The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve: Ephemeral Protection

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The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve: Ephemeral Protection

Matthew Chapman*

As part of his administration's efforts to preserve environmentally valuable national areas for future generations, President Clinton issued two Executive Orders in late 2000 to begin the process of designating a vast tract of oceans and reefs in the Northwestern Hawaiian Islands as a National Marine Sanctuary, and Congress lent some support to this effort in the National Marine Sanctuaries Amendments Act of 2000. A sanctuary of this scale is unprecedented. Clinton's use of Executive Orders as the vehicle for the creation of this Reserve, however, has left these marine resources vulnerable, and the environmental statutes cited in the EOs provide little real power to preserve the coral reefs. As a vision, the NHICRER is an important development in marine protection, but as a reality, it is far from home free.

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* J.D. Candidate 2003, Boalt Hall School of Law, University of California at Berkeley. B.A. Stanford University, 1987; M.S. in Foreign Service, Georgetown University, 1991. I would like to thank Keala Ede for his dedication and patience in preparing this Note for publication, David Owen for his assistance, and Sarah Birkeland for her insightful guidance at the initial stages of my writing. As press time approached, events moved past the status of the sanctuary process presented in this Note, but overall the propositions and issues presented remain valid points of concern.

For an excellent and far-reaching review of marine ecosystem protection outside the scope of this Note, see Jeff Brax, Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America, 29 ECOLOGY L.Q. 71 (2002).
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INTRODUCTION

In December 2000, President Clinton issued Executive Orders (EO) 13,178 and 13,196, which created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (the Reserve). Starting 120 nautical miles west of the main Hawaiian chain, the Reserve stretches 1,079 nautical miles (2000 kilometers) north past Midway in the Northern Pacific, roughly the distance from Seattle to Los Angeles. Encompassing 99,500 square nautical miles (131,800 square statute miles, approximately half the size of Texas), this new Reserve is seven times the size of all the existing National Marine Sanctuaries combined and is very nearly the size

3. Id.
4. Id.
5. Exec. Order No. 13,178, 65 Fed Reg. § 3: “The Reserve shall be adjacent to and seaward of the seaward boundaries of the State of Hawaii and the Midway Atoll
of Australia's Great Barrier Reef Marine Park (at 102,043 square nautical miles). The creation of the Reserve represents the first coordinated federal and state plan to bring this vast area in the Pacific under cohesive, holistic management.

The Reserve’s remarkably vast size serves a valuable purpose. The immense scope of the Reserve is necessary to better protect and sustain the coral reef habitats and the creatures that depend on them. The world’s 174,890 square nautical miles of coral reef cover only 0.2% of the globe but support 12% of total global fisheries. Coral reefs shelter fully 33% of known marine fish species, and the remarkable biodiversity found in reef environments has yielded cures for cancer and cardiovascular diseases. Coral reefs face numerous man-made threats, including development, pollution, global warming, unsustainable fishing practices, and marine debris.

Ten percent of the world’s reefs are already degraded beyond recovery, with an estimated thirty percent more likely to follow in the next 20 years. Since the maximum growth rate of corals is generally considered to be only two meters every century, this degradation is significant cause for concern.

As a policy decision to protect U.S. reefs from such degradation, designating the Northwestern Hawaiian Islands Reserve was a natural choice; the Reserve contains approximately

National Wildlife Refuge, and shall overlay the Hawaiian Islands National Wildlife Refuge to the extent that it extends beyond the seaward boundaries of the State of Hawaii. The Hawaiian Islands National Wildlife Refuge is one of the nation’s older refuges, established by President Theodore Roosevelt in 1909. See NOAA WEBSITE Q & A supra note 2. Only 3.3% of the Reserve’s area, though, is actually coral reef habitat.

6. Id.
7. This is equal to 231,660 square statute miles, or 600,000 square kilometers.
9. NAT'L OCEANOGRAPHIC AND ATMOSPHERIC ADMIN., CORAL REEFS, supra note 8.
10. THE CORAL REEF ALLIANCE, CORAL REEF MEDICAL VALUE, at http://www.coralreefalliance.org/aboutcoralreefs/medicalvalue.html (last visited May 8, 2002). AZT, the well-known HIV treatment, was derived from a Caribbean reef sponge. Id. Coral reef organisms are such a promising source for cancer treatment that now more than half of all such research focuses on marine organisms. Id.
11. NAT'L OCEANOGRAPHIC AND ATMOSPHERIC ADMIN., GLOBAL PERSPECTIVE, supra note 8.
12. Id.
70% of the coral reefs in U.S. waters and a treasure house of biodiversity that provides habitat for over 7,000 marine species, of which approximately 3,500 are found nowhere else on earth. The area supports several species of marine mammals, 14 million migratory seabirds, and several federally protected species, including the threatened green sea turtle, the endangered hawksbill and leatherback turtles, and the only remaining population of the endangered Hawaiian monk seal. Yet this area traditionally has been regulated by a number of government and quasi-government agencies in a competing and often conflicting manner.

A growing awareness of the ecological importance of the global coral reef systems, and the numerous forces that threaten their survival, propelled Clinton's issuance of Executive Orders (EOs) 13,178 and 13,196. These two orders sought to coordinate federal

15. NOAA WEBSITE Q & A. supra note 2.
17. The administration's awareness of coral reef issues took a major step forward at the 1998 National Ocean Conference, where Clinton established the Coral Reef Task Force and directed federal agencies, through Exec. Order No. 13,089, 63 Fed. Reg. 32,701, § 2 (June 11, 1998), to identify agency activities that affected coral reefs, use their programs to actively protect and enhance reefs, and, in accordance with law, ensure that any agency actions undertaken or funded would not degrade those reefs. Exec. Order No. 13,089, 63 Fed. Reg. § 2(a); see also Robin Kundis Craig, The Coral Reef Task Force: Protecting the Environment Through Executive Order, 30 ENVTL. REP. 10,343, 10,346 n.64 (2000).

