I. INTRODUCTION

On March 3, 2007, the largest protected marine area in the world officially received the Hawaiian name of Papahānaumokuākea Marine National Monument. The name properly centers the origins of the Hawaiian people and the Hawaiian archipelago in the Northwestern Hawaiian Islands. In Hawaiian tradition, the union of Papahānaumoku (personifying the earth) and Wākea (personifying the sky) resulted in the birth of the entire Hawaiian archipelago. According to Aunty Pualani Kanahele, a member of the cultural working group that helped name the monument, “the name means the deity of our ancestors who extends to the Northwestern Hawaiian Islands, the great expanse she gave birth to.”

In scientific tradition, the creation of the Hawaiian Archipelago is the result of a series of undersea volcanoes emerging to form islands and then slowly sinking back into the ocean over millions of years. The northern three quarters of the archipelago is known as the Northwestern Hawaiian Islands. The Native Hawaiian Cultural Program for the monument explains that “Papahānaumokuākea is a name that will encourage abundance and energize the continued procreative forces of earth, sea, and sky.”
Encouraging abundance is exactly what the ocean surrounding and within Papahānaumokuākea needs. Overfishing of marine resources has a long history within the Northwestern Hawaiian Islands and it is a history that continues outside the monument boundaries today. In Northwestern Hawaiian Island waters the black-lipped oyster was nearly wiped out nearly eighty years ago and still has not recovered; a lobster fishery “decimated two species of lobster during fifteen years of fishing”; and the bottomfish fish populations are declining.

In the main Hawaiian Islands, the eight human populated islands at the southeast end of the archipelago, evidence of the need for fish stock recovery can be found in the recent emergency ban on bottomfishing in the main Hawaiian Islands. Bottomfishing will be suspended in both state and federal waters around all the main Hawaiian Islands for recreational and commercial fishermen from May 1, 2007 through September 30, 2007. The National Marine Fisheries Service has estimated that the onaga and ehu fisheries in the main Hawaiian Islands have been overfished since at least 1989. The crisis of surrounding fisheries makes the protected resources within Papahānaumokuākea all the more valuable and necessary to protect. Unfortunately, it also makes the protected resources that much more at risk for increased fishing pressure and poaching. Some of the commercial fishing pressure to fill the demand for bottomfish in the markets and restaurants of the main Hawaiian Islands will come from the few bottomfishing permits that remain active in the monument.

The Northwestern Hawaiian Islands are considered a sacred place in Hawaiian tradition, “a region of Kanaloa from which life springs and to which spirits return after death.” Designation of Papahānaumokuākea as a national monument attempts to
embrace the Northwestern Hawaiian Islands as a sacred place, one protected from pressures of fishing and other human-caused degradation from which, many hope, new life can spring for the oceans. Now the question becomes, however, whether the legal protections provided by monument status are capable of creating the sacred, untouched place that was envisioned for the Northwestern Hawaiian Islands.

This Note examines the anticipated challenges to management and enforcement of the Papahānaumokuākea Marine National Monument, the strengths and weaknesses of using the Antiquities Act to protect the natural resources in the Northwestern Hawaiian Islands, and the options available for additional protection of the natural resources in Papahānaumokuākea beyond monument designation. Part II reviews the evolution of protections for natural resources in the Northwestern Hawaiian Islands. Part III reviews the history and evolution of the Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2000), which provides the authority for national monument designations. Part IV identifies the challenges presented when the Antiquities Act is used to protect the natural resources of the Northwestern Hawaiian Islands. Part V examines the strengths and weaknesses of the Antiquities Act as an authority for protecting the Northwestern Hawaiian Islands and its resources. Finally, Part VI proposes actions that can strengthen natural resource protection in Papahānaumokuākea Marine National Monument.

II. THE EVOLUTION OF PROTECTIONS FOR NATURAL RESOURCES IN THE NORTHWESTERN HAWAIIAN ISLANDS

A. The Largest Marine Protected Area in the World

Papahānaumokuākea Marine National Monument covers nearly 140,000 square miles of ocean, atolls, reefs, and land masses. At the time of its designation, it was the largest and only offshore monument in a marine area. Papahānaumokuākea is one
hundred times larger than Yosemite National Park and more than seven times larger than all thirteen national marine sanctuaries combined.\textsuperscript{18}

The Northwestern Hawaiian Islands are part of the most isolated archipelago in the world, located 2,480 miles from any continental land mass\textsuperscript{19} and about 800 miles from the main Hawaiian Islands.\textsuperscript{20} Within the Northwestern Hawaiian Islands are 4,500 square miles of wild coral reefs that many scientists consider to be “among the healthiest and most extensive in the world.”\textsuperscript{21} The area is home to more than 7,000 species of living things, “a quarter of which are unique to the Hawaiian Islands.”\textsuperscript{22} As described by one observer, “[t]he waters contain the world's only remaining ecosystem where predators — like sharks, ulua or jacks, and big snappers — dominate.”\textsuperscript{23} Over fourteen million seabirds nest on the small areas of land, and four of the endangered land birds within the monument are found nowhere else in the world.\textsuperscript{24} At least seventy-five species of native insects have been found on Laysan, just one of the monument’s islands.\textsuperscript{25} According to the Council on Environmental Quality, “[t]he Monument represents the largest single conservation area in our Nation’s history and the largest protected marine area in the world.”\textsuperscript{26}

The creation of a national monument in the Northwestern Hawaiian Islands has a long history and is not without its own controversy. As early as 1909, President Theodore Roosevelt recognized the need to protect the biological treasures of the Northwestern Hawaiian Islands.\textsuperscript{27} He issued Executive Order 1019, to protect “large colonies of seabirds, which were being slaughtered for the millinery trade, and a variety of other marine organisms, including sea turtles and the critically endangered Hawaiian monk seal (\textit{Monachus schauinslandi}), as well as to address the commercial exploitation of wildlife
resources.” President Theodore Roosevelt eventually reserved all of the islands of the Northwestern Hawaiian Islands, except Midway, as the Hawaiian Islands Reservation. Protection for wildlife in the area was increased in 1940 by President Franklin D. Roosevelt, and in 1967, President Lyndon B. Johnson included protection for the surrounding submerged lands. Although not specifically directed toward the Northwestern Hawaiian Islands monument, President Ronald Reagan’s creation of the exclusive economic zone in 1983 extended the United States’ ability to protect living and non-living resources from three to 200 nautical miles off of all United States shorelines, including the shorelines of the islands within the Northwestern Hawaiian Islands. In 1988, additional protection was created for Midway Atoll, an atoll now a part of the Papahānaumokuākea National Monument, when the U.S. Fish & Wildlife Service and the U.S. Navy created the National Wildlife Refuge at Midway Atoll.

B. The Monument That Was Almost a Sanctuary

In 2000, President William J. Clinton created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve by Executive Order and directed the Secretary of Commerce to initiate the process of designating the Northwestern Hawaiian Islands as a National Marine Sanctuary. Unlike monuments, marine sanctuaries are created by Congress after a long process of public input. Sanctuaries are also managed by the Department of Commerce through the National Marine Sanctuaries Program of the National Oceanic and Atmospheric Administration (“NOAA”). The sanctuary process for the Northwestern Hawaiian Islands was initiated in 2000 and was nearing completion in 2006.
In June of 2006, representatives of NOAA prepared to present President George W. Bush with a draft management plan for the proposed sanctuary, which had taken over five years to create. To the surprise of NOAA officials and participants of the sanctuary process, President Bush announced that the Northwestern Hawaiian Islands would become a national monument, instead of a marine sanctuary. With an official proclamation, the protection of the Northwestern Hawaiian Islands was immediate, but monument status meant major changes to the management authority, management plan, and enforcement options that would have existed under the anticipated sanctuary.

Under the National Marine Sanctuaries Act of 1976, NOAA is designated as the sole management authority for national marine sanctuaries, but under the President Bush’s Proclamation for the Northwestern Hawaiian Islands, management authority for the monument is divided among two federal co-trustees: Department of Commerce, through NOAA, and Department of the Interior, through U.S. Fish & Wildlife Service. The State of Hawai`i retains its authority over the submerged lands and waters extending three miles from the shore of all submerged lands within the monument, except Midway Atoll. The co-trustees must work in close coordination with the State of Hawai`i to manage the monument.

The draft management plan that had been created by the sanctuary process must be adapted to reflect the new structure of management authority for the monument. The final monument management plan is still in progress; in the meantime, however, the three management entities have entered a Memorandum of Agreement (“MOA”). Interestingly, the MOA identifies all three parties to the agreement (State of Hawai`i, U.S. Department of the Interior, and the U.S. Department of Commerce) as “Co-Trustees,” and
states that the MOA “constitutes an agreement among the Co-Trustees to carry out coordinated resource management for the long-term comprehensive conservation and protection of the Monument.”

Through the MOA, the three parties are supposed to “collectively protect, conserve, and enhance Monument fish, plant, and wildlife habitats, including coral reefs and other marine and terrestrial resources.”

III. HISTORY AND EVOLUTION OF THE ANTIQUITIES ACT AND NATIONAL MONUMENTS

In September of 1906, President Theodore Roosevelt created the first national monument, Devil’s Tower in Wyoming, encompassing 1,194 acres, pursuant to the Antiquities Act of 1906. Congress created the Antiquities Act for the purpose of “protecting precious archeological artifacts and ruins from vandalism and theft.”

Section 2 of the statute provides:

The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . .

The Antiquities Act empowers the President to set aside federal lands as a national monument to protect “objects of historic or scientific interest,” immediately placing the designated lands under protection. Unlike other federal land withdrawals, monument designations do not require congressional approval or the often lengthy process of public participation. National monuments are not permanent; however, they can be reversed by Congress. Since 1906, 124 monuments have been created in the United States by Presidential Proclamation, accounting for 155,357,887 acres of federal land. Although
thirty-one national monuments have been redesignated as national parks by Congress,\textsuperscript{59} no monument has been dismantled.

