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DISTRICT COURT OF GUAM

CENTER FOR BIOLOGICAL
DIVERSITY, and PRUTEHI
LITEKYAN: SAVE RITIDIAN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE NAVY; LLOYD J. AUSTIN III, in
his official capacity as Secretary of
Defense, UNITED STATES
DEPARTMENT OF DEFENSE;
CARLOS DEL TORO, in his official
capacity as Secretary of the Navy;
UNITED STATES FISH AND
WILDLIFE SERVICE; and DEBRA
HAALAND, in her official capacity as
Secretary of the Interior,

Defendants.

Case No.:

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF
UNDER THE ENDANGERED
SPECIES ACT,
ADMINISTRATIVE
PROCEDURE ACT, AND
FREEDOM OF INFORMATION
ACT**

INTRODUCTION

1. Plaintiffs, the Center for Biological Diversity (“the Center”) and Prutehi Litekyan: Save Ritidian (“Prutehi Litekyan”), challenge the failure of the Defendants, the United States Department of the Navy (“Navy”) and the United States Fish and Wildlife Service (“the Service”), to comply with their affirmative duties and the strict procedural requirements under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”) and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”), to protect and conserve more than a dozen endangered and threatened species at imminent risk of extinction on Guam from the Defendants’ construction and operation of a United States Marine Corps (“USMC”) base known as Camp Blaz (“the Relocation Project” or “the Project”). Plaintiff the Center also raises claims challenging the failure of the Navy to produce records and final determinations to the Center under the Freedom of Information Act, 5 U.S.C. § 552(a)(3) and (b).

2. The Project involves the relocation of 5,000 marines and their dependents from Okinawa, Japan to Guam. It is an expansive military installation that includes a main cantonment area (“Main Cantonment”), housing facilities, a Live-Fire Training Range Complex (“Firing Range Complex”) and an associated “Surface Danger Zone” (i.e., an exclusion area), and aircraft overflights.

3. This massive development is causing great harm to Guam's endangered plants and animals including some of the most imperiled species in the world, and has destroyed hundreds of acres of Guam's last remaining native limestone forests. It has even disturbed human remains and cultural resources.

4. The Relocation Project, and the Firing Range Complex in particular, is devastating the once-pristine, biodiverse ecosystem at Ritidian (also known as Litekyan), one of the most ecologically and culturally sensitive places on Guam. Located on Guam's northernmost cliffs, Ritidian is a testament to the island's ecological and cultural richness, with its sandy beaches, lush limestone jungles, and vibrant coral reefs, and was once a sanctuary for Guam's rare and fragile plants and animals which are now struggling to survive. The military's Relocation Project stands in stark juxtaposition, casting a dark shadow over this once-thriving sanctuary and presenting an existential threat to the delicate balance of Ritidian's biodiverse ecosystem and the endangered species that depend on it for survival.

5. For instance, much of Firing Range Complex was built on areas that had been set aside as mitigation for Air Force military actions in 2006, and has destroyed and degraded key recovery habitat for three protected bird species—the Guam Kingfisher (“sihek” in CHamoru), Mariana Crow (“åga”), and Guam Rail (“ko'ko”)—all of which are extirpated from Guam due to past military activities. It was also constructed directly on some of the only remaining habitat for the rare

Mariana eight-spot butterfly (“ababang”), the already struggling *Cycas micronesica* (“fadang”) adjacent to the only adult tree of *Serianthes nelsonii* (“håyun lågu”) on Guam, and within “critical habitat,” 16 U.S.C. § 1532(5), for the Mariana Fruit Bat (“fanihi”) that Defendant U.S. Fish and Wildlife Service (“the Service”) formally designated in 2004 under the ESA. 69 Fed. Reg. 62,944 (Oct. 28, 2004).

6. All told, the Relocation Project detrimentally impacts 15 endangered and threatened species by destroying their habitats and disrupting their life cycles, threatening to erase them from Guam’s unique limestone forests.

7. Due to these impacts, between 2010 and 2017 the Service issued three “Biological Opinions” pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), that outlined specific “Conservation Measures” that the Navy agreed to carry out in order to offset adverse impacts to these species and habitats from the Navy’s ongoing military activities. However, Conservation Measures included in the 2017 Biological Opinion and its accompanying “Incidental Take Statement” fall short of providing sufficient protection for the adversely affected endangered and threatened species, and thus do not ensure these species’ survival and recovery as the ESA requires. *Id.* In addition, due to several more legal infirmities, the 2017 Biological Opinion is arbitrary, capricious, and contrary to law, in violation of the APA standard of review, 5 U.S.C. § 706(A)(2).

8. Moreover, while the construction—and destruction and degradation—is nearly complete, the Navy has yet to carry out many of the Conservation Measures that were developed by the Defendants during multiple rounds of ESA Section 7 “formal consultation” from 2010 to 2017, 50 C.F.R. § 402.02. These measures include eradicating and controlling invasive species like the brown tree snake and feral ungulates by using fencing, and restoring habitat to preserve the native limestone forests and native plants that are vital for the species’ survival and recovery on Guam. These Conservation Measures are mandatory and were specifically intended to offset the adverse impacts to these species from the Navy’s ongoing military activities at Camp Blaz.

9. By failing to carry out all required Conservation Measures, the Navy is failing to avoid jeopardy to these species’ continued existence, as it is required to do under the ESA, 16 U.S.C. § 1536(a)(2). To the contrary, the Navy is significantly increasing the risk of extinction for the ababang, fanihi, sihek, åga, ko’ko, håyun lågu, and other endangered and threatened species that are struggling to survive in the wild on Guam. This is another violation of the Navy’s affirmative duty to avoid jeopardy of these species’ continued existence under Section 7(a)(2), 16 U.S.C. § 1536(a)(2). The 2015 and 2017 Biological Opinions are invalidated by the Navy’s failure to carry out these measures, as are their Incidental Take Statements for the ababang and fanihi, and therefore, the Navy is conducting

activities resulting in “incidental take” of ababang and fanihi in violation of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B)-(C).

10. Thus, Plaintiffs—two nonprofit environmental conservation organizations—bring this action under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g), and the judicial-review provision of the APA, 5 U.S.C. §§ 702 and 706(A)(2), to obtain relief from this Court for Defendants’ ongoing violations of its affirmative duty under Section 7(a)(2) to carry out Conservation Measures to offset the adverse effects of the Relocation Project to Guam’s endangered and threatened species.

11. Plaintiffs seek an order directing the Navy to “reinitiate” formal consultation with the Service under Section 7(a)(2) of the ESA. 50 C.F.R. § 402.16. The Navy’s duty to reinitiate consultation is triggered due to the modifications to the Relocation Project and changes in circumstances stemming from the Navy’s failure to meet its duty to carry out Conservation Measures, and due to new information about threats to these species. *Id.* § 402.16(b)-(d). During reinitiated formal consultation, the Service will reassess the no-jeopardy determinations in the 2017 as well as the 2015 and 2010 Biological Opinions, and determine whether—as a result of its foot-dragging—the Navy should now be obligated to carry out additional Conservation Measures in order to satisfy its

affirmative duty to ensure that these species do not go extinct as a result of its actions and inaction, as the ESA requires. 16 U.S.C. § 1536(a)(2).

12. Finally, Plaintiff the Center for Biological Diversity brings a claim pursuant to the Freedom of Information Act requesting that the Court order the Navy to release documents pertaining to these issues which the Center requested under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), nearly two years ago.

13. Unfortunately, it has become clear that without such relief from this Court, the Navy will continue to carry out its military activities—including construction and operation of a base that has destroyed and degraded thousands of acres including some of the only remaining native limestone forests on the island, and conducting live fire training and increased aircraft overflights almost daily—while disregarding the very measures it promised to implement after the Service found them necessary to ensure these species’ continued existence. And it will do so in secrecy, without disclosing records it is required to disclose under the FOIA that pertain to these issues.

14. Thus, to remedy Defendants’ violations of the ESA and APA, Plaintiffs respectfully request that the Court: (a) Declare the Navy to be in violation of the ESA for failing to reinitiate formal consultation with the Service on the Relocation Project, 50 C.F.R. § 402.16; (b) Declare the Navy to be in violation

of its affirmative duty to avoid jeopardy under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by relying on invalid Biological Opinions and failing to implement mandatory Conservation Measures; (c) Declare the Service's 2017 Biological Opinion to be arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706(2)(A); (d) Vacate, set aside, and remand the Service's July 18, 2017 Biological Opinion and accompanying Incidental Take Statement, *id.*; (e) Order the Navy to implement without further delay and by a date(s) certain, all mandatory Conservation Measures, Reasonable and Prudent Measures, and Terms and Conditions in connection with the Relocation Project; (f) Order the Navy to reinitiate formal consultation with the Service; (g) Order the Navy to cease all activities that are adversely affecting the ababang, fanihi, sihek, åga, ko'ko', håyun lågu, and/or fadang, until formal consultation has been reinitiated and completed in full compliance with the ESA; and (h) Order the Navy to immediately cease any and all activities involving the irreversible and/or irretrievable commitment of resources which may foreclose development of reasonable and prudent alternatives during formal consultation that is reinitiated under the ESA.

15. To remedy the Navy's violations of the FOIA, the Center respectfully requests that the Court: (a) Declare the Navy to be in violation of Sections 552(a)(4)(E), (a)(6)(A)(i), (a)(7)(B), and 552(b)(5) of the FOIA; and (b) Order the

Navy to search for and produce all records and a final determination in response to the Center's FOIA request. *Id.*

JURISDICTION AND VENUE

16. Jurisdiction before this Court over Plaintiffs' Claims 1-7 is proper under 28 U.S.C. § 1331, 28 U.S.C. § 1346, 5 U.S.C. § 702, and/or 16 U.S.C. § 1540(g)(1), because these claims involve the United States as the defendants and arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1536 and 1538; the APA, 5 U.S.C. § 706(2)(A); and the FOIA, 5 U.S.C. § 552(a)(4)(B).

17. An actual and justiciable controversy exists between Plaintiffs and Defendants within the meaning of 28 U.S.C. § 2201.

18. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202; 5 U.S.C. §§ 702, 704, 705 and 706 (APA Claims 1-3); 16 U.S.C. § 1540(g) (ESA Claims 4-7); and 5 U.S.C. § 552(a)(4)(B) (FOIA Claim 8).

19. Venue for Claims 1-7 is proper in the District Court of Guam pursuant to 28 U.S.C. § 1391(e)(1)(B) and 16 U.S.C. § 1540(g)(3)(A) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

20. Venue for Plaintiffs' Claim 8 is proper in the District Court of Guam pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

21. The Federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

PARTIES

22. The CENTER FOR BIOLOGICAL DIVERSITY and PRUTEHI LITEKYAN: SAVE RITIDIAN bring this action under the ESA and the APA on behalf of their organizations and their injured members.

23. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit 501(c)(3) conservation organization with more than 84,000 members, including Guam residents, with legally protected interests in the survival and recovery of endangered and threatened species and the habitats they depend on. Through science, policy, and environmental law, the Center is actively involved in species and habitat protection throughout the United States, the high seas, and abroad, including efforts to protect Guam’s imperiled plant and animal species and to further the effective implementation of the ESA. Center members have researched, studied, observed, and sought protection for Guam’s endangered and threatened species under the ESA. In addition, the Center’s members and staff have visited areas where these species occur, sought out these species, and have observed or attempted to observe these species in Guam and its vicinity, including within or near areas used by Camp Blaz. The Center’s members and staff have

plans to continue to visit and observe, or attempt to observe, these species and habitats in the future.

24. The Center has members with interests in these species and habitat that being injured by the Relocation Project.

25. For example, Center member Ann Marie Gawel, Ph.D., grew up in Guåhan (CHamoru for Guam), and regularly visits the northern Guåhan area to enjoy the beach and to swim, hike, picnic, and view protected wildlife, plants, insects, and their habitat. Dr. Gawel derives personal, aesthetic, moral, and recreational benefits from the continued existence of endangered species in the Ritidian area. Dr. Gawel is committed to protecting the unique natural and cultural history of Guåhan. She has worked on conservation and ecology research projects in the region for over 15 years. She plans to continue visiting the area; however, her ability to enjoy Ritidian and the surrounding areas, and her interests in observing and protecting the native species they support, has been and will continue to be injured by the Relocation Project. Dr. Gawel is harmed by closures to accommodate construction and live-fire military training activities, as well as the noise, explosions, and possible fires associated with such activities. The decline and loss of these special plants, animals, and insects from the Relocation Project's activities injures and will continue to injure Dr. Gawel's interests in observing, researching, and protecting the species of this critically important ecological area.

26. The Center's members and staff have cultural, spiritual, aesthetic, health, recreational, educational, scientific, and conservation interests in the affected species' existence in the wild. These legally protected interests depend on the existence of healthy, sustainable, and fully recovered populations. The cultural, spiritual, aesthetic, health, recreational, educational, scientific, and conservation interests of the Center and its members have been and will continue to be irreparably injured if Defendants' ongoing violations of the ESA and APA continue. These are actual, concrete injuries to the Center's legally protected interests caused by the Defendants' ESA and APA violations.

27. The Center and its members are harmed by the Navy's FOIA violations, which preclude the Center and the public from gaining a full understanding of the Relocation Project. The Navy's failure to comply with the FOIA harms the Center's ability to provide full, accurate, and current information to the public on a matter of public interest. Absent this information, the Center cannot advance its mission to protect native species and their habitat.

