24 Defendants' argument that this action is barred by the act of state doctrine, which applies only if  
25 the relief sought would require a US court to judge the validity of a foreign sovereign's act. That  
26 is not the case here.

27 For these reasons, Defendants have failed to meet their burden in support of their motion.  
28

## FACTUAL BACKGROUND

The waters surrounding the Japanese Island of Okinawa are home to some of the few remaining Okinawa dugong (*Dugong dugon*), a rare, genetically isolated and unique member of the Dugong species. See U.N. Environment Programme, Dugong: Status Report and Action Plans for Countries and Territories, U.N. Doc. UNEP/DEWA/RS.02-1 (2002) (“UNEP Report”) at 41, Ex. 1; see also Marine Mammal Comm’n, Annual Report to Congress, 2001 (Mar. 31, 2002) (“Marine Mammal Comm’n Report”) at 129, Ex. 3. Dugongs, large marine mammals, are deeply significant in Okinawan culture. See UNEP Report at 10 (“Dugongs are culturally significant to communities throughout their range.”). They are associated with traditional Okinawan creation mythology, sometimes being considered the progenitor of the local people. Declaration of Isshu Maeda (“Maeda Dec.”), ¶¶ 6-7. Legends attribute to dugongs the power to create tsunamis. *Id.* ¶¶ 8-9, 22. Until less than a century ago, prayers to the dugong were considered essential to successful fishing expeditions. *Id.* ¶¶ 26-30. Dugong meat was traditionally offered to royalty as sacred food and medicine. *Id.* ¶¶ 10-12. Dugong-bone ornaments and tools as many as 3500 years old have been found in Okinawa. *Id.* ¶¶ 13-20. The people who used these objects considered them to contain spiritual power. *Id.* ¶¶ 18, 20. Dugongs continue to play a role in Okinawan spiritual and cultural practices, including folk songs and religious ceremonies. *Id.* ¶¶ 26-34. Because of its cultural significance, the Okinawa dugong is listed as a protected “natural monument” on the Japanese Register of Cultural Properties, established under Japan’s “Law for the Protection of Cultural Properties.” Japanese Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments, Ex. 31.

Henoko Bay, on the northeast coast of the Japanese island of Okinawa, is “some of the most important known remaining dugong habitat in Japan.” UNEP Report at 42-43. The US military’s Camp Schwab and the Camp Schwab Water Area are located adjacent to and in Henoko Bay. See Map of US Military Bases and Areas in Okinawa, Ex. 2. These areas have been used as a US military base since November 16, 1956, in accordance with the terms of

1 several treaties between the United States and Japan.<sup>1</sup> At least as early as 1966, DoD developed  
2 plans to build a large airbase on a reclaimed coral reef in the DoD-controlled waters of Henoko  
3 Bay directly adjacent to Camp Schwab in the Camp Schwab Water Area.<sup>2</sup> The seagrass beds  
4 under the site of this proposed base is an important dugong feeding ground. *See* Marine  
5 Mammal Comm'n Report at 129, Ex. 3.

6 The construction of this military base threatens to destroy some of the most important  
7 known remaining dugong habitat in Japan and will presumably result in additional  
8 disturbance to dugongs in the form of aircraft and boat noise and other activities in the  
9 area. The effect on the seagrass bed of the sewage from the expansion of Camp Schwab  
is also of concern. These impacts are potentially serious for such a small and presumably  
isolated dugong population.

10 UNEP Report at 42-43.

11 In November 1995, under the auspices of the bilateral Security Consultative Committee  
12 (SCC),<sup>3</sup> the United States and the Government of Japan formed the Special Action Committee on  
13 Okinawa (SACO),<sup>4</sup> a bilateral committee whose recommendations were subject to SCC  
14 approval.<sup>5</sup> On December 2, 1996, SACO issued its Final Report, Ex. 8, indicating that then US  
15 Secretary of Defense William J. Perry, together with the other SCC members, approved SACO's  
16

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17  
18 <sup>1</sup> These include the Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-  
19 Japan, 11 U.S.T. 1632, executed January 19, 1960, Ex. 4, *and* the Agreement Under Article VI  
20 of the Treaty of Mutual Cooperation and Security between the United States of America and  
Japan, Regarding Facilities and Areas and the Status of US Armed Forces in Japan ("SOFA"),  
Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652, Ex. 5.

21 <sup>2</sup> *See* Master Plan of Navy Facilities on Okinawa, Ryukyu Islands, *prepared by* Daniel, Mann,  
22 Johnson, & Mendenhall, for DoD (Dec. 29, 1966) ("1966 Master Plan") at 1, 28, Ex. 6  
(recommending and approving Camp Schwab/Henoko Bay for development of integrated  
23 Marine/Navy airbase including "reclamation of a coral reef area for dual runways and support  
24 facilities"); General Development Plan, Marine Corps Air Facility, Henoko, Okinawa, Ryukyu  
Islands, *prepared by* Daniel, Mann, Johnson, & Mendenhall, for DoD (Jan. 17, 1966), Excerpted  
at Ex. 7 (183-page technical engineering study of proposed sea-based facility, commissioned by  
DoD).

25 <sup>3</sup> The SCC includes the US Secretary of Defense, the US Ambassador to Japan, the Japanese  
Minister of Foreign Affairs, and the Japanese Minister of Defense.

26 <sup>4</sup> SACO's primary purpose was to reduce the burden of US military presence in Okinawa. *See*  
27 Special Action Committee on Okinawa, The Japan-US Special Action Committee (SACO)  
Interim Report (April 15, 1996) ("SACO Interim Report") at 1, Ex 9.

28 <sup>5</sup> *See, e.g.,* Special Action Committee on Okinawa, The SACO Final Report on Futenma Air  
Station (December 2, 1996) ("SACO Final Report") at 1(b), Ex. 8 ("On December 2, 1966, the  
SCC approved the SACO recommendation to pursue the SBF option.").

1 recommendation to replace US Marine Corps Air Station (MCAS) Futenma with a large offshore  
2 airbase, a “sea-based facility” (SBF), off the east coast of Okinawa. *See* SACO Final Report at  
3 ¶1(b).

4 Pursuant to the SACO Final Report, the SCC established a bilateral working group,  
5 called the Futenma Implementation Group (FIG) to develop an implementation plan for the SBF  
6 by December 1997, *id.* at ¶1(c), which would include a decision on the location of the SBF based  
7 on a number of DoD “operational requirements” that had not been specified as of the date of the  
8 Final Report. *Id.* at ¶3(c); *see also* Dep’t of Defense, Sea-Based Facility, Functional Analysis  
9 and Concept of Operations, MCAS Futenma Relocation, Executive Report (Sept. 3, 1997)  
10 (“1997 Executive Report”) at 27-28, Ex. 13. DoD has provided several million dollars for the  
11 operation of the FIG.<sup>6</sup>

12 On September 29, 1997, just two months before FIG’s December 1997 deadline, DoD  
13 “began the process” of “[a]cquir[ing] the sea-based facility” by “establishing operational ...  
14 requirements.” *See* General Accounting Office, Overseas Presence: Issues Involved in Reducing  
15 the Impacts of the US Military Presence on Okinawa, Rep. No. GAO/NSIAD-98-66 (Mar. 1998)  
16 (“1998 GAO Report”) at 29, Ex. 11. On that date, DoD released a document entitled  
17 “Operational Requirements and Concept of Operations for MCAS Futenma Relocation,  
18 Okinawa, Japan” (“1997 OR”). *See* Ex. 12. The 1997 OR is a 30-page document detailing  
19 DoD’s “functional requirements and concept of operations” for the SBF. *Id.* at 1-1. The 1997  
20 OR was developed with the involvement of and input from representatives of at least eight DoD  
21 sub-agencies. *Id.* at 2-4. A September 3, 1997, Executive Report to the 1997 OR indicates that  
22 the 1997 OR was “approved” by high-ranking officials of the US Army, Navy and Marines. *See*  
23 1997 Executive Report, Executive Summary at 1, ¶ III.D, Ex. 13.

24 By preparing and approving location and design specifications in the 1997 OR, “the  
25 United States has established requirements that Japan must meet as it designs, builds, and pays  
26

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27 <sup>6</sup> *See* Dep’t of the Navy, FY 1999 Amended Budget Estimates, Justification of Estimates (Feb.  
28 1998) at 16, item 4(c), Ex. 10 (budgeting US\$3,919,000.00 for “[a]nticipated reprogramming  
from Military Personnel marine Corps appropriation to fund associated costs for Special Action  
Committee on Okinawa/Futenma Implementation Group (SACO/FIG)”).

1 for the sea-based facility before [MCAS] Futenma is closed and are [*sic*] moved to the sea-based  
2 facility.” 1998 GAO Report at 3, Ex. 11; *see also* General Accounting Office, Status of Open  
3 Recommendations: Improving Operations of Federal Dep’ts and Agencies, Rep. No. GAO/OP-  
4 99-01 (Feb. 1999) at 24, Ex. 14 (“The United States has established requirements that Japan must  
5 meet before Futenma is closed and operations are moved to the sea-based facility.”); Statement  
6 of Admiral Thomas B. Fargo, US Navy Commander, US Pacific Command Before the House  
7 International Relations Committee’s Subcommittee on Asia and the Pacific (June 26, 2003)  
8 (transcript *available at* [http://www.house.gov/international\\_relations/108/far0626.htm](http://www.house.gov/international_relations/108/far0626.htm)) at 19,  
9 Ex. 15 (“[W]e continue to emphasize to the GOJ [Government of Japan] that our requirements  
10 have not changed, and a complete replacement facility is required before returning Futenma.”).

11 The 1997 OR sets forth DoD’s approval of the requirement that the SBF be located in the  
12 Camp Schwab Water Area. The 1997 OR states that the “SBF will be located off [the] east coast  
13 of Okinawa, connected to land by pier or causeway,” 1997 OR at 2-6, and provides a diagram of  
14 DoD’s SBF concept, demonstrating that it would be located in Henoko Bay adjacent to Camp  
15 Schwab. *Id.* at 3-4, Figure 6. This is the same location identified for a sea-based facility by DoD  
16 in 1966. *See* 1966 Master Plan, Ex. 6, *supra* at 1, n. \*\*. <sup>7</sup> This location requirement was  
17 established in the 1997 OR *before* FIG’s December 1997 deadline, and *before* the Government  
18 of Japan’s July 2002 approval of the location. *See* Basic Plan of the Futenma Replacement  
19 Facility (July 29, 2002) (“2002 Basic Plan”), Ex. 16.

20 The 1997 OR further indicates that Japan will “provide[] the SBF for [the US Forces’]  
21 use in accordance with the [SOFA],” 1997 OR at 2-6, and that US Marine Aircraft Group 36  
22 (MAG-36) “will become the major tenant aboard the [SBF].” *Id.* at 3-1; *see also id.* at 3-3 (“The  
23 SBF will become the new home of MAG-36.”). It also specifies numerous other detailed  
24 operational requirements based on DoD’s anticipated uses of the SBF, including a requirement  
25 that the SBF be built for a 40 year operational life and 200 year fatigue life, and a minimum size  
26 requirement of 1,500 meters by 800 meters. *See id.* at 3-1, 3-5 through 3-13, 3-17, 3-21.

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28 <sup>7</sup> *See also* 1997 OR at 3-5 (“Based upon a 1966 study, the proposed runway orientation should be  
7/25.”).

1 In addition to detailing DoD's operational requirements related to the location, shape,  
2 size, orientation and intended uses of the SBF, the 1997 OR elaborates DoD's requirements  
3 relating to the surveys required before SBF construction may begin. These include surveys of  
4 hydrodynamic load, wave load, pile load, wave slamming load, currents, wind load, earthquakes,  
5 and mooring forces, among others. 1997 OR at 3-13 through 3-16. Further to these  
6 requirements, the Naha Defense Facility Administration (NDFFA), an agency of the Japanese  
7 Defense Agency, is planning to carry out a technical survey imminently. *See* NAHA Defense  
8 Facility Administration Agency, Technical Survey Related to the Construction of the Futenma  
9 Airport Relocation Facility (Feb. 2, 2003) ("Survey Plan"), Ex. 17. The Survey Plan includes  
10 topographical surveys, marine condition surveys, meteorological surveys, and geological  
11 surveys. *See id.* at 1-2, 7, 11. The Survey Plan includes a diagram of the survey area, *id.* at 4,  
12 and indicates that the geological survey will include the boring of approximately 63 holes into  
13 Henoko Bay's coral reef and ocean floor. *Id.* at 15. DoD has approved numerous NDFFA  
14 requests to enter Camp Schwab and Camp Schwab Water Area to carry out the Survey Plan.<sup>8</sup>

## 15 APPLICABLE LAW

### 16 I. National Historic Preservation Act and Administrative Procedures Act

17 The National Historic Preservation Act (NHPA) establishes that "the policy of the  
18 Federal Government, in cooperation with other nations" is to "provide leadership in the  
19 preservation of the prehistoric and historic resources of the United States and of the international  
20 community of nations." 16 U.S.C. § 470-1(2). Congress enacted Section 402 of the NHPA in  
21 1980 to implement US obligations under the Convention Concerning the Protection of the World

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22  
23 <sup>8</sup> In March, 2004, a JELF representative filed a document request with NDFFA, requesting copies  
24 of the Japanese government's many requests for DoD approval to enter Camp Schwab to carry  
25 out work related to the Survey Plan, and copies of DoD's responses to those requests. Although  
26 NDFFA has not yet delivered copies of the requested documents, NDFFA has informed the JELF  
27 representative in writing of the dates and titles of the responsive documents it has thus far  
28 collected. These include documents related to DoD's granting of NDFFA requests to enter Camp  
Schwab to implement the Survey Plan. *See* NDFFA Letter Regarding Disclosure (May 28, 2004),  
Ex. 18; Takamichi Dec. ¶ 25. Similarly, DoD has approved NDFFA's construction and use of an  
office building within Camp Schwab to manage its on-site work related to SBF construction. *See*  
*Naha Facility Agency established Office in Camp Schwab: Three- management supervisor*  
*permanent residence for Futenma alternative facility construction*, RYUKYU SHIMPO, Sept. 4,  
2003, Ex. 19; Takamichi Dec. ¶ 25.

1 Cultural and Natural Heritage (“World Heritage Convention”) and to mitigate the adverse effects  
2 of Federal undertakings outside the United States. *See* 16 U.S.C. § 470a-2. Section 402 requires  
3 that:

4 Prior to the approval of any Federal undertaking outside the United States which  
5 may directly and adversely affect a property which is on . . . the applicable  
6 country’s equivalent of the National Register, the head of a Federal agency having  
7 direct or indirect jurisdiction over such undertaking take into account the effect of  
8 the undertaking on such property for purposes of avoiding or mitigating any  
9 adverse effects.

10 *Id.* Among other things, the NHPA provides that “[p]roperties of traditional religious and  
11 cultural importance to an [indigenous group] may be determined to be eligible for inclusion in  
12 the National Register.” 16 U.S.C. § 470a(d)(6)(A).

13 The US Department of the Interior (DoI) is the agency with authority to “direct and  
14 coordinate” US participation in the World Heritage Convention, 16 U.S.C. § 470a-1(a), and to  
15 “expand and maintain” the US National Register of Historic Places, 16 U.S.C. § 470a(1)(A).  
16 Pursuant to such authority, DoI has issued a number of guidelines and bulletins, which the Ninth  
17 Circuit considers authoritative interpretations of the NHPA. *See Muckleshoot Indian Tribe v. US*  
18 *Forest Service*, 177 F.3d 800, 807 (9th Cir. 1999) (DoI’s National Register Bulletin 38 “provides  
19 the recognized criteria for the [agency’s] identification and assessment of places of cultural  
20 significance”) (*citing Pueblo of Sandia v. US*, 50 F.3d 856, 860 n. 2, 861-62 (10<sup>th</sup> Cir. 1995)  
21 (finding that US Forest Service did not make effort required by DoI’s National Register Bulletin  
22 38 to determine existence of traditional cultural properties at project site, as required by NHPA));  
23 *see also Davis v. Latschar*, 202 F.3d 359, 362, 370-371 (D.C. Cir. 2000) (National Park Service  
24 complied with NHPA because it conducted analysis required by the “implementing guidelines”  
25 contained in National Register Bulletin 40). Pursuant to DoI guidelines, efforts to avoid or  
26 mitigate adverse effects “should be undertaken *early in the planning stage* of any Federal action  
27 that might affect historic properties.” *See* 63 Fed. Reg. 20496 (April 24, 1998), Standard 5  
28 (Consultation Principles) at (c).

29 The NHPA does not independently provide for judicial review. However,  
30 Congress provided for review of agency action under the Administrative Procedure Act  
31 (APA). 5 U.S.C. §§ 701-706; *see also, Bennett v. Spear*, 520 U.S. 154, 177 (1997). The

1 APA authorizes judicial review of final agency actions for which there is no other  
2 adequate remedy in a court. 5 U.S.C. § 704. Beginning with the Supreme Court’s  
3 decision in *Abbott Laboratories v. Gardner*, the courts have generally espoused a strong  
4 presumption of judicial review. 387 U.S. 136 (1967). To qualify as a final agency action  
5 under the APA, the action must mark the consummation of the agency’s decision-making  
6 process, and the action must be one by which rights or obligations have been determined,  
7 or from which legal consequences will flow. *See Bennett*, 520 U.S. at 177-78.

8 Determinations of finality should reflect a pragmatic and flexible approach. *Abbott*  
9 *Laboratories*, 387 U.S. at 149-50. To determine whether an agency action is ripe for  
10 review under the NHPA, the court must consider the fitness of the issue for judicial  
11 decision and the hardship to the parties of withholding consideration. *See Nat’l Mining*  
12 *Ass’n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003) (*quoting Ciba-Geigy Corp. v. EPA*,  
13 801 F.2d 430, 434 (D.C. Cir. 1986)). “Courts confronted with close questions of ripeness  
14 are appropriately guided by the presumption of reviewability.” *Ciba-Geigy*, 801 F.2d at  
15 434.

## 16 **II. Standard of Review**

17 Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a complaint for  
18 failure to state a claim upon which relief can be granted. Such a dismissal can be based on either  
19 the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable  
20 legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A  
21 complaint should not be dismissed unless it appears beyond doubt that the plaintiff could prove  
22 no set of facts in support of the claim for relief. *See Levine v. Diamantheset, Inc.*, 950 F.2d  
23 1478, 1482 (9th Cir. 1991). The court must treat all of plaintiff’s factual allegations as true. *See*  
24 *Experimental Eng’g, Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1991).  
25 The court must assume that all general allegations “embrace whatever specific facts might be  
26 necessary to support them.” *Pelozza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir.  
27 1994), *cert. denied*, 515 U.S. 1173 (1995). To dismiss with prejudice, it must appear to a  
28 certainty that the plaintiff would not be entitled to relief under any set of facts that could be

1 proven. *See Reddy v. Litton Indus.*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.S. 921  
2 (1991). Under Rule 12(b)(6), the defendant has the burden of showing no claim has been stated.  
3 *See, e.g., Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1165 (C.D. Cal. 2002) (*citing Kehr*  
4 *Packages, Inc. v. Fidelcor, Inc.*, 926 F. 2d 1406, 1409 (3d Cir. 1991)).

