



Marine Resources Committee Newsletter

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MESSAGE FROM THE CHAIRS

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Welcome to this very special joint newsletter for the SEER Marine Resources and SEER and SIL International Environmental Law Committees! The oceans have always had a very clear connection to international law, dating back to ancient custom. Attempts to conform the international rules that apply

to the oceans range from Hugo Grotius's 1609 *Mare Liberum* to the most recent incarnation of the United Nations Convention on the Law of the Sea and the United States's recurring debate over whether to ratify that treaty. Our three committees are therefore very happy to present this joint newsletter recognizing that connection.

The articles in this newsletter address a variety of current topics at the intersection of marine resources and international law. One article, for instance—“Papahânaumokuâkea Inscribed as World Heritage Site”—describes how the World Heritage Convention recently changed the status of an American marine resource, the Papahânaumokuâkea Marine National Monument. This huge marine reserve protects the coral reef ecosystem of the Northwestern Hawaiian Islands, and it is now one of the few World Heritage Sites that was designated for both its ecological and its cultural importance.

Other articles address emerging issues of global importance. In “Before the Sun Sets: Changing Ocean Chemistry, Global Marine Resources, and the Limits of Our Legal Tools to Address Harm,” Mark Spalding discusses the increasingly recognized—and increasingly concerning—problem of ocean acidification, which has been described by some as climate change's “evil twin.” Like climate change itself, ocean acidification requires a global solution—and it also provides perspectives regarding reliance on geo-engineering as a solution to more conventional climate change problems. Chad McGuire, in turn, takes up the

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intersection of international trade and marine species in “Marine Mammals and International Trade: Balancing Social Conscience with Trade Obligations—A Summary and Update on the World Trade Organization Seal Products Dispute.”

Finally, of course, the oceans and associated coastal areas play important roles in both domestic energy development and world energy and environmental issues, and two articles in this newsletter discuss that intersection. Oil spills have long been a concern in marine environmental protection, and the summer 2010 Gulf oil spill focused world attention on the continuing threat that oil spills pose to the marine environment, prompting reformation of offshore drilling regulation both in the United States and abroad. Moreover, Gulf oil spill issues were the subject of sessions at both the ABA SEER 18th Section Fall Meeting in New Orleans in September 2010 and the ABA SEER 40th Annual Conference on Environmental Law in Salt Lake City in March 2011. “Ban on the Use and Carriage of Heavy Grade Oils in Antarctica” discusses this persistent environmental threat in a different environment, examining the growing threat of an oil spill in Antarctica and its surrounding waters. This threat, the author argues, could undermine the international agreements to keep Antarctica as an international and peaceful ecological preserve. In turn, Roberto Liesegang and Maristela Abla Rossetti discuss Brazil’s development of its vast oil fields in “Brazilian Pre-Salt Oil Reserve Exploration: Regulatory and Environmental Aspects.”

We hope you enjoy this informative exploration into these new developments and critical matters. Please contact Chad McGuire at cmcguire@umassd.edu, if you would like to contribute to future issues of our newsletters.

PAPAHÂNAUMOKUÂKEA INSCRIBED AS WORLD HERITAGE SITE

**Ole Varmer
Theodore M. Beuttler**

On December 3, 2010, resource managers, marine scientists, conservation activists, political leaders and policy makers commemorated the inscription of the Papahânaumokuâkea Marine National Monument in the northwestern islands of Hawaii on the World Heritage list. They were also commemorating the 10th anniversary of the establishment of the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (“Reserve”) by President Bill Clinton. At that time, the Reserve became the single largest nature preserve ever established in the United States. Calling the designation “a bold and visionary action,” President Clinton recognized the work of an unprecedented coalition of government agencies, conservation groups, and concerned citizens as “[a] big step forward, not only for the United States, but for the oceans around the world . . . setting a new global standard for coral reef and wildlife protection.” The Reserve is now part of Papahanaumokuakea Marine National Monument, created by President George W. Bush in 2006. On July 30, 2010, “Papahânaumokuâkea” was designated as the first mixed site in the United States being recognized as a place of “outstanding universal value” for both its natural heritage and its cultural heritage under the 1972 World Heritage Convention (“Convention”). It is also the world’s first cultural seascape recognized for its continuing connections to living indigenous people.