28. Plaintiff PRUTEHI LITEKYAN: SAVE RITIDIAN is a non-profit corporation based in Guam. Its mission is to protect natural and cultural resources in all sites identified for military live-fire training in Guam for the well-being of the people and future generations of Guam. Prutehi Litekyan seeks to prevent

environmental degradation and destruction on sacred and native lands and is dedicated to the return of ancestral lands to their original owners.

29. Prutehi Litekyan engages with the community in Guam to promote and advocate for the protection of environmental and cultural resources, including, but not limited to, endangered species, traditional fishing sites, sacred sites and ancestral remains, and sites for cultivating and gathering plants for traditional medicines. Prutehi Litekyan's mission includes protection of these resources from the adverse impacts resulting from Navy activities and operations at Camp Blaz.

30. Prutehi Litekyan conducts research and carries out public education efforts on these issues to help the community become better informed to participate in local and national processes regarding DOD activities and operations that may be harmful to the people and native species of Guam. Prutehi Litekyan also educates community leaders to encourage development of policies that prevent environmental degradation and ancestral desecration resulting from DOD activities and operations.

31. Prutehi Litekyan's members have cultural, social, spiritual, health, professional, scientific, recreational, aesthetic, economic, and other interests in the preservation of the cultural and natural resources in and around the Project. In response to the Navy's proposed military expansion, Prutehi Litekyan and its

members have continued to advocate for the protection of Guam's cultural and natural resources and ancestral lands.

32. For example, Frances Meno, a member of Prutehi Litekyan, is an indigenous CHamoru woman who serves as a yo'ãnte, or traditional healer, in the local community of Guam. She regularly harvests a variety of native plants in order to make ãmot, or traditional medicine. She has visited the Ritidian area, where the proposed Live Fire Training Range Complex is sited, in order to harvest the plants she uses to make ãmot. She goes both alone and with other people, including young cultural apprentices to whom she is passing on her traditional knowledge, to practice her culture, commune with her ancestors, and enjoy the area's cultural and biological resources. Being of CHamoru ancestry, Ms. Meno also has a deep spiritual connection to the resources of the Ritidian area. She plans to continue visiting the Ritidian area on a regular basis for these purposes. The development of the Live Fire Training Range Complex in this area fundamentally changes the character of Ritidian and interferes with Ms. Meno's use and enjoyment of the area, as do the impacts to the native species and imposition of restrictions on her site access.

33. Prutehi Litekyan's members and staff also have cultural, spiritual, aesthetic, health, recreational, educational, scientific, and conservation interests in the affected species' existence in the wild. These legally protected interests depend

on the existence of healthy, sustainable, and fully recovered populations. The cultural, spiritual, aesthetic, health, recreational, educational, scientific, and conservation interests of Prutehi Litekyan and its members have been and will continue to be irreparably injured if Defendants' ongoing violations of the ESA and APA continue. These are actual, concrete injuries to Prutehi Litekyan's legally protected interests that are being caused by the Defendants' violations of the ESA and APA.

34. Defendant U.S. DEPARTMENT OF THE NAVY is an agency of the United States Government within the United States Department of Defense. As a Federal agency, the Navy is responsible for complying with the affirmative duties in Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).

35. Defendant LLOYD J. AUSTIN III is the Secretary of the United States Department of Defense. Secretary Austin is sued in his official capacity.

36. Defendant U.S. DEPARTMENT OF DEFENSE ("DOD") is an agency of the United States Government. As a Federal department, DOD is responsible for complying with the affirmative duties in Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and ultimately responsible for the Navy's acts and omissions at issue in this case.

37. Defendant CARLOS DEL TORO is the Secretary of the Navy. Secretary Del Toro is sued in his official capacity.

38. Defendant U.S. FISH AND WILDLIFE SERVICE, the Service (also known as “FWS”), is an agency of the United States Government within the Interior Department. Through delegation of authority from the Secretary of the Interior, the Service administers and implements the ESA for non-marine wildlife listed as endangered or threatened under the ESA. 50 C.F.R. § 402.01(b).

39. Defendant DEBRA HAALAND is the Secretary of the United States Department of the Interior and is the Federal official responsible for making decisions that are in accordance with the ESA and all other applicable Federal laws. Secretary Debra Haaland is sued in her official capacity.

STATUTORY BACKGROUND

I. Endangered Species Act (ESA)

40. Recognizing the importance of protecting biodiversity from human activities, in 1973 the U.S. Congress enacted the ESA to provide “a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA proclaims that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1).

41. The ESA defines “conserve, conserving, and conservation” to mean “the use of all methods and procedures which are necessary to bring any

endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

42. Section 7(a)(2) of the ESA imposes an affirmative obligation on each Federal agency to ensure that any “action” they authorize, fund, or carry out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2).

43. A “species” under the ESA includes a taxonomically defined “species” as well as a “subspecies” of fish, wildlife, or plants. 16 U.S.C. § 1532(16).

44. The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range” 16 U.S.C. § 1532(6). A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

45. Section 4(a)(1) of the ESA directs Interior Secretary, through the Service, 50 C.F.R. § 402.01(b), to promulgate rules to list species that are endangered or threatened with extinction under the ESA” 15 U.S.C. § 1533(a)(1).

46. When promulgating listing rules. Section 4(a)(3) of the ESA requires the Service to designate “critical habitat” when it lists a species as endangered or

threatened. 16 U.S.C. § 1533(a). “Critical habitat” consists of areas with physical or biological features that are essential to the “conservation” of listed species that may require special protection or management considerations. 16 U.S.C. § 1532(5)(A).

47. Section 4(f) of the ESA requires the Secretary to develop and implement a “recovery plan” for each species that is listed as endangered or threatened. 16 U.S.C. § 1533(f). Recovery plans include: (1) site-specific management actions to conserve and ensure the survival of the species; (2) objective, measurable criteria that, when met, would result in the species being removed from the list; and (3) an estimate of the time and costs needed to achieve the plan’s recovery goal and the necessary steps toward that goal. 16 U.S.C. § 1533(f)(1). As such, a recovery plan is the road map for a listed species’ recovery from the threat of extinction and ultimately, its removal from the list of endangered or threatened species (i.e., delisting).

48. Once listed, the Service is required to “conduct, at least once every five years,” a review of all listed species and determine whether the species should be declared recovered from the threat of extinction and delisted, or reclassified from endangered to threatened or threatened to endangered. This review is known as the “5-Year Review.” 16 U.S.C. § 1533(c)(2).

49. Section 9 of the ESA and its implementing regulations prohibit any “person”—including any “any officer, employee, agent, department, or instrumentality of the Federal Government” and “any other entity subject to the jurisdiction of the United States,” 16 U.S.C. § 1532(13)—from causing a “take” or “taking” of any endangered species or certain threatened species, *id.* § 1538(a)(1); 50 C.F.R. § 17.31, except where such take is “incidental” to otherwise-lawful activities—i.e., “incidental take”—that has been expressly authorized by the Service, e.g., in the form of an “incidental take statement” (“ITS”), 16 U.S.C. § 1536(b)(4).

50. “Take” is broadly defined to include any activity that will harm, harass, trap, capture, wound, or kill a protected species directly or indirectly, i.e., by destroying or degrading its habitat. 16 U.S.C. § 1532(19). “Incidental take” means “takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.” 50 C.F.R. § 402.02.

51. Before authorizing, funding, or carrying out any activity or program (“of any kind in the United States, upon the high seas, or abroad—i.e., any “action”—including any “action[] directly or indirectly causing modifications to the land, water, or air,” 50 C.F.R. § 402.02, each Federal agency must meet its affirmative duty under Section 7(a)(2), to “ensure that the action is not likely to

jeopardize the continued existence of any endangered or threatened species” or “result in the destruction or adverse modification of any listed species’ critical habitat.” 16 U.S.C. § 1536(a)(2). The process by which an “action agency” satisfies this duty is called “consultation.”

52. The Service defines “[j]eopardize the continued existence of” to mean “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. 402.02.

53. The Service defines “[d]estruction or adverse modification” to mean “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.*

54. Strict compliance with the ESA’s consultation procedures under Section 7(a)(2) and 7(b)(4)-(5) and its implementing regulations, 50 C.F.R. Part 402, Subpart B, is the sole means by which Federal agencies may satisfy its affirmative duty under Section 7(a)(2) of the ESA.

55. Section 7 consultation includes “informal consultation” and “formal consultation.” 50 C.F.R. § 402.02.

56. Thus, to begin consultation on a proposed action, the action agency requests from the Service a list of all endangered and threatened species which

“may be present in the area of such proposed action,” 16 U.S.C. § 1536(c)(1), i.e., within the “action area.” 50 C.F.R. § 402.12. The “action area” consists of “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

57. Next, for all listed species and any designated critical in the action area, the action agency must “conduct a biological assessment” to “evaluate the potential effects of the action” on those species and habitats and determine whether they are likely to be “adversely affected.” 50 C.F.R. §§ 402.12(a) and (k)(1); *id.* § 402.02 (defining “biological assessment”).

58. A biological assessment is used by the action agency to determine whether formal consultation is required under 50 C.F.R. §§ 402.14 or 402.10. *See also id.* §§ 402.12(k)(1) and 402.12(j). This is “informal consultation.” 50 C.F.R. § 402.13.

59. The biological assessment examines: (1) whether listed species in the action area are likely to be affected by the proposed action, (2) how they will be affected, and (3) whether they will be “adversely affected” by the action. *Id.*

60. If the action agency concludes in a biological assessment that its proposed action “is not likely to adversely affect” listed species or critical habitat—i.e., if the effects are not expected to be discountable, insignificant, or completely beneficial—then the Service must review that determination and

conclude whether “the [Service] concurs,” in which case “formal consultation is not required.” 50 C.F.R. §§ 402.12(j) and (k)(1); U.S. Fish and Wildlife Service & National Marine Fisheries Service, *Endangered Species Consultation Handbook* (1998) (“Consultation Handbook”) xv-xvi (defining “is not likely to adversely affect” to mean “when effects on listed species are expected to be discountable, insignificant, or completely beneficial”).

61. On the other hand, if the action agency determines in a biological assessment that its action “is likely to adversely affect” listed species or critical habitat, then the action agency must initiate and complete formal consultation with the Service before proceeding with the action. 50 C.F.R. § 402.14; Consultation Handbook at xv (defining “is likely to adversely affect” to mean “any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial”); *id.* at x (defining “[a]ffect/effect” to mean “to bring about a change”).

62. During formal consultation, the Service uses the final biological assessment and the best available scientific information to prepare a document called a “biological opinion” that analyzes how the action will affect listed species and critical habitat, 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14, and determines “whether or not the Federal action is likely to jeopardize the continued existence of

listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.02 (definition of “biological opinion”).

63. If the Service concludes in the biological opinion that the proposed action “is likely to jeopardize the continued existence of” an endangered or threatened species, or “is likely to result in the destruction or adverse modification” of critical habitat, the Service must develop “reasonable and prudent alternatives” to the proposed action that will avoid those outcomes which “can be taken by the Federal agency ... in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A). A “reasonable and prudent alternative” is an alternative to the proposed action “that can be implemented in a manner consistent with the intended purpose of the action” and is consistent with the action agency’s legal authority, that is “economically and technologically feasible,” and that the Service “believes would avoid the likelihood” of jeopardy. 50 C.F.R. § 402.02.

64. If, however, the Service concludes in the biological opinion that the proposed action is not likely to jeopardize any listed species or result in destruction or adverse modification—but, that the action will nevertheless result in some “incidental take” of listed species—the Service must include an Incidental Take Statement (ITS) with the biological opinion. 16 U.S.C. § 1532(a)(4).

65. In the ITS, the Service specifies the amount or extent of the incidental take that is expected as a result of the action, any “Reasonable and Prudent

Measures” (“RPMs”) that the Service considers necessary or appropriate to minimize such impact, and the “Terms and Conditions” that must be complied with by the action agency to implement those RPMs. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). RPMs are “actions the [Service] believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.” 50 C.F.R. § 402.02.

66. In addition to expressing the amount or extent of anticipated take, an ITS must specify the authorized take will be monitored in terms of individuals of the species and set a clear standard for determining when the amount or extent of anticipated take has been exceeded. 50 C.F.R. § 402.14(i)(1)(i).

67. If the action agency or the Service rely on “Conservation Measures” to support a “no jeopardy” or “no destruction or adverse modification” determination, those measures must be clear, measurable, enforceable, and address threats to the species in a way that satisfies the jeopardy and adverse modification standards. Conservation Measures are measures that are incorporated into the proposed action that are intended to benefit or promote recovery of listed species and offset the action’s adverse effects.

68. The failure to fully implement Conservation Measures that are incorporated into the proposed action or an ITS can render a biological opinion

invalid and expose the action agency to a citizen suit under the ESA, 16 U.S.C. § 1540(g).

69. A biological opinion must rely “solely” on the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

70. A biological opinion must consider all potential effects of a proposed agency action on a listed species, including the likely effects on the species’ recovery from the threat of extinction as well as its survival; and must consider both short-term impacts as well as long-term impacts.

71. The agencies’ compliance with the ESA continues after formal consultation is completed, a final biological opinion is produced, and an agency action is adopted and implemented. For instance, once it proceeds with a final agency action, the action agency must “report the progress of the action and its impact on the species to the Service as specified in the incidental take statement.” 50 C.F.R. § 402.14(i)(3).

