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Conserving the United States' Coral Reefs: National Monument Designation to Afford Greater Protection for Coral Reefs in Four National Marine Sanctuaries

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CONSERVING THE UNITED STATES' CORAL REEFS: NATIONAL MONUMENT DESIGNATION TO AFFORD GREATER PROTECTION FOR CORAL REEFS IN FOUR NATIONAL MARINE SANCTUARIES

JENNIFER C. WHITE*

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The Oceans Are in Danger of Dying.

—Jacques Cousteau

INTRODUCTION

Coral reefs around the world are in danger.¹ They have been overfished, destroyed by poisonous and explosive fish harvesting practices, buried due to poorly managed forestry, farming, and construction practices, targeted for hobbyists' tanks, regularly damaged by storms, susceptible to diseases, and baked under global warming.² And the state of reefs is getting progressively worse. A report at a 1998 high-level government meeting confirmed the alarming condition of coral reefs: "up to two-thirds of the world's global reefs are currently in decline or threatened."³ A 2004 report by the Global Coral Reef Monitoring Network⁴ found that twenty percent of the world's coral reefs virtually have been destroyed with no signs of recovery.⁵ Today, the National Oceanic and Atmospheric Administration ("NOAA") predicts that forty percent of the world's coral reefs could die by 2028.⁶ It appears that "hardly a reef ecosystem around the globe [is] unscathed."⁷

¹ "Coral reefs are widely recognized as highly productive, ecologically valuable, and economically important ecosystems that, because of their particular sensitivity to environmental changes, are experiencing a world-wide decline." Memorandum from J. Charles Fox, Assistant Adm'r., U.S. Envtl. Prot. Agency & Joseph W. Westphal, Assistant Sec'y (Civil Works), Dep't of the Army, to the Field, Regarding Special Emphasis Given to Coral Reef Protection Under the Clean Water Act, Marine Protection, Research, and Sanctuaries Act, Rivers and Harbors Act, and Federal Project Authorities, *available at* <http://www.epa.gov/owow/wetlands/guidance/coral.html> (last visited Apr. 15, 2008).

² *Coral Reefs: Are We Doing Too Little Too Late?*, CNN, Oct. 22, 1998, <http://www.cnn.com/TECH/science/9810/22/reefs.yoto/> [hereinafter *Are We Doing Too Little Too Late?*].

³ *Id.*

⁴ The Global Coral Reef Monitoring Network is an operating unit of the United Nations International Coral Reef Initiative program. The Network aims to improve management and sustainable development of reefs by assessing their status and trends. This is conducted mainly by linking established organizations around the world so that they may communicate more effectively, providing an ongoing monitoring program of coral reefs, and disseminating local and regional results on coral reef status and trends to better aid environmental management agencies. See Global Coral Reef Monitoring Network, What We Do, <http://www.gcrmn.org/about.aspx> (last visited Apr. 15, 2008).

⁵ Fred Bierman, *Advisory: Travel Notes; Coral Reefs in Peril, Reports Says*, N.Y. TIMES, Mar. 13, 2005, *available at* <http://query.nytimes.com/gst/fullpage.html?sec=travel&res=9801E4D61E3DF930A25750C0A9639C8B63>.

⁶ *Are We Doing Too Little Too Late?*, *supra* note 2.

⁷ *Id.*

The importance of coral reefs is unquestionable. Not only do billions of people worldwide rely on these ecosystems for food, coastal protection, and tourism income, but reefs also provide habitats for one-third of all marine fish species, serve as the building blocks for tropical islands, and contain potential pharmaceuticals.⁸ Furthermore, they gauge water quality and the ecological integrity of ecosystems.⁹ Because reefs can tolerate only relatively narrow ranges of temperature, salinity, water clarity, and other chemical and water quality characteristics, they are excellent indicators of the surrounding environment's condition.¹⁰

This Note argues that the four National Marine Sanctuaries with coral reefs as their key feature may be afforded greater protection through national monument designation. Monument status may provide more stringent regulations and better environmental monitoring of these reefs. The National Marine Sanctuary Act is largely viewed as failing to fulfill its potential, jeopardizing the fragile coral reefs.¹¹ National monument designation is a quick and effective method that can provide greater protection to reefs, and can contribute to the global effort to stop their dramatic decline. The recent designation of the Northwestern Hawaiian Islands as a national monument is an effective and reasonable template to design a similar structure for the four sanctuaries.

Part I of this Note explores the fundamental characteristics comprising a coral reef ecosystem. Part II focuses on how a National Marine Sanctuary is created and the current four National Marine Sanctuaries with reefs as key environmental features. Part III addresses the American Antiquities Act of 1906 and the powers granted to the President of the United States to declare national monuments. Part IV explores how national monument designation can afford greater protection to the four National Marine Sanctuaries. Part V addresses some of the issues that may arise in national monument designation. This Note concludes that designating coral reefs as national monuments under the Antiquities Act would offer a more comprehensive conservation program than designations as National Marine Sanctuaries alone can provide.

⁸ U.S. Coral Reef Task Force, *Why Care about Coral Reefs?*, <http://www.coralreef.gov/coralreefs/why.html> (last visited Apr. 15, 2008).

⁹ U.S. Environmental Protection Agency, *Coral Reef Protection*, <http://www.epa.gov/OWOW/oceans/coral/> (last visited Apr. 15, 2008) [hereinafter *Coral Reef Protection*].

¹⁰ *Id.*

¹¹ See discussion *infra* Part II.C.

I. WHAT IS A CORAL REEF?

Coral reefs are the most biologically diverse ecosystems in the world.¹² An individual reef is only one part of a larger ecosystem, one made up of many biological communities.¹³

Corals are tiny sessile animals that are part of the group *cnidaria*.¹⁴ Collections of these species create colonies, called polyps.¹⁵ The polyps secrete a hard calcium carbonate skeleton that serves as a substrate for the colony and protects it from predators.¹⁶ The polyps constantly secrete calcium carbonate, which enlarges the colony and, in turn, increases the size of the coral structure.¹⁷ Growth, which ranges from 0.3 to 10 centimeters per year, is dependent upon coral species and the environment.¹⁸

Coral species are separated into characteristic zones based on competition with other species and environmental conditions.¹⁹ Furthermore, the vast majority of corals have a symbiotic relationship with algae; the algae produce food while the coral supplies protection and access to light for algal photosynthesis.²⁰ This relationship is of particular importance regarding bleaching,²¹ which results from coral algal loss. This process is most often caused by "disease, excess shade, increased levels

¹² U.S. Coral Reef Task Force, What are Coral Reefs?, <http://www.coralreef.gov/coralreefs/index.html> (last visited Apr. 15, 2008).

¹³ Coral Reef Protection, *supra* note 9.

¹⁴ *Id.* The phylum consists of organisms that include jellyfish and hydra. There are two main body types for Cnidarians, medusa (free-swimming or floating) and polyp (sessile). Nematocysts are a defining characteristic of the phylum. These are tiny organelles that are discharged for capturing prey or predators. They are coiled, tubular threads, often bearing barbs and poison. University of Michigan Museum of Zoology, *Phylum Cnidaria*, <http://animaldiversity.ummz.umich.edu/site/accounts/information/Cnidaria.html> (last visited Apr. 15, 2008).

¹⁵ Coral Reef Protection, *supra* note 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Coral bleaching occurs when coral loses its color. It is a result of the "coral tissues expel[ling] a symbiotic algae that is essential to the coral's survival. Bleaching is caused by a variety of events, such as changes in water temperature or changes in nutrient levels . . . [T]here is no known way to reverse or stop the bleaching once it begins." Karla J. Black & Greg Domareki, *A Review of Developments in Ocean and Coastal Law 2000*, 6 OCEAN & COASTAL L.J. 233, 240 (2001).

of ultraviolet radiation, sedimentation, pollution, salinity changes, and increased temperatures."²² Moreover, corals have a relationship with larger organisms, such as sponges, mollusks, crustaceans, echinoderms, fish, and fungi, that rely on corals for food and shelter.²³ These complex interactions between coral and its surrounding environment demonstrate the importance of understanding and treating reefs as whole ecosystems.

