



Spring 1985

A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come

Craig S. Harrison

Recommended Citation

Craig S. Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come*, 25 Nat. Resources J. 317 (1985).

Available at: <https://digitalrepository.unm.edu/nrj/vol25/iss2/4>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sahrk@unm.edu.

A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come[†]

INTRODUCTION

Conflicts Concerning the Northwestern Hawaiian Islands

The Northwestern Hawaiian Islands (NWHI)¹ are a series of emergent rocks, coral reefs, and sandspits atop submarine volcanos in the North Central Pacific. Far removed from public awareness, these islands are an unlikely setting for serious conflict concerning the management of marine resources. The fishery resources there are substantial,² and have been receiving increased attention from fishermen, both domestic and foreign.³ The wildlife resources of the NWHI are so unique and vulnerable that the area was proclaimed the Hawaiian Islands Reservation by President Theodore Roosevelt in 1909.⁴ Hawaiian fishermen want to develop the fishery resources of the NWHI, whereas wildlife managers want to protect the wildlife from harm that may accompany increased human activities in waters adjacent to the islands.

This conflict has resulted in a state-federal confrontation concerning jurisdiction over certain waters in the NWHI.⁵ However, this jurisdictional dispute is merely a symptom of the fundamental issue: what is the proper balance between wildlife conservation and fishery exploitation? The state of Hawaii and the federal government recognize the importance of both goals. The State of Hawaii is currently cast in the role of a strong proponent of fishery development in the NWHI in order to help strengthen and

*Associate, Goodsill, Anderson, Quinn & Stifel, Attorneys at Law, Honolulu, Hawaii.

†The author acknowledges the support of the Environment & Policy Institute of the East-West Center, Honolulu, and the assistance of Professor David Callies, Richardson School of Law, in the preparation of this article. An earlier version of this article received first prize in an essay contest sponsored by the Hawaii Chapter of the American Planning Association.

1. The NWHI include Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Laysan, Lisianki, Pearl and Hermes Reef, Midway, and Kure, a distance of 1200 miles. *ATLAS OF HAWAII* 22 (R.W. Armstrong ed. 1973).

2. Foster, *Identification of Ongoing and Planned Fisheries in the NWHI* 4, (1981) (Report No. MMC-80/04).

3. *Id.* at 14.

4. Exec. Order No. 1,019 (1909), *reprinted in* *United States v. Schlemmer*, 3 U.S. Dist. Ct. Hawaii 546, 547-48 (1910).

5. The dispute involves an area of about 254,000 acres. These include lagoons and submerged waters at French Frigate Shoals, Maro Reef, Pearl and Hermes Reef, and Laysan Island. Comment, *State-Federal Jurisdictional Conflict over the Internal Waters and Submerged Lands of the NWHI*, 4 U. HAWAII L. REV. 139, 142 n.8 (1982).

diversify the state economy.⁶ Hawaii law also requires effective protection of Hawaii's unique and fragile environmental resources,⁷ an overall conservation ethic in the use of Hawaii's natural resources,⁸ and encouragement of the protection of rare or endangered plant and animal species and habitats native to Hawaii.⁹ State officials contend that these goals can be achieved while pursuing other statutory mandates, such as encouragement of new ocean-related employment in marine industries,¹⁰ and generation of new ocean-related economic activities in food production.¹¹

Federal officials urge caution in fishery development, yet are caught in a similar dilemma. The federal government actively encourages new fisheries,¹² yet also has a plethora of laws and regulations that are designed to protect various wildlife resources.¹³ The involvement of many state and federal agencies obscures the fundamental dispute concerning the proper balance between two legitimate goals. Neither the state nor federal government has clearly defined its policies on this issue.

Although biologists recognize that effective resource management and conservation of a resource system require a sophisticated approach that takes into account the entire ecosystem,¹⁴ there is no such approach to the current management of the NWHI. State and federal laws and regulations in the NWHI frequently overlap and just as frequently ignore potential resource management problems.

This article focuses on the institutions that manage the natural resources of the NWHI, and suggests changes that may improve the decisionmaking process concerning the balance of uses there. It begins with a brief description of the fishery and wildlife resources, followed by a survey of the primary federal, state, and regional agencies responsible for the management of marine resources. It focuses on the laws, regulations, and policies of each agency that shape the agency's views on the utilization and conservation of the resources of the NWHI. The article proceeds to analyze the deficiencies in the existing institutional scheme which fragments responsibilities among state and federal agencies. Each agency pursues its own goals in the absence of a conflict resolution mechanism

6. Department of Land & Natural Resources (DLNR), Hawaii Fisheries Development Plan v (1979) [hereinafter cited as Development Plan].

7. HAWAII REV. STAT. § 226-11(a)(2) (Supp. 1984).

8. *Id.* § 226-11(b)(1).

9. *Id.* § 226-11(b)(6).

10. *Id.* § 226-10(b)(1).

11. *Id.* § 226-10(b)(9).

12. 16 U.S.C. § 1801(b)(6) (1982).

13. *E.g.*, the Endangered Species Act, 16 U.S.C. § 1531-1543 (1982); Migratory Bird Treaty Act, 16 U.S.C. § 703-712 (1982).

14. HOLT & TALBOT, NEW PRINCIPLES FOR THE CONSERVATION OF WILD LIVING RESOURCES (Wildlife Monographs No. 59 1978).

that can balance competing policies. The existing scheme fosters needless interagency conflict, inefficient exploitation of fishery resources, and inadequate protection of both wildlife and fishery resources. The article then discusses the possibility of introducing a new institution into the NWHI, the federal marine sanctuary program, which is administered by the Office of Coastal Zone Management in the National Oceanic and Atmospheric Administration (NOAA). The strengths and weaknesses of marine sanctuary status for the NWHI are discussed. The article concludes that the goals of fishery development and wildlife conservation would be enhanced under the marine sanctuary program.

MARINE RESOURCES

The marine resources of the NWHI include economically valuable fisheries and wildlife that are internationally recognized as unique. Important resources such as these require careful management.

Substantial fish resources occur in the waters of the NWHI, but the exact magnitude that can be developed remains speculative.¹⁵ The state estimates potential fishery yields to be about 100 million pounds per year,¹⁶ but this estimate may be excessive.¹⁷ Much of this potential exists in open-ocean tunas, especially skipjacks.¹⁸ A skipjack tuna fishery requires the availability of a strong baitfish near the fishing grounds.¹⁹ Other promising fisheries include handlining for bottom fish,²⁰ trapping or trawling for shrimp or lobsters,²¹ and trolling for various pelagic fish.²²

The wildlife resources of the NWHI are spectacular. The islands have been managed as a wildlife refuge for more than 75 years.²³ An estimated ten million marine birds of eighteen species breed there in an internationally recognized unique ecological community.²⁴ Seven of the species are rare elsewhere.²⁵ For example, the black-footed and Laysan albatrosses, the largest seabirds in the North Pacific, nest virtually nowhere

15. Development Plan, *supra* note 6, at 41.

16. *Id.*

17. See, e.g., Hirota, Taguchi, Shuman & Jahn, *Distribution of Plankton Stocks, Productivity, and Potential Fishery Yield in Hawaiian Waters* in PROCEEDINGS OF THE SYMPOSIUM ON THE STATUS OF RESOURCE INVESTIGATIONS IN THE NWHI 191 (R. Grigg & P. Pfund eds. 1980) (University of Hawaii Sea Grant College Program Misc. Rep. No. 4) [hereinafter cited as SYMPOSIUM PROCEEDINGS].

18. Development Plan, *supra* note 6, at 42.

19. *Id.* at 239.

20. Foster, *supra* note 2, at 21-22.

21. *Id.* at 41-46.

22. Uchiyama, *Survey of the Pelagic Fishes of the NWHI* in SYMPOSIUM PROCEEDINGS, *supra* note 17, at 251-52.

23. See note 4, *supra*.

24. HARRISON, HIDA & SEKI, HAWAIIAN SEABIRD FEEDING ECOLOGY (Wildlife Monographs No. 85 1983) [hereinafter cited as SEKI].

25. Harrison & Hida, *The Status of Bird Research in the NWHI* in SYMPOSIUM PROCEEDINGS, *supra* note 17, at 17, 18.

else.²⁶ Most birds feed in surface waters near the colonies, and several species rely on tuna schools to drive prey to the surface.²⁷ The Hawaiian monk seal is an endangered species²⁸ that lives only in the NWHI.²⁹ Its population has declined to about 1,000 animals.³⁰ The green sea turtle, a threatened species,³¹ lives throughout the Hawaiian Archipelago, but almost all nesting is in the NWHI.³² The NWHI are valuable to marine biologists because they are a relatively undisturbed natural ecosystem that can serve as a natural laboratory. Several rare fish species are found there.³³ Additionally, Kure Island is unique in that it is the northernmost coral atoll on earth.³⁴

Given the conservation and commercial importance of the marine resources of the NWHI, it is important to understand the existing management regime there. The public agencies with responsibilities in the NWHI are the channels through which public policies in laws and regulations are implemented. Too often the nature of such organizations is overlooked in evaluating the successes and failures of public policy.³⁵

EXISTING MANAGEMENT REGIME

The management of the natural resources in the NWHI is fragmented among several federal, state, and regional agencies.³⁶ The state and federal governments have conflicting management policies, stemming in part from different perspectives. In addition, neither the state nor the federal government has delegated responsibility for marine resource management to a single agency. Some agencies, such as the U.S. Fish and Wildlife Service (FWS) and the State of Hawaii Department of Planning and

26. I R.S. PALMER, HANDBOOK OF NORTH AMERICAN BIRDS 121,127 (1962).

27. See, e.g., Ashmole & Ashmole, *Comparative Feeding Ecology of Seabirds of a Tropical Oceanic Island*, 24 PEABODY MUSEUM NAT. HISTORY BULL. (1967); Murphy & Ikehara, *A Summary of Fish Schools and Bird Flocks and of Trolling in the Central Pacific*, U.S.F.W.S. SPECIAL SCI. REP. FISH 154 (1955).

28. 16 U.S.C. § 1532(6) (1982).

29. Johnson, DeLong, Fiscus & Kenyon, *Population Status of the Hawaiian Monk Seal (Monachus Schauinslandi)*, 1978, 63 J. MAMMOLOGY 415 (1982) [hereinafter cited as Johnson]. This seal has occasionally been sighted in the main Hawaiian Islands and Johnston Island.

30. *Id.*

31. 16 U.S.C. § 1532(20) (1982).