72. If the agency action exceeds the amount or extent of incidental take in the ITS, the action agency and the Service must “reinitiate” consultation immediately. 50 C.F.R. § 401.14(i)(4); 50 C.F.R. § 402.16(a).

73. In addition, the obligation of the action agency to reinitiate consultation occurs when the action agency retains discretionary involvement or control over the action and: new information reveals impacts to listed species or

critical habitat as a result of the action that were not previously considered in the biological opinion; the action is modified in a manner that causes effects to listed species or critical habitat that were not previously considered in the biological opinion; or a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(b)-(d).

74. An action agency's failure to fully implement Conservation Measures that are incorporated into the proposed action, RPMs, and/or the Terms and Conditions in an ITS constitutes a modification of the proposed action in a manner that causes effects to listed species or critical habitat that was not previously considered in the 2015 or 2017 Biological Opinions, and thus also triggers the action agency's duty to reinitiate consultation. *Id.* § 402.16(c).

75. Once consultation is initiated or reinitiated, the action agency is prohibited from making any irreversible or irretrievable commitment of resources which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

76. Strict compliance with the ESA's procedural requirements is the sole means by which the action agency can discharge its affirmative duties under Section 7(a)(2) and proceed with the final agency action. Whenever an agency action is likely to affect a listed species, the absence of formal consultation and a biological opinion means that the action agency has not fulfilled its Section 7(a)(2)

duty to ensure that its action will not be likely to jeopardize a listed species or destroy or adversely modify its critical habitat.

77. Claims 4-7 of Plaintiffs' complaint are brought pursuant to the ESA's citizen-suit provision, 16 U.S.C. § 1540(g).

78. Section 706(2)(A) of the APA provides the standard of review of Plaintiffs' Claims 1-3, which challenge the Service's 2017 Biological Opinion.

79. Under the APA standard of review, a biological opinion that is "arbitrary and capricious" must be vacated, or "set aside." 5 U.S.C. § 706(2)(A).

II. Administrative Procedure Act (APA)

80. The Administrative Procedure Act provides aggrieved persons a right of judicial review of final Federal agency actions for which there is no other adequate remedy. *Id.* §§ 702, 704. This includes claims challenging a final biological opinion prepared by the Service. *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

81. The APA's standard of review requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706.

82. An agency action is "arbitrary and capricious" and must be set aside when the agency relies on factors which Congress did not intend for it to consider,

entirely fails to consider an important aspect of the problem, offers an explanation for its decision that is contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

FACTUAL BACKGROUND

I. The Action Area

83. Guam's natural environment has undergone a unique evolutionary journey, characterized by a distinct set of ecological dynamics. The island's geographical isolation and geological history have contributed to the development of remarkably diverse, but fragile, ecosystems. With the exception of bats, Guam has no native land mammals and few other predators of any type, which allowed birds, bats, and plants to thrive, but also to evolve with few defenses to the growing host of invasive species now found on Guam.

84. Without the pressure of invasive brown tree snakes, ungulates, or other herbivorous mammals, native plants could flourish and create dense and diverse jungles that were once emblematic of the island's natural beauty. The native plants, birds, and bats of Guam have developed intricate relationships over time, forming a delicate web of ecological interdependencies.

85. Ritidian Point, where the Firing Range Complex is being built, is renowned for its native limestone forests and variety of plant communities which

are used for traditional medicine by CHamoru healers, who pass down their knowledge through the generations.

86. CHamoru practices continue, but Ritidian Point—and Guam as well as much of Micronesian archipelago—is transformed today from a legacy of colonialism, development, agricultural conversion, and the expansive presence of the U.S. military, resulting in drastic consequences for the island’s natural environment. Indeed, much of Guam’s native plant communities including its limestone forests, have been lost and drastically reduced from these impacts.

87. Yet perhaps no other aspect of Guam’s environmental transformation has had a bigger impact to its native flora and fauna than invasive species—in particular, the invasive brown tree snake and ungulates—like deer and feral pigs, goats, and cattle—which continue to wreak havoc on Guam’s delicate ecosystem.

88. The brown tree snake (*Boiga irregularis*) evolved in the environments of coastal Australia, Indonesia, Papua New Guinea, and northwestern Melanesian islands, was likely introduced to Guam’s environment as a stowaway in military cargo shortly after World War II.

89. An invasive and unnatural predator, the brown tree snake has decimated Guam’s birds and bats since its introduction to the island. It is a primary reason for the disappearance of ten (10) of Guam’s twelve (12) native forest birds and two (2) bat species, including sihek, ko’ko’ and åga, which have been reduced

to “quasi-extinction,” which means below the threshold of sustainability in the wild, as they can no longer be found on the island.

90. Recognizing this, the U.S. Federal government has developed and tested efforts to eradicate and control brown tree snakes, but has yet to initiate the “landscape-level” control and eradication repeatedly emphasized by the Service as essential to recovery of Guam’s endangered species and to the return of bird song to the forest.

91. In addition to brown tree snakes, invasive feral ungulates severely impact Guam’s endangered species by foraging on the plants they need to survive.

92. Rats, insect pests, exotic snails, and domestic animals present additional threats.

93. Another growing threat to Guam’s endangered species is the increased frequency and intensity of typhoons due to climate change. For example, the probability of intense tropical cyclones is expected to double by 2050.

94. Thus, the Relocation Project adds yet another major destructive threat to some of the only remaining high-quality native limestone forests, and exacerbates the current, dire status of the sihek, åga, ko’ko’, fanihi, ababang, håyun lågu, fadang, and each of Guam’s many other endangered species—many of which are barely hanging on in a state of quasi-extinction.

II. The Marine Relocation to Guam

95. Based on a 2005 agreement with the Government of Japan to reduce U.S. military presence on Okinawa, the Navy initiated what ultimately became the Relocation Project: a plan to relocate 5,000 marines and 1,300 dependents from Okinawa (and other areas) to Guam.

96. The United States military controls over a quarter of Guam's land base, and the Relocation Project continues a long history of drastic impacts by the military on the people and environment of Guam, with devastating consequences for the unique native wildlife and plant communities of the island.

97. The Navy initially decided to exclude Ritidian from consideration as the site of a Firing Range Complex because it "would have ...[destroyed] considerable stands of primary limestone forest in Guam, the habitat ...[needed] for the recovery of the endangered Micronesian Kingfisher," the sihek, as well as many more listed species.

98. In part due to prior litigation involving allegations by these Plaintiffs, along with other co-plaintiffs, National Environmental Policy Act ("NEPA") violations, in 2013 the Navy began preparing a Supplemental Environmental Impact Statement.

99. In December 2014, the National Defense Appropriations Act ("NDAA") included a Section entitled "Establishment of Surface Danger Zone,

Ritidian Unit, Guam National Wildlife Refuge.” (public law 113-291, 128 stat 3292). This provision authorized the Secretary of the Navy and the Secretary of the Interior to enter into an agreement to establish the Surface Danger Zone (“SDZ”), an exclusion zone where ammunition may strike, for the Firing Range Complex that spans throughout the Ritidian Unit of the Guam National Wildlife Refuge. People may not enter the SDZ whenever live fire training activities are taking place, which is expected to occur 39 weeks of the year.

100. In 2014, the Navy issued its Record of Decision finalizing the Relocation Project, which entails construction of the Main Cantonment on 1,213 acres, housing on 510 acres, the Firing Range Complex on 212 acres of the Ritidian Unit of the Guam National Wildlife Refuge, with a 3,701-acre SDZ, a hand-grenade range, utilities, roads, and bridges.

101. To provide perspective, the cantonment and housing areas would be nearly as large as the villages of Sinajana, Hagåtña, and Agana Heights combined. The Firing Range Complex and Surface Danger Zone, an area where a bullet may strike, would span an area of land and water larger than the village of Tamuning.

102. Much of this massive development will occur in some of the only remaining native limestone forests on Guam. The Firing Range Complex is sited directly atop habitat for some of the last populations of ababang and adjacent to the only mature hâyun lågu tree left anywhere on Guam.

103. In 2006, the Air Force developed new facilities at Andersen Air Force Base (“AAFB”) for conducting surveillance activities, known as the “ISR/Strike Project.” Sadly, much of the native limestone forest destroyed by the Relocation Project was set aside in 1993 as part of the Guam National Wildlife Refuge, and in 2006 as a Conservation Measure to mitigate the destructive impacts from expansion of AAFB.

104. To offset impacts to fanihi, sihek, åga, and ko’ko’ from destruction of habitat and disturbance caused by the ISR/Strike Project, the Air Force agreed to fence 494 acres and remove ungulates at Ritidian Point.

105. However, this fence was torn down in large part due to the Firing Range Complex, which has been constructed over these same 494 acres. While the fence has been since reconstructed. Meanwhile, upon information and belief, invasive ungulates still remain in the habitat and continue to harm Guam’s endangered and threatened species.

III. Endangered and Threatened Species in the Project Action Area

106. Set forth below are summaries of the endangered and threatened species that are most severely affected by the Project, including ababang, fanihi, sihek, åga, ko'ko', hâyun lågu, and fadang.

A. Ababang (Mariana eight-spot butterfly)

107. The ababang—the Mariana eight-spot butterfly (*Hypolimnas octocula marianensis*), pictured below—is a rare butterfly in the *Nymphalidae* family that was endemic to Guam and Saipan but is now likely gone from Saipan.



Photo credit: U.S. Fish and Wildlife Service

108. Like other nymphalid butterfly species, abagang are characterized by their own unique pattern of orange and black markings.

109. Adult ababang occur in small numbers and are short-lived.

110. Larvae depend on two host plants for food—specifically, *Elatostema calcareum* and *Procris pedunculata*—two once-common forest herbs that grow only on karst substrates in wet areas of Guam’s native limestone forests.

111. Due to habitat loss, surveys show that *E. calcareum* and *P. pedunculata* are now rare and relegated to a few small, irregular patches found on boulders and small cliffs beyond the reach of browsing ungulates.

112. Ababang occur in small, isolated populations under threat from ongoing habitat loss and invasive ungulates. Ababang are unlikely to cross large open areas, making them vulnerable to fragmentation of habitat by development.

113. Recent surveys have found ababang at only 10 locations.

114. The Service listed the ababang as endangered on October 1, 2015.

115. When it listed the species, the Service emphasized that ababang is at considerable risk of extinction and if declining trends in host plants and population connectivity continue, this butterfly will be lost forever.

116. In addition, the Service stated that protection and restoration of contiguous habitat with host plants to facilitate gene flow will be essential to the

butterfly's continued existence, with the highest priority being the immediate protection of occupied host plants.

117. The species' survival depends on establishment of a functional metapopulation—specifically, at least six spatially distributed-yet-interconnected populations which interact with each other and exchange gene flow across fragmented patches of habitat through habitat corridors.

118. Ritidian Point where the Firing Range has been constructed is a particularly critical area for the butterfly's immediate survival due to its interconnected patches of occupied host plants within primary and secondary limestone forests.

119. Remaining habitat on Ritidian Point will experience live fire most of the year due to training at Camp Blaz.

120. All told, construction and operation of the Firing Range will destroy and degrade 350 acres of high-quality limestone forest with occupied host plants resulting in a decline in the carrying capacity of the area for the butterfly and consequent decreased use.

121. The Project will permanently destroy 140 host plants in the Firing Range area.

122. In addition to impacts related to direct habitat destruction and disturbance, the Project will fragment remaining ababang habitat and populations further jeopardizing the butterfly's chances of survival and recovery.

123. The Navy committed to fencing and removing ungulates from 285 acres of primary and secondary limestone forest surrounding the Firing Range. This area was already supposed to have been fenced and ungulate free per the 2006 ISR/Strike biological opinion.

124. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determination for the ababang invalid and requires the Navy to reinitiate consultation with the Service.

B. Fanihi (Mariana Fruit Bat)

125. The fanihi – the Mariana fruit bat (*Pteropus mariannus mariannus*) – is a subspecies in the *Pteropus* genus (known as “flying foxes”) that is endemic to the Mariana archipelago including Guam and the Northern Mariana Islands.

126. As shown in the photograph below, adult fanihi have a gold to brown mantel coat with deep brown to black leathery wings and an elongated nose that resembles a fox.



Photo credit: Anne Brooke, U.S. Fish and Wildlife Service

127. Fanihi forage for fruits and flowers of native plants and roost in the once-dense native limestone forests that have become increasingly rare since European colonization of Guam.

128. Fanihi play a vital role in native limestone forest ecosystems because they disperse seeds that regenerate plants and help forests recover from typhoons and other catastrophic events.

129. Fanihi numbers have declined precipitously in Guam and the Mariana archipelago through the 20th century as their native limestone forests have been lost to agriculture and development.

130. Along with habitat conversion came the encroachment of non-native ungulate species like deer, pigs, goats, and cattle.

131. In addition, fanihi have declined from hunting by humans for consumption as a food delicacy.

132. Invasive brown tree snakes, ungulates, and plants, as well as war, have all contributed to the decline of fanihi and continue to impede the species' recovery.

133. Through the 1980s, just 400-800 fanihi were found across the Mariana Islands.

134. In 1984, the Service listed fanihi under the ESA as an endangered species. 49 Fed. Reg. 33,881 (Aug. 27, 1984).

135. As Guam's native limestone forests were still being destroyed and degraded, only a single roost was left by 2005.

136. This last colony was on an area of Andersen Air Force Base known as Pati Point, below an active aircraft runway. Following a dramatic increase in overflights of the Pati Point Colony by military aircraft associated with the ISR/Strike Project, fanihi abandoned the colony by 2010.

