Sustainable Development Law & Policy

Volume 7
Issue 1 *Fall 2006: Ocean & Fisheries Law*

Article 11

Are Marine National Monuments Better Than National Marine Sanctuaries? U.S Ocean Policy, Marine Protected Areas, and the Northwest Hawaiian Islands

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U.S. Ocean Policy, Marine Protected Areas, and the Northwest Hawaiian Islands

*by Robin Kundis Craig**

Introduction

Since at least the 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Fishery Conservation and Management Act,[1] the United States has, at least nominally, been pursuing a policy of sustainable management of fisheries, guided by the precautionary principle. Nevertheless, there is continued concern about the state of American fisheries. As the Pew Oceans Commission pointed out in May 2003, we are depleting the oceans of fish and have been for decades. While we only know the status of one-third of the commercially fished stocks in U.S. waters, thirty percent of the fish populations that have been assessed are overexploited to some degree.[2] In its 2004 Final Report to Congress and the President, the U.S. Commission on Ocean Policy expressed similar concerns in a chapter devoted to the topic of sustainable fisheries. Specifically, the Commission noted that "the last thirty years have witnessed overexploitation of many fish stocks, degradation of habitats, and negative consequences for too many ecosystems and fishing communities."[3]

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Chances are that the United States' actual attainment of sustainable fisheries will involve the increasing use of marine protected areas ("MPAs") and marine reserves. MPAs are location-based legal protections for marine species and ecosystems — the ocean equivalent of terrestrial national and state parks. While all MPAs restrict some activities within their boundaries, often through the use of marine zoning, the most protective MPAs are marine reserves. Within the boundaries of a marine reserve, usually all extractive uses of the marine ecosystem are prohibited, including all fishing. Some marine reserves go further and prohibit all access to the ecosystem except scientific research, but most allow non-extractive recreational uses such as snorkeling, diving, and boating.

Research has repeatedly demonstrated that MPAs and marine reserves that are scientifically chosen to protect important fish habitats, such as breeding grounds or nurseries, can be quite effective in increasing both the numbers and size of targeted species of fish.[4] Size can be just as important as numbers for the many species for which larger, older fish — the usual targets of commercial and recreational fishers — produce far more gametes far more often than smaller fish. As the Pew Oceans Commission summarized:

> "Marine reserves — areas of the ocean in which all extractive and disruptive activities are prohibited — are a relatively new, but very promising approach to marine conservation . . . . The establishment of areas that prohibit extractive and disruptive activities, such as wilderness areas, has been a well-accepted conservation practice on land for more than a century and has greatly enhanced ecosystem protection. While 4.6 percent of the land area of the United States is preserved as wilderness, the area of ocean under U.S. jurisdiction that is protected in marine reserves is a small fraction of one percent."[5]

Similarly, the U.S. Commission on Ocean Policy linked sustainable fisheries to the increased use of MPAs and ecosystem-based management. It recommended that fisheries managers increase the use of "essential fish habitat" designations on an ecosystem basis[6] and that the federal government "develop national goals and guidelines leading to a uniform

