New Marine National Monuments Settle Issues

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The three new proclamations suggest that some of the intriguing legal questions concerning a marine national monument have been settled, at least for now. These questions include whether a president can, by proclamation, set apart and reserve marine areas within the 200-mile exclusive economic zone (EEZ) of the United States as monuments under Section 2 of the Antiquities Act of 1906, 16 U.S.C. 431. If the answer is yes, do these proclamations provide a sufficient legal basis for fully protecting these areas of special scientific interest and value? Clearly, the executive branch answers “yes” to the first question. Any uncertainty about the legality of marine national monuments has been set aside, and future presidents can expect to receive many requests to follow these precedents. The Council on Environmental Quality drafted the three new proclamations, and it undoubtedly found useful a 2000 Department of Justice (DOJ) legal opinion, written when President Clinton was considering a monument for the waters around the NWHI. DOJ concluded that the quantum of control over the EEZ was sufficient to allow the president to establish a national monument under the Antiquities Act, as long as the purpose was to protect the marine environment. The Law of the Sea Convention “appears not only to allow the United States to take action to protect marine resources, but also to require some such actions.” DOJ, Office of Legal Counsel, Memorandum Opinion, Administration of Coral Reef Resources in the NWHI, Sept. 15, 2000, at 9, available at www.usdoj.gov/olc/coralreef.htm.

The new proclamations also demonstrate confidence in the validity of the United States’ EEZ claim around its uninhabited rocks, islands, and coral atolls in the Pacific, even though some may not meet the criteria for generating an EEZ or continental shelf under the Law of the Sea Convention’s Article 121. See Proclamation 5030, 3 C.F.R. 22 (1984). The International Maritime Organization, representing the world’s shipping nations, approved designation of the waters around the NWHI as a Particularly Sensitive Sea Area and U.S. adoption of a mandatory ship reporting system. See 73 Fed. Reg. 73,592 (Dec. 3, 2008). Because judicial review of monument proclamations is very hard to obtain and congressional legislation is not required to codify reservations under the Antiquities Act, only one question remains: are any gaps in the legal framework significant enough to warrant new legislation and run the risk of opening up the full-protection principles to meddling by the Congress?

The new Marianas Trench Marine National Monument contains three components: (1) an “Islands Unit” consisting of the waters and submerged lands within a 50-mile radius around the three most northern of the fourteen islands in the Northern Marianas—Farallon de Pajaros (Uracas), Mau, and Asuncion—which are each relatively active volcanoes ringed by coral reefs; (2) a “Trench Unit” consisting of the submerged lands of the Mariana Trench, which is the world’s deepest canyon (nearly 36,000 feet at the deepest point), located east of the 14 islands and running 940 nautical miles long and 38 nautical miles wide, extending 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 hydrothermal submarine volcanoes and vents along the Mariana Volcanic Arc west and north of the fourteen islands. Proclamation 8335 of Jan. 6, 2009, 74 Fed. Reg. 1557 (Jan. 12, 2009). This 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 et seq. Although not a “co-trustee” as the State of Hawaii is for the Papahānaumokuākea Monument, the Commonwealth will play a cooperating role, especially on the issue of traditional indigenous fishing within the Islands Unit, where commercial fishing is prohibited but recreational and sustenance fishing are to be allowed. Proclamation 8335, at 1559. The Commonwealth’s constitution preserves the three islands in the Island Unit as uninhabited places for preservation and protection of natural resources. CNMI Constitution, Article XIV, § 2.

