

# The Papahānaumokuākea Precedent: Ecosystem-scale Marine Protected Areas in the EEZ

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INTRODUCTION .....	210
I. MARINE PROTECTED AREAS AND THE LAW OF THE SEA	
CONVENTION .....	215
II. PAPAHAANAUMOKUAKEA MARINE NATIONAL MONUMENT .....	219
A. The Unique Qualities of the Northwestern Hawaiian Islands.....	220
B. U.S. Jurisdiction and Management at the NWHI.....	225
C. International Scope of the Papahānaumokuākea Marine National Monument.....	232
D. The 2009 Pacific Marine National Monuments.....	237
III. THE INTERNATIONAL RESPONSE TO THE U.S. MARINE NATIONAL MONUMENTS.....	243
A. IMO Acceptance of the Particularly Sensitive Sea Area .....	244
B. Impact on Other High Seas Freedoms: Fishing and Military Activities.....	246
C. State Practice under Articles 121(3), 192 and Article 194(5).....	249
CONCLUSION.....	251

## INTRODUCTION

In 2006, the United States designated by presidential proclamation a 362,073 square kilometers protected area around the Northwestern Hawaiian Islands, a remote chain of coral atolls, reefs, and islands

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extending 1200 miles seaward of the U.S.'s fiftieth state. A subsequent proclamation renamed the area Papahānaumokuākea Marine National Monument to reflect the area's cultural and spiritual significance to the Native Hawaiian people.<sup>1</sup> In 2009, the U.S. designated additional national monuments in areas of the Pacific Ocean the U.S. claims as exclusive economic zones ("EEZs"), including submerged lands within the Marianas Trench and the waters surrounding the U.S. Line Islands. These designations brought the total area under monument status to over 850,000 square kilometers.<sup>2</sup>

The expressed purpose of these unprecedented presidential actions was to place areas containing unique marine ecosystems under permanent protection and to withdraw them from extractive activities. An implicit goal was to minimize the impact of unilateral marine conservation measures on evolving principles of the law of the sea, especially those pertaining to navigational rights. Aware of the international response to President Truman's 1945 proclamation regarding sovereign rights to the continental shelf,<sup>3</sup> and the U.S. response to Canada's Arctic Waters Pollution Prevention Act of 1970,<sup>4</sup> military and foreign affairs advisors to President Bush were no doubt eager to limit the potential of his proclamations for similar unintended consequences. Without language constraining its application to other states, the proclamation of Papahānaumokuākea would have provided a high-profile example of coastal state practice and *opinio juris* that could lead to future constraints on the mobility and operational flexibility of military vessels and other national security assets in the EEZs and elsewhere.<sup>5</sup>

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<sup>1</sup> Establishment of the Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443, (June 26, 2006) [hereinafter *Proclamation No. 8031*]; Amending Proclamation 8031 of June 15, 2006, To Read "Establishment of the Papahānaumokuākea Marine National Monument," Proclamation No. 8112, 72 Fed. Reg. 10,031, (Mar. 6, 2007). The first paragraph of Proclamation No. 8031 acknowledges the islands' and waters' value to the native Hawaiian people ("this area has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protecting and understanding"). Proclamation No. 8031, 71 Fed. Reg. 36,443, (June 26, 2006).

<sup>2</sup> See Alison Rieser & Jon M. Van Dyke, *New Marine National Monuments Settle Issues*, 24 NAT'L RESOURCES & ENV'T 50 (2009). The Rose Atoll Marine National Monument added another 34,838 square kilometers. See also discussion *infra* note 138-42.

<sup>3</sup> Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Presidential Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

<sup>4</sup> See generally R. Michael M'Gonigle, *Unilateralism and International Law: The Arctic Waters Pollution Prevention Act*, 34 UNIV. OF TORONTO L. REV. 180 (1976).

<sup>5</sup> Proclamation No. 8031, *supra* note 1. The first goal was explicit in the

In signing the Papahānaumokuākea proclamation, President George W. Bush was responding to calls from conservation scientists and environmental organizations to place large, ecosystem-scale areas of the oceans into fully-protected status.<sup>6</sup> The President's willingness to sign the proclamation was an important victory for this campaign, inspiring campaigners to identify other large areas within EEZs, where marine reserves would add to the global portfolio of protected marine ecosystems.<sup>7</sup> The proclamation did indeed trigger something of a "conservation race" in which coastal states compete for the prestige of having adopted the largest marine reserve in the world.<sup>8</sup> Since 2006, very large marine reserves have been designated in the south central Pacific and the central Indian Ocean; Australia has proposed appending a large area in the southwest Pacific to its Great Barrier Reef Marine Park, to be known as the Coral Sea Park. The largest of these new reserves is the U.K.'s Chagos Protected Area, which comprises the entire EEZ around the Chagos Archipelago, with the notable exclusion of the atoll island of Diego Garcia where the U.S. maintains a military base (see Table 1 and Figure 1 below).

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introductory paragraphs of Proclamation No. 8031; the second goal is implicit in the paragraph directing the Secretary of State to seek international cooperation to further the purposes of the Monument. *Id.* See discussion, *infra* notes 101, 117-22.

<sup>6</sup> At the June 15, 2006 signing ceremony, the president emphasized the size of the area ("The national monument we're establishing today covers nearly 140,000 square miles. To put this area in context, this national monument is more than 100 times larger than Yosemite National Park, larger than forty-six of our fifty states, and more than seven times larger than all our national marine sanctuaries combined. This is a big deal."). THE WHITE HOUSE, *President Bush Establishes Northwestern Hawaiian Islands National Monument*, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060615-6.html> (last visited Dec. 22, 2011).

<sup>7</sup> See Jay Nelson & Heather Bradner, *The Case for Establishing Ecosystem-Scale Marine Reserves*, 60 MARINE POLLUTION BULL. 635, 635-37 (2010). In 2004, States parties to the Convention on Biological Diversity set a deadline of 2012 for establishing comprehensive networks of marine protected areas in order to stem the loss of marine and coastal biological diversity, and the inclusion of at least ten percent of each biome in a totally protected status. Alexander Gillespie, *Obligations, Gaps, and Priorities Within the International Regime for Protected Areas*, 19 GEO. INT'L ENV'L L. REV. 1, 9, n. 59 (2006-07) (discussing the seventh Conference of the Parties to the Convention on Biological Diversity and Decision VII/28).

<sup>8</sup> Nicola Jones, *Marine Protection Goes Large*, NATURE INT'L WKLY. J. SCI., May 16, 2011, <http://www.nature.com/news/2011/110516/full/news.2011.292.html>; Daniel Cressey, *Ocean Conservation: Uncertain Sanctuary*, 480 NATURE INT'L WKLY. J. SCI. 7376 (Dec. 7, 2011), available at <http://www.nature.com/news/ocean-conservation-uncertain-sanctuary-1.9568>.

<i>Date</i>	<i>Coastal State</i>	<i>Ecosystem-scale Marine Reserve</i>	<i>Size</i>
1981	Australia	Great Barrier Reef World Heritage Site	348,000 km <sup>2</sup>
2004	Australia	Great Barrier Marine Park No-take Areas (re-zoning)	115,884 km <sup>2</sup>
2006	Kiribati	Phoenix Islands Protected Area	185,000 km <sup>2</sup>
2006	USA	Papahānaumokuākea Marine National Monument	362,073 km <sup>2</sup>
2006	Kiribati	Phoenix Islands Protected Area (final regulations)	408,000 km <sup>2</sup>
2009	USA	Marianas Trench Marine National Monument	246,000 km <sup>2</sup>
2009	USA	Pacific Remote Islands Marine National Monument	225,038 km <sup>2</sup>
2010	UK	British Indian Ocean Territory/Chagos Reserve	544,000 km <sup>2</sup>
2011	Australia	Coral Sea Heritage Park (proposed)	989, 842 km <sup>2</sup>

Table 1. Ecosystem-scale Marine Reserves.



Figure 1. Global Ocean Legacy project sites. Source: Nelson and Bradner (note 7).

Commentators have raised concerns about this apparent race for the largest marine conservation area, suggesting that its objectives are not

to protect rare and vulnerable marine ecosystems, but rather to solidify jurisdictional claims in remote areas of the oceans and to further shield military installations from environmental scrutiny.<sup>9</sup> In one instance, a neighboring state has challenged the large marine reserve as exceeding a coastal state's authority under the Law of the Sea Convention.<sup>10</sup> Others suggest that we may be entering a new era of "green enclosure" raising troubling questions regarding impacts of these unilateral actions on the common heritage of humankind.<sup>11</sup>

This paper describes the new marine national monuments created by the Bush proclamations and considers their impact on evolving law of the sea principles. It concludes that although the protected areas are large in geographic reach, the Papahānaumokuākea and other U.S. marine national monuments are relatively narrow in substantive scope and legal impact. This is because the threats that face Papahānaumokuākea's marine ecosystems are global in nature and by definition cannot be addressed without significant international cooperation. To achieve this cooperation, however, the U.S. has eschewed unilateral action. Instead, the U.S. proposed a relatively modest set of regulations to the International Maritime Organization ("IMO") for ships operating around and in the monument and accepted very minor revisions to Annex V of the Convention on the Control of Pollution from Ships ("MARPOL") controlling the discharge of plastic wastes at sea.<sup>12</sup> On the other hand, by

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<sup>9</sup> See, e.g., E.M. De Santo et. al, *Fortress Conservation at Sea: A Commentary on the Chagos Marine Protected Area*, 35 MARINE POLICY 258, 258-60 (2011); Peter H. Sand, 'Green' Enclosure of Ocean Space—Déjà Vu? 54 MARINE POLLUTION BULL. 374, 374-76 (2007); See also Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. OF INT'L L. 830, 832 (2006).

<sup>10</sup> In December, 2010, the Republic of Mauritius instituted arbitral proceedings under the U.N. Law of the Sea Convention challenging the Chagos MPA. See Peter Prows, *Mauritius Brings UNCLOS Arbitration Against the United Kingdom over the Chagos Archipelago*, 15 AM. SOC'Y OF INT'L LAW 1 (Apr. 5, 2011). Mauritius appointed Rudiger Wolfrum of Germany as its arbitrator; the United Kingdom appointed Sir Christopher Greenwood, a British national. Irini Papanicolopulu, Current Legal Developments, *Submission to Arbitration of the Dispute on the Marine Protected Area around the Chagos Archipelago*, 26 INT'L J. MAR. & COASTAL L. 667 (2011). The president of the International Tribunal for the Law of the Sea, in consultation with the parties, appointed three arbitrators to serve on the Annex VII arbitral tribunal: Ivan Shearer (Australia), James Kateka (Tanzania), and Albert Hoffman (South Africa). Press Release, International Tribunal for Law of the Sea, Three Arbitrators Appointed By The President of the Tribunal in the Arbitral Proceedings Instituted by Mauritius Against the United Kingdom in Respect of the Dispute Concerning the 'Marine Protected Area' Related to the Chagos Archipelago (Mar. 25, 2011), available at [http://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/press\\_164\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/press_164_eng.pdf).

<sup>11</sup> Sand, *supra* note 9.

seeking Papahānaumokuākea's inscription on the list of World Heritage Sites by UNESCO's World Heritage Commission the U.S. acknowledged the need for international acceptance and set a high bar for future marine world heritage sites. To be accepted as a World Heritage Site, a marine area must be of truly global significance and any coastal state that proposes a marine area's inscription must commit itself to continuing protection for the benefit of future generations.<sup>13</sup>

The "Papahānaumokuākea precedent" then, if one indeed exists, is of a coastal state fulfilling a fiduciary duty of stewardship rather than asserting a proprietary right. Papahānaumokuākea thus supports the notion that the rights and jurisdiction accorded by the law of the sea include a duty of ecological trusteeship.<sup>14</sup> The larger and broader marine reserves other coastal states have adopted under its precedent raise legal questions, but they do not differ to the same degree as the sovereign claims that followed in the wake of the Truman proclamations.<sup>15</sup> Moreover, the protection of biodiversity and vulnerable marine ecosystems is now an international norm, and the issues of military uses of the EEZ and environmental protection are ripe for international adjudication.<sup>16</sup> The arbitration concerning the United Kingdom's Chagos Protected Area offers an opportunity to clarify the international norms regarding protection of nature and protection of national security.<sup>17</sup>

#### I. MARINE PROTECTED AREAS AND THE LAW OF THE SEA CONVENTION

The Great Barrier Reef Marine Park was the only large-scale marine-protected area in existence at the time of the third United Nations Conference on the Law of the Sea. When preparations for the conference began in the early 1970s, Australia's Great Barrier Reef was believed to be

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<sup>12</sup> See discussion, *infra* notes 152-68.

<sup>13</sup> See Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

<sup>14</sup> For an argument on behalf of this principle, see Sand, *supra* note 9.

<sup>15</sup> See generally Oxman, *supra* note 9.

<sup>16</sup> See generally Jon M. Van Dyke et al., *Whales, Submarines, and Active Sonar*, 18 OCEAN YEARBOOK 330 (2004); Jon M. Van Dyke, *Military Ships and Planes Operating in the Exclusive Economic Zones of Another Country*, 28 MARINE POL'Y 29 (2004).

<sup>17</sup> Mauritius's application for arbitration raises the issue whether a coastal state can use the goal of protecting marine ecosystems to justify closing its EEZ to all extractive activities while allowing military activities with significant environmental impacts to continue. See Prows, *supra* note 10 and Papanicolopulu, *supra* note 10.

in a class by itself, one of the few natural wonders of the world, and the only structure built by non-human organisms that could be seen from outer space.<sup>18</sup> The treaty that resulted from the U.N. conference bears little evidence that negotiators expected that other coastal states would discover and then designate other large areas as marine parks or reserves. But the Law of the Sea Convention does contain a number of provisions supporting such actions, in Parts V and XII and in the definitions in Article 1.<sup>19</sup> Most of the legal support for the designation of large, fully-protected marine reserves comes from the practice of states since the Law of the Sea Convention entered into force.