A. Early Use of the Act to Protect Natural Resources

Traditionally, national monuments were created to protect archeological objects and were managed by the National Park Service to "'promote and regulate the use' of national monuments in order to 'conserve the scenery and the natural and historic objects and the wild life therein' so lands remain 'unimpaired for the enjoyment of future generations.'"\textsuperscript{60} Fourteen Presidents have used the Antiquities Act to protect federal lands that housed archeological, cultural and natural treasures.\textsuperscript{61} These new national monuments received the highest level of protection, prohibiting all extractive uses within the monument boundaries. Pursuant to the language of the Antiquities Act, the boundaries of a monument are to "be confined to the smallest area compatible with the proper care and management of the objects to be protected."\textsuperscript{62} These objects of interest have ranged from Cabrillo National Monument, which is less than an acre, to Wrangell-St. Elias National Monument in Alaska, which is almost eleven million acres.\textsuperscript{63}

Under President Clinton, monument designations began to be used to deliberately protect objects of interest on an ecosystem scale.\textsuperscript{64} President Clinton designated nineteen monuments during his administration, ranging in size from 2.3 acres to 1.7 million acres.\textsuperscript{65} The management authority charged with protecting national monuments also changed under President Clinton, with federal agencies such as the Bureau of Land Management, Forest Service, Department of Energy, and Fish and Wildlife Service now charged with the protection of newly created monuments.\textsuperscript{66} With Papahānaumokuākea,
the Department of Commerce has been added to the list of unconventional management authorities.67

The definition of monument protection has also evolved since the creation of Devil’s Tower in 1906. Monument designation once meant that the lands within monument boundaries were protected from extractive uses. That is no longer the case, as seen in monuments such as Grand Staircase-Escalante, Grand Canyon-Parashant, and Giant Sequoia National Monuments where extractive uses such as grazing, hunting, fishing, timber harvesting, and mining are allowed to continue within monument boundaries.68 The level of resource protection provided by modern monument designations is affected by exceptions that may be included in the President’s proclamation creating the monument.69 In the case of Papahānaumokuākea, however, the only extractive uses included in the presidential proclamation are sustenance fishing that is incidental to permitted activity within the monument, and limited commercial bottomfishing.70 The few active bottomfishing permits will not be renewed when they expire and all commercial fishing within the monument will be prohibited by June 15, 2011.71

B. Broad Judicial Interpretation of the Antiquities Act and Deference to the President

National monuments have often been controversial.72 They represent a withdrawal of federal lands from most commercial and recreational uses to a state of heightened protection of resources73 without any input from Congress or the American public.74 Given the power exercised by the President in the creation of monuments, the validity of that power and the designation of specific monuments have been challenged in the courts by the state governments,75 as well as by industries and interest groups that
have been barred from future use of the natural resources located within the newly designated monuments.76 Challenges to the Antiquities Act and to Presidential invocation of the Act are relatively few, however, given that the Act was created in 1906. In the limited judicial interpretation that does exist,77 deference to executive authority under the Act and broad interpretation of the Act dominate the opinions.78

The Antiquities Act was created in 1906, and it is simplistic in many ways,79 which can be difficult to apply to a complex modern world. The Antiquities Act does not restrict the size of monuments to a specific acreage,80 so many large monument designations have been challenged in court based on the executive power exercised under the Act and the vast nature of the withdrawals. These challenges began in 192081 and have continued through 2006, with the Tenth Circuit Court of Appeals dismissing on appeal a challenge to the 1996 creation of Grand Staircase Escalante National Monument in Utah.82 However, the Supreme Court and the lower courts have yet to find the designation of a national monument to be invalid.83

Some of these challenges prompted Congressional reactions which limit the future use of the Antiquities Act in specific states.84 In general, however, executive authority pursuant to the Antiquities Act has received great deference from the courts and the limits of that authority have been interpreted broadly.85 Interestingly, the courts have even interpreted monument designations to be exempt from the National Environmental Policy Act,86 which requires all federal agencies to assess the potential impacts of any proposed actions “significantly affecting the quality of the human environment.”87

Much of the judicial interpretation available for the Antiquities Act addresses the validity of a monument’s creation.88 This is often the stage where many commercial
interest groups and municipal governments have the greatest interest and object to the withdrawal of large areas of land by the federal government.\textsuperscript{89} Interpretation of the Act is scarcer, however, once the monument is in place and resources within it must be protected using the Act.\textsuperscript{90}

Enforcement of the Act’s protection has been challenged in court and the language of the Act was found to be unconstitutionally vague.\textsuperscript{91} These challenges to enforcing artifact protection under the Antiquities Act and the difficulty of bringing successful criminal cases prompted Congress to pass the Archaeological Resources Protection Act of 1979 (“ARPA”).\textsuperscript{92} ARPA provided the necessary detail for protecting objects of antiquity and provided the use of civil penalties, in addition to adequate criminal penalties for enforcing monument protection.\textsuperscript{93} Unlike criminal prosecutions, imposition of civil penalties requires a lower level of proof and can be conducted outside of a court through administrative proceedings.\textsuperscript{94}

IV. MANY CHALLENGES LIE AHEAD IN PROTECTING THE NORTHWESTERN HAWAIIAN ISLANDS WITH THE ANTIQUITIES ACT

Although Papahānaumokuākea National Monument protects cultural and archeological resources, the vast majority of the monument protects natural and biological resources.\textsuperscript{95} These resources fit within the protection of the Antiquities Act as “objects of historic or scientific interest,”\textsuperscript{96} but may create challenges to management and enforcement using the tools available through the Antiquities Act and other existing applicable statutes.

A. Antiquities Act Jurisdiction in the Ocean

Papahānaumokuākea Marine National Monument stretches out into the deep ocean for approximately fifty nautical miles on either side of its islands, atolls and shoals.\textsuperscript{97} The
The United Nations Convention on the Law of the Sea (UNCLOS III), was adopted in 1982, and although the United States was not a party to this treaty, many of its provisions have become accepted as customary international law. UNCLOS III recognized a zone called the “territorial sea,” which extended twelve nautical miles from the coast of a nation, where that nation can “claim full ownership and sovereignty.” A zone called the “contiguous zone” extends twenty-four nautical miles from the coast of a nation, where that nation can “impose regulations to protect the territorial sea and to enforce customs, fiscal, and sanitary laws.” The exclusive economic zone generally extends 200 nautical miles from the coast of a nation, where that nation “has the right to explore, exploit, conserve, and manage marine resources.”

Brad Barr, Senior Policy Advisor for the Office of the Director of NOAA’s National Marine Sanctuary Program, and Katrina Van Dine, an expert in marine science and policy, have pointed out in a recent joint essay that “the full applicability of the Antiquities Act authority remains unresolved for at least the areas beyond territorial waters.” Their analysis is based on the Antiquities Act language authorizes the President to designate as a monument, objects of interest that are “situated upon lands owned or controlled by the Government of the United States.” The authors suggest that the language “owned or controlled by the Government of the United States” may only apply to the territorial zone, where a coastal nation can “claim full ownership and sovereignty,” according to modern international and ocean law. The authority of the Antiquities Act as applied to waters beyond the territorial sea has not yet been tested. It
suggests, however, a possible threat to Papahānaumokuākea’s intended protections. If monument authority only extends twelve nautical miles offshore from the emergent lands in the monument, instead of the designated fifty nautical miles,\textsuperscript{106} the outermost ring of Papahānaumokuākea (thirty-eight nautical miles wide) may not legally benefit from monument protection and enforcement.

**B. Patchwork of Preexisting Protections in Papahānaumokuākea National Monument**

Monument designation does not replace preexisting land reservations or protections that a natural area may have received prior to becoming a monument. In the case of Papahānaumokuākea, areas within the monument had been placed under various types of federal or state protection beginning in 1909.\textsuperscript{107} All of those protections, with their own purposes, prohibitions, and tools for enforcement, remain intact and functional under the larger overlay of monument protection.\textsuperscript{108}

Preexisting federal protections include the Hawaiian Islands National Wildlife Refuge, Midway Atoll National Wildlife Refuge, Battle of Midway National Memorial, and the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.\textsuperscript{109} The Hawaiian Islands National Wildlife Refuge was created in 1909 for the purpose of protecting large seabird colonies and marine life from commercial exploitation\textsuperscript{110} and is managed by the U.S. Fish and Wildlife Service.\textsuperscript{111} It includes eight islands and atolls: Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisianski, and, Pearl and Hermes Atoll.\textsuperscript{112} The refuge also protects the coral reefs surrounding most of the islands and atolls to the depth of ten fathoms (twenty fathoms around Necker Island).\textsuperscript{113} No public or recreational use is allowed in the Hawaiian Islands National Wildlife Refuge.\textsuperscript{114}
Refuge staff, scientific researchers, and natural history film crews are the only individuals who have been officially allowed to enter the refuge.

Pursuant to the National Wildlife Refuge System Administration Act, it is unlawful for any unauthorized person to “take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any [national wildlife refuge]; or enter, use, or otherwise occupy any [national wildlife refuge] for any purpose.”115 The U.S. Fish and Wildlife Service is capable of enforcing the refuge protections with criminal penalties and imprisonment, but not with civil or administrative penalties.116

Midway Atoll National Wildlife Refuge was established in 1988 to allow the U.S. Fish and Wildlife Service “to assist the U.S. Navy in managing the atoll's unique wildlife and resources.”117 In 1996, management of Midway Atoll was transferred to the U.S. Fish and Wildlife Service.118 The refuge is home to “the largest colony of Laysan albatross in the world and the second largest colony of black-footed albatross.”119 At one point as many as 5,000 people also lived on Midway, however, the current population is down to approximately thirty people.120 From 1995 to 2002, the U.S. Fish and Wildlife Service conducted a regularly scheduled visitor program on Midway, and even after 2002, visitors were able to visit the refuge by sailboat, cruise ship, or for commemorative events for the Battle of Midway.121

Midway Atoll National Refuge is a part of the National Wildlife Refuge System and is subject to the same prohibitions of the National Wildlife Refuge System Administration Act discussed above for the Hawaiian Islands National Wildlife Refuge.122
Enforcement of the refuge protections and prohibitions is also limited to criminal, rather than civil penalties.\textsuperscript{123}

Secretary of Interior, Bruce Babbitt, designated the Battle of Midway National Memorial on September 13, 2000, “to commemorate the pivotal World War II Battle of Midway,”\textsuperscript{124} and to ensure that “the heroic courage and sacrifice of those who fought against overwhelming odds to win an incredible victory will never be forgotten.”\textsuperscript{125} The Battle took place from June 4 through June 6, 1942 and is what many consider to be a turning point in World War II’s War of the Pacific.\textsuperscript{126} Battle of Midway was the first national memorial to be designated on a National Wildlife Refuge.\textsuperscript{127} It is managed by U.S. Fish and Wildlife Service to “provide activities that honor and interpret the World War II history at Midway Atoll,” while still being compatible with the purpose and goals of the National Wildlife Refuge.\textsuperscript{128}

