

NOTES & COMMENTS

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Hawaiian Monk Seals: From Controversy to Cooperation, a Case Study of Cooperative Federalism

The Endangered Species Act (ESA)¹ permits the federal government to regulate the states' treatment of endangered species, often inviting resentment and consternation from state officials. States resent that the federal government comes to *their* territory and tells them how to treat *their* animals and manage *their* land. Despite the potential for conflict between federal and state officials, cooperative federalism, in which federal and state governments work together toward a common goal of protecting an endangered species, may be the most productive model of environmental protection.

This note presents a case study of the Hawaiian monk seal to show how cooperation between federal, state, and local officials contributes to effective conservation of an endangered species. In the Hawaiian monk seals' case, the State of Hawaii initially opposed federal regulation—particularly designation of critical habitat—because it feared that the federal government would usurp the State's ability to manage its resources. Despite the State's concerns, the early years of monk seal regulation were relatively free from dispute because the Hawaiian monk seal lived only in the northwestern Hawaiian Islands (NWHI), away from any significant human population. However, as time passed, Hawaiian monk seals appeared in the main Hawaiian Islands (MHI) in greater numbers, leading to conflict between fed-

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¹ 16 U.S.C.A. §§ 1531-1544 (West 2004).

eral, state, and local groups about how best to conserve the monk seal.² The conflict escalated over a beach closure in 2001, leading federal, state, and local officials to convene a workshop on monk seal management. Since the workshop, the groups have worked together to manage the Hawaiian monk seal population under a paradigm of cooperative federalism.

Part I presents background information on the Hawaiian monk seal. It discusses Hawaiian monk seal biology, threats to monk seal survival, and historical conservation efforts. Part II tells the story of listing the Hawaiian monk seal under the ESA, including the initial listing process, the designation of critical habitat, and the drafting of a recovery plan. Part III considers the way in which issues of federalism have affected the Hawaiian monk seals' regulation, arguing in favor of cooperative federalism. This Part examines the treatment of native Hawaiians under the ESA, the applicability of the ESA to purely intrastate species such as the monk seal, and the practical effects of cooperative federalism on the Hawaiian monk seals' conservation. Ultimately, this note concludes that cooperative regulation produces the most effective conservation efforts.

I

BACKGROUND

A. *Biological Information*

The Hawaiian monk seal, *Monachus schauinslandi*, or *ilio holo kai* in Hawaiian,³ is one of three seal species in the *monachus* family. This family of seals gets its name because of its relatively solitary behavior.⁴ The Hawaiian monk seal is the most primitive

² Scientists are unsure whether the monk seal occupied the MHI during prehistoric times. TIMOTHY J. RAGEN, THE ROLE OF THE MAIN HAWAIIAN ISLANDS IN THE RECOVERY OF THE HAWAIIAN MONK SEAL 1 (2002), available at <http://www.mmc.gov/reports/workshop/pdf/ragen.pdf>. In fact, scientists are unsure of the current monk seal population in the MHI and do not know why they have appeared in greater numbers there. JASON D. BAKER & THEA C. JOHANOS, DISTRIBUTION AND ABUNDANCE OF HAWAIIAN MONK SEALS IN THE MAIN HAWAIIAN ISLANDS 1 (2004), available at <http://www.mmc.gov/reports/workshop/pdf/baker.pdf>.

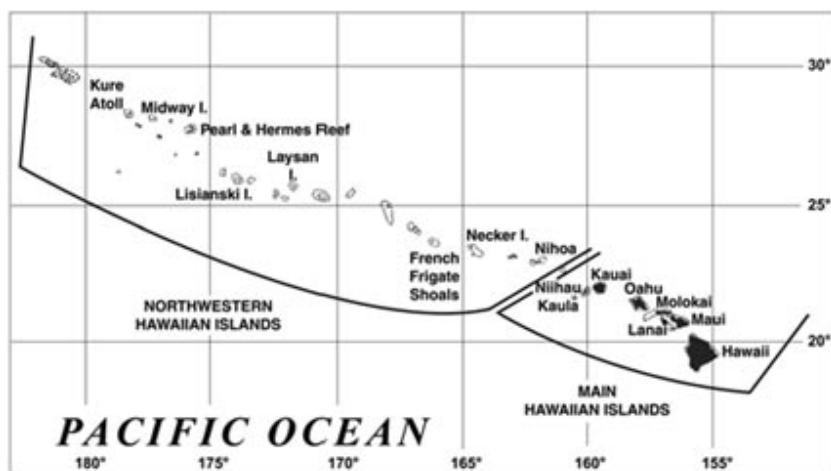
³ Hawaii Wildlife Fund, *Hawaiian Monk Seals*, <http://www.wildhawaii.org/seals.html> (last visited Sept. 30, 2005).

⁴ NatureServe Explorer, *Comprehensive Report Species – Monachus schauinslandi*, <http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Monachus+schauinslandi> (last updated June 2005).

in the *monachus* family, which possibly explains why it has been more sensitive to human intrusion than other monk seal species.⁵

The Hawaiian monk seal is endemic to Hawaii and the majority of the population (approximately 14,000) inhabits the NWHI, a chain of islands roughly 1,840 kilometers long. Hawaiian monk seals do not live outside Hawaiian waters. The monk seal population is comprised of six separate reproductive subpopulations in the NWHI at Kure Atoll, Midway Islands, Pearl and Hermes Reef, Lisianski Island, Laysan Island, and French Frigate Shoals.⁶

FIGURE 1: THE HAWAIIAN ISLANDS



Creatures of habit, monk seals tend to return consistently to the islands on which they were born.⁷ Despite the monk seals' fidelity to their birth islands, the subpopulations are not discrete. Rather, monk seals travel between subpopulations, forming a metapopulation.⁸ Although the population is highly concen-

⁵ WILLIAM G. GILMARTIN, RECOVERY PLAN FOR THE HAWAIIAN MONK SEAL, *MONACHUS SCHAUINSLANDI* 1 (1983), available at http://www.nmfs.noaa.gov/pr/readingrm/Recoverplans/Hawaiian_Monk_Seal_Rec_Plan.pdf (“the monk seals appear to be far more sensitive to human intrusion in their environment, perhaps because of their primitiveness”).

⁶ National Marine Fisheries Service, HAWAIIAN MONK SEAL ANNUAL REPORT 41 (2003), available at http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/Pinnipeds/Hawaiian_Monk_Seal/po03hawaiianmonkseal.pdf [hereinafter ANNUAL REPORT].

⁷ GILMARTIN, *supra* note 5, at 5.

⁸ RAGEN, *supra* note 2, at 1.

trated in the NWHI, there are approximately 150 seals living around the MHI.⁹

Adult monk seals have dark gray or brown backs, and light gray underbellies. Pups, on the other hand, have dark black fur, which they molt upon weaning. All monk seals—pups and adults—molt once a year.¹⁰ An average adult weighs between 400 and 600 pounds, and is between six and eight feet long.¹¹ Adult females tend to be slightly larger than males.¹² Scientists believe that monk seals live between twenty-five and thirty years, but there is a paucity of data regarding the monk seals' life span.¹³ The oldest tagged seals are only twenty-years old.¹⁴

The monk seal eats primarily benthic animals, or bottom-dwellers, such as reef fish, octopuses, spiny lobsters, eels, and bottom fish. It forages in the NWHI and will often stay away from the islands for weeks at a time looking for food. While foraging, the seals will dive down as far as 1,500 feet.¹⁵

Females typically give birth when they are between six and seven years old. Most female seals bear pups at irregular intervals, although some give birth annually. The gestation period is about one year long and pups are born in the spring and summer.¹⁶ Females haul out¹⁷ to give birth on sandy beaches backed by vegetation that blocks the wind. These beaches are usually adjacent to shallow pools protected from sharks, in which the mother teaches her offspring to swim and forage.¹⁸ When a pup

⁹ NATIONAL MAMMAL COMM'N, MARINE FISHERIES SERV. & HAWAII DIVISION OF AQUATIC RESOURCES, FINAL REPORT, WORKSHOP ON THE MANAGEMENT OF HAWAIIAN MONK SEALS ON BEACHES IN THE MAIN HAWAIIAN ISLANDS 19, *available at* <http://www.mmc.gov/reports/workshop/pdf/monksealfinal.pdf> (Oct. 29-31, 2002) [hereinafter FINAL REPORT].

¹⁰ Earthtrust, *Hawaiian Monk Seals*, <http://www.earthtrust.org/wlcurric/seals.html> (last visited Sept. 30, 2005).

¹¹ Kaua'i Monk Seal Watch Program, *Hawaiian Monk Seals*, <http://www.kauaimonkseal.com/AboutTheSeals.html> (last visited Sept. 30, 2005).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NAT'L MARINE FISHERIES SERV., COMMITTED TO THE CONSERVATION AND RECOVERY OF THE ENDANGERED HAWAIIAN MONK SEAL 5 (Jan. 11, 1999), *available at* <http://www.monachus.org/catalog.htm> [hereinafter COMMITTED TO THE CONSERVATION].

¹⁶ *See generally* Kaua'i Monk Seal Watch Program, *supra* note 11.

¹⁷ Hauling-out is the technical term used for monk seals' movement from water to land.