5 Federal Rule of Civil Procedure 12(b)(1) allows the court to dismiss a complaint for lack  
6 of subject matter jurisdiction. “In ruling on a challenge to subject matter jurisdiction, the district  
7 court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to  
8 trial, resolving factual disputes where necessary.” *Augustine v. United States*, 704 F.2d 1074,  
9 1077 (9th Cir. 1983) (*citing Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730,  
10 733 (9th Cir. 1979)).<sup>9</sup> “In ruling on a jurisdictional motion involving factual issues which also  
11 go to the merits, the trial court should employ the standard applicable to a motion for summary  
12 judgment, as a resolution of the jurisdictional facts is akin to a decision on the merits.” *Id.*  
13 “Therefore, the moving party should prevail only if the material jurisdictional facts are not in  
14 dispute and the moving party is entitled to prevail as a matter of law.” *Id.* “The requirement that  
15 the nonmoving party present evidence outside his pleadings in opposition to a motion to dismiss  
16 for lack of subject matter jurisdiction is the same as that required under Rule 56(e) that the  
17 nonmoving party to a motion for summary judgment must set forth specific facts, beyond his  
18 pleadings, to show that a genuine issue of material fact exists.” *Trentacosta v. Frontier Pacific*  
19 *Aircraft Industries, Inc.*, 813 F.2d 1553, 1559 (9<sup>th</sup> Cir. 1987) (*citing, inter alia, Celotex Corp.*,  
20 477 U.S. 317, 323 (1986)).

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25 <sup>9</sup> Plaintiffs believe that the evidence accompanying this motion is sufficient to raise numerous  
26 issues of material fact to mandate denial of Defendants Rule 12(b)(1) motion. Plaintiffs  
27 additionally submit that such evidence is sufficient to require this Court to resolve any  
28 contentious factual matter in Plaintiffs’ favor. However, to the extent that this Court may be  
inclined to make factual findings in favor of Defendants, Plaintiffs note that they have not yet  
had the opportunity to engage in discovery in this case, and hereby respectfully request that they  
be given an opportunity to engage in discovery prior to the making of any such adverse factual  
finding.

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## ARGUMENT

**I. Plaintiffs Have Stated a Claim on Which Relief Can Be Granted Because the NHPA Applies to the Dugong and Numerous DoD Undertakings Will Affect the Dugong**

**A. The Japanese Register of Cultural Properties is the Equivalent of the US National Register**

Section 402 of the NHPA applies to Federal undertakings outside the United States that may adversely affect a property on the applicable country’s equivalent of the National Register. *See* 16 U.S.C. § 470a-2. Plaintiffs’ First Amended Complaint (“Complaint”) alleges that the NHPA applies to the Okinawa dugong because the dugong is on the Japanese Register of Cultural Properties, which is the “equivalent” of the US National Register for purposes of Section 402 of the NHPA. *See* Complaint ¶¶1, 9, 36.

The NHPA seeks to preserve “the historical and cultural foundations of the Nation ... as a living part of our community life and development.” 16 U.S.C. § 470(b)(2). The US National Register is “an authoritative guide” used “to indicate what properties should be considered for protection from destruction or impairment.” *See* 36 C.F.R. § 60.2 (2003). Similarly, the Japanese Law for the Protection of Cultural Properties (July 2003) (“Japanese Cultural Protection Law”), Ex. 20, seeks to “preserve and utilize cultural properties, so that the culture of the Japanese people may be furthered and a contribution made to the evolution of world culture.” *Id.*, Article 1. Pursuant to this law, such cultural properties are listed on the Japanese Register of Cultural Properties. *See* Declaration of Sekine Takamichi (“Takamichi Dec.”) ¶ 9.

Like the NHPA in the United States, the Japanese Cultural Protection Law is the only Japanese law concerned with the protection of culturally significant properties in Japan. *See id.* at ¶ 4. Among other kinds of cultural properties, the Japanese law protects as “Natural Monuments” a limited number of wild animal populations found to have special cultural significance. *Id.* at ¶ 10; Japanese Cultural Protection Law at Article 2(4). As described below, *see* Section I.B., the NHPA and the National Register provide equivalent protection to culturally significant species by protecting the locations where the species’ cultural significance is expressed.

1 According to Defendants, in addition to cultural protection goals, the Japanese list is  
2 intended to achieve species protection objectives akin to those of US environmental laws. Def.  
3 Mot. at 14-15. Despite citing no basis for this proposition, Defendants suggest that the Japanese  
4 list is not equivalent to the US National Register for this reason. Defendants are incorrect.

5 Like the NHPA, the only objective of the Japanese Cultural Protection Law is to protect  
6 objects of cultural value; species with no independent cultural value are not eligible for listing  
7 under the Japanese Cultural Protection Law, no matter how endangered they may be.<sup>10</sup>

8 Takamichi Dec. ¶ 12. Based on the significance of the Okinawa dugong in Okinawa culture  
9 (described above), and not on any biological or environmental grounds, the Okinawa dugong has  
10 been listed on Japan’s Register of Cultural Properties since 1955. *See* Takamichi Dec. ¶¶ 15, 18-  
11 20.

12 Like the NHPA, which developed parallel to US species-protection laws, the Japanese  
13 Cultural Protection Law developed separately from Japan’s several laws protecting wild animals  
14 for their biological value. *See* Takamichi Dec. ¶ 6. Like the United States, Japan has  
15 promulgated distinct statutes to protect flora and fauna for their biological value. For example,  
16 Japan’s Law for the Conservation of Endangered Species of Wild Fauna and Flora is intended to  
17 protect threatened species, *see id.* at ¶ 6, 14-15, in a manner similar to the US Endangered  
18 Species Act.

19 The dugong and many other animal species are protected under one or more of Japan’s  
20 statutes that protect animals for their biological value. *See id.* at ¶¶ 6, 14-15. If the Japanese  
21 Registry of Cultural Properties were intended to protect species for their biological value, there  
22 would be no need for these other species protection laws, and certainly no need to protect the  
23 dugong under other statutes. Likewise, if the dugong were not a cultural object, but were only of  
24 biological value, there would be no need to include it on the Japanese cultural registry. *See id.* at  
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27 <sup>10</sup> Defendants’ suggestion that the Complaint should be dismissed in order “to avoid having a  
28 federal district court interpret and apply complex foreign laws,” Def. Mot. at fn.15, must be  
rejected, because the statute explicitly requires DoD and, where necessary, the courts, to examine  
foreign laws and determine their equivalence to the US National Register. 16 U.S.C. § 470a-2.

¶¶ 12, 15. As in the United States, Japanese species-protection objectives are not achieved through cultural protection laws.

The similarities between the NHPA and the Japanese Cultural Protection Law have prompted Eric Williams, an archaeologist hired in 1998 by DoD to work on the MCAS Futenma Master Plan, to make the following observations:

The primary purpose [of the Japanese Law] is to preserve and use cultural resources to advance the culture of the Japanese people and contribute to the knowledge of the evolution of world culture. *In many ways the [Japanese] law is similar and equivalent to US laws concerning cultural resources.* The cultural resource laws of Japan provide for the designation of significant cultural resources, and for review and mitigation procedures to assess potential impacts to known and newly discovered cultural resources.

See Richard Pearson, Preserving Okinawa’s History: Cultural Resource Management on MCB Camp SD Butler (1995), at <http://members.tripod.com/williamsem/id27.htm> (last visited June 12, 2004) (emphasis added), Ex. 21.<sup>11</sup>

**B. Although Congress Intended the Emphasis to Be on the Equivalence of a Foreign Nation’s Cultural Protection List, Not on the Particular *Objects* on the List, the Fact that the Dugong Would Be Eligible for Inclusion on the US National Register Is Further Evidence that the Japanese Register of Cultural Properties is Equivalent to the US Registry**

As explained above, the Japanese Register is the “equivalent” of the US National Register for purposes of Section 402. Congress’s focus on the equivalence of the foreign nation’s list, as opposed to protecting only objects that would be eligible for listing on the US National Registry, arises out of Congress’s acknowledgement of each nation’s right to “delineate” its own meritorious heritage. Senate Committee on Energy and Natural Resources, National Historic Preservation Act Amendments of 1980, S. Rep. No. 96-943 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6406 (1980) at 43, Ex. 22. Congress enacted Section 402 to comply with US obligations under the World Heritage Convention, which, in Congress’s view “leaves it to each participating nation to identify and delineate the meritorious heritage properties situated

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<sup>11</sup> Defendants’ own practice indicates its recognition that animals can have cultural significance. See Presentation by US Marine Corps, Natural Resources Management, MCB Butler, Okinawa, Slide Show at 4, Ex. 23 (including “fauna of cultural importance” in definition of “Natural Resource with Cultural Significance”)

1 within its own territory.” *Id.* It would thus be contrary to the purpose of Section 402 to question  
2 – as Defendants do – Japan’s inclusion of an item or category of items, like culturally significant  
3 wild animals, on its list of protected cultural properties.<sup>12</sup> Nonetheless, even under US standards,  
4 the Okinawa dugong, if situated in US waters, would be eligible for protection under the NHPA  
5 as an element that contributes to the cultural significance of its habitat. *See* King Dec. ¶ 15.

6 The NHPA was enacted in 1966 to expand statutory protections for cultural resources.  
7 *See id.* at ¶¶ 25-26. NHPA regulations state that the National Register is intended to protect “a  
8 wide diversity of resources.” *See* 36 C.F.R. § 60.4 (2003). The NHPA protects “any prehistoric  
9 or historic ... site, ... or object included in, or eligible for inclusion on the National Register.”  
10 16 U.S.C. § 470w(5). The regulations define “object” as “a material thing of functional,  
11 aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet  
12 related to a specific setting or environment.” 36 C.F.R. § 60.3(j) (2003). As described above,  
13 the Okinawa dugong has aesthetic, cultural, historical and scientific value to the people of  
14 Okinawa. *See generally* Maeda Dec. Because the Okinawa dugong depends on the seagrass  
15 beds of Henoko Bay for survival, *see* Marine Mammal Comm’n Report at 129, Ex. 3 (seabed  
16 under proposed site of SBF is dugong feeding ground), they are also “movable yet related to a  
17 specific setting or environment.”<sup>13</sup> *See also* UNEP Report at 42-43, Ex. 1 (Region around Camp  
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19 <sup>12</sup> Defendants’ argument changes Section 402’s analysis from the statutorily mandated  
20 identification of the foreign nation’s “equivalent to the National Register” to an assessment of  
21 whether the object in question would be eligible for inclusion in the Register. Had Congress  
22 intended to establish such a test, it could easily have said so.

23 <sup>13</sup> Defendants’ argument that the “lack of any precise boundary delineations for the dugong’s  
24 habitat” dooms the Complaint, *see* Def. Mot. at 13, is without merit. The Ninth Circuit has  
25 explained that a historical site may be designated for protection under the NHPA as long as there  
26 is “some good evidence of just where the site is and what its boundaries are.” *Hoonah Indian*  
27 *Association v. Morrison*, 170 F.3d 1223, 1232 (9<sup>th</sup> Cir. 1999).

28 In *Hoonah*, the court declined to find that a large wilderness through which over 1,000  
members of an indigenous group retreated in 1804 was eligible for designation because no  
“particular path” had been identified. *Id.* The court noted that whereas the fort from which the  
retreat had proceeded is a “historic site,” *id.* at 1230, the route or routes of the retreat march was  
not. *Id.* Similarly, although *Hoonah* would likely preclude designation of the vast unspecified  
seas through which Okinawa dugong occasionally roam, it does not preclude the designation of  
the Henoko Bay seagrass beds, where they regularly feed. *See, e.g.,* King Dec. ¶ 17; *see also*  
*Hoonah*, 170 F.3d at 1232 (“Abraham’s tomb is an identifiable site, but the wanderings of the  
Jews in the Sinai Desert after the Exodus did not leave any accurately identifiable path that could

1 Schwab and Henoko designated as “Rank I” area requiring protection. Construction of SBF  
2 threatens to destroy “some of the most important known remaining dugong habitat in Japan.”).  
3 These regulations thus indicate that wild animals like the Okinawa dugong may be protected as  
4 historic “objects” under the NHPA.

5 Indeed, the US system often protects culturally significant animals as elements  
6 “contributing” to the cultural importance of properties. *See, e.g.*, King Dec. ¶¶ 14, 33. DoI’s  
7 National Register Bulletin 38 indicates that wholly natural places, made up of biological  
8 features, can be eligible for listing on the National Register if they are ascribed cultural  
9 significance by living communities based on traditional beliefs. *See* King Dec. ¶ 10; *see also*  
10 Nat’l Park Service, Dep’t of the Interior, Guidelines for Evaluating and Documenting Traditional  
11 Cultural Properties, Nat’l Register Bulletin 38 (1998) (“National Register Bulletin 38”) at 14-22,  
12 Ex. 24. Similarly, DoI has defined “cultural landscapes” to include “the wildlife” therein. *See*  
13 King Dec. ¶29 (*citing* Charles A. Birnbaum & Chris-Capella Peters, Nat’l Park Service, The  
14 Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for  
15 the Treatment of Cultural Landscapes (1996), Ex. 25).

16 Pursuant to these principles, many natural places have been deemed eligible for inclusion  
17 in the National Register,<sup>14</sup> often due to their association with culturally significant animals. For  
18 example, the Mattaponi River in Virginia is regarded as eligible due in part to the cultural

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21 be a ‘site.’”). Like Abraham’s tomb and the fort in *Hoonah*, there is ample evidence that the area  
22 of concern is Henoko Bay, location of the seagrass beds on which the dugong feed. *See, e.g.*,  
23 UNEP Report at 42, Ex. 1 (Region around Camp Schwab and Henoko designated as “Rank I”  
area requiring protection. Construction of SBF threatens to destroy “some of the most important  
known remaining dugong habitat in Japan.”); *see also* Marine Mammal Comm’n Report at 129,  
Ex. 3 (seabed under proposed site of SBF is dugong feeding ground).

24 Also, the fact that the boundaries of a historic site are difficult to ascertain does not  
25 render the site ineligible for listing on the National Register. National Register guidance  
26 expressly acknowledges that defining boundaries of traditional cultural properties is frequently  
27 difficult because consideration of the relevant cultural factors can result in the identification of  
very large areas of land. National Register Bulletin 38 at 25 (“Boundaries”). Federal agencies  
regularly overcome such difficulties by careful consideration of the traditional uses of the  
property, even though “this may involve making some rather arbitrary decisions,” *id.*, and may  
require reliance on determinations of boundaries based upon probabilities. *See* King Dec. ¶17.

28 <sup>14</sup> The NHPA applies to historic properties *listed* on the National Register as well as those  
*eligible* for such listing. 16 U.S.C. §470w(5).

1 importance of shad fisheries to the native Mattaponi and Pamunkey Tribes. *See* King Dec. ¶ 12,  
2 35 (also noting eligibility of the Klamath River, California, largely due to the role of the river  
3 and its salmon on the culture of neighboring indigenous tribes).<sup>15</sup> In addition, many traditional  
4 cultural properties included in the Register have cultural associations dependent on animals, such  
5 as Devil’s Tower, Montana, which is listed in part because of its cultural association with bears  
6 for the Lakota Tribe. *See id.* at ¶34.<sup>16</sup> At least three wildlife refuges<sup>17</sup> are also included in the  
7 National Register because of their status as *wildlife* refuges.<sup>18</sup> *Id.* Just as the wild animals  
8 inhabiting these natural places are protected by the NHPA because they contribute to (or, in  
9 some instances, establish) the cultural significance of a particular location, so would the  
10 Okinawa dugong be protected if its habitat, and the neighboring Okinawa people, occurred in  
11 and near US waters.<sup>19</sup> *See id.* at ¶¶ 15-23, 45(e).

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15 <sup>15</sup> Other examples include: the *Mushgigagamongsebe* historic district in Wisconsin, regarded as  
16 eligible as one of the last places the Mole Lake Sokaogon Community of Great Lakes Ojibwe  
17 can carry out their traditional hunting and gathering, which feature the taking of deer, beaver,  
18 muskrat and ducks as well as the intensive management of wild rice and other plants;  
19 Chequamegon Bay in Wisconsin, regarded as eligible in part because of its important association  
20 with fishing and wild rice gathering by the Ojibwe people of the Bad River and Red Cliff  
21 Reservations; Mauna Kea in Hawaii, where the Weikiu Bug, an insect that lives at the  
22 mountain’s summit, is regarded by Native Hawaiians as a spiritually significant creature that  
23 contributes to the National Register eligible mountain’s cultural importance. *See* King Dec. ¶ 35.

20 <sup>16</sup> Other examples include: Mt. Tonnaachaw Historic District in Chuuk, Federated States of  
21 Micronesia, listed partly because of its traditional association with fishing and shellfish  
22 collection, which obviously involve animals; Massacre Canyon in Nebraska, listed in part  
23 because it was the site of the Pawnee Tribe’s last communal bison hunt. *See* King Dec. ¶ 34.

22 <sup>17</sup> Lower Klamath Wildlife Refuge, Lake Merritt Wild Duck Refuge, and Pelican Island National  
23 Wildlife Refuge. *See* King Dec. ¶ 34.

24 <sup>18</sup> The examples provided here are but a sample. The enormous number of properties listed on or  
25 eligible for listing on the National Register precludes a comprehensive survey. *See, e.g.,* Nat’l  
26 Park Service, Nat’l Register of Historic Places, at <http://www.cr.nps.gov/places.htm> (last visited  
27 June 12, 2004) (National Register Collection documents nearly 75,000 listed properties); *see also*  
28 National Register of Historic Places, at  
<http://www.nationalregisterofhistoricplaces.com/welcome.html> (last visited June 12, 2004) (there  
are over 12,000 federal listings and over 81,000 state listings).

27 <sup>19</sup> Defendants’ conclusory argument that wild animals cannot be “historic property” under the  
28 NHPA because the federal government does not “own” them, Def. Mot. at 12, has no basis.  
Federal ownership is not a prerequisite to the applicability of the NHPA. *See* 36 C.F.R. § 60.2  
(2003) (private property may be listed on the National Register); King Dec. ¶ 27.

1                   **C. There Are Numerous “Federal Undertakings” For Purposes of the NHPA**

2                   Defendants argue that there is no “federal undertaking” for the purposes of the NHPA.  
3                   *See* Def. Mot. at 16. The Complaint alleges various DoD actions that are reviewable  
4                   “undertakings” under the NHPA.<sup>20</sup> Section 402 requires DoD, as the agency with “direct or  
5                   *indirect* jurisdiction” over the SBF project, to take into account the effects of its actions on the  
6                   Okinawa dugong “prior to the approval of *any* Federal undertaking outside the United States.”  
7                   Most of the undertakings identified in the complaint and described in more detail below, both  
8                   sole DoD activities and bilateral US-Japanese activities, are within DoD’s direct jurisdiction.  
9                   The rest of the activities at issue in this case, undertaken on behalf of DoD, are at a minimum  
10                  within DoD’s indirect jurisdiction for NHPA purposes. 16 U.S.C. § 470a-2 (emphasis added).

11                  The NHPA, 16 U.S.C. § 470w(7), defines “undertaking” as:

- 12                  A project, activity, or program funded in whole or in part under the direct or  
13                  *indirect* jurisdiction of a Federal agency, including –  
14                  (A) those carried out by or on behalf of the agency;  
15                  (B) those carried out with Federal financial assistance;  
16                  (C) those requiring a Federal permit license, or approval; and  
17                  (D) those subject to State or local regulation administered pursuant to a  
18                  delegation or approval by a Federal agency. [Emphasis added.]