137. In 2004, the Service designated "critical habitat" for the sihek pursuant to Section 4(a)(3) of the ESA, 16 U.S.C. § 1533(a)(3), on about 376 acres in the Guam National Wildlife Refuge. 69 Fed. Reg. 62,944.

138. The Service formally excluded about 18,815 acres of Navy and Air Force lands in northern Guam from its 2004 critical habitat designation, based on

promises by the Air Force to implement Conservation Measures on military lands in northern Guam, including protecting the area for the species that is now the site for the Firing Range Complex.

139. The Service’s exclusion of 18,815 acres military lands from the 2004 critical-habitat designation was based on promises of the Air Force to take specific Conservation Measures for the fanihi on their lands in northern Guam, including controlling brown tree snakes, protecting and enhancing degraded habitat, and protecting the now-abandoned colony on Andersen Air Force Base. *Id.* 62,957—62,958.

140. Despite the exclusion of these military lands from critical habitat, the Service emphasized that they are essential to the conservation and recovery of fanihi.

141. In 2005, the Service reclassified the fanihi from an “endangered species” to “threatened species.” 70 Fed. Reg. 1190 (Jan. 6, 2005). The Service based this reclassification on new information that fanihi in Guam and other areas of the Mariana archipelago are not distinct subspecies, but parts of a larger subspecies. This reclassification did not reflect any improvement in the status of the fanihi on Guam.

142. In a 2010 recovery plan, the Service explained that military training activities such as live-fire and aircraft overflight trainings continue to threaten fanihi and impede its recolonization.

143. Also in the recovery plan, the Service found that for fanihi to recover, military training impacts must be avoided, minimized, and/or mitigated—i.e., until they no longer threaten the survival of fanihi.

144. The 2010 recovery plan also found that brown tree snakes must be controlled, and invasive species including ungulates must be contained and eradicated, or greatly reduced, for the fanihi to recover.

145. Fanihi survive on Rota, but only one population is sufficiently viable to meet the Service's recovery criteria.

146. Fanihi from Rota regularly travel to Guam, particularly after typhoons, with 82 observed in 2020.

147. Through formal consultation on the Relocation Project, the Service found that the Firing Range Complex, aircraft overflights, and Project-related construction undermine the reestablishment of a maternal roost colony at Andersen Air Force Base, destroy and degrade remaining habitat, and take any fanihi left in the area, and thereby reduce the bats Guam can support even more, and indisputably jeopardize the species' continued existence.

148. In determining the Project did not jeopardize the fanihi, the Service relied on the Navy's commitment to manage and enhance 5,234 acres under a "Memorandum of Agreement" ("2015 MOA").

149. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determinations for the fanihi invalid and requires the Navy to reinitiate consultation with the Service.

C. Sihek (Guam Kingfisher)

150. The sihek—the Guam Kingfisher (*Todiramphus cinnamominus*)—is a beautiful bird, endemic to Guam, that preys on insects and small vertebrates and nests in cavities in soft, rotten wood.

151. This kingfisher, pictured below, was once common in native limestone forest and edge habitats throughout the island, but declined drastically due to brown tree snake predation and destruction of its native limestone forests.



Photo credit: Noah Greenwald, Center for Biological Diversity

152. About 3,000 sihek were recorded in 1981, but the kingfisher declined rapidly and was gone from the wild by 1988.

153. Today, sihek survive solely through a captive-breeding program that began in 1986 with the capture of 29 wild birds.

154. The captive population reached a peak of 157 birds in 2014 but due to a lack of space in 25 institutions where sihek are held captive, has since declined to 135 birds, which is far below what is minimally viable and results in inbreeding.

155. In 2015, the taxonomic status of the sihek on Guam was reclassified from a subspecies, *Halcyon cinnamomina cinnamomina*, to a species, *Todiramphus cinnamominus*, based on differences in plumage, proportions, size, and vocals. This new information underscores the uniqueness of this Guam species.

156. In a 2008 recovery plan developed by the Service under Section 4(f) of the ESA, 16 U.S.C. § 1533(f), the Service found that controlling feral ungulates

and brown tree snakes is absolutely critical for survival and recovery of the sihek from the threat of imminent extinction, as is restoring its native limestone forest habitat.

157. Ultimately, the Service has determined that recovery will depend on successfully reestablishing 500 breeding pairs on 11,512 acres of habitat in northern Guam, where the Relocation Project is based, along with 500 breeding pairs in southern Guam.

158. In 2004, the Service designated critical habitat for the fanihi on 376 acres within the Guam National Wildlife Refuge.

159. As with the fanihi, the Service excluded about 18,815 acres of Navy and Air Force lands in northern Guam from critical habitat.

160. Nevertheless, the Service emphasized, these excluded military lands would be essential to the conservation and recovery of the Guam Kingfisher.

161. In the 2015 Biological Opinion, the Service found that the Project will permanently destroy, fragment, and degrade about 1,334 acres of sihek habitat including some of the best forests that remain in northern Guam.

162. To remedy this loss of habitat and ensure survival and recovery of sihek, in 2015 the Service and Navy entered into a memorandum of agreement under which the Navy committed to “actively restore native habitat and manage” 5,234 acres to benefit the survival and recovery of the species.

163. The Service relied on restoration of these acres to support its determination that the project would not jeopardize sihek. To date, these acres have not been restored and there are no concrete plans by Defendants to reintroduce sihek to Guam.

164. The Service also relied on promises of landscape level brown tree snake control and eradication, which has yet to occur.

165. Yet, despite these devastating impacts, the Service relied on the Navy's commitment to manage and enhance 5,234 acres under the 2015 MOA to reach a no-jeopardy determination.

166. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determinations for the sihek invalid and requires the Navy to reinitiate consultation with the Service.

D. Åga (Mariana Crow)

167. The åga —the Mariana Crow (*Corvus kubaryi*)—is a small, mostly black crow with a ragged appearance and greenish-black, bluish-black, and gray features.

168. The åga once ranged throughout Guam and Rota but was gone from southern Guam by the mid-1960s, from central Guam by the early 1970s, and was completely gone from Guam completely by 2003.

169. The last åga born on Guam was observed in 2001.

170. The Service listed the åga as endangered in 1984 due to its severely reduced range, brown tree snake predation, habitat destruction and degradation, and disturbance from noise and human activities. 49 Fed. Reg. at 33,883.

171. Today, the åga remains listed as endangered “wherever found.”

172. An attempt to reintroduce the species to Guam from birds captive reared on Rota Island failed when the population declined, from 10 birds in 2006, to three in 2008, to one male in 2012.

173. Meanwhile, the Service has warned that development, human persecution, and predation by cats on Rota Island still threaten the last wild åga population found anywhere in the world. 69 Fed. Reg. at 62,959.

174. The population on Rota has declined as well, from 1,318 birds in 1982, to 592 in 1995, to 234 in 1999, and to just 50-60 breeding adults in 2008, where has persisted thus far.

175. Making matters worse, a new and dire threat—Åga Eucaryote X (“AEX”), a syndrome of unknown origin—is now killing and sickening åga with systemic inflammation, anemia, and pneumonia.

176. AEX underscores the urgent need to protect remaining åga and habitat on Guam.

177. In 2004, the Service designated the same 376 acres of critical habitat in the Guam National Wildlife Refuge for åga as for sihek and fanihi. 69 Fed. Reg. at 62,975.

178. The Service has identified nearly 14,000 acres that could support 156 breeding pairs and 150 non-breeding åga in northern Guam.

179. As with sihek and fanihi, the Service excluded 18,815 acres of Navy and Air Force lands in northern Guam from its 2004 critical habitat designation for åga, based on promises by the Air Force to take specific Conservation Measures, while also emphasizing the critical importance of these lands to the survival and recovery of the species. *Id.* at 62,956.

180. In a 2005 recovery plan for the Mariana Crow, the Service concluded that to avoid extinction, three viable populations of at least 75 breeding pairs each must be reestablished on Rota Island, northern Guam, and southern Guam.

181. However, the potential for reestablishment of an åga population in northern Guam is now in serious doubt due to ongoing habitat loss that is not being addressed, a lack of management, and the persistent yet unmet need to eradicate and control brown tree snakes at the landscape level.

182. Any reestablished population must also withstand typhoons, which are becoming more severe and frequent with climate change and could wipe out the last wild population on Rota Island at any time.

183. The Service has found that the Relocation Project will permanently destroy, fragment, and degrade another 1,332 acres of åga habitat, including some of the best forests left anywhere on Guam.

184. In determining the Project did not jeopardize the åga, the Service relied on the Navy's commitment to manage and enhance 5,234 acres under the MOA.

185. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determinations for the åga invalid and requires the Navy to reinitiate consultation with the Service.

E. Ko'Ko' (Guam Rail)

186. The ko'ko'—Guam Rail (*Hypotaenida owstoni*), pictured below—is a small, flightless but fast-running bird with a narrow body, a chocolate-brown

head and neck, and a plain gray stripe above the eye that draws attention to its gray bill.



Photo credit: Martin Kastner

187. Ko'ko' once occurred throughout Guam's grasslands and forests, but declined steeply in the late 1970s-early 1980s, and by 1983 plummeted to fewer than 100 individuals in isolated groups in northern Guam.

188. The species was lost from Guam by 1985.

189. Today, the ko'ko' survives in captivity and small populations on Rota and Cocos islands (a small island located one mile off the southern tip of Guam) that could provide a source of birds for reintroduction to Guam in the future.

190. The Service listed ko'ko' as endangered in 1984. 49 Fed. Reg. at 33,883.

191. It remains classified as endangered “wherever found.”

192. The ko'ko' and its habitat, where they remain, are still under assault from multiple converging and compounding threats, including threats that are responsible for the species' steep decline from historic levels as well as new and emerging threats.

193. A new threat is the revelation that brown tree snakes have now made their way to Cocos Island—where one of the only two remaining wild ko'ko' populations left anywhere on Earth is found, with just 24 birds at last count.

194. In the species' recovery plan and Biological Opinions for the Relocation Project, the Service has consistently acknowledged the need to manage threats such as predation and ongoing habitat degradation and loss to ensure suitable habitat is available for reintroduction” for the ko'ko'.

195. The recovery plan established a goal for a reintroduced population of 2,000 birds, including 1,000 in northern Guam and 1,000 in southern Guam. Today, there are only an estimated 340 birds alive, including 116 in captivity, 200 on Rota, and 24 on Cocos Island.

196. In connection with the Relocation Project, the Navy has destroyed over 1,100 acres of remaining forest needed to support reintroduction of the

ko'ko'. Ongoing training activities further diminishes habitat suitability for reintroduction through noise and live fire, including 125 acres that in 2012 was proposed by the Guam National Wildlife Refuge to be specifically managed for Guam rail and to serve as a reintroduction site, but now sits in the Surface Danger Zone of the Firing Range Complex, putting the proposal on indefinite hold.

197. In determining that the Project is not likely to jeopardize the ko'ko', the Service relied on the Navy's commitment to manage and enhance 5,234 acres as set forth in the 2015 MOA.

198. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determinations for the ko'ko' invalid and requires the Navy to reinitiate consultation with the Service.

F. Håyun Lågu (*Serianthes nelsonii*)

199. The håyun lågu (*S. nelsonii*), pictured below, is among the largest tree species found in the native limestone forests that once dominated the Mariana archipelago.



Photo credit: Pacific Air Force (2011)

200. The håyun lågu is endemic to Guam and Rota, with recent information showing clear genetic differentiation between the tree on the two different islands.

201. The Service listed hâyun lågu as an endangered species in 1987 due to habitat destruction, including land clearing by Anderson Air Force Base.

202. There is only one mature, reproducing hâyun lågu tree left in Guam, which is known as the “Mother Tree”.

203. This Mother Tree is located on Ritidian Point directly adjacent to the planned machine gun range but for a small 100-foot buffer. As a result, this tree is exposed to live-fire training, and to typhoons. Indeed, the recent Typhoon Mawar very well may have killed this last Mother Tree by stripping leaves and snapping off its fragile limbs.

204. Hâyun lågu seedling survival is incredibly low with no trees surviving to a reproductive age yet.

205. This single Mother tree, and hence this unique tree species, could not be at any greater risk of imminent extinction.

206. The Service predicted that the Relocation Project will destroy this only remaining Mother Tree on Guam, and this may now have occurred. The Relocation Project has also destroyed 948 acres of potential habitat where recovery of this species might have begun.

207. If the Mother Tree has survived, it remains vulnerable to future typhoons, stray bullets, and other threats. An equipment fire close to the tree

occurred on May 15, 2022, exemplifying the threat to the tree's existence from military activities.

208. In determining the Project did not jeopardize the hâyun lågu, the Service relied on a commitment by the Navy to establish 30 outplantings of the tree and maintain them into adulthood.

209. Upon information and belief, these commitments have yet to be fulfilled. This renders the Service's no-jeopardy determinations for the hâyun lågu invalid and requires the Navy to reinitiate consultation with the Service.

G. Fadang (*Cycas micronesica*)

210. The Service listed the fadang as threatened on October 1, 2015. Fadang is a tree known historically from Guam, Rota, the independent Republic of Palau, and Yap (geographically part of the Caroline Islands; politically part of the Federated States of Micronesia). It has also been outplanted on Tinian. Fadang is a food source for the fanihi, which feed on its fruits, as well as for CHamaru people.