¹⁸ NAT'L OCEANIC AND ATMOSPHERIC ADMIN., SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, PROPOSED DESIGNATION OF CRITICAL HABITAT FOR THE

is born, its mother nurses it for six weeks and will not leave its side. The pup, which weighs about thirty pounds at birth, can weigh up to 200 pounds by the time it is weaned.¹⁹ When the six weeks are up and the pup is weaned, the mother, emaciated, will depart for up to twenty days to feed, returning to the beach well nourished.²⁰

B. Threats to Monk Seal Survival

Monk seals were first recorded at Kure Atoll, the northwestern-most island of the NWHI, in 1825. A series of shipwrecks that began in 1837 impacted the monk seal because stranded sailors hunted them for food.²¹ Monk seals were also affected by Japanese feather poachers, sealers, guano miners, and fishing operations that followed on the heels of the shipwrecks.²²

During the early 1900s, monk seals were killed for their pelts. Because they were not accustomed to land predators, they did not know how to escape sealers' clubs.²³ Then, the onset of World War II brought the U.S. military to Midway Island, and the U.S. Coast Guard to Kure Atoll and French Frigate Shoals. Machinery, construction, and thousands of people accompanied the military and the Coast Guard to the NWHI, disturbing the monk seals' habitat.²⁴ Sustained human activity on beaches that were traditionally used by monk seals may have contributed to a decline in the monk seal population, because the mere presence of humans can cause monk seals to abandon their hauling-out sites.²⁵

More recently, fishing nets threaten monk seal survival. In 2004 alone, there were fifteen reported monk seal interactions

HAWAIIAN MONK SEAL IN THE NORTHWESTERN HAWAIIAN ISLANDS 25 (1984) [hereinafter SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT].

¹⁹ COMMITTED TO THE CONSERVATION, *supra* note 15, at 5.

²⁰ NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC AND ATMOSPHERIC ADMIN. & U.S. DEP'T OF COMMERCE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, PROPOSED DESIGNATION OF CRITICAL HABITAT FOR THE HAWAIIAN MONK SEAL IN THE NORTHWESTERN HAWAIIAN ISLANDS 53 (1980) [hereinafter DRAFT ENVIRONMENTAL IMPACT STATEMENT].

²¹ GILMARTIN, *supra* note 5, at 1.

²² *Id.* at 2-3.

²³ *Hawaiian Monk Seals*, *supra* note 10.

²⁴ COMMITTED TO THE CONSERVATION, *supra* note 15, at 3. Most people were removed from Midway Island in 1978, leaving only 250 military personnel. Few people remain on Kure Atoll and French Frigate Shoals. DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 20, at 116.

²⁵ GILMARTIN, *supra* note 5, at 7-8.

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with lobster traps and 434 with bottom-fishing operations throughout the Hawaiian Islands.²⁶ Newly weaned pups and juveniles are the most vulnerable to the dangers posed by the fishing industry because they are more likely to explore their environments, including fishing nets and fishing lines, leading to a high mortality rate among young seals.²⁷

Human activities aside, monk seals face natural threats as well. First, monk seals fall victim to shark attacks. Second, a sex ratio skewed toward males has led male monk seals to “mob” females. “Mobbing is a term that describes a group of aggressive adult male seals that attempt to mate with a single seal, often inflicting mortal wounds. Some adult males also attempt to mate with pups or immature seals of both sexes, again with fatal consequences.”²⁸ Lastly, some scientists question whether ciguatera poisoning contributes to monk seal fatalities because there have been seals found with high levels of ciguatoxin and maitotoxin.²⁹

C. *Historical Conservation Efforts*

On February 3, 1909, President Theodore Roosevelt created the Hawaiian Islands Reservation with Executive Order 1019. The Reservation has been called the Hawaiian Islands National Wildlife Refuge (HINWR) since 1940. The protected area included Kure Atoll, Pearl and Hermes Reef, Laysianki Island, Laysan Island, Maro Reef, Dowsett Reef, Gardner Island, Two Brothers Reef, French Frigate Shoals, Necker Island, Frost Shoal, and Nihoa Island. Early conservation efforts did not clearly delineate where federal jurisdiction stopped. It was unclear whether the federal government or the Territory/State of Hawaii controlled “certain submerged lands and waters as well as the emergent lands.”³⁰

The NWHI were also designated a State Wildlife Refuge in 1951. After achieving statehood on August 21, 1959, Hawaii pushed the federal government to return the HINWR to its con-

²⁶ List of Fisheries for 2004, 69 Fed. Reg. 48,407 (Aug. 10, 2004). Most of these interactions were not fatal. *Id.*

²⁷ SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 18, at 20.

²⁸ COMMITTED TO THE CONSERVATION, *supra* note 15, at 6.

²⁹ When one-celled aquatic organisms called dinoflagellates bloom, they produce ciguatera toxins, ciguatoxin and maitotoxin, which may contribute to monk seal mortality. See GILMARTIN, *supra* note 5, at 8-9. For a diagram of the monk seal’s population decline, see Figure 2 *infra* p. 177.

³⁰ GILMARTIN, *supra* note 5, at 10.

trol, claiming that it could do a better job regulating the area. John A. Burns, then Governor of Hawaii, noted that:

In the past, the State has had a close and amicable relationship with the Department of the Interior concerning these islands. However in spite of this close relationship, the records have shown that the Federal government has not been able to manage the refuge and enforce the regulations necessary to protect the unique flora and fauna existing therein.³¹

Despite the Governor’s request, the federal government did not cede control of the NWHI to the State because Hawaii lacked firm conservation policies. Also, federal politicians feared that they would lose environmentalist’s votes, and therefore re-election, if they ceded control of the NWHI to Hawaii.³²

Hawaii ultimately passed statutes that prohibited “harassment, killing, capture, or possession of any Hawaiian monk seal or its parts in areas under State jurisdiction in the NWHI,” except for scientific purposes.³³ Although strong on paper, Hawaiian conservation laws were ineffective because they were poorly enforced.³⁴ The Hawaii Department of Land and Natural Resources (DLNR) lacked money to fund the conservation ef-

³¹ Dennis K. Yamase, Comment, *State-Federal Jurisdictional Conflict Over the Internal Waters and Submerged Lands of the Northwestern Hawaiian Islands*, 4 U. HAW. L. REV. 139, 158-59 n.84 (1982) (citing GOV. JOHN A. BURNS, STATE OF HAWAII COMMENTS ON HAWAII PROPERTY REVIEW REPORT CONCERNING DEPARTMENT OF INTERIOR LANDS (July 28, 1961)). In 1974, the state disputed the legitimacy of the federal government’s control over the refuge, arguing that the federal government did not legitimately control the water up to three miles from the Hawaiian shore. Hawaii believed that state control of the waters would have put the state in a better position to capitalize on fishing opportunities. It is unclear whether the state was motivated predominantly by environmental concerns or by economic interests. *Id.* Despite the Governor’s comments, it is unclear whether or not the state would have been able to do a better job conserving Hawaii’s resources.

³² *See id.* at 159 n.86, n.88.

³³ GILMARTIN, *supra* note 5, at 2. The current Hawaiian version of the Federal Endangered Species Act makes it illegal to take, possess, process, sell, offer for sale, deliver, carry, transport, or ship any endangered species. HAW. REV. STAT. § 195D-4(e) (2004).

³⁴ 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 For example, DNLNR recently was forced by court order to comply with actions necessary to save a forest bird from extinction.

Craig S. Harrison, *A Marine Sanctuary in the Northwestern Hawaiian Islands: An Idea Whose Time Has Come*, 25 NAT. RESOURCES J. 317, 330 (1985) (citing *Palila v. Dep’t of Land and Nat. Res.*, 471 F. Supp. 985 (D. Haw. 1979), *aff’d* 639 F.2d 495 (9th Cir. 1981)).

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forts and also had questionable technical expertise.³⁵ Hawaii's protection of its waters, which extended out three miles from the coast, was vastly less protective than the federal government's management of its waters, which began three miles off the Hawaiian coast.³⁶

II

LISTING UNDER THE FEDERAL ENDANGERED SPECIES ACT

A. *Listing the Seal*

In 1975, the Marine Mammal Commission (MMC) recommended listing the monk seal as depleted under the Marine Mammal Protection Act (MMPA).³⁷ It also recommended that the United States National Marine Fisheries Service (NMFS) list the monk seal as endangered under the ESA.³⁸ The MMC suggested utilizing the ESA in conjunction with the MMPA because the ESA had a mechanism for protecting habitat that the MMPA did not. NMFS completed an internal status review of the monk seal in June 1975. Although not entirely clear from the sparse historical record, it appears that the State of Hawaii played no role in the pre-listing research.

NMFS reported a rare and declining population of monk seals, with a particularly high mortality rate for pups. More specifically, as required under section 4(a) of the ESA,³⁹ NMFS found that: (a) human use of the monk seals' traditional breeding and resting beaches had led the seal to abandon those areas; (b) the monk seal was being overused for commercial, recreational, scientific, and educational purposes; (c) shark predation was con-

³⁵ *Id.*

³⁶ See Robin Kundis Craig, *Taking Steps Towards Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii*, 34 MCGEORGE L. REV. 155, 197 (2003).

³⁷ 16 U.S.C.A. §§ 1361-1407 (2004).

³⁸ Hawaiian Monk Seal, Proposed "Endangered" Status, 41 Fed. Reg. 33,922 (Aug. 11, 1976), available at <http://ecos.fws.gov/docs/frdocs/1976/76-23275.pdf> (last visited Sept. 30, 2005).