19                  Agency actions are reviewable NHPA undertakings “as long as the ... agency has  
20                  opportunity to exercise authority at any stage.” *See Morris County Trust For Historic*  
21                  *Preservation v. Pierce*, 714 F.2d 271, 279 (3d Cir. 1983); *see also Watch v. Harris*, 603 F.2d  
22                  310, 324 (2d Cir. 1979) (“undertaking” should be construed consistent with Congressional intent  
23                  to provide “a meaningful review” of federally assisted projects that affect historic properties).

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24                  <sup>20</sup> DoD argues that “any possible decision regarding the Futenma Relocation Facility rests with  
25                  the Government of Japan.” Def. Mot. at 16. This brief demonstrates that there are at least *some*  
26                  decisions regarding the SBF that rest primarily, if not exclusively, with the United States. But  
27                  even to the extent that the project is a bilateral one, logic holds that such a project requires  
28                  “undertakings” from both governments. The participation of a foreign government in a DoD  
                  project does not exempt DoD’s participation from the requirements of Section 402. Indeed, to so  
                  hold would render Section 402 meaningless because nearly every act of US Federal agencies  
                  with a potential effect on a cultural property protected by another country’s laws outside the  
                  United States will involve some kind of participation of that country’s government. Congress  
                  must thus have foreseen such involvement when it enacted Section 402. Moreover, the NHPA  
                  itself clarifies that “undertakings” include projects “funded in whole *or in part* under the direct  
                  *or indirect* jurisdiction of a federal agency.” 16 U.S.C. § 470w(7) (emphasis added).

1 According to DoD's own interpretation of the statute, an "undertaking" may be any of "a broad  
2 range of activities including construction, rehabilitation and repair projects, demolition, licenses,  
3 Federal property transfers, testing during environmental investigation (e.g., borings through  
4 floors of historic buildings, sampling for asbestos, etc.) and many types of remedial actions."  
5 Naval Facilities Engineering Command, Navy/Marine Corps Installation Restoration Manual  
6 (Feb. 1997), Ex. 26.

7 Each of the undertakings described below is a final agency action for purposes of the  
8 NHPA and the APA because they each represent the consummation of DoD's decision-making  
9 process and legal consequences flow from each. *See Bennett v. Spear*, 520 U.S. 154, 177-78  
10 (1997). The Ninth Circuit consistently finds federal agency actions similar to those at issue here  
11 reviewable under the NHPA and the APA. *See, e.g., Tyler v. Cuomo*, 236 F.3d 1124, 1128, 1131  
12 (9<sup>th</sup> Cir. 2000) (reviewing, pursuant NHPA and APA, city development project funded in part by  
13 federal agency); *Presidio Golf Club v. Nat'l Park Service*, 155 F.3d 1153 (9<sup>th</sup> Cir. 1998)  
14 (reviewing, pursuant NHPA and APA, proposal for concessionaire to build project on behalf of  
15 agency); *Native Americans for Enola v. US Forest Service*, 832 F. Supp. 297 (D. Or. 1993),  
16 *remanded as moot*, 60 F.3d 645 (9<sup>th</sup> Cir. 1995) (reviewing, pursuant to NHPA and APA,  
17 agency's grant of permission to enter territory under its control); *Apache Survival Coalition v.*  
18 *United States*, 21 F.3d 895, 898 (9<sup>th</sup> Cir. 1994) (reviewing, pursuant to NHPA and APA, agency  
19 approval of proposed construction project); *Sierra Club v. Clark*, 774 F.2d 1406, 1408, 1410 (9<sup>th</sup>  
20 Cir. 1985) (reviewing, pursuant to NHPA and APA, agency approval of proposed racecourse  
21 location); *Muckleshoot Indian Tribe*, 177 F.3d at 805 (reviewing, pursuant to NHPA and APA,  
22 federal approval of land exchange program).

### 23 **1. DoD's Approval of the Plan for the Sea-Based Facility Is a Reviewable** 24 **NHPA Undertaking**

25 As alleged in the Complaint, "[o]n December 2, 1996, SACO issued its Final Report,  
26 which was approved by the SCC [the bilateral Security Consultative Committee] ...[, and]  
27 concluded that a sea-based facility was the best option for the Futenma relocation." Complaint  
28 ¶24. As discussed above, on December 2, 1996, SACO issued its Final Report, Ex. 8, indicating  
that then US Secretary of Defense William J. Perry, together with the other SCC members,

1 approved SACO's recommendation to replace US Marine Corps Air Station (MCAS) Futenma  
2 with the SBF. *See* SACO Final Report at ¶1(b). The SCC work carried out by DoD staff was  
3 funded by the United States, and, by virtue of its bilateral nature, was under at least the indirect  
4 jurisdiction of DoD. DoD's independent "approval" of the joint decision of the SCC is therefore  
5 an "undertaking" for purposes of the NHPA. *See* 16 U.S.C. § 470w(7)(C); *see also, e.g., Apache*  
6 *Survival Coalition v. United States*, 21 F.3d 895, 898 (9<sup>th</sup> Cir. 1994) (National Forest Service  
7 approval of proposed construction of astrophysical laboratory by private consortium required  
8 assessment of impacts to traditional cultural properties pursuant to NHPA).

## 9 **2. DoD's Approval of the SBF Location and Design Is a Reviewable NHPA** 10 **"Undertaking"**

11 The Complaint alleges that DoD's preparation, approval and delivery of the 1997 OR is  
12 an NHPA undertaking. Complaint ¶¶ 2, 27, 39. As discussed above, on September 29, 1997,  
13 just two months before the deadline set by the SCC for FIG to choose the SBF location based on  
14 "operational requirements," DoD "began the process" of "[a]cquir[ing] the sea-based facility" by  
15 "establishing operational ... requirements." 1998 GAO Report at 29, Ex. 11. On that date, DoD  
16 released the 1997 OR, detailing DoD's "functional requirements and concept of operations" for  
17 the SBF. 1997 OR. at 1-1, Ex. 12. A September 3, 1997, Executive Report to the 1997 OR  
18 indicates that the 1997 OR, was "approved" by high-ranking officials of the US Army, Navy and  
19 Marines. 1997 Executive Report, Ex 13. By preparing and approving location and design  
20 specifications in the 1997 OR, "the United States has established requirements that Japan must  
21 meet as it designs, builds, and pays for the sea-based facility before [MCAS] Futenma is closed  
22 and are [*sic*] moved to the sea-based facility." 1998 GAO Report at 3, Ex. 11.

23 The 1997 OR, developed by DoD and thus requiring a considerable expenditure of DoD  
24 funds, sets forth DoD's approval of the requirement that the SBF be located in the Camp Schwab  
25 Water Area, and provides a diagram of DoD's SBF concept, demonstrating that it would be  
26 located in Henoko Bay adjacent to Camp Schwab. 1997 OR at 2-6; *id.* at 3-4, Figure 6. This  
27 location requirement was established in the 1997 OR *before* FIG's December 1997 deadline, and  
28 *before* Japan's July 2002 approval of the location. *See* 2002 Basic Plan, Ex. 16. These  
requirements were reaffirmed on June 26, 2006. *See* Statement of Admiral Thomas B. Fargo,

1 Ex. 15. The 1997 OR constitutes DoD’s “approval” of the plan to locate the SBF in Henoko Bay  
2 adjacent to Camp Schwab and constitutes a reviewable undertaking for purposes of the NHPA.  
3 *See* 16 U.S.C. § 470w(7)(C); *see also, e.g., Sierra Club v. Clark*, 774 F.2d 1406, 1408, 1410 (9th  
4 Cir. 1985) (agency approval of proposed racecourse location subject to NHPA review);  
5 *Muckleshoot Indian Tribe v. US Forest Service*, 177 F.3d at 805 (federal approval of land  
6 exchange program subject to NHPA review).

7 **3. DoD’s Approval of Requests to Enter Camp Schwab and Camp Schwab  
8 Water Area to Conduct the Technical Surveys, and to Construct and Use  
9 an SBF Planning Building in Camp Schwab, are Reviewable NHPA  
10 “Undertakings”**

11 The Complaint alleges that “[u]nderwater construction surveys, including acoustic  
12 surveys that use high intensity noise sources and boring activities are planned to begin as early as  
13 December 2003.” Complaint ¶31. The 1997 OR elaborates DoD’s requirements relating to the  
14 surveys required before SBF construction may begin. As discussed above, further to these  
15 requirements, the Naha Defense Facility Administration (NDFA), an agency of the Japanese  
16 Defense Agency, is planning to carry out a technical survey imminently. *See* Survey Plan, Ex.  
17 17. DoD has approved numerous NDFA requests to enter Camp Schwab and Camp Schwab  
18 Water Area to carry out the Survey. *See supra*, fn. 8. DoD has also approved NDFA’s  
19 construction and use of a building in Camp Schwab for activities related to the surveys and to  
20 SBF construction. *Id.* Each of these DoD “approvals,” the authority for which was within  
21 DoD’s direct jurisdiction, is an undertaking for purposes of the NHPA. *See* 16 U.S.C. §  
22 470w(7)(C); *see also, e.g., Native Americans for Enola v. US Forest Service*, 832 F. Supp. 297  
23 (D. Or. 1993), *remanded as moot*, 60 F.3d 645 (9<sup>th</sup> Cir. 1995) (agency’s granting of permission  
24 to enter territory under its control subject to NHPA review).

25 **4. DoD’s Funding of the Preparation of the 1997 OR and Funding the FIG  
26 Are Both Reviewable NHPA “Undertakings”**

27 The Complaint alleges that DoD’s SBF-related activities include “funding” the Futenma  
28 relocation. Complaint ¶¶ 2, 40. The Complaint further alleges that DoD’s preparation of the  
1997 OR is an NHPA undertaking. Complaint ¶¶ 2, 39. As discussed above, DoD has provided  
several million dollars for the Futenma Implementation Group (FIG), which was established by

1 the SCC pursuant to the Final Report to develop an implementation plan for the SBF. *See supra*,  
2 fn. 6. In addition, the 1997 OR was developed with the involvement and input of representatives  
3 from at least eight DoD sub-agencies, 1997 OR at 2-4, which represents significant expenditure  
4 of agency resources. Such funding of FIG and DoD activities, both under the direct or indirect  
5 jurisdiction of DoD, constitutes “undertakings” for purposes of the NHPA. *See* 16 U.S.C. §  
6 470w(7)(B); *see also, e.g., Tyler v. Cuomo*, 236 F.3d 1124, 1128, 1131 (9<sup>th</sup> Cir. 2000) (city  
7 development project funded in part by Federal agency subject to NHPA review).

8 **5. Construction of the SBF on Behalf of DoD, Pursuant to DoD’s**  
9 **Requirements, and for DoD’s Use, is a Reviewable NHPA “Undertaking”**

10 The Complaint alleges that the OR details the “design specifications that, according to  
11 DoD, must be followed by the GoJ [Government of Japan] to facilitate the Futenma relocation.”  
12 Complaint ¶28. As discussed above, the 1997 OR states Japan will “provide[] the SBF for [the  
13 US Forces’] use in accordance with the [SOFA],” 1997 OR at 2-6, and that US Marine Aircraft  
14 Group 36 (MAG-36) “will become the major tenant aboard the [SBF].” *Id.* at 3-1. The SBF  
15 construction, being carried out on behalf of DoD, is a reviewable NHPA “undertaking.” *See* 16  
16 U.S.C. § 470w(7)(A); *see also, e.g., Presidio Golf Club v. Nat’l Park Service*, 155 F.3d 1153 (9<sup>th</sup>  
17 Cir. 1998) (proposal for concessionaire to build project on behalf of agency subject to NHPA  
18 review).

19 **III. The Presumption Against Extraterritorial Application of US Law Does Not Apply to**  
20 **the NHPA**

21 Defendants argue that the Complaint should be dismissed because the NHPA “does not  
22 apply extraterritorially to matters of foreign policy.” Def. Mot. at 16-18. Defendants ignore the  
23 obvious purpose of the statute, the controlling legal standard, their own interpretation of the  
24 statute, and their own extraterritorial practice.

25 It is well settled that the general presumption against the extraterritorial application of US  
26 statutes is overcome by an “affirmative intention of the Congress clearly expressed” to extend  
27 the scope of the statute to conduct occurring within other sovereign nations. *See EDF v. Massey*,  
28 986 F.2d 528, 530-532 (D.C. Cir. 1993) (*citing EEOC v. Arabian American Oil Co.*, 499 U.S.  
244 (1991) (*Aramco*)). Section 402 of the NHPA, 16 U.S.C. § 470a-2, requires federal agencies

1 to take into account the effects of their undertakings “outside the United States” that may affect a  
2 cultural property on “the applicable country’s” equivalent of the National Register. *See* 16  
3 U.S.C. §470a-2. It is hard to imagine a more clearly expressed intention that a statute apply  
4 extraterritorially.<sup>21</sup>

5 Indeed, DoD has itself determined that the NHPA applies to its activities in Japan and  
6 requires the requisite impact assessment for properties listed on the Japanese Register of Cultural  
7 Properties “[b]efore beginning any major construction or repair work, regardless of funding  
8 sources (including GoJ funding).” DoD Japan Environmental Governing Standards, Version 1.1  
9 (Oct. 2001) at Ch. 12, Art. 12-3.8, Ex. 27; *see also id.* at Table 12-1 (requiring NHPA review of  
10 “Specially Designated Flora/Fauna”).<sup>22</sup>

11 Notwithstanding Congress’s clear expression of intent and DoD’s own determination and  
12 practice applying Section 402 to its activities in Okinawa, Defendants now suggest that Section  
13 402 should not be applied extraterritorially because such application would allegedly conflict  
14 with US foreign policy interests. Defendants’ position is not supported by law.

15 Whether the application of a particular statute extraterritorially would conflict with  
16 foreign sovereignty is merely a “threshold question” that brings the presumption against  
17 extraterritoriality into play. *See Massey*, 986 F.2d at 532 (noting that in determining that NEPA  
18 did not apply to US agency actions concerning Antarctica, the district court had “by-passed the  
19

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20 <sup>21</sup> In support of their argument, Defendants rely exclusively on cases that involve statutes lacking  
21 any indication of Congressional intent that they apply extraterritorially. *See Arc Ecology v. US*  
22 *Dep’t of the Air Force*, 294 F.Supp.2d 1152, 1153 (N.D. Cal 2003) (CERCLA, 42 U.S.C. §§  
23 9601 *et seq.*); *United States v. Mitchell*, 553 F.2d 996, 1004 (5<sup>th</sup> Cir. 1977) (Marine Mammal  
24 Protection Act, 16 U.S.C. § 1361 *et seq.*); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668,  
25 672-76 (S.D.N.Y. 1991) (RCRA, 42 U.S.C. §§ 6901 *et seq.*); *EDF v. Massey*, 986 F.2d 528, 531  
26 (D.C. Cir. 1993) (NEPA, 42 U.S.C. § 4321 *et seq.*); *NEPA Coalition of Japan v. Aspin*, 837 F.  
27 Supp. 466 (D.D.C. 1993) (same). Equally inapposite is *Committee for Nuclear Responsibility*  
28 *v. Seaborg, Inc.*, 463 F.2d 796, 798 (D.C. Cir. 1971), which considered national security and  
foreign policy interests in the context of the equitable balancing for injunctive relief, *not* for  
determining the extraterritorial application of the statute at issue.

<sup>22</sup> *See also* Cultural Resources Management Plan, Commander Fleet Activities, Okinawa/US  
Naval Air Facility, Kadena, Japan (Sept. 1998) at 7-10, 80-82, 87, Ex. 28 (requiring assessments  
of impacts to properties protected under the Japanese Cultural Protection Law, pursuant to  
Section 402); Presentation by US Marine Corps, Natural Resources Management, MCB Butler,  
Okinawa, Slide Show at 4, Ex. 23 (including “fauna of cultural importance” in definition of  
“Natural Resource with Cultural Significance”); *see also* King Dec. ¶¶ 8, 46.

1 threshold question of whether [such] application ... presents an extraterritoriality problem at  
2 all”); *see also id.* at 530 (“the primary purpose of this presumption against extraterritoriality is  
3 ‘to protect against the unintended clashes between our laws and those of other nations which  
4 could result in international discord.’ *Aramco*, [499 U.S. at 248.”). Only after a court has  
5 identified the potential for such conflict does the presumption against extraterritorial application  
6 of the statute come into play. At that point, however, the presumption is overcome by, *inter alia*,  
7 an explicit expression of Congressional intent. *Id.* at 531; *see also id.* (noting that, in *American*  
8 *Banana Co. v. US Fruit Company*, 213 U.S. 347 (1909), the Supreme Court refused, *in the*  
9 *absence of a clear statement of extraterritorial scope*, to infer congressional intent to apply the  
10 federal statute to the conduct of a foreign government because enforcement would have  
11 interfered with the exercise of foreign sovereignty” (emphasis added)). Because, as noted above,  
12 Congress explicitly stated its intention that the NHPA apply extraterritorially, the statute applies  
13 extraterritorially regardless of any potential conflict.<sup>23</sup>

14 Even if the possibility of conflict with Japanese sovereignty were relevant in this case,  
15 there is no such conflict here. In *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 fn. 5  
16 (D.D.C. 1993), cited by Defendants in support of the relevance of potential conflict in this case,  
17 the court found that conducting an Environmental Impact Assessment pursuant to US law would  
18 conflict with diplomatically established US-Japanese agreements in part because such an  
19 assessment would require “DOD to collect environmental data from the surrounding residential  
20 and industrial complexes,” including impacts to broadly drawn neighboring regions normally  
21 under exclusive Japanese regulatory control. Here, by contrast, NHPA compliance would only  
22 require assessment of impacts to resources within a territory already under DoD’s control, the  
23

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24  
25 <sup>23</sup> In light of this, Defendants’ reliance on *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466  
26 (D.D.C. 1993), is inapposite. In that case, the court was asked to apply to US military activities  
27 in Japan a statute (NEPA) that contained no explicit language concerning extraterritorial  
28 application, and to do so in light of a prior circuit court decision (*Masse*) that the statute applied  
in Antarctica in part because there was no potential for conflict with foreign sovereignty. *See id.*;  
*Masse*, 986 F.2d 528. The question of conflict with Japanese sovereignty was thus relevant in  
*NEPA Coalition*, but, because of Congress’s clarity in the NHPA, is irrelevant here. *See also*  
*EEOC*, 499 U.S. at 248 (Courts must “assume that Congress legislates against the backdrop of  
the presumption against extraterritoriality.”).

1 Camp Schwab Water Area, *see* Map of US Military Bases and Areas in Okinawa, Ex. 2, and  
2 would not require entry into surrounding residential or industrial complexes.