32. Balazs, *A Review of Basic Biological Data on the Green Turtle in the NWHI*, in SYMPOSIUM PROCEEDINGS, *supra* note 17, at 42, 44.

33. E.g., the sling-jaw wrasse (*Epibulus insidiator*), the masked angel fish (*Genicanthus personatus*), and a butterfly fish (*Chaetodon trifascialis*).

34. Woodward, *The Natural History of Kure Island, NWHI 1* (Smithsonian Institution Atoll Research Bull. No. 164, 1972).

35. Pfund, *Institutional Policymaking in the Management of Fisheries Case Study: State of Hawaii*, 5 SEA GRANT Q. 6 (1983).

36. The City and County of Honolulu may also assume a management role in the future. Honolulu's general planning department has recently recommended that the NWHI be included in the Oahu General Plan. Honolulu Star-Bulletin, Mar. 13, 1985, at A-20, col. 1.

Economic Development (DPED), are single-purposed. Other agencies, such as the State of Hawaii Department of Land and Natural Resources (DLNR) and the federal National Marine Fisheries Service (NMFS), are multi-purposed.

No single agency adopts a balanced, comprehensive approach to the protection and wise use of marine resources. No institutional mechanism exists that ensures interagency coordination or the timely resolution of conflicts. Some agency laws and programs overlap, such as the state³⁷ and federal³⁸ endangered species programs. Other potential problems, for example, foreign skipjack tuna fisheries beyond three miles,³⁹ are not regulated even though intense fishing could cause severe declines in seabird populations.⁴⁰ Cobalt-rich manganese crust⁴¹ resources are present on the seabed within a few miles of some NWHI,⁴² and mining could be proposed there. Institutional mechanisms exist to regulate the effects of deepsea mining on fish or wildlife resources. The following accounts of the five primary agencies responsible for the management of the resources of the NWHI will clarify the role of each agency. Improved coordination based on an ecosystem approach to management is needed.

Federal Agencies

The primary federal agencies with responsibilities in the NWHI are FWS (Interior) and NMFS (Commerce), but the Coast Guard provides ships and airplanes that are used in surveillance and enforcement activities. Until the establishment of NOAA in 1970,⁴³ NMFS and FWS were administered under the same department.⁴⁴ A 1980 proposal would reunite

37. HAWAII REV. STAT. § 195D (1976 & Supp. 1982).

38. 16 U.S.C. § 1531-1543 (1982).

39. The Fishery Conservation and Management Act specifically exempts from regulation highly migratory species, which are defined to be tunas. 16 U.S.C. § 1802(6)(14)(1982). See generally Harrison, *Costs to the United States in Fisheries By Not Joining the Law of the Sea Convention* in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 342, 351-61 (J.M. Van Dyke ed. 1985).

40. See Ashmole & Ashmole, *supra* note 27; Murphy & Ikehara, *supra* note 27. If tuna populations decline, bird populations that rely on them to feed will also decline.

41. These include deep-sea ores of cobalt, copper, nickel, and manganese. Cobalt and manganese are among the six most strategic minerals for the national economy. See generally CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, U.S. ECONOMIC DEPENDENCE ON SIX IMPORTED STRATEGIC NON-FUEL MINERALS (1982).

42. U.S. GEOLOGICAL SURVEY, PROGRAM PLAN FOR INVESTIGATION OF THE MID-PACIFIC COBALT-RICH MANGANESE CRUSTS (1982). The state of Hawaii and the U.S. Department of the Interior are currently preparing an environmental impact statement that would allow a lease sale for cobalt-rich manganese crusts offshore of Hawaii. The proposal includes areas which lie between the depths of 800 to 2,400 meters on submerged island slopes and seamounts. The initial proposal does not include the HINWR. 49 Fed. Reg. 8,088-90 (1984).

43. Reorganization Plans 3 and 4, Oct. 3, 1970, 5 U.S.C. App. II, § 1(a) (1982).

44. NMFS was the old Bureau of Commercial Fisheries, and FWS was the old Bureau of Sport Fisheries and Wildlife. Together they comprised the old U.S. Fish & Wildlife Service.

these agencies⁴⁵ in an attempt to simplify federal marine resource policy. More recently, however, reorganization plans would remove NOAA from the Department of Commerce and give it equal status with the National Science Foundation and the Environmental Protection Agency without involving the Department of the Interior.⁴⁶ FWS and NMFS have overlapping responsibilities with the monk seal and green sea turtle, but neither has clear responsibility for seabirds beyond the territorial sea.⁴⁷

U.S. Fish and Wildlife Service

FWS administers the Hawaiian Islands National Wildlife Refuge (HINWR) in the NWHI and consequently occupies a key role in the dispute concerning fishery utilization and wildlife conservation.⁴⁸ FWS exercises jurisdiction over many, but not all, of the islands of the NWHI.⁴⁹ FWS also exercises jurisdiction over certain nearshore waters, although this jurisdiction is strongly contested by the State of Hawaii.⁵⁰ FWS manages the wildlife resources of the HINWR pursuant to many laws and regulations, but the most important are the Migratory Bird Treaty Act⁵¹ and the Endangered Species Act.⁵² FWS faces severe constraints in the management of a marine ecosystem, and arguably does not possess the technical expertise or the resources to effectively manage marine waters. As a single-purpose agency devoted to wildlife conservation, FWS lacks the comprehensive viewpoint necessary to manage the entire NWHI ecosystem. The National Wildlife Refuge System is the only extensive system of federally owned lands managed primarily for the conservation of wildlife.⁵³ Established at the turn of the century,⁵⁴ the system maintains

45. See Ocean Sci. News, Mar. 3, 1980, at 4.

46. Byrne, *Reorganization of the Commerce Department*, 221 Sci. 698 (1983).

47. FWS does not believe that the Migratory Bird Treaty Act can be enforced beyond the territorial sea. Memorandum from Assistant Solicitor, Fish and Wildlife to Office of Migratory Bird Management, FWS (March 27, 1981). NMFS has only recently become involved with birds. It is studying the mortality to birds from the Japanese high seas salmon gillnet fishery in the North Pacific. Graham, *An Incidental Catch*, AUDUBON 24 (Mar. 1982); Marine Mammal Protection Act of 1982, Pub. L. No. 97-389.

48. The original Hawaiian Islands Reservation became the Hawaiian Islands National Wildlife Refuge by Presidential Proclamation No. 2416 (July 25, 1940), *reprinted in* 54 Stat. 2717-19.

49. Midway is a Naval Air Facility and Kure is both a state of Hawaii wildlife refuge and a Coast Guard LORAN station.

50. The complex history of the competing state and federal claims is recounted in Comment, *supra* note 5, at 151-66.

51. 16 U.S.C. § 703-711 (1982).

52. 16 U.S.C. § 1531-1543 (1982).

53. M.J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 119 (2d ed. 1983).

54. Congress prohibited hunting on federal lands that had been reserved as breeding grounds for birds by Act of June 28, 1906, ch. 3565, 34 Stat. 536 (current version codified at 18 U.S.C. § 41, (1982)). Pelican Island, established in 1903, is considered by some to be the first National Wildlife Refuge.

a national network of lands and waters that will provide public benefits from wildlife, particularly migratory birds and endangered species.⁵⁵ Economic uses in wildlife refuges are allowed only where there is no conflict with the primary long-term conservation value of the refuge.⁵⁶ Fisheries are not currently permitted in the HINWR. FWS was a party to an agreement with NMFS and DLNR to survey and assess the living resources of the NWHI.⁵⁷ FWS deferred decisions concerning fishing within refuge boundaries and the use of Tern Island as a fishery support station⁵⁸ until the end of the study period in 1983.⁵⁹ Decisions have apparently been deferred further until the completion of a master plan for the HINWR.⁶⁰ Several statutes authorize the administration of the National Wildlife Refuge System.⁶¹ With respect to the disputed waters in the NWHI, the Secretary of the Interior must make certain findings before he can dispose of a portion of the refuge system. Before he can remove them from the system, the secretary must find that such lands are no longer needed to achieve the purposes for which the HINWR was established.⁶² FWS asserts that a unit of the refuge system cannot be transferred from FWS administration to that of another federal agency without congressional approval.⁶³

FWS claims jurisdiction over an odd combination of waters around the islands in the HINWR. It manages Maro Reef and the lagoons within the atolls at Pearl and Hermes Reef and French Frigate Shoals. In addition, it claims some of the waters around Laysan Island. FWS claims no waters around Nihoa, Necker, Gardner Pinnacles, or Lisianski Island, although it manages those islands.⁶⁴ FWS claims that the original intent of the Hawaiian Islands Reservation was to protect the wildlife therein, and that management cannot be restricted to emerged land but must also include the marine waters on which marine wildlife depend for their sustenance. Some FWS claims are almost inexplicable from a biological perspective.

55. U.S. DEP'T. OF THE INTERIOR, U.S. FISH & WILDLIFE SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, OPERATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM I-4 (1976) [hereinafter cited as FINAL EIS].

56. *Id.* at VI-5.

57. Tripartite Cooperative Agreement for the Survey and Assessment of the Living Resources of the NWHI (May 23, 1977) [hereinafter cited as Tripartite Agreement]. Five-year objectives of FWS were (1) enumeration of seabird populations, (2) inventory of food utilized, (3) location of major feeding areas, and (4) determination of consumptive rates. Signed by U.S. Fish & Wildlife Service, National Marine Fisheries Service, and State of Hawaii Department of Land and Natural Resources.

58. Development Plan, *supra* note 6, at 204-07.

59. Shallenberger, *Status of the HINWR*, in SYMPOSIUM PROCEEDINGS, *supra* note 17, at 281.

60. U.S. DEP'T. OF THE INTERIOR, DRAFT ENVIRONMENTAL IMPACT STATEMENT, HAWAIIAN ISLANDS NATIONAL WILDLIFE REFUGE MASTER PLAN (1984).

61. 16 U.S.C. §§ 460k-k-4, 668dd (1982).

62. *Id.* § 668dd.