³⁹ Section 4(a) of the ESA requires consideration of five criteria when deciding whether or not to list a species: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." Endangered Species Act, 16 U.S.C.A. § 1533(a)(1) (2004).

tributing to the decline of the monk seal population; (d) the regulatory mechanisms in place at the time were inadequate because federal law only covered seals living in the HINWR, and many seals lived outside of that area; and (e) human recreational activities, such as boating, were hurting the seals.⁴⁰

The MMC listed the seal as depleted under the MMPA on July 22, 1976.⁴¹ On August 11, 1976, NMFS proposed listing the monk seal as endangered in the Federal Register.⁴² The seal was listed as endangered under the ESA on November 23, 1976.⁴³

B. Designation of Critical Habitat

On December 9, 1976, the MMC recommended to NMFS that it designate critical habitat. NMFS finished an environmental assessment (EA) in 1977 that proposed designating critical habitat, including any beaches typically used for hauling out and the surrounding waters.⁴⁴ The EA proposed designating critical habitat up to ten fathoms because at that depth there was little to no burden on the lobster fishery.⁴⁵

In October 1978, NMFS selected and circulated five alternative critical-habitat proposals for comment. The five proposed options were: (1) designating the beaches used for hauling out and surrounding waters to a depth of ten fathoms, (2) designating the beaches used for hauling out and the surrounding waters to a depth of twenty fathoms, (3) designating the beaches used for hauling out and the surrounding waters to a distance of three nautical miles surrounding the barrier reefs, (4) designation of all marine habitat, and (5) no action.⁴⁶ Any action would have applied to Kure Atoll, Midway Islands (except Sand Island), Pearl and Hermes reefs, Lisianski Island, Laysan Island, French Frigate

⁴⁰ 41 Fed. Reg. at 33,922.

⁴¹ 41 Fed. Reg. 30,120 (July 22, 1976).

⁴² 41 Fed. Reg. at 33,922.

⁴³ Hawaiian Monk Seal Final Regulations, 41 Fed. Reg. 51,611 (Nov. 23, 1976), available at <http://ecos.fws.gov/docs/frdocs/1976/76-34552.pdf>.

⁴⁴ DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 20, at 10.

⁴⁵ Monk Seal Chronology, http://www.kahea.org/nwhi/pdf/monk_seal_chronology.pdf (last visited Sept. 30, 2005); DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 20, at 19 (noting that the “economic impact on the spiny lobster fishery is not expected to be significant since only approximately 9.4 percent of the spiny lobster habitat is found within the 10-fathom” boundary). At the time, the lobster fishery was extremely lucrative and the federal government did not want to risk upsetting the fishing community.

⁴⁶ DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 20, at 3.

Shoals, and Necker Island.⁴⁷ NMFS did not propose, nor has it subsequently proposed, to designate any critical habitat for the monk seal in the MHI, because the majority of monk seals live in the NWHI.⁴⁸

The designated critical habitat was intended to ensure that monk seals have three essential habitat components: (1) “[p]lugging and major hauling beaches including the vegetation immediately backing the beaches;” (2) “[s]hallow protected water adjacent to the above (tide pools, inner reef waters, shoal areas, and near shore shallows);” and (3) “[d]eeper inner reef areas, lagoon waters, and all other water areas out to the 10-fathom isobath.”⁴⁹ Monk seals use beaches backed by vegetation for resting, nursing, and giving birth. They use the shallow protected waters to teach their young how to swim and feed. Lastly, monk seals use the deeper inner reef waters for feeding. Although the proposed habitat would have included the three elements, “it should [have been] recognized that many of the habitat components . . . such as beach areas, nearshore water areas, and offshore banks and shoals [could not have been] simply delineated as specific distances along specific beaches or arbitrary distances offshore.”⁵⁰ On the contrary, it was “necessary to designate the entire area without piecemeal delineations.”⁵¹

The State of Hawaii objected to the initial proposal to designate critical habitat because it believed that there was insufficient information to identify correctly the necessary elements of the monk seals’ habitat.⁵² The State was also worried that a designation of critical habitat would cause it to lose control over its waters.⁵³ Moreover, the Hawaiian commercial fishing community objected to the designation of critical habitat because fishermen

⁴⁷ *Id.*

⁴⁸ The monk seals use approximately 14 km² in the MHI. RAGEN, *supra* note 2, at 2.

⁴⁹ SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 18, at 25. Of the three, the beaches and shallow water are the more important parts of the monk seal’s habitat. *Id.* at 22.

⁵⁰ *Id.* at 24.

⁵¹ *Id.*

⁵² Designated Critical Habitat, Hawaiian Monk Seal, 50 Fed. Reg. 1088 (Jan. 9, 1985), available at <http://ecos.fws.gov/docs/frdocs/1985/85-662.pdf>.

⁵³ Interview with Athlene Clark, Hawaii Dep’t of Land and Natural Resources (Oct. 29, 2004).

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did not want habitat regulation to interfere with their ability to fish.⁵⁴

After the initial proposal in 1978, NMFS also prepared a Draft Environmental Impact Statement (DEIS), which it circulated for public comment in 1980.⁵⁵ Public commentary on the DEIS showed that twenty-three out of thirty individual commentators were in favor of designating critical habitat. Of twenty-eight institutional commentators, fourteen clearly supported designation of critical habitat.⁵⁶ Of those fourteen, twelve supported the twenty-fathom option and two had no preference as to where critical habitat was designated.⁵⁷ The opposition included the State of Hawaii, the Western Pacific Fishery Management Council, and the Hawaiian Fishing Coalition. Those groups argued that there was not enough information to support a designation of critical habitat,⁵⁸ existing regulatory mechanisms were sufficient to protect the monk seals' habitat, designation of critical habitat would impede the development of commercial fisheries, and designation of critical habitat would lead to "[f]ederal pre-emption in resource management activities."⁵⁹

NMFS delayed any action until the monk seal recovery team had a chance to review the DEIS. After looking at the DEIS, the recovery team, although not unanimously, supported designating critical habitat to include the hauling-out beaches and the surrounding waters up to a depth of twenty fathoms.⁶⁰ Because of the lack of unanimity among the recovery team and the opposition of the State of Hawaii, a decision on critical habitat was postponed until 1983, when the Monk Seal Recovery Plan was completed.⁶¹ Again in 1983, the recovery team supported designating critical habitat out to a depth of twenty fathoms.⁶²

⁵⁴ 50 Fed. Reg. at 1088, *supra* note 49.

⁵⁵ Designated Critical Habitat, Hawaiian Monk Seal, 51 Fed. Reg. 16,047, 16,048 (Apr. 30, 1986).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ States consistently claim that the federal government lacks sufficient scientific justification for declaring critical habitat. As a practical matter, such a claim makes sense from the states' perspective because it is hard to refute. The federal government may want to establish a uniform set of minimum scientific requirements in order to assuage the states.

⁵⁹ 51 Fed. Reg. at 16,048.

⁶⁰ GILMARTIN, *supra* note 5, at app. A.

⁶¹ *See id.*

⁶² *Id.* at 24.

Despite the recommendations of the recovery team, NMFS did not go forward with designating critical habitat because it believed that section 7 of the ESA may have obviated the need for critical habitat in the NWHI. After some legal research, NMFS discovered that it had to designate the critical habitat for the seal unless the Assistant Administrator for the fisheries found that no designation would benefit the species.⁶³ The Assistant Administrator chose to designate critical habitat as the recovery team had suggested, but only to a depth of ten fathoms.

NMFS still did not propose a designation of critical habitat for the monk seal in the Federal Register. In 1984, the Sierra Club Legal Defense Fund (SCLDF) sent NMFS a sixty-day notice of its intent to file a citizen suit against NMFS. It claimed that NMFS's failure to designate critical habitat for the monk seal violated both the ESA and the MMPA.⁶⁴ As a result, NMFS proposed critical habitat for the monk seal in the Federal Register on January 9, 1985⁶⁵ and held a public hearing regarding the designation of critical habitat on February 5, 1985 in Honolulu.

The State of Hawaii and Hawaiian fishermen continued to object to the designation of critical habitat for the reasons mentioned above; and NMFS, despite the proposal in the Federal Register and the public hearing, continued to do nothing. The SCLDF sent NMFS another sixty-day notice of its intent to file a citizen suit against NMFS in 1986.⁶⁶ Finally, in April 1986, NMFS designated the beaches used for hauling out and the surrounding waters up to ten-fathoms deep as critical habitat.⁶⁷ In the designation, NMFS responded to the State's arguments that section 7 of the ESA rendered any designation of critical habitat superfluous and that declaring critical habitat was unwise because of a lack of information.

A critical habitat designation may enhance the section 7 process by requiring federal agencies to consult in instances where their activities may modify or destroy habitat without directly affecting the species. The benefit provided by the designation is the clear and early notification to federal agencies and the public of

⁶³ 50 Fed. Reg. at 1088.

⁶⁴ Monk Seal Chronology, *supra* note 45.

⁶⁵ 50 Fed. Reg. at 1088.

⁶⁶ Monk Seal Chronology, *supra* note 45.

⁶⁷ 51 Fed. Reg. at 16,047.

the existence of critical habitat, and the importance of the area to the monk seal.

Based on the best scientific information available, the NMFS has determined that there is sufficient justification to define and designate critical habitat for the Hawaiian monk seal. The components of monk seal habitat identified as critical habitat in the Final Environmental Impact Statement (FEIS) include breeding areas, pupping and major haul out sites, and nearshore waters used by females and pups.⁶⁸ NMFS did not respond to the State's concerns about losing sovereignty.