Under Part XII, states clearly have both individual and collective duties to protect the marine environment; they also have the authority to adopt measures specifically tailored to the special ecological conditions of a particular place in the ocean.<sup>20</sup> The question is whether states may set aside large swathes of the ocean within their EEZs as “no-take” zones, where fishing, oil and gas development, mining and all other extractive activities are permanently barred. If the Convention permits such designations and accompanying prohibitions, must they be made by or in consultation with regional or global bodies acting under a specific international agreement?<sup>21</sup>

Article 192 in Part XII describes the obligation that all states have, regardless of geographical circumstances or status as port, flag or coastal states, to protect and preserve the marine environment. Although the Convention does not define the term “marine environment” it does define broadly the term “pollution of the marine environment” in Article 1(4), suggesting an intention to cover every conceivable area of the marine

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<sup>18</sup> The Great Barrier Reef was inscribed as a World Heritage Site in 1981. See UNESCO, *Great Barrier Reef*, available at <http://whc.unesco.org/en/list/154/> (last visited Dec. 22, 2011).

<sup>19</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982) and *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea and of the Agreements relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea with Index and excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea*, U.N. Sales No. E.97.V.10 (2001) [hereinafter *United Nations Convention on the Law of the Sea*].

<sup>20</sup> Jon M. Van Dyke, *The 1982 United Nations Convention on the Law of the Sea*, OCEAN & COASTAL LAW & POL’Y 375, 375-407 (Donald C. Baur et. al eds., 2008).

<sup>21</sup> Article V of the International Convention for the Regulation of Whaling (“ICRW”), for example, provides for the designation of sanctuary areas and their inclusion on the schedule of quotas and regulations. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72. The ICRW is implemented in U.S. law by the Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916-1 (2006).

realm.<sup>22</sup> Article 193 restates the sovereign right of states “to exploit their natural resources pursuant to their environmental policies” and subjects the sovereign right to this broad and general duty of marine protection.<sup>23</sup> That states were expected to use a wide and evolving range of protective measures is suggested by the statement in Article 194 that states shall take *all measures* that are necessary to prevent pollution from *any* source using the best practicable means at their disposal and in accordance with their capabilities.<sup>24</sup> In perhaps the clearest reference to spatial measures for protection, Article 194(5) states explicitly that the measures taken in fulfillment of these obligations “shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>25</sup>

For the prevention of vessel source pollution, Part XII of the Law of the Sea Convention states a definite preference for global or regional action, but allows individual states to adopt measures as a condition for entry of foreign vessels into a port or internal waters.<sup>26</sup> States are directed to act through “competent international organizations or general diplomatic conference” to establish international rules and standards to prevent pollution.<sup>27</sup> If a coastal state believes the international rules and standards are inadequate to meet “special circumstances” in a “particular, clearly defined area of [its] exclusive economic zone,” the Convention provides a process for the development of special mandatory rules. The Convention seeks to limit special rules to those areas where they are required by “recognized technical reasons in relation to [the area’s] oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic.”<sup>28</sup>

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<sup>22</sup> Article 1(4) of the United Nations Convention on the Law of the Sea (definition of “pollution” of the marine environment) suggests an intent to interpret the term broadly by specifically identifying estuaries, which because they consist of freshwater and seawater, might otherwise not have been included in the concept of “marine.” United Nations Convention on the Law of the Sea, art. 1(4), *supra* note 19.

<sup>23</sup> *Id.* at art. 193 (stating “and in accordance with their duty to protect and preserve the marine environment”).

<sup>24</sup> *Id.* at art. 194 (emphasis added).

<sup>25</sup> When negotiators at UNCLOS III included Article 194 in the final draft of the convention, Australia’s Great Barrier Reef had recently been inscribed on the World Heritage List (in 1981).

<sup>26</sup> *Id.* at art. 211.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at art. 211(6).



With respect to living and non-living resources, the Convention expresses differing expectations with regard to their utilization. For oil, natural gas, and other deposits of non-living natural resources, the coastal state is completely at liberty to decide to leave those resources unexploited. Article 77 in Part VI states that the sovereign rights over the continental shelf are exclusive; if the coastal state chooses not to explore the continental shelf or exploit its natural resources, including sedentary species living on or in the seabed, it may do so.<sup>29</sup> For all other living resources, however, Part V of the Convention subjects the coastal state's sovereign rights to exploit, conserve, and manage to certain duties, including that of promoting the objective of "optimum utilization," as long as it can be achieved without endangering resources by overexploitation.<sup>30</sup>

But Part V heavily qualifies the coastal state's obligation to promote utilization of living marine resources. Article 61 requires coastal states to adopt measures to ensure that harvested species are maintained at population levels that can produce maximum sustainable yield. If there is a surplus in the allowable catch of a living resource, the coastal state has a duty to provide access to these resources to other states.<sup>31</sup> Article 65 only allows a coastal state to exempt marine mammals from the objective of optimum utilization; there is no express provision for other potentially harvestable species of high non-use value. However, Article 61 requires coastal states to consider the potential effects of fishing on species associated with or dependent upon harvested species and to take measures to ensure that these species are not seriously threatened.<sup>32</sup> Moreover, determinations of which species are harvestable, their maximum sustainable yield ("MSY") and allowable catch levels, and the effects on ecologically associated species are all within the discretion of the coastal state; these determinations are not subject to compulsory dispute resolution under of Part XV.<sup>33</sup> At most, a state objecting to a coastal state party's adoption of a no-take policy for living resources in a large segment of its EEZ could request conciliation to determine if the coastal state's policy is arbitrary.<sup>34</sup> If the area of the no-take policy has been widely acknowledged as including rare and unique species, species assemblages,

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<sup>29</sup> *Id.* at art. 77(2).

<sup>30</sup> *Id.* at art. 61-62.

<sup>31</sup> *Id.* at art. 61.

<sup>32</sup> *Id.* at art. 61(4).

<sup>33</sup> *Id.* at art. 297(3)(a).

<sup>34</sup> *Id.* at art. 297(3)(a)(ii).

and environments, for example, through a process such as an inscription as a natural world heritage site, it is doubtful the objection would be sustained in the conciliation. It is conceivable, however, that a state could challenge the marine reserve as an abuse of rights under Article 300,<sup>35</sup> but the circumstances that would support such a claim would probably need to be exceptional, involving unresolved sovereignty or sovereign-rights claims or other contextual factors suggesting an ulterior motive.<sup>36</sup>

## II. PAPAĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT

The unique biological and geological features of Papahānaumokuākea Marine National Monument would seem to make the area an appropriate candidate for special protection under U.S. and international law. In the past, agreement was elusive whether the natural resources of the area should be developed or protected, fueled in part by conflicting jurisdictional claims and the remoteness of the location.<sup>37</sup> The 2006 proclamation precludes any further development of the marine resources of Papahānaumokuākea so that the major anthropogenic challenges now facing Papahānaumokuākea's coral reefs and other marine ecosystems are those that come from well beyond the monument's boundaries. The proclamation acknowledges the need for international cooperation to address these threats, but by attempting to minimize the proclamation's precedential effect on the rights of other nations to the use of the oceans and marine resources, the President may have limited the U.S.'s ability to achieve its objective of total protection.

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<sup>35</sup> *Id.* at art. 300. Article 300 provides that “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

<sup>36</sup> It has been suggested that such motives exist in the case of the United Kingdom's declaration of the Chagos Protected Area in 2010 when there was apparently an understanding among the parties that the EEZ would be returned to Mauritius when it was no longer needed for use by the US military and there is pending litigation concerning the right of return of an indigenous people. *See, e.g.,* Sand, *supra* note 9.

<sup>37</sup> *See generally,* Dennis K. Yamase, Note, *State-Federal Jurisdictional Conflict over the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*, 4 U. HAW. L. REV. 139 (1982); Craig S. Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come?*, 25 NAT. RESOURCES J. 317 (1985).

A. *The Unique Qualities of the Northwestern Hawaiian Islands*<sup>38</sup>

Hawai'i is the only state in the United States that consists entirely of islands and ocean waters and that therefore has no neighbors. This makes the Hawaiian Archipelago the most geographically-isolated archipelago in the world. To the northwest of the main inhabited Hawaiian Islands lies a chain of smaller insular outcroppings that extends over almost 1100 nautical miles of ocean (see Figure 2 below).

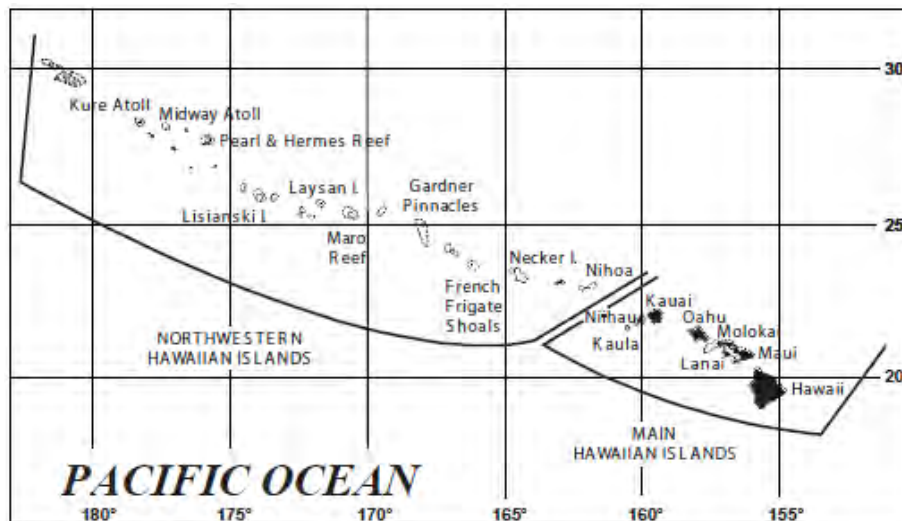


Figure 2. The Hawaiian Archipelago. Source: G. DiNardo and F.A. Parrish, eds. *Proceedings of Third NWHI Scientific Symposium*, 543 *ATOLL RESEARCH BULLETIN* (2006) (lines indicate the 100 fathom contour).

From Nihoa Island at the southern end to Kure Atoll at the northern end, these features lie in the center of the Hawaiian-Emperor seamount chain that marks the trail of the Pacific plate as it moved tectonically northwestward over a fixed-mantle plume or “hot-spot” now located under the island of Hawai‘i.<sup>39</sup> The so-called “Darwin Point” lies at Kure Atoll (latitude twenty-nine degrees north). This is the place in the ocean where the rate of subsidence and erosion exceeds the rate of coral growth so that coral atolls and islands are no longer present.<sup>40</sup> The submerged and

<sup>38</sup> Some of the material in this section is adapted from Jon M. Van Dyke et. al, *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?*, 25 *SAN DIEGO L. REV.* 425, 466-67 (1988).

<sup>39</sup> W. Jason Morgan, *Deep Mantle Convection Plumes and Plate Motions*, 56 *AM. ASSOC. PETROLEUM GEOLOGISTS BULL.* 203 (1972).

<sup>40</sup> R.W. Griggs, *Darwin Point: A Threshold for Atoll Formation*, 1 *CORAL REEFS* 29 (1982); R.W. Griggs, *The History of Marine Research in the Northwestern Hawaiian Islands: Lessons from the Past and Hopes for the Future*, 543 *ATOLL RES. BULL.* 13

emergent features left by these geological and biological processes are known collectively as the Northwestern Hawaiian Islands (“NWHI”), although few if any of them are actual islands. They are in fact coral atolls, rocky islets and pinnacles, coral reefs, submerged banks, shoals and seamounts.<sup>41</sup>

The NWHI are now home to the world’s largest tropical seabird rookery, the principal nesting and birthing beaches of the threatened Pacific green turtle (*Chelonia mydas*) and the highly-endangered Hawaiian monk seal (*Monachus schauinslandi*), and the greatest area of coral reef under U.S. jurisdiction.<sup>42</sup> The area supports more than 7000 species of coral, fish, birds, marine mammals, and other flora and fauna, almost half of which are found nowhere else on Earth. Ninety-nine percent of the world’s Laysan albatross (*Diomedea immutabilis*) and ninety-eight percent of the Black-footed albatross (*Phoebastria nigripes*) breed on the islands.<sup>43</sup> The total landmass of the area is only 5.2 square miles (13.2 square kilometers), most of which is included in the previously-established Hawaiian Islands National Wildlife Refuge; the Midway Islands are included in the Midway Atoll National Wildlife Refuge.<sup>44</sup> These low-lying atolls are more oceanic than terrestrial; any use of these land areas or attempt to develop their resources profoundly affects the conditions of the surrounding waters and submerged lands. Just as coral reefs constitute unique ecosystems, isolated low-lying atolls are “almost by definition,” a “rare or fragile ecosystem” as that term is used in the Law of the Sea Convention, and warrant special protection.<sup>45</sup>

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(2006).

<sup>41</sup> An atoll is defined as “a coral reef in the shape of a ring or horseshoe enclosing a lagoon.” W. Moore, A DICTIONARY OF GEOGRAPHY 18-19 (4th ed. 1968).

<sup>42</sup> Jon M. Van Dyke, *Protected Marine Areas and Low-Lying Atolls*, 16 OCEAN & SHORELINE MGMT. 87 (1991).

<sup>43</sup> PAPAĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT, *Marine National Monument Established, available at* <http://www.papahanaumokuakea.gov/management/welcome.html> (last visited Dec. 22, 2011) [hereinafter *PMNM website*]. Among the species that are indigenous to the Northwestern Hawaiian Islands, in addition to the monk seal and the green turtle, are the Laysan duck, the Laysan finch, the Nihoa finch, the Nihoa millerbird, as well as several species of terns, petrels, noody, albatross, and frigate birds.

<sup>44</sup> *Id.*

<sup>45</sup> Jon M. Van Dyke, *Protected Marine Areas and Low-Lying Atolls*, 16 OCEAN & SHORELINE MGMT. 87 (1991) (finding proposals to dispose of hazardous wastes on isolated atolls of the Pacific under U.S. jurisdiction incompatible with obligations of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and Article 194(5) of the 1982 U.N. Law of the Sea Convention).