63. FINAL EIS, *supra* note 55, at VIII-48.

64. Comment, *supra* note 5, at 162 n.107.

The most important feeding areas for many wildlife species are omitted, yet marginally valuable waters are included.⁶⁵

The Migratory Bird Treaty Act⁶⁶ and the Endangered Species Act⁶⁷ authorize FWS to manage the wildlife resources of the HINWR. The former implements treaties with Great Britain (on behalf of Canada),⁶⁸ Mexico,⁶⁹ Japan,⁷⁰ and the U.S.S.R.,⁷¹ and requires the Secretary of the Interior to protect the birds listed in the conventions, which include each of the eighteen seabirds that nest in the NWHI.⁷² The treaty with Japan is unusual in requiring the parties to protect the ecological balance of unique island environments.⁷³ Actions by FWS that allowed depletion of food supplies of birds or disturbance of nesting islands could be considered a violation of the Migratory Bird Treaty Act. The Endangered Species Act requires the Secretary of the Interior to publish lists of species that are endangered or threatened.⁷⁴ The Hawaiian monk seal is listed as endangered,⁷⁵ and the green sea turtle in Hawaii is listed as threatened.⁷⁶ NMFS is the lead agency for the management of the monk seal.⁷⁷ FWS and NMFS share this responsibility for the turtle, the former being lead agency when a turtle is on land, and the latter when a turtle is in the water.⁷⁸ FWS must consult with NMFS when any of its programs might jeopardize the continued existence of either of these species.⁷⁹

FWS faces severe institutional constraints in its management of the HINWR. Few refuges in the National Wildlife Refuge System contain marine wildlife.⁸⁰ Because refuge managers tend to transfer frequently

65. Maro Reef has no breeding turtles, seals, or birds and is, therefore, of little value as a wildlife refuge, yet this area comprises one-third of the waters claimed by FWS. Pearl and Hermes Reef also comprises about one-third of the claimed waters and is also marginal. Few birds or turtles nest there. The population of monk seals is also very low, and the area is important only for a few months during monk seal pupping season. See *infra* text accompanying notes 189-202.

66. 16 U.S.C. § 703-712 (1982).

67. 16 U.S.C. § 1531-1543 (1982).

68. Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.I.A.S. No. 628.

69. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.I.A.S. No. 912.

70. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States-Japan, 265 U.S.T. 3329, T.I.A.S. 7990 [hereinafter cited as Japanese Convention].

71. Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-U.S.S.R., T.I.A.S. No. 9073.

72. 50 C.F.R. § 10.13 (1984).

73. Japanese Convention, *supra* note 70, art. VI.

74. 16 U.S.C. § 1533(c) (1982).

75. 50 C.F.R. § 17.11 (1984). This section also lists the short-tailed albatross, which occurs occasionally at several of the NWHI.

76. *Id.*

77. 16 U.S.C. § 1362(11) (1982).

78. 50 C.F.R. § 222.23(a) (1984).

79. 16 U.S.C. § 1536 (1982).

80. For example, it is difficult to find any reference to the marine environment in the lengthy overview of the National Wildlife Refuge System. See FINAL EIS, *supra* note 55.

and FWS usually fills vacancies from within its organization, many refuge managers assigned to the HINWR lack education or experience to manage a complex *marine* ecosystem. Recognizing that FWS does not have a boat to monitor its refuge or conduct enforcement operations, state officials contend that FWS is not particularly interested in the marine environment.⁸¹ Much of the present and historical emphasis of the refuge system is on the production of waterfowl for hunters. Because many senior FWS managers possess expertise primarily in waterfowl management and view hunters as their main clientele,⁸² expenditures on marine wildlife fare poorly in FWS budget priorities.⁸³ Despite enthusiasm for the project in the Honolulu office, FWS' expenditures on the Tripartite studies in the NWHI were a very small fraction of those by NMFS.⁸⁴ Apparently FWS managers in Hawaii often adopt policies that do not conform to those of the national organization.⁸⁵

FWS is adept at the management of the terrestrial components of the refuge system in the NWHI, but it does not possess the requisite expertise for marine waters. Such expertise in the federal government, however, is found in NOAA.

National Marine Fisheries Service

NMFS, a division of NOAA, is the second federal agency with important authority in the NWHI. It has responsibilities for both fishery development and wildlife conservation. NMFS fosters fishery development through research and by developing information for fishery management plans.⁸⁶ Its management authority in wildlife conservation comes

81. 2 Manta Corp., Tern Island Study 80 (1979). The state official here was Susumu Ono, Chairman, Board of Land and Natural Resources.

82. While traditional constituents, such as hunting and fishing groups, have diminished in importance in comparison to the growing importance of organizations that have a more comprehensive view of what the Fish and Wildlife Service should do, top management is still drawn from an era in which game management rather than ecosystem management was the fundamental goal of the agency. Internal promotion mechanisms insure that senior managers remain inbred, virtually all having "come up through the ranks" using old boys' club selection procedures. For example, any FWS employee who applies for a different position within FWS *must* be evaluated for the new position by the employee's current supervisor. Although other federal agencies, such as NOAA and EPA, regularly advertise vacancies for senior positions in SCIENCE, the American Association for the Advancement of Science publication, FWS does not. See generally Coates, Prillaman & Coates, Trends Affecting the Future of the Fish and Wildlife Service (1983) (FWS Report No. 98210-1417-82).

83. For example, in fiscal year 1979, FWS spent only \$37,000. 1 Manta Corp., Tern Island Study 63 (1979). FWS did not assign a fulltime permanent position to the five-year study, despite approval of the study personally by the Director of FWS. One result of this lukewarm effort has been that some FWS objectives in the Tripartite Agreement were not met.

84. NMFS spent \$576,000 on this project in 1979. *Id.* at 64.

85. Honolulu refuge managers chose to supervise studies in the NWHI directly, rather than involve the FWS Research Division, which has expertise in marine wildlife research. This decision is contrary to established FWS policy.

86. U.S. DEP'T. OF COMMERCE, CALENDAR YEAR 1981 REPORT ON THE IMPLEMENTATION OF THE MAGNUSON FISHERY CONSERVATION ACT OF 1976 53 (1982) [hereinafter cited as 1981 REPORT].

primarily from the Marine Mammal Protection Act⁸⁷ and the Endangered Species Act. NMFS aids both development and conservation goals by participation in enforcement activities in the NWHI, although these are designed to monitor foreign fisheries.⁸⁸ NMFS is a multi-purpose agency that seems to draw a reasonable balance between competing goals.

NMFS is currently pursuing a nationwide program to stimulate the development of under-utilized fisheries such as those in the NWHI.⁸⁹ The Honolulu Laboratory has an oceanographic ship to survey fish populations, develop new fishing techniques, and investigate the biology of important commercial species.⁹⁰ NMFS has studied the offshore fishery resources of the NWHI for the past five years, pursuant to the Tripartite Agreement with FWS and DLNR.⁹¹ This agency also encourages fishery development by serving as a liaison between private fishery interests in Hawaii and the federal government concerning federal fishery policy.⁹² NMFS has responsibilities under the Fisheries Conservation and Management Act, which requires the preparation of fishery management plans for each major fishery within the 197-mile fishery conservation zone that requires conservation and management.⁹³ NMFS collects and analyzes fishery data to aid in the preparation of these plans.⁹⁴

NMFS' responsibility for the conservation and management of the Hawaiian monk seal and green sea turtle comes from the Marine Mammal Protection Act and the Endangered Species Act. Although federal responsibility for the management of these species is shared with FWS, NMFS is the lead agency for the seal under all circumstances.⁹⁵ NMFS is the lead agency for the turtle whenever the turtle is in the water.⁹⁶ Because both of these creatures reproduce primarily on refuge islands managed by FWS, NMFS must obtain permits from FWS to conduct surveys pursuant to its statutory responsibilities.⁹⁷

Congress enacted the Marine Mammal Protection Act to ensure that marine mammals do not cease being a functioning element in their ecosystem.⁹⁸ This act placed a moratorium on the taking⁹⁹ of marine mam-

87. 16 U.S.C. §§ 1361-62, 1371-84, & 1401-07 (1982).

88. 16 U.S.C. § 1861 (1982).

89. 16 U.S.C. § 1801(b)(6) (1982).

90. Development Plan, *supra* note 6, at 17.

91. Tripartite Agreement, *supra* note 57.

92. Development Plan, *supra* note 6, at 18.

93. 16 U.S.C. § 1852(h)(1) (1982).

94. 1981 REPORT, *supra* note 86, at 53.

95. 16 U.S.C. § 1362(11)(A) (1982).

96. 50 C.F.R. § 222.23(a) (1984).

97. 16 U.S.C. § 1536 (1982).

98. 16 U.S.C. § 1361(2) (1982).

99. The Act defined "take" to mean "harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(12).

mals, but allowed incidental taking in connection with commercial fishing,¹⁰⁰ subject to the issuance of a permit.¹⁰¹ Although certain porpoises¹⁰² are protected by this act, fishing in the NWHI would probably not pose a threat to any marine mammal except the monk seal.¹⁰³

The seal and turtle derive protection from the Endangered Species Act, which allows the Secretary of Commerce to designate critical habitat for any endangered or threatened species. Critical habitat is a specific area that is essential to the conservation of a species.¹⁰⁴ Critical habitat cannot include the entire range of the endangered species.¹⁰⁵ Once critical habitats for the seal and turtle have been designated, the secretary could promulgate regulations restricting fishing activities there.¹⁰⁶ FWS proposed critical habitat for the green sea turtle which includes only the emergent lands in the refuge, but later withdrew the proposal.¹⁰⁷ NMFS has proposed critical habitat for the monk seal¹⁰⁸ and has considered several options, the most expansive being one that would include all state waters around many of the islands in the NWHI.¹⁰⁹ After holding this proposal in abeyance for almost five years, NMFS has recently proposed the designation of all beach areas, lagoon waters, and ocean waters out to a depth of ten fathoms around the NWHI as critical habitat for the monk seal.¹¹⁰

Federal regulations, pursuant to the designation of critical habitat of endangered species, can have a profound impact on fishery development in the NWHI because all state waters could become subject to federal regulation. In an effort to improve management decisions with respect to their critical habitat proposals, NMFS has pursued an active research program on the monk seal and green sea turtle.¹¹¹

NMFS, in cooperation with the Coast Guard, is the only agency with

100. 16 U.S.C. § 1371(a)(2) (1982).

101. 16 U.S.C. § 1374 (1982).

102. See generally E. Shallenberger, *The Status of Hawaiian Cetaceans* (1979) (Marine Mammal Commission Rep. #MM7AC023).

103. The purse seine fishing techniques for tunas that drown porpoises when purse seine nets are encircled around mixed tuna and porpoise schools throughout the Eastern Tropical Pacific are seldom used in Hawaiian waters. 2 Manta Corp., *supra* note 81, at 83.

104. 16 U.S.C. § 1532(5)(A) (1982).

105. *Id.* § 1532(5)(C).

106. *Id.* § 1533(f).

107. 1 Manta Corp., *supra* note 83, at 231.