3 Similarly, the *NEPA Coalition* court declined to apply NEPA to DoD’s activities in Japan  
4 because such application would have been duplicative of the Joint Committee’s ongoing  
5 consideration of certain environmental and noise pollution impacts. *See id.* at 467 (noting that  
6 there was a standing bilateral subcommittee on environment that met biweekly “to examine the  
7 types of concerns raised by plaintiffs”). Here, by contrast, there is no evidence of such a bilateral  
8 committee meeting regularly to discuss the impacts of DoD activities on Japan’s protected  
9 cultural resources.<sup>24</sup>

#### 10 **IV. The Act of State Doctrine Does Not Apply to this Case**

11 Defendants argue that this case should be dismissed on the basis of the act of state  
12 doctrine. Def. Mot. at 18-19. The act of state doctrine holds that “the courts of one country will  
13 not sit in judgment on the acts of the government of another, done within its own territory.” *See*  
14 *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 416 (1964) (*citing Underhill v. Hernandez*,  
15 168 U.S. 250, 252 (1897)). The act of state doctrine does not establish a defense against cases  
16 that may embarrass foreign governments, but merely requires that US courts deem valid the acts  
17 of foreign sovereigns taken within their own jurisdictions. *Kirkpatrick v. Environmental*  
18 *Tectonics*, 493 U.S. 400, 404 (1990). Thus, an action will be barred only if: (1) there is an  
19 official act of a foreign sovereign performed within its own territory; and (2) the relief sought  
20 would require a US court to declare invalid the foreign sovereign’s official act. *Credit Suisse v.*  
21 *U.S. Dist. Court*, 130 F.3d 1342, 1346 (9<sup>th</sup> Cir. 1997) (*citing Kirkpatrick*, 493 U.S. at 405).<sup>25</sup>

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23 <sup>24</sup> Nor does the Japanese government’s alleged compliance with the Japanese Environmental  
24 Impact Assessment Law, Def. Mot. at 7, duplicate the assessment required under the NHPA.  
25 Unlike the NHPA, this Japanese law does not require the assessment of impacts to cultural  
26 resources or mandate that the potential impacts be avoided or mitigated. *See Takamichi Dec.* ¶  
27 7; *cf.* 16 U.S.C. § 470a-2 (purpose of Section 402 review is to “avoid or mitigate” adverse effects  
28 cultural properties).

<sup>25</sup> *See also Kirkpatrick*, 493 U.S. at 406, 405 (“Act of state issues only arise when a court *must*  
*decide* – that is, when the outcome of the case turns upon – the effect of official action by a  
foreign sovereign. When that question is not in the case, neither is the act of state doctrine.”; “In  
every case in which we have held the act of state doctrine applicable, the relief sought or the  
defense interposed would have required a court in the United States to declare invalid the official  
act of a foreign sovereign performed within its own territory.”).

1 Disposition of the instant case requires no judgment regarding any act of the Japanese  
2 government or its subdivisions. This case only alleges claims against DoD, Complaint ¶¶39,  
3 Relief ¶¶1-3, arising out of DoD's actions. Complaint ¶¶1, 2, 26-29, 39, Relief ¶¶ 1-2.  
4 Consequently, this case only requires that the Court sit in judgment on the acts of DoD pursuant  
5 to its jurisdiction under the NHPA and the APA. Indeed, it is difficult to imagine how the relief  
6 sought in this case might embarrass the Government of Japan given that the result would be due  
7 respect for Japan's determination that a cultural property should be protected for the benefit of  
8 the Japanese people.

9 The mere involvement of the Japanese government in the facts related to this lawsuit does  
10 not trigger the act of state doctrine. *Kirkpatrick* 493 U.S. at 405 (1990) (act of state doctrine not  
11 triggered by claim of US plaintiff that US competitor secured Nigerian procurement contract  
12 through bribes, notwithstanding Nigeria's involvement in potentially voided contract). Nor is the  
13 doctrine triggered by any potential for embarrassment to the Japanese government. *Id.* at 409.  
14 Thus, DoD's characterization of this lawsuit as one requiring a judgment of Japanese  
15 government actions, *see* Def. Mot. at 18-19, is incorrect, and the act of state doctrine does not  
16 apply.

### 17 CONCLUSION

18 For the foregoing reasons, and because Defendants have failed to meet their burden under  
19 Fed. R. Civ. P. 12(b)(6) and 12(b)(1), Plaintiffs respectfully request that this Court deny  
20 Defendants' Motion to Dismiss. However, should this Court decide to grant Defendants'  
21 motion, Plaintiffs respectfully request that such dismissal be made without prejudice to  
22 Plaintiffs' right to amend their Complaint.

23 Respectfully submitted on the 21st day of June, 2004.

24  
25 /s J. Martin Wagner

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12  
13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN FRANCISCO DIVISION**

16 \_\_\_\_\_ )  
17 OKINAWA DUGONG (Dugong Dugon), )  
18 *et al.*, )

19 Plaintiffs, )

20 v. )

21 DONALD H. RUMSFELD, in his official )  
22 capacity as the Secretary of Defense, *et al.*, )

23 Defendants. )

24 Civil Action No. C-03-4350 (MHP)  
25 Honorable Marilyn Hall Patel  
26 Courtroom 15

27 August 4, 2004, 2:00 p.m.

28 DECLARATION OF THOMAS F. KING,  
Ph.D IN SUPPORT OF PLAINTIFFS'  
OPPOSITION TO DEFENDANTS' MOTION  
TO DISMISS

1. My name is Thomas F. King. I hold a Ph.D in Anthropology from the University of California, Riverside, with an emphasis in archaeology. I am a specialist in what its practitioners in the United States call “cultural resource management” – that is, the management of places, things, and practices thought to have cultural value of some kind, and the impacts of the modern world on such resources, under various Federal, state, local, and Indian tribal laws and

1 regulations.<sup>1</sup> In other countries, the same field of practice is often called “cultural heritage  
2 management.”

3  
4 2. I have worked in applying and implementing the U.S. National Historic Preservation Act of  
5 1976, 16 U.S.C. §§ 470 *et. seq.* (NHPA), since shortly after it was enacted in 1966. I have  
6 worked with the NHPA as an archaeologist; as organizer of “state” historic preservation  
7 programs in the now defunct Trust Territory of the Pacific Islands and the new island nations that  
8 succeeded it; as senior staff to the Advisory Council on Historic Preservation (ACHP),  
9 established pursuant to 16 U.S.C. § 470i, to oversee certain aspects of NHPA implementation;  
10 and as a teacher, writer, and consultant. At the ACHP, my primary job was to coordinate the  
11 ACHP’s nationwide oversight of Federal agency compliance with Section 106 of NHPA (16  
12 U.S.C. § 470f). Section 106 is the domestic equivalent of Section 402, requiring agencies to take  
13 into account the effects of their actions on properties included in or eligible for the National  
14 Register of Historic Places, a list of significant historic properties maintained by the National  
15 Park Service. Section 106 is implemented by following regulations at 36 C.F.R. 800, with whose  
16 development and interpretation I have been intimately involved for the last 30 years. I am the  
17 author of four recent textbooks dealing with cultural resource management, as well as many  
18 journal articles and government regulations and guidelines. I teach short courses on NHPA and  
19 related cultural resource management topics for the National Preservation Institute. I am the co-  
20 author of National Register Bulletin 38, a publication of the National Register of Historic Places  
21 providing guidance on the eligibility of certain types of cultural property, including places that  
22 are entirely natural, for the National Register. *See* U.S. Dep’t of the Interior, Nat’l Park Service,  
23  
24  
25  
26

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27  
28 <sup>1</sup> The term “cultural resource,” though widely used by practitioners, is not defined in law. *See*  
Thomas F. King, *Cultural Resource Laws and Practice* (2d ed. 2004), for discussion of the term’s  
varied meanings and relevant statutory authorities.

1 Guidelines for Evaluating and Documenting Traditional Cultural Properties, Nat'l Register  
2 Bulletin 38 (1998) ("National Register Bulletin 38"). I also participated in drafting the Secretary  
3 of the Interior's guidelines for NHPA historic preservation programs. See The Secretary of the  
4 Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant  
5 to the National Historic Preservation Act, 63 Fed. Reg. 20496 (Apr. 24, 1998) ("Secretary of the  
6 Interior's Standards"). I have worked extensively with the cultural resource management  
7 programs of the U.S. Department of Defense (DOD) and the various military services, and  
8 regularly teach DOD personnel and contractors in my classes. In the mid-1990s I worked as a  
9 subcontractor for the DOD on its Legacy Resource Management Program, in which context I had  
10 occasion to become acquainted with DOD's discharge of its cultural resource management  
11 responsibilities overseas. A short professional résumé of my qualifications is attached to this  
12 declaration.  
13  
14

15  
16 3. I have prepared this declaration at the request of Plaintiffs' attorneys to address four  
17 questions:

- 18 1) What can be said about compliance with Section 402 of NHPA, 16 U.S.C. § 470a-2, by  
19 U.S. agencies in general and the military services specifically?
- 20 2) How are animals dealt with under the National Historic Preservation Act, and specifically  
21 how might the Okinawa dugongs be dealt with if they lived in the United States?
- 22 3) What is the background of cultural heritage registration systems and how have they  
23 evolved with respect to the inclusion of the natural world, including animals?
- 24 4) To what extent is Japan's Cultural Properties Registry equivalent to the National Register  
25 of Historic Places?

26 4. I have not, nor will I, receive any monetary or other compensation for preparing this  
27 declaration. I prepare this declaration because of my concern for the effective management of  
28 cultural resources worldwide, and my interest in effective cultural resource management policy.

5. In preparing this declaration, I have reviewed:

- Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief

- 1 • Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' First Amended
- 2 Complaint
- 3 • DoD Operational Requirements and Concept of Operations for MCAS Futenma
- 4 Relocation, Okinawa, Japan (Sept. 29, 1997)
- 5 • National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*
- 6 • Senate Comm. on Energy and Natural Resources, National Historic Preservation Act
- 7 Amendments of 1980, S. Rep. No. 96-943 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6406
- 8 (1980)
- 9 • Linking Nature and Culture; Report of the Global Strategy Natural and Cultural Heritage
- 10 Expert Meeting, 25 to 29 March 1998, Amsterdam, The Netherlands (Bernd von Droste,
- 11 Mechtild Rossler & Sarah Tichen eds. 1998)
- 12 • The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic
- 13 Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg.
- 14 20496 (Apr. 24, 1998)
- 15 • U.N. Environment Programme (UNEP), Dugong Status Report and Action Plans for
- 16 Countries and Territories, U.N. Doc. UNEP/DEWA/RS.02-1 (2002)
- 17 • U.S. Dep't of the Interior, Nat'l Park Service, Guidelines for Evaluating and
- 18 Documenting Traditional Cultural Properties, Nat'l Register Bulletin 38 (1998)
- 19 • U.S. Navy, OPNAV Instruction 5090.1B Environmental and Natural Resources Program
- 20 Manual (Oct. 17, 2002) at Chapter 18, *at*
- 21 [http://enviro.nfesc.navy.mil/erb/erb\\_a/regs\\_and\\_policy/5090chng3/5090\\_chng3-](http://enviro.nfesc.navy.mil/erb/erb_a/regs_and_policy/5090chng3/5090_chng3-)
- 22 [chp18.pdf](http://enviro.nfesc.navy.mil/erb/erb_a/regs_and_policy/5090chng3/5090_chng3-) (last visited June 15, 2004)
- 23 • Mark Kinkade, *The Past Preserved: History and Heritage Kept Alive on Pacific Base –*
- 24 *Misawa Air Base*, AIRMAN, Feb. 2003
- 25 • Okinawa Prefectural Government, *The Destruction of Cultural Properties Inside the U.S.*
- 26 *Military Bases* (1996)
- 27 • David Allen & Chiyomi Sumida, *Henoko Protestors Still Camped Out*, STARS AND
- 28 STRIPES, PAC. EDITION, Apr. 30, 2004, *at*
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- Properties* (July 2003)
- Dep't of Defense, *Japan Environmental Governing Standards, Version 1.1* (Oct. 2001) at
- Chapter 12
- Memorandum from the Director of the Bureau of Land Mgmt, U.S. Dep't of the Interior
- to State Directors Alaska, Arizona, California, Eastern States, Idaho, Montana, New
- Mexico, and Oregon/Washington (Aug. 12, 2002) (Instruction Memorandum 2002-226)
- at* <http://www.blm.gov/nhp/efoia/wo/fy02/im2002-226.html> (last visited June 15, 2004)
- Charles A. Birnbaum, *Protecting Cultural Landscapes: Planning, Treatment, and*
- Management of Historic Landscapes*, National Park Service, Technical Preservation
- Brief 36 (Sept. 1994)
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- Conservation History*, in *Nara Conference on Authenticity, Proceedings* (Knut Einar
- Larsen ed., 1995)

- 1 • Dep't of the Interior, National Park Service, National Register of Historic Places  
2 Registration Form, Klamath Lake Reservation (May 1990)
- 3 • Dep't of the Interior, National Park Service, National Register of Historic Places  
4 Registration Form, Lake Merritt Wild Duck Refuge (Oct. 18, 1977)
- 5 • Dep't of the Interior, National Park Service, National Register of Historic Places  
6 Registration Form, Pelican Island National Wildlife Refuge (Apr. 30, 1984)
- 7 • *An Act Respecting the Protection of Heritage Animals*, Nwfd R.S. ch. H-2.1 (1996), at  
8 [www.gov.nf.ca/hoa/chapters/1996/H02-1.c96.htm](http://www.gov.nf.ca/hoa/chapters/1996/H02-1.c96.htm) (last visited June 15, 2004)
- 9 • Danish Forest and Nature Agency, *Cultural Heritage in Planning*, at  
10 [http://www.sns.dk/udgivelser/2001/87-7279-298-1/kap04\\_eng.htm](http://www.sns.dk/udgivelser/2001/87-7279-298-1/kap04_eng.htm) (last visited June 10,  
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- 12 • Quandamooka Lands Council, *Places of Cultural Heritage Value*, at  
13 [http://www.quandamooka.org.au/01\\_DISCOVER/issues/native\\_title.htm#places](http://www.quandamooka.org.au/01_DISCOVER/issues/native_title.htm#places) (last  
14 visited June 15, 2004)
- 15 • Australian Heritage Commission, *Criteria for the Register of the National Estate*, at  
16 <http://www.ahc.gov.au/register/furtherinfo/criteria.html> (last visited June 15, 2004)
- 17 • *Convention Concerning the Protection of the World Cultural and Natural Heritage:  
18 Decisions Adopted by the 27th Sess.*, U.N. Educational, Scientific and Cultural  
19 Organization, World Heritage Comm., 27th Sess., U.N. Doc. WHC-03/27.COM/24 (Dec.  
20 10, 2003), at <http://whc.unesco.org/toc/mainf17.htm> (last visited June 15, 2004)
- 21 • Nara Conference on Authenticity in Relation to the World Heritage Convention, *Nara  
22 Document on Authenticity* (Raymond Lemaire & Herb Stovel, eds. 1994), at  
23 [http://www.international.icomos.org/naradoc\\_eng.htm](http://www.international.icomos.org/naradoc_eng.htm) (last visited June 15, 2004)
- 24 • *Convention Concerning the Protection of the World Cultural and Natural Heritage:  
25 Expert Meeting on the "Global Strategy" and thematic studies for a representative World  
26 Heritage List*, U.N. Educational, Scientific and Cultural Organization, World Heritage  
27 Comm., 18th Sess., U.N. Doc. WHC-94/CONF.003/INF.6 (Oct. 13, 1994), at  
28 <http://whc.unesco.org/archive/global94.htm> (last visited June 15, 2004)
- U.N. Educational, Scientific and Cultural Organization, *3rd Global Strategy Meeting,  
Identification of World Heritage Properties in the Pacific* (1997), at  
<http://whc.unesco.org/archive/208inf8.htm> (last visited June 15, 2004)
- U.N. Educational, Scientific and Cultural Organization, *2nd World Heritage Global  
Strategy Meeting, Identification of World Heritage Properties in the Pacific* (1999), at  
<http://whc.unesco.org/archive/vanuatu99.htm> (last visited June 15, 2004)
- Richard Pearson, *Preserving Okinawa's History: Cultural Resource Management on  
MCB Camp S.D. Butler* (1995) (unpublished paper)

#### 24 **Compliance with Section 402 of the NHPA, 16 U.S.C. § 470a-2 by U.S. Agencies**

25 6. Section 402 of the NHPA requires that agencies take into account the effects of their actions  
26 overseas on places included in the World Heritage List or in a host nation's equivalent of the  
27 U.S. National Register of Historic Places. 16 U.S.C. § 470a-2. It is difficult to determine the  
28 extent to which agencies of the U.S. Government comply with Section 402, because no

1 consistent or comprehensive records of such compliance are kept. By contrast, Federal agency  
2 actions under NHPA Section 106, 16 U.S.C. § 470f, are kept track of by the ACHP and the State  
3 Historic Preservation Officers (SHPOs), whose records are audited periodically by the National  
4 Park Service (NPS), an agency of the U.S. Department of the Interior (DOI). Host nation  
5 historic preservation authorities may keep records of U.S. agency actions to protect historic  
6 properties in their territories, but I am not aware of any nation that does so systematically.

7  
8 7. That federal agencies are aware of their responsibility to comply with Section 402 is  
9 indicated by references to its requirements in various agency historic preservation and  
10 environmental procedures and directives. For example, the Federal Deposit Insurance  
11 Corporation, in its regulations on international banking requires that banks applying to establish  
12 foreign branches must certify that they are not building on World Heritage List properties or  
13 properties included in the foreign nation's equivalent of the National Register. *See* 12 C.F.R. §  
14 303.182 (2002). Similarly, in 2003, the Bureau of Land Management in the Department of the  
15 Interior issued Instruction Memorandum #2002-226 instructing its field offices to address  
16 Section 402 requirements on projects with impacts in Mexico and/or Canada.

17  
18  
19 8. Most relevant to this case, Chapter 18 of OPNAV Instruction 5090.1B lists the requirements  
20 of Section 402 among the requirements to be complied with by overseas installations. U.S.  
21 Navy, *supra*, Section 18.2.1. In most military guidance, however, the requirements of Section  
22 402 are alluded to in more general statements of environmental management policy. For  
23 example, Chapter 12 of the Japan Environmental Governing Standards issued by the Navy as  
24 executive agent under DOD's Overseas Environmental Baseline Guidance Document (OEBGD)  
25 establishes a requirement for "the protection and management of both U.S. and Japanese historic  
26 and cultural resources," including "properties on the World Heritage List or those cultural and  
27  
28

1 natural properties designated and protected under the Japanese cultural laws.” Japan  
2 Environmental Governing Standards at Ch. 12, Section 12-1, Ex. 27.

3 **Animals and the National Historic Preservation Act**

4  
5 9. During the 1980s, it became apparent to both the NPS (within which the National Register is  
6 lodged) and the ACHP (where I worked at the time) that places of traditional cultural  
7 importance to living communities – notably including natural places valued by indigenous, low-  
8 income, and minority communities – were being inappropriately regarded as not eligible for the  
9 National Register because they were not impressive to professional archeologists, historians, and  
10 architectural historians. As a result, such properties and the communities that valued them were  
11 being deprived of the protections afforded by Section 106 of the NHPA – the domestic  
12 equivalent of Section 402. In essence, agencies were regarding as not eligible for the National  
13 Register any place that was not recognized and valued by a professional archaeologist,  
14 architectural historian, or historian, regardless of the significance of the place in the eyes of local  
15 communities. The NPS and the ACHP thought this tendency to be ethnocentric, elitist,  
16 discriminatory, and inconsistent with NHPA’s purposes (*See*, for instance, 16 U.S.C. §  
17 470(b)(2): “the historical and cultural foundations of the Nation should be preserved as a living  
18 part of our community life and development in order to give a sense of orientation to the  
19 American people,” – not just to its historic preservation professionals). To remedy this problem,  
20 Patricia Parker of the National Park Service and I were tasked by our respective agencies to draft  
21 National Register Bulletin 38, which was published by the National Register in 1990. *See*  
22 National Register Bulletin 38, Ex. 24. Bulletin 38 has since been considered by the 10<sup>th</sup> Circuit  
23 Court of Appeals as an authority on DOI’s interpretation of the applicability of the NHPA to  
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1 “traditional cultural properties.” *See Pueblo of Sandia v. U.S.*, 50 F.3d 856, 860 n. 2, 861 (10<sup>th</sup>  
2 Cir. 1995).