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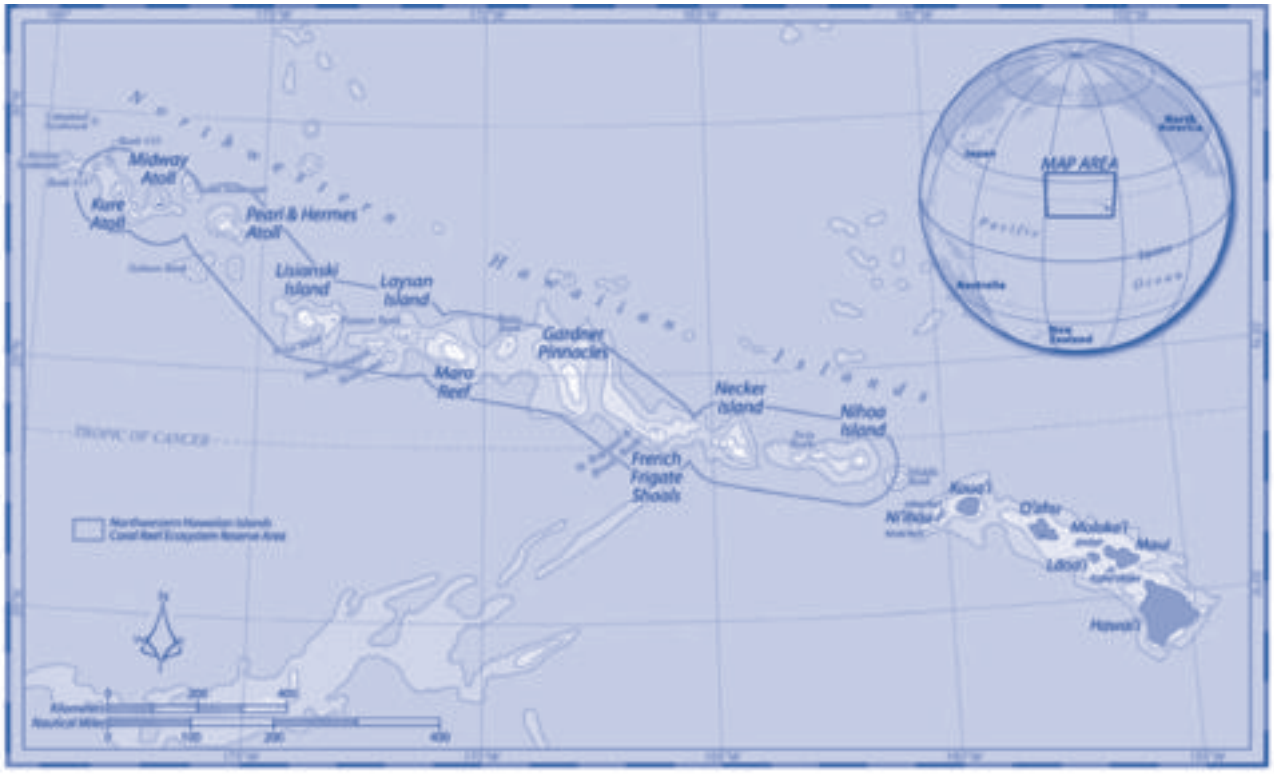

National Oceanic and Atmospheric Administration (NOAA)

The Northwestern Hawaiian Islands Marine National Monument.

process for the effective design, implementation, and evaluation of marine protected areas."[7]

Even accepting these general goals, the legal mechanism for establishing a national system of MPAs and marine reserves remains relatively unexamined. Currently, there are many legal vehicles available to create an MPA or marine reserve, even just within federal law. For example, MPAs can and have been created through the Antiquities Act of 1906,[8] the Marine Protection, Research, and Sanctuaries Act ("MPRSA"),[9] the Magnuson-Stevens Act, direct congressional legislation,[10] and presidential executive order. In addition, coastal states can establish MPAs and marine reserves in the first three nautical miles of the ocean pursuant to a wide variety of state statutes. This variety of legal vehicles gives credence to concerns that both the Pew Oceans Commission and the U.S. Commission on Ocean Policy raised regarding the uncoordinated patchwork of laws and regulatory programs that govern the nation's oceans. However, differences in these regulatory regimes, and in the MPAs and marine reserves that result, can also suggest improvements in the law that might better effectuate sustainable use of the nation's marine fisheries.

The Northwestern Hawaiian Islands provide one possible testing ground for examining the many federal legal mechanisms for creating MPAs and marine reserves. On June 15, 2006, President Bush used the Antiquities Act to create the Northwestern Hawaiian Islands Marine National Monument ("NWHI Monument" or "Monument").[11] This new national monument protects almost 140,000 square nautical miles of ocean around the long chain of islands — almost 1400 miles long — that stretches north and west of Kauai, the northernmost Hawaiian island that tourists normally visit. The Monument is the largest MPA in the world and protects the largest and arguably most pristine and remote coral reef ecosystem in the world, which is home to more than seven thousand marine species, twenty-five percent of which are found nowhere else.