The memorial covers all of the lands and waters that are also included within the boundaries of the Midway Atoll National Wildlife Refuge, and further authority for the U.S. Fish and Wildlife Service’s management of the memorial is provided by the Archaeological Resources Protection Act, 16 U.S.C. § 470aa-11 (2000),\textsuperscript{129} the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 (2000),\textsuperscript{130} the National Historic Preservation Act, 16 U.S.C. § 470 (2000),\textsuperscript{131} and the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (2000).\textsuperscript{132} Under these statutes, the U.S. Fish and Wildlife Service is capable of protecting archeological resources of the memorial with criminal as well as civil penalties, but is only capable of enforcing the protections of the wildlife refuge with criminal penalties.\textsuperscript{133}
The final federal protection established in the Northwestern Hawaiian Islands, prior to the monument designation, was the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.\textsuperscript{134} The reserve was created on December 7, 2000 by President Clinton for the principal purpose of ensuring “the comprehensive, strong, and lasting protection of the coral reef ecosystem and related marine resources and species (resources) of the Northwestern Hawaiian Islands.”\textsuperscript{135} The reserve included “submerged lands and waters of the Northwestern Hawaiian Islands, extending approximately 1,200 nautical miles (nm) long and 100 nm wide.”\textsuperscript{136} The reserve was created adjacent to the State of Hawai`i and the Midway Atoll National Wildlife Refuges, and was an overlay on the Hawaiian Islands National Wildlife Refuge “to the extent that it extend[ed] beyond the seaward boundaries of the State of Hawaii.”\textsuperscript{137}

At the time the reserve was created, it was the largest conservation area ever established in the United States.\textsuperscript{138} The Secretary of Commerce was charged with the sole responsibility of managing the reserve.\textsuperscript{139} President Clinton also directed, however, that the Secretaries of Commerce and the Interior work cooperatively with the State of Hawai`i and in consultation with the Western Pacific Fishery Management Council to develop a coordinated management plan for the coral reef ecosystem of the Northwestern Hawaiian Islands.\textsuperscript{140}

The executive order establishing the reserve prevented commercial fishing in designated “Reserve Preservation Areas,” prohibited any increase in the number of commercial fishing permits issued for use within the reserve, capped the annual level of fish taken from the reserve, and prevented any new types of fishing permits from be issued.\textsuperscript{141} Recreational fishing levels were also capped throughout the reserve, preventing
any increases in fishing levels, effort, species targeted, or changes to allowable gear
types.142 The Secretary of Commerce was allowed to further restrict fishing in the reserve
after consultation with the Secretary of Interior and the Governor of Hawai`i, public
review and comment, and consideration of recommendations of the Reserve Council143
and Western Pacific Regional Fishery Management Council.144

Other activities were prohibited in the reserve entirely, including oil, gas, or
mineral development, anchoring of vessels on living or dead coral, altering the seabed,
discharging or depositing anything into or near the reserve, or removing or damaging any
living or nonliving reserve resources, with a exceptions for Native Hawaiian
noncommercial subsistence, cultural or religious uses.145 The Secretary of Commerce
was empowered to enforce reserve protections with civil and criminal penalties in
coordination with the United States Coast Guard and other relevant agencies.146 It is
unclear, however, whether reserve protections and civil penalties still remain active, now
that the sanctuary designation process for the reserve has been abandoned.147

In addition to preexisting federal protections, the State of Hawai`i has created state
protections within the Northwestern Hawaiian Islands prior to monument designation.
The State of Hawai`i holds the State submerged and ceded lands of the Northwestern
Hawaiian Islands in trust.148 These lands include submerged lands and water surrounding
each of the Northwestern Hawaiian Islands out to three miles from their shores.149 Most
of the coral reef habitat in the Northwestern Hawaiian Islands is under State
jurisdiction.150

On September 29, 2005, Governor Linda Lingle and Peter Young, Board of Land
and Natural Resources Chair, signed regulations establishing all State of Hawai`i
waters in the Northwestern Hawaiian Islands as a marine refuge, with limited access and no extraction allowed. This represented the State of Hawai`i’s largest marine refuge. These regulations were the result of two rounds of statewide public hearings held over three-and-a-half years, which resulted in over 25,000 public comments. The regulations prohibit commercial and recreational fishing, and require an entry permit for all other activities. Native Hawaiian traditional and customary practices were still allowed in the refuge under the new regulations. The Department of Land and Natural Resources is responsible for managing the state marine refuge and the Board of Land and Natural Resources is authorized to issue permits for entry into the refuge. The Department of Land and Natural Resources and the Board of Land and Natural Resources can enforce the prohibitions and permits of the refuge with criminal penalties, imprisonment, and administrative fines.

Kure Atoll or Moku Pāpapa is located at the extreme northwest end of the Northwestern Hawaiian Islands and is the northernmost coral atoll in the world. In 1992, the United States Coast Guard closed a navigation station on Kure Atoll, and since the closure, Kure Atoll has been managed as part of the State of Hawai`i Seabird Sanctuary by the Division of Forestry and Wildlife within the Hawai`i Department of Land and Natural Resources.

Hawai`i law prohibits the removal, disturbance, injury, killing, or possession of plants or wildlife within all wildlife sanctuaries, including the seabird sanctuary at Kure Atoll. Possession of weapons, firearms, and any devices designed to kill wildlife are also prohibited. Camping, entering surface waters, introducing plants or animals, starting fires, damaging signs, dumping waste, and operating vehicles in the wildlife...
sanctuary is also prohibited, with the exception of vehicles and aircraft used for official Coastal Guard and Navy duties.\textsuperscript{165} Entry into the wildlife sanctuary is prohibited without authorization by the Board of Land and Natural Resources.\textsuperscript{166} The Department of Land and Natural Resources is capable of enforcing its protections with criminal penalties, imprisonment, and civil actions to recover administrative fines and costs.\textsuperscript{167}

All of the preexisting federal and state protections within Papahānaumokuākea cover different geographic areas of the monument and carry with them different enforcement tools. Some provide civil and administrative penalties to supplement the more simplified criminal enforcement scheme of the Antiquities Act.\textsuperscript{168} Unfortunately, however, any available civil or administrative penalties only work within the bounds of their preexisting protection area. They do not apply to the entire monument as it is designated today.

This patchwork of protections and enforcement tools will likely create confusion, particularly among marine management and enforcement agencies, and inhibit effective enforcement of the protections provided by the monument designation. The trustees are expected to approach the management of the entire 139,793-square-mile expanse of Papahānaumokuākea with a comprehensive and consistent approach.\textsuperscript{169} Assuming a management plan will eventually be in place to weave together the interests and purposes of all agencies and protected areas, successful enforcement of that plan will require consistency. Enforcement tools beyond criminal penalties and imprisonment must be available for the entire monument for successful enforcement to be possible.

C. Weak Protections for “Objects” That Are Not Artifacts
Environmental protection statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601-9628 (2000),\textsuperscript{170} the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1274 (2000),\textsuperscript{171} the Marine Mammal Protection Act of 1972 (“MMPA”), 16 U.S.C. §§ 1361-1421h (2000)\textsuperscript{172} and the Endangered Species Act of 1973 (“ESA”), 16 U.S.C. §§ 1531-1544 (2000),\textsuperscript{173} will protect the destruction of natural resources within the entire monument from threats such as pollution or the taking of endangered species. For the harvesting of resources that are not considered endangered species, however, protection under the Antiquities Act is limited to criminal prosecution.\textsuperscript{174}

If the objects of antiquity are the “material remains of human life or activities,” they may be protected by criminal as well as civil penalties under the Archaeological Resources Protection Act.\textsuperscript{175} Many archaeological sites and cultural artifacts have been documented on the islands of Nihoa and Mokumanamana (Necker) in the Northwestern Hawaiian Islands,\textsuperscript{176} which would be eligible for protection under the Archaeological Resources Protection Act. On the whole, however, the objects of interest that lead to the designation of Papahānaumokuākea as a monument are mostly natural and biological objects of interest.\textsuperscript{177} As such, they will not likely be protected under the Archaeological Resources Protection Act’s definition of “archeological resources,”\textsuperscript{178} and would not benefit from the use of civil penalties when enforcing the monument’s protections.

Past enforcement of criminal penalties under the Antiquities Act has been challenged as unconstitutionally vague for not giving potential violators notice in lay terms of what constitutes an “object of antiquity.”\textsuperscript{179} The Archaeological Resources Protection Act was created to address the vageness of the Antiquities Act, which was
ultimately allowing objects of antiquity to be removed from national monuments and sold commercially with little risk of penalty. The Archaeological Resources Protection Act created new civil penalties that allowed punishment for violation of monument protections that did not rise to the level of a criminal act and more discretion was given to administrative agencies than would be available in a court proceeding.

Unfortunately for the natural resources that are “objects of scientific interest” protected in Papahānaumokuākea, the Archaeological Resources Protection Act only applies to monument resources that are the “material remains of human life or activities.” This limitation of the Archaeological Resources Protection Act’s focus would not extend the act’s protections to the living resources in Papahānaumokuākea, such as valuable fish stocks, precious coral, non-endangered aquarium fish, and other species not protected by other laws, such as the Marine Mammal Protection Act of 1972 (“MMPA”) or the ESA. As a result, the civil penalty enforcement would not extend to living resources, either.