3  
4 10. Among other things, Bulletin 38 makes it clear that wholly natural places can be found  
5 eligible for the National Register if they are ascribed cultural significance by living communities  
6 based on traditional beliefs. Such places, of course, are made up of geological features like  
7 mountains and canyons, hydrological features like lakes and rivers, and biological features like  
8 plants and animals. National Register Bulletin 38 at 2, 14

9  
10 11. Every historic property is made up of what the National Register calls “contributing” and  
11 often “non-contributing” elements. U.S. Dep’t of the Interior, How to Complete the National  
12 Registration Form, Nat’l Register Bulletin 16a (1997) at Section III, *at*  
13 [http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a\\_III.htm](http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_III.htm) (last visited June 16,  
14 2004). As the names imply, a contributing element contributes to the significance of the  
15 property, while a non-contributing element does not. For example, older buildings in a historic  
16 district made up of multiple buildings may contribute to its Register eligibility, while younger  
17 buildings may not. It ought to go without saying (as we felt it did when we wrote Bulletin 38)  
18 that the life-forms that help make up a largely or wholly natural traditional cultural property  
19 contribute to its significance. Take away such life-forms and the significance of the place will be  
20 diminished, if not destroyed. As an obvious example, consider San Francisco’s Chinatown.  
21 Take away the Chinese-American people who live there and Chinatown would lose its essential  
22 character. It might still be eligible for the National Register as a sort of quaint relic, but it would  
23 not be the Chinatown we know and would like to preserve.

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27 12. In the same way, although animals by themselves are obviously not “districts,” “sites,” or  
28 “buildings,” and have not been explicitly regarded by the National Register as “structures” or

1 “objects” even though they could certainly be embraced by some definitions of those terms,  
2 animals often contribute to the cultural importance of places. For example, the Mattaponi River  
3 in Virginia, which is regarded as eligible for the National Register by the U.S. Army Corps of  
4 Engineers and the Virginia State Historic Preservation Officer, *see* King, Places That Count at  
5 120, 267, is significant in large part because of the cultural importance of shad fishing in the  
6 river for the Mattaponi, Pamunkey, and Mattaponi tribes.<sup>2</sup>

8 13. Another National Park Service publication pertaining to the management of National  
9 Register-eligible properties is even more explicit than Bulletin 38 about the relevance of animals  
10 to a property’s significance. Preservation Brief 36, dealing with historic landscapes (usually  
11 classed as “districts” or “sites” by the National Register), defines one type of such landscape, the  
12 “ethnographic landscape,” as:  
13

14 *... a landscape containing a variety of natural and cultural resources that*  
15 *associated people define as heritage resources. Examples are contemporary*  
16 *settlements, religious sacred sites and massive geological structures. Small plant*  
17 *communities, **animals**, subsistence and ceremonial grounds are often*  
*components.*<sup>3</sup>

18 14. Species are entitled to protection for their cultural value in many nations. Some, like Japan,  
19 protect culturally significant species directly; others, like the United States, protect culturally  
20 significant species by protecting the locations in which that significance is expressed. The way  
21 the US system achieves this protection is demonstrated by applying US National Register listing  
22 criteria/practices to the dugongs’ habitat.  
23

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25 <sup>2</sup> In order to facilitate project review under Section 106 of NHPA, 36 C.F.R. § 800.4(c) allows  
26 agencies and State Historic Preservation Officers to regard properties as eligible for the Register  
27 without seeking a formal determination of eligibility or nominating such properties to the  
Register. Most traditional cultural properties are dealt with in this way.

28 <sup>3</sup> Charles A. Birnbaum, Protecting Cultural Landscapes: Planning, Treatment, and Management  
of Historic Landscapes, National Park Service, Technical Preservation Brief 36 (Sept. 1994) at 2.

1 15. If the population of dugongs at issue in this litigation were resident in the waters of the  
2 United States, then it would be likely to be protected by virtue of the National Register eligibility  
3 of its habitat, which the presence of the dugongs has made culturally significant. In the logic of  
4 the National Register, the Okinawa dugongs' Henoko Bay habitat would likely be the significant  
5 property, and the dugong population would be the primary element contributing to its cultural  
6 significance. Impacts on Henoko Bay would then be reviewable under Section 106, 16 U.S.C.  
7 470f and 36 C.F.R. § 800 (2002).  
8

9 16. National Register Bulletin 38 instructs federal agencies to apply a four-step process for  
10 determining the eligibility of a traditional cultural property. National Register Bulletin 38 at 14.  
11 Below, I apply this process to the Henoko Bay Okinawa dugong habitat to ascertain whether, if  
12 this area were in the United States, it would be eligible for the National Register because of the  
13 cultural significance of the Okinawa dugong.  
14

15 17. The first step in the National Register Bulletin 38 evaluation process is to verify that the  
16 resource being evaluated is in fact a "property" – that is, a district, site, building, structure or  
17 object. The Henoko Bay habitat is obviously a place, which in National Register terms we  
18 would probably call a "site." If we were formally nominating the site to the National Register,  
19 we would need to describe it in some detail and establish fairly firm boundaries for it. If we  
20 were simply regarding it as eligible for purposes of planning and NHPA Section 106 compliance,  
21 we would undertake such definitions only to the extent required to make planning decisions.  
22 Often with traditional cultural properties, we do not need to establish boundaries with any great  
23 precision (if at all); instead we merely identify a general area as sensitive and work with it  
24 accordingly.  
25  
26  
27

28 (emphasis added), Ex. 29.

1 18. The next step is to establish whether the place has “integrity” of two kinds – integrity of  
2 association and integrity of condition.

3 19. A place has integrity of association if “it is known or likely to be regarded by a traditional  
4 cultural group as important in the retention or transmittal of a belief, or to the performance of a  
5 practice.” National Register Bulletin 38 at 15. Henoko Bay’s integrity of association is  
6 demonstrated by the present role of the dugong in Okinawa culture, as discussed in the  
7 accompanying Declaration of Isshu Maeda. This integrity is also suggested by the vigor with  
8 which Okinawan people oppose construction of the sea-based facility based on their desire to  
9 preserve the bay and its dugong habitat. Such concern about the site and its inhabitants would  
10 not be expressed had they lost their integrity of association.  
11

12 20. A place has integrity of condition if its location, setting, design or materials have not been so  
13 altered that its significance has been effectively lost in the view of those who would otherwise  
14 value it. National Register Bulletin 38 at 15. Without inspecting the site it is difficult for me to  
15 judge its physical integrity, but the fact that the dugong continue to live there indicates that it  
16 retains some degree of such integrity, and the concern of the local people about the project  
17 suggests that the area has not lost its integrity in their eyes.  
18

19 21. National Register Bulletin 38 next directs that the property be evaluated with respect to the  
20 National Register Criteria at 36 C.F.R. § 60.4 (2003). There are four criteria, and a property can  
21 be eligible under any one of them. A property is eligible if it:  
22

- 23 a. is associated with events that have significantly contributed to broad patterns of  
24 history;
- 25 b. is associated with the lives of historically significant people;
- 26 c. exhibits the characteristics of a significant type, style, or school of architecture, a type  
27 of construction, the work of a master, high artistic qualities, etc, or comprises a  
28 “distinctive entity, the individual components of which may lack distinction;” or
- d. is known or likely to contain important historic or prehistoric data.

1 *Id.* at 16-18.

2 22. Traditional cultural properties are most often determined eligible under criterion “a” for their  
3 association with traditional events and patterns of events, which may include “events” based on  
4 folklore and tradition, and patterns of everyday events that make up a community’s traditional  
5 ways of life. It is under this criterion that the Henoko habitat would most likely be eligible for  
6 the National Register, because of the traditional relationships between its dugongs and Henoko’s  
7 human community, and its association with traditional beliefs about the dugong. Isshu Maeda  
8 reports that traditional Okinawa culture associates the dugong with origin traditions, and with  
9 control of tsunamis. *See* Maeda Dec. ¶¶ 6-9. He indicates that the dugong was traditionally  
10 regarded as a dangerous spirit-being, and that dugong flesh was eaten in the past, particularly by  
11 royalty, while their bones were used for various purposes having spiritual connotations. *See id.*  
12 at ¶¶ 8, 10-12, 13-20. He suggests that the names given dugong by different groups of islanders  
13 reflect the animal’s perceived power, its human-like qualities, and its spiritual associations. *See*  
14 *id.* at ¶¶ 21-25.

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16  
17  
18 23. Of course, to definitively demonstrate eligibility would require more study, but I think it is  
19 fair to say that if the Henoko Bay habitat were in the United States, if evaluated following the  
20 standards set forth in National Register Bulletin 38, it would be found eligible for the National  
21 Register. If the bay were determined eligible for the Register, the Okinawa dugong population  
22 would undoubtedly be identified as important contributing elements to the habitat’s cultural  
23 significance and integrity.

24  
25 **Cultural heritage registration systems and how have they evolved with respect to the**  
26 **natural environment and animals**

27 24. The idea of listing cultural things for purposes of preserving them or considering them in  
28 planning has taken somewhat different forms in different countries, but the core idea shared by

1 all listing systems is that the government should identify (or provide for the identification of)  
2 places and things in which the public has a cultural interest, and that these places and things  
3 should be considered in planning and decision making about the use of land and resources.<sup>4</sup>  
4

5 25. In the United States, governmental concern for antiquities (more or less moveable historic  
6 and prehistoric objects) and specific famous battlefields dates back to the late 19<sup>th</sup> century, and  
7 the National Park Service began a list of historic places shortly after its creation in 1916. In  
8 1935, this listing enterprise was given Congressional approval in the Historic Sites Act (16  
9 U.S.C. §§ 431-433). The list maintained under this act was limited to places that in the judgment  
10 of the Secretary of the Interior were important in commemorating and illustrating the whole  
11 nation's history. In other words, they were of pedagogical or commemorative value, and related  
12 somehow to the national experience.  
13

14 26. In the 1960s, particularly during the Johnson administration under the leadership of Lady  
15 Bird Johnson, studies were undertaken concluding that the United States was, in effect, giving  
16 too little protection to too narrow a range of places. Based in large part on a study of European  
17 systems,<sup>5</sup> the result was the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 *et seq.*  
18 Among other provisions, this act authorized the Secretary of the Interior to “expand and  
19 maintain” a more inclusive list of historic places. 16 U.S.C. § 470a(a)(1)(A). The resulting  
20 National Register embraces places of national, state, and local significance, based on association  
21 with historically or culturally significant events or people, representation of a type, style, or  
22 school of construction, high artistic value, association with the work of a master, or known or  
23 probable possession of important information.  
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27 <sup>4</sup> Thomas F. King & Samuel Struelson, *Historic Preservation Laws*, in *Encyclopedia of Life*  
28 *Support Systems* (EOLSS Publishers, 2002).

1 27. Eligibility for the National Register is judged solely based on the significance of the subject  
2 property in history, archaeology, architecture, engineering, and/or culture. Neither the current  
3 nor intended use of the property or its ownership are considered in judging its significance, and  
4 hence its eligibility. These latter factors are considered only after the determination of a  
5 property's eligibility has been made, and only in the context of considering the potential effects  
6 of federal agency actions on them. Uses and ownership are not considered in the evaluation of a  
7 property's cultural significance or eligibility. Cultural significance is an independent variable,  
8 much like the wetness of a wetland or the presence/absence of an endangered species.

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10  
11 28. Since the Register's creation, questions have often arisen about just what could and could not  
12 be eligible for inclusion in it. The National Park Service, in which the National Register is  
13 lodged, has addressed these questions by issuing guidelines of various kinds. Two of these  
14 publications are particularly relevant to this litigation.

15  
16 29. *The Secretary of the Interior's Guidelines for the Treatment of Cultural Landscapes*  
17 discusses how "cultural landscapes" eligible for the National Register should be managed. It  
18 defines such a landscape as:

19 *a geographic area (including both cultural and natural resources and the wildlife*  
20 *or domestic animals therein) associated with a historic event, activity, or person*  
21 *or exhibiting other cultural or aesthetic values.<sup>6</sup>*

22 30. National Register Bulletin 38, discussed above, deals with places of all kinds – sites,  
23 structures, districts – to which a living community ascribes cultural significance that is rooted in  
24 the group's traditions and history. Such places, it indicates, are often entirely natural – "a  
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27 <sup>5</sup> See U.S. Conference of Mayors, *With Heritage So Rich* (1983).

28 <sup>6</sup> Charles A. Birnbaum & Chris-Capella Peters, *Nat'l Park Service, The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes* (1996) at 4 (emphasis added); *see also* NPS Preservation Brief 36.

1 mountaintop, a lake, or a stretch of river.” National Register Bulletin 38 at 2. These  
2 publications represent DOI’s instructions to Federal agencies and others involved in evaluating  
3 and managing historic properties, as to how the National Register’s criteria for listing should be  
4 interpreted and how the significant elements making up historic properties should be treated.

5  
6 31. I am not an expert in the history of Japanese cultural resource laws, but based on my reading<sup>7</sup>  
7 it appears that these laws have developed more or less in parallel with those of the United States.  
8 An antiquities registration and protection program was established in 1871, and government  
9 grants began to be provided for the maintenance of old shrines and temples in 1880. The Old  
10 Shrines and Temples Protection Act of 1897 established criteria for listing “special protected  
11 buildings.” In 1919, consideration was expanded to “historic sites, areas of scenic beauty, and  
12 natural monuments.” In 1929, the National Treasures Act combined moveable properties  
13 (antiquities) and immoveable properties like sites and buildings into a single category, the  
14 “National Treasure.”  
15

16  
17 32. Both the 1919 Historic Sites, Scenic Beauty and Natural Monuments Protection Act and the  
18 1929 National Treasures Protection Act were superceded toward the end of the American  
19 occupation by the Cultural Properties Protection Act of 1950. This law initiated the term  
20 “Cultural Properties,” to subsume all the categories embraced by the previous laws, plus “sites of  
21 archaeological interest” and “intangible cultural properties.” The law has been amended several  
22 times since its enactment, and now addresses five overlapping classes of cultural resource:  
23 tangible buildings, structures, and artifacts; intangible arts, drama, and song; folk culture and its  
24 associated material objects; historic building groups in their landscapes; and “monuments” – a  
25  
26

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28 <sup>7</sup> See Yukio Nishimura, *Changing Concept of Authenticity in the Context of Japanese  
Conservation History*, at 175-183, in *Nara Conference on Authenticity, Proceedings* (Knut Einar  
Larsen ed., 1995).

1 large and diverse category that includes historic and archaeological sites, landscapes of great  
2 beauty, and culturally important plants and animals together with their habitats.

3 33. The registers maintained by the United States and Japan are different from one another, as  
4 befits the fact that they reflect the histories and perceptions of different cultures, but in terms of  
5 policy, they are both justified as tools for the preservation of culturally valued resources. They  
6 both embrace a broad range of resource types, and this range of resources has broadened over the  
7 years in both countries. The Japanese system explicitly includes animals as entities that can be  
8 listed, while the U.S. system protects culturally significant animal species by protecting places in  
9 which their cultural significance has been recognized.  
10  
11

12 34. Many natural places have been included in the National Register, often entirely or in part  
13 because of their association with animals. At least three wildlife refuges are included in the  
14 National Register because of their status as refuges for wildlife<sup>8</sup> – a function obviously linked  
15 with animals. Many traditional cultural properties included in the Register have animal  
16 associations. Devil’s Tower in Montana, for example, also known as Mato Tipi or Bear’s Lodge,  
17 is significant in part because it is associated with Lakota traditions featuring bears. The Mt.  
18 Tonnaachaw Historic District in Chuuk, Federated States of Micronesia<sup>9</sup> is on the National  
19 Register partly because of its traditional association with such activities as fishing and shellfish  
20 collection, which obviously involve animals. Massacre Canyon in Nebraska is on the Register in  
21 part for the fact that it was the site of the Pawnee Tribe’s last communal bison hunt. Many  
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23  
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26 <sup>8</sup> Lower Klamath Wildlife Refuge, Lake Merritt Wild Duck Refuge, and Pelican Island National  
27 Wildlife Refuge are listed as National Register sites, Ex. 30.

28 <sup>9</sup> The Federated States of Micronesia is a “state” for purposes of the NHPA, so properties there  
can be placed on the U.S. National Register.

1 archeological sites are included in the Register in part for their association with animal hunting  
2 and processing.

3 35. Section 106 of the NHPA requires that federal agencies take into account the effects of their  
4 actions not only on places *listed* in the National Register but also on places that are *eligible* for  
5 listing; it is up to each agency to find such places in areas subject to effect by their actions and to  
6 evaluate them against the National Register Criteria (36 C.F.R. § 60.4; 36 C.F.R. § 800.4(c)). If  
7 they are eligible, the agency goes on to consider them in decision making, in consultation with  
8 various interested parties. Agencies usually prefer to complete their Section 106 review  
9 responsibilities without formally nominating eligible places to the National Register, to avoid the  
10 unnecessary time and costs involved in preparing nominations. As a result, there are far more  
11 places that have been *considered eligible* for the Register for purposes of Section 106 review  
12 than there are places *actually included* in the Register.<sup>10</sup> The following are examples of natural  
13 places to which animals contribute cultural significance have been regarded as eligible for the  
14 National Register during Section 106 review:

- 18     ▪ The Mattaponi River in Virginia (mentioned above), regarded as eligible by the U.S.  
19     Army Corps of Engineers in part because of the cultural importance of the shad fisheries  
20     to the Mattaponi and Pamunkey Tribes.
- 21     ▪ The *Mushgigamongsebe* historic district in Wisconsin, regarded as eligible by the  
22     Corps of Engineers as one of the last places the Mole Lake Sokaogon Community of  
23     Great Lakes Ojibwe can carry out their traditional hunting and gathering, which feature  
24     the taking of deer, beaver, muskrat and ducks as well as the intensive management of  
25     wild rice and other plants.
- 26     ▪ Chequamegon Bay in Wisconsin, regarded as eligible by the Corps of Engineers in part  
27     because of its important association with fishing and wild rice gathering by the Ojibwe  
28     people of the Bad River and Red Cliff Reservations.
- 29     ▪ The Klamath River in California, whose eligibility the Klamath River Intertribal Fish and  
30     Water Commission has asserted in documentation provided to the Federal Energy

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31 <sup>10</sup> Records of such properties are maintained by the agencies and the State Historic Preservation  
32 Officers, but not by the National Register, except in cases where a contested determination is  
33 reviewed and ruled upon by the Register itself.

1 Regulatory Commission, based in large part on the central role played by the river and its  
2 salmon in the lives of the tribes that live along its banks.

- 3 ■ Mauna Kea in Hawaii, where the Weikiu Bug, an insect that lives at the mountain's  
4 summit, is regarded by Native Hawaiians as a spiritually significant creature that  
5 contributes to the National Register-eligible mountain's cultural importance and should  
6 not be affected by proposed federally assisted observatory expansion.