211. Fadang is severely affected by multiple pest species, with *A. yasumatsui*—an introduced cycad specialist armored scale insect—being the most significant threat. The cycad aulacaspis scale is causing rapid mortality of all life stages of the plant. Once infected with the cycad scale insect, fadang plants can have a 90 percent mortality rate over several years, especially in heavily degraded habitat.

212. During 2014-2015, surveys were conducted at Ritidian Point, where the Firing Range Complex is constructed. Fadang was reported as occurring in high densities with few scale infestations.

213. The largest concentration of fadang (18,620 in total) occurred within primary limestone forest habitat in the Ritidian area, much of which has now been cleared. Fadang relies on a healthy limestone forest; therefore, the loss of 1,219 acres (493 ha) of limestone forest habitat will adversely affect the population of fadang on Guam.

214. The Project involves removing 3,191 individuals of fadang in order to clear forest for the Firing Range Complex at Ritidian Point and the Main Cantonment at Finegayan. The remaining 3,177 individuals within the Ritidian Point area will be subject to edge effects, habitat fragmentation, and increased susceptibility to the cycad scale, *A. yasumatsui*.

215. Despite this, to avoid jeopardy, the Service relies on translocation and planting of nursery raised individuals into forest enhancement areas.

216. However, a recent study found that fadang is acutely adapted to local soil conditions, as individual plants that were moved to new locations showed poor survival, which appeared and grew worse over time

217. Another recent study found that invasive tree species that currently dominate forests targeted for enhancement by the Navy significantly change and

modify soil properties and that these changes likely persist long after removal of the non-native species from a restoration site.

218. The new information in these recent studies raises serious questions about the effectiveness—or ineffectiveness, as the case appears to be—about reliance on translocation to offset impacts to this important species.

IV. Adverse Effects of the Marine Base Relocation to Critically Endangered Listed Species and Critical Habitat

219. In the three Biological Opinions for the Relocation Project, the Service repeatedly documented severe adverse impacts to Guam’s endangered and threatened species found in the action area, and described how those impacts will occur to each species and habitat.

220. Despite serious impacts to the species, the Relocation Project was allowed to proceed with the benefit of the Service’s many no-jeopardy determinations that were based on the Navy’s promises to carry out Conservation Measures to offset the impacts from the Relocation Project. These Conservation Measures include protecting and enhancing 5,234 acres of habitat to support reintroduction of sihek and the other extirpated bird species, fencing, and ungulate removal on 1,000 acres at Finegayan, and eradication landscape-level control of brown tree snakes, and a host of other actions.

221. However, while the Project has been and continues to be carried out, Conservation Measures have not. In the following sections specific Conservation Measures are discussed.

A. Conservation Measures from the 2006 ISR/Strike Project Biological Opinion

222. Although the ISR/Strike Project is an Air Force agency action, not a Navy agency action, it is relevant because four of the same species are adversely impacted, including the fanihi, sihek, åga and ko'ko', and the Air Force thus committed to carry out conservation Measures on much of the same acreage now cleared by Camp Blaz.

223. The ISR/Strike Project destroyed and degraded 143 acres of habitat for four (4) of the same species as in this case, and resulted in a massive increase in aircraft overflights causing noise and disturbance to these species.

224. In particular, daily aircraft overflights on the north runway of Anderson Airforce Base, which is directly above where the last colony of fanihi occurred at Pati Point, increased from roughly two (2) to fifty-four (54) overflights per day. As the Service predicted in the 2006 Biological Opinion, this resulted in abandonment of the colony. Unfortunately, the biological opinion's prediction that the colony would re-colonize another site turned out to be overly optimistic. No fanihi have produced pups on Guam in over a decade.

225. In addition, the Air Force committed to install fencing and to permanently exclude ungulates from two (2) areas totaling 494 acres, including many of the same areas that are now the Firing Range Complex. According to these commitments, fencing was supposed to have been installed by 2013 at which time eradication of ungulates would begin.

226. The Air Force also committed to setting aside 148 acres as a “habitat management unit” (“HMU”), where fencing would exclude both ungulates and brown tree snakes.

227. Finally, the Air Force committed to secure funding for research of “cost-effective strategies to control or eliminate brown tree snakes in quarantine and field situations,” including lures, attractants, and methods to aerially deploy substances which are toxic to brown tree snakes.

228. The Air Force did construct the fencing and funded brown tree snake control methods. While this led to aerial deployment of attractants laced with acetaminophen, which was found to be toxic to the snakes, upon information and belief, ungulates are still present in the 494 acres where fences have been constructed near Ritidian Point.

B. The 2010 Biological Opinion

229. On September 8, 2010 the Navy and the Service completed the first formal consultation on the Relocation Project with the Service’s issuance of the

Biological Opinion for Joint Guam Program Office Relocation of the U.S. Marine Corps from Okinawa to Guam and Associated Activities on Guam and Tinian (“2010 Biological Opinion”).

230. In the 2010 Biological Opinion, the Service analyzed the Relocation Project under Section 7(a)(2) of the ESA, finding it would cause adverse effects to fanihi, sihek, åga, and ko’ko’ by destroying, degrading, and fragmenting even more habitat, causing noise and wildfires, and introducing and spreading invasive species, but would not be likely jeopardize their continued existence.

231. In the Incidental Take Statement prepared as part of the 2010 Biological Opinion, the Service found that the Relocation Project was likely to take “up to ten [10] remaining Mariana fruit bats at the Pati Point natural area colony” due to noise from aircraft overflights. In the 2010 ITS, the Service did not authorize take of sihek, åga, or ko’ko’ due to them being extirpated from Guam.

232. To offset these adverse effects with Conservation Measures for these species’ survival and recovery, including measures to support reintroduction of sihek, åga and ko’ko’ on DOD lands, consistent with the species’ recovery plans. One such measure was to develop a re-introduction plan for these species, which has yet to occur.

233. The Service’s finding that the Relocation Project is not likely to jeopardize Guam’s endangered species was based on this and additional

Conservation Measures including brown tree snake eradication and control, which is necessary for such re-introduction.

234. The Navy also committed to “sustained funding” for “methods to eradicate or significantly suppress brown tree snakes island-wide.” The Navy further committed to join a working group that develops and implements projects to find ways to suppress, interdict, and control brown tree snakes at the landscape-level.

235. Finally, the Navy committed to develop an ungulate management plan for the control and potential eradication of ungulates on Navy lands. The plan was in development at the time the 2010 Biological Opinion was issued with implementation required to begin one year after the plan was finalized.

236. Upon information and belief, these Conservation Measures were not carried out.

237. The 2010 Biological Opinion did not require new ungulate fencing—rather, it pointed to the Air Force’s agreement, as reflected in the 2006 Biological Opinion, to fence and remove ungulates from 494 acres and create the Habitat Management Unit to contribute to the conservation of the species.

238. Thus, in 2010, the Navy promised to offset habitat loss, fragmentation and degradation from Camp Blaz by creating four Ecological Reserve Areas (“ERA”) in northern and southern Guam, including one at Ritidian Point that

would add 180 acres to a 601-acre area that the Air Force had carried out as part of its commitments to offset the impacts from the ISR/Strike Project, for a total of 781 acres.

239. Many of these acres have now been cleared for the Firing Range Complex.

240. The ERAs were supposed to have totaled 2,929 acres and in addition to Ritidian Point, include ERAs in other areas including Pati Point, the Naval Munitions Site, and expansion of an existing ERA at Orote.

241. The 2010 Biological Opinion contained a number of other measures requiring increased staffing, monitoring and reporting.

242. Although the Service based its 2010 “no-jeopardy” determination on the Navy’s promises to carry out these and other Conservation Measures, the Service did not specify when these measures must be fully complete to continue to support the validity of the Service’s determinations under Section 7(a)(2), 16 U.S.C. § 1536(a)(2).

243. To date, upon information and belief, the Navy has not yet carried many of these Conservation Measures it committed to in the 2010 Biological Opinion and Incidental Take Statement, including developing reintroduction plans, eradicating and controlling brown tree snakes, implementing an ungulate management plan, and establishing and enhancing the ERAs.

C. The 2015 Biological Opinion and Incidental Take Statement, and the 2015 MOA

244. In 2012, the Navy informed the Service that it was changing the Relocation Project to include the Firing Range Complex and that because of cuts in that year's National Defense Authorization Act, it would not be carrying out certain Conservation Measures from the 2010 Biological Opinion. These two modifications to the agency action resulted in re-initiation of consultation and culminated in the Service's issuance of the 2015 *Biological Opinion for the Department of the Navy's Relocation of the U.S. Marine Corps from Okinawa to Guam and Associated Activities on Guam* ("2015 Biological Opinion").

245. As documented in the 2015 Biological Opinion, from 2012 to 2014, the Navy and Service engaged in a protracted back and forth over the scope of the new consultation. The Navy initially resisted re-initiation and once it agreed, the Navy tried to limit its scope, to exclude consideration of the three extirpated bird species—sihek, ko'ko', and åga—and claiming the modified Relocation Project, with the Firing Range Complex, would not affect the only håyun lågu Mother Tree in Guam.

246. The Service did not concur with the Navy's claims concerning the 2015 Biological Opinion and concluded that the Project was likely to adversely affect the five species under consideration. However, the Service again concluded that the Project still would not be likely to jeopardize (or destroy or adversely

modify their critical habitat), despite the addition of the Firing Range Complex and the subtraction of Conservation Measures to offset the Project.

247. The Navy considered several locations for the Firing Range Complex, but decided to site it at Ritidian Point, in an area that was to become an ERA, as set forth in the 2010 Biological Opinion's Conservation Measures, to offset impacts from the Air Force's ISR/Strike Project in 2006, and as part of the Guam National Wildlife Refuge Overlay in 1993.

248. In the 2015 Biological Opinion, the Service found that the proposed action, with the addition of the Firing Range Complex, would now result in the destruction of more than 1,000 acres of habitat, more habitat loss, degradation, and fragmentation, edge effects, development, noise, and wildfire. The Service found that the "most severe effects on listed species habitat from habitat fragmentation and edge effects" would occur at Ritidian Point, from construction of the Firing Range Complex.

249. As noted in the 2015 Biological Opinion, the Service was particularly concerned about the loss of 181 acres of limestone forest to the Firing Range Complex because it was occupied by fanihi and h ayun l agu, potential habitat for the three extirpated bird species, and adjacent to more forest habitat on the Guam National Wildlife Refuge.

250. In the 2015 Biological Opinion, the Service also explained that the Firing Range Complex will create six miles of new forest edge, which degrades habitat by exposing species to solar radiation, wind, predation, invasive species, and wildfire. The combination of these edge effects and increased noise from live-fire training and loud aircraft overflights, led the Service to conclude that habitat quality near Ritidian Point would be “degraded and no longer provide the same ecosystem services it currently does,” and that the Firing Range Complex would cause “permanent loss of some of the best remaining primary limestone forest on Guam.”

251. The Firing Range Complex will have particularly severe impacts on the last adult h̄ayun l̄agu Mother Tree on Guam. Sixty-five (65) acres of primary limestone forest directly adjacent to the tree was cleared last year for a multi-purpose machine gun range with a mere 100-foot buffer around the tree. In the 2015 Biological Opinion, the Service observed that edge effects like changes in micro-climate and more invasive species, typically extend 492 feet into the forest—four times more than the buffer. The Service thus found that the Project will “likely damage” the h̄ayun l̄agu Mother Tree and seedlings by creating “abiotic conditions that are less favorable to growth and survival, and increase fire risk, invisibility, and wind load, and decreasing the likelihood of pollination and

seed dispersal,” with increased wind damage during storms, including typhoons, posing the greatest risk to the Mother Tree’s survival.

252. Unfortunately, this prediction came true this year, as Typhoon Mawar severely damaged the tree, and as of the filing of this Complaint it is unclear whether it will survive.

253. In the Incidental Take Statement in the 2015 Biological Opinion, the Service found the Relocation Project would repeatedly take up to thirty (30) fanihi in the form of harassment—specifically, due to injury from noise from loud aircraft overflights, live-fire training, construction, and other disturbance for the life of the Project. In 2015, there were fewer than 30 bats on all of Guam.

254. As with the 2010 Biological Opinion, in reaching its no-jeopardy determinations, the Service relied on new Conservation Measures to offset impacts to these species. At the same time, the Service acknowledged “some level of uncertainty” that these Conservation Measures would be carried out because of the Navy’s expanding military development into established mitigation areas, including at Ritidian Point.

255. Thus, to offset Project’s many adverse effects to these species, the Navy committed to the following Conservation Measures:

- (1) implement a forest enhancement project by fencing and removing ungulates and invasive plants and propagating and planting native

plants on approximately 1,000 acres in an area of Navy lands known as Finegayan, to known as the “Finegayan Forest Enhancement”;

- (2) propagate, plant and maintain a minimum of thirty (30) individual h ayun l agu;
- (3) construct a fence and maintain a buffer of 100 feet around the one adult h ayun l agu on Guam;
- (4) within two years, construct and maintain a new fence around the Firing Range Complex, to “encompass the area within the existing Ritidian ungulate fence” per the ISR/Strike Project 2006 Biological Opinion.
- (5) remove all ungulates from the area within six months of completing the new ungulate-exclusion fence;
- (6) construct a brown tree snake barrier around a 160-acre area, and conduct brown tree snake eradication and control, and when successful, increase this area to 300 acres; and
- (7) control rodents and feral cats.