Although the designation quieted the SCLDF, the MMC did not agree with NMFS's decision. The MMC wrote to NMFS stating that the chosen ten-fathom option was inconsistent with biology and that it ought to have been twenty fathoms.⁶⁹ The MMC also urged NMFS to include Maro Reef as part of the critical habitat. In 1988, NMFS extended the boundary of critical habitat for the monk seal from ten fathoms to twenty fathoms and included Maro Reef, as the MMC had urged it to do.⁷⁰ Only the State of Hawaii opposed the expansion of critical habit, arguing that there was insufficient evidence and "no legal basis for the proposed rulemaking."⁷¹ Midway Island was also designated a wildlife refuge in 1988; its management was turned over to the U.S. Fish and Wildlife Service in 1997. The designation of Midway meant that the entire chain of NWHI was part of a wildlife refuge and that "monk seals [could] again enjoy solitude in their natural habitat."⁷²

C. Effects of Critical Habitat

At the time of designation, NMFS noted that the designation of critical habitat would have had minimal economic effects because it would "not [have] affect[ed] State and local government activities or private actions which [were] not dependent on or limited by Federal authority, permits, or funds."⁷³ Any increased expenses would have primarily stemmed from a potential in-

⁶⁸ *Id.* at 16,049.

⁶⁹ During pupping season, the monk seal will use waters up to twenty-two fathoms in depth to forage for food. GILMARTIN, *supra* note 5, at 7.

⁷⁰ Critical Habitat; Hawaiian Monk Seal; Endangered Species Act, 53 Fed. Reg. 18,998-19,002 (May 26, 1988).

⁷¹ *Id.*

⁷² COMMITTED TO THE CONSERVATION, *supra* note 15, at 3.

⁷³ 51 Fed. Reg. at 16,052.

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crease in the number of consultations pursuant to section 7 of the ESA.⁷⁴ Declaring critical habitat added a component to section 7's consultation requirement: federal agencies had to consult with the Secretary of Commerce (NMFS) when their activities could have impacted the monk seal *and* when they could have impacted its critical habitat. This increase, however, should not have amounted to much, if anything, because cases where an agency's activity would affect the monk seal's habitat without affecting the monk seal itself would be rare.

NMFS also considered the effect critical habitat designation would have on the fisheries, which harvested spiny lobster; slipper lobster; deep ocean shrimp; sea bass; pink, gray, and red snappers; jacks; yellowfin tuna; skipjack tuna; wahoo; and mahimahi.⁷⁵ The impact of critical habitat on the fisheries was

⁷⁴ Under section 7, a federal agency must "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" or "result in the destruction or adverse modification of habitat." 16 U.S.C.A. § 1536(a)(2) (2004). To do so, the agency must consult with the Secretary of Commerce. The Secretary must then undertake "detailed discussion of the effects of the action on listed species or critical habitat" and must issue an opinion as to "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(h)(2), (3) (2005).

⁷⁵ There are three main federally-run fisheries in the NWHI: the lobster fishery, the bottomfish fishery, and the longline fishery. See Pacific Islands Fisheries Science Center, <http://www.nmfs.hawaii.edu/fmep/> (last visited Sept. 30, 2005). President Clinton limited the expansion of the NWHI fisheries by Executive Order in 2000 when he created the Coral Reef Ecosystem Reserve. See Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 4, 2000). Despite President Clinton's Executive Order, the Western Pacific Fishery Management Council may be attempting to expand the bottomfish and lobster fisheries and to establish a coral fishery. Cha Smith, *Northwestern Hawaiian Islands: Creating a Pu'uhonua for Future Generations*, MONACHUS GUARDIAN (June 2003), <http://www.monachus-guardian.org/mguard11/1121covsto.htm>. But see WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL, MANAGING MARINE FISHERIES OF HAWAII AND THE U.S. PACIFIC ISLANDS: PAST, PRESENT AND FUTURE 10 (2004) (noting that the Executive Order prohibits mining coral without mention of expansion), <http://www.wpcouncil.org/documents/WPRFMCDocument/4.5-PreciousCoralFisheries.pdf>. The lobster fishery in the NWHI is presently closed as a result of the decision in *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123 (D. Haw. 2000). The bottomfish fishery has declined significantly since the 1980s. Its current revenues are approximately thirty percent of what they were in 1987. WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL, BOTTOMFISH FISHERY ANNUAL REPORT, HAWAII 3-3 (2002), <http://www.wpcouncil.org/Bottomfish/Documents/AnnualReports/2002/2002%20Bottomfish%20Annual%20Report-Appendix%203-Hawaii.pdf>. The longline fishery has also declined similarly. It brought in \$44 million in revenue in 2002, down from \$72 million in 1987. WESTERN PACIFIC FISHERY MANAGEMENT COUNCIL, PELAGIC FISHERY ANNUAL REPORT, HAWAII 3-1 (2002), <http://www.wpcouncil.org/Bottomfish/Documents/Annual>

particularly important because in the early 1980s, the State of Hawaii had fishery development as a high priority on its agenda and strongly supported developing the fisheries in the NWHI.⁷⁶ In fact, the State argued that conservation goals could have been “achieved while pursuing other statutory mandates, such as encouragement of new ocean-related employment in marine industries and generation of new ocean-related economic activities in food production.”⁷⁷

In the DEIS it circulated in 1980, NMFS noted that the “economic impact on the spiny lobster fishery is not expected to be significant since only approximately 9.4 percent of the spiny lobster habitat is found within the 10-fathom” boundary.⁷⁸ However, with the expansion of critical habitat to the twenty-fathom boundary and a decrease in the supply of lobsters in the lobster fishery, the designation of critical habitat may have had a larger economic impact than NMFS predicted in the DEIS.

In 1979, DNLR published a Fisheries Development Plan that intended to stimulate fishing in the NWHI. In the early 1980s, the State proposed establishing fishery support stations in the NWHI. It petitioned the federal government to approve the proposal, but after fifteen months, the federal government refused to do so.⁷⁹ In 1991, NMFS conducted a section 7 consultation of the lobster fishery in the NWHI. Thereafter, NMFS closed the fishery for a year because of declining lobster stock, not because of the fishery’s impact on the monk seal. During 1992-1994, the fishery was open only sporadically, due to insufficient stock.⁸⁰ Finally, in 1999, NMFS completed a section 7 consultation and found that the fishery did not impact the monk seals’ critical habitat.⁸¹

The MMC wrote to NMFS, urging it to reconsider keeping the fishery closed in areas where monk seals were known to forage.⁸² The MMC was not alone in its criticism of NMFS. In May of 2000, the Hawaii House of Representatives, which undoubtedly

Reports/2002/2002%20Bottomfish%20Annual%20Report-Appendix%203-Hawaii.pdf.

⁷⁶ Harrison, *supra* note 34, at 328.

⁷⁷ *Id.* at 318.

⁷⁸ DRAFT ENVIRONMENTAL IMPACT STATEMENT, *supra* note 20, at 19.

⁷⁹ Harrison, *supra* note 34, at 335-36.

⁸⁰ Monk Seal Chronology, *supra* note 45.

⁸¹ *Id.*

⁸² *Id.*

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had a strong economic interest in the lobster fishery,⁸³ entered into a resolution urging NMFS to close the fishery.⁸⁴

BE IT RESOLVED by the House of Representatives of the Twentieth Legislature of the State of Hawaii, Regular Session of 2000, that the National Marine Fisheries Service is requested to close the Northwestern Hawaiian Islands lobster fishery for at least three years, as recommended by the Hawaiian monk seal experts, so that this critically endangered marine mammal is given every opportunity to survive for future generations to know and enjoy.⁸⁵

The lobster fishery remained open until November of 2000, when Judge Samuel P. King of the Federal District of Hawaii issued his decision in a lawsuit the Greenpeace Foundation⁸⁶ filed against NMFS.⁸⁷ Greenpeace claimed that in keeping the lobster and bottomfish fisheries open, NMFS had abdicated its duties under sections 7⁸⁸ and 9⁸⁹ of the ESA with respect to monk seals.⁹⁰ Judge King granted summary judgment to plain-

⁸³ Many of the fishermen who obtained permits to fish the fisheries were Hawaiian, and the fisheries, therefore, represented a source of income for Hawaiian residents.

⁸⁴ In light of the state's previous positions on the Hawaiian monk seal, at first glance it is surprising that the state House of Representatives backed closing the lobster fishery. The state's position, however, changed and the state had begun to cooperate with the federal government in conserving the Hawaiian monk seal. For a more detailed discussion, see discussion *infra* Part III.

⁸⁵ See also Haw. House Res. 91 (2000), http://www.capitol.hawaii.gov/session2000/bills/hr91_.htm available at (last visited Sept. 30, 2005). It is also interesting to consider the change in the state's opinion of the seal as a function of the fisheries' productivity. Although never explicitly stated, the state's change of heart in 2000 may have been related to the relative decline of the fisheries in the NWHI. When the state initially opposed critical habitat for the monk seal in the late 1970s and early 1980s, fishing in the NWHI represented a potential goldmine for the state. See Harrison, *supra* note 31, at 345. However, the fisheries' productivity sharply declined in the 1990s, and some of the fisheries even closed because of depleted stock. Monk Seal Chronology, *supra* note 45. It is unclear whether NMFS policy has changed as a result of the fisheries' declining productivity.