Coral reefs are located in many places and appear in many structures. There are three main types of reefs: fringing reefs, the most common kind, which extend from shores; barrier reefs, which are separated from shores by bays or lagoons; and atolls, which rest on submerged volcanoes.²⁴ Coral can be found throughout the ocean, but most coral reefs are located in warmer-water areas with average monthly temperatures above 18°C (64°F) throughout the year.²⁵ Although these temperatures are characteristic of the tropics, reefs can be found at latitudes "approaching 35°N and S on the western margins of ocean basins where warm-water masses . . . raise [the] average temperatures."²⁶

II. THE NATIONAL MARINE SANCTUARY PROGRAM

A. History

The National Marine Sanctuary Program ("NMSP") was created by the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA").²⁷ The MPRSA was initiated by the passage of House Bill 9727.²⁸ It was later re-titled the National Marine Sanctuaries Act ("NMSA").²⁹ The NMSA "authorizes the Secretary of Commerce to designate and manage areas of the marine environment with special national significance due to their conservation, recreational, ecological, historical,

²² Coral Reef Protection, *supra* note 9.

²³ *Id.*

²⁴ *Id.*

²⁵ H.V. THURMAN, *ESSENTIALS OF OCEANOGRAPHY* 336 (4th ed. 1993).

²⁶ *Id.*

²⁷ See Marine Protection, Research and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. 3, 86 Stat. 1052, 1061 (codified as amended at 16 U.S.C. §§ 1431-1445 (2000)). The NOAA created the Office of Ocean Management in 1978. In 1979, this Office merged with the Office of Coastal Zone Management. The NMSP took form within the resulting Office of Ocean and Coastal Resource Management. Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 726 (2003).

²⁸ Owen, *supra* note 27, at 715.

²⁹ *Id.* at 712.

scientific, cultural, archeological, educational, or esthetic [sic] qualities.”³⁰ The program is administered by NOAA’s National Ocean Service (“NOS”).³¹ “Because [the] sanctuaries are formally designated marine protected areas (MPAs), they are focal points of conservation efforts.”³² The NMSA provides a formal structure for receiving and designating a sanctuary, a term “that invokes something more powerful, more dignified, and more important than ‘marine park’ or ‘marine protected area.’”³³

National Marine Sanctuaries come in all varieties. Sanctuaries range from one-quarter of a square mile to over 5,300 square miles.³⁴ Together, the sanctuaries occupy over 150,000 square miles of waters and marine habitats.³⁵ Each sanctuary “has on-site field staff that conduct research and monitoring, resource protection, and educational activities.”³⁶

Coral reefs are the main feature of four sanctuaries, and those areas are the focus of this Note (excluding the Northwestern Hawaiian Islands, which have recently received national monument status). These four sanctuaries are Fagatele Bay (American Samoa), Florida Keys (Florida), Flower Garden Banks (Texas/Louisiana), and Gray’s Reef (Georgia).³⁷

³⁰ National Oceanic & Atmospheric Administration’s National Ocean Service, National Marine Sanctuaries, <http://www.oceanservice.noaa.gov/topics/oceans/nms/welcome.html> (last visited Apr. 15, 2008) [hereinafter National Marine Sanctuaries].

³¹ *Id.* Although the language of the statute authorizes the Secretary of Commerce to develop the management plans for these areas, the Secretary has delegated the authority to NOAA. See Marine Sanctuaries, Program Guidelines, 39 Fed. Reg. 10,255 (Mar. 19, 1974); see also Owen, *supra* note 27, at 712; National Marine Sanctuaries, *supra* note 30.

³² National Marine Sanctuaries, *supra* note 30. National Marine Sanctuaries are Marine Protected Areas (“MPA”s). “Sanctuaries are but one type of MPA, with others falling under the authority of other local, state, territorial, tribal or federal jurisdictions.” Answers to Questions from U.S. Commission on Ocean Policy, Question 4, Apr. 17, 2002, http://www.oceancommission.gov/meetings/feb_22_02/answers/causey_answers.pdf [hereinafter Answers to Questions].

³³ Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 *ECOLOGY L.Q.* 71, 128 (2002).

³⁴ National Marine Sanctuaries, *supra* note 30.

³⁵ *Id.*

³⁶ National Ocean Service, National Marine Sanctuary Program, <http://oceanservice.noaa.gov/programs/nmsp/welcome.html> (last visited Apr. 15, 2008).

³⁷ NAT’L OCEANIC & ATMOSPHERIC ADMIN., PROTECTING OUR NATIONAL MARINE SANCTUARIES: A REPORT BY THE CENTER FOR THE ECONOMY AND THE ENVIRONMENT (2000), <http://montereybay.noaa.gov/research/techreports/sanctuaryreport/welcome.htm> (follow “Chapter 2” hyperlink) (last visited Apr. 15, 2008) [hereinafter PROTECTING OUR NATIONAL MARINE SANCTUARIES]; see also National Oceanic & Atmospheric Administration, National Marine Sanctuaries: About Your National Marine Sanctuaries, <http://sanctuaries>

B. *Regulations and Restrictions*

The NMSP regulations “have the effect and enforceability of law.”³⁸ First codified in 1974, the regulations prohibit specific activities, describe and define the boundaries of the designated sanctuaries, and create permit systems for certain activities.³⁹ The NMSP creates two distinct objectives that the regulations implement.⁴⁰ First, it prohibits all ocean dumping by United States vessels unless a permit is issued.⁴¹ Permits are issued by the EPA when it is determined that the dumping “will not unreasonably degrade or endanger human health, welfare, the marine environment, ecological systems, or economic potentialities.”⁴² Destruction, loss or injury to the sanctuary resources results in a penalty equal to the sum of the response costs and resulting damages, plus interest.⁴³ Second, it provides for the designation of National Marine Sanctuaries.⁴⁴

The NMSA charges the Secretary of Commerce, and by delegation NOAA, with a host of duties, including 1) “to support, promote, and coordinate scientific research on, and long-term monitoring of, the resources of these marine areas,”⁴⁵ 2) “to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas,”⁴⁶ 3) “to develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, state and local governments, Native American

.noaa.gov/about/history/welcome.html. Gray’s Reef is not actually a coral reef, “but rather outcroppings of rock . . . covered with soft corals and plants . . . sheltering a rich variety of fish.” PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra*. The remaining nine National Marine Sanctuaries are the Channel Islands (California), Cordell Bank (California), the Gulf of the Farallones (California), Humpback Whale (Hawaii), the Monitor (North Carolina), Monterey Bay (California), Olympic Coast (Washington), Thunder Bay (Michigan), and Stellwagen Bank (Massachusetts). National Marine Sanctuaries, *supra* note 30.

³⁸ National Oceanic & Atmospheric Administration, National Marine Sanctuaries: Regulations, <http://www.sanctuaries.noaa.gov/protect/regulations/welcome.html> (last visited Apr. 15, 2008) [hereinafter National Marine Sanctuaries: Regulations].

³⁹ See 15 C.F.R. § 922 (2007).

⁴⁰ John Charles Kunich, *Losing Nemo: The Mass Extinction Now Threatening the World’s Ocean Hotspots*, 30 COLUM. J. ENVTL. L. 1, 85 (2005).

⁴¹ 33 U.S.C. § 1411 (2000).

⁴² Kunich, *supra* note 40, at 85 (citing 33 U.S.C. § 1412(a) (2000)).

⁴³ 16 U.S.C. § 1443(a)(1) (2000).

⁴⁴ *Id.* § 1433(a).

⁴⁵ *Id.* § 1431(b)(5).