Before the invention of modern navigational equipment, navigation at the NWHI was dangerous for non-Polynesian sailing craft, but this did not deter exploitation of terrestrial and marine resources found there in the 19th and early 20th centuries. Many of the reefs and atolls got their names from whaling ships that ran aground and wrecked on the shoals;<sup>46</sup> shipwrecked sailors discovered there were other economic resources to exploit besides whales.<sup>47</sup> Sealing expeditions soon followed and exploited the monk seals, and poachers plundered the seabird rookeries for feathers and eggs; these assaults upon the wildlife were accompanied by the slaughter of nesting sea turtles for subsistence, fish bait, and market.<sup>48</sup> Under permits issued by the Territory of Hawai‘i, mining companies removed nearly half a million tons of guano from Laysan Island.<sup>49</sup> Rabbits introduced by a failed meat-production scheme decimated the indigenous birds and plants on Laysan Island, causing several endemic bird species to go extinct before systematic biological surveys were conducted. Both the Laysan honeycreeper (*Himateone sanguinea freethii*) and the Laysan millerbird (*Acrocephalus familiaris familiaris*) were extinct by 1923, the

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<sup>46</sup> Pearl and Hermes Atoll bears the name of two ships that were lost on the same night in 1822. In 2010, a remnant of the Nantucket whaling fleet, the whaleship *Two Brothers*, was discovered at French Frigate Shoals. The *Two Brothers* had run aground in 1823 and was the sister ship of the whaleship *Essex* that was struck and sunk by a sperm whale, a story made famous by Herman Melville’s classic novel, *Moby Dick*. For information on the discovery, see PAPAHAŪNAUMOKUĀKEA MARINE NATIONAL MONUMENT, *Lightning Strikes Twice: The Tragic Tale of the Nantucket Whaleship Two Brothers*, available at <http://www.papahānaumokuākea.gov/maritime/twobrothers.html> (last visited Dec. 22, 2011).

<sup>47</sup> Robert J. Shallenberger, *History of Management in the Northwestern Hawaiian Islands*, 543 ATOLL RES. BULL. 23 (2006).

<sup>48</sup> *Id.*

<sup>49</sup> The Guano Act of 1856, 11 Stat. 119 (1856), codified at 48 U.S.C. §§1411-1419 (2012), allowed any private U.S. citizen to take possession of and occupy any unclaimed island, rock, or cay containing guano deposits on behalf of the United States, and the President to exercise discretion in considering the island as appertaining to the U.S. The U.S. Congress enacted the law to help domestic agricultural interests who were unhappy paying high prices for imported fertilizer to Peruvian guano exporters. Some features in the NWHI were claimed under the Act by passing naval vessels but the deposits were deemed too small. When guano mining began in the NWHI, the mining companies attempted to manage plumage hunting, recognizing that the seabird colonies were the source of the guano. MARK J. RAUZON, ISLES OF REFUGE: WILDLIFE AND HISTORY OF THE NORTHWESTERN HAWAIIAN ISLANDS (2001); JIMMY M. SKAGGS, THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION (1994). See also Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779 (2005); Dan O’Donnell, *The Pacific Guano Islands: The Stirring of American Empire in the Pacific Ocean*, 16 PAC. STUDIES 43 (1993).

year of the *U.S.S. Tanager* scientific expedition. Other species were reduced to near extinction and are now the subject of recovery programs under the U.S. Endangered Species Act.<sup>50</sup> A fishing company discovered a population of black-lipped pearl oysters (*Pinctada margaritifera*) at Pearl and Hermes Reef in 1927 and removed over 150,000 oysters in a matter of only three years, leading to near total extirpation by 1930.<sup>51</sup>

The NWHI ecosystems have in fact already been “significantly altered by humans,” encouraged in most instances by government policies of other eras.<sup>52</sup> Exploitation of bottomfish species began in the early 20th century; foreign fisheries for tuna and precious corals began after World War II.<sup>53</sup> Honolulu-based fisheries for tuna developed, and fisheries for Hawaiian lobsters and precious corals commenced in 1976 after exploratory fisheries revealed their potential.<sup>54</sup> Management plans were prepared under the Magnuson-Stevens Fishery Conservation and Management Act, and these fisheries continued until terminated due to uncertain stock assessments, potential adverse effects on the endangered Hawaiian monk seal, and, finally, the creation of Papahānaumokuākea Marine National Monument.<sup>55</sup> Despite the historical exploitation of certain species, the lagoons, reefs and waters of Papahānaumokuākea host large fish populations and many species of corals and algae. These species and populations make up ecosystems that are largely predator-dominated, making them rare among sub-tropical coral reef ecosystems.<sup>56</sup>

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<sup>50</sup> Shallenberger, *supra* note 47, at 26-27 (pointing out that the Hawaiian Islands National Wildlife Refuge is the only refuge on which an animal is known to have gone extinct and has lost three species to extinction by 2006). MARK J. RAUZON, ISLES OF REFUGE (2001). The endemic Laysan duck and Laysan finch remain, however, as do dozens of endemic plant species due to restoration activities of the U.S. Fish and Wildlife Service. See Virtual Visit, PAPAHAANAUMOKUĀKEA MARINE NATIONAL MONUMENT, available at <http://www.papahanaumokuakea.gov/visit/laysan.html> (last visited Dec. 22, 2011).

<sup>51</sup> Shallenberger, *supra* note 47, at 25. See generally Rauzon, *supra* note 49.

<sup>52</sup> See J.K. Schultz et. al, *Tempering Expectations of Recovery for Previously Exploited Populations in a Fully Protected Marine Reserve*, 14 J. MARINE BIOLOGY 1, 1-14 (2011).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> A previous executive order limited the expansion of existing commercial fisheries but did not phase them out entirely. Exec. Order No. 13,178 of Dec. 4, 2000, Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, 65 Fed. Reg. 76,903 (Dec. 7, 2000) [hereinafter *NWHI Ecosystem Reserve*].

<sup>56</sup> See PAPAHAANAUMOKUĀKEA MARINE NATIONAL MONUMENT, *World Heritage Nomination*, available at <http://www.papahanaumokuakea.gov/management/>

Extensive military activities in the NWHI also have had a lasting impact.<sup>57</sup> The first executive order concerned with the NWHI put Midway Atoll under the control of the U.S. Navy in 1903, following a confrontation between the employees of a cable-laying company operating out of Midway and Japanese seabird poachers.<sup>58</sup> Runways were built on an islet in Midway Atoll and on Tern Island in French Frigate Shoals, both homes to millions of seabirds, in support of military maneuvers before and during World War II. After the war, Tern Island was transferred to the U.S. Coast Guard for use as a long-range navigation (“LORAN”) station, as was Kure Atoll.<sup>59</sup> The Navy maintained an air base at Midway until 1993, when responsibility for the area was transferred to the Fish and Wildlife Service.<sup>60</sup> Because the resident seabird populations were seen as a hazard to aircraft landing and takeoff, military personnel were assigned to puncture eggs to keep nest numbers to a minimum on and near the landing strips.<sup>61</sup>

Maritime casualties continued throughout the twentieth century. Japanese fishing vessels grounded on Laysan Island in 1969 and 1976, and on Kure Atoll in 1976. A foreign-flag tanker grounded at French Frigate Shoals in 1980 and dumped more than 2000 tons of kaolin clay in order to free itself from the reef. U.S. fishing vessels ran aground at Kure Atoll in 1999 and at Pearl and Hermes Reef in 2000. Another caught fire and sank north of French Frigate Shoals in 1977, spilling five million gallons of fuel oil and killing uncounted numbers of seabirds and other marine life.<sup>62</sup> Vessels have been the source of other documented adverse impacts to the

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worldheritage.html (last visited Dec. 22, 2011). Due to the lack of historical baseline levels of abundance, the area appears to be relatively pristine, and that term is used frequently in official descriptions of the area. *See* Schultz et al., *supra* note 52 (lack of baseline abundance levels may mask the actual state of the NWHI marine ecosystems).

<sup>57</sup> Shallenberger, *supra* note 47, at 28. A channel dredged in 1871 for use by a proposed coaling station was expanded in the early twentieth century.

<sup>58</sup> *Id.* at 24. Roosevelt followed his Executive Order (No. 199-A) by deciding to send a detachment of Marine to Midway in 1904 to protect the seabirds as well as the cable company’s assets and employees.

<sup>59</sup> *Id.*

<sup>60</sup> U.S. FISH AND WILDLIFE SERVICE, *Midway Atoll National Wildlife Refuge*, available at <http://www.fws.gov/midway/> (last visited Dec. 22, 2010).

<sup>61</sup> Rauzon, *supra* note 49.

<sup>62</sup> Shallenberger, *supra* note 47, at 26; Eric C. Franklin, *An Assessment of Vessel Traffic Patterns in the NWHI Between 1994 and 2004*, 56 MARINE POLLUTION BULL. 136, 136 (2008) (reporting 545 vessels reported inside the boundaries of the Monument between 1994 to 2004).

coral reefs, including introduction of invasive species.<sup>63</sup> Thus, the unique qualities of the remote NWHI not only include ecological richness, but also a long history of resource exploitation and the uncertain property rights that are often associated with over-exploited resources.

B. *U.S. Jurisdiction and Management at the NWHI*<sup>64</sup>

Jurisdictional complexity has been a feature of the NWHI since before the turn of the twentieth century. After annexing the Hawaiian Islands in 1898, the United States created the Territory of Hawai‘i.<sup>65</sup> During the territorial period, due to continuing reports of seabird poaching at Midway Atoll and elsewhere, President Theodore Roosevelt created a bird reservation around the NWHI.<sup>66</sup> Roosevelt’s 1909 executive order relied on the implied powers of the President to reserve public lands and on the U.S. Lacey Act of 1900. This act gave the secretary of agriculture the authority to protect game and other wild birds.<sup>67</sup> The uncertainty of President Roosevelt’s legal authority for declaring the Hawai‘i Islands Bird Reservation was compounded by unclear geographic boundaries.<sup>68</sup> The order described the Reservation as the “islets and reefs” of the NWHI and listed many of the reefs by name. This list included some that were no longer emergent, and failed to specify the seaward limits of the reefs that were still evident. A map accompanying the order showed the named reefs and islets surrounded by an elliptical dotted line (see Figure 3 below).

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<sup>63</sup> Franklin, *supra* note 62.

<sup>64</sup> Material in the section is drawn from Jon M. Van Dyke, *Overview of the Jurisdictional Issues Affecting Hawaii’s Ocean Waters*, 11 INT’L J MARINE & COAST L. 351 (1996) [hereinafter *Hawaii’s Ocean Waters*].

<sup>65</sup> *See id.* at 361. The short-lived and much disputed Republic of Hawai‘i ceded all crown and government lands to the U.S. including submerged lands.

<sup>66</sup> President Theodore Roosevelt established the Hawaiian Islands Reservation by Executive order No. 1019 (1909), *reprinted in United States v. Schlemmer*, 3 U.S. Dist. Ct. Hawai‘i 546, 547 (1910). *See also* Dennis K. Yamase, Note, *State-Federal Jurisdictional Conflict over the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*, U. HAW. L. REV. 139, 140-142, n.6 (1982). By Presidential Proclamation No. 2416, the Hawai‘i Islands Reservation was redesignated as the Hawaiian Islands National Wildlife Refuge on July 25, 1940, *reprinted in* 54 Stat. 2717-19.

<sup>67</sup> Shallenberger, *supra* note 47, at 24.

<sup>68</sup> *See United States v. Schlemmer*, *supra* note 66.



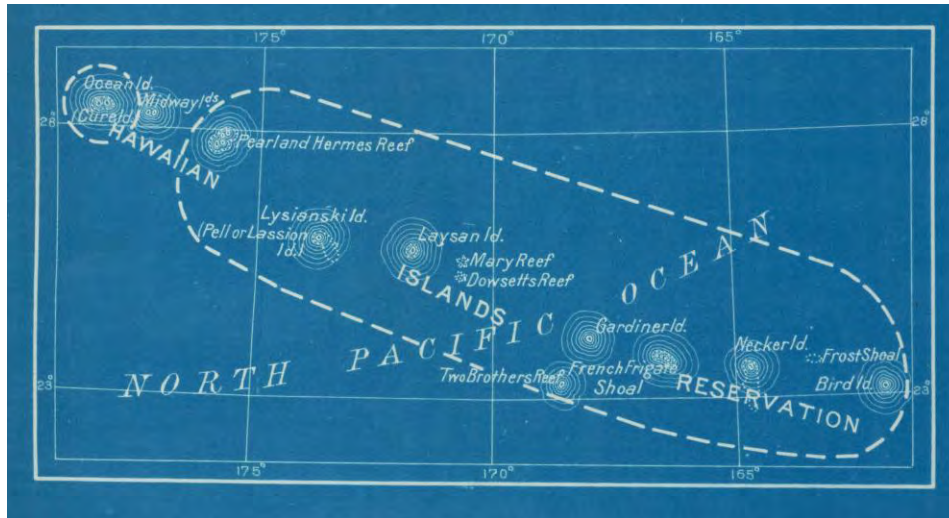


Figure 3. Map accompanying 1909 Executive Order creating the Hawaiian Islands Reservation. Source: U.S. Fish and Wildlife Service.

However, the map had no legend, so it has never been clear if the seaward boundary of the Reservation was marked by the elliptical line, by the seaward limit, or by the low-water mark of each listed reef and islet.<sup>69</sup>

When President Franklin D. Roosevelt transferred the Hawaiian Islands Bird Reservation to the National Wildlife Refuge System in 1940, the area became subject to the federal administration laws of the system. Due to the vagueness of the 1909 map, the actual boundaries of the Hawaiian Islands National Wildlife Refuge were uncertain especially vis-à-vis the state waters of Hawai‘i. This made it difficult for federal and state authorities to coordinate policies for management and protection of the refuge.<sup>70</sup>

The remoteness of the area has however always been the greatest challenge to effective protection of the NWHI. From 1909 to 1916, a U.S. vessel, the revenue cutter *Thetis*, monitored the area and arrested poachers.<sup>71</sup> It was not until 1960 that a federal manager stationed in Hawai‘i was assigned to the refuge.<sup>72</sup> By that time, many resources had been over harvested, including the local population of the black-lipped pearl oyster (*Pinctada margaritifera*), taken in the 1920s for the

<sup>69</sup> Shallenberger, *supra* note 47, at 29, describes the results of all the orders and proclamations and enactments as a “jurisdictional quagmire” but that there have been notable examples of cooperation. See also generally *Hawaii’s Ocean Waters*, *supra* note 64.

