

1-1-2005

Is There a Constitutional Right to Fish in a Marine Protected Area?

Doug Obegi

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Doug Obegi, *Is There a Constitutional Right to Fish in a Marine Protected Area?*, 12 *Hastings West Northwest J. of Envtl. L. & Pol'y* 103 (2006)

Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol12/iss1/11

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Is There a Constitutional Right to Fish in a Marine Protected Area?

An analysis of the California Constitution's Right to Fish Provision and its impact on the State's power to create marine reserves and other types of marine protected areas (MPAs)

By Doug Obegi*

In 2002, after more than three years of study and deliberation, the California Fish and Game Commission adopted regulations prohibiting or restricting recreational and commercial fishing in roughly nineteen percent of the state waters surrounding the Channel Islands offshore of Santa Barbara.¹ The adopted regulations established a network of marine reserves and other types of marine protected areas.² Although strongly supported by environmental organizations and nonconsumptive user groups, the regulations were bitterly contested by sport and commercial fishing interests who challenged the regulations in state court on several grounds.³ One of the central claims in the litigation was that the regulations violated the California Constitution's Right to Fish provision.⁴

* Mr. Obegi is a J.D. Candidate at University of California, Hastings College of the Law, graduating in 2006. He worked for The Ocean Conservancy, a national nonprofit environmental organization, during the regulatory process that resulted in creation of the Channel Islands MPAs described herein. He wishes to thank the *West-Northwest* editorial staff and the outside reviewers for their work, which vastly improved this note. This note is dedicated to the countless individuals and organizations that participated in the process and eventually helped to create the Channel Islands MPAs.

1. *Ventura County Commercial Fishermen's Ass'n v. Cal. Fish & Game Comm'n*, No. B166335, 2004 Cal. App. Unpub. LEXIS 1416, at *3 (Cal. Ct. App. Feb. 17, 2004); see Kenneth Weiss, *Channel Islands Fish Reserve Plan Ready*, L.A. TIMES, Feb. 8, 2002, at B1.

2. CAL. CODE REGS. tit. 14, § 632(b)(41)-(55) (2005).

3. Jenifer Ragland, *Channel Islands Fishing Ban Begins*, L.A. TIMES, Apr. 10, 2003, at B1; see also Pete Thomas, *Sanctuary Proposal Under Fire*, L.A. TIMES, Mar. 8, 2002, at D5.

4. *Ventura County Commercial Fishermen's Ass'n*, 2004 Cal. App. Unpub. LEXIS 1416, at *17-19; see also Ragland, *supra* note 3.

A marine protected area (“MPA”), like protected areas on land, is a discrete area of the ocean that has been established by the government for special protection or regulation.⁵ A marine reserve is a type of MPA where no fishing or extractive uses are permitted.⁶ Marine reserves and other types of marine protected areas have the potential to be important management tools for sustaining, preserving and conserving marine biodiversity and fisheries.⁷ In recognition of the growing scientific support for the use of MPAs, federal and state governments have initiated various public processes to designate new MPAs and evaluate existing ones. Opponents in California have vociferously invoked the State Constitution’s Right to Fish provision to challenge MPAs that restrict fishing. Opponents have also sought enactment of legislation on the state and federal level, the so-called Freedom to Fish Act, to further restrict the ability to create MPAs that restrict fishing.⁸

This note explores the legal ramifications of the California Constitution’s Right to Fish provision, and the potential impact of Freedom to Fish legislation on the establishment of MPAs in the Channel Islands and elsewhere in California. Part I of this paper defines the term MPA and the scientific support for creating MPAs to conserve marine species and habitats. Part II explores California’s history of managing marine resources, the sources of its power to do so, and the State’s powers to create and modify

MPAs in particular. Part III examines the meaning and impact of the Right to Fish provision on the creation of MPAs, and analyzes the litigation over the Channel Islands MPAs and potential future litigation over MPAs in California. Part IV examines the potential impact of state and federal Freedom to Fish Acts on California’s ability to create MPAs, particularly marine reserves. In Part V, the paper concludes with recommendations for the State with respect to creating MPAs.

I. What Are Marine Protected Areas, and Why Are They Useful?

A. Nomenclature: What is an MPA?

California law defines a marine protected area as “a named, discrete geographic marine or estuarine area . . . together with its overlying water and associated flora and fauna that has been designated by law, administrative action, or voter initiative to protect or conserve marine life and habitat.”⁹ There are several types of MPAs under California law; the type most relevant to this note, a “marine reserve,” is defined as a type of MPA where all extractive activities, including commercial and recreational fishing, are prohibited.¹⁰ MPAs can have a variety of goals and purposes, including fisheries management, habitat protection, recreational use, and scientific research.¹¹ MPAs in California have been created by a variety of legislative and administrative processes,¹² including Constitutional amendment.¹³

5. See *infra* text accompanying note 9.

6. See *infra* text accompanying note 10.

7. CAL. FISH & GAME CODE §§ 2851(f)-(h) (West 2005); CAL. PUBLIC RES. CODE § 36601(a)(3) (West 2005); CAL. DEP’T OF FISH AND GAME, FINAL ENVIRONMENTAL DOCUMENT, MARINE PROTECTED AREAS IN NOAA’S CHANNEL ISLANDS NATIONAL MARINE SANCTUARY, 1-5 to -9 (2002), available at http://www.dfg.ca.gov/mrd/ci_ceqa/pdfs/chapter1.pdf (last visited Oct. 19, 2005) [hereinafter CHANNEL ISLANDS FEIS]; see also sources cited *infra* note 16.