⁸⁶ The Greenpeace Foundation is a Hawaiian organization and is unaffiliated with Greenpeace USA. For more information, see <http://www.greenpeacefoundation.com/about/gpfaq.cfm> (last visited Sept. 30, 2005).

⁸⁷ Greenpeace Found. v. Mineta, 122 F. Supp. 2d 1123 (D. Haw. 2000).

⁸⁸ See 16 U.S.C.A. § 1526(a)(2).

⁸⁹ Section 9 prevents the taking of monk seals. 16 U.S.C.A. § 1538(a)(1). The ESA defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(19) (2004).

⁹⁰ Greenpeace, 122 F. Supp. 2d at 1123.

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tiffs on their section 7 claim with respect to the lobster fishery.⁹¹ The court held that NMFS had violated section 7 when it issued a no-jeopardy opinion without scientific support. “[W]hen an agency concludes after consultation that it cannot [e]nsure that the proposed action will not result in jeopardy, and yet proceeds to implement such action, the agency has flouted the plain requirements of Section 7.”⁹² Judge King enjoined operation of the lobster fishery “until NMFS completes formal consultation.”⁹³ Judge King also granted plaintiff’s summary judgment on its section 9 claim with respect to the bottomfish fishery because it was taking monk seals;⁹⁴ however, he reserved ruling on an injunction until he had more information. Ultimately, he denied the injunction.⁹⁵

D. The Recovery Plan

The monk seal recovery team completed its review of the monk seal in 1980 and completed its recovery plan in 1983.⁹⁶ NMFS took the lead role in writing the recovery plan for the Hawaiian monk seal, and the recovery efforts are almost entirely federally funded.⁹⁷ However, since 1988, NMFS has worked in conjunction with other federal agencies and the State of Hawaii,

⁹¹ Judge King granted defendant’s summary judgment on plaintiff’s section 7 claim with respect to the bottomfish fishery because plaintiff’s claim was moot. *Id.* at 1128. NMFS conducted a section 7 biological opinion in 2002 on the bottomfish fishery and decided it would not harm the monk seal. ANNUAL REPORT, *supra* note 6, at 4.

⁹² *Greenpeace*, 122 F. Supp. 2d at 1131.

⁹³ *Id.* at 1137.

⁹⁴ Judge King denied both parties’ motions for summary judgment on the section 9 claim with respect to the lobster fishery because there was not enough information to make a sound judgment. *Id.* at 1134-36.

⁹⁵ *Greenpeace Found. v. Evans*, 2001 U.S. Dist. Lexis 23062 (D. Haw. 2001), *reconsidered sub nom.*, 122 F. Supp. 2d 1123 (D. Haw. 2000). Because Judge King did not enjoin the bottomfish fishery, it is unclear what, if anything, the finding of a section 9 violation accomplished.

⁹⁶ *See generally* GILMARTIN, *supra* note 5.

⁹⁷ 144 CONG. REC. S9616 (daily ed. July 31, 1998) (Mr. Akaka speaking, “The NMFS is leading the effort to save the Hawaiian monk seal from further endangerment and ultimate extinction.”); Memorandum from Robert Brownell, Hawaiian Monk Seal Recovery Team Leader (July 29, 1992), *reprinted in* WILLIAM G. GILMARTIN, HAWAIIAN MONK SEAL WORK PLAN FOR THE FISCAL YEARS 1994-96, App. A (2003), *available at* http://www.nmfs.hawaii.edu/adminrpts/SWFC_Admin_Report_93-16.pdf [hereinafter HAWAIIAN MONK SEAL WORK PLAN].

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both to protect the monk seal and to protect marine resources more generally.⁹⁸

At least until the early 1990s, most of the money devoted to the Hawaiian monk seal was used for research and population monitoring, not for recovery efforts. The monk seal recovery plan listed six main objectives:

- (1) identify and, where possible, mitigate the natural factors causing or contributing to the decreased survival and productivity of monk seals;
- (2) characterize the marine and terrestrial habitat requirements of the monk seal, including use patterns and feeding habits;
- (3) assess the monk seal population and monitor population trends;
- (4) document, and where possible, mitigate the direct and indirect effects of human activities on monk seals;
- (5) implement appropriate management actions leading to conservation and recovery of the species; and
- (6) develop an educational program to foster greater conservation efforts among the users of the Northwestern Hawaiian Islands and the public.⁹⁹

The original recovery plan was so focused on researching the monk seal that it did not set a quantitative goal for recovery of the monk seal population.¹⁰⁰ However, it did set some “milestones [and] intermediate goals”:¹⁰¹

⁹⁸ MARINE MAMMAL RESEARCH PROGRAM, PROTECTED SPECIES DIVISION, PACIFIC ISLANDS FISHERIES SCIENCE CENTER, NOAA FISHERIES, HAWAIIAN MONK SEAL FACT SHEET (2004), <http://www.pifsc.noaa.gov/pressrelease/factsheet.pdf>; see also WILLIAM J. WALSH, RYAN OKANO, ROBERT NISHIMOTO, NORTHWESTERN HAWAIIAN ISLANDS/KURE ATOLL ASSESSMENT AND MONITORING PROGRAM, FINAL REPORT 3 (2000), available at http://www.hawaii.gov/dlnr/dar/pubs/NWHI_Kure_Atoll_AMP.pdf. That report notes that:

Several agencies have management responsibility over the marine resources of the NWHI. The U.S. Fish and Wildlife Service administers two National Wildlife Refuges that protect all islands (excluding Kure), all reef areas at Midway, and all other reef areas to a depth of 10 fathoms. The National Marine Fisheries Service is responsible for monitoring and protecting monk seals and other marine mammals as well as sea turtles and fisheries resources within the U.S. Exclusive Economic Zone (EEZ). The State of Hawai'i Department of Land and Natural Resources (DLNR), Division of Aquatic Resources (DAR) has management responsibility for all marine resources out to 3 nm from all emergent lands, with the exception of Midway.

Id. at 3.

⁹⁹ GILMARTIN, *supra* note 5, at 12-13.

¹⁰⁰ HAWAIIAN MONK SEAL WORK PLAN, *supra* note 97, at 3.

¹⁰¹ GILMARTIN, *supra* note 5, at 19.

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1. stopping the downward trend in numbers of monk seals in the central and western portions of the species range;
2. taking action to develop positive growth rates at most or all islands;
3. identifying and preventing human activities that could result in the degradation or destruction of habitats or habitat components critical to the survival and recovery of the species; and
4. determining the population level that will result in maximum net productivity.¹⁰²

NMFS continued to emphasize research as opposed to recovery until the 1990s.

In the 1990s, the MMC urged NMFS to increase its recovery efforts.¹⁰³ NMFS began to shift some of its energy to preserve and recover the seal and undertook concrete steps—beyond research—to conserve the monk seal. For example, in November of 1990, NMFS noted that frequent interactions with fisheries were contributing to monk seal mortalities. An emergency rule was published enabling NMFS to make an individualized determination about whether each fishing boat entering the NWHI should be required to carry an observer. The observer would conduct research on fishery-monk seal interactions *and* protect the monk seals.¹⁰⁴ All boats within fifty nautical miles of the NWHI were required to notify NMFS of their arrival, allowing NMFS to decide whether to require an observer.¹⁰⁵ In 1991, a protected species zone was established out to fifty nautical miles from Lisianski and Midway Islands and the corridor between them to protect the monk seal from the pelagic longline fishery.¹⁰⁶ In January of 1993, the recovery team further focused its

¹⁰² *Id.*

¹⁰³ Letter from John R. Twiss, Executive Dir. of Marine Mammal Comm'n, to the Honorable William W. Fox, Jr., Assistant Adm'r for Fisheries, NMFS (Dec. 20, 1991), reprinted in HAWAIIAN MONK SEAL WORK PLAN, *supra* note 97, at App. C.

¹⁰⁴ Pelagic Fisheries of the Western Pacific Region, 55 Fed. Reg. 49,285 (Nov. 27, 1990) (noting that “[i]n addition, the precarious condition of the Hawaiian monk seal population makes it imperative that accurate and site-specific data on interactions be collected immediately so that if interactions are in fact occurring, the effects of such interactions can be evaluated and solutions to any problems can be identified”).

¹⁰⁵ Office of Protected Resources, *Hawaiian Monk Seal*, http://www.nmfs.noaa.gov/prot_res/species/Pinnipeds/hawaiianmonkseal.html (last visited Sept. 30, 2005).