President Bush's invocation of the Antiquities Act, however, was the last in a series of federal legal actions to protect the Northwestern Hawaiian Islands coral reef ecosystem. By invoking the Antiquities Act, President Bush cut short the process of designating the Northwestern Hawaiian Islands as a national marine sanctuary pursuant to the MPRSA. The national marine sanctuary designation process, in turn, was a response to President Clinton's use of an executive order to create the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve ("NWHI Reserve" or "Reserve"), which was itself in tension with both the Western Pacific Fishery Management Council's ("WestPac's") fisheries management planning pursuant to the Magnuson-Stevens Act and, at least for a while, the State of Hawaii's management efforts pursuant to state law.

Protecting the Northwestern Hawaiian Islands as an MPA: Choice of Legal Vehicle

Jurisdiction over the Northwestern Hawaiian Islands

Under the third United Nations Convention on the Law of the Sea ("UNCLOS III"),[12] which entered into force on November 16, 1994, coastal nations can assert various levels of regulatory authority over four zones of the ocean. The twelve nautical miles of ocean closest to shore are the territorial sea, in which the coastal nation may exercise sovereign control over the waters, the airspace, the seabed, and the subsoil. The next twelve nautical miles of ocean (twelve to twenty-four nautical miles out

to sea) are the contiguous zone, which coastal nations can use to enforce laws relating to activities in the territorial sea or on shore. A nation's exclusive economic zone ("EEZ") can extend up to two hundred nautical miles from shore. In its EEZ, the coastal nation has sovereign rights to explore, exploit, conserve, and manage the sea's natural resources, "whether living or non-living," in the waters, seabed, and subsoil.[13] Finally, coastal nations can exercise regulatory control over the continental shelf, particularly for energy development purposes.

The United States is not a party to UNCLOS III. However, it views most of the jurisdictional provisions of UNCLOS III as customary international law and has asserted conforming claims of jurisdictional authority over all four zones. Thus, as a practical matter, the United States regulates marine fisheries out to two hundred nautical miles from its shores. Given the United States' relatively long and unshared coastlines and its territorial holdings in the Pacific and Caribbean, this assertion of jurisdiction means that the United States regulates more square miles of ocean than it does of land.

Nevertheless, while, as a nation, the United States asserts jurisdiction over two hundred nautical miles of ocean extending from its shores, generally only the outermost 197 nautical miles are purely federal waters. In 1947, the U.S. Supreme Court declared all marine waters under U.S. jurisdiction to be federal.[14] However, six years later, Congress "restored" title to the first three nautical miles of ocean to the states through the Submerged Lands Act of 1953.[15] In addition, the Submerged Lands Act allowed states to assert claims to more than the standard three nautical miles, based on historical control. While most of such claims have been unsuccessful, Texas and Florida both established that their sovereign rights extend three marine leagues (about nine nautical miles) into the Gulf of Mexico.

Title to submerged lands gives the states authority to regulate the waters above those lands. However, states' regulation of the three nautical miles of ocean closest to shore remains subject, under both the Submerged Lands Act and the Supremacy Clause, to the federal government's authority to regulate for "commerce, navigation, national defense, and international affairs."[16] Thus, with respect to the Northwestern Hawaiian Islands, the State of Hawaii generally has primary authority to regulate the three-nautical-mile "donut" of ocean water surrounding each island (Midway Island is an exception). The rest of the waters surrounding this island chain are purely federal.