8. See discussion *infra* Part IV.

9. CAL. FISH & GAME CODE § 2852(c); CAL. PUBLIC RES. CODE § 36602(e).

10. CAL. FISH & GAME CODE § 2852(d); CAL. PUBLIC RES. CODE § 36710(a). Although the text of the MLPA uses the term “marine life reserve,” the term “marine reserve” shall be used in this note.

11. CAL. FISH & GAME CODE § 2853.

12. CAL. PUBLIC RES. CODE § 36601(a)(4).

13. CAL. CONST. art. XB, § 14.

Both the state and federal governments can create MPAs, although local governments cannot.¹⁴ California has more than 100 MPAs in state water, and 4 federal MPAs that overlap state water, although only a small fraction of these MPAs substantially restrict fishing or have been designated as marine reserves where all fishing and extractive use is prohibited.¹⁵

B. Why Are MPAs and Marine Reserves Proposed for California?

Marine reserves and other types of MPAs have been proposed as management tools to reverse the observed decline in fish populations in California, along the West Coast, and for the United States at large.¹⁶ Although there are substantial data problems and uncertainties associated with fish population estimates, there is fairly widespread agreement that the number and size of fish have declined markedly on both a

local and global scale.¹⁷ The collapse of the sardine fishery in Monterey Bay in the late 1940s,¹⁸ romanticized by John Steinbeck's novel *Cannery Row*, was one of the first popular realizations that our ocean's bounty was finite and limited. Yet the State had taken action decades earlier to conserve fisheries, for instance by limiting the amount of fish that could be used for reduction fisheries in the 1920s in order to conserve sardine populations.¹⁹

Although the decline and listing of West Coast Salmon and other anadromous species under the Endangered Species Act for many years dominated news coverage and congressional appropriations,²⁰ marine fish populations have also declined, sometimes precipitously. For instance, the sport and commercial fisheries for giant sea bass (also known as black sea bass) were eliminated in 1981 after concerns that this spe-

14. See generally discussion *infra* Part II and text accompanying note 61.

15. DEBORAH McARDLE, CALIFORNIA MARINE PROTECTED AREAS, at x (1997); CAL. FISH & GAME CODE 2851(g).

16. CAL. FISH & GAME CODE § 2851; CHANNEL ISLANDS FEIS, *supra* note 7, at 1-5 to -9; Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 31, 2000); NATIONAL RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS (2001), available at <http://books.nap.edu/catalog/9994.html> (last visited Oct. 22, 2005); Steven N. Murray et al., *No-take Reserve Networks: Sustaining Fishery Populations and Marine Ecosystems*, FISHERIES, Nov. 1999, at 11, 11-25; AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, SCIENTIFIC CONSENSUS STATEMENT ON MARINE RESERVES AND MARINE PROTECTED AREAS (Feb. 17, 2001), available at <http://www.nceas.ucsb.edu/Consensus/consensus.pdf> (last visited Oct. 22, 2005); PACIFIC FISHERY MANAGEMENT COUNCIL, INFORMATION SHEET: MARINE RESERVES (2004), available at <http://www.pcouncil.org/facts/mr.pdf> (last visited Oct. 23, 2005); see also sources collected in the U.S. Marine Protected Area Library, http://www3.mpa.gov/mpa_lib/virtual_library.aspx.

17. U.N. FOOD & AGRIC. ORG. [FAO], *The State of World Fisheries and Aquaculture*, pt. 1 at 23 (2002), available at <ftp://ftp.fao.org/docrep/fao/005/y7300e/>

y7300e01.pdf (last visited Oct. 22, 2005) (noting that 47% of fisheries worldwide are fully exploited, 18% are overexploited, and 10% are significantly depleted or recovering from depletion, with only 25% under- or moderately exploited); Daniel Pauly & Reg Watson, *Counting the Last Fish*, SCI. AM., July 2003, at 42, 42-47; Daniel Pauly et al., *Fishing Down Marine Food Webs*, 279 SCIENCE 860, 860-863 (1998).

18. CAL. DEP'T OF FISH & GAME, CALIFORNIA'S LIVING MARINE RESOURCES: A STATUS REPORT, 299-302 (William S. Leet et al. eds., 2001) [hereinafter MARINE RESOURCES STATUS REPORT], available at http://www.dfg.ca.gov/mrd/status/pacific_sardine.pdf (last visited Oct. 22, 2005). The collapse of the fishery was caused by a combination of natural ecosystem fluctuations and overfishing. *Id.* at 302.

19. See, e.g., *California v. Monterey Fish Products Co.*, 195 Cal. 548, 554 (1925) (discussing statutory provisions which, in order to "conserve the fish supply in California," prevented defendants from operating a reduction plant to turn sardines that were fit for human consumption into fish meal and fish oil).

20. See Endangered and Threatened Species: Proposed Listing Determinations for 27 ESUs of West Coast Salmonids, 69 Fed. Reg. 33,102 (June 14, 2004).

cies was headed towards extinction.²¹ After several decades of protection from directed take, the population may be slightly recovering, although there are still concerns about unintentional take of these species in gill nets and by recreational fishermen as bycatch.²² More recently, the fishery for the seven native species of abalone was closed south of San Francisco because the populations had dramatically declined due to a combination of disease, overfishing, and pollution.²³ As a result of the decline, the white abalone was listed as an endangered species.²⁴ In addition, the Department of Fish and Game, concerned that the red abalone population is still decreasing, has increased restrictions on the fishery in Northern California to conserve the remaining mollusks.²⁵

21. MARINE RESOURCES STATUS REPORT, *supra* note 18, at 209-211, available at http://www.dfg.ca.gov/mrd/status/giant_seabass.pdf (last visited Oct. 22, 2005). Closure of the fishery meant only that directed, intentional take of the species was prohibited; incidental catch still occurred, and commercial fishermen were allowed to keep one fish per trip if caught incidentally under certain conditions. *Id.* at 209.