Over the past few decades, this Convention has become the mechanism for international cooperation on the conservation of the cultural and natural heritage of international significance by its Parties through their domestic laws and management plans. Today, 187 countries or States are Parties to the Convention, making it an almost universally accepted set of principles and framework of action. *See* <http://whc.unesco.org/pg.cfm?cid=246>.

This article will provide an overview of the World Heritage Convention and how it facilitates the

cooperation among Parties in their respective protection and management of natural and cultural resources of mutual interest. It will also provide an overview of how and why the very special place in the marine environment, now known as Papahânaumokuâkea, was inscribed on this most prestigious list of predominantly terrestrial sites. Finally, it discusses how the listing of this and other sites in the marine environment have extended beyond the territories of nations and onto their continental shelf and exclusive economic zone (EEZ) and whether it is possible that the World Heritage Convention may someday include sites in the high seas, such as the *Titanic*, which will be protected by the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage on the 100th anniversary of its sinking in April 2012.

I. The Development of the 1972 World Heritage Convention and List of Sites of Natural and Cultural Heritage: U.S. Leadership

A. The Catalyst for International Cooperation on Certain Heritage

Enactment of international and domestic environmental and historic preservations laws can often be traced to a harm or threat to resources that raises concern sufficient for action by governments. In the case of the World Heritage Convention, the catalyst was the impending loss of ancient Egyptian temples at Abu Simbel from flooding caused by the construction of the Aswan Dam. In response, fifty nations acting in conjunction with the United Nations Educational, Scientific and Cultural Organization (UNESCO) came together to assist in an \$80 million project that included disassembling and relocating the temples to higher ground. The project was a recognition of the international cultural significance of the Abu Simbel temples and helped lead to the development of the World Heritage Convention as an agreement between Parties to use their national sovereignty and authority to protect and manage cultural resources of outstanding value to the world. With the help of the International Council on Monuments and Sites (ICOMOS), parties to UNESCO began preparation of a draft convention on the protection of cultural heritage. During this same

period there was also interest in protecting natural resources as a result of the developing environmental movement.

B. United States Leadership in Developing the World Heritage Convention

The United States played a significant, leading role in the development of the 1972 World Heritage Convention and particularly in proposing that its scope include natural as well as cultural heritage. At a White House conference in Washington, D.C., in 1965, the United States called for a “World Heritage Trust” that would stimulate international cooperation to protect “the world’s superb natural and scenic areas and historic sites for the present and the future of the entire world citizenry.” In 1968, the International Union for Conservation of Nature (IUCN) developed similar proposals for its members. These proposals were presented to the 1972 United Nations Conference on the Human Environment in Stockholm. Eventually, a single text was agreed upon by all parties concerned, and the Convention Concerning the Protection of World Cultural and Natural Heritage was adopted by the General Conference of UNESCO on November 16, 1972. By regarding heritage as both cultural and natural, the Convention underscores the ways in which people interact with nature, and of the fundamental need to preserve the balance between the two. *See* <http://whc.unesco.org/en/convention/#Brief-History>. In 1973, the United States became the first nation to ratify the Convention by a vote in the Senate of 95-0. The Convention entered into force on December 17, 1975, after ratification by the requisite number of States Parties. The United States has served as a member of the World Heritage Committee for much of that body’s existence and in 1978 hosted the first committee meeting that listed sites. Of the 12 sites listed at that time, two were in the United States: Mesa Verde and Yellowstone National Parks. The United States has always remained a party to the Convention and has participated in meetings despite withdrawing from UNESCO in 1984 over concerns about budget, management, and politicization. *See* <http://www.unesco.jp/meguro/reprint/rejoin.htm>. Between 1978 and 1994, twenty United States sites were inscribed.

II. U.S. Obligations Under the World Heritage Convention

As a party to the Convention, the United States is obligated to “ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory” and take “effective and active measures” to protect this heritage (Convention Arts. 4, 5). The Convention calls on all States Parties to “recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate,” but does so while “fully respecting the sovereignty of the States on whose territory the cultural and natural heritage . . . is situated, and without prejudice to property right provided by national legislation.” (Convention Art. 6, *available at* <http://whc.unesco.org/en/conventiontext/>). The listing of a site does not in any way result in the loss of sovereignty, rights, or authority over the site. To the contrary, listing reflects a promise by the Party to protect and manage a particular site in a manner consistent with its own laws and management plans as described in the nomination package. If a listed site subsequently is included on the list of World Heritage Sites in Danger (Art. 11), the Party is obligated to undertake appropriate measures to enhance or fulfill the protection and management promised when it was inscribed or risk having the site delisted.