In late 1999, and again in early 2000, the Task Force released two action plans calling on the federal agencies to work with state, territorial and non-governmental groups to expand Marine Protected Areas in the U.S. See JEFFREY ZINN & EUGENE BUCK, RS20810: MARINE PROTECTED AREAS: AN OVERVIEW, at http://cnie.org/NLE/CRSreports/Marine/mar-39.cfm (February 8, 2000). The two action plans were, respectively, "Turning to the Sea: America's Ocean Future" authored by a Cabinet task force established at the National Ocean Conference in 1998, and issued on September 2, 1999, and the "National Action Plan to Conserve Coral Reefs" by the U.S. Coral Reef Task Force, March 2, 2000. ZINN & BUCK, supra, at n. 2. The National Plan's approach is to use marine zoning, accurate mapping, and research to develop an overarching management approach to the nation's coral reef resources. See Craig, supra, at 10,343.

Unification of the management of the Northwestern Hawaiian Islands in particular began on May 26, 2000, when President Clinton directed the Secretaries of Commerce and the Interior, through Executive Order 13,158, to begin jointly developing a national system of Marine Protected Areas. See Exec. Order No. 13,158, 65 Fed. Reg. 34,909, § 4 (May 26, 2000). See generally Press Briefing by NOAA Administrator James Baker and Deputy Secretary of the Interior David Hayes (May 26, 2000) [transcript available at http://www.noaa.gov/baker/oceans-reefs.htm] [hereinafter Press Briefing by Baker & Hayes]. One outcome of this was to begin to address the fragmented management of the vast area of the Northwestern Hawaiian Islands. The Secretaries were directed to work with the Western Pacific Regional Fisheries Management Council (WesPac) and the State of Hawaii to develop a program that, in its final form, became the Reserve announced in Executive Order 13,178. Id.
management of this vast marine environment and, most importantly, to begin the process of designating the area as a national marine sanctuary.

The state of Clinton's EOs, however, remains insecure. President Bush can issue an Executive Order repealing the Reserve EOs. The Administration spent months reviewing both EOs, and groups with political and economic stakes in the area are seeking to weaken or overturn them. Furthermore, the laws governing the Reserve, as it currently exists under the two Executive Orders, are ill-suited and insufficient for achieving effective protection of these marine resources, principally because none of the laws are designed specifically for coral reef preservation. Sanctuary designation is one possible answer. However, while bringing to bear important statutory powers that can focus and strengthen management practices, it unfortunately does not address the commercial and extractive activities that have degraded these resources in the first place.

This note discusses the unique nature and weaknesses of executive orders for this kind of policy making, the obstacles faced by the new Reserve, the shortcomings of current law with regard to protection of Reserve resources, and finally the advantages and shortcomings of Sanctuary status. Ultimately, it is clear that these resources remain under threat.

1

THE EXECUTIVE ORDERS

A. The Executive Order As a Compromise Tool for Conservation

The orders sought to create the Reserve through a new cohesive management structure based on existing agencies, policies, and practices rather than entirely new laws. The EOs direct the Department of Commerce to take the lead in working cooperatively with the Department of the Interior, the State of Hawaii, and the Western Pacific Fishery Management Council

(WesPac) (the Regional Fishery Council designated by the Magnuson-Stevens Fisheries Conservation and Management Act)\(^9\), to develop overarching Management Principles, conservation measures, and a Reserve Operations Plan. These are to be based on scientific research, new mapping techniques, and the precautionary principle of management, and are intended to make federal management of this area more focused and effective.\(^{20}\)

The use of an EO, rather than statutory tools like the Antiquities Act,\(^{21}\) was in a sense a compromise that sought to protect unique resources while welcoming input from all affected stakeholders. As discussed below, Clinton made extensive use of the Antiquities Act to designate significant portions of wilderness areas as national monuments.\(^{22}\) He was considering a similar designation for the Northwestern Hawaiian Islands but chose instead to issue these EOs in order to preserve a role for the commercial fishing interests in the area and managerial responsibility for WesPac.\(^{23}\) The EOs therefore did not truly change the legal status of the area, but rather directed existing agencies with historic jurisdiction over the region to cooperate in developing policies to preserve and restore these coral reef ecosystems.

### B. An Attempt to Balance Preservation and Consumption

The EOs limit the types of extractive uses allowed in the Reserve, prohibiting exploration for oil and gas, anchoring on coral, drilling, dredging, or otherwise altering the seabed, discharging

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20. See NOAA WEBSITE Q & A, supra note 2. The precautionary principle of management dictates that when scientific knowledge is not sufficient to clearly establish sustainable guidelines for fishing, water pollution, or other environmental factors, standards are set at levels that are certain to avoid serious harm.


22. See infra notes 58-62.

waste from ships (except for 'graywater'\textsuperscript{24}) and removing any biological resources.\textsuperscript{25} There are, however, important and specific exceptions to this ban which allow commercial and recreational fishing. It is these exceptions that form the center of controversy.\textsuperscript{26}

Under an Antiquities Act national monument designation, the area would have been managed by the Department of the Interior and could have been closed to all extractive uses. In a compromise with the fishery interests, however, these EOs allow fishing to continue, capping future bottom fishing at recent or current levels\textsuperscript{27} and allowing currently permitted trolling for pelagic species by bottomfishing crews.\textsuperscript{28} In an effort to provide the highest level of protection to the richest sections of the Reserve, EO 13,178 did set aside fifteen special Reserve Preservation Areas, comprising roughly 4.8\% of the total area, or 16,450 km\textsuperscript{2},\textsuperscript{29} in which all extractive uses were banned.\textsuperscript{30} However, following input from the commercial fishing industry during the public comment period, Executive Order 13,196 liberalized access to the Preservation Areas to allow for commercial bottomfishing and trolling of pelagic species, by permitted commercial and recreational vessels, in eight of the fifteen areas.\textsuperscript{31} Extractive uses remain banned in the other seven

