

**Papahānaumokuākea: The Legal and Policy Issues that Must Be Resolved to Make a Success of the Northwestern Hawaiian Islands Marine National Monument**

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**I. Introduction**

- A. A Description of the Wonders and Resources of the Northwestern Hawaiian Islands
- B. 140,000 square nautical miles of coral reefs, atolls, shallow and deep waters, extending 1200 miles northwest of the main Hawaiian Islands
- C. Specific marine and bird species that are endemic to the Monument area, focusing on those that are threatened or endangered.
- D. The Hawaiian monk seal.

**II. A History of the Northwestern Hawaiian Islands**

- A. Activities Before Western Contact – fishing activities by the Hawaiians; communities in and visits to Necker and Nehoa; were those communities Polynesian?
- B. Exercise of jurisdiction over the Northwestern Hawaiian Islands by the Kingdom of Hawaii in the nineteenth century.
- C. Governance of the Northwestern Hawaiian Islands by the United States during the Territorial Period and during World War II.
- D. Governance of the Northwestern Hawaiian Islands by the State of Hawaii after statehood.
- E. The Hawaiian Islands National Wildlife Refuge
- F. Continuing claims of Native Hawaiians to the land and marine resources of the Northwestern Hawaiian Islands.
- G. The status of the ocean waters surrounding the Northwestern Hawaiian Islands under the 1982 United Nations Law of the Sea Convention.

**III. The Process of Creating the Northwestern Hawaiian Islands Marine National Monument**

- A. The activities undertaken pursuant to the Marine Sanctuaries Act
  - 1. President Clinton’s executive orders of 2000 and 2001
  - 2. National Marine Sanctuaries Amendments of 2000
- B. The creation of the “Monument” in June 2006 pursuant to the Antiquities Act of 1906

**IV. The Goals and Governance of the Northwestern Hawaiian Islands Marine National Monument**

- A. An examination of the purposes and implementation of the 1906 Antiquities Act, and a discussion of whether it provides sufficient legal basis for the effective administration of the Northwestern Hawaiian Islands Marine National Monument (focusing on planning, management, and coordination requirements).
- B. The Goals of the Northwestern Hawaiian Islands Marine National Monument, as

- described in the initial governing documents
- C. The responsible management agencies – Commerce Dept (NOAA), Interior Dept (Fish & Wildlife Service), and State of Hawaii – interagency agreement signed on May 19, 2006. State Dept. works with international agencies to promote purposes of the Monument.
  - D. Anticipated governance conflicts
    1. What research activities are permitted, and which are prohibited, in light of the prohibition on bio-prospecting?
    2. Who will ultimately decide when special use permits will be given for scientific research?
    3. Will foreign scientists be allowed to conduct scientific research?
    4. Can sharks be culled to protect monk seals? Will other endangered species recovery activities be permitted? What are the implications of the “no-entry, no-touching policy”? Which agency ultimately will decide this question?
  - E. A comparison with marine sanctuaries established under the US National Marine Sanctuaries Act
    1. An analysis of the planning, regulatory, research, and enforcement provisions that govern sanctuaries established under the National Marine Sanctuaries Act
    2. Do the provisions of the Sanctuaries Act regarding natural resources damages, response, and civil penalty provisions apply to instances where Monument resources are threatened or damaged by negligent or intentional activities?
  - F. A focus on the Hawaiian Islands Humpback Whale Sanctuary
  - G. Marine protected areas established by the State of Hawaii – Kealakakua Bay, Lapakahi, Hilo Bay, Puako Bay and Reef, Kailua Bay, Kaloko-Honokohau, Pu`uhonua o Honaunau, and Waialea Bay, Island of Hawaii; Hulopoe Bay-Palawai and Manele Bay-Kamao, Manele Boat Harbor, Lanai; Honolulu and Mokuleia Bays, Kahului Harbor, Cape Kinau and La Perouse Bays, Ahihi-Kinau, and Molokini, Maui; Kaho`olawe; Kalaupapa, Molokai; Haunama Bay, Pupukea Beach Park, Waikiki-Diamond Head, and Coconut Island, Oahu; Waimea Bay, Hamamaulu Bay and Ahukini aPier, Kauai. Others?
  - H. Marine protected areas established by laws of other states within the United States
  - I. Issues related to the rights of Native Hawaiians
    1. When will “Native Hawaiian Practice Permits” be issued, and by what agency?
    2. What role will the Native Hawaiian Governing Entity play after the enactment of the Akaka Bill.
    3. What governance role should Native Hawaiians play prior to the establishment of a Native Hawaiian Governing Entity?
    4. Possible analogies – in the Canadian Arctic, Inuit and Inuvialuit people have special harvest rights for subsistence purposes; in Australia, the