108. U.S. DEP'T. OF COMMERCE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, PROPOSED DESIGNATION OF CRITICAL HABITAT FOR THE HAWAIIAN MONK SEAL IN THE NWHI, Tables 7-8 (1980) [hereinafter cited as DRAFT EIS].

109. *Id.* at 3.

110. U.S. DEP'T. OF COMMERCE, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED DESIGNATION OF CRITICAL HABITAT FOR THE HAWAIIAN MONK SEAL IN THE NWHI (1985) [hereinafter cited as SUPPLEMENTAL EIS].

111. See generally, SYMPOSIUM PROCEEDINGS, *supra* note 17.

an active enforcement program in the NWHI. Although these duties stem primarily from a need to monitor foreign fishery operations within the U.S. 200-mile exclusive economic zone,¹¹² this surveillance can be useful for wildlife conservation. Aerial surveys by NMFS often pass over the NWHI and can discover or deter unauthorized landings.

The twin goals of fishery development and wildlife conservation for certain species require NMFS to balance conflicting priorities. NMFS generally appears to draw a reasonable balance, but was taken to court to implement its wildlife conservation responsibilities with respect to porpoise drownings during tuna fishing operations.¹¹³ Although NMFS arguably might be able to manage the resources of the NWHI in a comprehensive manner, it has no statutory authority to do so.

State Agencies

The State of Hawaii is a strong proponent of fishery development in the NWHI. By law, the policy of the state is to generate new ocean-related economic activities in food production.¹¹⁴ The governor and the legislature have recognized fishery development to be a priority venture that would be consistent with a need for economic diversification and prudent utilization of the natural resources of the State of Hawaii.¹¹⁵ The Department of Land and Natural Resources (DLNR) has the clearest overall responsibility within the state to administer the development of marine natural resources, but certain aspects are administered by the Department of Planning and Economic Development (DPED).¹¹⁶

Department of Land and Natural Resources

DLNR has legal authority over a broad range of marine resource management programs, the responsibility for which it delegates to the Division of Aquatic Resources (formerly Division of Fish and Game)¹¹⁷ and the Division of Conservation and Resources Enforcement. DLNR is a multi-purpose agency. As a strong proponent of fishery development in the NWHI,¹¹⁸ it occupies a key role in the dispute with the federal government over fishery policy.¹¹⁹ DLNR is also responsible for a broad range of

112. 16 U.S.C. § 1861 (1982).

113. *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297 (D.D.C. 1976), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

114. HAWAII REV. STAT. § 226-10(9) (Supp. 1984).

115. Development Plan, *supra* note 6, at v.

116. *Id.* at 18.

117. Department of Land and Natural Resources, Report to the Governor 1980-81 29 (1982) [hereinafter cited as Governor Report].

118. See generally Development Plan, *supra* note 6.

119. HAWAII REV. STAT. § 188 (1976 & Supp. 1984) (provides general laws concerning fishing); HAWAII REV. STAT. § 189 (1976 & Supp. 1984) (setting forth laws pertaining to commercial fishing).

conservation programs in Hawaii as well. Consequently, it must balance two competing state policies. Although DLNR is responsible for the enforcement of controls on the harvest of marine resources, its program is understaffed and inadequately funded. Therefore, many conservation laws are weakly enforced.¹²⁰ Many resource managers believe that DLNR is so strongly committed to fishery development that it has become a *de facto* single-purpose agency on this issue.

DLNR has specific statutory authorization to regulate fisheries in state waters of the NWHI.¹²¹ It is authorized to adopt rules to ensure that marine resources there will not be depleted.¹²² The Hawaii Fisheries Development Plan, prepared by DLNR, represents a comprehensive approach to fisheries development throughout the state. The plan focuses on the economic potential of the development of fishery resources, especially those in the NWHI. It also stresses the logistical constraints that impede development in the NWHI, especially the need for a fishery support station.¹²³ But DLNR's initial request for the use of Tern Island as a fishery support station was denied by FWS.¹²⁴ It also has requested and has been denied an opportunity to fish for bait within the lagoon at French Frigate Shoals, a portion of the HINWR.¹²⁵ DLNR has participated in the Tripartite Agreement with FWS and NMFS,¹²⁶ and has spent five years assessing the nearshore fishery resources of the NWHI. Expenditures on this project, however, have been limited.¹²⁷ DLNR generally does not receive the financial backing from the state that would be commensurate with a high-priority fishery development program. For example, state fishery biologists in Hawaii rank *last* among the fifty states in salary.¹²⁸ Such extremely low salaries may suggest a lack of support for professional expertise in DLNR.

In its wildlife conservation role, DLNR administers programs that are directed both toward habitats and certain species. Several programs pro-

120. U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, STATE OF HAWAII COASTAL ZONE MANAGEMENT PROGRAM 37 (1978) [hereinafter cited as CZM Program]; 1 Manta Corp., *supra* note 83, at 66.

121. HAWAII REV. STAT. § 188-37 (Supp. 1984).

122. *Id.*

123. Development Plan, *supra* note 6, at 204-07.

124. Letter to Susumu Ono, Chairman, Board of Land and Natural Resources from Ernest Kosaka, Acting Pacific Islands Administrator, U.S. Fish & Wildlife Service (Mar. 23, 1981).

125. *Id.*

126. Tripartite Agreement, *supra* note 57.

127. In fiscal year 1979, the Division of Fish and Game spent only \$25,000. However, the Marine Affairs Coordinator spent \$150,000 which perhaps should be included to reflect the true financial commitment of the State of Hawaii to this project. 1 Manta Corp., *supra* note 83, at 64.

128. Sullivan & Brome, *Fishery Biology Salaries*, 15 BULL. AM. FISHERY SOC'Y 26 (1980). This comparison was based on salaries in state agencies in 1979 and adjusted for cost of living. Hawaii still ranked last in 1984. Markrich, *The Answer is More Sea-going Officers; The Question is Who*, The Sunday Star Bulletin & Advertiser, Mar. 31, 1985, at E-6, col. 2.

tect various lands and waters in Hawaii. All marine waters of Hawaii are designated to be marine life conservation areas and, therefore, subject to DLNR rules that govern taking and conservation of marine life.¹²⁹ The lands of the HINWR and Kure Island, the northernmost island of the NWHI, are designated to be state wildlife refuges,¹³⁰ but the surrounding waters receive no special protection. Various islands along the windward coast of Oahu are managed by DLNR as seabird sanctuaries.¹³¹ DLNR also administers a Natural Area Reserves System¹³² and Marine Life Conservation Districts,¹³³ but no lands or waters in the NWHI have been so designated. DLNR administers the Hawaii Endangered Species Act,¹³⁴ which is very similar to the federal statute. Pursuant to this act, the state has listed the monk seal as endangered and the green sea turtle as threatened.¹³⁵ The Hawaii Act recognizes that many Hawaiian species are extinct and that management is necessary to enhance the survival of endangered species.¹³⁶

The conservation laws of Hawaii are relatively strong, yet DLNR does not appear to administer them as part of a balanced, comprehensive approach to the protection and wise use of marine resources. The enforcement of state conservation laws is inadequate, and the technical expertise of the agency questionable. For example, DLNR recently was forced by court order to comply with actions necessary to save a forest bird from extinction.¹³⁷ Hawaii is reknowned for the many extinct species now gone from its islands.¹³⁸ Some professional natural resource managers fear that DLNR pursues policies that foster a continuation of this trend. The recent reorganization that involved moving wildlife biologists from the fishery management division has the unfortunate result of diminishing the role of wildlife conservaton in fisheries planning.¹³⁹

Department of Planning and Economic Development

DPED is not traditionally viewed as a marine resource management agency, but it has considerable authority in the marine environment by

129. HAWAII REV. STAT. § 190 (1976 & Supp. 1984). The State Land Use Commission designates state waters as conservation on its maps.

130. Resolution No. 7, Board of Commissioners of Agriculture and Forestry (April 25, 1952).

131. Title 13 DLNR, Subtitle 5, Part II, Ch. 125 (Sept. 28, 1981).

132. HAWAII REV. STAT. § 195 (1976 & Supp. 1984).

133. *Id.* § 190.

134. *Id.* § 195D.

135. Title 13 DLNR, Subtitle 5, Part II, Ch. 124 (Mar. 22, 1982).

136. HAWAII REV. STAT. § 195D-1 (Supp. 1984).

137. *Palila v. Department of Land and Nat. Resources*, 471 F. Supp. 985 (D. Hawaii 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). See Note, *Palila v. DLNR: "Taking Under Section Nine of the Endangered Species Act of 1973,"* 4 U. HAWAII L. REV. 181 (1982).

138. A. BERGER, HAWAIIAN BIRDLIFE 18-20 (1972).

139. Governor Report, *supra* note 117, at 29.

virtue of its lead role in the implementation of the Hawaii coastal zone management program.¹⁴⁰ This program manages marine waters from the shoreline to the seaward extent of Hawaii's jurisdiction.¹⁴¹

The coastal zone management program has created subzones within conservation districts that are placed on official state maps.¹⁴² All land in the NWHI and all areas necessary to preserve the natural ecosystems of native wildlife, especially those that are endangered, are placed in the "P" (protective) subzone.¹⁴³ Permitted uses in the "P" subzone are very restrictive.¹⁴⁴ All waters not expressly assigned to "P" are assigned to the "R" (resource) subzone, in which commercial fishery and aquaculture activities are permitted uses.¹⁴⁵ Apparently, the waters surrounding the NWHI have not been designated "P" to protect the endangered Hawaiian monk seal or the threatened green sea turtle. Any activity that occurs in state waters utilized by monk seals or green sea turtles could be challenged in state court because the Coastal Zone Management Act confers standing on an aggrieved party to commence a civil action.¹⁴⁶

Although DPED is usually considered a development-oriented agency,¹⁴⁷ the coastal zone management program apparently enables DPED to establish subzones in state waters that could promote wildlife conservation. DPED's responsibilities in the NWHI are clearly much less than those of DLNR. DPED lacks the expertise and the statutory authorization to provide comprehensive management of the marine resources of the NWHI.

Regional Agency: Western Pacific Fisheries Management Council

The Western Pacific Fisheries Management Council (WPFMC) is a hybrid federal-state agency that includes official representatives from Hawaii, American Samoa, the Northern Mariana Islands, Guam, and NMFS.¹⁴⁸ It develops fishery management plans for the U.S.-controlled portion of the Western Pacific¹⁴⁹ and functions as a regional agency. Because WPFMC is responsible for the regulation of fisheries in Hawaii, including those in the NWHI, it plays an important role in the dispute concerning the management of the marine resources there.