Federal Legal Instruments for Setting Aside the Northwestern Hawaiian Islands as an MPA

The Northwestern Hawaiian Islands have long attracted federal attention. In 1909, President Theodore Roosevelt, acting through executive order, reserved all of the Northwestern Hawaiian Islands except Midway "for the use of the Department of Agriculture as a preserve and breeding ground for native birds."[17] This reservation eventually became the Hawaiian Islands National Wildlife Refuge, and in 1988 the Refuge's protections were extended to the area's coral reefs and the marine life found in and around them.

The Clinton Executive Orders

In 1998, President Clinton issued the Coral Reef Protection Executive Order[18] to preserve the biodiversity and other values of the United States' coral reef ecosystems. The Order makes federal agencies directly responsible for protecting coral reefs and their associated ecosystems, and it created the Coral Reef Task Force. In March 2000, the Clinton Administration adopted the Coral Reef Task Force's *National Plan to Conserve Coral Reefs*. A key component of this plan was to set aside twenty percent of the existing coral reef MPAs as no-take fisheries reserves (also referred to as "marine wilderness areas").

Once an area is designated as a National Marine Sanctuary, no one can use or remove sanctuary resources except in accordance with federal law.

On May 26, 2000, President Clinton signed the Marine Protected Areas Executive Order.[19] The Order seeks to establish a national system of MPAs by linking MPAs and marine reserves established under federal, state, territorial, tribal, or local law. President George W. Bush adopted this Executive Order in June 2001. The National Oceanic and Atmospheric Administration ("NOAA") is currently implementing the Executive Order through the National Marine Protected Areas Center. In November 2004, the MPA Center issued its Strategic Plan for working toward "a cohesive and integrated system of MPAs."

The designation of the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve came about through an unusual blending of congressional and presidential action. In November 2000, through the National Marine Sanctuary Amendments Act of 2000, Congress authorized President Clinton, in consultation with the Governor of Hawaii, to "designate any Northwestern Hawaiian Islands coral reef or coral reef ecosystem as a coral reef reserve to be managed by the Secretary of Commerce."[20] President Clinton exercised this authority in Executive Order No. 13178,[21] establishing the NWHI Reserve. This Reserve set aside an area 1200 nautical miles long by one hundred nautical miles wide, protecting seventy percent of the nation's coral reefs. President Clinton ordered the Reserve to be managed pursuant to a precautionary approach that favored resource protection when information was lacking. The Order also called for the use of marine zoning, including the establishment of marine reserves

("Reserve Preservation Areas"), and for restoration of degraded portions of the reef. Finally, the Order capped all fishing in the Reserve at the currently existing levels.

The problem with the NWHI Reserve Executive Order was that Congress did not permanently eliminate other sources of legal authority that could apply in the Northwestern Hawaiian Islands. The flimsiness of President Clinton's legal authority to establish the Reserve is evidenced by the fact that, in an appropriations act, Congress demanded "adequate review and comment" before the Reserve Preservation Areas could become permanent. The Secretary of Commerce held seven public hearings on the executive order's proposal, allowing President Clinton to issue a final NWHI Reserve Executive Order on January 18, 2001,[22] three days before he left office.

The Magnuson-Stevens Act

The legal authority of the NWHI Reserve Executive Orders remained questionable, especially in light of the authority given to NOAA and WestPac pursuant to the Magnuson-Stevens Act. This Act establishes "[a] national program for the conservation and management of the fisheries resources in the United States" in order "to prevent overfishing, to rebuild overfished fish stocks, to ensure conservation, and to realize the full potential of the Nation's fishery resources"[23] Moreover, as noted, when Congress amended the Magnuson-Stevens Act through the 1996 Sustainable Fisheries Act, it incorporated both a precautionary approach to and a sustainable development goal for the country's fisheries management.