¹⁰⁶ BRENT S. STEWART & PAMELA K. YOCHER, PACIFIC ISLANDS FISHERIES SCIENCE CENTER, DISPERSION AND FORAGING RANGES OF HAWAIIAN MONK SEALS (*Monachus schauinslandi*) Near Lisianski and Midway Islands: 2001-2002 2 (2004), available at http://www.nmfs.hawaii.edu/adminrpts/PIFSC_Admin_Rep_04-04C.pdf (last visited Sept. 30, 2005).

efforts on rehabilitation. It suggested that NMFS continue the observation program begun with the emergency rule to help minimize the number of human-caused casualties. It also proposed that NMFS inject up to fifty over-aggressive males with a drug to minimize the effects of testosterone, in an effort to mitigate the effects of the monk seals' skewed sex ratio.¹⁰⁷

E. Regulation Beyond the ESA

A number of other federal and state regulations beyond the ESA and the MMPA help the monk seal, some indirectly. For example, Hawaii passed laws limiting the use of gillnets, which threaten various forms of marine life, including monk seals.¹⁰⁸ DNLNR has also acted quickly to remove boats that harmed marine life, such as an eighty-five-foot fishing boat that grounded on Pearl and Hermes Reef, before they can do more damage.¹⁰⁹ On the federal side, President Clinton issued Executive Order 13,178, which established the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve.¹¹⁰ Additionally, on January 18, 2001, President Clinton issued Executive Order 13,196 which restricted the area of the lobster fishery and mitigated, at least to some degree, depletion of the monk seals' food supply.¹¹¹

Although a step in the right direction, listing and the regulations that coincide with it have not resulted in a substantial increase in the number of monk seals. In 1982, six years after listing, the highest monk seal population estimates were about fifty percent of those from the years 1956-58.¹¹² Between the 1950s and the early 1980s, on the islands consistently used by monk seals, the monk seal population only increased on one island, French Frigate Shoals. Other islands, such as Pearl and Hermes Reef, and Midway, showed a ninety-three percent de-

¹⁰⁷ HAWAIIAN MONK SEAL WORK PLAN, *supra* note 97, at 27-34 (Minutes from the Hawaiian Monk Seal Recovery Team Meeting, Jan. 4-5, 1993).

¹⁰⁸ Division of Aquatic Resource, State of Hawaii Department of Land and Natural Resources, Lay Net (Gillnet) Management in Hawaii (Sept. 9, 2005), http://www.hawaii.gov/dlnr/dar/library/laynet_mgmt.htm.

¹⁰⁹ Press Release, State of Hawaii Department of Land and Natural Resources, Agencies Investigate Grounding of Fishing Boat at Pearl & Hermes Reef, Outline Steps to Remove Vessel, Prevent Damage to Marine Life (June 6, 2000), *available at* <http://www.hawaii.gov/dlnr/chair/pio/HtmlNR/00-36.htm>.

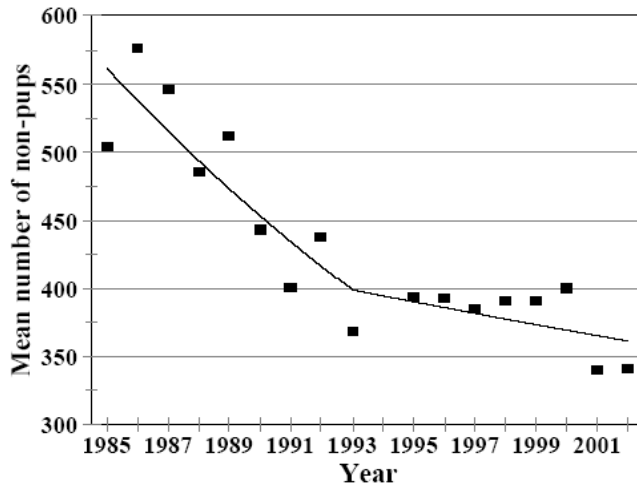
¹¹⁰ Exec. Order No. 13,178, 65 Fed. Reg. 76,903 (Dec. 4, 2000).

¹¹¹ Exec. Order No. 13,196, 66 Fed. Reg. 7,395 (Jan. 18, 2001).

¹¹² GILMARTIN, *supra* note 5, at 4.

crease during the same time.¹¹³ The monk seal population continued to decline from 1985-93, but has since stabilized.¹¹⁴ Currently, NMFS estimates that there are between 1,378 and 1,409 monk seals.¹¹⁵ Both the federal government and Hawaii have realized that a shift in paradigm—from piecemeal regulation to comprehensive regulation—is necessary to preserve and ultimately restore the monk seal.¹¹⁶

FIGURE 2: HAWAIIAN MONK SEAL POPULATION¹¹⁷



III

ISSUES OF FEDERALISM

Issues of federalism—“[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government”¹¹⁸—have arisen with respect to the monk seal. These issues have fallen into three categories: (1) the applicability of the ESA to native Hawaiians, (2) the applica-

¹¹³ *Id.* at 4-5.

¹¹⁴ ANNUAL REPORT, *supra* note 6, at 42.

¹¹⁵ *Id.* at 41.

¹¹⁶ DEP’T OF LAND & NATURAL RES., KURE ATOLL SEABIRD HABITAT RESTORATION AND MANAGEMENT – HONOLULU COUNTY, available at http://www.hawaii.gov/dlnr/programs/wcrp/FY02/Kure_Seabirds.htm (noting that a “comprehensive program is needed to manage the wildlife resources at Kure Atoll, in order to maximize the benefits to nesting seabirds, Hawaiian Monk seals, and Green sea turtles”).

¹¹⁷ ANNUAL REPORT, *supra* note 6, at 42.

¹¹⁸ BLACK’S LAW DICTIONARY (8th ed. 2004).

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bility of the ESA to an intrastate species, and (3) the practical relationship between NMFS and Hawaii. This Part takes each issue in turn.

A. Applicability of the ESA to Native Hawaiians

Hawaii is home to native Hawaiians, who claim interests in the flora and fauna beyond mere economic interests. The NWHI, for example, are culturally important to native Hawaiians because they “hold rich cultural resources that inform us about the origins of Hawaii’s first people.”¹¹⁹ “Myth and culture join in ancient oli and mele telling of the fire goddess Pele and her family traversing the NWHI and stopping at Mokumanamana (Necker Island) on their way to the Main Hawaiian Islands.”¹²⁰

Although Kahea,¹²¹ a group that defends the cultural rights of native Hawaiians, supports protection of the NWHI, some native Hawaiians argue that the ESA does not apply to them. Therefore, they argue, they are allowed to take Hawaiian monk seals. In *United States v. Kaneholani*, a native Hawaiian was prosecuted under the ESA for taking and possessing parts of a monk seal.¹²² The defendant claimed that he, as a native Hawaiian, had aboriginal rights in the monk seal.¹²³ Judge David A. Ezra of the Federal District of Hawaii found that native Hawaiians did not have aboriginal rights in the monk seal, despite the exception in the ESA that enabled native Alaskans to hunt endangered species in

¹¹⁹ *Northwestern Hawaiian Islands; Your Involvement is Needed to Protect this World Treasure as a Pu’Uhonua*, http://www.kahea.org/nwhi/pdf/NWHI_FACT_SHEET_Spring_03.pdf (last visited Sept. 30, 2005).

¹²⁰ *Id.*

¹²¹ See KAHEA, About KAHEA, http://www.kahea.org/about_us.html (last visited Sept. 30, 2005) (informational website describing KAHEA).

¹²² *United States v. Kaneholani*, 773 F. Supp. 1393, 1394 (D. Haw. 1990).

¹²³ *Id.* at 1395. Some native Hawaiians claim that the monk seal is not an important part of Hawaiian culture and should not be heralded as such. For example, in a letter to the editor in the *Garden Island*, the newspaper on the Island of Kauai, a native Hawaiian argued against protecting the monk seal because of its lack of connection to Hawaiian culture:

Point #2: There are no chants about the seal. Point #3: There is no seal aumakua. Point #4: No seal heiau anywhere in the state of Hawai’i. Point #5: No genealogies of the seal. Point #6: No seal pohaku or carvings, wood, etc. Point #7: No history of a seal being on a migration canoe. Point #8: No history of migration story of the seal. Point #9: No burn pits where people ate the seals. Point #10: No native weapons made from the seal. Point #11: No seal petroglyphs. Point #12: Is the seal native, or a foreign sub species? Kawika Cutcher, Letter to the Editor, *Monk seals*, GARDEN ISLAND, Oct. 13, 2004, available at <http://www.kauaiworld.com/articles/2004/10/13/opinion/edit02.txt>.

Alaska. “[I]f Congress had intended to grant native Hawaiians an exception to the Act . . . it would have passed a statute specifically granting this right. This court has no power to fashion such a statute where none exists. Such action would be a violation of the separation of powers doctrine.”¹²⁴

The Ninth Circuit, in upholding the *Kaneholani* decision in *United States v. Nuesca*,¹²⁵ agreed that carving out an exception for native Alaskans, but not for native Hawaiians, was not a violation of the Equal Protection Clause of the Fourteenth Amendment¹²⁶ because the two groups were not similarly situated. Native Alaskans hunted endangered species for subsistence. The exception to the ESA was specifically tailored for subsistence needs.¹²⁷ Native Hawaiians, on the other hand, did not need to hunt monk seals to survive.¹²⁸

While the Ninth Circuit’s decision in *Nuesca* is legally correct, it poses bigger cultural questions. When applying a law like the ESA to a native population, what are we trying to preserve? In focusing on the native Alaskans hunting endangered species for subsistence, the Ninth Circuit, like Congress, emphasized survival: Alaskans needed to hunt to live, while Hawaiians did not. Survival, however, may extend beyond physical survival and may encompass cultural survival as well.¹²⁹ Even though native Hawaiians admittedly do not need to eat monk seals to live, if use of the seals is as important to aboriginal Hawaiian culture as the defendant in *Kaneholani* claimed, an exception to the ESA may be warranted to preserve island culture.

¹²⁴ *Kaneholani*, 773 F. Supp. at 1395-96 (citation omitted).

¹²⁵ 945 F.2d 254 (9th Cir. 1991). *Nuesca* involved a native Hawaiian who took an endangered sea turtle. *Nuesca* and *Kaneholani* were combined for purposes of appeal.

¹²⁶ “The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike.” *Id.* at 257 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

¹²⁷ 16 U.S.C.A. § 1539(e)(1) (West 2004) permits native Alaskans to take “any endangered species or threatened species . . . if such taking is primarily for subsistence purposes.”