22. *Id.* at 211 ("The California population of giant sea bass is well below historical highs. Anecdotal information suggests that numbers may be beginning to rebound under current measures. No hard data exist that provide actual or relative numbers of giant sea bass.").

23. MARINE RESOURCES STATUS REPORT, *supra* note 18, at 89-97, available at <http://www.dfg.ca.gov/mrd/status/abalone.pdf> (last visited Oct. 22, 2005).

24. Endangered and Threatened Species; Endangered Status for White Abalone, 66 Fed. Reg. 29,046 (May 29, 2001).

25. California Department of Fish and Game, New Abalone Regulations, http://www.dfg.ca.gov/mrd/ab_regs.html (last visited Oct. 22, 2005) ("The Fish and Game Commission acted to reduce the take of red abalone in response to biological concerns that the northern California recreational abalone fishery was not sustainable."); *Abalone Season Opens with Limits*, SAN DIEGO UNION TRIB., Apr. 2, 2002, at A4 (daily limit reduced from 4 to 3 abalone per person, and season limit reduced from 100 abalone per person to 24 per person).

26. Generally, California manages fisheries that occur primarily within 3 miles of shore, whereas the

The problems are not confined to fisheries managed by the State of California.²⁶ In its 2003 report to Congress, the National Marine Fisheries Service found that sixty fish stocks²⁷ are being overfished, seventy-six stocks have been overfished, and the status of more than six hundred stocks was unknown.²⁸ In that same report, the federal government estimated that of the sixty-four "major" species federally managed on the West Coast, seven were listed as "overfished."²⁹ This legal designation signifies that the species' population has declined to a level below which fishing is unsustainable,³⁰ and for most rockfish species, it signifies that the population has fallen below 25 percent of its historic, unfished population.³¹ As a result of these designations,

federal government manages offshore fisheries. *See* discussion *infra* Part II.

27. A "stock of fish" is defined in the Magnuson Act as "a species, subspecies, geographical grouping, or other category of fish capable of management as a unit." 16 U.S.C. § 1802(37) (2005).

28. NAT'L MARINE FISHERIES SERV., U.S. DEPT. OF COMMERCE, ANNUAL REPORT TO CONGRESS ON THE STATUS OF U.S. FISHERIES, 2003 at 4-5 (May 2004), available at http://www.nmfs.noaa.gov/sfa/statusoffisheries/statusostocks03/Report_Text.pdf (last visited Oct. 22, 2005).

29. *Id.* at 8. The report also notes that 2 minor stocks are overfished. *Id.* As of September 2004, "[e]ight Pacific coast groundfish stocks continue to be designated as 'overfished': [Pacific Ocean perch], bocaccio, lingcod, canary rockfish, cowcod, darkblotched rockfish, widow rockfish, and yelloweye rockfish. Pacific whiting is no longer designated as overfished." Magnuson-Stevens Act Provisions; Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures, 69 Fed. Reg. 56,550, 56,558 (Sept. 21, 2004).

30. 16 U.S.C. § 1802(29) (2005) ("The terms 'overfishing' and 'overfished' mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.").

31. *See* PACIFIC FISHERY MANAGEMENT COUNCIL, FINAL ENVIRONMENTAL ASSESSMENT/REGULATORY IMPACT REVIEW FOR AMENDMENT 11 TO THE PACIFIC COAST GROUND FISH FISHERY MANAGEMENT PLAN EA/RIR-6 (Oct. 1998), available at <http://www.pcouncil.org/groundfish/gffmp/gfa11/gfa11.pdf> (last visited Oct. 23, 2005).

fishing for most rockfish and ground fish species has been restricted or prohibited in more than 10,000 square miles of the Pacific Ocean.³² Along the West Coast, several rockfish species were petitioned for listing under the Endangered Species Act in the past half decade.³³ Although none of the petitions was granted, the petitions brought increased government attention to these problems and likely contributed to significant fishing restrictions imposed in the past several years.³⁴

The life characteristics of rockfish species make them extremely vulnerable to overfishing.³⁵ These fish are slow to mature and live extremely long lives³⁶ (some rockfish are estimated to have lived over 150 years, which would mean they were swimming in the Pacific when Abraham Lincoln delivered the Emancipation Proclamation). Many of the species live at fairly deep depths and have a swim bladder, thus they often die quickly when brought to the surface and are less likely to survive efforts to practice catch and release fishing.³⁷

32. See Magnuson-Stevens Act Provisions; Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures, 69 Fed. Reg. 56,550 (Sept. 21, 2004) (proposed rule for 2005-2006 ground fish fishery offshore of California, Oregon, and Washington establishes Groundfish Conservation Areas); 50 C.F.R. § 660.390 (2005).

33. Endangered and Threatened Species: Puget Sound Populations of Copper Rockfish, Quillback Rockfish, Brown Rockfish, and Pacific Herring, 66 Fed. Reg. 17,659 (Apr. 3, 2001) (denying ESA listing petition for these species in Puget Sound, WA); Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Bocaccio as Threatened, 67 Fed. Reg. 69,704 (Nov. 19, 2002) (denying ESA listing petition for Bocaccio, in part because "NMFS believes that the Council's most recent proposed measures, adopted in September 2002, will ensure that the southern stock of bocaccio will not become endangered within the foreseeable future").