Pursuant to the 1996 amendments, the regional Fisheries Management Councils have begun to experiment with an ecosystem approach to fisheries management, including the use of zoning and MPAs. For example, on June 28, 2006, NOAA Fisheries used its authority under the Magnuson-Stevens Act to amend five fishery management plans for Alaska fisheries to prohibit trawling in 370,000 square miles of Alaska waters. This regulation, which became effective July 28, 2006, effectively created two MPAs — a 320,000-square-mile area in the Aleutian Islands and a 50,000-square-mile area in the Gulf of Alaska — for Alaska's cold-water coral gardens, one of the rarest marine ecosystems in the world. More recently, the Pacific Fishery Management Council has used its authority under the Magnuson-Stevens Act to create marine reserves off the California coast, especially in connection with the Channel Islands National Marine Sanctuary.

Nevertheless, nothing in the Magnuson-Stevens Act validates the establishment of the NWHI Reserve or required NOAA and WestPac to respect the Reserve Protected Area designations. In fact, under this Act, NOAA and WestPac remained legally free to choose to impose fishing regimes for the Northwestern Hawaiian Islands that would contradict the Reserve Protected Area designations.

Indeed, conflicts did arise. In December 2000, WestPac published its ecosystem-based *Draft Fishery Management Plan for the Coral Reef Ecosystems of the Western Pacific Region*. It received several comments adamantly opposing the creation of MPAs, and especially no-take marine reserves, in the Northwestern Hawaiian Islands, despite the fact that federally regulated fishing there was already fairly limited. Yet, when WestPac issued the final version of this fishery management plan in October 2001, it did preserve the concept of no-take marine reserves. However, the marine reserve boundaries in the fishery management plan differed from those President Clinton had designated within the NWHI Reserve, leaving the executive order more protective of the coral reefs than WestPac allowed pursuant to the Magnuson-Stevens Act.

Incoming President George W. Bush took about a year to accept President Clinton's NWHI Reserve Executive Orders, rendering the Reserve's status even more legally ambiguous. Moreover, after the change in administration, WestPac more actively opposed the NWHI Reserve's Reserve Protection Areas and their prohibitions on fishing, proposing instead to allow harvesting of lobsters and precious coral.

Similarly, into mid-2001, Hawaiians continued to express concern about the fishing limitations in the NWHI Reserve. Indeed, the Hawaii Department of Land and Natural Resources was reluctant to commit to MPA and marine reserve protections in the Hawaiian state waters surrounding each island. Its January 2002 draft management plan for these waters was far less protective, and far more permissive of fishing, than President Clinton's executive order for the federal waters in the Reserve.

The Marine Protection, Research, and Sanctuaries Act of 1972

The national marine sanctuaries provisions of the MPRSA allow the Secretary of Commerce, acting through NOAA, to designate "any discrete area of the marine environment" as a National Marine Sanctuary if NOAA makes certain findings.[24] Specifically, NOAA must find that: (1) the area is of special national significance; (2) the area needs protection; and (3) the area is manageable. Thirteen National Marine Sanctuaries currently exist, protecting more than 18,000 square miles of ocean. In addition, in January 2006, Governor Ted Kulongoski of Oregon proposed a new Oregon Coast National Marine Sanctuary.

Once an area is designated as a National Marine Sanctuary, no one can use or remove sanctuary resources except in accordance with federal law. Thus, National Marine Sanctuaries are MPAs. However, historically, very few National Marine Sanctuaries have included marine reserves because the MPRSA emphatically encourages multiple uses of these sanctuaries. Nevertheless, some of the National Marine Sanctuaries are experimenting with the use of marine reserves. The designation of the Dry Tortugas Ecological Reserve in the Florida Keys National Marine Sanctuary is probably the most famous example of a marine reserve negotiation. In addition, the Channel Islands National Marine Sanctuary, off the coast of southern California, has been pursuing a multi-year plan to establish marine reserves within the sanctuary.