<sup>70</sup> Shallenberger, *supra* note 47, at 24.

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.*

manufacture of buttons, and countless fish and green turtles had been shipped out of French Frigate Shoals from the Navy's abandoned airstrip at Tern Island.<sup>73</sup>

When the United States enacted the Fishery Conservation and Management Act of 1976, a 200-nautical mile fishery conservation zone was established around all territories and insular possessions of the U.S., including the NWHI, and the U.S. Coast Guard began regular surveillance of the area for unlawful fishing activities.<sup>74</sup> Since 1983, maps depicting the U.S. EEZ have always included a 200-mile area surrounding the NWHI as well as the main Hawaiian islands.<sup>75</sup> With the establishment of the fishery conservation zone in 1976, interest was renewed in the commercial potential of fisheries at the NWHI. Fisheries for Hawaiian lobsters and bottomfish soon developed. These fisheries were managed under the policies of the Fishery Conservation and Management Act, which encouraged the development of "under-utilized species" and their management for "optimum yield."<sup>76</sup> When the Hawaiian monk seal was listed as endangered under the U.S. Endangered Species Act in 1976, the stage was set for conflicts in the 1980s and 1990s between the preservation of this species and the development of these remote fisheries. However, in 1991 the U.S. established a NWHI protected species zone that excluded longline fishing operations in waters within fifty nautical miles of the islets and banks and within the migrating corridors used by Hawaiian monk seals when traveling between these areas.<sup>77</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1802, 1811 (1982); 42 Fed. Reg. 12,937-40 (1977). See Jon M. Van Dyke, et. al, *The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?*, 25 SAN DIEGO L. REV. 425, 428, n.17 (1988) [hereinafter *EEZ of the NWHI*]. In his proclamation of March 10, 1983, former President Ronald Reagan claimed an EEZ for the United States contiguous to the territorial sea of the U.S. and of its overseas territories and possessions and extending 200 miles from the baselines from which the U.S. territorial sea has been measured. Proclamation No. 5030, 3 C.F.R. § 22-23 (1983). The Fishery Conservation and Management Act was later renamed the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

<sup>75</sup> 1983 Reagan Proclamation of the US EEZ, 77 AJIL 619, 619-23. U.S. Department of State, EEZ and Maritime Boundaries: Notice of Limits, 60 Fed. Reg. 43,829 (Aug. 23, 1995) (replacing all previous descriptions of the U.S. EEZ boundaries). This is notwithstanding the fact that many of the features of the NWHI are uninhabited and uninhabitable due to their tiny size and lack of resources necessary to sustain human life. See *EEZ of the NWHI*, *supra* note 74.

<sup>76</sup> Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884 (2012).

<sup>77</sup> See 50 C.F.R. §665.806 (2011).

Since the early 1980s, a jurisdictional dispute has simmered between the State of Hawaii and the federal government over the internal lagoon waters and submerged lands of the atolls within the NWHI. The U.S. Fish and Wildlife Service triggered the dispute when it proposed to classify all the lands and waters in the Hawaiian Islands National Wildlife Refuge as “wilderness” under the U.S. Wilderness Act. This classification would have precluded further use of these waters for commercial fisheries.<sup>78</sup> In 1988 the people of Hawai‘i amended the state constitution to include the following claim to all marine resources in the EEZ around Hawai‘i:

The State of Hawaii asserts and reserves its rights and interest in its exclusive economic zone for the purpose of exploring, exploiting, conserving and managing natural resources, both living and nonliving, of the seabed and subsoil, and super-adjacent waters.<sup>79</sup>

In addition to this claim on behalf of all the citizens of the State of Hawai‘i, marine resources are also impressed with a claim on behalf of the indigenous people of Hawai‘i. The Office of Hawaiian Affairs (“OHA”) was created by constitutional amendment in 1978 to represent the interests of the Native Hawaiian community. OHA has asserted a claim on behalf of all persons of Hawaiian ancestry to the submerged lands of the state as part of the “ceded lands” that were illegally conveyed to the U.S. government by the Republic of Hawaii.<sup>80</sup> The Attorney General of Hawai‘i concluded in 1982 that the submerged lands are ceded lands granted in Section 5(b) of the Admission Act and are subject to the public trust created in Section 5(f) of that act.<sup>81</sup> In 1989, the OHA reiterated its marine resource claim on behalf of persons of Hawaiian ancestry:

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<sup>78</sup> Yamase, *supra* note 37, at 142 n.8, 143. The dispute was over approximately 254,000 acres within the waters and adjacent to Pearl and Hermes Reef, French Frigate Shoals, Maro Reef, and Laysan Island. The wilderness proposal arose at the time when commercial fisheries interests were proposing to build a fishing support facility at Tern Island in French Frigate Shoals.

<sup>79</sup> See HAW. CONST., art. XI, § 1. In the early 1990s, a proposal was circulated to add the Pacific islands of Baker, Howland, Jarvis, Midway, Palmyra, and Kingman Reef, and possibly Wake Island to the State of Hawai‘i. The objective was to increase the ability of the state to participate in the management of living and nonliving resources of the waters and seabed. *Hawaii’s Ocean Waters*, *supra* note 64, at 355.

<sup>80</sup> See generally JON M. VAN DYKE, WHO OWNS THE CROWN LANDS? (2008).

<sup>81</sup> *Hawaii’s Ocean Waters*, *supra* note 64, at 361-62. Article XII, section 4 of the Hawai‘i State Constitution, provides that certain lands ceded by the U.S. to the State of

Native Hawaiians have an interest in the living and nonliving resources of the submerged lands and offshore water in the exclusive economic zones and territorial seas surrounding the Hawaiian Islands, Johnston Atoll, Palmyra Island, and Midway Island. Native Hawaiians are entitled to half of all revenues received by the U.S. government from these resources. Native Hawaiians are also entitled to harvest half of all resources in these areas. Both the living and nonliving resources should be co-managed by appropriate federal and state agencies and OHA, or any successor Native Hawaiian entity developed pursuant to the process set forth below, in an environmentally sensitive manner designed to preserve these resources for future generations.<sup>82</sup>

In 1998, U.S. President Bill Clinton adopted an executive order calling for increased interagency cooperation in the protection of U.S. coral reef ecosystems.<sup>83</sup> In subsequent executive orders, Clinton directed his administration to strengthen the management of the U.S.'s marine protected areas, to develop a national system of such areas, and to recommend new marine areas for protection.<sup>84</sup> He also requested his secretaries of interior and commerce to work with the State of Hawai'i and the Western Pacific Regional Fishery Management Council to develop recommendations for a new, coordinated management regime to "provide

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Hawai'i under the Admission Act (Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4), Section 5(f)), are held in trust by the State for Native Hawaiians and for the general public. Under Article XII, section 6, a portion of the income derived from the ceded lands are to be used by the Office of Hawaiian Affairs to promote the well-being of native Hawaiians.

<sup>82</sup> Office of Hawaiian Affairs, Draft Blueprint for Native Hawaiian Entitlements (Sept. 2, 1989), quoted in *Hawaii's Ocean Waters*, *supra* note 64, at 361.

<sup>83</sup> Exec. Order No. 13,089, 63 Fed. Reg. 32, 701 (June 15, 1998). In a subsequent ocean policy action, President Clinton issued a proclamation extending the U.S. contiguous zone to twenty-four miles seaward of the baseline from which the territorial sea is measured. Proclamation No. 7219, 64 Fed. Reg. 48701 (Sept. 8, 1999). This extension followed eleven years after the claim of a twelve mile territorial sea under President Ronald Reagan's proclamation and sixteen years after President Reagan's proclamation on the EEZ. Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989); Proclamation 5030 of March 10, 1983, Exclusive Economic Zone of the U.S., 48 Fed. Reg. 10605 (Mar. 14, 1983).

<sup>84</sup> Exec. Order No. 13,158, 65 Fed. Reg. 34909 (May 31, 2000). The order of Dec. 4, 2000 notes that on May 26, 2000, President Clinton directed his secretaries to work cooperatively with the State of Hawai'i and consult with the Western Pacific Fishery Management Council to develop recommendations. *NWHI Ecosystem Reserve*, *supra* note 55.

strong and lasting protection to the coral reef ecosystems of the Northwestern Hawaiian Islands.”<sup>85</sup> These orders triggered calls by non-governmental organizations and scientists for the creation of a marine protected area around the NWHI.<sup>86</sup> One objective was to establish a sentinel research site located at some distance from local or regional-scale sources of anthropogenic impacts in order to assess the effects of global warming and ocean acidification on coral reefs.<sup>87</sup>

President Clinton’s order in May, 2000, also triggered a request by the secretaries of the U.S. Department of Justice to clarify the legal basis for a coordinated regime based on protection from resource development.<sup>88</sup> Their questions focused on whether permanent protection could be afforded to marine ecosystems at the NWHI under the Antiquities Act of 1906. The Antiquities Act authorizes the President to establish a national monument around objects of historic or scientific interest that are situated upon the lands owned or controlled by the U.S. government or in waters located on or above such lands.<sup>89</sup> The Justice Department concluded that the President could use his authority under the Antiquities Act to establish a national monument in both the territorial sea and the EEZ because these lands and waters are either owned or controlled by the national government under both U.S. law and international law.<sup>90</sup> Noting that the U.S. possesses substantial authority to regulate the EEZ for the purpose of protecting the marine environment under both customary law and the Law of the Sea Convention, the Justice Department found that the latter “appears not only to allow the U.S. to take action to protect marine resources, but also to require some actions,” citing Articles 61, 62, 65, and

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<sup>85</sup> *Id.*

<sup>86</sup> Interview with Athline Clark, Haw. Dept. of Land and Natural Res., in Honolulu, Haw. (Apr. 23, 2007).

<sup>87</sup> Franklin, *supra* note 62, at 151.

<sup>88</sup> See Memorandum Opinion for the Solicitor, Dept. of Interior, the General Counsel, NOAA, and the General Counsel, Council on Environmental Quality, Administration of Coral Reef Resources in the Northwestern Hawaiian Islands, Sept. 15, 2000, available at <http://www.usdoj.gov/olc/coralreef.htm> (last visited Dec. 22, 2011) [hereinafter *Administration of Coral Reefs in NWHI*].

<sup>89</sup> Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (LEXIS through 2012 legislation); *United States v. California*, 436 U.S. 32, 36 n.9 (1978).

<sup>90</sup> The memorandum opinion cited Proclamation No. 2667, 3 C.F.R. § 67 (1943-1948); Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (LEXIS through 2012 legislation); Proclamation No. 5928, 3 C.F.R. § 547 (1989); Proclamation No. 5030, 3 C.F.R. § 22 (1984); and Proclamation No. 7219, 3 C.F.R. § 98 (2000).

194.<sup>91</sup> “In our view, although a close question, the authority the United States possesses under international law to protect the marine environment in the EEZ, in combination with the overall amount of restraining and directing influence that the U.S. exerts in the EEZ, gives the U.S. sufficient control over the EEZ for the [P]resident to invoke the Antiquities Act for the purposes of protecting the marine environment.”<sup>92</sup>

However, rather than use the power granted the President by Antiquities Act, President Clinton issued another executive order late in 2000. This order created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, a zone approximately 1200 nautical miles long and 100 nautical miles wide, covering waters seaward of the three-nautical mile seaward boundaries of the State of Hawai‘i.<sup>93</sup> This later order set in motion a process to designate the waters of the NWHI as a national marine sanctuary under the U.S. National Marine Sanctuaries Act.<sup>94</sup> The public consultation process required by the Sanctuaries Act generated extensive public support for the total protection of the area and for ending the commercial fisheries. In 2005, the governor of the State of Hawai‘i designated the state waters surrounding the NWHI as a state marine refuge, prohibiting all extractive uses, including recreational and commercial fishing. The refuge rules require a permit before entry for all other activities and allow traditional Native Hawaiian activities that perpetuate the culture.<sup>95</sup> This action apparently signaled to the White

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<sup>91</sup> *Administration of Coral Reefs in NWHI*, *supra* note 88, at 9.

<sup>92</sup> *Id.* The Justice Department concluded *inter alia* that the president could not use the National Wildlife Refuge Administration Act to establish a refuge in either the territorial sea or the EEZ relying solely on implied authority rooted in practice; that the secretary of interior must have management authority over any national monument, that the Fish and Wildlife Service cannot share management authority with another agency for any refuge areas within a national monument, that federal fisheries regulations must be consistent with regulations applicable to national monuments, and that the establishment of a national monument would not preclude establishment of a national marine sanctuary in the same area under the National Marine Sanctuaries Act.

<sup>93</sup> *NWHI Ecosystem Reserve*, *supra* note 55. Although President Clinton created nineteen monuments under the Antiquities Act before he left office in 2001 (one more than President Theodore Roosevelt), opposition to the idea of a national monument by a senior member of the Hawaiian congressional delegation and by some Commerce Department officials was sufficient to convince the president’s advisors to give up the idea of using the Antiquities Act to establish a monument around the NWHI coral reef ecosystems, according to the advisor to then-secretary of interior, Bruce Babbitt. See William Brown, Commentary, *Sanctuary a victory long in making*, HONOLULU ADVERTISER, June 18, 2006, <http://the.honoluluadvertiser.com/article/2006/Jun/18/op/FP606180306.html>. See also Christopher Pala, *A Long Struggle to Preserve a Hawaiian Archipelago and its Varied Wildlife*, N.Y. TIMES, Dec. 19, 2006, at D3.

<sup>94</sup> National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1431-1445c (LEXIS through 2012 legislation).