III. Listing of Papahānaumokuākea as a World Heritage Site

Under the Convention, the list of sites is determined and maintained by the World Heritage Committee. The committee is composed of 21 elected representatives of nations that are parties to the Convention. The IUCN, the International Centre for the Study of the Preservation and Restoration of Cultural Properties (ICCROM), and ICOMOS make recommendations to the committee as to whether sites meet the stringent standards for listing under the Convention and its implementing guidelines. In general, the committee adds about 25–30 sites per year to the list. Today, there are 911 sites on the list, located in 151 countries around the world.

Pursuant to its authority under federal law, the National Park Service completed the process to identify sites to be nominated by the United States to the World Heritage Committee and announced the decision in early 2009. 16 U.S.C. § 470a-1, a-2, d; 36 C.F.R. § 73; 74 Fed. Reg. 5,677 (2009). Papahānaumokuākea was among the sites nominated by the United States and submitted to the World Heritage Committee. *See* 74 Fed. Reg. 5,677 (2009). The committee determined, based on the recommendations of its advisory bodies (ICOMOS and IUCN), that the nomination met at least one of the necessary criteria. The site was inscribed on the World Heritage list in July of 2010 during the committee’s meeting in Brasilia.

The addition of Papahānaumokuākea to the list of World Heritage Convention sites is a nod to more than a century of domestic efforts designed to protect the rich cultural and natural resources of the Northwestern Hawaiian Islands (NWHI). The NWHI have been federally protected since 1909, Exec. Order No. 1019, and have been designated as a National Wildlife Refuge for over 70 years. 5 Fed. Reg. 147 (1940). As mentioned above, in 2000, President Clinton declared the federal submerged lands and waters surrounding the NWHI as a Coral Reef Ecosystem Reserve, extending federal protections approximately 50 nautical miles out from the state of Hawaii’s seaward boundary. Exec. Order No. 13178, 65 Fed. Reg. 76,903 (2000); Exec. Order No. 13196, 66 Fed. Reg. 7,395 (2001). The state of Hawaii strengthened these protections in 2005 when it created the Northwestern Hawaiian Islands Marine Refuge, a state-regulated, restricted-entry protection zone encompassing all NWHI land and waters within Hawaii’s jurisdiction. HAW. CODE R. § 13-60.5. In 2006, President Bush exercised his discretion under the Antiquities Act by issuing Presidential Proclamation 8031, which established the Northwestern Hawaiian Islands Marine National Monument (subsequently renamed Papahānaumokuākea). 71 Fed. Reg. 36,443 (2006). As codified in regulations promulgated by the Department of Commerce through the National Oceanic and Atmospheric Administration, and the Department of the Interior through the Fish and Wildlife Service, the proclamation prohibits, *inter alia*,

the taking, possessing, injuring, or damaging of any living or nonliving Monument resource within Papahānaumokuākea, and subjects prospective entrants to strict permit requirements. 50 C.F.R. pt. 404 (2006).

IV. Recognition of the Outstanding Value of Papahānaumokuākea’s Natural and Cultural Heritage

A. Natural Heritage

The remote chain of atolls and surrounding waters represent the first U.S. site to be added to the World Heritage list in over 15 years and the nation’s first on the list of “mixed sites” designated for their outstanding value for both their natural heritage and their cultural heritage. Papahānaumokuākea includes a 1200-mile-long string of coral islands, atolls, seamounts, banks, and shoals, running northwest from the main Hawaiian Islands. The nearly pristine environment represents a complete, holistic cross section of a Pacific archipelagic ecosystem and supports a large number of species found nowhere else, including 23 species that are listed as threatened or endangered. The marine waters are described as a top-predator-dominated ecosystem and include a large number of species found nowhere else in the world. Nomination for Inscription of Papahānaumokuākea Marine National Monument for Inscription on the World Heritage List, 2009; 74 Fed. Reg. 5,677 (Jan. 30, 2009); Papahānaumokuākea Marine National Monument Management Plan (2008).

B. Cultural Heritage

The islands and their significant archaeological sites also have deep cosmological and traditional significance for living Native Hawaiian culture as an ancestral environment, as an embodiment of the Hawaiian concept of kinship between people and the natural world, and as the place where it is believed that life originates and to where the spirits return after death. On two of the islands, Nihoa and Mokumanamana, there are archaeological remains relating to pre-European settlement and use. Natural and cultural heritage are inseparably linked at Papahānaumokuākea and it is the world’s first cultural

seascape recognized for its continuing connections to living, indigenous people.