34. *Id.*

35. See, e.g., S.J. Parker et al., *Management of Pacific Rockfish*, FISHERIES, March 2000, at 22, 22-29, available at

However, these same characteristics also make MPAs a potentially valuable management tool for rockfish.³⁸ Most importantly, rockfish exhibit exponential reproductive success; that is, an older (and larger) fish will have exponentially more larvae (e.g., a three-fold increase in size will cause a nine fold increase in reproduction).³⁹ Thus, retaining the large, older fish is essential to reproductive success of the fishery.⁴⁰ Moreover, many of these fish exhibit geographic specificity, meaning that they tend to stay in or return to a general area.⁴¹ Thus, an MPA's protections may protect an individual fish for much or all of its lifespan. Finally, rockfish species often aggregate with one another, making it difficult for managers to allow fishing on one type of rockfish without catching other species.

The scientific support for MPAs as a management tool has also grown substantially in recent years. Scientific studies have confirmed that marine reserves generally have more fish, more types of fish, and larger fish within their boundaries than outside of

<http://www.fisheries.org/html/fisheries/archive/FISHMarch22-29.pdf> (last visited Oct. 22, 2005).

36. *Id.* at 22.

37. *Id.* at 23.

38. *Id.* at 26; see also NAT'L MARINE FISHERIES SERV., U.S. DEPT' OF COMMERCE, NOAA-TM-NMFS-SWFSC-255, MARINE HARVEST REFUGIA FOR WEST COAST ROCKFISH: A WORKSHOP (1988), available at <http://www.pfeg.noaa.gov/events/workshops/refugia/Rockfish.pdf> (last visited Oct. 29, 2005).

39. Steven A. Berkeley et al., *Maternal Age as a Determinant of Larval Growth and Survival in a Marine Fish, Sebastes Melanops*, 85(5) ECOLOGY 1258, 1258-64 (2004); Steven A. Berkeley et al., *Fisheries Sustainability via Protection of Age Structure and Spatial Distribution of Fish Populations*, FISHERIES, Aug. 2004, at 23, 23-32.

40. Esther Landhuis, *Fishing Regulation Changes Urged*, SAN JOSE MERCURY NEWS, Feb. 20, 2005, at 10B, available at <http://www.mercurynews.com/mlid/mercurynews/living/health/10948209.htm> (last visited Oct. 22, 2005).

41. See Parker et al., *supra* note 35, at 23.

them.⁴² Importantly, these benefits appear to “spill over” outside of the MPA boundaries to the surrounding waters, thus benefiting fishermen and others outside of the MPA.⁴³

In addition to these biological benefits, MPAs can be used to reduce conflicts between different user groups and to increase scientific understanding of the impact of fishing (distinguishing fishing impacts on fish populations from pollution, climate change, and other impacts).⁴⁴ MPAs, and marine reserves in particular, also serve as an important insurance policy on “traditional” management restrictions (size, season, and bag limits), by ensuring that there are some standing populations that can repopulate surrounding, overfished areas.⁴⁵

II. Marine Protected Areas Within the Existing Legal Framework in California

A. State Jurisdiction over Offshore Marine Waters

Although California has been managing fisheries for more than a century, the State’s power to regulate fisheries in the waters off-

shore of the state only exists because Congress ceded such power to the states. Since admission of California to the United States, California’s constitution established a seaward boundary of three “English miles” offshore of the mainland, and around the islands.⁴⁶ Such authority was presumed by California, and indeed, by most states.⁴⁷ In 1941, the U.S. Supreme Court upheld the power of the State of Florida to regulate sponge fishing in the territorial waters offshore of the state under its police powers “in the absence of conflicting federal legislation.”⁴⁸

However, in the landmark case of *California v. United States*, the Supreme Court held that the federal government, rather than the State of California, owned the submerged lands and “resources of the soil under that water, including oil,” in the three-mile belt surrounding the Channel Islands.⁴⁹ Only a year later, the Court tempered its rule by reaffirming *Skiriotes*, holding that the states could exercise their police powers to regulate fishing activities within these territorial waters in the absence of conflicting federal law.⁵⁰

42. CHANNEL ISLANDS FEIS, *supra* note 7, at 1-5 to -9; Benjamin S., Halpern, *The Impact of Marine Reserves: Do Reserves Work and Does Reserve Size Matter?* 13(1) ECOLOGICAL APPLICATIONS S117, S117-S137 (Supp. 2003), available at http://www.nceas.ucsb.edu/~halpern/pdf/Halpern_EA_2003.pdf (last visited Oct. 22, 2005); see also sources cited *supra* note 16.

43. See sources cited *supra* note 42.

44. *Id.*; see also sources cited *supra* note 16.

45. See, e.g., Mark A. Carr & Peter T. Raimondi, *Marine Protected Areas as a Precautionary Approach to Management*, 40 CALCOFI REP. 74, 74 (1999), available at <http://bio.research.ucsc.edu/people/raimondi/publications/carr/Carr%20Raimondi%20CalCOFI%201999.pdf> (last visited Oct. 22, 2005); see also sources cited *supra* notes 7, 16.