256. In addition to these measures, the Navy entered into the 2015 MOA, in which it committed to “protect and manage” 5,234 acres of habitat on Navy lands in northern Guam for sihek reintroduction.

257. The Service did not explain why the Navy's commitment to protect these acres was not expressly incorporated included as a conservation measure into the proposed action as analyzed in the 2015 Biological Opinion. Regardless, in the 2015 Biological Opinion the Service relied on the commitments set forth in 2015 MOA, to "offset impacts of the Guam Military Relocation," and to support its no-jeopardy determinations that the Relocation Project will not jeopardize the continued existence of sihek, åga, ko'ko', fanihi and hãyun lågu. As such, the Conservation Measures set forth in the 2015 MOA are mandatory.

258. Thus, in the 2015 MOA, the Navy committed to "identify, develop and implement specific management activities and projects on the 5,234 acres" to support kingfisher survival and recovery, including:

- (1) brown tree snake control and suppression of brown tree snake populations;
- (2) support development of methods to control brown trees snakes at the landscape level;
- (3) fencing and eradication of ungulates;
- (4) control of small mammalian predators;
- (5) invasive plant control and eradication;
- (6) native plant restoration; and

(7) localized control of invasive invertebrates that may adversely affect kingfisher nesting and fledging.

259. In addition, the Service based its no-jeopardy determination for the h ayun l agu in the 2015 Biological Opinion on a commitment by the Navy to outplant thirty (30) individual seedlings from the one adult h ayun l agu Mother Tree on Guam, and maintain them through adulthood.

260. Eight years later, upon information and belief, most of these promises have been only partially carried out, or not implemented at all.

261. Meanwhile, the Navy has proceeded with full and complete implementation of the Relocation Project.

262. On February 14, 2016, the Navy informed the Service that up to 112 fanihi were found within the HMU on AAFB during surveys, and subsequently requested an increase in the amount of authorized take in the form of harassment.

D. The 2017 Biological Opinion

263. On October 1, 2015, the Service listed twenty-three (23) additional Micronesian species as endangered or threatened under the ESA, all but two of which occur in Guam, resulting in reinitiation of consultation over the impacts of the Relocation Project to those newly listed species and the Service's issuance of a third biological opinion on July 18, 2017—the *Final Reinitiated Biological Opinion on the Department of the Navy's Relocation of U.S. Marine Corps from*

Okinawa to Guam and Associated Activities on Guam (“2017 Biological Opinion”).

264. The 2017 Biological Opinion analyzed effects to ten (10) more species adversely affected by the Project, including ababang, fading, three tree snails (Guam tree snail, humped tree snail and fragile tree snail), and three (3) orchids (*B. guamense*, *D. guamense*, *T. Guamense*), and three tree species (*C. micronesica*, *H. longipetiolata*, *T. rotensis*).

265. The Service included the fanihi in this third consultation to address new information on the species’ status and the Navy’s request to increase the amount of take of fanihi through harassment that it had authorized in the 2015 Biological Opinion. With this addition, 2017 Biological Opinion analyzes the Relocation Project’s effects to eleven (11) species.

266. In April 2017, the Service informed the Navy that the 5-year Review for the hâyun lågu found that the species had declined on Rota Island by 73 percent when compared to the 1992 baseline. The Service recommended that the Navy reinitiate consultation due to the significant decline of the population in the wild.

267. However, in May 2017, the Navy informed the Service that it was “not interested in adding *S. nelsonii*” to the newly reinitiated consultation. The 2017 Biological Opinion thus fails to consider vital new information regarding the declining status of hâyun lågu. Nor did the consultation consider the Project’s

impacts to the sihek, ago, and ko'ko', despite the Navy's modification of the proposed action from its failure to carry out the Conservation Measures in the 2015 Biological Opinion.

268. The 2017 Biological Opinion superseded all information and analysis related to the fanihi in the 2015 Biological Opinion. The Terms and Conditions in the 2015 Biological Opinion's ITS remain operable and in effect as to sihek, åga, ko'ko', and håyun lågu.

269. The Service found that the 11 species would be adversely affected destruction and degradation of limestone forest, as discussed in the 2015 Biological Opinion, including the destruction of 919 acres of fanihi and fadang habitats, and 1,153 acres of habitat for the ababang, tree snails, and *H. longipetiolata* and *T. rotensis*.

270. The Service also once again found that the Firing Range Complex would have the "largest effects on listed species habitat." In addition to clearing habitat, the Service found the Firing Range Complex will limit access to the Guam National Wildlife Refuge, which will limit active habitat management for these species.

271. Thus, in the 2017 Biological Opinion, the Service concluded that ababang is at a high risk of extinction in Guam from ongoing habitat destruction

and fragmentation, and that creation and protection of high quality ababang habitat should occur without delay.

272. The Service also found the Ritidian Point area is an “important site” for ababang.

273. The butterfly’s habitat patches are already fragmented at Ritidian Point. Further loss of habitat could isolate butterflies locally, and between two other populations at Haputo and Tarague. Isolated populations are at greater risk of disappearing.

274. In the 2017 Biological Opinion, the Service found that the Firing Range Complex would result in the loss of 350 acres (142 ha) of ababang habitat, including the permanent removal of 140 of the butterfly’s host plants.

275. The Service found in the 2017 Biological Opinion that fanihi is sensitive to noise and human disturbance and will avoid the Firing Range Complex during operation. In combination with clearing, this disturbance would result in the loss of 2,136 acres of fanihi habitat and ultimately, would limit the “establishment and growth” of a fanihi colony in northern Guam.

276. The Service once again found that the Relocation Project would take fanihi.

277. In direct contrast to the 2015 ITS, the Service used habitat destruction as a surrogate for take in the 2017 ITS, declining to identify a number of individual

bats that will be taken through habitat destruction or the number of bats that will be taken due to harassment.

278. In the 2017 Biological Opinion and ITS, the Service claimed that the “causal link between the surrogate and take is described above in the *Effects of the Action* section,” but this section shows no such explanation. Instead, take in the form of habitat destruction and take in the form of harassment related to noise from live-fire and loud aircraft overflights are discussed in separate sections, reflecting the distinct nature of the impacts to the species from these threats.

279. The Service observed that fanihi numbers fluctuate in the action area due to “periodic movements between Rota and Guam,” and that this connectivity is “important to allow access to available food resources and ensure genetic flow between islands.”

280. In partnership with the University of Guam, the Air Force has conducted annual surveys for fanihi in Guam since 2013.

281. In 2015 and 2016, 112 fanihi were found in the HMU on Andersen Air Force Base. The Service never explains why these annual surveys and observations would not provide a sufficient basis for estimating take in the form of harassment of individual fanihi or to establish a trigger for reinitiation of consultation if the allowable take is exceeded. In the absence of such a trigger, an

infinite number of fanihi can be repeatedly taken with a real potential to jeopardize the continued existence of the species.

282. The Ritidian Point area contains the largest concentration of fadang. The Project will result in removal of 3,191 individuals of the species. Remaining individuals will be exposed to habitat fragmentation, edge effects and increased susceptibility to introduced cycad scale insects, which kill 90 percent of infected individuals. The Navy committed to ensure that 1,596 individuals of fadang are maintained and survive into maturity. The Navy only committed to one year of maintenance and monitoring to satisfy this success criteria. New information indicates considerable mortality beginning four years after translocation, yet Conservation Measures only require monitoring for one year after translocation.

283. The Service again relied on the Conservation Measures in the 2015 Biological Opinion and MOA, including the commitment to actively restore and manage 5,234 acres of habitat to support reintroduction of the sihek, ko'ko', åga and fanihi and the requirement to protect 1,000 acres at Finegayan by constructing an ungulate fence, removing all ungulates, and controlling non-native plants.

284. In addition, the 2015 Biological Opinion required, among other things, fencing of the Haputo Ecological Reserve area, pre-construction surveys, salvage and outplanting of listed plants, creation of a native plant nursery for propagation of native and listed species, annual reporting of Conservation

Measures, and identification and use of successful technology to severely suppress or eradicate brown tree snakes.

285. In support of its no-jeopardy determinations, the Service relied on these Conservation Measures even though they are uncertain, non-specific, unenforceable, and unlikely to be effective or adequate.

V. Failure to Implement Conservation Measures

286. Upon information and belief, the Navy has failed to carry out many Conservation Measures contained in the 2015 Biological Opinion, MOA, and ITS, and the 2017 Biological Opinion and ITS. Thirteen (13) years after the 2010 Biological Opinion and with the Relocation Project nearly complete, upon information and belief, sihek habitat remains unprotected, the three extirpated bird species have not been reintroduced, the h ayun l agu and ababang host plants have not been successfully outplanted, and brown tree snake suppression at the landscape level has not occurred.

287. In the meantime, the plight of several of the species, including sihek, ko'ko',  aga, ababang, fanihi, fadang, and h ayun l agu, has only grown more dire, while the Navy continues to undertake activities that further harm these protected species.

288. Since 2017, the Navy has produced annual reports documenting progress implementing the RPMs required by the Biological Opinions. These

reports show that the Navy has failed to implement key aspects of the Biological Opinions.

A. Finegayan Forest Enhancement

289. In the 2015 and 2017 Biological Opinions, the Navy committed to implement a forest enhancement project on a minimum of 1,000 acres at Finegayan, including fencing and ungulate removal. Yet a 2022 annual report shows that the Navy has only fenced 679 acres so far, and has yet to remove all ungulates.

B. Brown Tree Snake Control and Suppression

290. The 2015 Biological Opinion required the Navy to install a barrier to exclude brown tree snakes from 160 acres “after the current experimental suppression activities within the [HMU] has been determined to be successful.” Once this fencing was complete and brown tree snakes controlled, the Navy was required to install a second barrier to exclude brown tree snakes from an additional 140 acres. for a total of 300 acres.

291. The Navy has worked with and funded the U.S. Department of Agriculture Wildlife Services to test brown tree snake control in the HMU, leading to a 2016 report that unequivocally concluded brown tree snakes could be successfully suppressed. Dorr, Brian S., Clark, Craig S., and Savarie, Peter. 2016. Aerial Application of Acetaminophen-treated Baits for Control of Brown

Treesnakes. USDA/Wildlife Services/National Wildlife Research Center, Starkville, MSUSDA/Wildlife Services, Honolulu, HI (“Dorr et al. 2016”).

292. Dorr et al. 2016 should have triggered construction of the 160-acre barrier, yet it is still not built seven years later. In the 2022 annual report, the Navy reports that it has initiated planning for construction of the barrier. Regardless, without such landscape-level control, these species remain on critical life support with much more action needed if they are to survive.

C. Northwest Field Ungulate Control Area

293. The Navy was required to have built a fence to create the Northwest Field Ungulate Control Area within two years of awarding a contract to remove the “Ritidian Ungulate Fence” constructed by the Air Force and removed all ungulates within six months of constructing the fence. Upon information and belief, the fence was constructed behind schedule and the Navy has yet to remove ungulates from this critical area.

D. 2015 Memorandum of Agreement

294. Upon information and belief, the Navy has failed to protect, manage, and actively restore approximately 5,234 acres of sihek habitat on Navy lands in northern Guam as required and relied upon by the Service in its no-jeopardy determinations as set forth in 2015 and 2017 Biological Opinions. The Service identified these 5,234 acres as habitat needed to offset the Relocation Project’s

impacts on sihek. Additionally, this commitment was a key component of the Service's conclusion that the relocation would not jeopardize the sihek, as well as the other two extirpated bird species, fanihi, and hāyun lāgu.

295. The 2015 MOA requires the Navy to identify, develop and implement specific management activities and projects on 5,234 acres. The Service required enhanced active management to ensure that this habitat will support sihek reintroduction. Yet, eight years later, the Navy has done little to protect and manage this necessary habitat.

E. Measures for Ababang Survival and Recovery

296. Upon information and belief, the Navy has failed to implement requirements the Service deemed necessary to minimize the serious effects of the Relocation Project on the ababang.

297. The 2017 Biological Opinion requires the Navy to prioritize the enhancement of high quality ababang habitat (e.g., forest enhancement areas, Haputo ERA trail, and the Northwest Field Ungulate Control Area), including outplanting of the butterfly's host plants into enhancement areas prior to or commensurate with clearing of the butterfly's habitat.

298. The ababang's habitat has been cleared for the Firing Range Complex, yet according to the Navy's annual reports, not one of the ababang's host plants (*P. pedunculata* and *E. calcareum*) has been outplanted in the forest enhancement

sites, or the earthen berms of the Firing Range Complex. This is another violation of the 2017 Biological Opinion's mandatory Conservation Measures.

299. Additionally, the 2017 Biological Opinion requires the Navy to conduct a biological survey, at least on an annual basis, to evaluate ababang host plants with butterflies at various stages of the life cycle (e.g., eggs, caterpillar, and chrysalis) and to relocate them to an appropriate host plant away from the Project area. Yet, while salvage and translocation of various life-stages of the butterfly occurred in 2021, the Navy's 2022 annual report makes no mention of these surveys.

F. Measures for the Håyun lågu

300. To date, upon information and belief, the Navy has not outplanted any håyun lågu to the forest enhancement sites despite a requirement to outplant 30 individual trees, even as it has cleared the area surrounding the last surviving tree, exposing it to damaging winds and other imminent threats to its existence.