⁴⁶ *Id.* § 1431(b)(6).

tribes and organizations, international organizations, and other public and private interests concerned;⁴⁷ 4) "to create models of, and incentives for, ways to conserve and manage these areas,"⁴⁸ and 5) "to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment."⁴⁹

These duties can be categorized into three general purposes: protection, promotion of public awareness, understanding, and appreciation, and the facilitation of multiple uses of the sanctuary.⁵⁰ The third purpose has raised the most amount of controversy over the NMSP.⁵¹ That controversy is whether a truly effective conservation program can simultaneously support a broad range of uses.⁵²

C. *Problems Facing the NMSP*

The primary problem with the NMSP is the legislation that created it, the NMSA. At the time of the NMSA's passage, almost every member of Congress believed they were responding to a "major problem with a comprehensive solution," creating a program likely to provide for thorough multi-use ocean management.⁵³ The intent at the time was to create a system by which both protection and facilitation would be advanced.⁵⁴ Congress was careful to emphasize the balanced, not prohibitory, approach of the bill for this reason.⁵⁵

As a result of this vision, the law contains "more obstacles than spurs to action, . . . ensur[ing] a slow and careful designation process rather than broad sweeping changes."⁵⁶ Before an area is protected, it must meet detailed criteria, withstand substantial input from the public, and be in accord with Congress and the affected states.⁵⁷ Hence, designation

⁴⁷ *Id.* § 1431(b)(7).

⁴⁸ *Id.* § 1431(b)(8).

⁴⁹ *Id.* § 1431(b)(4).

⁵⁰ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37.

⁵¹ *See id.* An example would be when the program helped Arnold Schwarzenegger film an explosion scene on an abandoned bridge in the Florida Keys. Sanctuary employees flew overhead to signal when the area was clear of dolphins and turtles. *Id.* This raises legitimate questions about the necessity of the third purpose.

⁵² *See infra* notes 65-73 and accompanying text.

⁵³ Owen, *supra* note 27, at 716.

⁵⁴ *See id.* at 717-18.

⁵⁵ *See id.* at 716-18.

⁵⁶ *Id.* at 718.

⁵⁷ *Id.* at 718-19.

is complicated and difficult.⁵⁸ Furthermore, the statute emphasizes the importance of facilitating multiple uses of “‘special areas’ of the ocean,”⁵⁹ yet provides for a comprehensive conservation and management plan.⁶⁰ This language seems inconsistent.

Second, a related legislative problem is that the NMSA guidelines are unclear: “By delegating power to an understaffed agency and providing that agency with nebulous goals, no clear mission, and no internal or external incentives to act, Congress all but ensured ineffectual protection.”⁶¹ For example, the Secretary of Commerce may declare sanctuaries in appropriate cases, but the NMSA does not force him to do so.⁶² Additionally, the NMSA does not set any specific designation goals, such as numerical targets.⁶³ The comprehensive protections Congress envisioned have no guarantees for enforcement: “Without a singular preservation focus, the [NMSA] has proved to be an unreliable vehicle for comprehensively preserving the full array of the nation’s marine resources and special places.”⁶⁴

Third, sanctuary management permits multiple uses. Sanctuaries are managed like national forests;⁶⁵ they are not “strict sanctuaries,” off-limits to human activities and interferences.⁶⁶ Instead, they are generally managed for multiple uses, as set forth in section 1433.⁶⁷ For this reason, the apparent protection of the sanctuaries is misleading. For example, “most of these 13 sanctuaries allow intensive human use.”⁶⁸

Permits issued by the Secretary allow certain activities within the sanctuaries.⁶⁹ Before a government agency or private/commercial entity

⁵⁸ *Id.*

⁵⁹ *Id.* at 719.

⁶⁰ 16 U.S.C. § 1431(a)(3) (2000).

⁶¹ Owen, *supra* note 27, at 717.

⁶² *Id.* at 719; *see also* 16 U.S.C. § 1433(a) (2000) (noting that the Secretary of Commerce “may designate” marine sanctuaries (emphasis added)).

⁶³ Owen, *supra* note 27, at 720-22.

⁶⁴ WILLIAM J. CHANDLER & HANNAH GILLELAN, MARINE CONSERVATION BIOLOGY INSTITUTE, *THE MAKINGS OF THE NATIONAL MARINE SANCTUARIES ACT: A LEGISLATIVE HISTORY AND ANALYSIS* 29 (2005).

⁶⁵ Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 581 (2001). For example, commercial fishing is permitted, which results in less protection for the marine ecosystems. *Id.*

⁶⁶ Kunich, *supra* note 40, at 86.

⁶⁷ *See* 16 U.S.C. § 1433 (2000); Kunich, *supra* note 40, at 86.

⁶⁸ CHANDLER & GILLELAN, *supra* note 64, at 4.

⁶⁹ Donald C. Baur et al., *Putting “Protection” Into Marine Protected Areas*, 28 VT. L. REV. 497, 510 (2004).

undertakes any plans in or around a sanctuary, they must consult with NOS to determine if the activity will "destroy, cause the loss of, or injure any sanctuary resource."⁷⁰ If an alternative is offered to the proposed action by NOS, however, the agency or entity is free to depart from this, so long as it provides a written justification.⁷¹ As is evident, the NMSP does not provide a guarantee against potentially harmful human activities. In fact, the superficially strict prohibitions are usually overtaken by the exceptions in actual practice.⁷² For example, specific activities may be authorized if it is necessary to "establish conditions of access to and use of any sanctuary resource."⁷³ Loopholes such as this permit a wide variety of harmful activities to be lawfully carried out.

A fourth problem with the NMSP is its inability to meaningfully regulate commercial fishing. Under the NMSA, the Magnuson-Stevens Fishery Conservation and Management Act provides that eight Regional Fishery Management Councils must regulate fishing.⁷⁴ The Councils' self-written regulations are to be accepted and issued unless the Secretary finds that the proposals fail to fulfill the purposes and policies of the NMSA and the sanctuary management plans.⁷⁵ In effect, it is improbable that any commercial fishing can be limited to a meaningful extent under this setup.⁷⁶ In fact, the Fishery Conservation and Management Act allows fishing and other forms of consumptive use in the vast majority of sanctuaries.⁷⁷ As one scholar noted, "[t]hey may as well post signs on buoys along the perimeter of [the sanctuaries], similar to those in national forests: 'water of many uses.'"⁷⁸

A fifth problem is the NMSP is small. In 1999, the Directory of the Marine Sanctuaries Division indicated thirty-three people staffed at the national headquarters in Silver Spring, Maryland, and eighty-two at the sanctuaries.⁷⁹ Approximately twenty percent of those individuals in

⁷⁰ Kunich, *supra* note 40, at 86-87 (citing 16 U.S.C. § 1434(d)(1)(a) (2000)).

⁷¹ *Id.* at 87.

⁷² *Id.* at 86. For example, "each year, approximately 60 million cubic yards of dredged material are disposed of in the ocean at designated sites." *Id.*

⁷³ Baur et al., *supra* note 69, at 510.

⁷⁴ Kunich, *supra* note 40, at 87.

⁷⁵ *Id.*

⁷⁶ *Id.* at 87-88.

⁷⁷ Baur et al., *supra* note 69, at 507.

⁷⁸ Kunich, *supra* note 40, at 88.

⁷⁹ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37 (follow "endnotes" hyperlink).

headquarters were contractors, not federal employees.⁸⁰ As a more specific example of the understaffed program, Stellwagen Bank had only two full-time professional staff on site in 2000.⁸¹ As of January 1, 2007, the total number of employees in the NMSP was 370.⁸² Eighty-nine staff were positioned at the NMSP's headquarters, with the remaining employees located at the sanctuaries themselves.⁸³ While one sanctuary boasts seventy-three employees, most have between ten and twenty, and one as few as four.⁸⁴

Lastly, the NMSP suffers from a small budget. In fiscal year 1999, the program received an annual budget of only \$14 million.⁸⁵ Financing has been a problem that has plagued the program throughout many presidential administrations.⁸⁶ For example, during President Reagan's tenure, funding levels stabilized at the beginning of his presidency, but declined during his second term.⁸⁷ Inadequate funding plagued both President H.W. Bush's and President Clinton's presidencies as well.⁸⁸ As a result, some sanctuaries remained "almost completely unmanaged."⁸⁹

The National Marine Sanctuaries Amendment Act of 2000 sought to alleviate this problem by extending and improving the management of the thirteen sanctuaries through funding increases—\$32 million in fiscal year 2001, with \$2 million increases per year through 2005.⁹⁰ In addition to this amount, \$6 million per year was authorized for the cost

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ E-mail from Michael T. Murphy, National Outreach Coordinator, NOAA National Marine Sanctuary Program, to Jennifer White (Mar. 23, 2007, 14:26 EST) (on file with author). Although these numbers fluctuate, they provide a rough representation.