\begin{itemize}
\item \textsuperscript{24} Executive Order 13,196, 66 Fed. Reg. 7,395, § 3(4) (Jan. 23, 2001), amending Executive Order 13,178, 65 Fed Reg. 76,903, § 7(b)(4)(C) (Dec. 7, 2000), strengthened the water protection powers of the Reserve managers by specifically stating that the only allowable discharges were those, in part, that constituted "water generated by routine vessel operations (e.g., deck wash down and graywater as defined in section 312 of the Federal Water Pollution Control Act)." Graywater in turn means "galley, bath and shower water." 33 U.S.C. §1322(11). By specifically including the FWPCA in the standards for graywater discharges, the President brought to bear an additional statutory enforcement tool.
\item \textsuperscript{25} See NOAA WEBSITE Q & A, supra note 2.
\item \textsuperscript{26} The EOs also recognize and encourage traditional Native Hawaiian use of the area and set out guidelines for Native Hawaiian participation in the planning and management of the Reserve. See Exec. Order No. 13,178, 65 Fed Reg. § 9.
\item \textsuperscript{27} Executive Order 13,196, 66 Fed. Reg. § 3(2), amending Executive Order 13,178, 65 Fed Reg. 76,903 § 7(a)(1)(C)(1), caps commercial bottomfishing at the average annual take over the five years proceeding Executive Order 13,178 (backdating from December 4, 2000) for each individual permit holder, and further allows for a reasonable one-time increase in the annual aggregate catch limit to allow for two Native Hawaiian use permits.
\item \textsuperscript{28} See Exec. Order No. 13,196, 66 Fed. Reg. § 3(3) (amending Exec. Order No. 13,178, 65 Fed Reg. 76,903, by adding § 7(a)(1)(F), which reads, "Trolling for pelagic species shall be capped based on reported landings for the year preceding December 4, 2000.").
\item \textsuperscript{29} See NOAA WEBSITE Q & A, supra note 2.
\item \textsuperscript{30} Exec. Order No. 13,178, 65 Fed Reg. §§ 8(b)(1)(A), (C). It is unclear, but this ban probably would not include traditional Hawaiian uses, particularly if they are limited to ancient fishing practices.
\item \textsuperscript{31} Exec. Order No. 13,196, 66 Fed. Reg. § 4, (amending Exec. Order No. 13,178, 65 Fed Reg. § 8). In three of the Preservation Areas, fishing will be allowed for a trial
Preservation Areas. Environmental groups point out that only a minute percentage of the fishing areas remain off limits, but commercial fishing interests maintain that the restricted areas contain some of the richer fishing grounds. Indeed, the continuing debate about access to, and management of, those fishing areas forms the center of the current challenges faced by the Reserve.

C. Unifying Management and Working Toward Sanctuary Designation

EO 13,178 also directed the Secretary of Commerce (the Secretary), in consultation with the Secretary of the Interior, the Governor of Hawaii, and a newly established non-governmental Reserve Council, to develop a Reserve Operations Plan to set out precisely how the various federal and state agencies would work together to achieve the goals of the Reserve and, more importantly, to take the first step toward designating the Reserve as a National Marine Sanctuary. The EOs hence appear to create a wonderfully inclusive and effective regime for truly protecting the coral reef ecosystems found in the Reserve. However, so many political and legal pitfalls stand between the threatened status of the Reserve's resources and true, long-term conservation that the effectiveness of EOs as a tool for natural resource preservation remains questionable.

period of five years, after which a determination will be made whether such activity is having an adverse impact on the resources in those areas. See Exec. Order No. 13,196, 66 Fed. Reg. § 48 (amending Exec. Order No. 13,178, 65 Fed Reg. § 6, by deleting §§ 8(a)(2)(D), (E), and adding § 8(3)(A)-(C)). According to the calculations of the Hawaii-based environmental group KAHEA, these protected areas are not unfairly restrictive for commercial or recreational fishing interests:

[B]ottomfishers and recreational fishers can fish throughout 95% of the general Reserve waters and throughout 95% of the "specially protected" areas, leaving only 0.2% (by area) of the 100 fathom fishing waters in the Reserve closed to all fishing (prime bottomfishing is found at 50-150 fathoms).

FRIED ET AL., supra note 18 at 5.
32. NOAA WEBSITE Q & A, supra note 2.
33. See FRIED ET AL., supra note 18 at 9.
34. See discussion infra Part II.A.
35. Executive Order 13,178, 65 Fed Reg. § 5(f), also directed the creation of a Coral Reef Ecosystem Reserve Council, to ensure scientific, community, commercial, and Native Hawaiian input on how the Reserve should best be managed. The Council includes representatives from the Native Hawaiian community, commercial fishermen, tour operators, oceanographers, coral reef ecologists, and educators. See id. § 5(b)(12), (f)(1)-(10).
II

THE FUTURE OF THE RESERVE: REVOCATION, STATUS QUO, OR SANCTUARY

Bold as it is, the vision offered by the new Reserve rests on uncertain legal ground. WesPac has questioned the legality of the Executive Orders themselves. The Bush administration could issue a countermanding executive order dissolving or changing the Reserve. The sanctuary designation process could fail, leaving the Reserve only as delineated by the two Orders and without the legal protections provided by sanctuary status. Finally, not even sanctuary status may be sufficient to fully protect the resources found there since it does not address the source of the pressures that are stressing those reefs: resource extraction.

A. Challenges to the Reserve

1. WesPac's Challenge

The Orders create a Reserve with new regulations capping fishing effort and establishing Preservation Areas where no fishing will be allowed. WesPac and NOAA lawyers question the legal foundation for such an order, asserting that the Magnuson-Stevens Fisheries Management and Conservation Act gives them exclusive authority over the management of the fisheries found in the area. Executive orders, the theory goes, cannot override legislatively-delegated authority, with perhaps limited exceptions in times of emergency. This challenge demonstrates that despite legislative authority from Congress in support of sanctuary designation, the Reserve nonetheless faces important challenges from powerful stakeholders, including from within the Executive Branch. This opposition may weaken the final product of the sanctuary process.

2. A New Executive Order

Executive Orders, while important, lack the staying power of legislation. They are administrative tools used by the President to direct the workings of the executive branch. They are not expressly addressed in the Constitution but are considered part of the

37. See discussion supra Part I.B.
39. Telephone interview with Kevin Kelly, staff member, Western Pacific Regional Fishery Council, in Honolulu, Hi. (November 16, 2001)
40. See infra note 47 and accompanying text.
plenary powers found in Article II, sections 1-3. EOs may also be based on express or implied statutory authority from Congress. Without legislative affirmation, they have no authority outside the continued support of the President, and if an order does not result in a finalized rule or plan before that President leaves office, the new administration can delay its implementation, abandon the EO, or issue EOs that may overturn or change the course of previous orders.