As discussed above, the underlying Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve was created pursuant to the National Marine Sanctuaries Act, which provides civil penalties for the enforcement of reserve protections. It is unclear however, whether the power of the National Marine Sanctuaries Act is still in effect in the monument, since monument designation terminated the marine sanctuary designation process. The reserve was intended as an intermediate step to sanctuary designation, and it is not apparent what power the National Marine Sanctuaries Act has in a protected area that is less than a congressionally approved sanctuary.
The lack of civil penalties is a limitation on practical enforcement, and will make protection of monument resources from illegal harvesting more difficult. Criminal prosecutions require “proof beyond a reasonable doubt” that a prohibited act has occurred.\textsuperscript{188} In the enforcement of civil penalties, the enforcement agency must only prove that it is more likely than not that a prohibited act occurred.\textsuperscript{189} Proving beyond a reasonable doubt that any act has been committed will be nearly impossible in an area that is 1,380 miles from Honolulu at its furthest point,\textsuperscript{190} and approximately 1,200 nautical miles long and 100 nautical miles wide.\textsuperscript{191}

These challenges to enforcement and evidence collection could prove particularly damaging to the precious corals and commercially valuable fish located within the monument.\textsuperscript{192} Poachers may take the risk of illegally collecting and fishing if the chances of a successful criminal prosecution are slim. For example, the Coast Guard has already found a U.S.-flagged longline fishing vessel poaching four miles inside the monument boundaries near Necker Island.\textsuperscript{193} It is unclear what action NOAA’s Office of Law Enforcement will take against the violator, but the criminal penalties authorized for enforcement pursuant to the Antiquities Act are a maximum of $500 or ninety days in prison.\textsuperscript{194} For valuable resources, such as precious coral, which can sell for as much as $5,000 per pound, a poacher may even decide to take the risk of a successful prosecution.\textsuperscript{195} As discussed above, there may also be an issue of whether monument protections would be enforceable four miles inside the monument boundary, as it would be beyond the twelve-mile boundary of the territorial sea.\textsuperscript{196}

D. Challenges Created by the Monument’s Management Structure
Another potential challenge for the monument may arise from its management structure. Papahānaumokuākea is the first monument to designate an agency of the Department of Commerce as a management authority. Although this is not the first monument to be designated for management by an agency other than the National Park Service, some critics believe that the National Park Service is the only agency that has been granted legal authority to manage monuments. One observer noted that in the National Park Service Organic Act, “Congress delegated to the NPS express authority to manage ‘the Federal areas known as national parks, monuments, and reservations hereinafter specified.’” President Clinton’s designation of the Bureau of Land Management as management authority for eighteen of his nineteen monuments was seen by some as an “impermissible reorganization of government.” To date none of these designations of authority have been challenged in court and twenty-three national monuments continue to be managed by federal agencies other than the National Park Service.

Another possible challenge for the Northwestern Hawaiian Islands Monument is that the Department of Commerce is not one of the permitting authorities identified in the Antiquities Act. The Act identifies the Department of Agriculture, Department of the Army, and Department of the Interior as agencies authorized to issue permits for collecting monument resources. The Department of Commerce, which houses NOAA, is not included in that short list. In Papahānaumokuākea, “permits are required for research, education, conservation and management, native Hawaiian practices and non-extractive special ocean uses.” NOAA may encounter legal problems if it must issue permits for the collection of specimens for research or other permitted activities within the
waters of the monument, where it has been given management jurisdiction, but no permit-
issuing authority. This issue may or may not be addressed by the unified permitting
system that is currently being designed by the NOAA, U.S. Fish & Wildlife Service, and
Hawai`i’s Department of Land and Natural Resources.207

The unified permitting system may also prove to be a challenge, as it will issue
permits for all activities within all areas of the monument,208 and all three trustees will be
involved in creating and administering the permitting system.209 All requirements of the
unified permitting system are still in the process of being defined by the trustees.210

Public interest groups, including environmental, fishing, and Native Hawaiian
advocacy groups, have been concerned that during the development of the permitting
process opportunities for public participation have been unavailable.211 Stephanie Fried
of Environmental Defense has said, “The Northwestern Hawaiian Islands permitting
process has been shrouded in secrecy and backroom deals between federal authorities for
decades.”212 Cha Smith of KAHEA, the Hawaiian Environmental Alliance, contrasts the
agencies’ approach after monument designation with the approach used during the
sanctuary designation process, “The public has been squeezed out of the permitting
process and has had no chance to comment on a process that had high public involvement
for the last six years.”213

In response to these concerns, Peter Young, Chair of Hawai`i’s Department of
Land and Natural Resources, proposed to NOAA and the U.S. Fish & Wildlife Service a
45-day public review process for all permits to conduct activities within
Papahānaumokuākea.214 Public interest groups have celebrated Young’s proposal.215
This would be a significant shift for the two federal trustees which have not provided an
opportunity for public input on Northwestern Hawaiian Islands permits in the past.\textsuperscript{216} One observer found that 380 permits were issued to 340 people for activities within the monument during 2006, and only one of those permits was made public.\textsuperscript{217} Public review and comment of permit applications is required by the State’s refuge regulations,\textsuperscript{218} but it is unclear whether public review and participation will become a part of the final unified permitting system requirements for the entire monument. If public review is not included, it will be very difficult for the State to fulfill its obligations under state refuge regulations when unified monument permits will be issued without public review.

Other challenges to management and enforcement in Papahānaumokuākea are created by the sheer size and remoteness of the area. There will undoubtedly be physical limitations and budgetary challenges to monitoring nearly 140,000 square miles of marine waters, shoreline, emerged, and submerged lands\textsuperscript{219} that are separated from the nearest human population by 800 miles of ocean.\textsuperscript{220}

Tommy Friel, Special Agent with NOAA’s Office for Law Enforcement, says remoteness and the large size of the monument will be a challenge to enforcement.\textsuperscript{221} Enforcement officers will need to utilize new technologies, consider using existing technologies for different uses, and share the cost of satellites, for example, with other federal agencies.\textsuperscript{222} Significantly, in a recent report by NOAA’s Coral Reef Conservation Program, managers and practitioners from 126 marine protected areas said insufficient enforcement, funding and resources were impeding the effective management of their marine protected areas.\textsuperscript{223} They also identified monitoring, lack of interagency coordination, and insufficient communication between researchers and managers as challenges.\textsuperscript{224} Real protection of Papahānaumokuākea’s valuable and fragile resources
will require investment in remote monitoring technology, true cooperation among the trustees, and well-funded enforcement that is capable of following through on violations. The legal protections that are created by monument status will only be useful if they can be enforced.

V. WHAT ARE THE STRENGTHS AND WEAKNESSES OF PROTECTING NATURAL RESOURCES WITH THE ANTIQUITIES ACT?

A. Strengths of the Antiquities Act in the Northwestern Hawaiian Islands

The Antiquities Act is a swift means of immediately protecting significant areas of historical or scientific importance. Designation as a national monument can protect an area that is threatened by damage or destruction from development pressure, neglect, or Congressional inaction. These advantages benefit natural as well as archaeological resources. Additionally, the Antiquities Act has the sole purpose of preserving the objects identified as significant. There is no dual mandate, as with other preservation models, that would require a certain level of use for the recreation or enjoyment of the public. The Act does not require that the natural resources or “objects of historic or scientific interest” be managed for sustainable use of the resources or optimum yield of commercial extraction. All extractive activities can be prohibited within a monument, subject only to valid existing rights at the time of designation. There is no obligation to continue granting future rights to extract monument resources, if the President does not choose to do so.

For marine resources particularly, the Antiquities Act can be much more protective of living resources, such as commercially valuable fish. Unlike the National Marine Sanctuaries Act, the Antiquities Act does not require the managing authority to maintain resources at a level that can support their sustainable use by commercial
fishing.\textsuperscript{232} For Papahānaumokuākea, commercial fishing will effectively disappear in four years when the eight existing commercial bottomfishing permits expire.\textsuperscript{233} This would most likely not have been the case if the area had been designated a national marine sanctuary.

Papahanaumokuakea creates a marine protected area in the Northwestern Hawaiian Islands\textsuperscript{234} and will eventually represent the strictest form of protection for marine areas once all fishing (including the bottomfishing) is prohibited.\textsuperscript{235} Many scientists view this type of marine protected area as essential for the recovery of the fish stocks and ecosystems of the ocean.\textsuperscript{236} Marine protected areas that prohibit all consumptive uses such as fishing may enhance fisheries by allowing fish to grow to maturity and increase in overall abundance.\textsuperscript{237} According to the National Marine Protected Areas Center, “this leads to increased reproductive potential inside reserves, and the subsequent increased production of eggs and larvae, which can be transported by currents of the reserves to replenish nearby fishing grounds.”\textsuperscript{238}

National monuments are also fairly permanent forms of federal lands protection. Significantly, future presidents cannot abolish national monuments.\textsuperscript{239} The President who creates the monument cannot even abolish it once it has been created.\textsuperscript{240} Congress can abolish or change the protective status of monuments, but since 1906, only eleven monuments have been abolished.\textsuperscript{241} If Congress decided to turn Papahānaumokuākea into a national park, the resources of the Northwestern Hawaiian Islands would still be protected, although they would be managed for multiple uses and would likely receive increased pressure from recreational activities.
One final benefit of the Antiquities Act is that it allows the President to reserve land and water immediately, instead of leaving the reservation to an administrative agency. The National Marine Sanctuaries Act allows NOAA, an administrative agency, to identify areas that will be reserved for protection, a practice that has been criticized as an inappropriate delegation of power by Congress. As noted by one observer, setting aside land and water for protection is a political act that is inappropriate for an administrative agency because the agency may find it difficult to withstand political pressures to alter or delay reservations.

B. Weaknesses of the Antiquities Act in the Northwestern Hawaiian Islands

Although the Antiquities Act offers some advantages for protecting natural resources, the Act is not ideal for this purpose. The major weakness of using the Act in the Northwestern Hawaiian Islands, is that it may not apply to waters beyond twelve miles from shore. Another significant weakness of the Antiquities Act is the limitation of methods for enforcing the Act’s protections, regardless of how far out to sea its authority extends. As discussed above, under the current structure of the Antiquities Act, civil penalties are not available for enforcing monument prohibitions against collecting natural resources that are not already protected by the ESA and other statutes. This weakness suggests that the advantages of the monument protections mentioned above are only advantages if the monuments regulations are obeyed without the need to enforce them. If enforcement is required to realize the true protection of the monument, the Antiquities Act may not be of much use to the natural resources of the Northwestern Hawaiian Islands.
Another disadvantage of using the Antiquities Act to protect the natural resources of Papahānaumokuākea, from the point of view of the public, is the reduced opportunity for public participation in the creation of the management plan and permitting system.\textsuperscript{247} Unlike the National Marine Sanctuaries Act, the Antiquities Act does not require a process of public input and Congressional approval.\textsuperscript{248} This lack of transparency can translate into less support from the public, less buy-in to the regulations and permitting systems that are put into place, and less support from Congress when funding decisions are made for the effective management and protection of the monument.\textsuperscript{249}

On the whole, there are more strengths than weaknesses to using the Antiquities Act to protect the Northwestern Hawaiian Islands, but the weaknesses, particularly the uncertainty of its legal use beyond the territorial sea and its lack of civil penalties, are significant enough that they must be addressed for true protection of Papahānaumokuākea National Monument to be possible.