140. HAWAII REV. STAT. § 205A (1976 & Supp. 1984).

141. *Id.* § 205A-3(7).

142. CZM PROGRAM, *supra* note 120, at 277.

143. *Id.*

144. *Id.* at 227-28.

145. *Id.* at 278-79.

146. HAWAII REV. STAT. § 205A-6 (Supp. 1984).

147. DPED "shall undertake statewide planning and economic development activities . . . and encourage the development and promotion of industry. . . ." HAWAII REV. STAT. § 26-18 (Supp. 1984).

148. 16 U.S.C. § 1852(b)(1) (1982).

149. *Id.* § 1852(a)(8).

WPFMC is one of eight regional fishery management councils created by the Fishery Conservation and Management Act¹⁵⁰ to regulate fisheries within the 197-mile fishery conservation zone¹⁵¹ adjacent to the territorial sea.¹⁵² WPFMC is required to submit fishery management plans to the Secretary of Commerce¹⁵³ for each major fishery in Hawaii that requires conservation and management.¹⁵⁴ Management plans have been completed for precious corals, lobsters, billfish, bottomfish and seamount groundfish.¹⁵⁵ Plans are currently being considered for deep-sea shrimps.¹⁵⁶

Within the 197-mile zone, WPFMC has exclusive management authority over fish, but not over marine mammals, birds, or tunas.¹⁵⁷ The WPFMC must manage fisheries to avoid overfishing and to achieve an optimum yield on a continuing basis.¹⁵⁸ The optimum yield for any fishery is the maximum sustainable yield¹⁵⁹ "as modified by any relevant economic, social, or ecological factor."¹⁶⁰ WPFMC could set fishery catch limits to ensure adequate food supplies for wildlife.¹⁶¹ Fishery management plans must avoid irreversible or long-term adverse effects on the marine environment.¹⁶²

WPFMC lacks the statutory responsibility to function as a comprehensive management agency for the resources of the NWHI, although the management plans do reflect an attempt to balance both economic and ecological factors. Any comprehensive resource management scheme in the NWHI must include authority to regulate tuna fisheries.

Summary of Agencies

The five federal, state, and regional agencies that manage the marine resources of the NWHI have fragmented responsibilities. The laws, reg-

150. *Id.* § 1801-1861, 1881-82.

151. *Id.* § 1812.

152. Within the three-mile territorial sea, the State of Hawaii may exercise its jurisdiction and regulate all fisheries. 43 U.S.C. § 1311(a), 1312 (1982).

153. 16 U.S.C. § 1852(h)(1) (1982).

154. *Id.* § 1852(a)(8).

155. Rutka, *Management Plans for Fishery Resources in the NWHI*, in PROCEEDINGS OF THE SECOND SYMPOSIUM ON RESOURCE INVESTIGATIONS IN THE NWHI 463 (R. Grigg & K. Tanoue eds. 1984) [hereinafter cited as SECOND SYMPOSIUM].

156. Interview with Justin Rutka, WPFMC, in Honolulu (Mar. 18, 1985).

157. 16 U.S.C. § 1802(6) (1982).

158. 16 U.S.C. § 1851(a)(1) (1982). Warner, Finamore & Bean, *Practical Application of the Conservation Aspects of the Fishery Conservation and Management Act*, 5 HARV. ENVTL. L. REV. 30 (1981) (arguing that, to date, the long-term conservation goals of the Act have not been met).

159. Maximum sustainable yield is the maximum yield of a fishery that can be sustained for many years without a steady depletion of the stock. M. GROSS, OCEANOGRAPHY 461 (2d ed. 1977).

160. 16 U.S.C. § 1802(18) (1982).

161. In addition to domestic law, customary international law may require certain protections for marine wildlife.¹ See Harrison, *Costs to the United States in Environmental Protection and Marine Scientific Research by Not Joining the Law of the Sea Convention* in CONSENSUS AND CONTRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 425, 433-37 (J.M. Van Dyke ed. 1985).

162. 16 U.S.C. § 1802(2)(B)(ii) (1982).

ulations, and policies of some agencies overlap. For example, each agency has some responsibility for the preservation of the monk seal and the green sea turtle.¹⁶³ Some potential problems are not regulated by any agency. Excessive skipjack tuna fishing near the NWHI could seriously threaten seabird populations, yet no agency may set fishery quotas for the foreign fishing that occurs beyond the three-mile territorial sea.¹⁶⁴

The fragmentation of management within the federal government is exemplified in regard to the green sea turtle. FWS is the lead agency when the turtle is on land, NMFS when it is in the water, and the turtle's status is uncertain when it basks in the intertidal zone.¹⁶⁵ Fragmentation of management between federal and state governments is illustrated by the management of the waters surrounding Laysan Island and Lisianski Island. Each has extremely large populations of seabirds¹⁶⁶ and significant proportions of the world population of the Hawaiian monk seal.¹⁶⁷ Each island is recognized internationally to be an important wildlife sanctuary.¹⁶⁸ Because of fortuitous events, the nearshore waters of Laysan are managed by FWS as a wildlife sanctuary, yet the nearshore waters around Lisianski are managed by DLNR and receive no special protection. At neither island are the most important feeding areas for seabirds protected.

The issue concerning the proper balance between wildlife conservation and fishery development is evident in the state-federal confrontation over jurisdiction in the NWHI. FWS manages a haphazard combination of NWHI waters as a wildlife refuge. Some of the protected waters are unimportant to wildlife, yet others vital to wildlife conservation are outside the refuge.¹⁶⁹ DLNR seeks to develop fisheries in the NWHI, including those that may have adverse effects on wildlife resources. DPED plays a minor role in the NWHI and is involved only through the Hawaii coastal zone management program. While NMFS and WPFMC attempt to balance economic and ecological goals in fishery development, neither can effectuate a comprehensive management scheme. Neither has the statutory authority to manage seabirds or skipjack tuna fisheries, both important components in any management scheme in the NWHI. No agency has authority to resolve interagency conflicts except on an agency by agency basis.

163. DPED should place the habitats of these species in the coastal zone management program subzone "P" (protective). CZM PROGRAM, *supra* note 120, at 277. WPFMC must modify its fishery management plans by any relevant ecological factor. 16 U.S.C. § 1802(18) (1982). The effect of a fishery on an endangered species is clearly such a factor.

164. 16 U.S.C. § 1802(6)(1982). The Japanese fish extensively for skipjack tunas near the NWHI. Development Plan, *supra* note 6, at 49; Hida, *Pelagic Fishery Resources of the NWHI*, in SECOND SYMPOSIUM 328, *supra* note 155.

165. 50 C.F.R. § 222.23(a) (1984).

166. Harrison & Hida, *supra* note 25, at 20.

167. Johnson, *supra* note 29, at 416.

168. Harrison, *Fragile Islands*, 4 GEO AUSTRALASIA 114 (1982).

169. See *infra* text accompanying notes 189 to 202.

DEFICIENCIES IN EXISTING MANAGEMENT REGIME

Effective management and conservation of a resource system require an approach that takes into account the entire ecosystem.¹⁷⁰ Fragmentation among the five primary agencies with management responsibilities in the NWHI undermines the wise use and conservation of the marine resources there. Each agency pursues its own narrow policies within the confines of haphazard jurisdiction based largely upon historical accident. Conflicting policies, especially those between the federal and state governments, cannot be resolved by any single dispute-solving mechanism. Many biologists and marine resource managers in Hawaii believe that interagency management would be best for Tern Island,¹⁷¹ and that such an approach could be useful for all of the NWHI. The existing management regime fosters needless interagency conflict, inefficient exploitation of fisheries, and inadequate protection of some wildlife species.

Interagency Conflicts

Interagency conflicts have occurred or have the potential of occurring between the state and federal governments, the state and WPFMC, and between FWS and NMFS. These conflicts breed mistrust and undermine cooperative management efforts.

The most prominent conflicts concerning the NWHI are between the state and federal governments. The state disputes FWS jurisdiction to manage the nearshore waters adjacent to several islands of the HINWR and FWS jurisdiction over Tern Island.¹⁷² FWS claims sole authority concerning resource utilization within the HINWR,¹⁷³ whereas state officials threaten litigation if FWS does not change its policies.¹⁷⁴ The genesis of this dispute rests primarily on conflicts between resource utilization and wildlife conservation. Conflict also exists with respect to federal preemption¹⁷⁵ of state wildlife laws. Although there is a growing tendency in the U.S. Supreme Court to avoid striking down state legislation on federal preemption grounds and instead to seek accommodation between federal and state statutes,¹⁷⁶ federal preemption in wildlife con-

170. HOLT & TALBOT, *supra* note 14.

171. See generally interviews in Manta Corp., *supra* note 81.

172. See generally Comment, *supra* note 5.

173. Shallenberger, *supra* note 59, at 281.

174. Letter from State Senator Wadsworth Y.H. Yee to Donald P. Hodel, Under Secretary of the Interior (Dec. 23, 1981). If the State of Hawaii challenges federal jurisdiction of waters of the HINWR, the federal government may challenge state jurisdiction over Kure Atoll. For the history of claims to Kure, see Comment, *supra* note 5, at 142 n. 6.

175. See REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 131-34 (1982).

176. MANDELKA & NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 537 (1977). E.g. Askew v. American Waterway Operators, Inc., 411 U.S. 325 (1973) holding that the Federal Water Quality Improvement Act of 1970 did not preclude state regulation.

servation is settled law.¹⁷⁷ The Court has held that state control over its natural resources does not preclude a proper exercise of federal power.¹⁷⁸

WPFMC and the state have had conflicts over fishery management plans. The implementation of several plans was delayed because DPED found the plans inconsistent with the Hawaii coastal zone management program.¹⁷⁹ Conflicts also could arise if the Secretary of Commerce were to find that the state was acting adversely to the operation of a fishery management plan. The secretary could then assume regulation of fishing within state boundaries,¹⁸⁰ but only after notice, a full adversarial hearing, and specific findings.¹⁸¹ State authority to manage fisheries in state waters essentially has a presumption of validity. The secretary would have the burden to establish the legitimacy of federal authority.¹⁸²

Potential conflicts exist between NMFS and FWS. It is awkward that NMFS must apply to FWS for permits to carry out its surveys of monk seals on refuge lands. FWS does not possess a ship, and often must rely on NMFS to transport its biologists to the HINWR. Relationships between FWS and NMFS have been amicable during the Tripartite Agreement,¹⁸³ but relationships between NOAA and Interior elsewhere have been stormy.¹⁸⁴ Conflicts are certainly possible.