7  
8 36. Japanese, American and other nations' approaches to the consideration of animals and other  
9 aspects of the natural environment as cultural resources reflect a trend toward increasing  
10 inclusiveness that is observable in other national registration systems. In Canada, for example,  
11 the government of Newfoundland and Labrador has established a special register of "heritage  
12 animals," which are listed in part based on their historic and cultural value.<sup>11</sup> Denmark's  
13 program for cultural heritage in planning addresses cultural landscapes, defined as representing  
14 "the combined works of nature and of humans."<sup>12</sup> Australia's national register has evolved into a  
15 "Register of the National Estate" that explicitly covers both cultural and natural resources. The  
16 Australian register recognizes that many places and things are both natural and cultural, with  
17 cultural values linked closely to plant and animal populations.<sup>13</sup> Dugong habitats are explicitly  
18 identified in planning documents as places of cultural value for at least the Quandamooka people  
19 of the Brisbane area.<sup>14</sup>

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22 <sup>11</sup> See Government of Newfoundland & Labrador, *Chapter H-2.1: An Act Respecting the*  
23 *Protection of Heritage Animals*, at [www.gov.nf.ca/hoa/chapters/1996/H02-1.c96.htm](http://www.gov.nf.ca/hoa/chapters/1996/H02-1.c96.htm) (last  
24 visited June 10, 2004).

25 <sup>12</sup> See Danish Forest and Nature Agency, *Cultural Heritage in Planning*, at  
[http://www.sns.dk/udgivelser/2001/87-7279-298-1/kap04\\_eng.htm](http://www.sns.dk/udgivelser/2001/87-7279-298-1/kap04_eng.htm) (last visited June 10, 2004).

26 <sup>13</sup> See Australian Heritage Commission, *Criteria for the Register of the National Estate*, at  
27 <http://www.ahc.gov.au/register/furtherinfo/criteria.html> (last visited June 10, 2004).

28 <sup>14</sup> See Quandamooka Lands Council, *Places of Cultural Heritage Value*, at  
[http://www.quandamooka.org.au/01\\_DISCOVER/issues/native\\_title.htm#places](http://www.quandamooka.org.au/01_DISCOVER/issues/native_title.htm#places) (last visited  
June 10, 2004).

1 37. At the international level, the *Convention Concerning the Protection of the World Cultural*  
2 *and Natural Heritage*, usually referred to as the World Heritage Convention, was adopted by the  
3 United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1972<sup>15</sup> and has  
4 been ratified by both the United States and Japan, among many other nations. Implementation of  
5 the Convention is overseen by a UNESCO World Heritage Committee, served by a World  
6 Heritage Centre within UNESCO. Under the Convention, UNESCO compiles and maintains a  
7 *World Heritage List* made up of places nominated by states party to the Convention. States party  
8 are bound by Article 5 of the Convention to endeavor to identify heritage places, and by Article 6  
9 to:  
10  
11

12 recognize that such heritage (of each state party) constitutes a world heritage for  
13 whose protection it is the duty of the international community as a whole to co-  
14 operate...[, and] not to take any deliberate measures which might damage directly  
15 or indirectly the cultural and natural heritage ... the territory of other States  
16 Parties to this Convention.<sup>16</sup>

17 38. The place-types eligible for the World Heritage List, outlined in Articles 1 and 2 of the  
18 Convention, are divided into “cultural” and “natural” categories. Over the last decade or so the  
19 World Heritage Centre and UNESCO member governments have struggled with the need to link  
20 the two, recognizing that many listed areas are “mixed” and that the cultural places of many  
21 indigenous groups and Third World nations are largely if not entirely natural. A number of  
22 conferences on these and related subjects have been held since the early 1990s, notably in  
23 Phuket, Thailand and Nara, Japan in 1994, in Suva, Fiji in 1997, in Amsterdam, the Netherlands  
24 in 1998, and in Vanuatu in 1999.

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26 <sup>15</sup> See UNESCO Convention Concerning the Protection of the World Cultural and Natural  
27 Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, *available at*  
28 <http://whc.unesco.org/pg.cfm?cid=182> (last visited June 15, 2004).

<sup>16</sup> See *id.* at Article 6.

1 39. Although debate continues in the international community about how to properly consider  
2 places that are valuable for both cultural and natural reasons, and about how to address  
3 relationships between the natural and cultural worlds, the conferences have produced statements  
4 that are relevant to this litigation. For example, the *Nara Document on Authenticity*,  
5 promulgated by the 1994 Nara conference, discourages the application of narrow and culture-  
6 bound standards to judging the cultural authenticity of places to which people ascribe cultural  
7 importance:  
8

9 All judgments about values attributed to cultural properties as well as the  
10 credibility of related information sources may differ from culture to culture, and  
11 even within the same culture. It is thus not possible to base judgments of values  
12 and authenticity within fixed criteria. On the contrary, the respect due to all  
13 cultures requires that heritage properties must be considered and judged within  
14 the cultural contexts to which they belong.<sup>17</sup>

14 40. The Phuket conference recommended that special attention be given in nominating cultural  
15 properties to the World Heritage List to the theme of “human coexistence with the land,”<sup>18</sup> in  
16 other words, how the cultural and natural worlds interact.

17 41. The Suva conference noted that:

18 The natural diversity of the (Pacific) region forms an ocean of islands which gives  
19 rise to the special relationship with land and sea for Pacific Island peoples.<sup>19</sup>

20 42. UNESCO’s Director General for Culture, opening the Amsterdam conference, stressed that:

21  
22 <sup>17</sup> See Nara Conference on Authenticity in Relation to the World Heritage Convention, *Nara*  
23 *Document on Authenticity* (Raymond Lemaire & Herb Stovel, eds. 1994), at  
24 [http://www.international.icomos.org/naradoc\\_eng.htm](http://www.international.icomos.org/naradoc_eng.htm) (last visited June 15, 2004).

25 <sup>18</sup> See *Convention Concerning the Protection of the World Cultural and Natural Heritage:*  
26 *Expert Meeting on the "Global Strategy" and thematic studies for a representative World*  
27 *Heritage List*, U.N. Educational, Scientific and Cultural Organization, World Heritage Comm.,  
28 18th Sess., U.N. Doc. WHC-94/CONF.003/INF.6 (Oct. 13, 1994), at  
<http://whc.unesco.org/archive/global94.htm> (last visited June 15, 2004).

<sup>19</sup> See U.N. Educational, Scientific and Cultural Organization, *3rd Global Strategy Meeting,*  
*Identification of World Heritage Properties in the Pacific*, at  
<http://whc.unesco.org/archive/208inf8.htm> (last visited June 15, 2004).

1  
2 The (World Heritage) Convention's definitions for natural and cultural heritage  
3 are not an attempt to distinguish between what is 'natural' and 'cultural'; it is  
4 aimed at recognizing the importance of the diversity of 'heritage', i.e. natural and  
5 cultural, whose identification, conservation and presentation are built on different  
6 combinations of disciplines and knowledge-based traditions.<sup>20</sup>

7  
8 43. And the Vanuatu conference stressed:

9 The importance of recognizing that cultural issues and values are important at  
10 cultural and natural sites in the Pacific.<sup>21</sup>

11 44. In summary: there is widespread recognition, at both national and international levels, that  
12 there is a fundamental relationship between cultural and natural resources, which ought to be  
13 reflected in cultural resource listing systems. Exactly how it should be reflected remains  
14 unresolved, or has been or is being resolved in different ways by different nations, but  
15 developing the relationship is one of the basic ways such listing systems are currently evolving.

16 **Are the Japanese and U.S. registers equivalent?**

17 45. Does all this mean that the Japanese Registry of Cultural Heritage and the U.S. National  
18 Register of Historic Places are "equivalent" for the purposes of NHPA Section 402 in terms of  
19 implementation and practical outcome? In my opinion, yes, for the following reasons.

- 20 a. By virtue of the differences in national cultures, no two nations' cultural heritage  
21 registers will be identical. It would be ridiculous and deeply ethnocentric to demand that  
22 another nation's register be precisely the same as the U.S. National Register in order to  
23 identify it as equivalent. Indeed, such demand would wholly vitiate Congressional intent  
24 in passing Section 402, because *no* country possesses a register that is precisely the same  
25 as the U.S. National Register.

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26 <sup>20</sup> Linking Nature and Culture; Report of the Global Strategy Natural and Cultural Heritage  
27 Expert Meeting, 25 to 29 March 1998, Amsterdam, The Netherlands (Bernd von Droste,  
28 Mechtild Rossler & Sarah Tichen eds. 1998) (statement of Jan Riezenkamp, Director General for  
29 Culture, UNESCO, on the occasion of the opening of the UNESCO Experts' Meeting on Nature  
30 and Culture).

<sup>21</sup> See U.N. Educational, Scientific and Cultural Organization, *2nd World Heritage Global  
31 Strategy Meeting, Identification of World Heritage Properties in the Pacific*, at  
32 <http://whc.unesco.org/archive/vanuatu99.htm> (last visited June 15, 2004).

- 1
- 2 b. The U.S. and Japanese registers were created for the same purposes, and spring from
- 3 comparable if not identical intellectual traditions.
- 4 c. Both registers, in common with other registers the world over, including the World
- 5 Heritage List, have evolved over the years in the direction of greater inclusiveness,
- 6 specifically including places and things that are both “natural” and of “cultural”
- 7 significance.
- 8 d. While the U.S. National Register does not list animals per se, it does list places to whose
- 9 cultural qualities animals contribute centrally. The Mattaponi River without its shad
- 10 would have lost its cultural integrity as surely as would Miami’s Little Havana if its
- 11 Cuban population moved away. The difference between the U.S. technique of addressing
- 12 the cultural significance of animals as aspects of the places in which that significance is
- 13 expressed and the Japanese approach of listing culturally significant animals directly is
- 14 vanishingly small.
- 15 e. If one were to evaluate the Okinawa dugong habitat in U.S. National Register terms, one
- 16 would very likely find the habitat eligible, with the dugong as central contributing
- 17 elements. Although in the Japanese system (in this case) the habitat may not be explicitly
- 18 listed though the animals are, since the animals would not be there without the habitat it
- 19 seems to me that, again, the difference between the two systems is negligible.

20 46. Accordingly, in my opinion the Japanese Registry is equivalent to the U.S. National Register

21 of Historic Places, and the Okinawa dugongs, together with their habitat, should be fully

22 considered under NHPA Section 402. The DOD’s Overseas Baseline Environmental Guidance

23 Document indicates that the military services should follow either the host country’s pertinent

24 rules or those of the United States, whichever are more stringent, in considering the Okinawa

25 dugongs under Section 402. *The Secretary of the Interior’s Standards and Guidelines for*

26 *Federal Agency Historic Preservation Programs Under the National Historic Preservation Act*

27 recommend consultation with host nation preservation authorities, affected communities and

28 groups, and relevant professional organizations<sup>22</sup> as the way to resolve conflicts like the one

presented here.

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<sup>22</sup> See Secretary of the Interior’s Standards at Standard 4, Guideline (m).

1 I declare under penalty of perjury and under the laws of the State of Maryland that the foregoing  
2 is true and correct.

3 Executed this 21st day of June, 2004, Silver Spring, Maryland.  
4

5 /s Thomas F. King  
6 Thomas F. King, Ph.D  
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## **Thomas F. King, PhD**

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**Professional Résumé**

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*Cultural Resource Impact Assessment and Negotiation, Writing, Training*

### **Employment**

*Presently:* Private consultant, educator, writer, facilitator in cultural resource management and environmental review; Archeologist, The International Group for Historic Aircraft Recovery Amelia Earhart Project. Senior Instructional Consultant, National Preservation Institute. Member, Sussex Archaeological Executive, advising the Government of Great Britain regarding archaeological recovery of HMS *Sussex* off Gibraltar.

*Formerly:* Expert consultant to U.S. General Services Administration, program director for Advisory Council on Historic Preservation, Consultant to the High Commissioner, Trust Territory of the Pacific Islands, Archeologist with the National Park Service, consulting archeologist, head of archeological surveys at San Francisco State University, UCLA, University of California Riverside.

### **Education**

*PhD*, University of California, Riverside, Anthropology, 1976.

*BA*, San Francisco State University (then College), Anthropology, 1968.

*Certificate:* Mediator, Bowie State University Center for Alternative Dispute Resolution, 1997.

### **Recent and current Clients**

*Government Agencies:* Bureau of Land Management California State Office; Bakersfield Field Office; USDA Forest Service. USDA Farm Service Agency, U.S. Fish and Wildlife Service. U.S. Navy, U.S. Air Force, U.S. Army, Federal Aviation Administration. Grand Canyon Monitoring and Research Center. City of Newport News, Virginia.

*Indian Tribes and Organizations:* Klamath River Intertribal Fish and Water Commission; Mole Lake Sokaogon Community of Lake Superior Chippewa Indians; Bad River and Red Cliff Bands of Lake Superior Tribe of Chippewa Indians. Hualapai Tribe. Round Valley Indian Tribes. Penobscot Tribe.

*Private Sector:* Blythe Energy Corp., Cingular Wireless. Odyssey Marine Exploration.

*Non-profit organizations:* National Preservation Institute.

## Thomas F. King: Courses Taught

Short courses for the National Preservation Institute, University of Nevada, Reno, General Services Administration, Advisory Council on Historic Preservation, Environmental Protection Agency, National Park Service, and Department of Defense in historic preservation and cultural resource law and policy, Section 106 review, National Environmental Policy Act implementation, identification and protection of traditional cultural properties, Native American consultation, environmental justice, conflict resolution, and related subjects.

## Thomas F. King: Publications (Selected)

### *Books and Monographs*

- *Places that Count: Traditional Cultural Properties in Cultural Resource Management.* AltaMira Press 2003
- *Thinking About Cultural Resource Management: Essays From the Edge.* AltaMira Press 2002.
- *Amelia Earhart's Shoes.* With R. Jacobson, K. Burns, and K. Spading. AltaMira Press, 2001.
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- *Cultural Resource Laws and Practice: An Introductory Guide.* AltaMira Press 1998 (Second edition in press: 2004)
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*Other*

- Curriculum material for short courses in historic preservation law and practice, identification and management of traditional cultural properties, environmental review, and related topics, for Advisory Council on Historic Preservation, University of Nevada, Reno, National Preservation Institute, and others.
- Videotapes on "historic contexts" and "traditional cultural properties," for National Park Service
- "E-Book" environmental review software, for General Services Administration

- "NEPA for Historic Preservationists and Cultural Resource Managers," worldwide web pages for National Preservation Institute.

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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15	_____ )	
16	OKINAWA DUGONG (Dugong Dugon), )	Civil Action No. C-03-4350 (MHP)
17	<i>et al.</i> , )	Honorable Marilyn Hall Patel
18	Plaintiffs, )	Courtroom 15
19	v. )	August 4, 2004, 2:00 p.m.
20	DONALD H. RUMSFELD, in his official )	
21	capacity as the Secretary of Defense, <i>et al.</i> , )	DECLARATION OF ISSHU MAEDA IN
22	Defendants. )	SUPPORT OF PLAINTIFFS' OPPOSITION
23	)	TO DEFENDANTS' MOTION TO DISMISS
24	)	
25	)	
26	_____ )	

27 1. My name is Isshu Maeda. I am a Special Researcher at Okinawa Kokusai University  
28 Ryukyu Culture Research Institute and a part-time lecturer at the University's Faculty of  
Cultural Studies. I hold a Master's Degree in sociology from the Okinawa Kokusai  
University Graduate School in Okinawa, Japan. My specialty is the significance of  
natural and living things on human culture in Okinawa Prefecture. As reflected in the  
attached résumé, I have focused for over ten years on documenting, writing, and lecturing  
on the human cultural values associated with living things in Okinawa. During this

1 period, I have worked for the Okinawa government, local museums, and Okinawa  
2 Kokusai University.

- 3  
4 2. I have prepared this declaration at the request of Japan Environmental Lawyers  
5 Federation (JELF), for the purpose of explaining to the Court various aspects of the  
6 Dugong's historic and cultural importance in Okinawa.
- 7 3. In preparing this declaration I have relied primarily on my research for a journal article I  
8 am presently authoring entitled "Cultural Aspects of the Okinawa Dugong." This  
9 research consists primarily of oral and documentary evidence that I have collected  
10 throughout Okinawa Prefecture over the past ten years.
- 11  
12 4. It is my understanding and belief that the Okinawa dugong is listed as a Protected  
13 Cultural Property (Natural Monument) under Japan's Law for the Protection of Cultural  
14 Properties due to its importance in Okinawa culture. The dugong's cultural attributes  
15 have been widely documented, and I attempt to describe some of the cultural attributes  
16 and related documentation in this declaration.
- 17  
18 5. In recognition of the historic and cultural significance of the Okinawa dugong, the  
19 Ryukyu government issued a postage stamp, Ex. 36, commemorating the Okinawa  
20 dugong in 1966, describing it as "Natural Monument Dugong (Mermaid)."  
21

22 The Dugong in Okinawa Creation Mythology and Tsunami Legends

- 23 6. Oral history related to the dugong in Okinawa demonstrates that the dugong is part of the  
24 traditional Okinawa creation mythology, because the dugong is regularly referenced in  
25 discussions concerning the origins of humanity among the people of Okinawa. For  
26 example, Fuyu Iha (1876-1947), a famous folklorist from Okinawa, documented folk  
27 legends from Nikijin Village, Kouri Island, Okinawa. One of these is the following:  
28

1 On Kouri Island there was a naked man and woman who lived by eating rice  
2 cakes received from the heavenly spirits. Once the couple got smart enough  
3 to think of storing the rice cakes, the spirits stopped providing them. The man  
4 and woman then looked up at the sky and sang, “Oh great moon, please give  
5 us a big rice cake, and we will find rock shells for you,” but nothing  
6 happened, and the couple had to labor for their food. One day when they were  
7 on the seashore looking for shells like *umaguru* and stringing them, they saw  
8 dugongs mating and became interested in sex, but they felt ashamed of their  
9 nakedness and started covering their private parts with *kuba* leaves. The  
10 descendants of that man and woman are today's Okinawans.

11 *See Fuyu Iha, Mythology of Ryukyu (1965).*

- 12 7. Similarly, a legend from Yakena, Yonashiro Town, Okinawa, recounts the following:

13 In a cave on Yabuchi Island a dugong princess and a short-finned pilot whale  
14 boy knew each other and a shining animal in human form was born. That  
15 child became the ancestor of Yabuchi Island, and the progenitor of the people  
16 of Yakena.

- 17 8. Dugong legends in Okinawa oral history are not limited to creation myths. Rather,  
18 Okinawa culture has long considered the dugong a revered but feared ocean spirit capable  
19 of creating tsunamis, or huge sea waves. For example, a legend written in 1748 recounts  
20 the following concerning a fish called “Yonatama.” An Ikema Island fisherman has  
21 explained to me that “yonatama” means dugong in the local Ikema Island dialect.

22 Long ago a fisherman from Shimoji Village on Irabu Island caught a fish  
23 called Yonatama. Apparently it had a fish body and a human face, and spoke  
24 human language. The fisherman thought he would like to eat this rare fish, so  
25 he lit some charcoal and started drying it. That night when people were  
26 sleeping and it was quiet, a neighbor's child started crying and saying he  
27 wanted to go to Irabu Island. When the worried mother held her child and  
28 went outside, a voice said, “Yonatama, Yonatama, why are you late coming  
home?” The fish hanging over the charcoal replied, “I’m being dried over a  
fire. Hurry and make a tsunami.” After hearing this exchange, the mother  
went to Irabu Island and told the villagers about it, then returned to Shimoji  
Village the next morning and found the whole village had been washed away.