Spurred by President Clinton's final NWHI Reserve Executive Order, NOAA announced on January 19, 2001, that it intended to designate the Reserve as a national marine sanctuary. As a result of the Bush Administration's reconsideration, however, NOAA did not begin the scoping process for the sanctuary

until March 2002, and then, because of high levels of public interest, it extended that process twice. Designation of the national marine sanctuary also required the issuance of a fishery management plan pursuant to the Magnuson-Stevens Act and a full environmental impact statement ("EIS") pursuant to the National Environmental Policy Act.[25] Partially as a result of these and the MPRSA's procedural requirements, NOAA anticipated from the beginning that sanctuary designation would take two to three years.

Even so, it is fair to say that the sanctuary designation process effectively stalled out. As late as May 2006, NOAA was still working on the draft EIS for the proposed sanctuary,[26] and management of the NWHI Reserve was still proceeding through the uneasy double authorities of President Clinton's executive order and WestPac's implementation of the Magnuson-Stevens Act.[27] This four-year delay helps to explain why President Bush reached for the Antiquities Act.

The Antiquities Act/Act of June 8, 1906

The Antiquities Act is very short. Under it, the President of the United States is "authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."[28] Moreover, while the Antiquities Act has a predominantly terrestrial focus, Presidents have repeatedly used it to create marine-related national monuments that function as MPAs, such as the Buck Island Reef National Monument in the Virgin Islands and the California Coastal National Monument along most of the coast of California.

President Bush's proclamation[29] establishing the Northwestern Hawaiian Islands Marine National Monument is very protective of the area. Virtually all activities within the Monument are subject to regulation by the Secretaries of Commerce (water) and the Interior (land), and the proclamation imposes a vessel monitoring requirement as well. All commercial fishing is to be phased out over five years, with the lobster fishery immediately subject to an annual catch limit of zero. Oil and gas exploration and development, vessel anchoring, and introductions of invasive species are absolutely prohibited. In addition, the Secretaries cannot permit any activity within the Monument unless the activity meets ten ecosystem-preserving criteria. For example, recreational snorkeling and diving are prohibited in the Special Preservation Areas and Midway Atoll Special Management Area. Thus, effectively, most of the NWHI Monument is or will become a marine reserve, the largest such reserve on the planet.

Conclusion

The Northwestern Hawaiian Islands' history as an MPA strongly suggests that pure presidential authority is a more efficient vehicle for establishing MPAs, especially marine reserves. Even at the executive order stage, President Clinton accomplished far more through the NWHI Reserve Executive Order than NOAA managed in five years of the national marine sanctuary designation process. As noted, however, executive orders lack comprehensive legislative backing and authority, leading to potential conflicts with other marine regulatory programs, such as those established under the Magnuson-Stevens Act.

In contrast, the Antiquities Act gives the President this executive authority with full legislative backing, an improvement over the use of executive orders. It also appears to have two advantages over the MPRSA. First, the Antiquities Act has the advantage of speed of designation. As soon as President Bush declared the NWHI Monument established on June 15, 2006, the Monument existed. In addition, NOAA — undoubtedly aided by the prior existence of the NWHI Reserve and the national marine sanctuary process — issued its final regulations for the national monument just two months later.[30]

Second, the legal protections for a marine national monument are potentially much greater than those for a national marine sanctuary. As noted, the MPRSA promotes a philosophy of multiple use regulation of national marine sanctuaries. In contrast, the Antiquities Act inspires a preservationist philosophy, as President Bush's proclamation setting aside the NWHI Monument attests.

Congress is currently debating whether and how to implement the many recommendations of the Pew Oceans Commission and the U.S. Commission on Ocean Policy. The history of the Northwestern Hawaiian Islands suggests that if Congress decides to vigorously pursue the Commissions' recommendation to increase the use of MPAs and marine reserves to preserve and restore fisheries and to protect marine ecosystems in general, it should seriously consider modeling at least one part of any new federal MPA legislation on the Antiquities Act and giving the president considerable direct authority to establish MPAs and marine reserves.

Of course, to create a coherent national system, Congress may want to constrain presidential authority in some way — for example, by limiting presidential designation authority to recommendations of an expert agency or panel. Nevertheless, this constrained authority would still be more likely to produce a functional national system of MPAs and marine reserves — especially if joined to a streamlined agency designation process — than the multi-use, multi-agency, multi-analysis national marine sanctuary regulatory regime.