If Congress mandated or directed the issuance of the presidential EO, however, courts will grant it the force of law. Nevertheless, a subsequent president may revise even an EO with such legal force. President Bush, therefore, retains full power to redirect the efforts of the executive branch as he sees fit, limited, indeed, only by the will of Congress. Bush therefore can override EOs 13,178 and 13,196, but would be restricted to the degree to which Congress directed or mandated the creation of the Reserve. Aware of the fragile nature of EOs, outgoing President Clinton attempted to give these two orders the patina of the force of law by citing numerous statutes supposedly supporting the creation of the Reserve. All but one of them, however, lack any language on the

42. See id.
43. See Chrysler Corp. v. Brown, 441 U.S. 281, 283 (1979) (noting that for regulations derived from an executive order to have “the ‘force and effect of law,’ there must be a nexus between the regulations and some delegation of the requisite legislative authority by Congress.”); Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 6 (3rd Cir. 1964) (“There are instances when the President issues proclamations and orders, and governmental agencies promulgate rules and regulations, pursuant to a mandate or a delegation of authority from Congress. In such instances the proclamations, orders, rules and regulations have the force and effect of laws.”); Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967) (citing Farmer); see also U.S. v. Gilbertson, 111 F.2d 978, 980 (7th Cir. 1940) (holding “that the extensions of the restriction here involved were made by Executive Order pursuant to the statute of 1906 rather than directly by the statute we do not consider of any significance, since administrative regulations, properly made, have been held to be equivalent of law.”) (citations omitted).
44. Congress, of course, has substantial power to overturn or redirect executive orders it is opposed to. It can use congressionally-mandated processes, like the Truth in Regulating Act, 5 U.S.C. § 801 (1996), to create additional tools for opponents of an executive branch plan to delay or complicate implementation. It can, of course, also withhold funding for key provisions of executive orders that require fiscal expenditures. Udall, supra note 41, at 4–5 n.10.
45. Clinton based his authority to issue Executive Order 13,178 on the Constitution, as well as the National Marine Sanctuaries Act, the National Marine Sanctuaries Amendments Act of 2000, the Magnuson-Stevens Fishery Conservation and Management Act, the Coastal Zone Management Act, the Endangered Species Act, the Marine Mammal Protection Act, the Clean Water Act, the National Historic
Reserve. This congressional silence means that subsequent administration policy toward the Reserve is not hindered by this laundry list of federal environmental statutes.

Only one statute cited by Clinton, the National Marine Sanctuaries Amendments Act of 2000, offers some small protection for the authority of the Reserve. Three weeks before President Clinton signed Executive Order 13,178, Congress passed this Act in part to permit the President to designate any coral reef or coral reef ecosystem in the Northwestern Hawaiian Islands as a coral reef reserve and to authorize $4 million annually through 2005 for NOAA to begin the process of designating the area as a marine sanctuary. Congress showed further support for the Reserve in the language of the amendments, directing the Secretary to manage the Reserve, pending sanctuary designation, "in a manner consistent with the purposes and policies of this Act." This is certainly a meaningful indication of the intent of Congress.

This congressional endorsement means that if President Bush chooses to follow the EOs and proceed with sanctuary designation, the manner in which he does so has been prescribed by Congress. It does not, however, state that the President must proceed with sanctuary designation, and therein lies one of the dangers to the Reserve's long-term survival; Bush may still choose to let the process languish, or abandon it altogether. Furthermore, the congressional language does not expressly mention and preempt Executive Order 13,196, leaving the Reserve's existence based solely on the two EOs. Bush therefore still has the option of issuing his own Executive Order revoking 13,196, halting the

Preservation Act, and the National Wildlife Refuge System Administration Act. See Exec. Order No. 13,178, supra note 1 at introduction. Only some of these are directly useful to the management of the Reserve, as will be discussed infra.


47. NMSAA § 6(g)(7).


49. See NMSAA § 6(g).

50. The NMSAA directs that if the Reserve is not designated a sanctuary before October 1, 2005, "the Secretary shall conduct a review of the management of the reserve under section 304(e) [of the NMSA]," NMSAA supra note 46, § 6(g)(5), 114 Stat. at 2386. There is not, however, any further action required.

51. The NMSAA contains no mention of either Executive Order. It only grants congressional permission and authorizes funding for designating a reserve if the President wishes, not requiring creation of this particular Reserve, meaning its legal framework and existence remains rooted in the two orders.
current sanctuary designation process and dismantling the Reserve.\textsuperscript{52}

3. \textit{Political and Economic Forces Challenge the Reserve}

The new administration is already reviewing both EOs, and although it insists this procedure is standard for any incoming administration, a number of external pressures may be fueling the review. Environmental groups charge that WesPac is creating pressure to weaken or overturn the Reserve.\textsuperscript{53} Fishery interests opposed to the Reserve's restrictions could find willing allies in political groups angered by President Clinton's aggressive use of the Antiquities Act to set aside significant tracts of federal land as national monuments. Furthermore, there are allegations that the creation of the Reserve and other parks during the waning days of the Clinton presidency was done without sufficient opportunity for public comment.

Many environmental groups and commentators, including the native Hawaiian group KAHEA, allege that WesPac is behind the pressure to review these Orders because it seeks greater commercial fishing access to the Preservation Areas and protection of its influence over the area's management.\textsuperscript{54} WesPac, for its part, insists it supports the Reserve and merely wants to make more efficient use of the resources, claiming that the closed areas provide the best fishing for high-value snapper species like Opakapaka and Onaga,\textsuperscript{55} and studies by NOAA have asserted that the chief threat to the reef ecosystems is not fishing activity, but the physical damage inflicted on the reefs by tons of marine debris that invade the Reserve area every year from all around the Pacific.\textsuperscript{56} Ironically, the debris consists primarily of discarded fishing gear.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{52} See Udall, \textit{supra} note 41, at 10.
\item \textsuperscript{54} Prior to Reserve designation, WesPac was less restrained in its management of the area's fisheries. With the creation of the Reserve Council and the Reserve Management Plan, its voice in managing the area has become diluted, according to State of Hawaii marine officials.
\item \textsuperscript{55} See Christensen, \textit{supra} note 53.
\item \textsuperscript{56} One article on this issue cited NOAA studies that found 60 tons of marine debris had washed ashore over a five year period from 1995-2000 on only two of the Reserve's atolls, Pearl and Hermes. Prabha Natarajan, \textit{Fishermen Distraught Over
Commercial fishing interests, dissatisfied with the Reserve's restrictions, will find allies in Washington. There is significant conservative resentment over President Clinton's use of the Antiquities Act\textsuperscript{58} to preserve large sections of the U.S. mainland, the most famous example being his designation of the Grand-Staircase Escalante National Monument in Utah, the largest national monument ever created in the continental U.S.\textsuperscript{59} Clinton arguably changed the focus of the Antiquities Act from protecting small, discrete areas of natural beauty to protecting entire ecosystems.\textsuperscript{60} The unprecedented scale of the lands protected by Clinton under the Antiquities Act, including six such designations in his last week in office,\textsuperscript{51} angered many conservatives, who complain that the set-aside of large areas, without consultation, is an abuse of the Act and of the democratic process.\textsuperscript{62} Although Congress's passage of the National Marine Sanctuaries Amendment Act of 2000 implies approval for this broad stretch in executive power, lingering congressional discomfort over the massive scale of Clinton's monument designations could add force to other political pressures adversely affecting the future implementation of the Reserve.\textsuperscript{63}