46. CAL. CONST. app. I, art. XII, § 1; *United States v. California*, 332 U.S. 19, 29-30 (1947). Although the language of the provision is abstruse, the courts have interpreted it to include three miles of waters surrounding the offshore islands that are part of the State. *In re Application of Marinovich*, 48 Cal. App. 474 (Ct. App. 1920) (upholding

conviction for illegal possession of fishing nets offshore of Santa Catalina Island; holding that the State has jurisdiction over the territorial waters within three miles of shore and encircling the island, and that the State has the power of control over fisheries within these waters).

47. See *Geer v. Connecticut*, 161 U.S. 519, 532 (1896) (“So far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish . . . the ownership being in the people of the state . . . it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best sub serve the public welfare.”); see *In re Parra*, 24 Cal. App. 339, 342-344 (Ct. App. 1914) (discussing cases holding that a state legislature has power to enact laws to protect fish in the territorial waters of that state).

48. *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941).

49. *United States v. California*, 332 U.S. 19, 38-39 (1947).

50. *Toomer v. Witsell*, 334 U.S. 385, 393 (1948).

In response to these decisions, Congress enacted the Submerged Lands Act, ceding control and management of the submerged lands and waters within three nautical miles of shore to the states.⁵¹ As the Supreme Court subsequently noted, subject to the restrictions and exceptions in the Submerged Lands Act,

[The]state of California is entitled, as against the United States, to the title to and ownership of the tidelands along its coast (defined as the shore of the mainland and of islands, between the line of mean high water and the line of mean lower low water) and the submerged lands, minerals, other natural resources and improvements underlying the inland waters and the waters of the Pacific Ocean within three geographical miles seaward from the coast line and bounded on the north and south by the northern and southern boundaries of the State of California, including the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law.⁵²

However, the enactment of the Submerged Lands Act did not preclude the federal government from asserting fisheries management authority in the waters over which the states now had title, because Congress expressly retained

the federal government's power to regulate these lands and waters under the Commerce Clause and its other constitutional powers when it enacted the Submerged Lands Act.⁵³

With enactment of the Magnuson Act in 1976, Congress established a federal fishery management regime and asserted "sovereign rights and exclusive fishery management authority over all fish"⁵⁴ from the edge of the state's seaward boundary throughout the 200 mile wide exclusive economic zone which surrounds all U.S. territory.⁵⁵

The Magnuson Act and the 1996 amendments generally conformed to the state-federal split in the Submerged Lands Act. The Magnuson Act provides that "nothing in this [Act] shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."⁵⁶ Under the Act, the states may regulate within the territorial sea adjacent to the state boundaries.⁵⁷ A state may also regulate fishing outside of the territorial sea adjacent to the state, by vessels registered within that state, if such authority is delegated to the state in a federal fishery management plan or if there is no federal fishery management plan or other regulation that conflicts with the state management action for that species.⁵⁸ However, the Secretary of Commerce may preempt state management when she determines that the

51. 43 U.S.C. §§ 1301-1315 (2005). Under the Submerged Lands Act, Texas and Florida have jurisdiction over coastal waters within three leagues of the coastline (roughly nine miles) as a result of their historic ownership of these submerged lands in the Gulf of Mexico prior to their joining the Union as a state. *Id.* § 1301(b); *Louisiana v. United States*, 389 U.S. 155, 161 (1967) (upholding Texas' three league boundary because the Act "allows those States bordering on the Gulf of Mexico, which at the time of their entry into the Union had a seaward boundary beyond three miles, to claim this historical boundary 'as it existed at the time such State became a member of the Union,' but with the maximum limitation that no State may claim more than 'three marine

leagues' (approximately nine miles).").

52. *California v. United States*, 382 U.S. 448, 452-53 (1966).

53. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

54. 16 U.S.C. § 1811(a) (2005).

55. 16 U.S.C. § 1811; Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605 (March 14, 1983) (establishing the 200 nautical mile EEZ).

56. 16 U.S.C. § 1856(a)(1).

57. *Id.* § 1856(a)(2)(A).

58. *Id.* § 1856(a)(3); 50 C.F.R. § 619 (2005); *People*

state's action or inaction has substantially and adversely affected the implementation of a federal fishery management plan that occurs primarily in federal waters.⁵⁹ It is unlikely, but not entirely clear, that the federal government could, or would, preempt a state MPA because it conflicted with federal fisheries management.⁶⁰ The Magnuson Act also preempts local government regulation of fisheries.⁶¹

In practice, the states and federal government adopt a collaborative approach to fisheries management under the Magnuson Act. State and federal scientists work together to gather and generate the scientific information necessary for management, and the states take the lead in suggesting management plans and regulations for adoption by the relevant Fishery Management Council,

on which each state holds a voting seat.⁶² By and large, the Magnuson Act preserves state management in state waters. To date, it appears that the Act's exception authorizing federal preemption of state management in state waters has never been invoked, although it may have been used to coerce states to comply with federal management measures.⁶³

B. California's MPAs: Past, Present, and Future

The people of California established the State Fish and Game Commission in 1902 by Constitutional amendment, giving that body substantial authority to manage fishing and hunting "to protect fish and game."⁶⁴ As noted earlier, California has created over one hundred MPAs in the past

v. Weeren, 26 Cal. 3d 654, 669 (1980) ("section 1856(a), fairly read, is intended to permit a state to regulate and control the fishing of its citizens in adjacent waters, when not in conflict with federal law, when there exists a legitimate and demonstrable state interest served by the regulation, and when the fishing is from vessels which are regulated by it and operated from ports under its authority."); *Southeastern Fisheries Ass'n v. Mosbacher*, 773 F. Supp. 435, 440 (D.C. Cir. 1991) (holding failure by Secretary of Commerce to rescind state laws conflicting with federal fishery management plan was an abuse of discretion); *State v. Hayes*, 603 A.2d 869, 870-71 (Me. 1992); see generally Sarah Bittleman, *The Magnuson Fishery Conservation & Management Act: Retrospect and Prospect: Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues*, 9 TUL. ENVTL. L.J. 349 (1996).