VI. The Center's Requests for Records About the Relocation Project from the Navy under the Freedom of Information Act

301. To learn more information about the Relocation Project, in 2021 the Center for submitted a formal request to the Navy under the FOIA, seeking records regarding the impacts to endangered and threatened species.

302. The Center's request was submitted to the Navy by letter dated August 6, 2021, and requested the project files for ESA consultation and other

records related to the Relocation Project. This request was assigned tracking number DON-NAVY-2021-009329 by the Navy.

303. While the Center initially received some responsive records from the Navy in response its FOIA request, the Navy has yet to complete its production of and provide the Center with all responsive records and a final determination pursuant to FOIA. 5 U.S.C. § 552(b).

CLAIMS FOR RELIEF

—FIRST CLAIM FOR RELIEF—

THE SERVICE’S 2017 BIOLOGICAL OPINION IS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE APA AND ESA **The Service’s No-Jeopardy Determination for the Fanihi (Mariana Fruit Bat) is Arbitrary, Capricious, and Contrary to the Endangered Species Act**

304. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

305. Through formal consultation, the Service found that the Relocation Project will permanently destroy 2,136 acres of some of the last remaining roosting and foraging habitat for the fanihi (Mariana Fruit Bat) left on Guam, and will cause “take”—specifically in the form of “harm” and “harassment”—of all remaining fanihi in the area due to roost abandonment, miscarriages, and death of infant bats from noise, light, and construction and operation of the Firing Range Complex.

306. Rather than arresting the fanihi’s decline and averting the species’ freefall toward extinction by avoiding, minimizing, and mitigating military training

impacts—priorities for the species’ survival and recovery, according to the Service—these adverse effects will permanently destroy a large portion of what remains of the species’ very small, diminishing habitat.

307. The agency actions also undermine reestablishment of a maternal roost colony at Andersen Air Force Base, the location of some of the only remaining habitat and maternity colony before it was gone, by 2010, as a result of the same military activities and adverse effects as are occurring under the Project.

308. Reestablishment of a maternal roost colony at Andersen Airforce Base is critical to ensuring the species’ survival in the wild, according to the Service’s 2010 recovery plan for the fanihi.

309. In the 2017 Biological Opinion, the Service dismissed these devastating impacts to the fanihi’s prospects for survival and recovery in the wild.

310. Instead, and without any basis in fact, the Service concluded that Relocation will not jeopardize the fanihi’s continued existence because the Navy promised to: (1) “[e]nhance[] and protect[] ... two Forest Enhancement sites in Finegayan totaling 1,108 acres ... of limestone forest habitat”; (2) “construct[] an ungulate fence,” thus “creating an Ungulate Control Area in the Northwest Field, and eradicating ungulates within this area surrounding the [Firing Range Complex]”; (3) install “[f]encing of the Haputo Ecological Reserve Area (ERA)” in order to “prevent overuse by military and civilian personnel and potential

damage to terrestrial biological resources”; and (4) implement the 2015 MOA—all of which were supposed to help the fanihi “persist.” 2017 Biological Opinion at 106, 134.

311. These Conservation Measures echo similar measures from the 2015 Biological Opinion, 2010 Biological Opinion, and elsewhere. However, upon information and belief, the Navy has never actually fulfilled these commitments.

312. In determining that the proposed action would not jeopardize the fanihi in the 2017 Biological Opinion, the Service relied on Conservation Measures that the Navy was required to carry out to halt the fanihi’s decline toward extinction.

313. The Service’s determination was arbitrary and capricious because there was no indication that the Navy would ever implement those measures, given its pattern of broken promises.

314. Indeed, nearly six years after finalizing the 2017 Biological Opinion, upon information and belief, the Navy has yet to fulfill these mandatory Conservation Measures.

315. Thus, the Service’s no-jeopardy determination for the Mariana fruit bat in the 2017 Biological Opinion is arbitrary, capricious, and not in accordance with the ESA because, among other reasons, it:

- a. Fails to apply the best available scientific information to the fanihi's plight and prospects for survival in the wild, which indicates that the Relocation Project can be reasonably expected to appreciably reduce the chances of the fanihi's survival and recovery in the wild on Guam, both directly and indirectly, and constitutes a clear error of judgment on the part of the Service, and thus jeopardizes the species' continued existence, in violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02;
- b. Fails to articulate how the no-jeopardy determination bears any rational connection to the facts that were before the Service;
- c. Is based on vague Navy promises to carry out Conservation Measures to mitigate the impacts of the Relocation Project, without any indicia that the military will actually do so, with minimal acknowledgment of the Navy's prior broken promises, and without any factual basis for expecting a different outcome this time;
- d. Unreasonably concludes that the fanihi's survival and recovery will improve in the long-term based on unproven and unfulfilled Conservation Measures, and ignores the consequences of the Relocation Project's adverse short-term effects; and

- e. Applies the wrong legal standard for determining jeopardy—i.e., by finding that the Relocation Project will not appreciably reduce the likelihood of the survival and recovery of the Mariana fruit bat in the wild “because sufficient habitat and populations are likely to persist throughout its range that retain the potential for recovery... ,” rather than applying the proper legal standard for jeopardy, which is whether the action can be expected to reduce the likelihood of the fanihi’s survival and recovery in the wild by reducing the reproduction, numbers, or distribution of that species.

316. As a result, the Service’s no-jeopardy determination for the fanihi, set forth in the 2017 Biological Opinion, is arbitrary, capricious, and contrary to law because: (1) the best available scientific information makes clear that due to their miniscule status and range, low reproductive success, myriad ongoing threats, lack of suitable habitat, and cumulative impacts, it is reasonable to expect that the Relocation Project will appreciably reduce the survival and recovery of fanihi in the wild by reducing the species’ reproduction, numbers, and distribution; and (2) the Navy’s vague, unfulfilled promises to carry out Conservation Measures cannot be expected to offset this outcome sufficiently to reach a no-jeopardy determination.

—SECOND CLAIM FOR RELIEF—
THE SERVICE’S 2017 BIOLOGICAL OPINION VIOLATES SECTION 706
OF THE ADMINISTRATIVE PROCEDURE ACT
The Service’s Incidental Take Statement for Fanihi (Mariana Fruit Bat) failed
to properly establish a threshold for take

317. Plaintiffs re-allege and incorporate by reference the allegations set forth in this Complaint as though fully set forth below.

318. In the incidental take statement in the 2015 Biological Opinion, the Service found up to 30 fanihi could be “repeatedly taken in the form of harassment leading to injury” from loud aircraft noise, operation of the Firing Range Complex, construction noise, and other disturbance.

319. In the 2017 Biological Opinion’s ITS, however, the Service used habitat destruction as a surrogate for take, declining to identify the number of bats that will be taken from harassment.

320. The Service claims in the 2017 Biological Opinion that the “causal link between the surrogate and take is described above in the *Effects of the Action* section,” but this section provides no such explanation.

321. The Service notes in the 2017 Biological Opinion that “definitive population estimates are lacking” and that “natural population fluctuations are undescribed” as reasons for not quantifying take in terms of the number of individuals but fails to explain why these limitations did not preclude the Service

from estimating take using the number of individuals likely to be “repeatedly taken” in the 2015 Biological Opinion.

322. The Service observed that fanihi numbers fluctuate in the action area due to “periodic movements between Rota and Guam,” and that this connectivity is “important to allow access to available food resources and ensure genetic flow between islands.” Demonstrating fanihi use and dependence on this essential habitat in Guam.

323. Partnering with the University of Guam, the Air Force has conducted annual surveys for fanihi on Guam since 2013. In 2015 and 2016, 112 fanihi were found in the HMU on AAFB. Yet, the Service fails to provide a reasonable explanation for why these annual surveys and observations do not form a sufficient basis for estimating take of individual fanihi, or to establish a trigger for reinitiation of consultation.

324. As a result, the Service’s ITS for the fanihi, set forth in the 2017 Biological Opinion, is arbitrary, capricious, and contrary to the ESA because the best available scientific information provides a clear basis for establishing a numerical estimate of take in the form of harassment of individual fanihi as was utilized in the 2015 Biological Opinion.

325. This failure to apply the same information from 2015 to the 2017 Biological Opinion and its ITS is arbitrary, capricious, and contrary to law because

it fails to establish a meaningful trigger for reinitiation of consultation, effectively allowing unlimited take for the life of the Project, which has no specified end date.

—THIRD CLAIM FOR RELIEF—
THE SERVICE’S 2017 BIOLOGICAL OPINION VIOLATES SECTION 706
OF THE ADMINISTRATIVE PROCEDURE ACT
The Service’s No-Jeopardy Determination for the Ababang (Mariana Eight-Spot Butterfly) in the 2017 Biological Opinion
is Arbitrary, Capricious, and Contrary to the Endangered Species Act

326. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

327. Through formal consultation, the Service found that the Relocation Project will destroy 140 host plants the ababang depends on for survival, including host plants that are occupied by ababang—plants which were to receive the highest priority for immediate protection to stave off the species’ extinction—and further fragment the even lower number of host plants that remain in the wild.

328. The Relocation Project will also result in the loss of another 350 acres of the species’ already very small remaining range, which will likely undermine the potential for establishment of a functional meta-population for the six spatially distributed-yet-interconnected ababang populations which interact with each other, something that the Service has previously said is essential to the species’ very survival in the wild.

329. Having implicitly recognized the dire consequences for the butterfly’s long-term survival and recovery from the Relocation Project’s extensive

destruction of some of the species' only remaining habitat, in order to "prevent permanent degradation" of the species' habitat, the Service emphasized that the Navy would need to "place a high priority on creating and protecting quality butterfly habitat in the Haputo ERA and remaining locations within the Ritidian Point area, but outside [Firing Range Complex] operations." In recognition of the importance of this commitment, the Service further underscored in the 2017 Biological Opinion that "[t]he creation and protection of this high-quality Mariana eight spot butterfly habitat should occur without delay."

330. Yet nearly six years later, while the Navy has proceeded with carrying out the destructive activities that could very well jettison the possibility that this rare, beautiful butterfly continues to exist, upon information and belief, the Navy has *not* created or protected "this high quality Mariana eight spot butterfly habitat"—i.e., the "high priority" Haputo ERA and remaining locations within the Ritidian Point area—which was to have occurred (as the Service declared in 2017) "*without delay.*"

331. Given the short lifespan of the butterfly, a significant temporal gap between habitat destruction and restoration is particularly concerning, whereby loss of individuals to habitat destruction with no immediate replacement habitat leads to a permanent impairment of the species' status such that there are few or no

butterflies to colonize new habitat when and if the Navy ever gets around to carrying out the mandatory Conservation Measures for the species.

332. In addition, in a desperate attempt to shore up its no-jeopardy determination for the ababang, the Service pointed out that the Navy would relocate any Mariana eight-spot butterflies that it locates through pre-construction surveys to host plants located elsewhere. Yet, the Service cannot ignore that this measure “will not preclude effects to the species,” only that it would “minimize” them.

333. The Service did not estimate what it meant by “minimize,” provided no rationale or evidence to support the assertion that these efforts would succeed, and certainly did not do so to the degree that would be necessary to support the no-jeopardy determination that the agency reached.

334. Nevertheless, the Service concluded that the Relocation Project would not be likely to jeopardize the ababang because the Navy’s activities in connection with the Relocation Project, including with the addition of these Conservation Measures, “will be minimized significantly and sufficient habitat and populations are likely to persist throughout [the abbagang’s] [remaining, vastly reduced] range at levels that retain the potential for recovery of this species.”

335. In reaching this conclusion, the Service surmised that while impacts are certainly going to diminish the species in the short term, the Navy’s

commitments to Conservation Measures will “retain the potential for recovery” in the long term, a rationale that utterly fails to recognize the species’ short life cycle and low reproductive success.

336. As with the fanihi, banking on the Navy’s promises to carry out Conservation Measures that the Service blithely suggested will sufficiently mitigate the ababang’s decline to support the no-jeopardy determination, the agency acted arbitrarily and capriciously and contrary to law, and again turned a blind eye to the Military’s pattern of broken promises to protect listed species.

337. Thus, the Service’s no-jeopardy determination for the Mariana eight-spot butterfly in the 2017 Biological Opinion is arbitrary, capricious, and not in accordance with the ESA because, among other reasons, it:

- a. Fails to apply the best available scientific information to the ababang’s plight and prospects for survival and recovery in the wild; which indicates that the Relocation Project can be reasonably expected to appreciably reduce the chances of the ababang’s survival and recovery in the wild, both directly and indirectly, and constitutes a clear error of judgment on the part of the Service, and thus jeopardizes the species’ continued existence in violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02;

- b. Fails to articulate how the no-jeopardy determination bears any rational connection to the facts before the Service;
- c. Fails to reach the only reasonable conclusion, which is that the Relocation Project appreciably reduces the ababang's chances for survival and recovery in the wild, and thus jeopardizes the species' continued existence, in violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02;
- d. Is based on vague Navy promises to carry out Conservation Measures to ostensibly mitigate the impacts of the Relocation Project, without any indicia that the military will actually do so, with minimal acknowledgement of the Navy's history of broken promises, and without any factual basis for expecting a different outcome this time;
- e. Unreasonably concludes that the ababang's survival and recovery will improve in the long term based on unproven (and unimplemented) Conservation Measures, and ignores the consequences of the Relocation Project's adverse short-term effects which are likely to be devastating to the species, particularly in light of its short life cycle;

- f. Ignores other ongoing and worsening threats to the species and cumulative impacts; and
- g. Applies the wrong legal standard for determining jeopardy—i.e., by reasoning that Relocation Project will not appreciably reduce the likelihood of the survival and recovery of the Mariana eight-spot butterfly in the wild “because effects of the action will be minimized significantly and sufficient habitat and populations are likely to persist throughout its range at levels that retain the potential for recovery of this species,” rather than the proper legal standard under the ESA, which is whether the action will likely reduce the likelihood of the ababang’s survival and recovery in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

338. As a result, the Service’s no-jeopardy determination for the ababang, set forth in the 2017 Biological Opinion, is arbitrary, capricious, and contrary to the ESA because the best available scientific information makes clear that due to their miniscule status and range, short life cycle, myriad ongoing threats, lack of suitable habitat, and cumulative impacts, it is reasonable to expect that the Relocation Project will appreciably reduce the survival and recovery of ababang in the wild by reducing the species’ reproduction, numbers, and distribution, and the

Navy's vague, unfulfilled promises to carry out Conservation Measures cannot be expected to offset this outcome sufficiently to reach a no-jeopardy determination.