⁸⁴ The full breakdown of sanctuary employees is as follows: Channel Islands—25, Cordell Bank—9, Fagatele Bay—4, Florida Keys—73, Flower Garden Banks—8, Gray's Reef—11, Gulf of the Farallones—16, Hawaiian Islands Humpback Whale—19, Monitor—13, Monterey Bay—25, Papahānaumokuākea (Northwestern Hawaiian Islands)—26, Olympic Coast—19, Stellwagen Bank—13, and Thunder Bay—11. *Id.*

⁸⁵ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37. Consider the implications of this number: under the 1999 \$14 million budget, only \$778 could be allocated towards a square mile, as opposed to \$6,617 per square mile under the Forest Service and \$16,667 per square mile under the National Park Service. *See id.*

⁸⁶ *See* Owen, *supra* note 27, at 733-41.

⁸⁷ *Id.* at 728.

⁸⁸ *Id.* at 733-41.

⁸⁹ *Id.* at 741.

⁹⁰ Michelle Baldwin et al., *A Review of Developments in Ocean and Coastal Law 2000-2001*, 6 OCEAN & COASTAL L.J. 413, 432 (2001).

of facilities necessary for sanctuary management.⁹¹ In fiscal year 2006, however, the National Marine Sanctuary Program experienced a \$16 million budget cut, from \$51 million in fiscal year 2005 to \$35 million in 2006.⁹² The Farallones Marine Sanctuary Association commented that a thirty percent budget reduction is "significant and cannot be sustained without severe impacts to America's coast and ocean environments."⁹³ As a result, "[f]unding for essential ocean programs remains woefully insufficient and is far outpaced by current and future challenges."⁹⁴

Collectively, these aforementioned problems all but ensure that the NMSP cannot perform as well as it should. The Center for the Economy and Environment has commented that "[t]he program is far from fulfilling its potential. Most close observers of the sanctuaries say that the program is uncertain, ineffective, and pitifully small."⁹⁵ A former director of the Program agreed: "Even after 25 years, the advocates [of the NMSP] admit that the concept [of marine sanctuaries] is still murky. Where are the boundaries, what is protected, what isn't? No one has all the answers."⁹⁶ Numerous scholars concur with these authorities, citing many problems with the structure of the NMSP:

The combined effect of the [sanctuaries] is certainly better than nothing, but the multiple use, sustained yield approach, and the statutory concessions to commercial fishing, guarantee that our [sanctuaries] are less effective than they might be. Although the efficacy of marine sanctuaries is a matter of some scientific debate, it is incontrovertible that a loophole-ridden sanctuary is less protective of biodiversity than a stringent one.⁹⁷

The [NMSA] . . . has fallen short of . . . expectations. For years it languished at the hands of unsympathetic presidential administrations. NOAA proved to be a reluctant

⁹¹ *Id.* See also NAT'L ACAD. OF PUB. ADMIN., READY TO PERFORM? PLANNING AND MANAGEMENT AT THE NATIONAL MARINE SANCTUARY PROGRAM 5 (2006), available at <http://sanctuaries.noaa.gov/news/pdfs/napareport.pdf>.

⁹² Linda Hunter, *Budget for Marine Sanctuaries Slashed*, UPWELLING, http://www.farallones.org/e_newsletter/2006-05/SanctuaryBudget.htm (last visited Apr. 15, 2008).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37, at 1.

⁹⁶ *Id.*

⁹⁷ Kunich, *supra* note 40, at 88.

and ineffectual instigator of the designation process, and few of our current sanctuaries came into existence without substantial help from Congress. While those designations enjoyed widespread political support, and the resulting program seems to arouse little political antipathy, the sanctuaries that currently exist are widely criticized for providing insufficient resource protection. Huge areas of ocean remain unprotected.⁹⁸

III. THE AMERICAN ANTIQUITIES ACT OF 1906

A. *History and Objectives*

The United States Constitution confers upon Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁹⁹ The Antiquities Act is a reflection of Congress’s ability to bestow certain enumerated powers on the executive through statutory mandate.¹⁰⁰

Sections 431 to 433 of title 16 of the U.S. Code, commonly known as the “Antiquities Act of 1906”¹⁰¹ (“Act”), was enacted during the conservation movement of Theodore Roosevelt’s presidency.¹⁰² The legislation was significant because it pioneered the use of executive orders to protect federal lands.¹⁰³ The original intention behind passage of the Act was to protect “archaeological artifacts and ruins from vandalism and theft.”¹⁰⁴ Today, it has become a keystone for conservation and “the most important piece of preservation legislation ever enacted by the United States government.”¹⁰⁵

⁹⁸ Owen, *supra* note 27, at 712.

⁹⁹ U.S. CONST. art. IV, § 3, cl. 2.

¹⁰⁰ See Heidi M. Biasi, *The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton’s Quest to “Win the West”*, 9 BUFF. ENVTL. L.J. 189, 192-93 (2002).

¹⁰¹ Antiquities Act of 1906, ch. 3060, 34 Stat. 225; Marine Protected Areas of the United States, http://www.mpa.gov/helpful_resources/mpa_legislation.html (last visited Apr. 15, 2008).

¹⁰² THE OXFORD COMPANION TO AMERICAN LAW 260 (Kermit L. Hall ed. 2002) [hereinafter OXFORD COMPANION]. President Roosevelt designated the first monument in September of 1906 when he created Devil’s Tower National Monument in Wyoming. Biasi, *supra* note 100, at 198.

¹⁰³ OXFORD COMPANION, *supra* note 102, at 260.

¹⁰⁴ Biasi, *supra* note 100, at 196.

¹⁰⁵ HAL ROTHMAN, AMERICA’S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION 1

The Act authorizes the President of the United States to declare, in his discretion by public proclamation, "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."¹⁰⁶ Although the language is succinct and simple—the substance of the Act is embodied in only two sentences—it provides for broad and substantial executive power to protect large tracts of land.¹⁰⁷ In total, 124 national monuments have been designated.¹⁰⁸ Only three Presidents have not created national monuments.¹⁰⁹

Management of national monuments is shared between the National Park Service and the Bureau of Land Management, both within the Department of the Interior.¹¹⁰ Traditionally, the National Park Service was the primary authority, but under President Clinton's tenure the Bureau of Land Management became the preferred managing agency.¹¹¹

Perhaps the most curious and significant aspect of the Act is what it does not specify: "The Act does not restrict the size of monument delegations to specific acreages. The Act does not demand legislative oversight or public notice. Furthermore, the act does not limit national monuments to only archaeologically significant areas, but also areas of 'historic or scientific interest.'"¹¹²

B. Regulations and Restrictions

National monument designation still permits individuals to conduct research and other similar activities, but it closely regulates those who are given this privilege. The Secretaries of the Interior, Agriculture, and Army may grant "[p]ermits for the examination of ruins, the excavation of archaeological sites, the gathering of objects of antiquity upon

(1994), available at http://www.cr.nps.gov/history/online_books/rothman/intro.htm.

¹⁰⁶ 16 U.S.C. § 431 (2000).

¹⁰⁷ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 486 (2003).

¹⁰⁸ U.S. Dep't of the Interior, *Antiquities Act 1906-2006: Maps, Facts & Figures*, National Park Service, <http://www.nps.gov/archeology/sites/antiquities/fullmap.htm> (last visited Apr. 15, 2008).

¹⁰⁹ Biasi, *supra* note 100, at 189 n.3. Only Presidents Nixon, Reagan, and H.W. Bush failed to create any national monuments. *Id.*

¹¹⁰ *Id.* at 197-98.