Aboriginal and Torres Strait Islanders can lawfully catch dugong (but no one else can).

- J. Unresolved issues under US law, and additional administrative regulations and legislation needed to address those issues.

**V. The Status of the Northwestern Hawaiian Islands Marine National Monument Under International Law**

- A. National obligations under Article 194(5) of the Law of the Sea Convention
- B. National obligations under the 1995 Straddling and Migratory Fish Stocks Agreement, which specifies measures to conserve critical species and habitats.
- C. National obligations under the Convention on Biological Diversity (which also requires countries to establish a system of protected areas to conserve biodiversity).
- D. The World Heritage Convention, which lists “natural” as well as “cultural” sites that must be protected from degradation, which include, e.g., the Belize Barrier Reef and the Great Barrier Reef, Fraser Island, the Lord Howe Island Group, and Shark Bay in Australia, Ecuador’s Galapagos Islands, Aldabra Atoll in the Seychelles, Glacier Bay in Alaska, the Whale Sanctuary of El Vizcaino in Mexico, etc.
- E. The 1979 Bonn Migratory Species Convention, which calls for the creation of reserves to protect the spawning areas of migratory species, and may be relevant with regard to the sea birds that nest in the Northwestern Hawaiian Islands.
- F. A survey of marine protected areas established in other countries and approved by international agencies
- G. “Particularly Sensitive Sea Areas” (PSSA) – vulnerable to shipping activities
- H. “Areas to Be Avoided” (ATBA) as established by the International Maritime Organization – now applies to vessels of more than 1000 gross tons within 50 nautical miles of the islands and atolls within the Monument.
- I. Issues related to navigational freedoms raised by the establishment of the Northwestern Hawaiian Islands Marine National Monument
  - 1. Proclamation establishing the Monument is to be applied “in accordance with international law”
  - 2. How will the activities of foreign-flag vessels be regulated?
- J. The precedent established by the Northwestern Hawaiian Islands Marine National Monument, and its relevance to other fragile ecosystems in other parts of the world.
- K. Additional international approvals needed to achieve the goals of the Northwestern Hawaiian Islands Marine National Monument
  - I. How can activities outside the Monument that affect the Monument be regulated?
    - 1. Marine debris.
    - 2. Derelict fishing gear
    - 3. Alien marine species
    - 4. Climate change

5. Fishing practices outside the Monument that may interfere with the foraging, nesting, and nursery habits of the seabird, monk seal, and turtle populations within the Monument.

**VI. Recommendations for Action**

- A. Additional planning, coordination, and environmental impact assessments to enable management to be undertaken with full information and a transparent review process
- B. New administrative regulations
- C. New legislation
- D. More formal Native Hawaiian participation in governance
- E. Needed international agency action.
- F. Establishment of mediation-based dispute-resolution process
  1. For interagency disagreements
  2. For contested Monument access permits
- G. How to ensure financial sustainability?
- H. Any “zoning” of the Monument region?
- I. How to ensure responsive, adaptive, and flexible management, using interdisciplinary teams and ensuring ongoing public participation of all relevant communities.
- J. How to protect the fragile ecosystem of the Monument while allowing individuals and groups to study and enjoy its wonders and thus to recognize the benefits of maintaining (and funding) the Monument?