57. Id.

58. Antiquities Act, 16 U.S.C. § 431 (2000). The Act delegates significant power to the President to declare federal lands as national monuments. While the language limits the area to “the smallest area compatible with the proper care and management of the objects to be protected,” this is not a significant limitation, since it depends on the definition of what is to be protected. Id. For an ecosystem of this size, the “smallest area” could still be vast.


60. See id. (discussing this topic in greater detail).

61. The Carrizo Plain, Kasha-Katuwe Tent Rocks, Pompeys Pillar, Upper Missouri River Breaks, and Sonoran Desert National Monuments were all designated on January 17, 2001, and protected over 600,000 acres of federal land. \textit{Id.} at 537.

62. See Todd F. Gaziano, \textit{The Use and Abuse of Executive Orders and Other Presidential Directives} 9 (2001), available at http://www.heritage.org/library/legalmemo/lm2.html (labelling Clinton’s actions under the Antiquities Act “possibly illegal in scope”). The Reserve could be a tempting target, as its scale is representative of the concern the critics have with Clinton’s wilderness designations. but, unlike a national monument, it does not require a majority of Congress to amend or overturn; a new Executive Order will suffice. See Ranchod, supra note 59, at 552-53 (discussing the permanency of Clinton’s national monument designations under the current and future administrations).

63. Zinn & Buck, \textit{supra} note 17 (indicating that although other National Marine Sanctuaries have been created administratively, none were anything approaching the size of the Reserve, and none were so far-reaching as to reserve an entire ecosystem).

Congressman James Hansen (R-UT), Chairman at the time of the House Resources Committee, wrote to President-elect Bush on December 27, 2000 and expressed concern about, among other things, Clinton’s marine protection initiatives. \textit{See id.}
Finally, while public hearings for the Reserve were extensive and overwhelmingly in support of the proposed fishing closures,\textsuperscript{64} supporters of the Reserve fear that Bush still may challenge the sufficiency of the public input process to limit or overturn the Reserve, as he did in 2001 to delay implementation of the National Forest Service's roadless rule in federal forests, despite record public input supporting that policy.\textsuperscript{65}

As a result, current protection of the Reserve is shaky. Moreover, even while that protection lasts, it may be insufficient to properly protect the resources.

\section*{B. Status Quo: Non-Sanctuary Statutory Protection is Inadequate}

The Clinton administration promoted the Reserve primarily as an effort to bring a new cohesiveness to marine resource protection without requiring new legislation.\textsuperscript{66} To bolster the authority of the executive orders, Clinton cited numerous statutory authorities, including the National Marine Sanctuaries Act,\textsuperscript{67} the National Marine Sanctuaries Amendments Act of 2000,\textsuperscript{68} the Magnuson-Stevens Fishery Conservation and Management Act,\textsuperscript{69} the Marine Protection, Research and Sanctuaries Act,\textsuperscript{70} the Coastal Zone Management Act,\textsuperscript{71} the Endangered Species Act,\textsuperscript{72} the Marine Mammal Protection Act,\textsuperscript{73} the Clean Water Act,\textsuperscript{74} the National

\textsuperscript{64} See FRIED ET AL., supra note 18 at 7 (detailing history and data on the public comment process for the Reserve, which started in May, 2000). Of the 8,400 public comments received on the Reserve, less than 3\% felt the proposed closures were too restrictive. Id.


\textsuperscript{66} See Press Briefing by Baker & Hayes, supra note 17 (Deputy Secretary of the Interior David Hayes stating, "I'd like to emphasize that we are not changing the legal structure at all today of how we protect marine environments. We are still going to proceed under current authorities.").


\textsuperscript{72} Endangered Species Act, 16 U.S.C §§ 1531-1544 (1994).

\textsuperscript{73} Marine Mammal Protection Act, 16 U.S.C. §§ 1362-1421 (1994).

Historic Preservation Act,\textsuperscript{75} and the National Wildlife Refuge System Administration Act.\textsuperscript{76}

Although these laws have provisions that can regulate water quality, human activity, and ecosystem management of a marine environment, most were developed to address, with cooperative state jurisdiction, terrestrial and coastal activities and pollutants near or in populated areas. Most are ill-suited to address the management of such a remote, federally-managed, far-flung marine environment as that found in the Reserve.\textsuperscript{77} Only three of the statutes cited by Clinton are at all appropriate for the protection and management of this area: the Endangered Species Act, the Marine Mammals Protection Act, and the Magnuson-Stevens Fisheries Conservation and Management Act. Pending sanctuary designation, these are the best tools available to protect the Reserve's unique coral resources. Unfortunately, however, a review of their powers vis-a-vis such protection reveals significant inadequacies. These acts neither provided a legal mandate for Clinton's action nor offer an effective management scheme should the executive orders be revised or overturned and sanctuary designation fail to materialize.