¹¹¹ *Id.*

¹¹² *Id.* at 197 (citing 16 U.S.C. § 431 (2001)).

the lands.”¹¹³ Permits may only be issued, however, to individuals who are deemed qualified to conduct the aforementioned activities, and the findings must be “for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions.”¹¹⁴

Restrictions upon national monument lands differ. Older and smaller monument areas generally exhibit more stringent regulations than newer ones.¹¹⁵ Many newer “ecosystem monuments” are managed to allow some “compatible uses” previously deemed unacceptable.¹¹⁶ For example, hunting, livestock grazing, mining, and oil and gas drilling are permitted in some national monuments designated by President Clinton.¹¹⁷ This is not a concrete trend, however. National monuments can maintain the more traditional, stringent approach of the past. For example, Papahānaumokuākea Marine National Monument will phase out all commercial fishing within five years, strictly regulate all access to and activities within the monument, preserve cultural activities, carefully regulate educational and scientific endeavors, and prohibit all oil, gas, and mineral exploration and extraction and waste dumping.¹¹⁸ Additionally, permits, which must all be compatible with Proclamation 8031, are awarded only for research, conservation management, education, native Hawaiian practices, recreation (only for the Midway Atoll Special Management Area), and non-extractive special ocean uses.¹¹⁹ These regulations are clearly more strict than some newer National Monuments.

Violations of a national monument’s regulations result in criminal convictions. Originally, a violation was “punishable by a fine of not more than \$500, or imprisonment not to exceed 90 days, or both.”¹²⁰ “In 1987,

¹¹³ 16 U.S.C. § 432 (2000).

¹¹⁴ *Id.*

¹¹⁵ See Ranchod, *supra* note 65, at 538.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Northwestern Hawaiian Islands Marine National Monument, 50 C.F.R. § 404; see also *Agencies Publish Rules on Northwestern Hawaiian Island Monument*, U.S. DEPT OF THE INTERIOR NEWS, Aug. 29, 2006, available at http://www.doi.gov/news/06_News_Releases/060829b.html.

¹¹⁹ National Oceanic & Atmospheric Administration, Northwestern Hawaiian Islands Marine National Monument, Permit Application Instructions, <http://hawaiiireef.noaa.gov/management/permits.html> (click “Permit Application” and “instructions”) (last visited Apr. 15, 2008).

¹²⁰ U.S. DEPT. OF INTERIOR, THE ANTIQUITIES ACT: A CENTURY OF HISTORIC PRESERVATION, <http://www.blm.gov/heritage/adventures/menu/media/history.pdf> (last visited Apr. 15, 2008).

the penalties increased to a maximum fine of \$5,000 per individual, six months imprisonment, or both.¹²¹

C. *The Growth of the Antiquities Act and President Clinton's Tenure*

Once an obscure federal environmental law, the Antiquities Act "has grown into an important conservation tool."¹²² Congress has traditionally been lenient with the Antiquities Act, allowing expansive use by previous Presidents by acquiescing in broad judicial interpretation,¹²³ and through political considerations.¹²⁴ Various acreage withdrawn for protection under the Act "has ranged from less than one acre . . . to almost eleven million acres."¹²⁵

President Clinton created an "environmental legacy" under the Antiquities Act.¹²⁶ During his eight years in office, President Clinton established nineteen new national monuments and expanded three others,¹²⁷ adding six million acres to the national monument system.¹²⁸ Through this process, President Clinton significantly departed from the standard and traditional designation of national monuments. Prior to his presidency, national monuments were selected to protect "curiosities," objects of historic or scientific value that stood out from the landscape because of their extraordinary beauty, unusual geographic value, or historical value.¹²⁹ Almost all national monuments created during his tenure, however, revolved around large historically or scientifically significant and distinct ecosystems,¹³⁰ corresponding with the growing knowledge that an ecosystem's components are part of an interdependent community.¹³¹

¹²¹ *Id.*

¹²² Ranchod, *supra* note 65, at 539.

¹²³ A successful legal challenge has never been levied against an Antiquities Act use. There have been five federal cases questioning the propriety of a national monument designation, but in each case the acreage withdrawn was always determined as proper. *See id.* at 549-52.

¹²⁴ *Id.* at 535-36.

¹²⁵ *Id.* at 545. Cabrillo National Monument is a mere one acre, while Yukon Flats is a sprawling 10,600,000 acres. "Cumulatively, one-quarter of all national monuments are larger than fifty thousand acres." Biasi, *supra* note 100, at 190.

¹²⁶ Ranchod, *supra* note 65, at 535.

¹²⁷ *Id.* at 537, 555.

¹²⁸ Squillace, *supra* note 107, at 474.

¹²⁹ Mary Gray Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 515 (2002); *see also* Ranchod, *supra* note 65, at 537-38.

¹³⁰ Davidson, *supra* note 129, at 515; Ranchod, *supra* note 65, at 537.

¹³¹ Davidson, *supra* note 129, at 515.

IV. GREATER PROTECTION FOR THE FOUR NATIONAL MARINE SANCTUARIES WITH CORAL REEFS

A. *The Papahānaumokuākea National Monument: A Model*

On June 15, 2006, President Bush bestowed national monument status upon the Northwestern Hawaiian Islands, which was later renamed the Papahānaumokuākea Marine National Monument.¹³² Stretching 137,797 square miles,¹³³ roughly the size of Montana, the Reserve is the world's largest protected marine area.¹³⁴ This was not the first time, however, that a President authorized national monument status for an area containing a coral reef. Fort Jefferson National Monument, renamed Dry Tortugas, was the first national monument harboring a coral reef.¹³⁵ Only forty acres of the monument are above water. The monument primarily "serves as an ecological laboratory for studying, preserving, and enjoying its vast underwater world."¹³⁶

¹³² Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006); see also *Establishment of the Northwestern Hawaiian Islands Marine National Monument: A Proclamation by the President of the United States of America*, THE WHITEHOUSE, Aug. 29, 2006 [hereinafter *Establishment of the Northwestern Hawaiian Islands Marine National Monument*], available at <http://www.whitehouse.gov/news/releases/2006/06/20060615-18.html>. President Bush renamed the monument Papahānaumokuākea on February 28, 2007 to give the area a native Hawaiian name. Papahānaumokuākea Marine National Monument, Hawai'i; Monument Management Plan, 72 Fed. Reg. 16,328, 16,329 (Apr. 4, 2007). Papahānaumokuākea means "a sacred place." Papahānaumokuākea Marine National Monument, <http://hawaiireef.noaa.gov/about/name.html> (last visited Apr. 15, 2008).

¹³³ Papahānaumokuākea Marine National Monument, <http://hawaiireef.noaa.gov/about/name.html> (last visited Apr. 15, 2008). The area is larger than all national parks combined. *Id.*

¹³⁴ *The NewsHour with Jim Lehrer, President Bush Declares National Monument in Hawaii* (PBS television broadcast June 15, 2006) [hereinafter *President Bush Declares National Monument in Hawaii*] (transcript available at http://www.pbs.org/newshour/bb/environment/jan-june06/hawaii_06-15.html).

¹³⁵ See generally THOMAS SCHMIDT & LINDA PIKULA, SCIENTIFIC STUDIES ON DRY TORTUGAS NATIONAL PARK: AN ANNOTATED BIBLIOGRAPHY, available at <http://www.botany.hawaii.edu/faculty/duffy/ARB/443-449/449.pdf>. In fact, Fort Jefferson was the world's first underwater national park unit. *Id.* It was designated in 1935 and expanded, upgraded, and renamed Dry Tortugas National Park in 1992. Daniel Dustin et al., *The Curious History of Dry Tortugas National Park (Dry Tortugas Islands in the Gulf of Mexico)*, PARKS & RECREATION, Sept. 1, 1999, available at <http://www.encyclopedia.com/doc/1G1-57770095.html>.

¹³⁶ Dustin et al., *supra* note 135.