House that the balance of public opinion now favored an end to fisheries development around the islands.<sup>96</sup> On June 16, 2006, President George W. Bush ended the sanctuary designation process by signing the proclamation creating a marine national monument under the Antiquities Act.<sup>97</sup>

C. *International Scope of the Papahānaumokuākea Marine National Monument*

President Bush's goal in signing the proclamation was to secure an environmental legacy for his administration by adopting the largest marine conservation zone to date.<sup>98</sup> By using the Antiquities Act to establish a monument of all the coral islets, reefs, atolls, and surrounding waters to a distance of fifty nautical miles (100 miles total width), Bush was able to protect the area immediately, without having to consult the public further or seek the approval of Congress.<sup>99</sup> Although the proclamation was reportedly drafted in a short period of time, certain clauses indicate that there was enough time to consult with the Department of Defense and the Department of State.<sup>100</sup> The input from these agencies likely focused on two issues: first, ensuring the proclamation's consistency with international law, and second, in minimizing the proclamation's value as precedent for other coastal and island states to enact measures impinging upon the navigational freedom and operational flexibility of U.S. military vessels.<sup>101</sup> In drafting the proclamation, the President's aides no doubt

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<sup>95</sup> State of Hawai'i, Northwestern Hawaiian Islands Marine Refuge, HAW. ADMIN. R. § 13-60.5-5 (effective Oct. 10, 2005). The refuge includes waters extending seaward three nautical miles from any coastline from Nihoa Island to Kure Atoll, excluding Midway Atoll (which is not a part of the State of Hawai'i, but is within the Midway Atoll National Wildlife Refuge, administered by the U.S. Fish and Wildlife Service). *Id.*

<sup>96</sup> See Pala, *supra* note 93 at D3.

<sup>97</sup> Proclamation No. 8031, *supra* note 1.

<sup>98</sup> See Robin Kundis Craig, *Are National Marine Monuments Better than National Marine Sanctuaries?* 7 SUSTAINABLE DEVT L. & POL. 27, 27-31, 81 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> The proclamation was announced on the day that had been scheduled for the release of the draft environmental impact statement on the proposed NWHI national marine sanctuary. The national monument concept was introduced to the president by the director of the White Council on Environmental Quality, James L. Connaughton, who as chairman of the White House's Council on Environmental Quality visited Australia's Great Barrier Reef Marine Park in early 2005. See Pala, *supra* note 93.

<sup>101</sup> Raul Pedrozo, *Is it Time for the United States to Join the Law of the Sea Convention?*, 41 J. MARITIME L. & COMM. 151, 160 (2010) (Dep't. of Defense objected strenuously on national security grounds to President Bush's 2009 marine monument

relied upon the legal opinion of former President Clinton's deputy attorney general. This opinion indicated that the U.S.'s quantum of control in the EEZ satisfied the Antiquities Act's requirement that the monument area be subject to governmental control.<sup>102</sup> However, the proclamation itself does not specify the U.S. EEZ as the basis for federal control.

As noted previously, the Hawaiian Islands comprise an archipelago. However, they are not surrounded by "archipelagic waters" and do not generate archipelagic baselines because the U.S. is a continental state and is not entitled to claim archipelagic status.<sup>103</sup> Therefore, since 1983, the U.S. has claimed the waters adjacent to the territorial sea around the NWHI as part of its EEZ.<sup>104</sup> The U.S. has never made clear how the NWHI's land features qualify to generate an EEZ under international law; specifically, whether the islets and reefs are "islands" or "rocks" under the 1982 Law of the Sea Convention. Under Article 121, islands are entitled to generate a territorial sea, an EEZ, and a continental shelf.<sup>105</sup> However, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no [EEZ] or continental shelf."<sup>106</sup> As their history demonstrates, none of the emergent features of the NWHI has supported a stable community of permanent residents; some have supported short-lived economic activities, but none has sustained them for long. Only on Nihoa Island and Necker Island (Mokumanamana) at the southern end of the Monument has archeological evidence of habitation been found.<sup>107</sup> But it is also not clear that all the emergent features used to generate basepoints for the U.S. EEZ around the NWHI are merely "rocks."<sup>108</sup>

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proclamations and to NOAA's proposal to the International Maritime Organization to designate the NWHI as a Particularly Sensitive Sea Area).

<sup>102</sup> See discussion *supra* notes 88-92.

<sup>103</sup> Article 46(a) of the 1982 Law of the Sea Convention, *supra* note 19, defines an "archipelagic State" as "a State constituted wholly by one or more archipelagos" which the United States, located on the North American continent, is not. See *Hawaii's Ocean Waters*, *supra* note 64, at 353-54.

<sup>104</sup> Proclamation No. 5030, 3 C.F.R. § 22-23 (1983), *reprinted as amended in* 16 U.S.C. § 1453 (LEXIS through 2012 legislation).

<sup>105</sup> *United Nations Convention on the Law of the Sea*, *supra* note 19, at art. 121.

<sup>106</sup> *Id.*, at art. 121(3).

<sup>107</sup> See *EEZ of the NWHI*, *supra* note 74, at 469-72.

<sup>108</sup> Acknowledging the inherent ambiguity of Article 121(3), commentators have argued for an interpretation that is consistent with the rationale for recognizing the right of coastal states to claim exclusive rights to the ocean resources, that is, that their peoples have an interest in ensuring the management and conservation of these resources. This



The validity of the U.S. EEZ around similarly uninhabitable islands was challenged in *United States v. Marshalls 201* by a foreignflag fishing vessel. The vessel was prosecuted for fishing in waters around Baker and Howland islands, waters that are now included in the Pacific Remote Islands Marine National Monument (discussed in more detail in the next section). The U.S. federal district court declined to rule that the EEZ was inapposite to foreign flag vessels, relying on the express definition of an EEZ around “Pacific Insular Areas” in the Magnuson-Stevens Fishery Conservation and Management Act and noting that the Law of the Sea Convention is not yet legally enforceable on the U.S.<sup>109</sup>

The Marshalls 201 decision applying the U.S. EEZ against a foreign fishing vessel in waters around an uninhabitable island seems inconsistent, however, with recent rulings by international tribunals.<sup>110</sup> For example, in the *Monte Confurco* case decided by the International Tribunal on the Law of the Sea, Judge Vukas issued a separate declaration in order to dissociate himself from any conclusions in the tribunal’s judgment that were based on France’s proclaimed EEZ around the Kerguelen Islands. He stated: “[I]t is highly questionable whether the establishment of an economic zone off the shores of these ‘uninhabitable and uninhabited’ islands is in accordance with the reasons which motivated the Third United Nations Conference on the Law of the Sea to create that specific legal regime, and with the letter and spirit of the provisions on the exclusive economic zone, contained in the United Nations Convention on the Law of the Sea.”<sup>111</sup>

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would mean that an island should be entitled to generate an EEZ only if it has supported a stable community of permanent residents. See *Hawaii’s Ocean Waters*, *supra* note 64, 486-87. See also Jon M. Van Dyke & Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean’s Resources*, 12 OCEAN DEV’T & INT’L L. 265 (1983).

<sup>109</sup> *United States v. Marshalls 201*, 2008 WL 2018299, at \*1 (D. Guam May 8, 2008). See 16 U.S.C. §§ 1801(a)(10), 1802(35) (defining “Pacific Insular Area”), and 1824(e)(8) (creating a fund to receive fines and penalties from foreign vessel violations occurring in the EEZs around Howland, Baker, and Wake islands).

<sup>110</sup> Ever since the U.K. relinquished its EEZ claim around Rockall, state practice regarding “rocks” has been ambivalent, but *opinio juris* is likely that Article 121(3) is customary law subject to a very liberal interpretation. Roger O’Keefe, *Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea*, 45 INT’L & COMP. L. Q. 408, 411 n.16, 413 n.33 (1996). In *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Nor. v. Den.), 1993 I.C.J. 84, 85 (June 14, 1993), Article 121 is referred to as general international law. In the *Black Sea maritime boundary between Romania and the Ukraine*, the ICJ gave a disputed maritime feature called Snake Island no effect in the delimitation. *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), 2009 I.C.J. 1 (Feb. 3). See Jon M. Van Dyke, *The Romania-Ukraine Decision and Its Effect on East Asian Maritime Delimitations*, 16 OCEAN & COAST. L.J. 261 (2010).

<sup>111</sup> *Monte Confurco* (No. 6) (Sey. v. Fr.), Case No. 6, Prompt Release of Dec. 18,

Although the Papahānaumokuākea proclamation does not refer to waters of the monument as constituting part of the EEZ, it directs the secretaries of commerce and interior to exercise extensive regulatory jurisdiction over these waters using powers that are consistent with an EEZ.<sup>112</sup> For example, unless allowed by permit from the secretaries of commerce and interior, no person may remove any living or nonliving monument resource; drill, dredge, or construct any structure on the submerged lands; anchor or desert a vessel that has gone aground or is adrift; touch live or dead coral; possess unstowed fishing gear; swim, snorkel, or SCUBA dive; or discharge or deposit materials into the monument. Discharges or deposits of any material outside of the monument that later enter it and injure any resources are also prohibited.<sup>113</sup> Allowed activities include research, educational activities, conservation and management actions, Native Hawaiian practices that perpetuate traditional knowledge and ancestral connections to the NWHI, special ocean uses that are compatible with the purposes of the monument, and recreation confined to the Midway Atoll Special Management Area.<sup>114</sup> The Proclamation required any commercial fishing previously permitted to be phased-out by 2011, within five years of the proclamation.<sup>115</sup>

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2000, 6 ITLOS Rep. 1 (quoting the islands' discoverer, Captain Yves-Joseph de Kerguelen-Trémarec).

<sup>112</sup> Proclamation No. 8031, *supra* note 1. The secretaries are required to prohibit entry into the monument except by permit, to require vessels passing through the monument to give notice at least seventy-two hours prior to entry and within at least twelve hours after exiting, and for vessels to have an operating vessel monitoring system that meets detailed specifications. The secretaries must also prohibit oil and gas exploration; using poisons, electric shocks or explosives in collecting monument resources; releasing introduced species; and anchoring on any living or dead coral.

<sup>113</sup> *Id.* The only exception is for fish parts used as bait in the soon-to-be phased out fishing operations, or discharges incidental to vessel use such as deck wash, effluent from an approved marine sanitation device, engine exhaust and cooling water. Discharges of used fishing gear such as nets, fish aggregating devices, floats, or lines would presumably fall within these prohibitions.

<sup>114</sup> Before they can authorize any activity within the Monument, however, they must be satisfied that several conditions are met: that its ecological integrity will not be compromised, there is no practicable alternative to the proposed activity, the value of the activity outweighs any adverse impacts, and that the person applying to conduct the activity is qualified and has adequate financial resources to mitigate any potential adverse effect.

<sup>115</sup> The federal commercial fishing permits for lobster and bottomfish in the NWHI were surrendered after permit holders accepted compensation from the U.S. government in 2009 with funds authorized by the U.S. Congress amounting to USD \$6.7 million. NOAA, Fisheries of the Western Pacific, Compensation to Federal Commercial Bottomfish and Lobster Fishermen Due to Fishery Closures in the Papahānaumokuākea Marine National Monument, Northwestern Hawaiian Islands, 74 Fed. Reg. 47,119 (Sept.

Although entry to the monument is carefully controlled, the prohibitions only apply directly to U.S. residents and vessels of U.S. registry or state registration.<sup>116</sup> For foreign persons and foreign-flag vessels the President directed the secretaries to apply any regulations implementing the proclamation only “to the extent allowed by international law.”<sup>117</sup> The Secretary of State is directed “to enter into negotiations with other governments to make necessary arrangements for the protection of the monument”<sup>118</sup> and to seek the cooperation of other governments and international organizations “consistent with applicable regional and multilateral arrangements for the protection and management of special marine areas.”<sup>119</sup>

The Proclamation exempts all activities and exercises of the U.S. armed forces and Coast Guard from its restrictions on access to and activities within the Monument, as long as those activities are “consistent with applicable laws.”<sup>120</sup> However, it requires that these activities “be carried out in a manner that avoids, to the extent practicable and consistent with operational requirements, adverse impacts on monument resources and qualities.”<sup>121</sup> Further, if a government vessel spills oil or runs aground, and threatens injury to or loss of marine resources, the military or Coast Guard is required to coordinate their response with the Monument’s co-trustees. They must also mitigate the harm and restore or replace the monument resource or quality.<sup>122</sup>

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15, 2009).

<sup>116</sup> Proclamation No. 8031, *supra* note 1, at 36, 447.

<sup>117</sup> *Administration of Coral Reefs in NWHI*, *supra* note 88. The U.S. Justice Department counseled the White House that “any designation of a national monument in the US EEZ should specify that only regulations and restrictions that are consistent with international law will apply within the monument.” *Id.*

<sup>118</sup> Proclamation No. 8031, *supra* note 1, at 36,444.

<sup>119</sup> *Id.* This language is almost identical to the international cooperation references in the Section 1435 of the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445c (2012), as amended, the evolution of which is discussed in Scott A. Hajost, *The United States Marine Sanctuaries Program and Freedom of Navigation*, INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? 283-300 (Jon M. Van Dyke et. al, eds., 1988).