¹²⁸ *Nuesca*, 945 F.2d at 257.

¹²⁹ To this day, some still claim that the U.S. illegitimately overthrew the Hawaiian monarchy. See, e.g., Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

B. Federal Regulation of an Intrastate Species

The application of the ESA to the monk seal creates federalism concerns because the monk seal only lives in Hawaii, 3,000 miles from the U.S. mainland. If Congress ostensibly obtained its power to regulate endangered species from the Commerce Clause of the U.S. Constitution,¹³⁰ how is it that Congress has the power to regulate a species that admittedly neither travels in interstate commerce nor contributes to interstate commerce?

In *National Association of Home Builders v. Babbitt*,¹³¹ the main case addressing this issue, the National Association of Home Builders challenged the application of the ESA to the Delhi Sands flower-loving fly, arguing that Congress lacked the power to regulate the fly because it, like the monk seal, was an intrastate species that did not affect interstate commerce.¹³² Judge Patricia Wald, writing for the D.C. Circuit, found that federal regulation of intrastate species pursuant to the Commerce Clause did not exceed congressional power. Judge Wald noted that Congress could have rationally concluded that regulating the fly, or other intrastate species, substantially impacted interstate commerce for two reasons: (1) it preserved biodiversity, protecting current and future interstate commerce, which relied on biological variation such as pharmaceuticals; and (2) it controlled the adverse effects of interstate competition, or the race to the bottom.¹³³ Judge Henderson, in her concurrence, suggested that applying the ESA to the Delhi Sands flower-loving fly did not exceed congressional power because the ESA did not actually regulate the fly. It regulated “commercial development activity[,] which is plainly interstate,”¹³⁴ such as home building (or in

¹³⁰ The U.S. Constitution gives Congress the power to “regulate Commerce . . . among the several States[.]” U.S. CONST. art. I, § 8, cl. 3.

¹³¹ 130 F.3d 1041 (D.C. Cir. 1997).

¹³² [T]he Fly [did] not offer a noticeable contribution to the economy of San Bernardino County or anywhere else. The Fly [did] not possess any known medical value. Tourists [did] not flock to see it. People [did] not eat it. Scientists . . . searched in vain for any contributions that the Fly makes to human life. It [wa]s not the subject of the popular imagination or a key performer in the popular culture.

John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 181 (1998).

¹³³ *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052. The race to the bottom refers to the situation in which states would develop few mechanisms to protect endangered species in order to entice businesses. See also *GDF Realty Investments v. Norton*, 326 F.3d 622, 635 (5th Cir. 2003) (following Judge Wald's approach).

¹³⁴ *Nat'l Ass'n of Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring).

the case of the monk seal, fishing). Judge Sentelle, dissenting, noted the dangers of extending the ESA to intrastate species. “A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point.”¹³⁵

Although as Judge Sentelle’s dissent points out, applying the ESA to intrastate species involves risks like permitting the federal government to interfere in traditional areas of state regulation, such as land use,¹³⁶ there are strong policy arguments for letting the federal government regulate intrastate endangered species.¹³⁷ First, because the federal government has regulated more species than the states, proponents of federal regulation argue that it possesses an institutional expertise, which the states lack.¹³⁸ Second, it would be irrational to permit the federal government to “regulate the spotted owl because it is located in Washington, Oregon and California, but not the Palila bird because it is indigenous to Hawaii.”¹³⁹ “The fact that a species has been listed as endangered or threatened actually increases the likelihood that the species is found in only one state.”¹⁴⁰ Lastly, people outside a particular state in which an endangered species

¹³⁵ *Id.* at 1065 (Sentelle, J., dissenting).

¹³⁶ See Omar N. White, Comment, *The Endangered Species Act’s Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 *ECOLOGY L.Q.* 215, 249 (2000).

¹³⁷ For a detailed discussion of arguments for and against centralized environmental regulation, see Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346 (1990); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 595 (1996); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1210-20 (1977).

¹³⁸ White, *supra* note 135, at 250-51. The federal government has regulated many species and therefore knows and understands the procedural requirements of protecting an endangered species. For example, the federal government likely possesses institutional expertise with respect to species similar to the grizzly bear, the conservation of which required a multi-state effort. It is unclear, however, what advantage the federal government would have over the State of Hawaii in regulating the monk seal because the seal is geographically isolated and inhabits a terrain that is vastly different from the areas in which the federal government typically operates.

¹³⁹ Jeanine A. Scalero, *The Endangered Species Act’s Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 *CHAP. L. REV.* 317, 340 (2000).

¹⁴⁰ *Id.*

resides may value that species. If regulation is left to the states, the opinion of those outside it will be disregarded.¹⁴¹

Buttressed by arguments in favor of applying the ESA to intra-state species and a mandate from the federal courts, NMFS has continued to regulate intrastate species such as the Hawaiian monk seal, despite state objections. As the next Part demonstrates, while NMFS *may legally* regulate the seal without help or input from the states, as a practical matter, cooperative federalism, the “[d]istribution of power between the federal government and the states in which each recognizes the powers of the other while jointly engaging in certain governmental functions,”¹⁴² makes federal efforts more effective. Since the federal government relies on assistance from the State of Hawaii, partly for convenience and partly out of necessity, to preserve the monk seal, it is imperative that relations between the two groups remain cordial, at the very least.

C. *Federalism as a Practical Matter*

The State of Hawaii has consistently expressed concerns about losing control over its waters. As explained above, the state objected to each designation of critical habitat for the monk seal, citing economic concerns and a fear of federal encroachment on state autonomy.¹⁴³ While the monk seal was confined to the NWHI, a wildlife refuge, clashes between Hawaii and the federal government were minimal. When, however, more monk seals began moving to the MHI, home to a large human population, the federal government and the state began to butt heads.

The monk seals have increased their presence in the MHI. Multiple female seals have hauled out onto MHI beaches to give

¹⁴¹ “In the case of public goods or resources, the question of legitimate interests and thus of ‘missing voices’ among those with property rights may be even murkier. If a public resource belongs to us and is to be managed in our interests, who is ‘us’?” Esty, *supra* note 137, at 595. This argument also suggests that federal protection is necessary to prevent states from placing their economic interests ahead of broader, national, environmental interests. For example, in the case of the monk seal, the state took no action to protect the monk seal or to halt a steep population decline despite its knowledge of the threats to the seal’s existence. When the federal government stepped in, the state opposed federal designation of critical habitat because it wanted to retain its sovereignty and economic independence. Despite the state’s later concern for the seal, if it were not for federal intervention, the monk seal may have never received any protection.

¹⁴² BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁴³ See generally 50 C.F.R. § 226.101 (2004) (describing critical habitat designation).

birth. Since the late 1990s, more monk seals hauled out on Kauai than any other populated MHI, with nine births from 1999-2002.¹⁴⁴ Even though NMFS, DLNR, the Kauai Monk Seal Watch Program (KMSWP), and the Humpback Sanctuary Program combined efforts to protect hauled-out monk seals and set up twenty-four-hour watches to look after newborn pups during the late 1990s,¹⁴⁵ relationships between local residents and the federal government became tense. For example, during the summer of 2000, a federal biologist on monk seal watch was threatened in the middle of the night with bodily harm.¹⁴⁶

In the most high-profile clash between state and federal actors, in August 2001, a seal hauled out to one of the most popular beaches in Kauai to give birth. Volunteer members of the KMSWP,¹⁴⁷ suggested closing the Poipu side of the beach, while leaving the Waiohai side open to visitors. The federal government, calling the shots from the NMFS office in Honolulu, ignored the local suggestions and set up its own perimeter to protect the monk seal.¹⁴⁸ The federal government's boundaries were ineffective. The mother monk seal felt that nearby snorkelers were a threat to her pup and bit a visitor from Texas in the rear, leading to a closure of the entire beach for several weeks.¹⁴⁹ The federal government's refusal to listen to local volunteers resulted in the one thing that both groups wanted to avoid when protecting the monk seal, closing the beach.

After the closure, local residents felt "[w]idespread dissatisfaction and considerable anger" at the lack of consideration the fed-

¹⁴⁴ BAKER & JOHANOS, *supra* note 2, at 5.

¹⁴⁵ Brandon Spraguetgi, *24-Hour Watch Set up for Baby Monk Seal*, GARDEN ISLAND, July 6, 2000, available at <http://kauaiworld.com/articles/2000/07/07/news/export2540.txt>.

¹⁴⁶ *Welcome Mat Isn't Always out for Seals*, GARDEN ISLAND, Dec. 18, 2001, available at <http://kauaiworld.com/articles/2001/12/19/news/export5865.txt>.

¹⁴⁷ "The seal watch program operates under the auspices of the state Department of Land and Natural Resources and is supported by the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Hawaiian Islands Humpback Whale National Marine Sanctuary, the Kauai County Water Safety Division and residents." Lester Changgi, *Volunteer Program Helps Protect Monk Seals*, GARDEN ISLAND April 25, 2000, available at <http://kauaiworld.com/articles/2000/04/26/news/export536.txt>.

¹⁴⁸ TIM ROBINSON, VOLUNTEER PERSPECTIVES ON MANAGEMENT APPROACH AND RESPONSE EFFORTS WITH HAWAIIAN MONK SEALS ON KAUAI 4 (2002), available at <http://www.mmc.gov/reports/workshop/pdf/robinson.pdf>, at 4.