VI. WHAT IS THE BEST WAY TO STRENGTHEN NATURAL RESOURCE PROTECTION IN PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT?

The Antiquities Act alone is not enough to protect the natural resources of Papahānaumokuākea. Management and enforcement authority must be available beyond the territorial seas of monument waters, and civil penalties must be available to effectively enforce that authority consistently across the entire monument. The necessary protections could be provided by amending the Antiquities Act, enacting an entirely new statute, or amending the Archaeological Resources Protection Act.

A. Amend the Antiquities Act
There has been more than one attempt to amend the Antiquities Act in the past. Two acts passed by Congress have curtailed the future use of the Antiquities Act within specific states. Federal statute, 16 U.S.C. § 431a, was passed by Congress in response to the creation of Jackson Hole National Monument in Wyoming and a failed attempt to challenge the validity of the monument in federal court. The statute prevents the extension or establishment of future monuments in Wyoming “except by express authorization of the Congress.” A similar act was passed in Alaska in response to Anaconda Copper. The Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3209 (1980), rescinded some of the reservations and withdrawals that had been made by President Carter in Alaska. Both of these acts limit the use of the Antiquities Act, but do not actually alter the act itself.

Several attempts to amend the Antiquities Act arose after President Clinton’s revival of the Antiquities Act. These bills would have imposed specific size and public notice constraints upon the president when designating monuments under the Antiquities Act.

There has been much controversy surrounding the Antiquities Act since its creation in 1906. The use of the act by different presidential administrations has been challenged in federal courts and has been criticized by Congress. Despite these official and unofficial challenges, the Antiquities Act has never been amended. Considering this long history of acceptance and approval of the Act in its original form, it is unlikely that an attempt to amend the Antiquities Act itself would be successful. It is particularly unlikely that Congress would adapt an unaltered statute, created over 100 years ago to protect the field of archaeology, for the purpose of
accommodating the protection of coral, fish, and other living resources. Even if amendment of the Act is unlikely, the Act’s long history of broad interpretation and deference to the president may prove helpful if its application beyond the territorial seas is ever interpreted by the courts.

B. Propose a New Statute

There have also been attempts in the past to increase the protection of the Antiquities Act without altering the act itself. Congress passed the Archaeological Resources Protection Act in an attempt to improve the enforcement of monument regulations against looters. The Act was challenged in court for being unconstitutionally vague, because some of the protected items within the monument were only a few years old, but still considered to be “objects of antiquity.” The Archaeological Resources Protection Act was passed in an attempt to clarify the regulations of the monument, provide more appropriate criminal penalties, make civil penalties available, increase administrative discretion in enforcing monument protections, and increase public awareness about the value of protecting archeological resources. The detail, clarity, and flexibility provided by the Archaeological Resources Protection Act strengthened the managing agency’s ability to fulfill the envisioned protection of national monuments.

The Archaeological Resources Protection Act does not protect the natural resources of monuments, but it provides a model for the kind of supplemental statute that could be created to protect those natural resources. A similar model to protect the natural and biological resources of monuments like Papahānaumokuākea could provide the detail needed for successful criminal prosecutions and the civil penalties needed for
enforcement flexibility. Civil penalties would allow enforcement of monument regulations through administrative proceedings.265 Administrative proceedings would be faster, require fewer resources than full court proceedings, and allow agencies to adapt to the enforcement challenges created by the remote location and immense size of Papahānaumokuākea.

The new statute could also include NOAA as a possible permit-issuing authority for monuments that contain marine resources. This would leave the original Antiquities Act in place, while providing the necessary authority for issuing permits that may arise if any future marine monuments are created without a multi-agency management structure and sole authority is assigned to NOAA. Similarly, the new statute could extend existing monument designation authority to also include objects of historic or scientific interest “situated within the waters of the United States’ exclusive economic zone.”266

C. Amend the Archaeological Resources Protection Act

Another way to address the weaknesses of the Antiquities Act as it is applied to Papahānaumokuākea is to amend the Archaeological Resources Protection Act. As with the new statute proposition, the Archaeological Resources Protection Act would also need to incorporate language extending the reach of the Antiquities Act beyond the territorial seas to the United States’ exclusive economic zone.267 Additionally, the Archaeological Resources Protection Act’s term “archeological resource”268 could be replaced with the term “resource.” The previous definition of “archeological resource” could be amended to read:

The term "resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act or any object of historic or scientific interest protected by Presidential monument
Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age. Objects of historic or scientific interest shall include, but not be limited to living and nonliving: wildlife, plants, coral, minerals or any portion, piece, or part of any of the foregoing objects.  

Amending the Archaeological Resources Protection Act’s definition of “archeological resource” would allow the civil penalties and specificity of the act’s enforcement regime to be applied uniformly to all of Papahānaumokuākea. The Archaeological Resources Protection Act’s purpose is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

It may be argued that altering the definition of “archeological resource” to protect natural resources would not fall within the original purpose of the Archaeological Resources Protection Act. The Archaeological Resources Protection Act was created, however, to specifically address the theft and damage of monument resources and to enhance the ability of managing agencies to successfully enforce monument protections against violators. In this sense, the spirit and the purpose of the Archaeological Resources Protection Act would be retained with an amendment that would provide broader enforcement of national monument protections.
D. Transparency and Public Participation Are Vital to Success

A management plan created without management authority for the entire 100-nautical-mile width of the monument or without the use of civil penalties will be incomplete and essentially ineffective. Potential challenges to the enforcement of that plan may also increase if public participation is not available during the creation of the management plan and permitting process.

Public input during the creation of the management plan and permitting system for a national monument is not required, but it is also not prohibited. As stated earlier, support from the public as the management plan and permitting system is being created will only increase the ultimate success of monument protections. The public will have the opportunity to support the management scheme before it is put into place, and the risk of violations could be reduced. Public support of the management and enforcement of the monument can also increase the chance of receiving adequate funding for Papahānaumokuākea from Congress.

IV. CONCLUSION

Undeniably, the creation of Papahānaumokuākea is a major victory for conservation in the United States, the protection of marine resources, and the preservation of priceless biological and cultural resources. The public and official acknowledgement of the importance of the Northwestern Hawaiian Islands through monument designation alone is a significant statement about what the Bush administration considers valuable. For that statement to be more than an empty promise, however, Papahānaumokuākea needs more than the Antiquities Act to protect its natural resources from illegal activities, such as poaching, fishing, and collecting.
As it is written, the Antiquities Act may not be capable of protecting monument resources beyond the twelve-mile territorial sea boundary. It is also incapable of providing adequate enforcement tools for the protection of monument resources. Although amending the Antiquities Act or the Archaeological Resources Protection Act may be possible, a new statute, modeled after the Archaeological Resources Protection Act, would be the most effective choice to provide consistent and complete legal authority for all of Papahānaumokuākea’s resources.

First Lady Laura Bush stated during her announcement of the monument’s Hawaiian name that “[m]ost important, the name reminds us of our responsibility to mālama ka pae ‘āina – care for the archipelago.” Monument designation and the Antiquities Act were the first steps of fulfilling that responsibility. Enacting a new statute to strengthen the use of the Antiquities Act in the Northwestern Hawaiian Islands will ensure that fulfilling that responsibility can be done.


2 KIKILOI, supra note 1 (The name Papahanaumokuakea . . . comes from an ancient Hawaiian tradition concerning the genealogy and formation of the Hawaiian islands.”).

3 Id.


6 Id.

7 KIKILOI, supra note 1.


9 Id.

10 Jan TenBruggencate, Urgent Ban to Protect 7 Species, THE HONOLULU ADVERTISER, March 20, 2007, at B1 [hereinafter TenBruggencate, Ban](“An emergency five-month suspension
of all bottomfishing in the main Hawaiian Islands resulted from new research that seven species of bottomfish are being overfished and that immediate steps are needed to protect them.

11 Id. (“In 2007, the closed season is to begin May 1 and will last through September 30. It will apply to waters in both federal and state jurisdictions . . . .”).

12 DIV. OF AQUATIC RES., STATE OF HAW. DEP’T OF LAND & NATURAL RES., HAWAI’I’S BOTTOMFISH, available at http://hawaii.gov/dlnr/dar/bottomfish/index.htm (“NMFS scientists have been reporting that onaga and ehu in the Main Hawaiian Islands have been overfished since at least 1989.”).

13 TenBruggencate, Ban, supra note 10 (“The closure will mean the only Hawaiian bottomfish on local markets during those months will be from the Northwestern Hawaiian Islands, which federal regulators say is not being overfished.”).

14 Id. (“The closure will mean the only Hawaiian bottomfish on local markets during those months will be from the Northwestern Hawaiian Islands, which federal regulators say is not being overfished.”). Brooks Takenaka of United Fishing Agency, a Honolulu-based fish auction, said “some fish will continue coming in from the Northwestern Hawaiian Islands until a fishing ban takes place in four years within the Papahanaumokuakea National Marine Monument.” Id.


17 NOAA MAGAZINE, supra note 5.


19 See SCOTT GODWIN, ET AL., HAWAI‘I INSTITUTE OF MARINE BIOLOGY, REDUCING POTENTIAL IMPACT OF INVASIVE MARINE SPECIES IN THE NORTHWESTERN HAWAIIAN ISLANDS MARINE NATIONAL MONUMENT 19 (2005), available at http://cramp.wcc.hawaii.edu/Downloads/TR_Godwin_et_al%20Invasives_Final%20Draft.pdf (“The Hawaiian Islands are the most isolated archipelago in the world. Located 1,600 km from the nearest islands and 4,000 km away from the closest continent, this geographic isolation has resulted in, endemic biota.”).


21 CITIZEN’S GUIDE, supra note 15, at 3.

22 TenBruggencate, Monument, supra note 15.

23 Id.

24 CITIZEN’S GUIDE, supra note 15, at 3.

25 Id., at 8.


27 CITIZEN’S GUIDE, supra note 15, at 12.


and Coral Reef Marine Reserves in Florida and Hawaii, 34 McGeorge L. Rev. 155, 245 (Winter 2003) [hereinafter Craig, Wilderness] (quoting Exec. Order No. 1019, at 1 (Feb. 3, 1909)) (“Roosevelt reserved all of the islands of the NWHI, except Midway, as the Hawaiian Islands Reservation where it was ‘unlawful for any person to hunt, trap, capture, willfully disturb, or kill any bird of any kind whatever, or take the eggs of such birds,’ except in compliance with the Department’s regulations.”).