“Shimoji Village on Irabu Island Swallowed by Huge Wave,” in *Old Chronicles of  
Miyako (1748), reprinted in Kenpu Inamura, Explication of Miyako Island Chronicles  
and Historical Poems, 1977.*

1 9. Such tsunami legends are also heard throughout the Sakishima Islands, in the Koja area  
2 of Okinawa City as reported by Koei Sakima, in Gushikawa City's Takaesu area, in  
3 Toyohara, and in Dana on Iheya Island.  
4

5 The Dugong as a Source of Sacred Royal Food

6 10. References to “salted dugong” and “dried and pickled dugong” in Volume 2 of *Origins of*  
7 *the Ryukyu* (1713) indicate that the Ryukyu royal household (prior to annexation by  
8 Japan in the late 19<sup>th</sup> Century, present day Okinawa Prefecture was ruled as the  
9 “Kingdom of Ryukyu”) also preserved dugong meat as highly valued food fit for  
10 Okinawa royalty. Similarly, in Volume 6, “Products and Produce,” of the *Chuzan*  
11 *Denshinroku* (1721), Jo Houkou writes: “*Haima* [dugong]: Has horse-like head and fish-  
12 like body, but no scales. Meat like that of a pig, and hard to obtain. When people get it,  
13 they first offer it to the king.”  
14

15 11. Okinawa royalty used dugong as a medicinal food source as well. Cultural  
16 anthropologist Momehei Suzuki writes, “According to the custom of the Ryukyu  
17 Kingdom's royal Sho Family, before women gave birth – even if it was not a difficult  
18 birth – they would always have the mother drink shavings of dried dugong (hide and  
19 meat dried together) over which hot water had been poured.” *About the Okinawa*  
20 *Dugong*, 1915.  
21

22 12. Although there is no scientific basis for believing that eating dugong meat will make  
23 childbirth easier, it was believed among not only royalty, but also among the common  
24 people of the Naha area, as reported by Choei Kinjo. *Complete Works of Choei Kinjo*,  
25 Volume 2, 1974.  
26  
27  
28

1 The Significance of Dugong Bones

2 13. Scholars believe that religious beliefs drove the use of dugong bones for tools. Evidence  
3 of the use of dugong bones for tools abounds.

4 14. Tools and ornaments made from dugong bones have been excavated from the stratum of  
5 Okinawa's Murokawa shell midden, dating to about 3,500 years ago. These tools and  
6 ornaments are believed to have been made from the ribs or lower jaws of dugongs.

7  
8 *Ancient Okinawa City*, 1995.

9 15. In June 1932, Sadahiko Shimada found “butterfly-shaped bone objects” made from  
10 dugong bones while excavating the Sachihija River archeological site in Okinawa. He  
11 observed that the objects were “waist ornaments of some kind,” and expressed the view  
12 that “instead of being just ornamental, these objects have a latent talismanic  
13 significance.” *Ryukyu Sachihija River Shell Midden*, 1937.

14 16. Subsequently, more such butterfly-shaped dugong bone objects were unearthed at other  
15 shell middens including at Kadena in Kadena Town, Murokawa in Okinawa City, and  
16 Kiga Beach in Katsuren Town, Tsuken Island.

17 17. According to archaeologist Takeo Kanesekei (1897-1983), the butterfly-shaped dugong  
18 bone objects found at Sakihi River and other shell middens correspond to the *taotie* (evil  
19 beasts that adorned bronze vessels) found in ancient Chinese culture. *Archeological*  
20 *Detective Work*, 1975.

21 18. Ethnologist Naoichi Kokubu (born 1908) believes that the use of carved bone objects in  
22 Okinawa derived from similar use on the southeastern coast of China south of the  
23 Yangtze River. He also believes that the culture of carving butterfly-shaped bone objects  
24 “had some kind of magic significance.” *Research on Japanese Ethnic Culture*, 1972.  
25  
26  
27  
28

1 19. Archaeologist Harumi Shimabukuro analyzed the morphological changes, materials, and  
2 earthenware found with the bone objects. She concluded that the butterfly-shaped objects  
3 could be divided into two types: those whose shapes gradually degenerate from crude  
4 shapes that make one imagine a butterfly; and those whose initial designs are divided into  
5 a number of others to make the butterfly shapes larger and more showy. These bone  
6 objects were mostly dugong bones, and were a cultural characteristic of the first half of  
7 Okinawa's Late Shellmound Period, occurring about 3,500 years ago. *About the*  
8 *Butterfly-Shaped Bone Objects* (1991).

10 20. Arrowheads appearing to be made from dugong bones have been unearthed at Katsuren  
11 Castle. Scholars believe that religious beliefs drove the use of dugong bones for  
12 arrowheads. For example, Shinobu Origuchi (1887-1953), one of the most famous  
13 folklorists and scholars of Japanese literature, writes, “The word *umisachi-yamasachi*  
14 [food from the sea and mountains] originally symbolized the power of fishermen and  
15 hunters,” and “Those who received the power of the hunted food were these semi-divine  
16 beings.” Thus it was believed that the hooks used at sea and bows and arrows used in the  
17 mountains held this powerful spirit, which was transferred to the people who used these  
18 tools and gave them the power to fish and hunt (“Swords and Jewels,” 1984). The fact  
19 that the bones of dugong were traditionally chosen for use as hunting tools suggests a  
20 belief that they were imbued with the type of magic significance necessary to make them  
21 especially effective for hunting.

#### 22 Dugong Names and Ecology

23 21. Villagers throughout the Okinawa Prefecture have many names for the dugong,  
24 including: *zan* (Iheya Island and Noho Island); *zannaa*, *akangwaiyuu* (Kunigami Village,  
25  
26  
27  
28

1 Ada); *zan* (Kin Town, Yaka); *zan, akangwaiyuu, akanaagwa* (Yonashiro Town, Yakena);  
2 *zan, akangwaiyuu* (Henza Island); *zan, jan* (Hamahiga Island); *zan, jan* (Miyagi Island);  
3 *zan, jan* (Ikei Island); *zan, jan, akangwaiyuu* (Tsuken Island); *janmii* (Tamagusuku  
4 Village, Ou); *zan* (Kume Island); and *zan, akangwaiyuu, yonatama* (Miyako Island,  
5 Hirara City; Ikema Island). These can be divided into the categories of *zan, akangwaiyuu,*  
6 *akanaagwa,* and *yonatama.*  
7

8 22. Dugongs are most frequently called *zan*. In Number 30 of Volume 9 and Number 95 of  
9 Volume 11 of *Omorosaushi* (a collection of songs from the year 1623), the term *san*  
10 appears in numerous songs. Depending on the geographic area, *san* is pronounced *zan* or  
11 *jan*. Although the etymology of *zan* is unknown, Toshiro Kamiya, a specialist in  
12 comparative anatomy of aquatic mammals, explains, “*Zan* means tsunami, and one  
13 interpretation is that if you catch this fish something bad will happen, a tsunami will  
14 come.” *A Natural History of Mermaids*, 1989.  
15

16 23. *Akangwaiyuu* is the word most often used by fishermen. The “iyuu” end of the word  
17 means “fish” in Okinawa. Toshiro Kamiya believes this name was given by people who  
18 have seen a mother dugong suckle her offspring. According to a 51-year-old man at  
19 Yakena, “Mother dugongs have breasts by their front fins, so when the young are  
20 suckling, the mother is holding them. It's just like humans.” Based on this relationship  
21 between fish and human ecology, Kamiya believes the name *akangwaiyuu* signifies that  
22 the dugong is a cultural archetype for mermaids. *A Natural History of Mermaids*, 1989.  
23

24 24. *Yonatama* is used on Miyako island. Kunio Yanagida (1875-1962), one of Japan’s most  
25 famous folklorists, expressed this view about the name: “Yona is sometimes *ina* or *una*,  
26 archaic Japanese words still used throughout Japan to mean ocean.” “Tama” means  
27  
28

1 “soul” or “spirit” in Japanese. Yanagida continues, “If that is not mistaken, *yonatama*  
2 means ocean spirit, in other words, a spirit of the sea on the order of the soul of the  
3 nation.” *Talking Fish*, 1981. This name reflects the dugong’s cultural role as an ocean  
4 spirit.  
5

6 25. This survey of dugong names demonstrates some of the important cultural-linguistic  
7 attributes of the Okinawa dugong.

### 8 Blessings of the Sea and Dugongs

9  
10 26. When the fishing season opens in Okinawa, the fish come from far away. The old-timers  
11 call these fish and shellfish *yuimun*, meaning “things drawing near,” which are said to be  
12 blessings from the spirits in *Niraikanai* (paradise). A number of observances are  
13 conducted throughout Okinawa to ask for good fishing. A good example is the *Misezeru*  
14 rite of the “Toshiamenokoto” on Iheya Island, as described in Volume 16 of *Origins of*  
15 *the Ryukyu* (1713). The rite’s sacred song expresses the villager’s wish to *Niraikanai* that  
16 they may catch many fish. This observance is no longer conducted, but Shinobu  
17 Origuchi, who visited Tsuken Island in Okinawa in 1921, wrote the following description  
18 of an observance in which villagers caught *yuimun* and thanked the village spirits.  
19

20 On Tsuken Island, Nakagami County, the island's [fishing season] observance  
21 is called “Ufunaa Ceremony.” At that time they slaughter some dugongs,  
22 which come to the island just at that time, and offer them to the mountains.  
23 The leftover meat and broth are divided among the island's men and women.  
24 People not of this island say that the island has a sacred mountain “Zan-utaki”  
25 where the dugong is enshrined, but if one were to ask the islanders they would  
26 surely frown and deny it. (*The Story of Shinodazuma*, 1997).

27 27. Genshichi Shimabukuro tells about the *omoi* (Okinawa religious poetry) of the “Ungami”  
28 observance of Ogimi Castle. After playing with a rope, the spirit of *Niraikanai* shows by  
gestures that it is returning to the sea with the dugong. *Local Customs of Yambaru*, 1929.

1 28. The dugongs and other marine life in the Ryukyu sea were *yuimun* that regularly came  
2 from the sea, but there were also evil *yuimun*. Botanist Tokutaro Ito (1868-1941) relates  
3 a story in which a dugong caught in Baten Bay around October 1875 was hung from a  
4 banyan tree at Ryutan Pond, and the next February there was an epidemic among pigs.  
5 *Miscellaneous Record of Flora and Fauna Collecting in the Yaeyama Islands of Ryukyu*,  
6 date unknown. The Okinawans believed that the epidemic was caused by a curse of the  
7 captured dugong.  
8

9 29. There is a very interesting account in *Research on the History of Marine Traffic in Japan*  
10 (1973) by folklorist Toshio Kitami. Kitami observed fishing practices at Hateruma Island  
11 and reported, “When trying to catch a dugong, they would have one or two young men lie  
12 in the bottom of the boat and tie their penises with straw. It was believed that no dugong  
13 would be caught without this magic spell.” It is believed that the fishermen would have  
14 the young men expose their penises to attract the dugong, because the dugong was  
15 thought of as a female mermaid spirit.  
16  
17

18 30. Many islands in Okinawa Prefecture have hidden sanctuaries called “*Utaki*.” An *Utaki* is  
19 a place for worship based on unique Okinawa indigenous beliefs. Among these *Utakis*,  
20 there are some *Utakis* dedicated to the deification of the Okinawa dugong. For example,  
21 a *Utaki* on Kamiji Island is called Zan-Nu-On (*Utaki* of Zan (Dugong)), and is used to  
22 pray for successful fishing expeditions.  
23

24 31. The people of Aragusuku Island in Okinawa Prefecture retain various traditional folk  
25 songs related to dugong, including some that offer praise for catching dugong. One of  
26 those is called “*Zanturi Yunta*.” A *Yunta* is a descriptive song for laboring. This song  
27 commemorates the labor of making traditional nets to catch dugong, and also describes  
28

1 women who run to see *Zan* (dugong) when the fishermen come in from sea. This is  
2 evidence of the dugong's prevalence in Okinawa folk culture.

3  
4 32. Another song recounts that "some young girl stumbled over a dugong couple, and her  
5 private parts were exposed," and that "her kimono skirt got unfolded because she was in  
6 such a rush, so she had to close it." Another song tells the story of a young couple that  
7 came to see dugong couple. They felt too shy to see dugongs directly because they had  
8 exactly the same breasts and abdomens as human beings." Many other folk songs  
9 describe dugong and human culture with similar eroticism and humor.

10  
11 33. In Aragusuku Island, these folk songs were traditionally sung and danced to by many  
12 people during the lunar calendar New Year (lunar January) celebration and the seasonal  
13 festival in lunar July. Participants typically enjoyed a dance depicting a dugong hunt, and  
14 women and men joined the circle alternately. In some songs, young girls were set in the  
15 center of circle as dugong, and people surrounding them shrank the circle as if they were  
16 catching the dugong in a net. Kennichi Tanikawa, *Works of Kennichi Tanikawa*, October  
17 1980, Volume 1, Page 243.

18  
19 34. Many religious songs containing references to the dugong are regularly sung by the  
20 people living in and around Nago City and Henoko Bay, Okinawa. Indeed, the songs will  
21 be sung in the "Umachii" observance on July 31, 2004, by shamans and residents of  
22 Henoko.

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct.

3 Executed this 21st day of June, 2004, Okinawa, Japan.

4  
5 /s Isshu Maeda \_\_\_\_\_  
6 Isshu Maeda  
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## ISSHU MAEDA

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2002-Present: Part-Time Lecturer, Sociocultural Studies Department, Faculty of Cultural Studies, Okinawa Kokusai University

2002-Present: Naha City Non-Profit Organization Support and Activities Center

1997-Present: Cultural Property Interpretive Tour Guide, Independent Consultant

2002: Director of Planning, Planning and Coordination Section, Yonashiro Town Office, Okinawa

2001: Director, Cultural Properties Program, Okinawa City Local History Museum

2000: Staff, Survey Section, Okinawa Prefecture Buried Cultural Properties Center

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Okinawa Geographical Society (2002)

## **Publications**

Maeda, Isshu, "Dugong, the Marine Creature from Niraikanai," parts 1-5, *Okinawa Times*, October 10-19, 2000, *Okinawa Times*, 2000.

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## **Seminars and Other Activities**

Maeda, Isshu, "Grave Forms in Yakena and Their Changes," 1996 Okinawa Society of Ethnology Graduation Thesis Presentations, Oral Presentation in February 1997.

Maeda, Isshu, "Grave Forms in Yakena and Their Changes," 1996 Okinawa Society of Ethnology Graduation Thesis Presentations, Oral Presentation in March 1997.

Maeda, Isshu, "Okinawan Culture and the Dugong," February 2001 oral presentation at the symposium, "Can the Dugong Survive?" hosted by the NGO Rights of Nature Fund and the Japan Environmental Lawyers Federation.

Maeda, Isshu, "Local Communities and Local Currencies in Okinawa," December 2002 oral presentation, Reports at the Fifth Local Currency Study Session of the Uchina Awa Local Currency Steering Committee.

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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15	_____ )	
16	OKINAWA DUGONG (Dugong Dugon), )	Civil Action No. C-03-4350 (MHP)
17	<i>et al.</i> , )	Honorable Marilyn Hall Patel
18	Plaintiffs, )	Courtroom 15
19	v. )	August 4, 2004, 2:00 p.m.
20	DONALD H. RUMSFELD, in his official )	DECLARATION OF SEKINE TAKAMICHI
21	capacity as the Secretary of Defense, <i>et al.</i> , )	IN SUPPORT OF PLAINTIFFS’
22	Defendants. )	OPPOSITION TO DEFENDANTS’ MOTION
23	_____ )	TO DISMISS

24 1. My name is Sekine Takamichi. I am an attorney, duly licensed under the laws of Japan.

25 As detailed in the attached résumé, I have lectured and published articles on various  
26 topics of Japanese, United States, and international law. I earned an LLM degree in US  
27 law from Lewis and Clark College, Northwestern School of Law. I am a member of  
28 Plaintiff Japanese Environmental Lawyers Federation (JELF) and I submit this  
declaration in my professional capacity.

It is my professional and scholarly opinion that the listing of the Okinawa Dugong on the  
Japanese Cultural Properties Register is the equivalent of a similar listing on the U.S.

1 National Register, and that there is no other Japanese list that would serve as the  
2 equivalent of the U.S. National Register.

3  
4 3. In preparing this declaration I have reviewed:

5 Japanese Laws and Government Documents

- 6 • Japanese Law for the Protection of Cultural Properties (Japanese Cultural Protection  
7 Law)
- 8 • Japanese Law for the Preservation of National Treasures
- 9 • Japanese Law for the Preservation of Important Art Works
- 10 • Japanese Law for the Preservation of Historic Sites, Scenic Locations and Natural  
11 Monuments
- 12 • Japanese Law for the Conservation of Nature
- 13 • Japanese Natural Parks Law
- 14 • Japanese Law for the Conservation of Endangered Species of Wild Fauna and Flora
- 15 • Japanese Law for the Protection of Birds, Mammals and Hunting
- 16 • Japanese Forest Law
- 17 • Japanese Fisheries Law
- 18 • Japanese Law for the Preservation of Fisheries
- 19 • Proceedings of the 123rd House of Representatives Foreign Affairs Committee, No.  
20 10, May 26, 1992
- 21 • Proceedings of the 123rd House of Councilors Foreign Affairs Committee, No.10,  
22 June 28, 1992
- 23 • Japanese Cultural Properties Protection Committee, Official Gazette Notice No.2,  
24 1951
- 25 • Ryukyu Cultural Properties Protection Committee, Ryukyu Government Official  
26 Gazette Notice No. 2, January 7, 1955
- 27 • Ryukyu Cultural Properties Protection Committee, Ryukyu Government Official  
28 Gazette Notice No. 4, January 25, 1955
- *Natural Monuments of Japan*, Monuments and Sites Division, Japanese Agency  
for Cultural Affairs
- *The Destruction of Cultural Properties Inside the U.S. Military Bases*, Okinawa  
Prefectural Government, 1996

22 U.S. Laws

- 23 • U.S. National Historic Preservation Act
- 24 • U.S. Endangered Species Act
- 25 • Department of Defense (DoD) Instruction 4715.5, Management of Environmental  
26 Compliance at Overseas Installation, April 22, 1996
- 27 • DoD Instruction 4715.5-G, Overseas Environmental Baseline Guidance Document,  
28 March 15, 2000
- DoD Japan Environmental Governing Standards, October 2001

Other Materials

- Declaration of Isshu Maeda

- 1           • Declaration of Thomas F. King
- 2           • *Can Places of Scenic Beauty and Natural Monuments be Considered "Cultural*
- 3           *Properties?"*, by Akira Neki, Nagaoka University of Technology Reports, Vol.17
- (1995)

4           4. In Japan, there is currently only one law for the protection of cultural properties. The

5           Japanese Law for the Protection of Cultural Properties (“Japanese Cultural Protection

6           Law”), Ex. 20 (Government of Japan (GoJ) translation), was promulgated on May 30,

7           1950, and took effect on August 29, 1950. It has since been amended various times.