59. 16 U.S.C. § 1856(b); *Livingston v. Davis*, 465 So. 2d 507, 509 (Fla. 1985).

60. There appear to be no reported cases of the federal government preempting state regulation under the aforementioned provisions of the Magnuson Act. The federal government has preempted inconsistent state regulatory action that would have allowed a harvest level of lobster greater than the federal level under the authority of the Atlantic Coastal Fisheries Cooperative Management Act. American Lobster; Interstate Fishery Management Plans, 66 Fed. Reg. 13,443 (March 6, 2001). However, there appear to be no such instances where the federal government preempted state regulation because the state

provided too much protection to the fish, which would be the case if the federal government preempted a state MPA. The federal government would have to prove, in a formal adjudicatory hearing under the Administrative Procedure Act, that the state's prohibition on fishing in less than two hundred square miles of ocean waters, within the state's boundaries, "substantially and adversely" affects the implementation of a federal fishery management plan. See 16 U.S.C. § 1856(b)(1). Since the problem with most West Coast fisheries is overfishing, rather than an inability to catch the allocated amount of fish that can be sustainably caught, the federal government would have a hard time proving their case against the state. Indeed, it would appear that shifting fishing effort from inside the marine reserve boundaries several miles to the borders of the marine reserve would not "substantially" affect implementation of a fishery management plan for species that either migrate across or are found throughout a large geographic area, as is the case with most, if not all, federally managed West Coast species.

61. *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 179 (4th Cir. 2002).

62. 16 U.S.C. § 1852(b)(1)(A).

63. See *supra* note 60.

64. CAL. CONST. art. IV, § 25 ½ (renumbered 1966, current version at CAL. CONST. art. IV, § 20(a)) ("The Legislature may provide for division of the State into fish and game districts and may protect fish and game in districts or parts of districts.").

century, using a variety of legislative, Constitutional and administrative mechanisms.⁶⁵ However, very few of these MPAs prohibited fishing entirely; the majority of them restricted fishing for one or more species, or had no fishing restrictions at all.⁶⁶ The State, and most stakeholders, agreed that the array of MPAs along the California coast was ineffective in protecting and conserving marine life.⁶⁷

In response, in 1999 the California legislature enacted the Marine Life Protection Act (the "MLPA"), which mandated that the California Fish and Game Commission create a scientifically designed "master plan" for a network of MPAs and marine reserves along the California coast by 2002.⁶⁸ The MLPA also gave the Commission the power to restrict or prohibit fishing for any species in MPAs.⁶⁹ In addition, one year later the Legislature enacted the Marine Managed Areas Improvement Act (the "MMAIA"), which simplified the eighteen existing MPA classifications into six classifications, required the State to review the existing MPA system to decide which MPAs to retain and which to abolish, and established a petition process and guidelines for establishing new MPAs.⁷⁰ This law also expressly authorized the Fish and Game Commission to estab-

lish MPAs, including marine reserves where all fishing and extractive use is prohibited.⁷¹

Both the MLPA and MMAIA processes are continuing to this day, well beyond their statutorily mandated completion dates. These state processes, and the MLPA in particular, became extremely controversial in light of the State Fish and Game Commission's decision in 2002 to adopt the Channel Islands MPAs.

The Channel Islands MPA process was initiated in 1998, prior to the enactment of these aforementioned legislative MPA processes, by a citizen petition to the Fish and Game Commission.⁷² Over a two-year period, an appointed stakeholder committee unsuccessfully attempted to reach a consensus-based recommendation for a network of MPAs in state and federal waters surrounding the Channel Islands.⁷³ Ultimately, the state and federal agencies proposed the final recommendation, prepared a CEQA document analyzing their recommendation and alternatives, held further public hearings on their recommendation, and finally adopted the regulations implementing the MPA network in state waters of the Channel Islands in 2002.⁷⁴

65. CAL. FISH & GAME CODE § 2851(a) (West 2005); CAL. PUB. RES. CODE § 36601(a)(4) (West 2005); DEBORAH McARDLE, *supra* note 15, at x.

66. CAL. FISH & GAME CODE § 2851(g) ("despite the demonstrated value of marine life reserves, only 14 of the 220,000 square miles of combined state and federal ocean water off California, or six-thousandths of 1 percent, are set aside as genuine no take areas.").

67. CAL. FISH & GAME CODE § 2851(a); CAL. PUB. RES. CODE § 36601(a)(6); RESOURCES AGENCY OF CALIFORNIA, IMPROVING CALIFORNIA'S SYSTEM OF MARINE MANAGED AREAS, FINAL REPORT OF THE STATE INTERAGENCY MARINE MANAGED AREAS WORKGROUP 1 (2000), available at http://resources.ca.gov/ocean/Final_MMAs/PDF/Final_Report.pdf (last visited Oct. 14, 2005).