Papahānaumokuākea also reflects the rich maritime history of the Hawaiian Islands. Currently, 60 known shipwreck sites have been identified, the earliest dating back to 1822. Combined with known American and Japanese aircraft losses that occurred during the Battle of Midway, there are a total of 127 potential maritime resource sites, giving the area a significant and relatively undisturbed marine archaeological legacy. Nomination for Inscription of Papahānaumokuākea Marine National Monument for Inscription on the World Heritage List, 2009.

V. Protection and Management Under the World Heritage Convention

The World Heritage Convention is the most widely adopted international agreement for nature conservation and cultural preservation. The listing of a site does not affect the ownership, sovereignty, jurisdiction, or control of a site by the nation nominating it and does not provide any ownership, jurisdiction, or control to the United Nations, UNESCO, or any other international organization. Listing does, however, document international recognition of the value of a site and the commitment by the sovereign nation and the site's owners for its long-term protection and management under applicable domestic laws. The legal significance of this inscription is really more about international recognition of the domestic laws and management programs applied by the United States and Hawaii to protect and manage Papahānaumokuākea than the application of any new international law.

Papahānaumokuākea is cooperatively managed to ensure ecological integrity and achieve strong, long-term protection and perpetuation of Northwestern Hawaiian Island ecosystems, Native Hawaiian culture, and heritage resources for current and future generations. Three co-trustees—the Department of Commerce, Department of the Interior, and state of Hawaii—protect and manage this special place. Papahānaumokuākea is perhaps one of the first sites in the United States, if not the world, in which the very restrictive measures on activities for protecting the

natural heritage also help preserve the cultural heritage as the heritage is inextricably linked particularly to the first nation people of Hawaii. Accordingly, throughout the process of developing the laws and management plans, there has been a substantial effort by the United States to cooperate with the state of Hawaii in consulting with representatives of Native Hawaiian people.

VI. Broadening the Geographic Scope of the World Heritage Convention: From the Territory and Territorial Sea to the EEZ and Continental Shelf: Next Step, High Seas—Titanic?

As humans are terrestrial beings, it is no surprise that most, if not all, of the sites inscribed during the Convention's first decade were predominantly terrestrial. Although some sites that were listed included coastal water components, they were all within the territorial jurisdiction of the State, including its territorial sea. In 1972, a State's maritime jurisdiction under customary international law was simply the territorial sea that, under the old "cannon shot rule," was limited to three nautical miles (nm) out from the State's coastline. This was generally regarded as the limit that a coastal State could control through cannons stationed along its coastline. Beyond the 3-nm line were the high seas where a coastal State had no maritime jurisdiction, with the possible exception of a customs zone or contiguous zone for purposes of controlling customs and trafficking in the territory.

However, just as the Law of the Sea has evolved to recognize the need of coastal States to extend their jurisdiction and control in the marine environment to a 12-nm territorial sea and a 200-nm exclusive economic zone (EEZ), so has the World Heritage Committee's interest to list sites farther out in the marine environment to provide international recognition of the heritage beyond a State's territory and well into its EEZ. This is consistent with international recognition of domestic laws, jurisdiction, and authority by which a nation can protect its heritage far out into the marine environment.

In addition to Papahānaumokuākea, another significant addition to the list of World Heritage sites in 2010 was

the Phoenix Islands Protected Area (PIPA), an expanse of over 400,000 sq. km. off of Kiribati, comprising the largest marine protected area in the world. With outer boundaries reaching as far as 200 nm from Kiribati's coastline, PIPA is the first World Heritage site to extend to the full limit of a State's EEZ. Just as the Law of the Sea recognizes that a nation's continental shelf may extend beyond the 200-nm EEZ under Article 76, it is reasonable to conclude that the World Heritage Committee could expand the recognition of heritage of outstanding universal value that may be located on this extended portion of the continental shelf. Perhaps the best candidate may be the wreck site of RMS *Titanic*, which is already the subject of protection under an international agreement and various orders under the maritime law of salvage. On April 14–15, 2012, the 100th anniversary of its sinking, it will become an "underwater cultural heritage" and thus protected by the laws of nations that are parties to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.

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