The Papahānaumokuākea Marine National Monument is managed through a coalition of three co-trustees: NOAA, the United States Fish and Wildlife Service, and the State of Hawaii Department of Land and Natural Resources.¹³⁷ The Secretary of Commerce, through NOS and the National Marine Fisheries Service, has primary management responsibilities in consultation with the other co-trustees.¹³⁸ The co-trustees also collaborate with their interagency partners, the Office of Hawaiian Affairs, the United States Coast Guard, the Department of Defense, and the Environmental Protection Agency, to provide comprehensive protection.¹³⁹ The United States Coast Guard aids in administering the laws.¹⁴⁰

Funding for NOAA's management responsibilities is provided by NOAA's Coral Reef Conservation Program and NMSP, and administered through the NMSP.¹⁴¹ In addition, NOAA's National Marine Fisheries Service monitors all commercial fishing activities and protects all habitats of concern within the monument.¹⁴²

The United States Fish and Wildlife Services has sole management responsibility for two National Wildlife Refuges within the national monument, the Hawaiian Islands National Wildlife Refuge and the Midway Atoll National Wildlife Refuge, in consultation with NOAA.¹⁴³ The State of Hawaii manages the Northwestern Hawaiian Islands Refuge, a marine refuge in state waters surrounding the Hawaiian Islands, and the Kure Atoll State Wildlife Sanctuary.¹⁴⁴

B. Compelling Reasons to Utilize the Antiquities Act for Greater Protection

The Papahānaumokuākea Marine National Monument provides an example of how to ensure better protection for our nation's precious coral reefs. In fact, the monument provides the highest form of marine

¹³⁷ Northwestern Hawaiian Islands Marine National Monument: A Citizen's Guide, http://hawaiiireef.noaa.gov/PDFs/Citizens_Guide_Web.pdf (last visited Apr. 15, 2008) [hereinafter A Citizen's Guide].

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ NAT'L OCEANIC & ATMOSPHERIC ADMIN. & U.S. COAST GUARD, JOINT POSITION STATEMENT ON ENFORCEMENT OF THE NORTHWESTERN HAWAIIAN ISLANDS CORAL REEF ECOSYSTEM RESERVE, available at http://hawaiiireef.noaa.gov/PDFs/CG_NOAA_Enforcement.pdf.

¹⁴¹ A Citizen's Guide, *supra* note 137.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

environmental protection in the United States.¹⁴⁵ For this reason, the Northwestern Hawaiian Islands can serve as a template for the conservation of other coral reefs.

There are numerous persuasive reasons why national monument designation for the four National Marine Sanctuaries with coral reefs may provide greater protection and conservation than is presently given. As aforementioned, this would not be the first time that a coral reef was given national monument status; it is a plausible and reasonable solution in light of the recent creation of the Papahānaumokuākea Marine National Monument.¹⁴⁶

First, regulations under the Antiquities Act are much more stringent: "One of the . . . simple differences between a sanctuary and a monument . . . is . . . monument status is quicker; it's more comprehensive; and it's more permanent."¹⁴⁷ As mentioned above, multiple uses, such as commercial and recreational fishing, are permitted in a sanctuary.¹⁴⁸ This "third purpose" has been a principle problem with the NMSP, and there has been a longstanding debate whether this "purpose" is consistent with the goals and protections of sanctuaries.¹⁴⁹

A marine conservationist from the World Wildlife Fund commented that, "[Y]ou can give the coral reefs the best bet at survival by trying to remove all . . . human pressures."¹⁵⁰ Many have suggested that "NOAA should either forbid current activities that damage the environment or

¹⁴⁵ *Id.*

¹⁴⁶ President Clinton signed Executive Order 13,178 on December 4, 2000 designating the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve. Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 7, 2000). The Order initiated the process to designate the Reserve a marine sanctuary under the NMSA. Papahānaumokuākea Marine National Monument, <http://hawaiiireef.noaa.gov/about/faq.html> (last visited Apr. 15, 2008). The Northwestern Hawaiian Islands were effectively 'switched over' when President Bush designated the islands a national monument on June 13, 2006. *Establishment of the Northwestern Hawaiian Islands Marine National Monument*, *supra* note 132. Because the monument provides the protection envisioned by the sanctuary proposal, NOAA is not pursuing sanctuary designation for the area and is instead focusing efforts on the monument's management with the co-trustees. However, the National Marine Sanctuaries Amendments Act of 2000 and the Executive Order establishing the reserve remain in effect, in addition to the monument protection. Papahānaumokuākea Marine National Monument, <http://hawaiiireef.noaa.gov/about/faq.html>.

¹⁴⁷ *President Bush Declares National Monument in Hawaii*, *supra* note 134 (statement of Joshua Reichert).

¹⁴⁸ Answers to Questions, *supra* note 32.

¹⁴⁹ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37.

¹⁵⁰ Bierman, *supra* note 5.

ask Congress to either rescind the third purpose or change the name of the program."¹⁵¹ Others contest that eliminating the third purpose of the NMSP will not alleviate the problems facing sanctuaries.¹⁵² The Antiquities Act, conversely, offers a solution: protection against invasive and damaging human activities without the harmful hassle of balancing competing interests.

The difference lies in the legislation. The Antiquities Act centers on the proclamation that all activities on designated lands are prohibited.¹⁵³ Permission is then issued upon a demonstration of compatible and undisruptive usage.¹⁵⁴ Alternatively, the NMSA begins with a declaration facilitating multiple uses, presupposing compatibility.¹⁵⁵ This presumption is revoked only after harmful and incompatible activity is shown.¹⁵⁶ Consequently, the Antiquities Act and the NMSA are grounded in fundamentally opposite philosophies. While political battles must be fought and won to prevent harmful usage of sanctuaries under the NMSA, the Antiquities Act ensures that areas are untouched until appropriate use is demonstrated. Therefore, when safeguarding the integrity of the four sanctuaries' coral reefs, security would be more certain under the Antiquities Act.

Second, national monument designation status means that the Department of the Interior, the Department of Commerce, the Fish and Wildlife Service, and NOAA must work together.¹⁵⁷ Greater interaction will foster improved cooperation and communication, leading to a more efficient implementation of rules and regulations that protect the coral reefs.

¹⁵¹ PROTECTING OUR NATIONAL MARINE SANCTUARIES, *supra* note 37.

¹⁵² *See id.*

¹⁵³ *See* 16 U.S.C. §§ 431-433 (2000); *see also Establishment of the Northwestern Hawaiian Islands Marine National Monument*, *supra* note 132:

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including, but not limited to, withdrawal from location, entry, and patent under mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

¹⁵⁴ 16 U.S.C. § 432 (2000).

¹⁵⁵ *See id.* § 1431(b); 15 C.F.R. § 922.42 (2007) ("All activities . . . may be conducted unless prohibited or otherwise regulated . . .").

¹⁵⁶ *See* 15 C.F.R. § 922.61-2 (2007).

¹⁵⁷ *President Bush Declares National Monument in Hawaii*, *supra* note 134 (statement of Jean-Michel Cousteau).

Third, research is still permitted on national monument premises, and may be conducted in areas where subsistence fishing for local people is allowed.¹⁵⁸ In other words, national monument status will not impede scientific or environmental studies, and the regulations can be tailored to accommodate populations that rely heavily on the reefs for their livelihood.

Fourth, national monument designation is more comprehensive and permanent than protection under the NMSP.¹⁵⁹ Only a congressional act can undo national monument status.¹⁶⁰ Although monument designation is not "comprehensively permanent," there have been very few instances where monuments have been "undone" by Congress.¹⁶¹ And in these cases, the national monuments were of little national significance, and either were returned to national forest status or given to local or state governments.¹⁶² Similarly, although there is little legal authority on the matter, a 1938 Attorney General's opinion stated that "[P]residents do not have the authority to revoke existing monuments" designated by previous Presidents.¹⁶³ This eliminates the possibility of politically-charged presidential actions. This same report does state, however, that successive Presidents have the power to reduce the size of existing monuments.¹⁶⁴ Although it is unclear how this may affect monument designation, it does not undermine the fact that the Antiquities Act offers a more permanent approach than the NMSA.

National monument designation also demonstrates a strong status quo power. A key difference between an executive order¹⁶⁵ and a national monument designation is the amount of work necessary to maintain the

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (statement of Joshua Rechert).

¹⁶⁰ *Id.*

¹⁶¹ Ranchod, *supra* note 65, at 552.

¹⁶² *Id.*

¹⁶³ Biasi, *supra* note 100, at 240.

¹⁶⁴ *Id.* at 240-41.