\begin{itemize}
\item \textsuperscript{75} National Historic Preservation Act, 16 U.S.C. §§ 470-471 (1994).
\item \textsuperscript{76} National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-ee (1998).
\item \textsuperscript{77} The Coastal Zone Management Act, §§ 16 U.S.C. 1451-1465 (1994), is a federally created, state-run program to preserve state waters. The waters of the Reserve, of course, are hundreds of miles from the nearest point source in a state coastal zone. Clinton did try to strengthen the applicability of the Clean Water Act to the Reserve by directing the EPA in Executive Order 13,158 to take into account offshore water quality impacts on coral reefs by "expeditiously propos[ing] new science-based regulations... to ensure appropriate levels of protection for the marine environment." \textit{See} Exec. Order No. 13,158, 65 Fed. Reg. 34,909, § 4(8)(f) (May 26, 2000). He also specifically cited, in Executive Order 13,196, 66 Fed Reg. 7,395, § 3(4) (Jan. 23, 2001), Section 312 of the Clean Water Act to demonstrate the statutory tools available to the executive branch for regulating marine discharges in the Reserve. This section in part empowers the head of the EPA to regulate, and more importantly, prohibit marine discharges in ecologically sensitive waters if they are deemed damaging to the unique resources found in the area. \textit{See} 33 U.S.C. § 1322 (1994). A weakness of the Act, however, is its silence on private vessel discharges into federal waters; it covers only State waters or federal vessel discharges. \textit{See} 33 U.S.C. § 1322(f)(3), (4)(A) (1994); \textit{id.} § 1322(n)(7)(B)(i) (granting power to the EPA Administrator to prohibit sewage discharges into ecologically sensitive \textit{State} waters); \textit{see also} 33 U.S.C. § 1322(n)(9) (1994) (prohibiting such discharges from vessels of the Armed Forces).
\item Finally, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (1994), and the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1994), very broadly govern dumping in U.S. territorial waters, and could be used to further enforce preservation of the marine environment, but do not provide statutory tools for proactively preserving coral reefs.
\end{itemize}
1. The Endangered Species Act (ESA)

The ESA requires federal authorities to avoid taking any actions that would lead to the endangerment or harm of any threatened or endangered species and to ensure that no programs or projects receiving federal funds interfere with their survival. The ESA further prohibits individuals from "taking" any of these species, a broad term that has been extended to mean harming their habitat. Critical habitat designations in the Reserve for the threatened green sea turtle, the endangered hawksbill and leatherback turtles, and the endangered Hawaiian monk seal would, therefore, seem to give the federal agencies charged with managing the Reserve area effective powers to prevent takings of its coral reef and marine resources, with the full power of the ESA behind them. There are several limitations, however, on the ESA's ability to accomplish this.

First, and perhaps most importantly, the thrust of the ESA is not area preservation, but species preservation. As a tool for preserving the overall biological richness and integrity of a specific geographical area's physical ecosystem, therefore, it starts off on the wrong foot by not being able to provide broad-based ecosystem protection.

Second, and related to that, the ESA seeks to prevent harm but does not promote conservation. While Section 7 charges all federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species," this language has been interpreted by the Fish and Wildlife Service, the lead ESA agency, as not requiring a duty to conserve; in short, the ESA does not require any particular action from a federal agency in response to a perceived threat, and

79. See 16 U.S.C. § 1536(a)(1), (2) (1994) (describing the federal agency responsibilities under Section 7 of the ESA). The protection of critical habitat in the marine environment may also involve federal permitting processes, such as EPA regulations concerning wastewater discharges. See 16 U.S.C. § 1536(a)(2), (4) (1994). Indeed, in 1999, EPA prohibited discharges of pollutants near Saipan's coral reefs to protect both Green and Hawksbill turtles, even though the area was not designated as critical habitat for them. See Craig, supra note 17.
81. This view was upheld by the Supreme Court in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708 (1995) ("[T]he Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.").
82. 16 U.S.C. § 1536(a)(1).
the courts have deferred to that interpretation. This effectively shifts the ESA's application from proactive preservation to mere general avoidance of harm. Thus, the ESA provides little legal support for the proactive protection of a vast area, even if some endangered species are found there.

Third, the ESA's focus on species rather than habitat protection has generated research on species themselves, but not on the complexity of larger ecosystem mechanics, often resulting in incomplete scientific understanding of the complex ways in which a given habitat supports target species. This is particularly true for the complexities of the marine environment, and this piecemeal approach hampers effective management and preservation efforts. A given coral reef can only be protected under the ESA if it can be firmly linked to the needs of a listed species found in the area. Loss of coral reef biodiversity, therefore, can and does continue without legal recourse under the ESA to the extent that there is no firmly established corresponding impact on a listed species. Often the level of scientific proof is sufficient to draw a firm, 'common sense' inference between federally permitted human activity on a reef and a decline in an endangered species, but insufficient to prove that link as a matter of law.

Finally, even where strong evidence suggests that endangered species are dependent on coral reef resources within designated critical habitats, federal agencies have yielded to pressures from extractive industries to approve management plans that ignore such concerns. Political constituencies pushing for access to valuable natural resources undermine the ability or willingness of federal agencies to truly protect those resources. In addition to such 'agency capture,' the ESA even allows federal agencies to

84. See generally Jacqueline Lesley Brown, Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform, 12 J. ENVTL. L. & LITIG. 151 (1997) (discussing how the species focus of the ESA has meant a failure to achieve the goals of the Act, and asserting a need for a refocus on habitat preservation).
85. See Greenpeace Foundation v. Mineta, 122 F. Supp. 2d 1123, 1134 (D. Hawaii, 2000) (holding that, while evidence existed that suggested that lobster harvesting affected monk seals adversely by reducing their food supply, "[t]he information in the record is insufficient to establish as a matter of law that lobster is absolutely critical to the diet of the monk seal." The plaintiff's motion for summary judgment on a Section 9 violation of modifying and degrading habitat was therefore denied.).
86. See id. at 1129-33 (holding that the National Marine Fisheries Service's approval of lobster fisheries management plan, despite inability to find that the plan would not place the endangered Hawaiian Monk Seal in jeopardy, was arbitrary and capricious).
damage critical habitat or take a species within a habitat if a consultation process determines that such actions will not further endanger the species.⁸⁷

Since the ESA is not focused aggressively on preservation or on coral reef habitat and is undermined in application by the lack of established scientific knowledge of habitat-species links, it is not an appropriate tool to protect the Coral Reef Ecosystem Reserve.

2. **The Marine Mammal Protection Act (MMPA)**

The MMPA⁸⁸ is similarly flawed as a tool for protecting the Reserve. Its biggest weakness is that it does nothing to protect the area's coral reef ecosystems themselves. The only real impact of this law in the Reserve is to protect marine mammals found there that are not yet listed as threatened or endangered. Unlike the ESA, which prohibits some federal activity that degrades protected species' habitats, the MMPA does not address habitat protection. It is concerned with the incidental taking of species in the course of human activity, not the preservation of the biological systems upon which marine mammals depend. Its thrust is management, not preservation, and that thrust does not create legal authority for protection of coral reef systems.