Fishery Development

The present management regime in the NWHI does not allow efficient exploitation of fishery resources. Fishery development is fragmented among at least nineteen state, federal, and private agencies without a unifying framework or coordination.¹⁸⁵ Although some goals of some agencies involved in resource management in the NWHI may be incompatible, a better dispute-resolving mechanism is needed. For example, in December 1979, DLNR submitted proposals to FWS to use Tern Island as a fishery support station and to assess the baitfish potential at French Frigate Shoals.

177. Federal wildlife regulation has preempted state law since *Missouri v. Holland*, 252 U.S. 416 (1920).

178. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

179. Keith, *Laws Affecting the Development of Ocean Resources in Hawaii*, 4 U. HAWAII L. REV. 227, 327 (1982).

180. 16 U.S.C. § 1856(b) (1982).

181. The secretary must find: (1) the fishing of a fishery covered by the plan occurs predominantly within the fishery conservation zone and (2) the state has taken or omitted to take action that will substantially and adversely affect the carrying out of a fishery management plan. *Id.*

182. The proceeding is subject to rigorous adversarial procedures. BEAN, *supra* note 53, at 442-43.

183. Tripartite Agreement, *supra* note 57.

184. NOAA and Interior have had serious conflicts concerning the management of George's Bank, an important commercial fishing ground off the coast of New England that Interior has leased for oil development. See Finn, *Interagency Relations in Marine Resource Conflicts: Some Lessons from OCS Oil and Gas Leasing*, 4 HARV. ENVTL. L. REV. 359 (1980).

185. Development Plan, *supra* note 6, at 19.

Fifteen months passed before FWS and NMFS denied these requests because the proposals would threaten the continued existence of endangered and threatened species.¹⁸⁶

Although modern resource management principles stress the need for ecosystem management and optimum yield,¹⁸⁷ some agencies pursue, without a comprehensive viewpoint, management goals to maximize values for a limited number of species either for exploitation or conservation. The existing management regime overemphasizes conflicts among agency goals and underemphasizes areas of compatibility. Many fisheries are compatible with wildlife conservation. Greater collaboration between agencies could enhance common goals. For example, DLNR has shown little interest in using seabird populations to monitor the status of fishery stocks. Declines in seabird populations are correlated to declines in fish stocks.¹⁸⁸ A decline in seabird populations, which would greatly disturb wildlife managers, should also concern fishery managers. It would serve as a clear warning that certain fish stocks are low and that emergency controls should be implemented to protect certain fisheries as well as wildlife.

Wildlife Conservation

The patchwork of jurisdictions and laws in the NWHI does not properly protect its wildlife resources. Important feeding habitats for seabirds and endangered species are not protected. The fishery that has the greatest potential to adversely affect seabirds is unregulated. No agency manages the NWHI to conserve rare fish or unique coral habitats. There is too little enforcement of state or federal laws and regulations in the NWHI.

FWS manages waters in the NWHI today based on erroneous principles. This confusion may be attributed to the state of knowledge about both the NWHI and the natural histories of the wildlife present when the refuge was established in 1909. For example, the original Executive Order created a bird sanctuary on nonexistent reefs.¹⁸⁹ Clearly, President Roosevelt was misinformed concerning the nature of many islands in the NWHI when he promulgated his order. The waters of Maro Reef are marginal

186. Letter from Terry Leitzel, Assistant Administrator for Fisheries, NMFS, to R. Kahler Martinson, FWS Regional Director (Mar. 11, 1981). FWS began consultations with NMFS on this issue in February, 1980.

187. HOLT & TALBOT, *supra* note 14.

188. Overfishing has caused serious declines in bird populations in Peru and Southwest Africa. See Idyll, *The Anchovy Crisis*, 228 SCI. AM. 22 (1973); Crawford & Shelton, *Pelagic Fish and Seabird Interrelationships off the Coasts of South West and South Africa*, 14 BIO. CONSVN. 85 (1978).

189. The bird sanctuary included Dowsetts Reef, Frost Shoal, and Two Brothers Reef, none of which exist. See Executive Order No. 1019, *supra* note 4. Maro Reef's emerged land consists of a rock that barely protrudes above the water, yet 50,000 submerged acres are part of the HINWR today.

habitat for the wildlife of the NWHI, yet are part of the refuge.¹⁹⁰ The waters surrounding Lisianski Island, with three million seabirds¹⁹¹ and about one hundred seals,¹⁹² are not in the refuge. The original basis for FWS jurisdiction over the lagoons at French Frigate Shoals and Pearl and Hermes Reef ironically was to protect feeding habitat of seabirds. Most birds do not feed within these lagoons.¹⁹³ Relatively few of the birds in the NWHI nest at those atolls.¹⁹⁴

Seabird management under the existing regime suffers because seabirds are not protected from the effects of overfishing of tunas in waters near the nesting islands. Many birds depend upon tunas to drive small fish and squid to the surface in order to feed.¹⁹⁵ Hawaiian fishermen have traditionally relied on the use of feeding flocks of birds to guide them to tuna schools. The Fishery Conservation and Management Act expressly excludes the management of tuna beyond the three-mile territorial sea.¹⁹⁶ Fisheries in the NWHI for squid, baitfish, and coastal pelagic species must be regulated to protect seabirds, but no management plans presently cover these species.¹⁹⁷

FWS claims that the Migratory Bird Treaty Act¹⁹⁸ does not grant it authority to regulate the take of seabirds beyond U.S. territorial waters.¹⁹⁹ Therefore, authority to manage most of the feeding grounds for seabirds of the NWHI must be found in another statute, if it can be found at all.

The monk seal and turtle are inadequately protected by the existing management regime. Although the inclusion of French Frigate Shoals and Pearl and Hermes Reef protects these species, protection is not available at other important islands, such as Lisianski. Each species is susceptible, during its breeding cycle, to disturbance from human activities in nearshore waters. Critical habitat designation would provide a means to regulate fishing activities near the islands,²⁰⁰ but the current NMFS

190. DRAFT EIS, *supra* note 108, at app. II.

191. SEKI, *supra* note 24, at 20.

192. Johnson, *supra* note 29, at 416.

193. SEKI, *supra* note 24.

194. *Id.* at 7.

195. See Ashmole & Ashmole, *supra* note 27; Murphy & Ikehara, *supra* note 27.

196. 16 U.S.C. § 1813 (1982). The Western Pacific Fisheries Management Council ironically has the authority to regulate foreign longline tuna fishing, which would have little if any effect on birds, because of the incidental catch of billfish. WPFMC, *Final Fishery Management Plan for Pacific Billfish Fisheries of the Western Pacific Region* 47-49 (1981).

197. 16 U.S.C. § 1852(a)(8) (1982) requires a fishery management plan for every *major* fishery (emphasis added). Fisheries for opelu (*Decapterus* spp.) in the NWHI must be carefully managed because of their great importance in the diet of birds.

198. 16 U.S.C. §§ 703-712 (1982).

199. Memorandum from Assistant Solicitor, Fish and Wildlife to Office of Migratory Bird Management, FWS (Mar. 27, 1981). Query whether the proclamation claiming U.S. sovereign rights in the 200-mile exclusive economic zone will establish authority for FWS to manage the feeding grounds of seabirds. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).

200. 16 U.S.C. § 1532(5)(A)(C) (1982).

critical habitat proposal for the monk seal has a seaward boundary limited to ten fathoms.²⁰¹ Existing refuge boundaries do not clearly provide adequate protection of feeding areas for these species.²⁰²

Each of the agencies responsible for management of the resources of the NWHI has limited enforcement activities. FWS does not have a ship. Budgets are limited for each agency, and there is little genuine enforcement of state or federal law in the NWHI. Increased coordination among agencies could enable them to increase surveillance. Many fishermen have expressed a willingness to allow government observers on their vessels during fishing operations.²⁰³ Although the Ninth Circuit Court of Appeals recently held that observer programs on tuna fishing vessels do not necessarily violate the Fourth Amendment,²⁰⁴ in the absence of explicit statutory authorization, a mandatory program in the NWHI might not pass constitutional muster. The Fishery Conservation and Management Act provides for observers²⁰⁵ and transponders²⁰⁶ on *foreign* fishing vessels, but has no provision for either on domestic vessels.

Given the deficiencies in the present management of the marine resources of the NWHI, it is important to explore alternatives that may provide improvement. Adjusting some of the existing management strategies of each agency probably would bring improvements. As long as each agency continues to pursue actions that are rational only within the context of its own limited goals, predictable and avoidable confrontations will continue. Such interagency strife could result in tragic consequences for the marine resources of the NWHI. Fortunately, a relatively new federal program exists that is ideal for the NWHI: the marine sanctuary program.

MARINE SANCTUARY STATUS FOR THE NWHI: A SOLUTION?

NOAA's Office of Coastal Zone Management administers the marine sanctuary program which provides for a comprehensive management approach unavailable elsewhere.²⁰⁷ An evaluation of the marine sanctuary program will include a review of the goals and administrative procedures

201. SUPPLEMENTAL EIS, *supra* note 110.

202. 16 U.S.C. § 1538(a)(1)(B) (1982), however, provides that it is unlawful to "take" or harass any endangered species within the United States or its territorial sea, and might provide some protection.

203. Foster, *supra* note 2, at 14.

204. *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir. 1984) (en banc), *cert denied*, 104 S. Ct. 3536 (1984). This decision construed the Marine Mammal Protection Act, 16 U.S.C. § 1361-62, 1371-84, 1401-07 (1982).

205. 16 U.S.C. § 1821(c)(2)(D) (1982).

206. *Id.* § 1821(c)(2)(C). Transponders are electronic devices that identify and fix the position of a vessel.

207. 16 U.S.C. §§ 1431-34 (1982). *See generally*, Kifer, *NOAA's Marine Sanctuary Program*, 2 COASTAL ZONE MGMT J. 177 (1977).

of the program, a survey of existing marine sanctuaries, and a determination of the extent of problem solving attainable by designation of the NWHI as a marine sanctuary.