68. 1999 Cal. Stat. ch. 1015 (codified at CAL. FISH

& GAME CODE §§ 2850-2863). The statutory deadline for completion of the master plan has been postponed until January 2005. See 2001 Cal. Stat. ch. 753 § 3 (codified at CAL. FISH & GAME CODE § 2859(a)); 2002 Cal. Stat. ch. 559 § 2 (codified at CAL. FISH & GAME CODE § 2859(a)). The State process currently underway is scheduled to develop a master plan for the Central California coast by late 2006. See *supra* note 118.

69. CAL. FISH & GAME CODE § 2860(a).

70. 2000 Cal. Stat. ch. 385 (codified at CAL. PUB. RES. CODE §§ 36600-36900).

71. CAL. FISH & GAME CODE §§ 1590-1591.

72. CHANNEL ISLANDS FEIS, *supra* note 7, at 1-3.

73. *Id.*

74. *Id.* Although the project was originally de-

Sport and commercial fishermen immediately filed suit in state court to halt implementation of the regulations.⁷⁵ Their lawsuit included a variety of claims, including: (1) violations of the Brown Act and other generic procedural requirements applicable to rulemaking and public meetings; (2) substantive violations of CEQA; and (3) violation of the State Constitution's Right to Fish provision.⁷⁶ The plaintiffs filed a motion for a temporary restraining order, which was denied, and the denial was upheld on appeal in an unpublished opinion.⁷⁷ The litigation has not been dismissed as of this writing, but plaintiffs have shown little appetite for prosecuting the case, having filed only one motion for summary adjudication (also denied) in the past two years.⁷⁸

As a result, California's MPAs stand at a crossroads. The existing system of MPAs (exclusive of the Channel Islands MPAs) does not work effectively, but the processes to establish new MPAs have been bogged down in political controversy. The Channel Islands MPAs have been established in state waters, but the federal component of this network has not been implemented. In addition to these political challenges is this question: Does the Constitutional Right to Fish provision prohibit establishing marine reserves?

signed as a joint state-federal process, the National Marine Sanctuary Program is still working to implement the federal component. For an overview of the federal process and its current status, *see, e.g.*, Channel Islands National Marine Sanctuary, Marine Reserves Environmental Review Process, http://www.cinms.nos.noaa.gov/marineres/enviro_review.html (last visited Oct. 19, 2005).

75. *Ventura County Commercial Fishermen's Ass'n*, 2004 Cal. App. Unpub. LEXIS 1416, at *1-*2.

76. *Id.* at *4.

77. *Id.* at *2.

III. The California Constitution's Right to Fish Provision May Restrict, but Does Not Prohibit, MPAs That Do Not Allow Fishing

A. The Constitutional Right to Fish is a Qualified One

In 1910 the voters of California adopted Article I, Section 25 of the California Constitution. This provision, entitled "Fishing rights," reads:

The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.⁷⁹

Prior to enactment of this provision, the California Supreme Court had upheld the power of the State to regulate hunting and fishing as part of its inherent police powers.⁸⁰ In 1902, the California voters explic-

78. This conclusion is based on the author's personal involvement with the administrative process and the subsequent litigation, both as a policy advocate with The Ocean Conservancy (1998-2003) and as a summer law clerk with Earthjustice Environmental Law Clinic at Stanford University (counsel for intervenors in the case, including The Ocean Conservancy).

79. CAL. CONST. art. I, § 25. The provision was adopted November 8, 1910.

80. *Ex parte Maier*, 103 Cal. 476, 483 (1894) (upholding the Constitutionality of a penal law provision under which appellant was convicted of illegally selling deer

itly granted to the State Legislature the power to create fish and game districts and “protect fish and game in districts or parts of districts.”⁸¹ Thus, the Right to Fish provision of the Constitution exists within this larger framework, and courts have interpreted it this way.⁸²

Some of the earliest cases challenging state fisheries regulation for violation of this constitutional provision arose in the context of fishing licenses.⁸³ In *Parra*, the court of appeals upheld the constitutionality of the statutory fishing license requirement, finding that then section 25 ½ of Article IV (current section 20) does not conflict with Section 25 of Article I and together they give the Legislature power to protect fisheries.⁸⁴ In discussing the purpose of the Right to Fish provision, the court wrote:

The principal object of section 25 of article I was to preserve to the people the right to fish upon the public lands of the state, and to require that grants of land by the state should not be made “without reserving to the people the absolute right to fish thereupon.”⁸⁵

The California Supreme Court reached a similar conclusion four years later, writing approvingly of the *Parra* court’s interpretation of this provision in upholding a state law fixing the wholesale and retail prices for fresh fish.⁸⁶ The court went further, however, and stated that the State’s power to protect and regulate fisheries “was in no

wise [sic] modified by the addition of section 25, article I,”⁸⁷ and that the qualifying language at the end of the constitutional provision,

was evidently intended to leave the matter exactly as it was before the adoption of this amendment in November, 1910, except as it restricted the power to alienate public land without such reservation, or to create private fisheries thereon. This section gave no right to the people which they did not already have.⁸⁸

Nearly half a century later, the California Supreme Court agreed with this interpretation, concluding that the ballot argument submitted to the voters in 1910 made it clear that the purpose of the amendment was to prevent the State from disposing of land without reserving the public’s right to fish.⁸⁹ In pertinent part, the ballot argument reads:

For many years the people of California have enjoyed the right to take fish from the waters of the state pretty generally, but since the vigorous development of California’s natural resources by individuals and large corporations, many of the streams have been closed to the public and trespass notices warning the public not to fish are displayed to an alarming extent, It is not fair that a few should enjoy the right to take the fish that all the people are paying to protect and propagate, If

meat, because the game of the state belong to the people and “they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.”); see also *In re Phoedovius*, 177 Cal. 238, 245-246 (1918).