The Commonwealth is one of the five U.S.-flag-affiliated communities, all of which have a rather ambiguous relationship to the United States. See, e.g., Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands, 14 Univ. Hawaii L. Rev. 445, 480–87 (1992). Unlike the Territory of American Samoa, however, the Commonwealth has no jurisdiction over marine waters. CNMI v. United States, 399 F.3d. 1057 (9th Cir. 2005). If the United States someday grants submerged lands to the CNMI, these may remain a part of the monument, and management will be coordinated. Proclamation 8335, at 1558. The Proclamation authorizes the Secretaries 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. Because commercial fishing is prohibited only in the Islands...
Unit, fisheries that do not touch submerged lands 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 50 miles around Wake, Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll. Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 12, 2009). The first 12 of these miles from the islets is to be managed by the Secretary of the Interior, in consultation with the Secretary of Commerce, and the next 38 miles are to be managed by the Secretary of Commerce (through NOAA), in consultation with the Secretary of Interior. The Fish and Wildlife Service already manages national wildlife refuges at all but Wake Island, which supported an airbase in World War II. The Air Force will continue to manage portions of Wake Island and Johnston Atoll, where there is a weapons disposal site, until it decides to turn these areas over to the FWS. Fishing in this monument is subject to regulation, and recreational fishing may be allowed in specific locations upon request if compatible with the refuges. All military exercises and activities are exempt from the Proclamation’s prohibitions. Proclamation 8336, at 1569.

The Rose Atoll Marine National Monument consists of the “lands and interests in lands owned or controlled by the Government of the United States within the boundaries that lie approximately 50 nautical miles from the mean low water line of Rose Atoll.” Proclamation 8337, 74 Fed. Reg. 1577 (Jan. 12, 2009). Rose Atoll is a tiny, diamond-shaped atoll east of the main islands of American Samoa, consisting of 20 acres of land and 1,600 acres of lagoon, noted for the pink hue of its fringing reef of coralline algae. 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 United States. Van Dyke, supra, at 492–94. Like the other two proclamations, Proclamation 8337 makes clear that its reservation of federal lands and interests in lands includes the marine waters. Proclamation 8337, at 1578. The Secretary of Interior has management responsibility for the 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 50 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 through the National Environment Policy Act-EPA scoping process, 42 U.S.C. 4321 et seq., and cooperating with the territorial government.

All of the new monuments 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 not so much a portfolio of planning and management authorities (which already exist for the national wildlife refuges) but exceptional surveillance and enforcement authority. These powers do not exist under the Antiquities Act. See D. Kapua Sproat and Aarin F. Gross, The N.W. Hawaiian Islands Marine National Monument, 22 Nat. Res. & Env’t 57 (2008). However, each proclamation pointedly specifies that the agencies 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.” See, e.g., Proclamation 8336, at 1568. Regulations for the new monuments can draw upon the authority of laws, such as the Magnuson-Stevens Act, the Endangered Species Act, and the national wildlife refuge laws. These laws are the basis for the regulations for the Papahānaumokuākea Monument, 50 C.F.R. Pt. 404, and NOAA has already used them to levy hefty civil penalties against vessels caught violating the rules by the U.S. Coast Guard. A bill pending in the 111th Congress to reauthorize the Coral Reef Conservation Act of 2000 would clarify that liability for response costs and damages applies to any coral reefs under U.S. jurisdiction. H.R. 860 (introduced Feb. 4, 2009). By avoiding the ambiguous fisheries provisions of the National Marine Sanctuaries Act, 16 U.S.C. 1434(a) (5), this bill is preferable to H.R. 6537 (introduced July 17, 2008), which would have brought the marine national monuments under the National Marine Sanctuaries Act.

The vast size and remoteness of the new Pacific monuments mean the “marine national monument” is still something of a work in progress, and it remains to be seen if sites closer to the U.S. mainland will be protected under the Antiquities Act. The new proclamations confirm the advantages of using the Antiquities Act (speed, limited public participation), and may provide precedents for using this statute in the future to protect fragile marine areas. The brief but intense interagency negotiations that led to the proclamations resulted in a somewhat complex division of management responsibilities. These arrangements and the unique resource values of the Pacific monuments are bound to raise enough questions to keep marine policy analysts and agency lawyers busy for years to come.

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