¹⁶⁵ While a National Marine Sanctuary can only be declared by a congressional or administrative decision, an executive order is used to declare an area a reserve. *See generally* PEW OCEANS COMM'N, MARINE RESERVES: A TOOL FOR ECOSYSTEM MANAGEMENT AND CONSERVATION 6 (2002), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/pew_oceans_marine_reserves.pdf. The President can then direct the Secretary to begin the sanctuary designation process. *See* National Oceanic & Atmospheric Administration, Moves To Strengthen Protections for Northwestern Hawaiian Islands, <http://sanctuaries.noaa.gov/news/features/news020320.html> (last visited Apr. 15, 2008).

protection.¹⁶⁶ Under an executive order, key players must continue to work towards protection. Conversely, national monument status becomes the status quo once it is signed.¹⁶⁷ As explained by one author, the primary “obstacle for those opposed to the monuments is that significant delay after designation of the targeted monument will weaken political will to alter the monument. Delay allows new constituencies supporting the status quo to emerge, which can be expected to fight attempts to weaken the monument.”¹⁶⁸ Put another way, “[r]eversing the status quo is much more difficult than allowing a new program or executive order to wither away for lack of funding or attention.”¹⁶⁹

Fifth, national monuments are less affected by time-consuming public and political feedback. National monument designation is created via presidential designation.¹⁷⁰ As compared with the creation of a National Marine Sanctuary, national monument designation requires less congressional input, public debate, hearings, and meetings.¹⁷¹ There is no mention anywhere in the Antiquities Act of notice or public participation requirements or processes for facilitating congressional oversight.¹⁷² This eliminates the need for conservationists to persuade Congress to take affirmative action, and it shifts the burden to “anti-conservation forces to convince Congress to pass legislation undoing the [P]resident’s action.”¹⁷³ Furthermore, this swift designation process “enables the executive to intervene when precious lands are threatened with irreversible harm.”¹⁷⁴

¹⁶⁶ See Brax, *supra* note 33, at 127.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 16 U.S.C. § 431 (2000).

¹⁷¹ *President Bush Declares National Monument in Hawaii*, *supra* note 134 (statement of Joshua Reichert). Although this may sound undemocratic, the significant decrease in input nevertheless affords an opportunity to provide greater protection in less time. It is arguable that less political haggling and less compromise involved in national monument designation will direct the appropriate attention to the conservation needs at hand and offer truly necessary protection.

¹⁷² See Ranchod, *supra* note 65, at 540; Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2000). Though creation of the Papahānaumokuākea Marine National Monument was based on extensive public input, it was gained when the same area was under consideration for sanctuary status. Papahānaumokuākea Marine National Monument, *supra* note 146. This should not be confused with a requirement to seek public input before national monument designation.

¹⁷³ Ranchod, *supra* note 65, at 548.

¹⁷⁴ Biasi, *supra* note 100, at 234.

Additionally, a byproduct of this power is the ability to remove the land from state and local interest conflicts:

Oftentimes, state and county interests conflict with federal preservationist proclivities since states seek to maximize the economic value of their lands, potentially at the expense of valuable natural resources and plant and animal life. The Antiquities Act is a federal conservation tool amid this state self-interest enabling the federal government to intervene when threats arise.¹⁷⁵

Similarly, national monument designation means that the law will be applied immediately¹⁷⁶: "By providing a mechanism for unilateral executive action, the Act empowers the [P]resident to act quickly to protect public lands that are threatened by congressional inaction."¹⁷⁷

Sixth, national monument designation is not subject to the National Environmental Policy Act or other related environmental processes.¹⁷⁸ This means the President is not subject to the environmental impact statement requirement of NEPA¹⁷⁹ when designating areas as national monuments, as the presidency is not a federal agency.¹⁸⁰

Lastly, designation of the four National Marine Sanctuaries as national monuments would follow the trend of interpreting the Antiquities Act to embrace sprawling acreage of whole ecosystems, not just particularized parcels. This trend has led to more stringent land restrictions.¹⁸¹

¹⁷⁵ *Id.*

¹⁷⁶ *President Bush Declares National Monument in Hawaii*, *supra* note 134 (statement of Joshua Reichert).

¹⁷⁷ Ranchod, *supra* note 65, at 539.

¹⁷⁸ *See id.* at 540. The National Environmental Policy Act ("NEPA") requires federal agencies to integrate environmental values into their decisionmaking to ensure use of all practicable means to help preserve the environment. Agencies must prepare an Environmental Impact Statement ("EIS") if a proposed action will have significant environmental consequences. An EIS report details the environmental impact of alternatives to major federal actions that affect the environment. The Environmental Protection Agency then reviews and comments on these reports. U.S. Environmental Protection Agency, National Environmental Protection Act (NEPA): Basic Information, <http://www.epa.gov/compliance/basics/nepa.html> (last visited Apr. 15, 2008).

¹⁷⁹ Ranchod, *supra* note 65, at 540.

¹⁸⁰ *Id.* at 551.

¹⁸¹ The Virgin Islands Coral Reef National Monument prohibits mining claims, geothermal leasing, and almost all fishing. Furthermore, along with the extension of President Kennedy's Buck Island Reef National Monument, President Clinton also strengthened the reef's protection level by prohibiting all extractive uses, including fishing. *Id.* at 567-68.

President Clinton was the first to recognize the major changes in management necessitated by the new understanding of monument lands. Clinton transferred oversight away from the traditionally utilized National Park Service to the Bureau of Land Management.¹⁸² This was a calculated move to shift administration in the direction of lighter extractive uses of the protected land, resulting in "more environmentally sensitive management on national monument lands."¹⁸³ This trend may significantly and dramatically increase protection of the four National Marine Sanctuaries with coral reefs.

V. ISSUES SURROUNDING NATIONAL MONUMENT DESIGNATION

There are various risks and costs associated with national monument designation for the four National Marine Sanctuaries with coral reefs.

First, and perhaps the most important impediment, is that there is always the threat that such a designation will be politically unfavorable for a President. There may be underlying reasons why a proclamation would severely injure a President's popularity. For example, President Clinton experienced a great deal of criticism when he used the Antiquities Act to designate nineteen national monuments.¹⁸⁴ There were bipartisan cries in Congress claiming that these actions were blatant abuses of executive authority.¹⁸⁵

This is a phenomenon experienced by other Presidents as well. On December 1, 1978, President Carter declared "seventeen new or enlarged national monuments in Alaska, covering fifty-six million acres."¹⁸⁶ When these designations were announced, the Carter Administration made it clear that it would not allow "Alaska [to] become a private preserve for a handful of rape, ruin and run developers."¹⁸⁷ These national monuments created harsh opposition in Alaska, ultimately resulting in two lawsuits, one by the State of Alaska and the other by the Anaconda Copper Company.¹⁸⁸ Although both suits were decided in favor of the

¹⁸² See *id.* at 571.

¹⁸³ *Id.*

¹⁸⁴ See Government Affairs Program American Geological Institute, Update on Public Land Issues, Mar. 27, 2002, available at <http://www.agiweb.org/gap/legis107/natmon.html>.

¹⁸⁵ See generally *Clinton Declares New National Monuments*, CNN, Jan. 11, 2000, <http://archives.cnn.com/2000/NATURE/01/11/grand.canyon.02/index.html>.

¹⁸⁶ Squillace, *supra* note 107, at 502.

¹⁸⁷ *Id.* at 504.

¹⁸⁸ See *id.* at 504-07 (discussing *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978), and *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska July 1, 1980)).

Carter Administration,¹⁸⁹ their existence still demonstrates the intense controversy national monument designation can create. In another instance, President Clinton's designation of Utah's Grand Staircase-Escalante gave rise to three separate lawsuits.¹⁹⁰ Again, the suits were dismissed in favor of the federal government.¹⁹¹

Similarly, political debates can bubble between states, their representatives, and the President over land designated or not designated.¹⁹² The consequences of such tension could lead to decisions that do not necessarily aim to protect the integrity of the land and waters, but rather the political well-being of the proponent or opponent of the action.

Second, the locations of the four National Marine Sanctuaries make them susceptible to many interest groups. While the Papahānaumokuākea Marine National Monument is remotely located, the four sanctuaries are not so situated. Consequently, there is an increased likelihood that strict limitations on the reefs' usage would directly impact many individuals and industries not present in the Northwestern Hawaiian Islands. This poses the possibility of fierce political opposition to presidential declarations of national monuments, diminishing the possibility that these designations may occur.