Endnotes: Marine National Monuments

[1] Pub. L. No. 104-297, 110 Stat. 3559-3621 (Oct. 11, 1996), amending Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1882.

[2] Pew Oceans Commission, America's Living Oceans: Charting a Course for Sea Change. Summary Report (2003), *available at* http://www.sml.cornell.edu/forms/oceans_summary.pdf (last visited Sept. 25, 2006).

[3] U.S. Commission on Ocean Policy, Final Report: An Ocean Blueprint for the 21st Century 2004, *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf (last visited Sept. 25, 2006).

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[4] Pew Oceans Commission, *supra* note 2, at 15-18; *see also* Robin Kundis Craig, *Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 McGeorge L. Rev. 155, 166-83 [hereinafter *Taking Steps?*]; Robin Kundis Craig, *Taking the Long View of Ocean Ecosystems: Historical Science, Marine Restoration, and the Oceans Act of 2000*, 29 Ecology L. Q. 649, 673-88 (2002).

[5] Pew Oceans Commission, *supra* note 2, at 15.

[6] U.S. Commission on Ocean Policy, *supra* note 3, at 295-98.

[7] U.S. Commission on Ocean Policy, *supra* note 3, at 105.

[8] 16 U.S.C. §§ 431-433 (1906).

[9] 16 U.S.C. §§ 1431-1434 (1972).

[10] For example, Congress created the Florida Keys National Marine Sanctuary through directed legislation. Pub. L. No. 101-605, 104 Stat. 3089 (Nov. 16, 1990) (codified at 16 U.S.C. § 1433). This legislation, however, also provided that, after its creation, the new marine sanctuary would be managed in accordance with the MPRSA.

[11] For information regarding the Antiquities Act designation of this marine reserve, visit the National Atmospheric and Oceanic Administration's Northwestern Hawaiian Islands Marine National Monument website at http://www.hawaiireef.noaa.gov/ (last visited Sept. 25, 2006).

[12] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 183 U.N.T.S. 397 [hereinafter UNCLOS].

[13] UNCLOS, *id.* at Art. 56.1.

[14] *United States v. California*, 332 U.S. 19 (1947).

[15] Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1303, 1311-1315 (2000).

[16] Submerged Lands Act of 1953, *id.* at § 1314(a).

[17] Exec. Order No. 1019, at 1 (Feb. 1909).

[18] Exec. Order No. 13,089, 63 Fed. Reg. 32,701 (June 11, 1998).

[19] Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

[20] National Marine Sanctuary Amendments Act of 2000, Pub. L. No. 106-513, § 6(g), 114 Stat. 2381 (Nov. 13, 2000).

[21] Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 4, 2000).

[22] Exec. Order No. 13,196, 66 Fed. Reg. 7,395 (Jan. 18, 2001).

[23] 16 U.S.C. § 1801(a)(6) (1976).

[24] 16 U.S.C. § 1433(a) (1972).

[25] 42 U.S.C. § 4332 (1972).

[26] *See* 71 Fed. Reg. 29,924, 29,926 (May 24, 2006).

[27] *See* 71 Fed. Reg. 9,522 (Feb. 24, 2006) (announcing WestPac's public meeting regarding regulation of bottomfish and pelagics fisheries in the Northwestern Hawaiian Islands); 70 Fed. Reg. 57,858 (Oct. 4, 2005) (seeking to fill upcoming vacancies on the NWHI CRER Advisory Council).

[28] 16 U.S.C. § 431-433 (1906).

[29] Establishment of the Northwestern Hawaiian Islands Marine National Monument, *available at* http://www.whitehouse.gov/news/releases/2006/06/print/20060615-18.html (last visited Sept. 25, 2006).

[30] Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 51,134 (Aug. 29, 2006).