The MMPA is, in essence, not a resource protection statute. Instead, it is more a fisheries management statute, generally weighted in favor of the extraction of ocean resources and oversight of the commercial fishing industry. Its spirit seeks to curb abuses by marine industries rather than actively protect ecosystem resources.⁸⁹ While it prohibits the taking of marine mammals, this ban is subject to numerous exceptions, permitting, for example, incidental takings during commercial fishing operations. It even allows incidental takings of ESA-protected species, if certain determinations are made.⁹⁰ The MMPA does provide for monitoring those takings and monitoring of overall species population,⁹¹ and it

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⁸⁷. See 16 U.S.C. § 1536(b)(4) (1994). There is another process that goes further, granting exemptions to the ESA to allow the damaging of critical habitats and destruction of a species, but its use has been extremely rare. See 16 U.S.C. § 1536(e), (g), (h) (1994).


⁹⁰. See 16 U.S.C. § 1371(a)(5)(E) (1994) ("... the Secretary shall allow the incidental ... taking ... of ... endangered species or threatened species under the Endangered Species Act ... if the Secretary ... determines that" certain conditions are fulfilled).

gives the Secretary of Commerce the power to revoke permits\(^9\) and to close fisheries\(^9\) if operators do not comply with efforts to reduce incidental takes,\(^9\) but its overall focus is not on preservation.

3. **The Magnuson-Stevens Fisheries Conservation and Management Act**

The Magnuson Act\(^9\) sets national fishery conservation standards and gives the federal government authority to regulate, through Regional Councils,\(^9\) fisheries in the waters of the U.S. Exclusive Economic Zone (EEZ). It authorizes those councils to close areas and limit permits in order to protect long-term stocks.\(^9\) The National Marine Fisheries Service (part of the Department of Commerce) and the council members of WesPac cooperate in managing the fisheries found in the Reserve,\(^9\) but this relationship does not always ensure the overall protection of resources, particularly coral reefs.\(^9\) The two managing bodies also are frequently in conflict. The Department of Congress, and NMFS, are granted authority to manage the new Reserve in both the National Marine Sanctuaries Amendment Act and EOs 13,178 and 13,196.\(^1\) NMFS is charged with preserving and studying the Reserve's resources, while WesPac, reflecting commercial fishing

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96. The Magnuson Act established eight regional councils with some members appointed by the Secretary of Commerce to represent fishing and fishing-related communities, while other members are designated federal, state, and territorial officials with fisheries responsibilities. 16 U.S.C. § 1852; see also WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL WEBSITE, at http://www.wpcouncil.org; 16 U.S.C. § 1811(a) (detailing U.S. Exclusive Economic Zone (EEZ) management authority).

97. See 16 U.S.C. § 1853(a)-(d); see also ZINN & BUCKNER, supra note 17. The Act also, of course, provides the Secretary with enforcement power through civil penalties, the revocation of permits, and other methods. See generally 16 U.S.C. §§ 1857-1858 (particularly 16 U.S.C. § 1858(a), (g)).


interests, resists the limitations on catch imposed by the proposed Reserve.\textsuperscript{101}

Under this Act, fishery management plans usually are made by recommendation of the Regional Fishery Management Council, but the Secretary of Commerce can also propose and finalize plans directly, and it is the Secretary who has the final say on the form the plan will take.\textsuperscript{102} This oversight authority, however, is only effective if exercised by the Secretary, and, given NMFS's inaction in the mismanagement of lobster fisheries in the Reserve,\textsuperscript{103} it is questionable how much protection this provision affords coral reefs.

Finally, the Magnuson Act's main flaw is that, like the MMPA, its focus is fisheries management - to ensure maximum sustainable yields for commercial fishing interests.\textsuperscript{104} As such, its purpose is extraction of resources, not the conservation management of the inshore coral reef environment, the \textit{raison d'être} for the Reserve's designation.

\section*{C. Sanctuary Designation: A Long-Term Solution?}

The ESA, MMPA, and Magnuson Act do not afford direct protection to the reefs themselves, and were not designed to do so. Applying these laws to protect and manage the coral reef ecosystems of the Northwestern Hawaiian Islands is like trying to dress a large man using clothes tailored for someone else; occasionally something fits, but the overall result is ill-suited, and leaves embarrassing omissions in coverage. Sanctuary designation, on the other hand, solves some of these problems since it is not species-specific, but rather focuses on actively protecting...

\begin{footnotes}
\item[101.] See Natarajan, \textit{supra} note 56; see also Telephone interview with Kevin Kelly, \textit{supra} note 39.
\item[102.] See 16 U.S.C. § 1854(b), (c) (1996).
\item[103.] See discussion, \textit{supra} notes 85-86, concerning \textit{Greenpeace Foundation v. Mineta}, 122 F. Supp. 2d 1123; see also Environmental Defense, \textit{supra} note 19. Environmental Defense alleges that gross mismanagement of the area's lobster fisheries led to the collapse of those resources, while financially benefiting Council members and their spouses who overharvested the areas by as much as 500% of the maximum sustainable yield, citing the Council's own records. Id.
\item[104.] See 16 U.S.C. § 1802(28); optimum is defined as the maximum sustainable yield possible from a fishery, tempered by other considerations. For an overview how extractive pressures have often received priority over long-term sustainability, see David A. Dana, \textit{Overcoming the Political Tragedy of the Commons: Lessons Learned from the Reauthorization of the Magnuson Act}, 24 \textit{ECOLOGY LAW QUARTERLY} 833 (1997). See also SUSAN HANNA, HEATHER BLOUGH, RICHARD ALLEN, SUZANNE IUDICELLO, GARY MATLOCK & BONNIE MCCAY, THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS AND THE ENVIRONMENT, \textit{FISHING GROUNDS: DEFINING A NEW ERA FOR AMERICAN FISHERIES MANAGEMENT} (2000)
\end{footnotes}
ecosystems as a whole. Likely recognizing the weaknesses of other applicable statutes, Clinton launched the National Marine Sanctuaries Act's designation process in EO 13,178, hoping to activate a statute specifically designed for coral reef protection. This process can take two or three years, but, if successful, could formalize and make permanent the existence of the Reserve beyond the current authority of the executive order and thus strengthen its long-term chances for survival. Sanctuary status offers several advantages.