Similarly, there is a greater possibility of encroachment on populations relying upon these areas for subsistence. Designation poses the threat of irreparably harming these individuals, particularly because national monument laws can be more stringent than sanctuary laws.¹⁹³ Whether there are groups that rely upon these reefs for their daily sustenance and livelihood must be determined. When this situation has arisen in the past,¹⁹⁴ the federal government has created a number of solutions. A compensation program offering financial relief¹⁹⁵ or a permit allowing these groups to fish in a manner that would not disturb the integrity of

¹⁸⁹ *Id.* at 506-07.

¹⁹⁰ *Id.* at 511.

¹⁹¹ *Id.* at 511-12.

¹⁹² For example, President Clinton's express refusal to extend status to the Arctic National Wildlife Refuge has been attributed to his unease about bestowing designation upon another high-profile land. Allegations that Clinton had abused his executive authority were rampant at the end of his presidency and he feared that adding yet another land would jeopardize the future of the Act. See Ranchod, *supra* note 65, at 576-77.

¹⁹³ See 16 U.S.C. § 1431 (2000).

¹⁹⁴ For example, when the Northwestern Hawaiian Islands were designated a national monument, eight local fisherman were catching from the area. See *President Bush Declares National Monument in Hawaii*, *supra* note 134 (statement of Joshua Reichert).

¹⁹⁵ See *id.*

the ecosystem are workable alternatives. There is always the possibility, however, that the federal government will fail to adequately communicate and coordinate with affected populations.¹⁹⁶ This may be an especially difficult issue when working with four coral reefs, as there are likely more and larger populations than present in the Northwestern Hawaiian Islands.

Third, although national monument status may seem permanent, this is actually not the case. Monuments, though rarely undone, still are not steadfast fixtures. This is not a great threat, however, because "very few monuments have ever been undone by Congress. The handful of exceptions have involved small areas of little national significance that were either turned over to state or local governments, or put back to national forest status."¹⁹⁷ It is difficult for Congress to modify a national monument.

But there are other related consequences that can result from monument designation. In 1943, President Roosevelt proclaimed Jackson Hole National Monument in Wyoming, sparking intense outrage from local officials as the designation increased the protected acreage in the state 130-fold.¹⁹⁸ Congress intervened for the first time in American history when it attempted to abolish the National Monument by majority vote. President Roosevelt vetoed this decision and Congress was unable to secure the two-thirds supermajority for congressional override.¹⁹⁹ The designation resulted in a lawsuit decided in favor, once again, of the executive's authority under the Antiquities Act; but Congress retaliated through its enactment of 16 U.S.C. § 431a, which provided that no future national monuments could be proclaimed within Wyoming.²⁰⁰

Similarly, there is an absence of information regarding the power of a subsequent President to reduce the size of another President's designation.²⁰¹ Designation is an "inherently political decision"²⁰² that can affect subsequent presidencies. As was aforementioned, the 1938 Attorney General's opinion did state that although subsequent Presidents cannot

¹⁹⁶ See Ranchod, *supra* note 65, at 556-58 (stating that President Clinton's designation of the Grand Staircase-Escalante National Monument drew a significant amount of criticism over the fact that the designation imposed significantly upon rural communities and the federal government did not adequately collaborate with these populations).

¹⁹⁷ Brax, *supra* note 33, at 126.

¹⁹⁸ Biasi, *supra* note 100, at 205.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 206.

²⁰¹ See Ranchod, *supra* note 65, at 554.

²⁰² *Id.* at 573.

revoke monument status, they have the ability to change the size of existing monuments.²⁰³ It is unclear how this may affect national monument designation for the four sanctuaries.

A fourth issue is whether national monument status actually can provide the protection that coral reefs require. Protection may vary depending upon which department manages a national monument. Monuments regulated under the National Park System typically carry the most stringent regulations, whereas monuments governed under the United States Fish and Wildlife Services are subject to less strict restrictions.²⁰⁴ This is not a steadfast rule of thumb, however.

The Papahānaumokuākea Marine National Monument is managed by the Department of the Interior's Fish and Wildlife Service and NOAA.²⁰⁵ Commercial fishing will be permitted until 2011.²⁰⁶ Furthermore, there is a prohibition on entering the Papahānaumokuākea Marine National Monument except in emergencies, armed forces situations, when a permit is issued, or when passage will be conducted without interruption to the lands, provided that notification is given.²⁰⁷ Prohibited activities include "exploring for, developing, or producing oil, gas or minerals," and anchoring on living or dead coral,²⁰⁸ while regulated activities, which are illegal unless a valid permit is provided, include "removing, moving, taking, harvesting, injuring, disturbing, or damaging . . . any living or nonliving Monument resource," touching the coral, swimming, snorkeling, or SCUBA diving.²⁰⁹ These are just a few of the regulations that surround the Hawaiian Island's National Monument designation, and they are significant in their ability to protect the coral reefs, despite the potentiality that protection can vary depending upon which department manages a national monument. The Papahānaumokuākea Marine National Monument is perhaps the greatest example of the protection that the government can give to the four sanctuaries with coral reefs.

Lastly, there is uncertainty surrounding the management and use restrictions that national monuments provide. The language of the Antiquities Act is ambiguous regarding a President's prerogative to "reserve" land. Generally, however, this has not been a significant issue.

²⁰³ See discussion *supra* note 164 and accompanying text.

²⁰⁴ See Squillace, *supra* note 107, at 516.

²⁰⁵ See 50 C.F.R. § 404.1 (2007).

²⁰⁶ *Id.* § 404.10.

²⁰⁷ See *id.* § 404.4.

²⁰⁸ *Id.* § 404.6.

²⁰⁹ *Id.* § 404.7.

Most monument proclamations contain similar warnings that “‘all unauthorized persons [are] not to appropriate, injure, destroy, or remove any feature’ of the monument, and [are] ‘not to locate or settle upon any of the lands thereof.’”²¹⁰

CONCLUSION

There are numerous compelling reasons why the U.S. government should designate the four National Marine Sanctuaries with coral reefs as key environmental features—Fagatele Bay (American Samoa), Florida Keys (Florida), Flower Garden Banks (Texas/Louisiana), and Gray’s Reef (Georgia)—as national monuments under the Antiquities Act of 1906. The widespread destruction that coral reefs have experienced will continue to increase with time, lending support to the argument that time is of the essence. To grant such status to these areas will ensure that the delicate coral reef ecosystems that these sanctuaries harbor receive greater protection through more stringent regulations. The current implementation and management of the NMSP is not performing to its potential, which jeopardizes the future existence of these biologically rich natural phenomena.

The Antiquities Act of 1906 may afford greater protection to the four National Marine Sanctuaries with coral reefs in a number of ways. Because designation can be achieved quickly and effectively, without the hassles of formal political discussion and compromise, regulations for national monuments are more stringent than areas under the NMSP. Although there are drawbacks to designation, such as the impact that more stringent regulations will have on local populations relying upon the reefs for subsistence or the threat of non-permanent status the Antiquities Act bears, these potential pitfalls are workable, not inevitable. The Antiquities Act not only offers flexibility and alternatives to handle potentially damaging situations, but also carries the weight of many court decisions that uphold the broad executive power to declare national monuments.

The most important aspect of the Antiquities Act is its focus on preserving and protecting withdrawn lands. This is in striking contrast to the NMSA, which aims to work with public and private uses, facilitating the continuance of those harmful activities that the designation theoretically is supposed to prevent. Perhaps the greatest example of this downfall is the continuance of local and commercial fishing in sanctuaries. Coral reefs experience a great deal of stress from such harmful human

²¹⁰ Squillace, *supra* note 107, at 515.

activities. Unless more stringent laws are implemented, including better regulation and funding, the ecosystems within the four National Marine Sanctuaries with coral reefs will continue to die.

Although the greatest obstacle facing national monument status for the four sanctuaries is the actual implementation of such a designation, it presently offers a more comprehensive and able conservation program than the NMSA. Although other possibilities may provide a more feasible solution, such as amending the NMSA, the quickest and most guaranteed method to protect and preserve the coral reefs at the moment is through national monument designation under the Antiquities Act.