<sup>120</sup> Proclamation No. 8031, *supra* note 1, at 36, 447.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* The military activities savings clause was much less prescriptive in President Clinton’s 2000 executive order creating the Coral Reef Ecosystem Reserve, supporting one commentator’s contention that U.S. ocean policy under President Bush tilted more in favor of protecting the marine protection than maintaining national security. See Pedrozo, *supra* note 101, at 160 (the Bush Administration’s 2009 marine

#### D. *The 2009 Pacific Marine National Monuments*<sup>123</sup>

As soon as President Bush signed the Papahānaumokuākea proclamation, the lobbying for further application of the Antiquities Act to create marine monuments began. The White House Council on Environmental Quality sought nominations and conducted a public consultation on the nominations that were received.<sup>124</sup> On January 6, 2009, a few days before leaving office, President Bush established three new marine national monuments in the Pacific Ocean: for the submerged lands of Marianas Trench, for the "Pacific Remote Islands" lying south and west of Hawai‘i, which include Wake, Baker, Howland, and Jarvis islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll, and for the reefs and waters around Rose Atoll (in American Samoa) (see Figure 4 below).<sup>125</sup>

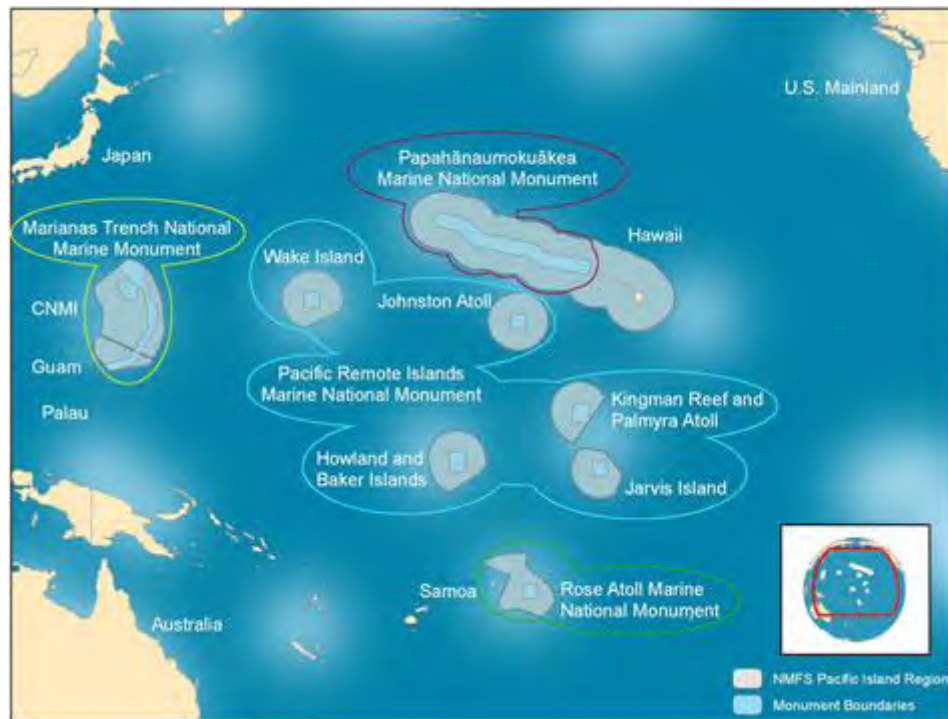


Figure 4. The four Pacific marine national monuments in the U.S.'s Pacific EEZ. Source: NOAA.

national monument proclamations and 2007 IMO proposal to designate a PSSA at the NWHI “illustrate a dysfunctional ocean policy focused on gaining political capital in the name of environmental protection rather than advancing U.S. ocean interests in a comprehensive, balanced manner”).

<sup>123</sup> Parts of this section are based on Alison Rieser & Jon M. Van Dyke, *New Marine National Monuments Settle Issues*, 24 NAT. RES. & ENV'T 50 (2009).

<sup>124</sup> Christopher Pala, *Scientists Laud Bush's Blue Legacy But Want More*, 323 SCIENCE 192 (Jan. 9, 2009).

<sup>125</sup> *Id.*

However, the 2009 proclamations are less prescriptive than the proclamation for Papahānaumokuākea. They leave most regulatory decisions to the discretion of the federal agencies that will manage the new monuments, and focus on specifying the cooperation that would be required among the federal agencies rather than from foreign states and international organizations.<sup>126</sup>

The new Marianas Trench Marine National Monument contains three components: (1) an "Islands Unit" consisting of the waters and submerged lands within a fifty nautical mile radius around the three most northern islands of the fourteen islands in the Northern Marianas—Farallon de Pajaros (Uracas), Maug, and Asuncion—which are each relatively active volcanoes ringed by coral reefs; (2) a "Trench Unit" consisting of the submerged lands of the Marianas Trench, the world's deepest canyon (nearly 11,000 meters at the deepest point), located east of the fourteen islands and running 940 nautical miles long and thirty-eight nautical miles wide, from the southern end to the northern end of the EEZ claimed around the Commonwealth of the Northern Marianas Islands ("CNMI"); and (3) a "Volcanic Unit" consisting of the submerged lands within a one-mile radius around twenty-one active, submarine volcanoes and hydrothermal vents along the Mariana Volcanic Arc west and north of the fourteen islands (see Figure 5 below).<sup>127</sup> No waters are included in the Trench and Volcanic Units.<sup>128</sup>

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<sup>126</sup> Proclamation No. 8335 of Jan. 6, 2009, Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1557 (Jan. 12, 2009); Proclamation No. 8336 of Jan. 6, 2009, Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 12, 2009); Proclamation No. 8337 of Jan. 6, 2009, Establishment of Rose Atoll Marine National Monument, 74 Fed. Reg. 1576 (Jan. 12, 2009).

<sup>127</sup> Proclamation No. 8335, *supra* note 126.

<sup>128</sup> The Marianas Trench Monument is to be managed by the Secretaries of Interior and Commerce (through the National Oceanic and Atmospheric Administration - NOAA), in consultation with the Secretary of Defense. Interior's Fish and Wildlife Service has primary management except with respect to fishery-related activities, which NOAA is to govern using its existing legal authorities, including the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1884 (2012).

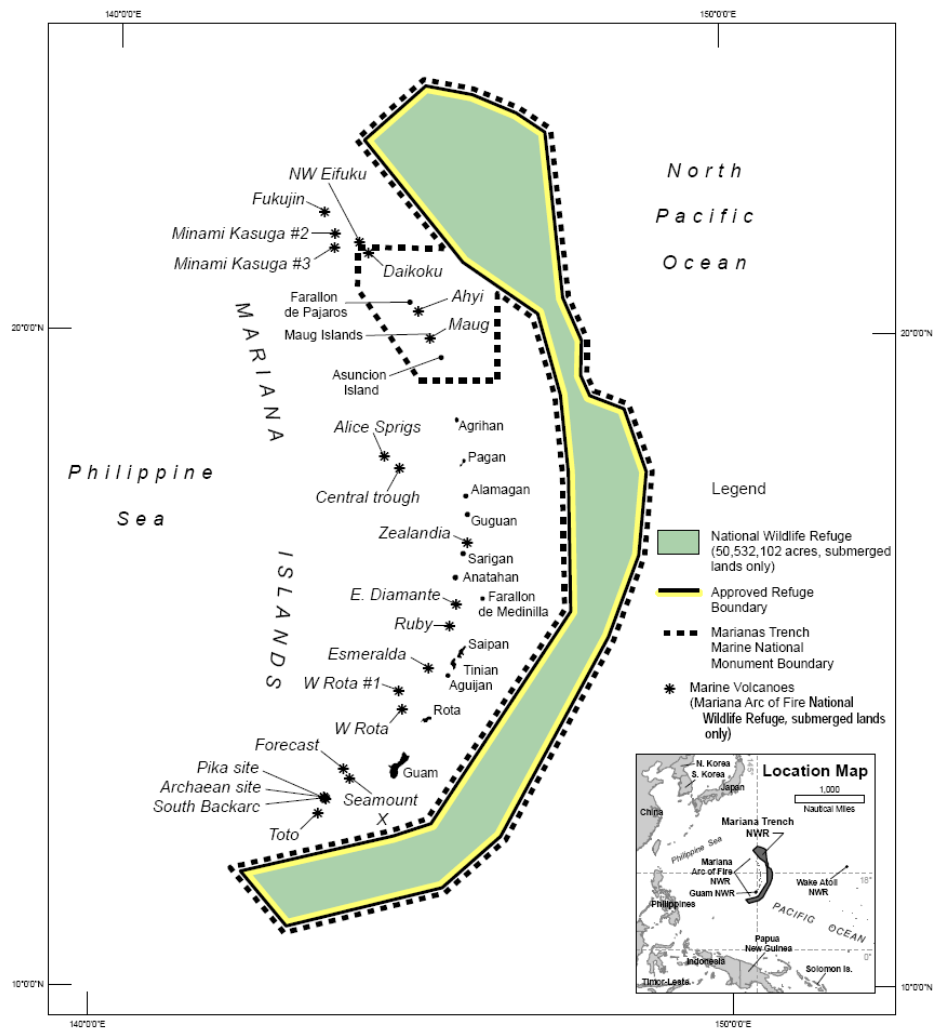


Figure 5. The islands, trench, and volcanic units' wildlife refuges of the Marianas Trench Marine National Monument. Source: U.S. Fish & Wildlife Service, Division of Realty and Refuge Information, Portland, OR.

The CNMI is one of the five U.S.-flag affiliated communities, all of which have a somewhat ambiguous relationship to the United States.<sup>129</sup> The constitution of the Commonwealth of the Northern Marianas maintains the three islands in the Island Unit as uninhabited places for preservation and protection of natural resources.<sup>130</sup> The CNMI, however,

<sup>129</sup> See, e.g., Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 480-87 (1992).

<sup>130</sup> Commonwealth of the Northern Marianas Islands (CNMI) Constitution, Article XIV, Sec. 2. The proclamation does not make the Commonwealth a “co-trustee” like the State of Hawai‘i is for the Papahānaumokuākea Monument, but it will play a cooperating role, especially on the issue of traditional indigenous fishing within the

has no jurisdiction beyond the low water mark.<sup>131</sup> If the U.S. one day grants submerged lands to the CNMI, these may remain a part of the Monument, and management will be coordinated.<sup>132</sup> The proclamation authorizes the secretaries of interior and commerce to allow features within the Monument to be disturbed or removed during scientific exploration and research, but neither may be required by the other to obtain a permit for their respective research activities.<sup>133</sup> Because commercial fishing is prohibited only in the Islands Unit, fisheries that do not touch submerged lands on seamounts in the Volcanic and Trench Units appear to be unaffected.

The Pacific Remote Islands Marine National Monument consists of the waters, and submerged and emergent lands within fifty nautical miles around Wake, Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll.<sup>134</sup> Each of these islands, except Wake, is already a national wildlife refuge; the proclamation adds twelve nautical miles of marine waters to their boundaries. The U.S. Air Force will continue to manage portions of Wake Island, a former military base, and Johnston Atoll, where there is a weapons disposal site.<sup>135</sup> Fishing in the Remote Islands Monument is subject to regulation. Recreational fishing may be allowed in specific locations upon request if compatible with the

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Islands Unit, where commercial fishing is prohibited but recreational and sustenance fishing are to be allowed. Proclamation No. 8335, *supra* note 126, at 1559.

<sup>131</sup> *N. Mariana Islands v. United States*, 399 F.3d. 1057 (9th Cir. 2005).

<sup>132</sup> Proclamation No. 8335, *supra* note 126, at 1558.

<sup>133</sup> *Id.* at 1559-60.

<sup>134</sup> The waters extending twelve miles from the islets are to be managed by the Secretary of the Interior, in consultation with the Secretary of Commerce, and the next thirty-eight miles are to be managed by the Secretary of Commerce (through NOAA), in consultation with the Secretary of Interior. Proclamation No. 8336, *supra* note 126.

<sup>135</sup> U.S. jurisdiction over the waters around Johnston atoll is not uncontroverted. The U.S. EEZ claim around the atoll, which has been enlarged through landfill, does not meet a strict interpretation of Article 121(1) of the United Nations Convention on the Law of the Sea and claims to the resources and submerged lands around the atoll on behalf of the native people of Hawai'i are extant. See *EEZ of the NWHI*, *supra* note 74, at 437, n.64; *Hawaii's Ocean Waters*, *supra* note 64, at 362. A proposal was aired in May 1990 to add Howland, Johnston, Midway, Palmyra and Kingman Reef, and possibly Baker, to the state of Hawai'i, to expand its resource management control and to prevent use of Johnson atoll for hazardous military activities inconsistent with its status (since 1926) as a wildlife preserve. *Id.*, at 355, n.22. See Jon M. Van Dyke, *Protected Marine Areas and Low-Lying Atolls*, 16 OCEAN & SHORELINE MGMT. 87, 91 (1991).

wildlife refuges.<sup>136</sup> All military exercises and activities are exempt from the proclamation's prohibitions.<sup>137</sup>

Rose Atoll is a tiny, diamond-shaped atoll east of the main islands of American Samoa, consisting of twenty-acres of land and 1600 acres of lagoon. It is noted for the pink hue of its fringing reef of coralline algae.<sup>138</sup> The Atoll is the easternmost island of Samoa and a part of the Territory of American Samoa, another U.S.-flag island with an ambiguous relationship to the U.S.<sup>139</sup> The atoll has been uninhabited for most of recorded history with the exception of one Samoan family reported to have remained after a proposed fishing station there was abandoned.<sup>140</sup> Thus, the atoll has "only a tenuous claim under Article 121 of the Law of the Sea Convention to be entitled to generate an EEZ and continental shelf."<sup>141</sup> Despite this fact, the Rose Atoll proclamation makes clear that its reservation of federal lands and interests in lands includes the marine waters to a distance of fifty nautical miles from the atoll's mean low water line.<sup>142</sup>

The new monuments all contain exceptional marine life, from "extremophiles" at the Mariana Volcanic Arc vents to countless and invaluable species of corals, fishes, invertebrates, whales, seabirds, sea turtles, and rare terrestrial bird and plant species. Protecting such remote marine areas will require exceptional surveillance and enforcement authority. Extensive enforcement powers do not exist under the Antiquities

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<sup>136</sup> Proclamation No. 8336, *supra* note 126, at 1568.

<sup>137</sup> Proclamation No. 8336, *supra* note 126, at 1569.

<sup>138</sup> Proclamation No. 8337, *supra* note 126, at 1577.

<sup>139</sup> Van Dyke, *supra* note 129, at 492-94.

<sup>140</sup> *Id.*

<sup>141</sup> Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT'L L.J. 143, 168 (2004). The islet was used as a base point in the treaties delimiting the maritime boundary between the U.S. and the Cook Islands and between the U.S. and Niue. *Id.*

<sup>142</sup> Proclamation No. 8337, *supra* note 126, at 1578. The Secretary of Interior has management responsibility for the Rose Atoll monument, which includes the existing Rose Atoll National Wildlife Refuge, with the exception of fishery-related activities in the marine waters seaward of the mean low water mark extending seaward fifty nautical miles. These waters are to be managed primarily by the Secretary of Commerce, who is directed to begin the process to designate the Atoll's marine areas as a national marine sanctuary, consulting with the other interested departments, and cooperating with the territorial government. These consultations will occur through the initial scoping of the environmental impact assessment document that the US will prepare under its National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4375 (2012). See FISH & WILDLIFE SERVICE, *available at* <http://www.fws.gov/roseatollmarinemonument/> (last visited Dec. 22, 2011).