31 Id.
32 Id.
33 Id.
34 Id.

The National Marine Sanctuaries Act contains more obstacles than spurs to action, and seems designed to ensure a slow and careful designation process rather than broadly sweeping changes . . . . The Act attempts to ensure that designated areas meet detailed criteria, are designated only after substantial input from the public, and are not designated against the wishes of Congress or the states in which portions of the sanctuaries will lie.


The most prominent federal authority for establishing MPAs is the National Marine Sanctuaries Program (NMSP) established by the National Marine Sanctuaries Act (NMSA) . . . . The NMSA authorizes the Secretary of Commerce, with presidential approval, to designate as a national marine sanctuary ‘any discrete area of the marine environment’ having ‘special national significance’ . . . . The Secretary has delegated authority to the Administrator of NOAA to implement the NMSA.


For six years, in more than 100 public hearings and in over 112,000 letters and faxes to federal and state officials, the public consistently called for 1) the strongest possible protection of our Küpuna Islands, 2) recognition of native Hawaiian traditional cultural use, and 3) a ban on all commercial activities.

39 TenBruggencate, Monument, supra note 16 (“Just yesterday morning, all were expecting a presidential announcement of support for a national marine sanctuary in the region — a process that has been under way for five years and had a year left to go.”).
40 Id. (“The historic decision to name it a monument stunned Washington bureaucrats and conservation groups alike.”).
41 Id.

President Clinton created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve and launched the proposed national marine sanctuary process. That process, under way for six years, has included public scoping meetings, as well as the production of a set of draft regulations, a draft environmental impact statement and draft management plan, all of which were to be released during the next few weeks. White House officials suggested that the work won't be lost,
since most of it has led to the monument decision, and will be employed in the operation of the monument.


43 Owen, supra note 36, at 712 (“The National Marine Sanctuaries Act (NMSA) - originally enacted as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972 - empowered the National Oceanic and Atmospheric Administration (NOAA) to set aside and develop management plans for particularly important areas of America's oceans.”).


45 Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006) (“To manage the monument, the Secretary of Commerce, in consultation with the Secretary of the Interior and the State of Hawaii, shall modify, as appropriate, the plan developed by NOAA's National Marine Sanctuary Program through the public sanctuary designation process, and will provide for public review of that plan.”); HAW. ADMIN. R. § 13-60.5-2 (“For enforcement purposes, the Northwestern Hawaiian Islands marine refuge area shall include, but is not limited to, reefs, and shoals, and their appurtenant reefs and all state waters extending three miles seaward of any coastline beginning and including Nihoa Island and Kure Atoll, but excluding Midway Atoll . . . .”).

46 Id.

47 Id.


50 Id.


53 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, 196 (2002). The Antiquities Act was drafted by archeologist Edgar Lee Hewett and received six and a half years of “revisions, reconfigurations, and lobbying.” Id. at 197.


Biasi, supra note 53, at 197 ("The Antiquities Act’s significance lies in what the Act does not regulate. The Act does not restrict the size of monument designations to specific acreages. The Act does not demand legislative oversight or public notice.”).

Sanjay Ranchod, The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act, 25 HARV. ENVTL. L. REV. 535, 553 (2001) ("National monument designations by presidential proclamation do not carry the full weight of the law and are not permanent. Congress can change the size, use, and management of a monument, or reverse a designation entirely."). It appears, based on the limited interpretation of the Antiquities Act, that “successor presidents do not have the authority to revoke existing monuments.” Biasi, supra note 53, at 241.


Ranchod, supra note 57, at 546.

Id., at 556-57 ("Clinton’s first monument designation, the Grand Staircase-Escalante National Monument . . . was the first of the ‘national landscape monument’ concept."). “Most of the landscape monuments protect natural ecosystems.” Id., at 569. “The Grand Canyon-Parashant National Monument was created, for example, to protect lands that are part of the drainage basin for the Colorado River and the Grand Canyon.” Id. The Environmental Protection Agency defines “ecosystem” as “a place having unique physical features, encompassing air, water, and land, and habitats supporting plant and animal life.” U.S. ENVTL. PROT. AGENCY, ECOSYSTEMS – HIGH SCHOOL ENVTL. CTR., http://www.epa.gov/highschool/ecosystems.htm (last visited Apr. 22, 2007).

Ranchod, supra note 57, at 585 Appendix A.

Id., at 570, 589 Appendix C. “Until Clinton’s use of the Antiquities Act, almost all national monuments had been given the protective NPS to manage, even though the BLM is the nation’s largest land manager.” Id., at 570.


Ranchod, supra note 57, at 557-60. “Pursuant to Clinton’s proclamations, landscape monument ecosystems are being managed to allow for compatible uses that were deemed unacceptable in smaller curiosity monuments and in national parks.” Id., at 571.

Id., at 573 (“Although national monument status entails increased protection for designated lands, the new landscape monuments have set a precedent that intensive extractive uses and non-tourism-related economic activities are acceptable on some monument lands.”).


Id., at 36,447.

At a minimum, all national monument lands are off limits to new mineral leasing under the express terms of the Mineral Leasing Act. Furthermore, land management agencies entrusted with management of a national monument are charged with managing the “objects” as may be necessary to fulfill the purposes of the proclamation. This usually means withdrawing the area from location under the mining laws. It also may require restrictions on grazing, rights-of-way, and other uses of the land, including recreational uses. These restrictions can be imposed in the proclamation itself, but to the extent that they involve discretionary actions, such as a decision to grant a new right of way, they might simply be handled in the course of managing the monument.

Id.

Ranchod, supra note 57, at 540 (“[T]he Antiquities Act includes no requirements for notice or public participation, and includes no processes for facilitating congressional oversight.”).


Cappaert, 426 U.S. 128; Cameron, 252 U.S. 450 (1920); Tulare County, 185 F. Supp. 2d 18.

Squillace, supra note 60, at 514 (“the legal analysis offered in the Antiquities Act cases has been sparse”).

Albert C. Lin, Clinton’s National Monuments: A Democrat’s Undemocratic Acts?, 29 Ecology L.Q. 707, 714 (2002) (“The few reported judicial challenges to monument designations, including challenges that authority under the Act is limited to the protection of archaeological sites, have been uniformly unsuccessful.”).

Squillace, supra note 60, at 476 (“Perhaps the most remarkable feature of the Antiquities Act of 1906 is its brevity. The heart of the law consists of two sentences . . . .”).

Biasi, supra note 53, at 197.

Cameron, 252 U.S. 450.

Utah Ass’n of Counties v. Bush, 455 F.3d 1094, 1096 (10th Cir. 2006) (dismissing the case for lack of standing).

Ranchod, supra note 57, at 549 (“There has never been a successful legal challenge to any use of the Antiquities Act, and the judiciary has interpreted the Act broadly.”).

In response to a federal district court’s interpretation in State of Wyoming v. Franke, 58 F. Supp 890 (D.C. Wyo. 1945), “Congress enacted a federal statute, 16 U.S.C. section 431a, providing that future national monuments cannot be established within the State of Wyoming.” Biasi, supra note 53, at 206. Similarly, an Alaska federal district court acknowledged a limit to executive authority under the Antiquities Act, but failed to identify that limit in Anaconda Copper Company v. Andrus, 1980 U.S. Dist. LEXIS 17861 (D. Alaska 1980). Id. This failure by the court prompted Congress to pass The Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3209 (1980), which essentially chopped up the monuments created in Alaska by President Carter into other nationally protected areas, such as national wilderness or national forests. Id. at 208.

Ranchod, supra note 57, at 549 (“There has never been a successful legal challenge to any use of the Antiquities Act, and the judiciary has interpreted the Act broadly.”); Roberto Iraola, Proclamations, National Monuments, and the Scope of Judicial Review Under The Antiquities Act of 1906, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 184 (2004) (“[W]hile judicial review is available, courts have limited their review to the question of whether the President has facially
exercised his discretion in accordance with the Act's standards, and in doing so, have broadly interpreted the authority of the President to designate national monuments under the Act.

86 Ranchod, supra note 57, at 551 (“The district court held [in Alaska v. Carter] that the president is not subject to the environmental impact statement requirement of NEPA when exercising his authority to proclaim national monuments under the Act, because the president is not a ‘federal agency’ under NEPA.”).

87 Alaska, 462 F. Supp. at 1158-59 (quoting 42 U.S.C. § 4332(2)(C) (1976)).

88 See Iraola, supra note 85, at 160-161 (“Throughout its nearly one hundred year history, the Antiquities Act has come under criticism on several fronts . . . [f]or example . . . the designation of large monuments[,] . . . us[ing] [it] . . . for political reasons[,] and[ ] . . . argu[ments] that the Act represents an unconstitutionally broad delegation of Congress’s power under the Property Clause.”).


90 Squillace, supra note 60, at 514 (“Among the quandaries posed by the terse language in the Antiquities Act is the uncertainty over the management and use restrictions that apply to national monuments.”).

91 Uniform Rules and Regulations for the Protection and Conservation of Archaeological Resources Located on Public and Indian Lands, 45 Fed. Reg. 77755 (proposed Nov. 24, 1980) (to be codified at 36 C.F.R. pt. 1215) [hereinafter Uniform Rules] (“In the past, the administration of the American Antiquities Act of 1906 (Public Law 59-209; 16 U.S.C. §§ 431-433) was subjected to legal challenges in the courts. The challenges were based on the statute's vagueness, resulting from its failure to inform the public in lay terms of what constitutes an ‘object of antiquity.’”).

92 Id. (“The challenges were based on the statute's vagueness, resulting from its failure to inform the public in lay terms of what constitutes an ‘object of antiquity.’ Consequently, the criminal sanctions of this statute were easily avoided by those individuals who were destroying, excavating, and removing objects of antiquity without authorization from federally owned or controlled lands.”).

93 Id. (providing “adequate criminal penalties, clear definitions, new civil penalties, and the promotion of greater public involvement in the decisionmaking process connected with the permitting procedure”).

94 Id.

The rule will include a systematic permitting procedure, an appeals process for parties denied permits, and a procedural approach for civil penalties imposed by the Secretary of the Interior and the other major Federal land managers for those persons who violate the statute in a noncriminal manner. This approach leaves a measure of Secretarial discretion in educating the public rather than using only criminal sanctions as the single effective deterrent to resource degradation.