The Marine Sanctuary Program

The marine sanctuary program is a comprehensive marine management program that fosters multiple use.²⁰⁸ The legislative history clearly indicates that it is not a marine wilderness authority²⁰⁹ and that commercial activity could occur in a sanctuary. Congressman Thomas Pelly stated, "A sanctuary is not meant to be a marine wilderness where man will not enter. Its designation will insure simply a balance between uses."²¹⁰ Congressman Hastings Keith stated, "Its purpose is to assure the preservation of our coastal areas and fisheries . . . It provides for multiple use of the designated areas."²¹¹ The General Accounting Office's 1981 assessment of the marine sanctuary program concluded that it provides comprehensive regulation, planning, and management, and it provides environmental protection where gaps exist in the coverage provided by other laws.²¹²

Ocean waters may be designated as marine sanctuaries by the Secretary of Commerce, subject to presidential approval.²¹³ Areas may be designated for their conservation, recreational, ecological, or aesthetic values.²¹⁴ A sanctuary may extend as far seaward as the outer edge of the continental shelf.²¹⁵ Arguably, a marine sanctuary in Hawaii could extend 200 miles to the limit of the Exclusive Economic Zone.²¹⁶ Consultation with appropriate federal agencies,²¹⁷ state officials,²¹⁸ and the public in coastal areas most affected by the designation²¹⁹ are required. The governor of Hawaii²²⁰ or Congress²²¹ could disapprove of a marine sanctuary within

208. Epting, *National Marine Sanctuary Program: Balancing Resource Protection with Multiple Use*, 18 HOUS. L. REV. 1037, 1055 (1981).

209. Kifer, *supra* note 207, at 178.

210. *Id.*

211. 117 Cong. Rec. 30,858 (1971).

212. GENERAL ACCOUNTING OFFICE, MARINE SANCTUARIES PROGRAM OFFERS ENVIRONMENTAL PROTECTION AND BENEFITS OTHER LAWS DO NOT (1981).

213. 16 U.S.C. § 1432(a) (1982).

214. *Id.*

215. *Id.*

216. The Act uses the definition of continental shelf as provided by the Convention on the Continental Shelf, 29 Apr. 1958, 15 U.S.T. 471; T.I.A.S. 5578, art. I. The convention considers the shelf to extend as far seaward as the natural resources of the seabed and subsoil can be exploited. *Id.* With the advent of deepsea mining, the continental shelf as defined by the Act and convention virtually has no limitation.

217. 16 U.S.C. § 1432(a) (1982).

218. *Id.* § 1432(b).

219. *Id.* § 1432(e).

220. *Id.* § 1432(b). State waters extend three miles around each island except for those under federal jurisdiction, e.g., those in the HINWR and around Midway.

221. *Id.* § 1432(h).

sixty days of its designation. Site management plans are now included in the environmental impact statement for a marine sanctuary to enable commentators to have a detailed understanding of the purposes and benefits of sanctuary designation.²²²

Existing Marine Sanctuaries

Only two marine sanctuaries were designated during the first five years of the program: the Monitor Marine Sanctuary (North Carolina)²²³ and the Key Largo Coral Reef National Marine Sanctuary (Florida).²²⁴ President Carter accelerated the program and designated the Channel Islands National Marine Sanctuary (California),²²⁵ Gray's Reef National Marine Sanctuary (Georgia),²²⁶ Looe Key National Marine Sanctuary (Florida),²²⁷ and Point Reyes-Farallon Islands National Marine Sanctuary (California).²²⁸ In Hawaii, a Humpback Whale Sanctuary has been proposed near Maui, but sanctuary status there would add little to the protection already extended to humpback whales by the Marine Mammal Protection Act, the federal Endangered Species Act, and the Hawaii Endangered Species Act.²²⁹

The Channel Islands, Farallon Islands, and NWHI have similar institutions and natural resources; each is managed by the Department of the Interior. The Farallon Islands are a unit of the National Wildlife Refuge System.²³⁰ The National Park Service manages both Point Reyes National Seashore²³¹ and the Channel Islands National Monument.²³² The State of California requested the designation of its sanctuaries²³³ because there was "no regime to monitor comprehensively the cumulative effects of . . . activities, nor any agency responsible for protecting the system as a whole."²³⁴ Sanctuary designation also emphasizes the national importance of the resources there.²³⁵ For both California sanctuaries, human

222. Epting, *supra* note 208, at 1057.

223. 15 C.F.R. § 924 (1984).

224. *Id.* § 929.

225. *Id.* § 935.

226. *Id.* § 938.

227. *Id.* § 937.

228. *Id.* § 936.

229. U.S. DEP'T OF COMMERCE, ISSUE PAPER, PROPOSED HAWAII HUMPBAC WHALE NATIONAL MARINE SANCTUARY (1982). An attorney at a public hearing on this proposal characterized this marine sanctuary as a solution searching for a problem.

230. U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED POINT REYES-FARALLON ISLANDS MARINE SANCTUARY E-9 (1980) [hereinafter cited as FARALLON FEIS].

231. *Id.* at F-41.

232. U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED CHANNEL ISLANDS MARINE SANCTUARY D-2 (1980) [hereinafter cited as CHANNEL FEIS].

233. Epting, *supra* note 208, at 1045.

234. FARALLON FEIS, *supra* note 230, at D-2.

235. CHANNEL FEIS, *supra* note 232, at C-9.

activity in the ocean has been increasing. Existing regulatory controls could not ensure comprehensive protection for the unique ecosystems.²³⁶

The California sanctuaries protect marine bird, mammal, and fish resources. The number and species of birds on the Farallon Islands²³⁷ and Channel Islands²³⁸ are far less than those in the NWHI.²³⁹ Most of the bird species protected in the California sanctuaries are widespread in the United States, whereas those in the NWHI are uncommon within U.S. jurisdiction. Large numbers of seals of several species live in the California sanctuaries²⁴⁰ but, unlike the Hawaiian monk seal, most commonly occur elsewhere and none are endangered. Fishery resources in the California sanctuaries are commercially important²⁴¹ and may be more valuable than those in the NWHI. On the basis of marine wildlife, it would be difficult to justify choosing either of the California sites as a marine sanctuary over the NWHI.

The Farallon and Channel Island sanctuaries extend as far seaward as twelve²⁴² and six²⁴³ nautical miles. Identical activities are regulated at each site.²⁴⁴ NOAA may promulgate regulations only for certain activities,²⁴⁵ which do *not* include fishing. The goals for each sanctuary include research, assessment, monitoring, education, and increased law enforcement.²⁴⁶ Sanctuary managers have been urged to form sanctuary advisory committees consisting of representatives from federal and state agencies and local interest groups.²⁴⁷

Problems That Would be Resolved by Designating a Marine Sanctuary in the NWHI

The designation of the NWHI as a marine sanctuary would solve many resource management problems, providing a comprehensive management

236. FARALLON FEIS, *supra* note 230, at C-1.

237. *Id.*, at D-1. The Farallons have 100,000 pairs of birds of twelve species.

238. CHANNEL FEIS, *supra* note 232, at D-1. The Channel Islands have about 20,000 pairs of birds of nine species.

239. The NWHI have about ten million birds of eighteen species. SEKI, *supra* note 24, at 7.

240. FARALLON FEIS, *supra* note 230, at E-15; CHANNEL FEIS, *supra* note 232, at D-1.

241. FARALLON FEIS, *supra* note 230, at E-20 to -23; CHANNEL FEIS, *supra* note 232, at E-70 to -78.

242. FARALLON FEIS, *supra* note 230, at C-1.

243. CHANNEL FEIS, *supra* note 232, at C-1.

244. Regulated activities include oil and gas development, seabed alteration, low overflight of aircraft and unnecessary passage within one mile of the islands. FARALLON FEIS, *supra* note 230, at C-8 to-10.

245. CHANNEL FEIS, *supra* note 232, at C-8.

246. *Id.* at C-2, C-9.

247. FARALLON FEIS, *supra* note 230, at C-6. The Point Reyes-Farallon Islands National Marine Sanctuary is administered through an interagency agreement between NOAA and the National Park Service. Sanctuary regulations are enforced through a cooperative agreement between NOAA and the California Department of Fish & Game. Letter from Peter J. Gogan, Sanctuary Manager, to Craig S. Harrison (Mar. 19, 1984).

regime with an interagency dispute settlement mechanism. Wildlife conservation would be enhanced by the management of currently unregulated waters. Fishery development would be enhanced by the relaxation of certain regulations and by the termination of unproductive interagency conflict. The designation of a marine sanctuary could settle the jurisdictional dispute between the State of Hawaii and the federal government. It would also provide funds for monitoring, increased law enforcement, and enhanced public education.

Comprehensive management would avoid the problems associated with the fragmentation of responsibilities among various federal, state, and regional agencies. The important wildlife and fishery resources of the NWHI could be managed under an ecosystem framework, in conformance with contemporary biological principles.²⁴⁸ The sanctuary should encompass all waters seaward to twelve miles for each island in the NWHI, including Kure and Midway. Each decision concerning fishery exploitation or wildlife conservation should be viewed in the context of the entire archipelago. For example, a decision to utilize Tern Island as a fishery support station might be balanced with increased protection of nearshore habitat for the remaining NWHI. From an institutional perspective, a marine sanctuary would afford a compromise between state and federal agencies which may have irreconcilable differences. The Sanctuary Program Office of NOAA has not been involved in any of the recent disputes concerning the NWHI and would be able to function as a relatively neutral agency. NOAA generally has great expertise in marine resource management. An advisory board comprised of representatives from FWS, NMFS, DLNR, DPED, WPFMC, and private organizations should be created to ensure that all viewpoints would be represented during decisionmaking.²⁴⁹ The marine sanctuary could be administered to settle expeditiously disputes concerning resource management.

A marine sanctuary would enhance protection of the unique wildlife resources of the NWHI, including seabirds, monk seals, and marine species that currently receive no special attention. The important feeding areas of seabirds could be protected by regulating certain fisheries in the vicinity of nesting islands which are barely protected, if at all, under the present regime. Although the federal government has no general authority to regulate skipjack tuna fisheries beyond the three-mile territorial sea,²⁵⁰ it could regulate such fisheries within a marine sanctuary.²⁵¹ Regulations

248. HOLT & TALBOT, *supra* note 14.

249. 1 Manta Corp., *supra* note 83, at 67, noted an overwhelming support for some sort of interagency management for Tern Island. An advisory board would extend this concept to all of the NWHI.

250. 16 U.S.C. § 1802(6)(14) (1982).

251. 16 U.S.C. § 1432(f) (1982).

could include emergency provisions, such as those in fishery management plans prepared by WPFMC, that would be invoked if bird populations were to decline because of apparent competition with commercial fisheries.²⁵²

A marine sanctuary would increase protection for the feeding areas of monk seals beyond ten fathoms of water depth. Nearshore human activities that disturb seals and increase pup mortality have been insufficiently regulated at Lisianski and Necker Islands because the HINWR does not extend there past the low tide line, but if the recent critical habitat proposal is adopted, the protection there will be enhanced.²⁵³ Some feeding areas of seals will remain unprotected even after the adoption of a ten-fathom critical habitat. Marine sanctuary status would also create opportunities to expand the concept of wildlife conservation in the NWHI. Current management focuses primarily on birds, seals, and turtles. Certain waters, however, may deserve protection because of the occurrence of rare fishes or unique coral reefs,²⁵⁴ and could be managed accordingly.