Act,<sup>143</sup> but each proclamation specifies that the U.S. agencies charged with managing the monuments are to “take appropriate action pursuant to their respective authorities under the Antiquities Act and the Magnuson-Stevens Fishery Conservation and Management Act, and such other authorities as may be available to implement this proclamation, to regulate fisheries, and to ensure proper care and management of the monument.”<sup>144</sup> Therefore, regulations for the new monuments and enforcement actions pursuant to them can draw upon the following U.S. laws: the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act, the National Marine Sanctuaries Act, and the national wildlife refuge laws.<sup>145</sup> As an example, a year before the monument at the Pacific Remote Islands was proclaimed, a fishing vessel registered in the Republic of the Marshall Islands was apprehended fishing in the waters around Baker and Howland islands. The vessel was charged with violating the U.S. Magnuson-Stevens Act.<sup>146</sup>

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<sup>143</sup> See D. Kapua Sproat & Aarin F. Gross, *The NW. Hawaiian Islands Marine National Monument*, 22 NAT. RES. & ENV'T 457 (2008).

<sup>144</sup> See, e.g., Proclamation No. 8336, *supra* note 126, at 1568.

<sup>145</sup> These laws are the basis for the regulations for the Papahānaumokuākea Monument, 50 C.F.R. § 404 (2012), and NOAA has authority to assess civil penalties for fishing vessels caught violating the rules by the U.S. Coast Guard. See NOAA OFFICE OF GENERAL COUNSEL, *NMSA and NWHI National Marine Monument Penalty Schedules*, available at <http://www.gc.noaa.gov/enforce-office3.html> (last visited Dec. 22, 2011). A bill introduced in the 111th Congress of the U.S. to reauthorize the Coral Reef Conservation Act of 2000, 16 U.S.C. §§ 6401-6409 (2012), would have clarified that liability for response costs and damages applies to any coral reefs under U.S. jurisdiction. Coral Reef Conservation Act Reauthorization and Enhancement Amendments of 2009, H.R. 860 (introduced Feb. 4, 2009). A similar bill, H.R. 6537, introduced July 17, 2008, would have amended the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445c (2006) to bring the marine national monuments under its provisions. See NOAA Coral Reef Conservation Program Reauthorization Archives, <http://coralreef.noaa.gov/aboutcrp/strategy/reauthorization/archive/>. Given the conflicts over the fishing regulations provision of the Act (16 U.S.C. § 1434(a)(5)) that stalled implementation of President Clinton's 2000-2001 executive orders and which led ultimately to President Bush's use of the Antiquities Act to establish Papahānaumokuākea as a fully-protected marine reserve, it would seem inconsistent with Proclamation No. 8031, to make Papahānaumokuākea a part of the national marine sanctuaries program. Unless very carefully worded to preserve the intent of the proclamation, such an amendment might make Papahānaumokuākea vulnerable to future congressional amendments to reauthorize commercial or recreational fishing at the behest of commercial interests in the State of Hawai'i.

<sup>146</sup> See *United States v. Marshalls 201*, *supra* note 109.

### III. THE INTERNATIONAL RESPONSE TO THE U.S. MARINE NATIONAL MONUMENTS

As shown above, the U.S. drafted the Papahānaumokuākea proclamation and subsequent monuments to minimize their precedential value for more expansive actions by coastal states that might impinge on national security. If the proclamation sets any precedent, it does not endorse the proposition that a state can take unilateral action to “territorialize” the EEZ under the guise of meeting the obligations of Article 192.<sup>147</sup> Notably, the affected area of marine environment at Papahānaumokuākea extends only thirty-eight miles beyond the U.S. territorial sea surrounding the coral atolls, reefs and low coral islands, and military activities are largely exempt from the restricted access. Moreover, the U.S. promptly sought international approval of an IMO Particularly Sensitive Sea Area (“PSSA”) for Papahānaumokuākea. The associated protection measures that the U.S. requested appear quite modest and narrowly tailored, at least in comparison with other PSSA proposals.<sup>148</sup> By obtaining Papahānaumokuākea’s inscription on the list of world heritage sites the U.S. action also suggests that only those marine areas that are of truly global significance may be protected by unilateral action, and that international endorsement of the claim of exceptional value must be promptly sought and received. Despite the risks posed by derelict fishing gear and other marine debris, when Annex V of MARPOL was reviewed and revised, the U.S. did not request stronger controls on fishing vessel discharges. It did not insist, for example, on language that would require states whose vessels fish on the high seas or EEZs within the central North Pacific to take highly precautionary actions to prevent the discharge of synthetic fishing nets and other gear associated with chronic damage to the coral reefs and risks to endangered species at Papahānaumokuākea.

Although the Bush proclamations were relatively narrow in substantive scope, they did inspire a conservation race as noted above (see Table 1 and Figure 1 above). This raised concern, at least within the U.S. military establishment, that the environmental “territorialization” Professor Oxman warned of was underway to the detriment of national security and to other freedoms of the high seas.<sup>149</sup> On the positive side, it

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<sup>147</sup> For a discussion of the risk that unilateral environmental security measures might destabilize the substantive balance reflected in the United Nations Convention on the Law of the Sea’s EEZ regime, see Oxman, *supra* note 9, at 843-49.

<sup>148</sup> See Julian Roberts et. al, *The Western European PSSA Proposal: A ‘Politically Sensitive Sea Area’*, 29 MARINE POL’Y 431, 431-440 (2005) [hereinafter *European PSSA*]. The European states requested authority, inter alia, to prevent aged, single-hulled oil tankers from entering the PSSA.

<sup>149</sup> See, e.g., Pedrozo, *supra* note 101.

should be noted that the largest of the new unilateral MPAs, the Chagos Protected Area, is in a highly contested marine area and was declared by the United Kingdom, which unlike the U.S. is a party to the Law of the Sea Convention.<sup>150</sup> The challenge to this particular conservation action may lead to some much needed international jurisprudence on whether the sovereign rights and responsibilities in the EEZ, and the duties of Article 192 include establishment of ecosystem-scale, non-extractive MPAs.<sup>151</sup>

#### A. IMO Acceptance of the Particularly Sensitive Sea Area

The U.S. followed the Papahānaumokuākea proclamation almost immediately with a proposal to the 56th session of IMO's Marine Environmental Protection Committee for a PSSA.<sup>152</sup> The IMO's Marine Safety Committee considered and accepted associated protective measures accompanying the PSSA proposal. These measures were an expansion of the six recommendatory areas to be avoided ("ATBA") IMO endorsed in 1980, but amended to apply to all ships, not just those of 1000 gross tonnage and above carrying oil and hazardous materials.<sup>153</sup> The expanded ATBAs included three other areas: the areas between Lisianski and Laysan islands and between Gardner Pinnacles and French Frigate Shoals; the area within a radius of fifty nautical miles centered near Raita Bank (to expand the existing ATBA around Maro Reef); and the areas within circles with a fifty-nautical mile radius centered on Kure Atoll and Midway Atoll.<sup>154</sup>

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<sup>150</sup> See Irini Papanicolopulu, Current Legal Developments, *Submission to Arbitration of the Dispute on the Marine Protected Area around the Chagos Archipelago*, 26 INT'L J. MARINE & COAST L. 667 (2011).

<sup>151</sup> *Id.*

<sup>152</sup> United States IMO proposal for Designation of Papahānaumokuākea Marine National Monument as a Particularly Sensitive Sea Area, April 3, 2007, available at [http://www.gc.noaa.gov/gcil\\_papahanaumokuakea.html#pssa](http://www.gc.noaa.gov/gcil_papahanaumokuakea.html#pssa) (last visited Dec. 22, 2011) [hereinafter *U.S. PSSA Submission to IMO*]. The international community had previously accepted the need for special measures regarding the waters around the NWHI. In 1981, upon the advice and request of the U.S., the IMO designated the waters within a 50-nautical mile radius of each of the features of the NWHI as areas to be avoided ("ATBA") by ships in transit. U.S. Dep't of Commerce, NOAA, United States Coast Pilot 7 at 422 (19th ed. 1983). The designation of these areas preceded the 1983 proclamation of an EEZ by President Reagan, *supra* note 74. Thus, it was separate from and independent of whether any of the land formations were entitled to EEZs. U.S. Dep't of Commerce, NOAA, United States Coast Pilot 7, at 422 (19th ed. 1983).

<sup>153</sup> The coverage of all vessels was justified in view of the groundings of fishing vessels and the resulting damage to the coral reefs in 2000 and 2005 at Pearl and Hermes Atoll.

<sup>154</sup> The U.S. did not propose to extend the ATBAs to cover three areas that are

The only new measure the U.S. requested was a ship reporting system, “CORAL SHIPREP,” in a ten nautical mile-wide band surrounding the Monument and in three areas through the Monument. The system would be recommendatory for ships in transit through the Monument, but mandatory for ships as a condition for entry into a U.S. port or place. The U.S. requested that it apply to ships of 300 gross tons and greater, all fishing vessels, and all ships in the event of a developing emergency. The purpose of the system was to remind vessels of the location of the ATBAs, to notify them of any other traffic or hazards in the area, and to give U.S. authorities an idea of potential emergencies requiring a response to minimize damage to the coral reefs.<sup>155</sup> Significantly, the ship reporting system exempts warships, naval auxiliaries, and any other vessels and aircraft owned or operated by a government that is operating on noncommercial service and exempt by sovereign immunity.

The PSSA proposal gained easy approval at the IMO. It became effective immediately upon its final designation by the IMO’s Marine Environmental Protection Committee on April 3, 2008. The ship reporting system and expanded ATBAs went into effect on May 1, 2008.<sup>156</sup> The IMO’s speedy acceptance of the U.S. proposal most likely reflects the care that the U.S. took in its drafting and also the U.S. delegation’s familiarity with the PSSA guidelines and practice of the IMO. The Papahānaumokuākea proposal was only the second proposal for a PSSA by the U.S. The U.S. delegation had been actively involved in the 2002 Florida Keys PSSA proposal, the 2005 Galapagos Archipelago proposal made by Ecuador, and in the revision of the PSSA guidelines that resulted

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used by the majority of ships that transit the waters around the NWHI: the area between Pearl and Hermes Atoll and Lisianski Island (for ships to maintain an east-west heading), the area in the middle of the chain between Maro Reef and Gardner Pinnacles, and the area at the eastern end of the chain between Necker Island (Mokumanamana) and Nihoa Island. These were instead adopted as the preferred routes for ships transiting through the waters surrounding the islands.

<sup>155</sup> The system is similar to the two mandatory ship reporting systems established by the U.S. Coast Guard along the U.S. eastern seaboard to prevent ship strikes of Atlantic right whales, so this was not a measure that the IMO parties were unfamiliar with. *See* Coast Guard, Mandatory Ship Reporting Systems, 66 Fed. Reg. 58,066 (Nov. 20, 2001) (codified at 33 C.F.R. § 169), *available at* <http://www.nmfs.noaa.gov/pr/shipstrike/mst/> (last visited Dec. 22, 2011).

<sup>156</sup> Press Release, NOAA, Papahānaumokuākea Marine National Monument Designated a Particularly Sensitive Sea Area (Apr. 4, 2008) (on file at [http://oceanservice.noaa.gov/news/pressreleases/apr08/supp\\_040408.html](http://oceanservice.noaa.gov/news/pressreleases/apr08/supp_040408.html)). NOAA proposed regulations to establish the reporting system on July 7, 2008, 73 Fed. Reg. 38,375 (July 7, 2008), and published final rules five months later, 73 Fed. Reg. 73,592 (Dec. 3, 2008).

from the 2003 Western Europe PSSA proposal.<sup>157</sup> Moreover, the Papahānaumokuākea proposal contained nothing controversial, only measures that were by then familiar to the IMO member states, with the only mandatory elements relying largely upon the jurisdiction of the U.S. under the port state control regime.

The U.S.'s justifications for the PSSA and associated measures were strong, tracking closely the latest PSSA guidelines.<sup>158</sup> They focused largely on the risks due to Papahānaumokuākea's remoteness and the difficulty of mounting a response that could minimize the damage if a ship foundering or ran aground on a reef. The introduction of alien species from fouled hulls grounding on the reef or by ballast water discharge was also noted, citing evidence that eleven alien species had so far been detected in the waters of the NWHI.<sup>159</sup>

#### B. *Impact on Other High Seas Freedoms: Fishing and Military Activities*

The effectiveness of the U.S. proposal for measures to minimize shipping risks to Papahānaumokuākea is in sharp contrast to the absence of any apparent effort by the U.S. to get stronger international measures to prevent marine debris, arguably the greatest proximate cause of damage to

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<sup>157</sup> For background on the evolution of the IMO's PSSA concept, see Hélène Lefebvre-Chalain, *Fifteen Years of Particularly Sensitive Sea Areas: A Concept in Development*, 13 OCEAN & COASTAL L.J. 47 (2007). See also European PSSA, *supra* note 148. Development and application of the PSSA concept was the life's work of Lindy S. Johnson, an attorney with the U.S. National Oceanic and Atmospheric Administration's Office of General Counsel for International Law. She was deeply involved in the development and revision of IMO's PSSA guidelines (see *infra* note 159) and their application to areas around the Florida Keys (2002), Ecuador's Galapagos Archipelago (2005), and the U.S.'s Papahānaumokuākea (2007). For her many contributions to the IMO's mission, she was posthumously awarded the IMO's International Maritime Prize for 2010. See Press Release, Efthimios E. Mitropoulos, Secretary-General, IMO, (July 11, 2011) (on file at [www.imo.org/mediacentre/](http://www.imo.org/mediacentre/)).

<sup>158</sup> See Identification and Protection of Special Areas and Particularly Sensitive Sea Areas, Designation of the Papahānaumokuākea Marine National Monument as a Particularly Sensitive Sea Area Submitted by the United States, IMO Marine Environment Protection Committee, 56th session, MEPC 56/8 and MEPC 56/INF.2 (Apr. 3, 2007), available at [http://www.gc.noaa.gov/documents/mepc\\_56\\_8.pdf](http://www.gc.noaa.gov/documents/mepc_56_8.pdf) (last visited Dec. 22, 2011). The Dept. of Defense, however, opposed the PSSA proposal within the U.S. delegation to the IMO, likely resulting in its scaled-back dimensions. See Pedrozo, *supra* note 101.