8           5. Before the Japanese Law was enacted, so-called “tangible cultural properties” such as

9           works of art and temple or shrine buildings were protected under the 1929 National

10           Treasure Preservation Law and the 1933 Law for the Preservation of Important Art

11           Works, while historic sites, scenic areas, natural environments, and certain other

12           “monuments” were protected by the 1919 Law for the Preservation of Historic Sites,

13           Scenic Locations and Natural Monuments. The 1950 Japanese Law integrated these laws

14           into a single law for the protection of cultural properties.

15           6. There are also several Japanese laws that protect wild animals for their biological value.

16           Such laws include the 1972 Japanese Law for the Conservation of Nature, the 1957

17           Japanese Natural Parks Law, the 1992 Japanese Law for the Conservation of Endangered

18           Species of Wild Fauna and Flora, the 1918 Japanese Law for the Protection of Birds,

19           Mammals and Hunting, the 1951 Japanese Forest Law, the 1949 Japanese Fisheries Law,

20           and the 1951 Japanese Law for the Preservation of Fisheries.

21           7. Pursuant to the 1997 Japanese Environmental Impact Assessment Law, GoJ and its

22           political subdivisions must in some instances prepare “Environmental Impact

23           Assessments” related to certain government projects. *See Japanese Environmental*

24           *Impact Assessment Law, Law No. 81 of 1997, GoJ translation at*

1            <http://www.env.go.jp/en/lar/assess/index.html> (last visited June 15, 2004). However,  
2            this law does not require the assessment of impacts to cultural resources or mandate that  
3            the potential impacts of the project to biological or cultural resources be avoided or  
4            mitigated. Nor does this law require the assessment of alternatives to the proposed  
5            project. Indeed, assessments under this law are typically conducted only after the project  
6            site has been chosen and resources irreversibly committed to carrying out the project at  
7            the predetermined site. According to Article 1 of the 1950 Japanese Cultural Protection  
8            Law, “[t]he purpose of this law is to preserve and utilize cultural properties, so that the  
9            culture of the Japanese people may be furthered and a contribution be made to the  
10            evolution of world culture.”

11  
12  
13        8. Article 3 of the Japanese Law clarifies the role of cultural properties in Japanese society:  
14            “the cultural properties of the country are indispensable to the correct understanding of its  
15            history, culture, etc., and ... they form a foundation for its cultural development for the  
16            future.”

17  
18        9. The Japanese Law divides cultural properties into five categories: Tangible Cultural  
19            Properties, Intangible Cultural Properties, Folk-cultural Properties, Monuments, and  
20            Traditional building groups. *See* Japanese Law at Article 2. Items from any of these  
21            categories may be administratively designated for preservation and protection.

22            Designated cultural properties are listed on the Japanese Register of Cultural Properties.

23  
24        10. The Japanese Law indicates that “animals (including their habitats, breeding places and  
25            summer and winter resorts)” may be designated as protected cultural properties. *See*  
26            Japanese Law at Article 2(4).  
27  
28

1 11. The designation criteria for special historic sites, places of scenic beauty and/or natural  
2 monuments, and for historic sites, places of scenic beauty and/or natural monuments are  
3 provided in the Official Gazette Notice No.2 of the Japanese Cultural Properties  
4 Protection Committee, 1951. The designation criteria for natural monuments are “flora,  
5 fauna, and geological features and minerals that are of great scientific-historic value and  
6 that commemorate Japan’s natural environment.”  
7

8 12. Notably, these criteria include items with “great scientific-historic value” that  
9 “commemorate Japan’s natural environment.” This indicates that natural objects of only  
10 biological value are not eligible for protection under the Japanese Cultural Protection  
11 Law; rather, it is only objects with a historic and cultural value that are eligible. Like the  
12 NHPA, the Japanese Cultural Protection Law is intended to achieve objectives other than  
13 species protection, and species with no independent cultural value are not eligible for  
14 listing under the Japanese Cultural protection Law, no matter how endangered they may  
15 be.  
16  
17

18 13. Many natural properties are protected in Japan as cultural properties under the Japanese  
19 Cultural Protection Law even though they are not threatened or endangered from a  
20 scientific perspective. For example, numerous large trees have been designated as natural  
21 monuments in Japan because of their cultural value, even when those trees are not rare  
22 from a scientific viewpoint.  
23

24 14. Some natural objects (like the Okinawa dugong), by contrast, are protected by one or  
25 more of Japan’s environmental laws due to their biological value, and also listed on the  
26 Japanese Register of Cultural Properties pursuant to the Japanese Cultural Protection  
27  
28

1 Law. This indicates that a listing in the Register of Cultural Properties is not intended to  
2 (and does not) provide the same type of protections as do the environmental laws.

3 15. If the Okinawa dugong were of concern only for species conservation purposes, it would  
4 not be listed in the Japanese Register of Cultural Properties pursuant to the Japanese Law  
5 for the Protection of Cultural Properties. Instead, the Okinawa dugong would be  
6 protected only under the Japanese Law for the Protection of Birds and Mammals and  
7 Hunting and/or the Japanese Preservation of Fisheries Resources Law, which presently  
8 protect the Okinawa dugong for its biological, rather than cultural, values.

9 16. The Okinawa dugong has been designated for protection as a cultural property in Japan  
10 on three separate occasions. Most recently, the Okinawa dugong was designated by the  
11 Government of Japan on May 15, 1972, as protected Natural Monument Number 947 on  
12 the Japanese Register of Historic Sites, Places of Scenic Beauty and/or Natural  
13 Monuments (Japanese Register) and pursuant to the Japanese Law. *See* Japanese  
14 Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments, Ex. 31.  
15 The listing indicates that the dugong’s “habitat/site” is “Okinawa.” *Id.* The listing also  
16 notes that the dugong requires preservation as a “prominent species” in Japan. *Id.*

17 17. The May 15, 1972 designation by GoJ was carried over from a previous designation by  
18 GoJ’s predecessor government in Okinawa Prefecture. After World War II, Okinawa  
19 Prefecture was administered by the US-controlled Ryukyu Government. During the post-  
20 war period, the Ryukyu Government enacted a Cultural Properties Protection Law (Law  
21 No. 7 of 1954) similar to the 1950 Japanese Cultural Protection Law.

22 18. Notice No. 4 of the Ryukyu Government’s Cultural Properties Preservation Committee,  
23 enacted on January 25, 1955, established the criteria for selecting special historic sites,  
24  
25  
26  
27  
28

1 scenic areas, natural monuments, and other items. The criteria for designating culturally  
2 important animals were exactly the same as those under the 1950 Japanese Cultural  
3 Protection Law, Official Gazette Notice No. 2 of the Japanese Cultural Properties  
4 Protection Committee (1951), except that the word “Japan” was replaced with “Ryukyu.”

5  
6 19. Pursuant to the Ryukyu Government’s Cultural Properties Protection Law, on January 7,  
7 1955, the Ryukyu Cultural Properties Protection Committee designated the Okinawa  
8 dugong as a Natural Monument. *See* Ryukyu Cultural Properties Protection Committee,  
9 Ryukyu Government Official Gazette Notice No. 2 (Jan. 7, 1955), Ex. 32. The Gazette  
10 Notice designates the Okinawa dugong as a “Natural Monument,” and provides that  
11 “Habitat/site” is “Waters near Ryukyu.” *Id.*

12  
13 20. The Ryukyu Government Register of Cultural Properties, now archived by the Okinawa  
14 Prefectural government, confirms that the Okinawa dugong was designated as a protected  
15 cultural property by the Ryukyu government in January 1955, pursuant to the Ryukyu  
16 Government Official Gazette Notice.

17  
18 21. The references in the Ryukyu Government Official Gazette Notice to the Okinawa  
19 dugong’s various names (mermaid, sea horse, *zannoiyu*) illustrate some of the cultural  
20 attributes that underpin the 1955 listing of the Okinawa dugong. *See* Maeda Declaration  
21 ¶¶ 21-25.

22  
23 22. Additionally, the Ryukyu Government Official Gazette Notice states that “[the Okinawa  
24 dugong] has been designated as a natural monument since before WW II.” This suggests  
25 that the Okinawa dugong had been designated a natural monument under the 1919 Law  
26 for the Preservation of Historic Sites, Scenic Locations and Natural Monuments, which  
27 was a predecessor of the 1950 Cultural Properties Protection Law.  
28

1 23. One prominent Japanese scholar has explained why Natural Monuments are considered  
2 “Cultural Properties” under the Japanese Cultural Properties Law. First, he explains that  
3 Natural Monuments are part of humanity’s cultural existence, and that a Natural  
4 Monument normally obtains the characteristics of a cultural property as soon as any  
5 cultural value is attached to it. Second, he notes that the collective conscience of the  
6 Japanese people has come to understand Natural Monuments to be cultural properties.  
7 Third, he observes that the Japanese Law imposes stricter preservation standards on  
8 Natural Monuments than do the parallel Japanese environmental laws. *See Akira Neki,*  
9 *Can Places of Scenic Beauty and Natural Monuments be Considered “Cultural*  
10 *Properties”?*, Nagaoka University of Technology Reports, Vol.17 (1995), Ex. 33.

13 24. In its pamphlet, *Natural Monuments of Japan*, the Monuments and Sites Division of the  
14 Agency for Cultural Affairs explains that Natural Monuments are culturally significant  
15 for at least three reasons: (1) as “witnesses” to history they assist in the study of Japan’s  
16 “natural history;” (2) as records of Japan’s “natural record” they preserve the record of  
17 Japan’s cultural and natural climate; and (3) as records of the “interaction of humans and  
18 nature” help to describe images of Japan and the interaction of the Japanese people and  
19 nature and thereby hold significance as “cultural history.” *See Monuments and Sites*  
20 *Division, Japanese Agency for Cultural Affairs, Natural Monuments of Japan, Ex. 37.*

23 25. In March, 2004, a JELF representative filed a document request with the Naha Defense  
24 Facility Agency (NDFA), an agency of the Okinawa Prefectural government, requesting  
25 copies of GoJ’s many requests for DoD approval to enter Camp Schwab to carry out  
26 work related to the Technical Survey Related to the Construction of the Futenma Airport  
27 Relocation Facility (“Survey Plan”), Ex. 17, and copies of DoD’s responses to those  
28

1 requests. Although NDFA has not yet delivered copies of the requested documents,  
2 NDFA has informed the JELF representative in writing of the dates and titles of the  
3 responsive documents it has thus far collected. These include documents related to  
4 DoD's granting of permissions to NDFA to enter Camp Schwab to implement the Survey  
5 Plan. *See* NDFA Letter Regarding Disclosure (May 28, 2004), Ex. 18. Similarly, DoD  
6 has approved NDFA's construction and use of an office building within Camp Schwab to  
7 manage its on-site work related to SBF construction. *See Naha Facility Agency*  
8 *established Office in Camp Schwab: Three-management supervisor permanent residence*  
9 *for Futenma alternative facility construction*, RYUKYU SHIMPO, Sept. 4, 2003, Ex. 19.  
10  
11

### 12 13 World Heritage Convention

14 26. Treating the listing of the Okinawa Dugong on the Japanese Cultural Properties Register  
15 as the equivalent of a listing on the U.S. National Register is consistent with the  
16 obligations of Japan and the United States under the Convention Concerning the  
17 Protection of the World Cultural and Natural Heritage. Both the United States (1973)  
18 and Japan (1992) are parties to the Convention.  
19

20 27. The Convention is implemented in Japan by three laws that existed at the time of Japan's  
21 accession to the Convention: the Japanese Law for the Protection of Cultural Properties,  
22 the Japanese Law for the Conservation of Nature, and the Japanese Natural Parks Law.  
23 *See* Proceedings of the 123rd House of Representatives Foreign Affairs Committee, No.  
24 10 (May 26, 1992), Ex. 34; Proceedings of the 123rd House of Councilors Foreign  
25 Affaires Committee, No.10 (June 28, 1992), Ex. 35.  
26  
27  
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1 28. The Convention allows for the protection of “natural heritage” and “cultural heritage.”  
2 *See Convention Concerning the Protection of the World Cultural and Natural Heritage:*  
3 *Decisions Adopted by the 27th Sess.*, U.N. Educational, Scientific and Cultural  
4 Organization, World Heritage Comm., 27th Sess., U.N. Doc. WHC-03/27.COM/24 (Dec.  
5 10, 2003), at <http://whc.unesco.org/toc/mainf17.htm> (“Convention Text”) (last visited  
6 June 15, 2004), Articles 1 and 2. In some cases, World Heritage is designated as both  
7 “natural heritage” and “cultural heritage.”  
8

9  
10 29. This illustrates the customary international view, and the view of the parties to the  
11 Convention, that natural objects can have cultural attributes that merit and require legal  
12 protection.

13 30. In Japan, items that require protection as “cultural heritage” under the Convention are  
14 protected pursuant to the Japanese Law for the Protection of Cultural Properties. *See*  
15 *supra*, ¶ 27.  
16

17 31. In Japan, items that would be protected as “natural heritage” under the Convention are  
18 protected by the Japanese Law for the Conservation of Nature, the Japanese Natural  
19 Parks Law, or the Japanese Law for the Protection of Cultural Properties. *See supra*,  
20 ¶ 27.  
21

22 32. In Japan the Okinawa Dugong is listed pursuant to the Japanese Law for the Protection of  
23 Cultural Properties, the only Japanese law that protects Japan’s cultural heritage pursuant  
24 to the Convention, for its cultural attributes. The Okinawa dugong is not specifically  
25 protected under the Japanese Law for the Conservation of Nature or the Japanese Natural  
26 Parks Law.  
27  
28

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct.

3 Executed this 21st day of June, 2004, Osaka, Japan.

4  
5 /s Sekine Takamichi \_\_\_\_\_  
6 Sekine Takamichi  
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## Sekine Takamichi

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### EDUCATION

*Lewis & Clark College, Northwestern School of Law*

LL.M. Environmental and Natural Resources Law, 1991

*Legal Training Institute of the Supreme Court of Japan, 1985*

*Waseda University, Japan, B.A. Law, 1979*

### TEACHING EXPERIENCE

School of Policy Studies, Kwansei Gakuin University

Professor, 1999 - Present

Adjunct Professor, 1998-1999

*Undergraduate Level Courses*

- Environmental Law
- Comparative Environmental Law
- Environmental Impact Assessment; Introductory Policy Study
- Business Law

*Graduate Level Courses*

- Policy Study; Ecosystem Study
- Local Environment Protection

Lecturer, Nara Sangyo University, 2001- Present

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- Seminar in Environmental and Historic Environment Preservation Law

### PROFESSIONAL STANDING

Licensed to practice law in Japan since 1979.

### PROFESSIONAL ASSOCIATIONS

*Memberships*

- Japan Environmental Lawyers Federation
- Japanese Environmental Law and Policy Society
- Japanese Environmental Sociology Society

- Public Nuisance Counter-measures and Environmental Protection Committee of Osaka Bar Association
- Environmental Advisory Committee of Takasago City

*Board Memberships*

- Counter-measures and Environmental Protection Committee of the Japan Federation of Bar Associations
- Nature Conservation Society of Japan

**MAJOR PUBLICATIONS**

*Authored Chapters in the Following Books (In Japanese):*

- Thinking about Marine Environment (November 1994)
- Environmental Studies Challenge toward the 21 Century (November 1995)
- The Rights of Nature – How Far the Law Can Protect Nature? (June 1996)
- Environmental Ethics and Market Economy (September 1997)
- Environment and Ethics – Toward the Co-existence of Human and Nature (August 1998)
- Environmental Non-Governmental Organizations (November 1998)
- Why Should We Protect Wildlife? (May 1999)
- Introduction to Environmental Law – From Public Nuisance to Global Environmental Issues (June 1999)
- Non-Governmental Organizations and Non-Profit Organizations as Pioneers of the 21 Century (April 2001)
- Protection and Law for Wildlife from Ecological Standpoint (November 2003).

*Articles (In Japanese):*

- Environmental Impact Assessment in Japan – Origin and Evolution of Japan's Assessment System, (January 1991)
- Environmental Protection, Destruction and Litigation in Japan ~ With Reference to Japan's Environmental Exploitation in Asia (July 1994)
- Trends of Litigation for the Rights of Nature in US (December 1997)
- Comparative Law Study of Endangered Species Acts of US and Japan – With Emphasis on Differences of the Acts (September 1999)
- Who Has Standing for the Environment? – Comparative Law Study of Environmental Standing (March 2002)
- Okinawa Oku-Yona Forest Road and Legal Issues Related (March 2003)
- Nature Management of Coastal Zone and Policy Science (October 2003)
- Okinawa Dugong and Environment Justice – Henoko Seabased Facility and Extraterritorial Application of U.S. Environmental Law (March 2004)
- Judicial Decision Review: Amami Black Rabbit Case – The Rights of Nature and Environmental Standing (April 2004)

*Translations*

- Daniel J. Rohlf, The Endangered Species Act of 1973 – A Guide to its Protections and Implementation (Stanford Environmental Law Society, 1989)(April, 1997) (Book)
- Sierra Club v. Morton, 405 U.S. 727 (1972) (translation published 1996)

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10 *Counsel for Plaintiffs*  
11 Okinawa Dugong (Dugong dugon), *et al.*

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15	_____ )	
16	OKINAWA DUGONG (Dugong Dugon), )	Civil Action No. C-03-4350 (MHP)
17	<i>et al.</i> , )	Honorable Marilyn Hall Patel
18	Plaintiffs, )	Courtroom 15
19	v. )	August 4, 2004, 2:00 p.m.
20	DONALD H. RUMSFELD, in his official )	[PROPOSED] ORDER DENYING
21	capacity as the Secretary of Defense, <i>et al.</i> , )	DEFENDANTS' MOTION TO DISMISS
22	Defendants. )	
23	_____ )	

24 Having reviewed Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint,  
25 and Plaintiffs' responsive pleadings, this Court hereby **DENIES** Defendants' motion.

26 IT IS SO ORDERED.

27 Dated: \_\_\_\_\_, 2004.

28 \_\_\_\_\_  
UNITED STATES DISTRICT COURT

1 J. MARTIN WAGNER (Cal. Bar No. 190049)  
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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
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17	<i>et al.</i> , )	Honorable Marilyn Hall Patel
18	Plaintiffs, )	Courtroom 15
19	v. )	August 4, 2004, 2:00 p.m.
20	DONALD H. RUMSFELD, in his official )	CERTIFICATE OF SERVICE
21	capacity as the Secretary of Defense, <i>et al.</i> , )	
22	Defendants. )	
23	_____ )	

24 I am a citizen of the United States and a resident of the State of California. I am over 18  
25 years of age and not a party to this action. My business address is 426 Seventeenth Street, 6th  
26 Floor, Oakland, California, 94612.

27 On June 21, 2004, I served a true and correct copy of the following documents:

- 28 - Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss;
- [Proposed] Order;
- Declaration of Thomas F. King
- Declaration of Isshu Maeda;
- Declaration of Sekine Takamichi; and
- Certificate of Service

1 *via electronic mail using the CM/ECF system* on the party listed below:

2 Charles Shockey  
3 charles.shockey@usdoj.gov

4 and via *facsimile* and *First Class mail* on the party listed below:

5 James Coda  
6 Department of Justice  
7 450 Golden Gate Ave.  
8 PO Box 36055  
9 San Francisco, CA 94102

10 I, Alyssa Johl, declare under penalty of perjury that the foregoing is true and correct.  
11 Executed this 21st day of June, 2004, at Oakland, California.

12 /s Alyssa Johl \_\_\_\_\_  
13 Alyssa Johl