—FOURTH CLAIM FOR RELIEF—
Violation of Section 7(a)(2) of the ESA:
Failure to Ensure Against Jeopardy

339. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

340. As the Federal action agency carrying out the Relocation Project, the Navy has an affirmative duty under Section 7(a)(2) of the ESA to ensure that the Relocation Project is not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2).

341. Through multiple rounds of formal consultation with the Service dating back to 2010, the Service consistently found that the Relocation Project will permanently destroy or degrade significant portions of the already vastly diminished remaining ranges for 15 endangered and threatened species on Guam, including some of Guam's last surviving birds, bat, and plants. These species include the fanihi and ababang as well as the sihek (Guam Kingfisher), åga (Mariana Crow), ko'ko' (Guam Rail), hâyun lågu (*Serianthes nelsonii*), and fadang (*Cycas micronesica*).

342. Every time, the Service has determined that the Relocation Project will not jeopardize these and other listed species' continued existence, in large part

based on promises the Navy made to carry out Conservation Measures—as part of the Relocation Project itself and/or terms and conditions in Incidental Take Statements—that the Service believes are necessary to offset the adverse effects of the Project.

343. These mandatory measures include commitments: to create reserves and restore native habitats for reintroduction and recovery of extirpated species and reestablishment of roost colonies; install fencing and buffers to protect species and habitats from invasive species; propagate outplantings of *håyun lågu* seedlings and ababang host plants; and remove, eradicate, and control brown tree snakes and feral ungulates, among many other measures.

344. However, Upon information and belief, the Navy has not implemented or even initiated the most essential Conservation Measures, thereby failing to carry out commitments the Navy has been making for years, even while it carries out the most destructive aspects of the Relocation Project, unimpeded, including clearing forests and habitat areas, constructing buildings and roads, operating Base activities, and conducting multiple military training activities such as live-firing of weapons and planned bursts of machine guns, day and night, for hours and even weeks at a time—within yards of the last adult *håyun lågu* Mother Tree on Guam and its seedlings.

345. The Navy cannot meet its ESA Section 7 obligations for the Relocation Project by relying on Biological Opinions that are legally invalid as a direct result of the Navy's own apparent refusal to fulfill its many promises to protect these species by implementing Conservation Measures to offset the devastating effects of its highly destructive activities, which have been occurring with impunity since 2010.

346. The Navy cannot proceed with activities that adversely affect endangered and threatened species and their habitats without fully complying with the strict procedural requirements of Section 7(a)(2) of the ESA and its implementing regulations, which is the only lawful way that the Navy can discharge its affirmative, substantive ESA duty and avoid the likelihood—indeed, the virtual certainty—that these activities are appreciably reducing species' ability to survive and recover from the very real, imminent extinction threat, not just allow them to “persist” or maintain their “potential for recovery” in the wild.

347. Because, upon information and belief, the Navy has failed to fulfill Conservation Measures from the Biological Opinions and ITSs, and continues to ignore its commitments to protect endangered species, the Navy is in direct, ongoing violation of its independent and substantive duty to ensure that the authorization and implementation of the Relocation Project will not likely

jeopardize the continued existence of any endangered or threatened species, in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

—**FIFTH CLAIM FOR RELIEF**—

Failure to Reinitiate Formal Consultation under 50 C.F.R. § 402.16(a)

348. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

349. The Navy has a legal obligation to “reinitiate” formal consultation with the Service where new information reveals effect of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, or the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence. 50 C.F.R. § 402.16(a)-(b).

350. In this case, there has been modifications to the proposed action in the form of delays in implementation of Conservation Measures, as well as extensive new information which demonstrates the Relocation Project will have deleterious effects to listed species not previously considered because the species face new or increased threats that place them in additional peril, including:

- a. An expected 100 percent increase in intense storms, including typhoons and super typhoons, due to climate change, presenting a serious threat to remaining limestone forest that serves as habitat for all the listed species;

- b. Eroding genetic diversity and likely inbreeding depression in sihek due to small captive population size and limited capacity in zoos.
- c. Elevation of sihek from a subspecies to a species, demonstrating its uniqueness, irreplaceability, and increased imperilment;
- d. Discovery of brown tree snakes on Cocos Island, where one of only three populations of ko'ko' survives;
- e. Determination that a new disease, AEX, that is affecting the health of the critically small population of åga remaining on Rota, which is the last in the world;
- f. Information that the last hâyun lågu on Guam is genetically distinct from remaining individuals on Rota Island;
- g. Very poor survival of propagated hâyun lågu seedlings, failure of the Navy to outplant any individuals into the forest enhancement areas, and severe injury of the Mother Tree in Typhoon Marwar.
- h. Drastic decline in the numbers of hâyun lågu trees on Rota;
- i. Determination that the invasive Cuban slug, which has become ubiquitous on Guam, is a major pest of the two host plants of ababang and causes mortality in a high proportion of infected plants; and

j. Delays and the Navy's failure to implement mandatory Conservation Measures further imperils these endangered species, leaving them at heightened risk of extinction to any number of threats.

351. In addition, by failing to implement Conservation Measures that were incorporated into the proposed action that was considered by the Service in the 2017 and 2015 Biological Opinions, the Navy has violated the Terms and Conditions of those opinions and thus modified the proposed action, requiring reinitiation of consultation.

352. Therefore, the Navy is in ongoing violation of the ESA's implementing regulations because it has failed to reinitiate consultation despite significant new information that reveals effects of the Relocation Project that may affect listed species in a manner or to an extent not previously considered in the 2017 and 2015 Biological Opinions, and because the Navy has failed to implement mandatory, essential Conservation Measures that were incorporated into the Relocation Project (the proposed action) and/or included as Terms and Conditions in the 2017 and 2015 Incidental Take Statements, which were supposed to help protect and restore habitat sufficiently for the affected endangered and threatened species to survive and recover. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).

—SIXTH CLAIM FOR RELIEF—
NAVY: Violation of Section 7(d) of the ESA;
Until the Navy Completes the Required Formal Consultation
It is Prohibited from Carrying Out Activities
That Foreclose Reasonable and Prudent Alternatives and Measures
That Will Not Jeopardize the Affected Species

353. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

354. Unless and until the Navy reinitiates formal consultation with the Service over the effects of its Relocation Project activities to the ababang, fanihi, sihek, åga, ko'ko', håyun lågu, and fadang, the Navy is prohibited under Section 7(d) of the ESA from “mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d).

355. Such activities here include but are not limited to military training exercises, live-fire training, clearing of vegetation or other habitat, aircraft overflights, and any and all other activities that may have the effect of foreclosing the Service’s formulation or implementation of reasonable and prudent alternatives, or reasonable and prudent measures, which will not jeopardize the continued existence of the affected endangered and threatened species.

—SEVENTH CLAIM FOR RELIEF—
Violation of ESA Section 9 for Take
of Ababang and Fanihi

356. Plaintiffs re-allege and incorporate by reference all allegations set forth in this Complaint as though fully set forth below.

357. Section 9 of the ESA prohibits the Navy from taking any endangered species within the United States or the territorial sea of the United States or the high seas absent valid take coverage. 16 U.S.C. § 1538(a)(1)(B) and (C).

358. In three Biological Opinions from 2017, 2015, and 2010, the Service determined that the Relocation Project would result in some amount of “incidental take” of individuals of the ababang and fanihi. On that basis, the Service prepared Incidental Take Statements that specify “the impact of such incidental taking on the species” and “those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact[.]” 16 U.S.C. § 1536(b)(4).

359. Thus, for example, in the 2010 ITS the Service specified that the Relocation Project would lawfully cause “incidental take” of “up to ten remaining Mariana fruit bats” in the form of “harassment” from noise, and specified RPMs and thus its Terms and Conditions—specifically, that the Navy implement the Conservation Measures it had incorporated into the proposed action, monitor and

track its progress in doing so, and prepare and send reports of that progress to the Service.

360. The Navy has failed to implement and to comply with the RPMs, Terms and Conditions, and Conservation Measures as set forth in the Project description in the 2017 and 2015 Biological Opinions and ITSs, and therefore lacks the necessary legal authorization to take ababang and fanihi.

361. Upon information and belief, the Navy has failed to “prioritize the enhancement and protection of high quality Mariana eight spot butterfly habitat (e.g., forest enhancement areas, Haputo ERA trail and NWF Ungulate Control Area),” and has failed to outplant any *P. pedunculata* and *E. calcareum*, the two host plants of the ababang into these protected areas “prior to or commensurate with vegetation clearing activities that remove butterfly habitat.”

362. Because the Navy has failed to implement all the reasonable and prudent measures, terms and conditions, and Conservation Measures in the 2015 and 2017 Incidental Take Statements, it is liable for violation of the prohibition against take in Section 9 of the ESA.

—EIGHTH CLAIM FOR RELIEF—
Violation of the Freedom of Information Act;
Failure to Promptly Disclose Records Responsive to the Center’s FOIA
Request; Failure to Make a Determination under FOIA on the Center’s
August 6, 2021, Request under the FOIA

363. Plaintiffs re-allege and incorporate by reference the allegations set forth in Section VI of this Complaint as though fully set forth below.

364. Plaintiff the Center for Biological Diversity is legally entitled to a final determination and records regarding the 2017 and 2015 Biological Opinions it requested under the FOIA in August 2021. 5 U.S.C. § 552(a)(3).

365. The Navy is in violation of FOIA by failing to complete its search for and produce all records that are responsive to the Center’s FOIA request numbered DON-NAVY-2021-009329, and any and all reasonably segregable portions thereof, and by failing to make a final determination on the Center’s request or an estimated date of its completion for such determination. 5 U.S.C. §§ 552(a)(4)(B), (a)(6) and (a)(7).

PRAYER FOR RELIEF

For the reasons stated above, the Center respectfully requests that the Court grant the following relief:

1. Declare the Navy to be in ongoing violation of the ESA for failing to reinitiate consultation on the ongoing impacts of the Relocation Project, 50 C.F.R. § 402.16;

2. Declare that the Service's July 18, 2017, Biological Opinion to be arbitrary and capricious and contrary to law in violation of the APA, 5 U.S.C. § 706(A)(2);
3. Declare the Navy to be in violation the ESA by relying on the legally invalid 2017 and 2015 Biological Opinions and Incidental Take Statements;
4. Declare the Navy to be in violation of its affirmative duty to avoid jeopardy under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by relying on invalid Biological Opinions and failing to implement mandatory Conservation Measures;
5. Vacate, set aside, and remand the Service's July 18, 2017 Biological Opinion and Incidental Take Statement;
6. Order the Navy to implement, without delay by a date certain, all Conservation Measures required pursuant to the 2017 Biological Opinion and 2015 Biological Opinion and their respective Incidental Take Statements, pending reinitiation and completion of consultation, including but not limited to the following:
 - (a) Enhance and protect Mariana eight-spot butterfly (ababang) habitat through the establishment and projection of forest enhancement areas, Haputo ERA, and NWF Ungulate Control Area;

- (b) Outplant *P. pedunculata* and *E. calcareum*, the two butterfly host plants into the required protected areas;
 - (c) Eradicate and control brown tree snakes, including at the Northwest Field;
 - (d) Fully implement the 2015 MOA; and
 - (e) Complete outplantings for h ayun l agu;
7. Order the Navy to cease all ongoing activities that adversely affect the ababang, fanihi, sihek,  aga, ko'ko', h ayun l agu, and fadang, pending the Navy's reinitiation and Defendants' completion of consultation;
 8. Order the Navy to immediately cease any and all activities involving the irreversible and/or irretrievable commitment of resources which may have the effect of foreclosing the development of reasonable and prudent alternatives during formal consultation under the ESA;
 9. Order the Navy to complete its search for all responsive records and produce them to the Center, and to provide a final determination in response to the Center's FOIA request numbered DON-NAVY-2021-009329;
 10. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant to 16 U.S.C.   1540(g)(4) (ESA) and/or 28 U.S.C.

§ 2412(d) (Equal Access to Justice Act) (APA Claims I-VI), and 5 U.S.C.

§ 552(a)(4)(E) (FOIA Claims VII-VIII); and

11. Grant such other and further relief as the Court deems just and proper to remedy the Defendants' violations of law.

DATE: July 18, 2023.

Respectfully Submitted,

/s/ Leevin T. Camacho

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