Marine sanctuary status could enhance fishery development in the NWHI. Fishery regulatory decisions would be made by sanctuary managers who are trained in marine ecology and who apply multiple use principles. The existence of a dispute resolving mechanism should allow fishery managers to spend less time on fruitless interagency conflict and more time on fishery development. Several fisheries could be established in NWHI waters that heretofore have been restricted. Maro Reef and Pearl and Hermes Reef provide marginal wildlife habitat and could sustain fisheries without conflicting with wildlife during most of the year. The establishment of a marine sanctuary in the NWHI would require a joint state-federal effort. The federal government designates a sanctuary, but the governor must agree to the inclusion of state waters.²⁵⁵ Consequently, the establishment of a marine sanctuary would entail a negotiated agreement concerning the jurisdictional disputes in the NWHI. The State of Hawaii would be unlikely to agree to transfer the management of state waters to NOAA unless FWS reciprocated and also conveyed to NOAA waters under its jurisdiction.²⁵⁶ A state-federal agreement that allowed NOAA to manage waters in the NWHI as a marine sanctuary would render further jurisdictional conflict there moot.²⁵⁷ FWS should be able to transfer its

252. 16 U.S.C. § 1855(e) (1982).

253. SUPPLEMENTAL EIS, *supra* note 110.

254. For example, the coral reefs at Kure Island may have special significance to biologists because it is the most northern atoll on earth at the cold water extreme for coral survival.

255. 16 U.S.C. § 1432(b) (1982).

256. FWS claims waters at French Frigate Shoals, Laysan Island, Maro Reef, and Pearl and Hermes Reef. Comment, *supra* note 5.

257. Once state waters are included in a federal marine sanctuary, it is unlikely that the state could revoke its consent. See *North Dakota v. United States*, 460 U.S. 300 (1983).

claims of waters in the NWHI to NOAA without an Act of Congress.²⁵⁸

The designation of a marine sanctuary in the NWHI would be accompanied by funds to increase law enforcement, monitor the environment, and enhance public awareness.²⁵⁹ If Midway were included in the sanctuary, there would be excellent opportunities to improve public access to the NWHI, thereby serving an important educational function. Sanctuary designation would also provide a mechanism to protect both the fishery and wildlife resources of the NWHI from potential adverse marine developments. Sanctuary regulations should include prohibitions against nuclear waste disposal and restrictions on deep-sea mining.²⁶⁰

Problems That Would Remain if the NWHI Were a Marine Sanctuary

The creation of a marine sanctuary in the waters of the NWHI would vastly improve marine resource management there, but several important issues would remain unresolved. First, the structure of the sanctuary might create problems, depending upon which waters were ultimately included. Second, designation would require the sanctuary program office to promulgate regulations for the sanctuary. Third, the creation of a marine sanctuary would not necessarily settle the dispute concerning the use of Tern Island (French Frigate Shoals) as a fishery support station.

A marine sanctuary could be created that omitted important waters in the NWHI. For example, the U.S. Navy could refuse to allow the inclusion of nearshore waters around Midway because of national security considerations. FWS might refuse to relinquish control over French Frigate Shoals. The State of Hawaii might restrict its approval of state waters to those that are jointly claimed by the FWS and the state. A sanctuary might be created that did not extend far enough seaward to protect wildlife species adequately.

The goal of comprehensive management can be achieved only if the waters around most of the islands are included in a sanctuary. If several islands were omitted, resource management in the NWHI would continue to be fragmented. State-federal jurisdictional conflicts would continue if

258. 16 U.S.C. § 668dd(b)(3) (1982) provides that the Secretary of the Interior is authorized "to acquire lands or interests therein by exchange . . . for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition. . . ." As long as a marine sanctuary agreement included interests in real property, such as an ability to regulate fisheries that were previously unregulated, in exchange for the interests in nearshore waters that were passed to NOAA, this statute would control.

259. U.S. DEP'T OF COMMERCE, NATIONAL MARINE SANCTUARY PROGRAM, PROGRAM DEVELOPMENT PLAN 2-3 (1982)[hereinafter cited as PROGRAM PLAN].

260. Polymetallic sulfides occur within a few miles of many of the NWHI. These resources are within the 200-mile Exclusive Economic Zone claimed by the U.S. Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983). Because these resources may be exploited without entering into the Law of the Sea Treaty, they will probably be exploited in the near future. See U.S. Geological Survey, *supra* note 42.

any disputed waters were left out of a sanctuary agreement. A NWHI marine sanctuary would require new regulations for fishing and other activities.²⁶¹ The fundamental conflicts among agencies and individuals concerning the proper use of the marine resources of the NWHI would emerge during the rulemaking process. Important decisions would be made, including catch limits, seasons, gear, monitoring methods, and emergency regulations.²⁶² If an observer program were necessary to monitor the fishery, express statutory authorization from Congress should be sought.²⁶³

Although the creation of a marine sanctuary would require a negotiated state-federal agreement on management of the NWHI, the question concerning the use of Tern Island as a fishery support station might not be included.²⁶⁴ The State of Hawaii wants the use of Tern Island to provide logistical support for fisheries throughout the NWHI. Disputes concerning the amounts and types of activities that may take place on Tern Island would not necessarily be resolved by the creation of a marine sanctuary.

SUMMARY AND CONCLUSION

The NWHI have important resources: the fisheries are economically valuable and the wildlife is recognized internationally as unique. The dispersion of marine resource management among various federal, state, and regional agencies has serious defects. Although each agency pursues a rational course of action within the context of its own limited goals, the absence of a comprehensive view fosters interagency conflict, inefficient exploitation of fishery resources, and inadequate protection of wildlife.

The primary federal agencies are FWS and NMFS. FWS manages most of the islands in the NWHI as part of the HINWR. FWS's goals are to conserve seabirds, monk seals, and turtles. It exercises jurisdiction over a haphazard collection of nearshore waters, much of which is of minor importance to wildlife. Important offshore feeding areas of marine birds and some nearshore pupping areas for seals are inadequately regulated. NMFS has responsibilities in fishery development and wildlife conservation. It conducts fishery research, develops information for fishery management plans, and is the lead federal agency for the management

261. New regulations are promulgated only when existing ones are inadequate to protect the resources of the site. PROGRAM PLAN, *supra* note 259, at 47.

262. Emergency regulations would be invoked when any of the wildlife species were threatened. Such regulations are presently included, for example, in the spiny lobster fishery management plan to protect monk seals. 1981 REPORT, *supra* note 86, at H-3.

263. *Balelo v. Baldrige*, *supra* note 204 (holding that an observer program was implicitly authorized by the broad rulemaking power delegated to the Secretary under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-62, 1371-84, 1401-07 (1982)).

264. See DLNR, *supra* note 6, at 204-07.

of the monk seal. The State of Hawaii delegates most aspects of fishery development and wildlife conservation to DLNR. DLNR strongly advocates fishery development in the NWHI. It has proposed bait fishing within the HINWR at French Frigate Shoals and the use of Tern Island as a fishery support station. Hawaii has accounted for a large proportion of wildlife extinctions in the United States. Although Hawaii laws, if properly implemented, would conserve wildlife, DLNR policies reflect a lack of interest in wildlife conservation. DPED administers the Hawaii coastal zone management program and consequently has some management authority in the NWHI. WPFMC is a hybrid federal-state agency that regulates important fisheries in the Western Pacific through the development of fishery management plans within the 197-mile fishery conservation zone. Various conflicts exist between and among the agencies with management responsibilities in the NWHI. These conflicts undermine fishery development and wildlife conservation. FWS has little expertise in the management of marine waters, yet manages a substantial proportion of the nearshore waters of the NWHI as part of the HINWR. FWS lacks a means to manage offshore waters; its inability to regulate skipjack tuna fishing near bird colonies weakens its ability to protect marine birds, the original basis for the refuge.

Marine sanctuary designation for the NWHI would solve many problems. Proper management would enhance both fishery development and wildlife conservation. The waters would remain under federal jurisdiction but would be managed by the Sanctuary Programs Office of NOAA. Sanctuary status would allow comprehensive regulation and planning, but state waters could be included only if the Governor of Hawaii agreed. Marine sanctuaries in California protect very similar resources.

A marine sanctuary would enable a neutral agency with expertise in marine resource management to administer the waters adjacent to the NWHI. An advisory board should be formed that includes FWS, NMFS, DLNR, DPED, and private organizations. Sanctuary status would provide funds for enhanced law enforcement, resource monitoring, and public education. Conflicting views on the proper balance between fishery utilization and wildlife conservation will continue, but a dispute solving mechanism would be established. The establishment of a marine sanctuary in the NWHI would require political compromise by all agencies. Public agencies often jealously guard their authority, even when a narrow view conflicts with the stated goals of the agency.²⁶⁵ The designation of a marine

265. It is unclear why designation of the NWHI as a marine sanctuary has not been seriously considered to date. It is mentioned briefly in DRAFT EIS, *supra* note 108, at 21-23. In addition, I Manta Corp., *supra* note 83, at 203, states, "The dispute with the State of Hawaii over the waters of the Refuge and the location of a refuge boundary could be settled, albeit *at the price of shared jurisdiction with NOAA*, by [designation of a marine sanctuary]" (emphasis added).

Query whether this FWS-commissioned report espouses an official policy to place its own political position above the furtherance of wildlife conservation.

sanctuary in the NWHI would be a bold step forward toward wise management of the marine resources there. It is an idea whose time has come.²⁶⁶

266. NOAA published a site evaluation list for new marine sanctuaries in 48 Fed. Reg. 35,568 (1983), which does not include the NWHI. "No Hawaiian sites were considered because NOAA determined that the proposed Humpback Whale Marine Sanctuary off Maui, now an active candidate in the designation process, satisfies the sanctuary needs of the islands." Chelsea International Corporation, National Marine Sanctuary Site Evaluations Recommendations and Final Reports WP-1 (1983). No public meetings concerning nominations were held in Hawaii. No transcripts of the closed meetings of the Western Pacific site evaluation team are available. Letter from Dr. Nancy Foster, Chief, Sanctuary Programs Division to Craig S. Harrison (Oct. 14, 1983).