¹⁴⁹ *More Seal Testiness Closes Beach*, GARDEN ISLAND, August 15, 2001, available at <http://www.kauaiworld.com/articles/2001/08/16/news/export5552>.

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eral government showed to their suggestions.¹⁵⁰ In fact, according to a leader in the volunteer organization, many volunteers in KMSWP quit.

The failure to acknowledge volunteer experience, local input, and the resultant double beach closure brought a great deal of discord to the community. Volunteers felt underutilized, and many drifted from the program. They sensed the site was remote-controlled from Honolulu and failed to comprehend the federal government's spending money to fly in and house four monitors without HMS experience. KMSWP has considerably fewer volunteers now as a result.¹⁵¹

Contrast the opinion of local volunteers with that of the federal government: "[i]n 2001, the federal government and the state government agreed on protocols for the management of the safe zone around the mother and the pup."¹⁵² The loss of volunteers on Kauai was damaging to recovery efforts because the federal government—for lack of manpower, funding, and local expertise—must rely on state and local support to effectively conserve the monk seal.¹⁵³

After the Kauai beach incident, local residents represented by the KMSWP urged the federal government "to allow some flexibility in decision making, permitting community groups to have a role in determining how to handle beach closings."¹⁵⁴ To answer those concerns, the MMC, NMFS, and DLNR sponsored a workshop on the management of monk seals in the MHI. The workshop brought together seventy people from various agencies and groups. Participants represented federal, state, and local agencies; volunteer groups; the local hotel and tourist industry; environmental organizations; and the scientific community.¹⁵⁵ To prepare for the workshop and fuel discussion, federal, state, and local representatives authored papers describing issues with

¹⁵⁰ Jan TenBruggencate, *Kaua'i Seeks Change in Handling of Monk Seals*, HONOLULU ADVERTISER, Nov. 29, 2001, at 2B.

¹⁵¹ ROBINSON, *supra* note 147, at 4.

¹⁵² MARGARET AKAMINE DUPREE, MANAGEMENT APPROACH AND EXPERIENCE TO DATE WITH MONK SEALS IN THE MAIN HAWAIIAN ISLANDS 7, available at <http://www.mmc.gov/reports/workshop/pdf/dupree.pdf> (last visited Sept. 30, 2005).

¹⁵³ See Dennis Fugimoto, *Monk Seal Pups Born in Po'ipu*, GARDEN ISLAND, Aug. 7, 2004, available at <http://kauaiworld.com/articles/2004/08/07/news/news01.txt>.

¹⁵⁴ TenBruggencate, *supra* note 149.

¹⁵⁵ FINAL REPORT, *supra* note 9, at iii.

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monk seal management from their perspectives.¹⁵⁶ During the workshop, participants broke into focus groups and discussed issues such as public outreach and education, development of a reporting system, and general management options. These focus groups consistently noted the importance of interagency cooperation. For example, the focus group on education and outreach recommended “that responsible agencies take steps to create a formal mechanism to bring together stakeholders to discuss issues and share information on a regular basis. Such meetings could facilitate the development of education and awareness materials, signage, and procedures that could be standardized among the various groups.”¹⁵⁷

The workshop resulted in a pledge to promote interagency cooperation. In the workshop report, the sponsoring agencies acknowledged that:

The Service . . . has been severely limited in addressing issues in the main Hawaiian Islands due in large part to limited staff and funding. Therefore, with little or no funding, state and local agency officials, volunteers, environmental groups, and local businesses have stepped forward to provide valuable assistance to protect hauled-out seals. Although most seals appear to have received adequate protection, responses sometimes have been undertaken with little guidance on who should and should not be doing what. At times this has led to great frustration and strained relations among those attempting to help.¹⁵⁸

The federal and state agencies recognized the concerns of local residents and began to move more towards a model of cooperative federalism.¹⁵⁹

¹⁵⁶ Marine Mammal Commission, Workshop on the Management of Hawaiian Monk Seals on Beaches in the Main Hawaiian Islands, *available at* <http://www.mmc.gov/reports/workshop/monkseal.html> (last visited Sept. 30, 2005).

¹⁵⁷ FINAL REPORT, *supra* note 9, app. 5 at 36.

¹⁵⁸ *Id.* at iii-iv.

¹⁵⁹ Government officials, state and federal, acknowledged the validity of the local perspective, as presented in the Monk Seal Watch workshop paper:

Local, on-site decision-making, within the parameters of state and federal endangered species law, is a key issue. We know and appreciate that significant time, effort, and federal dollars are spent studying HMS in the Northwest Hawaiian Islands. We also feel that Kaua'i, as the main Hawaiian Island with the largest HMS population, deserves at least one biologist/researcher stationed here. The opportunity to study the human/seal interaction, while overseeing volunteer and community efforts, is unique.

ROBINSON, *supra* note 147, at 4.

Despite the high profile beach closure in 2001, even before the workshop, there were also successful stories of collaboration. For example, in 2000, four biologists—three from NMFS and one from DNLR—worked together to remove a fish hook from a monk seal's tongue on Kauai. The local fire department doctor prescribed and provided the valium necessary to sedate the seal, because neither NMFS nor DNLR had enough.¹⁶⁰

Since the workshop, federal, state, and local actors have continued to cooperate, leading to a more efficient, comprehensive, and effective conservation effort. By consulting one another before taking action, they are able to pool resources, avoid duplicating efforts, and provide effective protection to the monk seal. For example, in 2004, the Coast Guard, the U.S. Marines, the State of Hawaii, and the University of Hawaii combined forces to remove a hook that had lodged between a monk seal's diaphragm and his lungs.¹⁶¹ A team of federal, state, and local groups continues to share responsibilities for watching and caring for monk seals on Kauai.

The federal government has also begun to acknowledge publicly the importance of involving state and local representatives in making decisions about the monk seal. Speaking about protecting young pups, a representative of the National Oceanic and Atmospheric Administration (NOAA) stated, “[o]ur first priority is to notify all the proper authorities and local business organizations and together work out a plan to monitor and protect the mothers and pups.”¹⁶² Similarly, another representative of NOAA commented: “It’s a time for [the volunteers] to be recognized . . . Without their dedication and efforts, it would be impossible for government agencies to accomplish the kind of aid and assistance they provide.”¹⁶³ In fact, yet another federal government official commented that “[t]he cooperation being shown by representatives of various federal, state, county and community agencies and volunteer groups, regarding protection of endangered Hawaiian monk-seal pups on [Kauai], could turn the

¹⁶⁰ Brandon Spraguetgi, *Hooked Monk Seal Rescued in Joint North Shore Effort*, GARDEN ISLAND, April 25, 2000, available at <http://kauaiworld.com/articles/2000/04/26/news/export535.txt>.

¹⁶¹ Tom Finnegan, *Monk Seal Comes Home*, GARDEN ISLAND, July 7, 2004, available at <http://kauaiworld.com/articles/2004/07/07/news/news01.txt>.

¹⁶² Fujimoto, *supra* note 149.

¹⁶³ *Id.*

area into a case study of how protecting such species is supposed to be done.”¹⁶⁴

Despite cooperation between state and federal agencies in the MHI, conservation and recovery efforts in the NWHI where the majority of monk seals live are still largely federally controlled. Recovery efforts are federally controlled in the NWHI for three reasons. First, the federal government began doing significant monk seal research on the land and waters that it controls in the NWHI long before the State became interested; state efforts would be largely duplicative. Second, because the NWHI are part of a marine sanctuary and sparsely inhabited, the conflict between federal agencies and local residents which ultimately led to cooperative federalism in the MHI does not exist. Thus, there is no local pressure for federal and state cooperation.¹⁶⁵ Lastly, even if there were more seals in state-controlled areas, the state lacks funding to operate a full-scale monk seal recovery plan.¹⁶⁶ Because of the lack of conflict and the State’s financial limitations, it is unclear what the state could add to the existing federal regulatory efforts beyond what it is already doing in the MHI.

IV

CONCLUSION

Cooperative federalism has played a significant role in the most recent conservation efforts of the monk seal in the MHI, even if the federal government controls research in the NWHI. Since the clash over the beach closure in 2001, federal, state, and local actors have been astute enough to recognize that cooperation between them is necessary to conserve the monk seal in the MHI. The efforts they have made to work together—particularly the 2002 workshop—have led to cooperative-conservation efforts and bode well for the future. As the monk seal moves to the

¹⁶⁴ Paul C. Curtis, *Community Cooperation on Monk-Seal Pups Impresses Officials*, GARDEN ISLAND, Aug. 10, 2004, available at <http://kauaiworld.com/articles/2004/08/10/news/news01.txt>.

¹⁶⁵ When a species is limited to a federal wildlife refuge, the listing process is easier because issues of state sovereignty are less pronounced, if they exist at all. The problems occur when the species leaves the refuge and enters more populated areas. The conservation efforts of the monk seal fit this pattern. Although the State of Hawaii opposed designation of critical habitat, conflict between state and federal agencies was minimal until monk seals began inhabiting the MHI in greater numbers.

¹⁶⁶ FINAL REPORT, *supra* note 9, at iii-iv.

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MHI in greater numbers, it is imperative that federal, state, and local actors continue to work together. The federal government may even want to consider involving the state in research efforts in the NWHI, even if not entirely necessary, to foster further cooperation between state and federal actors. The model that has emerged on the island of Kauai provides a paradigm that conservation efforts in other states may look to for inspiration—demonstrating what is possible when federal, state, and local actors work together instead of in opposition.