The area . . . supports a dynamic reef ecosystem with more than 7,000 marine species, of which approximately half are unique to the Hawaiian Island chain. This diverse ecosystem is home to many species of coral, fish, birds, marine mammals, and other flora and fauna including the endangered Hawaiian monk seal, the threatened green sea turtle, and the endangered leatherback and hawksbill sea turtles. In addition, this area has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protection and understanding.


122 16 U.S.C. § 668dd(c).

123 16 U.S.C. § 668dd(f); see also 50 CFR § 28.31 (2006) (providing the enforcement, penalty, and procedural requirements for committing prohibited acts within the National Wildlife Refuge System).


125 OFFICE OF THE SEC’Y, supra note 124.


127 Id.


129 The purpose of this act is:
secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act [enacted Oct. 31, 1979].

130 This act prohibits the “[u]nauthorized excavation, removal, damage, alteration, or defacement of archaeological resources,” and “[t]rafficking in archaeological resources the excavation or removal of which was wrongful under Federal law.” 16 U.S.C. § 470ee(a)-(b) (2000). Civil penalties as well as criminal penalties are available for enforcing the prohibitions of this law. Id.

131 The purpose of this act is:
“to further the policy set forth in the Act entitled ‘An Act to provide for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes,’ approved August 21, 1935 (16 U.S.C. 461-467), by specifically providing for the preservation of historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen’s communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program.

132 This act declared that the policy of federal government was to:
(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can
exist in productive harmony and fulfill the social, economic, and other
requirements of present and future generations;
(2) provide leadership in the preservation of the prehistoric and historic resources
of the United States and of the international community of nations and in the
administration of the national preservation program in partnership with States,
Indian tribes, Native Hawaiians, and local governments;
(3) administer federally owned, administered, or controlled prehistoric and
historic resources in a spirit of stewardship for the inspiration and benefit of
present and future generations;
(4) contribute to the preservation of nonfederally owned prehistoric and historic
resources and give maximum encouragement to organizations and individuals
undertaking preservation by private means;
(5) encourage the public and private preservation and utilization of all usable
elements of the Nation's historic built environment; and
(6) assist State and local governments, Indian tribes and Native Hawaiian
organizations and the National Trust for Historic Preservation in the United States
to expand and accelerate their historic preservation programs and activities.

Id. § 470-1.
This act does not define any prohibited acts, as it is a policy document that encourages
certain behavior by government entities rather than providing a tool to prevent activity by public
or private individuals. See generally id. § 470-470w-8.

132 The purpose of this act is to:
consolidate[e] the authorities relating to the various categories of areas that are
administered by the Secretary for the conservation of fish and wildlife, including
species that are threatened with extinction, all lands, waters, and interests therein
administered by the Secretary as wildlife refuges, areas for the protection and
conservation of fish and wildlife that are threatened with extinction, wildlife
ranges, game ranges, wildlife management areas, or waterfowl production areas
are hereby designated as the "National Wildlife Refuge System" (referred to
herein as the "System"), which shall be subject to the provisions of this section,
and shall be administered by the Secretary through the United States Fish and
Wildlife Service.

Id.
Criminal penalties are provided for violations of this Act, but civil and
administrative penalties are not available. Id.

135 Id.
136 Id.
137 Id.
138 Governor Signs Rules, supra note 113.
140 Id.
141 Id. at 76,907.
143 President Clinton’s Executive Order also created a Coral Reef Ecosystem Reserve
Council for the reserve “to provide advice and recommendations on the Reserve Operations Plan
and designation and management of any sanctuary.” Id. The council was comprised of:
three native Hawaiian representatives, including one Native Hawaiian elder, with
experience or knowledge regarding Native Hawaiian subsistence, cultural,
religious, or other activities in the Northwestern Hawaiian Islands; three representatives from the non-federal science community with experience specific to the Northwestern Hawaiian Islands and expertise in marine mammal science, coral reef ecology, native marine flora and fauna of the Hawaiian islands, oceanography, or any other scientific discipline the Secretary finds appropriate; three representatives from nongovernmental wildlife/marine life, environmental, and/or conservation organizations; one representative from the commercial fishing industry that conducts activities in the Northwestern Hawaiian Islands; and one representative from the recreational fishing industry that conducts activities in the Northwestern Hawaiian Islands.

Id. at 76,906.

Id. at 76,907.

Id. at 76907-09.

President Clinton relied on the National Marine Sanctuaries Act, (16 U.S.C. 1431 et seq.) and the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106-513) in his Executive Order creating the reserve. Id. The National Marine Sanctuaries Act (16 U.S.C. 1431 et seq.) does provide for criminal and civil penalties, however, the National Marine Sanctuaries Amendments Act of 2000 required the Secretary of Commerce to initiate the process of designating the Northwestern Hawaiian Islands Coral Reef Ecosystem as a National Marine Sanctuary as soon as it was designated as a reserve. Pub. L. 106-513, sec. 6(g)(1)(A). Until the reserve was designated as a National Marine Sanctuary, the Secretary of Commerce, and its designated agency NOAA, was required to manage the reserve in a manner consistent with the purposes and policies of National Marine Sanctuaries Act. Pub. L. 106-513, sec. 6(g)(1)(A). Once Papahanaumokuakea National Monument was designated, however, NOAA chose not to continue pursuing sanctuary designation. NAT’L OCEANIC & ATMOSPHERIC ADMIN., PAPAHANAUMOKUAKEA MARINE NATIONAL MONUMENT: QUESTIONS AND ANSWERS, http://www.hawaiireef.noaa.gov/about/faq.html#7 (last visited Apr. 22, 2007). It is unclear if the authority provided by the National Marine Sanctuaries Act and the National Marine Sanctuaries Amendments Act of 2000 is still available in for enforcing reserve protections with the use of civil penalties.


Governor Signs Rules, supra note 113.

“State marine waters” is defined in the regulations as “the area extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State’s police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary.” Haw. Admin. R. § 13-60.5-3 (2005).

Governor Signs Rules, supra note 113.

According to the state regulations, [f]or enforcement purposes, the Northwestern Hawaiian Islands marine refuge area shall include, but is not limited to, reefs, and shoals, and their appurtenant reefs and all state waters extending three miles seaward of any coastline beginning and including Nihoa Island and Kure Atoll, but excluding Midway Atoll . . . .


Governor Signs Rules, supra note 113.

Id.
The regulations defined “Traditional and customary practices” to be “Native Hawaiian traditional and customary practices as defined under the Hawai`i State Constitution, statutes and case law.” Haw. Admin. R. § 13-60.5-3 (2005). Governor Signs Rules, supra note 113.

Haw. Admin. R. §§ 13-60.5-1 to 60.5-7 (2005).


Governor Signs Rules, supra note 113.

Haw. Admin. R. §§ 13-60.5-1 to 60.5-7 (2005).


The regulations defined “Traditional and customary practices” to be “Native Hawaiian traditional and customary practices as defined under the Hawai`i State Constitution, statutes and case law.” Haw. Admin. R. § 13-60.5-3 (2005). Governor Signs Rules, supra note 113.

Haw. Admin. R. §§ 13-60.5-1 to 60.5-7 (2005).


164 Id.

165 Id.

166 Id.


169 Memorandum of Agreement, supra note 49, at 3 (agreement among the trustees “to carry out coordinated resource management for the long-term comprehensive conservation and protection of the Monument”).

170 CERCLA is a federal law that “prohibits the release of a ‘reportable quantity’ of a ‘hazardous substance,’ whether on land or on the navigable waters of the United States, and waters of the contiguous zone.” 3-4A Treatise on Environmental Law § 4A.02 (2006)).

171 “The Clean Water Act, as its fundamental goal, makes ‘the discharge of any pollutant’ into the waters of the United States unlawful, unless the discharge is in compliance with one of several statutory schemes.” United States v. Sinclair Oil Co., 767 F. Supp. 200, 201 (D. Mont. 1990).

172 Through the Marine Mammal Protection Act, “Congress has prohibited the taking of marine mammals without a permit.” Strong v. United States, 5 F.3d 905, 906 (5th Cir. 1993). “The term ‘take’ is defined to mean ‘to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal.’” Id. (citing § 1362(12)).


Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not
more than ninety days, or shall suffer both fine and imprisonment, in the
discretion of the court.

Id.


176 CITIZEN’S GUIDE, supra note 15, at 11 (“Nihoa has 88 cultural sites, including
ceremonial, residential and agricultural features. On Mokumanamana, there are 52 recorded
cultural sites, including ceremonial and temporary habitation features.”).

177 Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031,

The area . . . supports a dynamic reef ecosystem with more than 7,000 marine
species, of which approximately half are unique to the Hawaiian Island chain.
This diverse ecosystem is home to many species of coral, fish, birds, marine
mammals, and other flora and fauna including the endangered Hawaiian monk
seal, the threatened green sea turtle, and the endangered leatherback and
hawksbill sea turtles. In addition, this area has great cultural significance to
Native Hawaiians and a connection to early Polynesian culture worthy of
protection and understanding.

Id.

178 16 U.S.C. § 470bb(1) (“The term ‘archaeological resource’ means any material
remains of past human life or activities which are of archaeological interest, as determined under
uniform regulations promulgated pursuant to this Act.”).

179 Uniform Rules, supra note 91 (“In the past, the administration of the American
Antiquities Act of 1906 . . . was subjected to legal challenges in the courts. The challenges were
based on the statute's vagueness, resulting from its failure to inform the public in lay terms of
what constitutes an ‘object of antiquity.’”).

180 Id. (“[T]he criminal sanctions of this statute were easily avoided by those individuals
who were destroying, excavating, and removing objects of antiquity without authorization from
federally owned or controlled lands.”).

181 Id. Congress enacted the Archaeological Resources Protection Act of 1979 . . . which
provides adequate criminal penalties, clear definitions, new civil penalties, and
the promotion of greater public involvement in the decisionmaking process
connected with the permitting procedure . . . The rule will include a systematic
permitting procedure, an appeals process for parties denied permits, and a
procedural approach for civil penalties imposed by the Secretary of the Interior
and the other major Federal land managers for those persons who violate the
statute in a noncriminal manner. This approach leaves a measure of Secretarial
discretion in educating the public rather than using only criminal sanctions as the
single effective deterrent to resource degradation.

Id.


establishes a moratorium on the taking or importation of marine mammals and marine mammal
products.” United States v. Clark, 912 F.2d 1087, 1088 (9th Cir. 1990).