<sup>159</sup> IMO, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Resolution A.982(24), adopted on 1 December 2005 [hereinafter *IMO Revised Guidelines for PSSAs*]. A PSSA is defined as: "An area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities." *Id.* at para. 1.2.

the coral reef ecosystems. A known source of this damage is the discharge of plastic garbage and synthetic fishing nets by the fishing fleets that operate in the western and central North Pacific, in areas where currents carry discharges into the central Pacific's convergence zone.<sup>160</sup> This material eventually is cast upon the reefs and shoals of the NWHI. Huge tangles of discarded fishing nets weighing tons do serious damage to corals as the tides and storms wash them back and forth across the reefs. The risk of entanglement is severe for the critically endangered monk seals, a species whose negative population growth rate puts it at enormous risk of extinction.<sup>161</sup> The plastic garbage is also a source of mortality to both sea turtles and seabirds, with seabird parents feeding lethal quantities of ingested plastic to their chicks.<sup>162</sup>

The U.S. PSSA proposal noted that derelict fishing gear poses both a navigational hazard if it wraps around the propeller of a vessel and a severe and chronic threat to the biota of the area.<sup>163</sup> In the ten years prior to 2007, federal and state agencies had removed over 560 tons of debris from the reefs of the NWHI at a cost of over USD \$13.5 million.<sup>164</sup> The PSSA and associated measures do not, however, reach high seas fishing operations unless a fishing vessel chooses to transit the waters of the NWHI.<sup>165</sup> The relevant controls on garbage discharges come under regulations by the flag States pursuant to MARPOL's Annex V.<sup>166</sup> An

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<sup>160</sup> See Mary J. Donahue et. al, *Derelict Fishing Gear in the Northwestern Hawaiian Islands: Diving Surveys and Debris Removal in 1999 Confirm Threat to Coral Reef Ecosystems*, 42 MARINE POLLUTION BULL. 1301 (2001).

<sup>161</sup> See John R. Henderson, *A Pre- and Post-MARPOL Annex V Summary of Hawaiian Monk Seal Entanglements and Marine Debris Accumulation in the Northwestern Hawaiian Islands, 1982-2001*, 42 MARINE POLLUTION BULL. 584 (2001).

<sup>162</sup> The carcasses of albatross chicks revealing recognizable objects of plastic garbage were noted by First Lady Laura Bush when she visited Midway Atoll in March 1, 2007. *Mrs. Bush visits Midway Atoll*, THE WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/firstlady/photoessays/fl-Midway/> (last visited Dec. 22, 2011).

<sup>163</sup> *U.S. PSSA Submission to IMO*, supra note 152.

<sup>164</sup> *Id.*

<sup>165</sup> The proclamation prohibited discharges outside the boundaries of the Monument that could enter the Monument and damage its resources. See Proclamation No. 8031, supra note 1.

<sup>166</sup> International Convention for the Prevention of Pollution from Ships, 1973, Nov. 2, 1973, 12 I.L.M. 1319 (1973), as modified by the Protocol Relating to the International Convention for the Prevention of Pollution from Ships, June 1, 1978, 17 I.L.M. 546 (1978); Annex V: Regulations for the Prevention of Pollution by Garbage from Ships. The convention deals primarily with oil pollution but a series of optional annexes cover other sources of pollution from ships. Annex V addresses garbage

effort to reform Annex V has been underway for some time at the IMO, and proposals for strengthening these measures were aired in a correspondence working group of the Marine Environment Protection Committee. Although the U.S. is a participant on this group and a voting member of the Marine Environment Protection Committee, the U.S. delegation did not push for greater control preventing discharges of waste fishing gear or fish aggregating devices.<sup>167</sup> This latter type of fishing equipment is often constructed with used fishing nets and is usually abandoned after fishing operations in an area cease. Port state controls requiring fishing gear manifests, gear marking, and special garbage logs, as well as special area designation under Annex V are measures the U.S. could have adopted and proposed to IMO at the same time as the PSSA proposal to address this threat to Papahānaumokuākea.<sup>168</sup>

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discharges, including of plastic waste materials that make up the majority of marine debris. See Bruce Manheim, *Annex V of the MARPOL Convention: Will It Stop Marine Plastic Pollution?* 1 GEO. INT'L ENV'T'L L. REV. 71 (1988); Christopher C. Joyner, *Biodiversity in the Marine Environment: Resource Implications for the Law of the Sea*, 28 VAND. J. TRANSNAT'L L. 635, 665-689 (1995).

<sup>167</sup> The Annex V regulations provide that, while the discharge by ships of all plastics including synthetic fishing nets and ropes is prohibited, if fishing gear is accidentally lost, it is not a plastic "discharge" as long as "all reasonable precautions have been taken to prevent such loss." There is no definition of reasonable precautions, making the prohibition very difficult to enforce. There is also no requirement that fishing gear be marked so that if it is discharged or lost and becomes marine debris that threatens coastal resources, it can be identified and traced to its source. IMO, Annex V of MARPOL 73/78: Regulations for the Prevention of Pollution by Garbage from Ships, Consolidated Ed., IMO, London, UK (2006), Regulation 6. During consideration of amendments to Annex V in 2011, including to Regulation 6 (now Regulation 7) the IMO's Marine Environment Protection Committee was reluctant to delve further into this issue for fear it would impinge upon the authority and responsibility of different international bodies, presumably regional fishery management organizations. In U.S. editorial comments on draft amendments to Annex V, the U.S. noted that when any discharge or accidental loss of fishing gear occurs, it should be noted in detail in the ship's log or garbage record book (for ships over 400 gross tonnage) and the reasons given for the release and the reasonable precautions taken to prevent or minimize the discharge or loss. If the fishing gear poses a significant threat to the marine environment or navigation, it should be reported to its flag State and to the coastal state if the discharge or loss occurs in waters subject to the jurisdiction of a coastal state. United States, MEPC 62/6/8, Annex, page 8 (Apr. 8, 2011).

<sup>168</sup> A report by the National Research Council recommended, *inter alia*, that the U.S. take an active role in the reform of Annex V on the issue of derelict fishing gear and propose amendments to Annex V and its Regulations that would close the "accidental loss" loophole. Such measures would require gear marking, a ship's gear manifest to ensure the retrieval of floating and fixed fish aggregating devices, and other measures. See NATIONAL RESEARCH COUNCIL, TACKLING MARINE DEBRIS IN THE 21ST CENTURY (2009). The report was requested by NOAA and the U.S. Coast Guard, under the 2006 amendments to the Marine Debris Control Act, to evaluate the international and domestic measures to prevent marine debris, with particular attention to fishing in the western and

Military operations and the mobility of warships are not infringed upon by the measures the U.S. obtained in support of its PSSA at Papahānaumokuākea, consistent with the broad exemption of military activities from President Bush's proclamation.<sup>169</sup> Ultimately, regulation of sound discharges by ships may emerge under MARPOL, but if a new annex or treaty emerges, it will likely exempt warships, consistent with U.S. practice.<sup>170</sup> A military training range overlaps the entire Papahānaumokuākea monument, and exercises using sonar occur there on a regular basis. U.S. restrictions on discharges of sound by warships in Papahānaumokuākea, such as low-frequency active sonar, have been applied not by the federal agencies responsible for managing the monument but through court injunctions that impose closely-tailored conditions balancing the need to minimize danger to beaked whales and other cetaceans with the need for military readiness.<sup>171</sup>

C. *State Practice under Articles 121(3), 192 and Article 194(5)*

There remains the key issue regarding the Papahānaumokuākea precedent: whether the U.S. is entitled to use the “uninhabitable and uninhabited” rocks, islands, and coral atolls of the Northwestern Hawaiian Islands to generate an EEZ and in turn to set that area aside as a marine reserve. Does international approval of Papahānaumokuākea signal acquiescence in a liberal interpretation of Article 121 and a broad reading

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central Pacific, and to make recommendations for strengthening international measures. Instead of adopting these recommendations, however, the U.S. reported to IMO's MEPC that fishing gear that is intended to be retrieved after being placed in the water should not be considered garbage, and that it is “outside the scope of Annex V to regulate fishing gear in active or passive use” and recommended that the definitions be tightened to make that clear. United States, MEPC 62/6/17, page 6 (Apr. 8, 2011). If the U.S. had wanted to revise Annex V at the MEPC 62nd meeting in 2011 to increase protection of Papahānaumokuākea from derelict fishing gear, one of its most serious threats, it could have proposed to IMO an Annex V special area that includes all high seas tuna fishing grounds, adjacent to the convergence zone, where the international purse seine fleet operates and a requirement that ports receiving these vessels maintain adequate port reception facilities for waste fishing gear, including fish aggregating devices.

<sup>169</sup> See discussion *supra* notes 120-22.

<sup>170</sup> See Jeremy Firestone & Christina Jarvis, *Response and Responsibility: Regulating Noise Pollution in the Marine Environment*, 10 J. INT'L WILDLIFE L. & POL'Y. 109 (2007).

<sup>171</sup> See *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Because the U.S. regulates the activities of only U.S.-flag warships in the EEZ under the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1423h (LEXIS through 2012 legislation), its practice appears to have little bearing on the question whether coastal states may restrict foreign-flag warships in their EEZs.



of Article 192?<sup>172</sup> This issue is vital because of the concern commentators have expressed that tiny specks of land, some of which are mere “crumbs of empire,” are being used to enclose the ocean commons to the detriment of world public order.<sup>173</sup> It would be detrimental to the emerging understanding of Articles 192 and 194(5) of the Law of the Sea Convention and related international instruments to exercise stewardship of marine biodiversity on shaky legal foundations.<sup>174</sup>

The IMO’s approval of the PSSA and associated protective measures for Papahānaumokuākea do not cure the defects of the U.S. EEZ claim around the Northwestern Hawaiian Islands if any exist under Article 121 of the Law of the Sea Convention.<sup>175</sup> PSSAs are not restricted to territorial seas or EEZs.<sup>176</sup> Like the original 1980 ATBAs established for the NWHI, the Papahānaumokuākea measures can be justified under Article 194(5).<sup>177</sup> In fact, PSSAs are under increasing consideration for application to the high seas and other common areas, including those under the jurisdiction of regional seas agreements.<sup>178</sup> UNESCO’s inscription of Papahānaumokuākea as a World Heritage Site does not

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<sup>172</sup> One commentator suggests that if a coastal state creates a biodiversity reserve in the waters of the EEZ or on a continental shelf extended from an uninhabited and uninhabitable speck of land in the ocean, the reserve would allow the speck to satisfy the “economic life of its own” criterion of Article 121(3) in view of the enormous existence and other non-market value of biodiversity. Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15 AM. U. INT’L L. REV. 583 (2000).

<sup>173</sup> See O’Keefe, *supra* note 110, and Oxman, *supra* note 9.

<sup>174</sup> There is also the fairness issue that large EEZ MPAs could also serve to export environmental risks to less developed coastal states. Oxman, *supra* note 9, at 851. Professor Oxman points out that the United Nations Convention on the Law of the Sea prohibits such transfers by stating that “States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.” Article 195, United Nations Convention on the Law of the Sea, *supra* note 19.

<sup>175</sup> But see O’Keefe, *supra* note 110, at 411 n.16 (State practice already appears to favor a liberal interpretation of Article 121(3), confining its requirement of habitability to actual geographical rocks, like Rockall).

<sup>176</sup> See *IMO Revised Guidelines for PSSAs*, *supra* note 159.

<sup>177</sup> See *EEZ of the NWHI*, *supra* note 74, at 467.

<sup>178</sup> See e.g., B.C. O’Leary et. al, *The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next*, 36 MARINE POLICY 598 (2012); H. Calado et. al, *Introducing a Legal Management Instrument for Offshore Marine Protected Areas in the Azores – The Azores Marine Park*, 14 ENVTL. SCI. & POL’Y 1175 (2011).

affect the validity of the U.S. EEZ claim.<sup>179</sup> But the requirement of inclusion on UNESCO's list of world heritage sites could serve as an important check on the designation of areas less worthy of global marine protected status. The rapidity with which the U.S. sought both IMO and UNESCO approval suggests *opinio juris* that such approval is necessary.

It is worthwhile noting that no state has challenged Papahānaumokuākea, either its declaration or the measures adopted to protect it. Fortunately for international jurisprudence, the Chagos Protected Area, which presents a clearer case for consideration of these interrelated issues, has been challenged. As mentioned above, Mauritius requested that an arbitral tribunal consider the validity of the U.K.'s designation of a fully-protected area in the entire EEZ surrounding the British Indian Ocean Territory around Chagos. Not only is the Chagos Protected Area one-and-a-half times the size of Papahānaumokuākea (see Table 1), the proclamation that created it more completely exempts military activities from the environmental protection measures.<sup>180</sup> Thus the question is more sharply presented as to whether military activities can be excluded from environmental regulation in an EEZ in which all other uses of the oceans' resources are barred.

#### CONCLUSION

By setting a precedent for marine conservation that emphasizes scale and uniqueness, Papahānaumokuākea has set in motion a process of claim and response that could lead eventually to greater clarity of the norms set out in the Law of the Sea Convention. As Jon Van Dyke often stated, the convention remains the most comprehensive and far-sighted commitment to protecting the environment adopted by our generation. With the help of Papahānaumokuākea, the dispute resolution institutions that the Convention brought into being will re-affirm humanity's commitment of stewardship and of the "freedom for the seas for the twenty-first century."<sup>181</sup>

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<sup>179</sup> Convention Concerning Protection of the World Cultural and Natural Heritage, *supra* note 13, at art. 33.

| <sup>180</sup> See Prows, *supra* note 10.

<sup>181</sup> See Jon M. Van Dyke, *International Governance and Stewardship of the High Seas and Its Resources*, FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY, 13-22 (Jon M. Van Dyke et. al, eds., 1993).