First, the National Marine Sanctuaries Act (NMSA) takes an ecosystem-wide approach in its language, framed to actively conserve environmental resources rather than to merely avoid harm. Section 306 states that "it is unlawful for any person to destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary." In the latest amendments Congress strengthened the prohibition against the taking of any sanctuary resources by making it unlawful to "possess, sell, offer for sale, purchase, import, export, deliver, carry, transport, or ship by any means any sanctuary resource taken in violation of this section." In addition to broadening the prohibition against harming any resources found in the sanctuary, Congress made it a crime to resist or interfere with federal agents in

105. See 16 U.S.C. § 1431(a)(4)(C), (b)(3) (2000) ("The purposes of the Act are in part to 'maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas" and "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and where appropriate, restore and enhance natural habitats, populations and ecological processes.").

106. See Exec. Order No. 13,178, 65 Fed Reg. § 5(b)(12)(e) (Dec. 7, 2000). Once the Secretary begins the formal designation process, NOAA must consider several factors dictated by the NMSA: whether the area is of special national significance, whether existing statutes are inadequate to properly protect the area, and whether the area is of a size and nature that will permit comprehensive and coordinated conservation and management. See 16 U.S.C. §§ 1433(a)(1)-(E) (as amended). The vast scale of the Reserve could arguably make comprehensive and coordinated conservation and management extremely challenging.

Practicality of size for a proposed sanctuary is also a concern in the next subsection of the NMSA, entitled "Factors and consultations required in making determinations and findings": "the Secretary shall consider ... the manageability of the area, including factors such as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities." 16 U.S.C. § 1433(b)(1)(F) (2000). Conversely, the unique resources at stake, and the size of the Reserve, are strong arguments for special national significance and an appropriate ecosystem-wide scale.


their enforcement duties, defining interference to include supplying false information, and added criminal penalties for violators. ¹¹⁰

Furthermore, all activity within the sanctuary must be in accordance with the overarching goal of conservation. Permits are available for human activities, but the Secretary may grant only those permits that are "compatible with the purposes for which the sanctuary is designated, and with protection of sanctuary resources."¹¹¹ The permitted activity must be carried out so that it "does not destroy, cause the loss of, or injure sanctuary resources."¹¹² In addition, the NMSA grants the Secretary authority to undertake further research on the area's marine ecosystems, including the possibility of restoring damaged or lost systems.¹¹³ This provision addresses a principal shortcoming in public management of marine ecosystems: the fundamental lack of understanding about the underlying biological systems at work. These measures, taken together, represent stronger protections than found in the ESA and other Acts.¹¹⁴

Unfortunately (from a conservation perspective) the NMSA contains a provision that could undermine all of the above protections. The Act exempts commercial and recreational fishers from any additional permits: "Nothing in this section shall be considered to require a person to obtain a permit under this section for the conduct of any fishing activities in a national marine sanctuary."¹¹⁵ By leaving fisheries management up to the Magnuson-Stevens system, sanctuary status does not address past conflicts between fishing pressure and coral reef preservation, and as such does not address the original source of stress on the


¹¹⁴ The NMSA, however, cannot protect the reefs from the very real and serious threat of marine pollution, particularly discarded or lost fishing gear, that washes up on the Reserve's reefs and atolls by the ton every year, damaging the fragile coral structures and choking and snaring wildlife. See Natarajan, supra note 56. Given the boundless nature of the marine environment, strict policing of the Reserve is not enough. The NMSA does contain provisions for the Secretary to work with international parties to address this scourge, see 16 U.S.C. § 1435(b) (2000), but like the challenges faced by similar international transboundary issues like global warming, acid rain, and other pollutants, significant progress is likely years away.

Reserve's marine ecosystem. To critics of WesPac's management record, this represents a fatal weakness of the Act.\textsuperscript{116}

CONCLUSION

The Secretary of Commerce has initiated the sanctuary designation process for the Reserve, and both that and the final Reserve Operations Plan, to be reviewed by NOAA, are undergoing the public comment process.\textsuperscript{117} The Bush Administration has expressed initial support for the Reserve.\textsuperscript{118} The final protections for the Reserve, however, remain uncertain, and WesPac's and NOAA's challenges to the legality of the EOs,\textsuperscript{119} the charges of mismanagement and overfishing brought by environmental groups,\textsuperscript{120} and the exclusion of fisheries management from the NMSA,\textsuperscript{121} raise concerns whether the EOs were the best vehicle for achieving lasting protection of the Northwestern Hawaiian Islands coral reefs.

By choosing to create the Reserve through an executive order, Clinton subjected an initiative aimed at achieving vast protection for unique marine resources to lengthy consideration and modification by federal and state agencies, commercial interests, and the public - in short the same kinds of pressures that surround any proposal to limit commercial and public access to valuable natural resources. Traditionally battles over such resources - in the courts, in the media, and in Washington - result in compromise, compromises that may undermine the protection envisioned by Clinton. Even though it faces hurdles, however, Clinton's designation of this Reserve has created the nucleus of an

\textsuperscript{116} Under the current Reserve system, the Reserve is managed by the Department of Commerce through development of a Reserve Operations Plan (see Exec. Order No. 13,178, supra note 1, §5), with input from the Reserve Management Council. (Id., §5(f).) WesPac only has a non-voting seat on the Council, and hence, has less control over the policies and operations in the Reserve than it would under Sanctuary status. \textit{See The Reserve Council}, at http://hawaiioref.noaa.gov/council/council.html (listing WesPac as a non-voting member); National Marine Sanctuaries Act, 16 U.S.C. §1441(f) (exempting fishing permit management from Sanctuary powers); 16 U.S.C. §1445(b)(2) (allowing participation of Regional Fishery Council Members on Sanctuary Advisory Committees).


\textsuperscript{119} See discussion supra Part II.A.1.

\textsuperscript{120} See discussion supra Parts I.B., II.B.1.

\textsuperscript{121} See 16 U.S.C. § 1441(g) (2000).
idea that has widespread support in Hawaii and with interested groups around the country. It seems that the Executive Orders have, at the least, created a focused constituency.

122. The visioning sessions that gathered extensive public input during the initial stages of the Reserve's formation showed substantial public support for this Reserve. See NOAA WEBSITE Q AND A, supra note 2. Additional input was also received through WesPac's development of their initial Coral Reef Ecosystem Fishery Management Plan, which touched on many of the same issues. Id.