185 See supra note 146 and accompanying text.

186 NAT’L OCEANIC & ATMOSPHERIC ADMIN., PAPAHANAUMOKUAKEA MARINE
NATIONAL MONUMENT: QUESTIONS AND ANSWERS,

187 See supra note 146 and accompanying text.
Addington v. Texas, 441 U.S. 418, 423 (1979) ("In the administration of criminal justice, our society . . . require[es] under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.").

See id. ("At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence."); United States v. Barkman, 784 F. Supp. 1181, 1187 (D. Pa. 1992) ("Since this section of CERCLA provides for civil penalties only, the standard of proof that government must meet is a fair preponderance of the evidence.").


Nat'l Oceanic & Atmospheric Admin., President Sets Aside Largest Marine Conservation Area On Earth, NOAA NEWS ONLINE, http://www.noaanews.noaa.gov/stories2006/s2644.htm ("The commercial and recreational harvest of precious coral, crustaceans and coral reef species will be prohibited in monument waters and commercial fishing in monument waters will be phased out over a five-year period.");

On January 19, 2007, a Coast Guard aircraft stationed at Barbers Point on O`ahu was conducting a routine surveillance patrol in Papahanaumokuakea when it spotted the fishing vessel within the monument boundaries. Press Release, U.S. Coast Guard, Coast Guard Documents NWHI Fishing Violation (Jan. 25, 2007) available at http://www.uscghawaii.com/go/doc/800/142958/. A Coast Guard patrol boat had to be dispatched from the island of Kaua`i with a law enforcement team to collect evidence from the fishing vessel for NOAA’s Office of Law Enforcement. Id.


WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL, DRAFT ISSUES PAPER RELATING TO THE FISHERY MANAGEMENT PLAN FOR THE PRECIOUS CORAL FISHERIES OF THE WESTERN PACIFIC REGION 28 (Dec. 15, 2006), available at http://www.wpcouncil.org/councilmtgs/136th/Draft%20Precious%20Corals%20Amendment.pdf ("Prices for precious corals have gradually increased, and specimens of the highest quality pink coral currently sell for $5,000/lb in international auctions.").

Barr & Van Dine, supra note 98, at 255, 312, 316.

TenBruggencate, Monument, supra note 16 ("It will be the first national monument operated by the U.S. Department of Commerce . . . .").

Ranchod, supra note 57, at 570, 589 Appendix C. “Until Clinton’s use of the Antiquities Act, almost all national monuments had been given the protective NPS to manage, even though the BLM is the nation’s largest land manager.” Id. at 570.


Biasi, supra note 53, at 222-23 (quoting 16 U.S.C. § 1-18f(2000)).

Id. at 223.


16 U.S.C. § 432 ("Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War [Army] to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe . . . .").

Id.
Barr & Van Dine, supra note 98, at 261 (“the Antiquities Act does not currently allow NOAA to be given authority over national monuments”).


NAT’L OCEANIC AND ATMOSPHERIC ADMIN., SUPPORTING STATEMENT NORTHWESTERN HAWAIIAN ISLANDS NATIONAL MARINE MONUMENT OMB CONTROL NO. 0648, 3 (Aug. 25, 2006), http://www.cio.noaa.gov/itmanagement/0548sub.pdf (last visited Apr. 22, 2007) (“The agencies have consulted extensively with the State of Hawaii regarding their permitting processes in the NWHI. The agencies and the State are committed to developing a fully coordinated and integrated permitting system for the Monument to minimize duplication wherever possible.”).

Id.

Id.

See generally Lewis, supra note 206.

See id.

Id.

1 Id.

Telephone Interview with Cha Smith, Executive Director, KAHEA, in Honolulu, Haw. (Feb. 16, 2007).

Id.

Lewis, supra note 206.

See id.

“This is wonderful news!” said Dr. Stephanie Fried . . . “Until Peter Young took charge, there was a total absence of sunshine or public input on these permits.” . .

We warmly welcome Chairman Young's efforts to lift the veil of secrecy from the DLNR,” said hula teacher Vicky Holt Takamine, of the 'Ilio'ulaokalani Coalition, a native Hawaiian organization.

Id.

Id.


TenBruggencate, Monument, supra note 16.

NOAA MAGAZINE, supra note 5.


Telephone Interview with Tommy Friel, Special Agent with NOAA Office for Law Enforcement, in Honolulu, Haw. (Feb. 21, 2007).


Id.

Squillace, supra note 60, at 577 (“The purpose of the Antiquities Act is to insure that public lands and resources are protected before they suffer damage or destruction.”); Biasi, supra note 53, at 229 (“[T]he fundamental purpose of the Antiquities Act . . . [is] enabling swift national monument designations to thwart imminent threats to valuable public land.”).

Squillace, supra note 60, at 577 (“But calling attention to a monument proposal through a lengthy public process significantly increases the risk that local political issues and
pressures will overwhelm the public interest and prevent the designation of monuments which, in hindsight, are almost always universally accepted as being in the public interest.”); Biasi, supra note 53, at 229 (“[T]he fundamental purpose of the Antiquities Act . . . [is] enabling swift national monument designations to thwart imminent threats to valuable public land.”).


230 Lin, supra note 78, at 712 (“The president designating the monument has the discretion to delineate permissible uses within that monument, but those uses must satisfy the Act's requirement of ‘proper care and management of the objects to be protected.’”); Biasi, supra note 53, at 232 (“Mining lessees or permittees prior to the designations obtain property rights to certain areas on federal lands for a defined time and then the federal government retains the right of reverter . . . . Clearly, when a president creates a national monument, he cannot simply indiscriminately rescind all mineral leases without triggering the [fifth amendment Takings Clause.”).

231 Lin, supra note 78, at 712 (“The president designating the monument has the discretion to delineate permissible uses within that monument, but those uses must satisfy the Act's requirement of ‘proper care and management of the objects to be protected.’”).


233 TenBruggencate, Monument, supra note 16.


The term “marine protected area” has been used by marine management programs for several decades and has been defined in many ways. The definition provided in the President’s Executive Order is “any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”

Id.

235 Id. (“Marine reserves, a type of MPA in which consumptive uses such as fishing are prohibited, may actually enhance fisheries.”).


[M]arine protected areas (MPAs) are an important coral reef management tool . . . . MPAs are defined as “any area of the marine environment that has been reserved by federal, state, tribal, territorial, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”

Id. (citing Executive Order 13158, May 26, 2000); NATIONAL MARINE PROTECTED AREAS CENTER, supra note 234 (“MPA protections . . . are effective at protecting fish stocks at various life stages in which fish are dependent on specific habitat types or locations.”).

237 NATIONAL MARINE PROTECTED AREAS CENTER, supra note 234. The National Marine Protected Area Center was established in 2000, and represents implementation by the U.S. Department of Commerce and U.S. Department of the Interior of Presidential Executive Order 13158, which charged federal agencies with strengthening the management of existing MPAs and establishing a comprehensive national system of MPAs. NATIONAL MARINE PROTECTED AREAS

238 NATIONAL MARINE PROTECTED AREAS CENTER, supra note 234.

239 Lin, supra note 78, at 712 (“Early in its term, the George W. Bush Administration reviewed whether it could undo various monument designations made by the preceding administration, and concluded that it could not.”).

240 Id. at 711-12 (“Once the President establishes a monument, he is without power to revoke or rescind the reservation, although it remains uncertain whether the President may reduce a monument in size.”).

241 Ranchod, supra note 57, at 552. Congress can change the size, use, and management of a monument, or reverse a designation entirely. Very few monuments, however, have been undone by Congress. The handful of exceptions have involved very small areas of little national significance that were either turned over to state or local governments, or put back into ordinary national forest status.

242 Owen, supra note 36, at 749-50. National parks are designated by congressional legislation, as are wilderness areas and wild and scenic rivers. Congress or the President, not the Bureau of Land Management or the Forest Service, also established most other reservations of public lands from extractive use. The President designates national monuments, subject to congressional acquiescence . . . . What Congress sought to do in the NMSA, therefore, was unprecedented. Providing only vague and general guidance, it granted an agency the authority to set aside and develop management plans for potentially vast areas of ocean.

243 Id. at 750 (“Designating any kind of protected area, however, has always been intensely political, and no amount of science can make the politics go away.”).

244 Barr & Van Dine, supra note 98, at 255, 312, 316.


246 Id.

247 Biasi, supra note 53, at 197.

248 Id.

249 Ranchod, supra note 57, at 553 (“Funding for federal agencies to manage national monuments must be approved by a simple majority of Congress through annual appropriations bills. Without adequate funding, monument lands cannot be operated as national monuments, especially with regard to enforcement of restrictions on use, such as hunting and grazing.”).


251 Biasi, supra note 53, at 206.


253 1980 U.S. Dist. LEXIS 17861; Biasi, supra note 53, at 206.


255 Lin, supra note 78, at 712 (“Following the designation of Grand Staircase-Escalante, several bills were proposed to repeal or limit Antiquities Act authority.”).

256 Biasi, supra note 53, at 238 (“The stated purpose of the National Monument Fairness Act is to ‘amend the Antiquities Act regarding the establishment by the President of certain national monuments and to provide for public participation in the proclamation of national monuments.’”); Lin, supra note 78, at 718 (“Typical of these bills was a bill titled the ‘National
Monument Fairness Act of 1997.’ Sponsored by Senators Hatch and Bennet of Utah, the bill proposed that all monument proclamations greater than 5,000 acres be approved by Congress and preceded by consultation with the governor of the affected state.’

Lin, supra note 78, at 714 (‘Though the relative infrequency of legal challenges might suggest otherwise, exercise of presidential authority under the Act has long been surrounded by controversy.’).

Id.

Id. at 719 (‘Following the designation of Grand Staircase-Escalante, several bills were proposed to repeal or limit Antiquities Act authority . . . . None of these bills became law.’).


Uniform Rules, supra note 91.


See supra note 266 and accompany text.

The Archaeological Resources Protection Act defines ‘archaeological resource’ as “any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act,” and further states “[n]o item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” 16 U.S.C. § 470bb(1) (2000).


See Uniform Rules, supra note 91.

See id.


Ranchod, supra note 57, at 553.

Funding for federal agencies to manage national monuments must be approved by a simple majority of Congress through annual appropriations bills. Without adequate funding, monument lands cannot be operated as national monuments, especially with regard to enforcement of restrictions on use, such as hunting and grazing.

Id.