81. CAL. CONST. art. IV, § 25 ½ ((renumbered 1966, current version at CAL. CONST. art. IV, § 20); see *In re Application of Cencinino*, 31 Cal. App. 238, 239-40 (Ct. App. 1916) (adoption of this Constitutional provision by the people preempted local government regulation of crabbing in Humboldt Bay).

82. *In re Parra*, 24 Cal. App. at 340-41.

83. *Id.*; *Paladini v. Superior Court of San Francisco*, 178 Cal. 369, 371-72 (1918).

84. *In re Parra*, 24 Cal. App. at 342.

85. *Id.* at 342.

86. *Paladini*, 178 Cal. at 371-72.

87. *Id.*

88. *Id.* at 372.

89. *California v. San Luis Obispo Sportsman’s Ass’n*, 22 Cal. 3d 440, 447 (1978).

the people of the state vote favorably upon this proposed amendment to the constitution it will give them the right to fish upon and from the public lands of the state and in the waters thereof, and will prevent the state from disposing of any of the lands it now owns or what it may hereafter acquire without reserving in the people the right to fish.⁹⁰

Because the Right to Fish provision of the State Constitution explicitly authorizes the legislature to “provide for the season when and the conditions under which the different species of fish may be taken,”⁹¹ licensing requirements, fishing gear restrictions, seasons, and bag limits have been interpreted as “conditions” the legislature is authorized to fix.⁹² However, where state or local government regulation prohibits fishing, there appears to be a closer question whether the regulation violates the first and third clauses of the constitutional Right to Fish provision.⁹³

In *Quinn*, the court upheld the convictions of several fishermen for trespassing on the banks of the California Aqueduct, holding that the term “public lands” in the Right to Fish provision excluded state lands set aside for special purposes such as prisons

or mental institutions.⁹⁴ However, the California Supreme Court subsequently broadened this interpretation to include all state-owned lands within the meaning of the provision, except for any land “used for a special purpose that is incompatible with its use by the public—for example, lands used for prisons or mental institutions.”⁹⁵ Yet both decisions also emphasized that the State, through the exercise of its police powers, may restrict or prohibit fishing on any public lands in order to protect public safety and welfare.⁹⁶

Thus, in *San Luis Obispo Sportsman’s Association*, the California Supreme Court upheld the trial court’s ruling that the State must provide fishing access to the reservoir because “a properly implemented public recreational fishing program at Whale Rock Reservoir would not interfere with its function as a domestic water supply reservoir.”⁹⁷ One can thus infer a two part test for determining whether a public right to fish exists: first, whether the lands are owned by the State,⁹⁸ and, second, whether fishing is compatible with the primary purpose of that land and need not be restricted to protect the public safety and welfare.⁹⁹

Thus, the “right to fish under article I, section 25 is not an unqualified one.”¹⁰⁰ Although there is little question that the

90. *Id.*; see *In re Quinn*, 35 Cal. App. 3d 473, 484 (1973).

91. CAL. CONST. art. I, § 25.

92. *In re Parra*, 24 Cal. App. at 341-42 (rejecting plaintiff’s argument that “conditions” was restricted to net size, size of fish, etc., and upholding a licensing law within the Legislature’s power); see *In re Marincovich*, 48 Cal. App. at 475-76 (upholding state law restricting fishing net sizes against claim the law violated the state Constitution’s right to fish provision).

93. See *In re Quinn*, 35 Cal. App. 3d at 482 (“We are concerned with the first and third clauses of article I, section 25 and must determine the interpretation to be accorded to these clauses.”).

94. *Id.* at 485 (citing *McNeil v. Kingsbury*, 190 Cal. 406, 410-11 (1923) (where lands are devoted to some special public use by legislative authority they are not included within general statutes concerning the disposal of public lands)).

95. *San Luis Obispo Sportsman’s Ass’n*, 22 Cal. 3d at 447.

96. *In re Quinn*, 35 Cal. App. 3d at 486; *San Luis Obispo Sportsman’s Ass’n*, 22 Cal. 3d at 448.

97. *San Luis Obispo Sportsman’s Ass’n*, 22 Cal. 3d at 448.

98. *In re Quinn*, 35 Cal. App. 3d at 481 (holding that the “constitutional right to fish does not protect those fishing from county owned property.”).

99. *San Luis Obispo Sportsman’s Ass’n*, 22 Cal. 3d at 448.

100. *Id.*

provision does not restrict the State's reasonable use of bag or size limits, fishing seasons, fishing gear restrictions, or other "conditions" to protect fish, the provision requires opening public lands to fishing unless the primary purpose of the area is incompatible with fishing.

B. The Channel Islands MPAs Are Compatible with the Right to Fish Provision

One of the central claims in the fishermen's lawsuit challenging the MPA regulations in the Channel Islands was that these regulations violated the constitutional Right to Fish. In an unpublished opinion, the court of appeals affirmed the denial of a temporary restraining order to enjoin the regulations.¹⁰¹ The court found that the right to fish was a qualified one, the State had the power to create marine reserves, the Legislature had delegated to the Fish and Game Commission the power to regulate fishing in MPAs, and the fishermen "have no constitutional right to deplete or destroy a fish preserve, in this instance, a marine sanctuary."¹⁰² It must be emphasized that this decision is not published and was made on plaintiff's motion for a temporary restraining order, thus it is not binding precedent.

Yet it also appears to be the right decision. There is little doubt that the waters of the state that were protected by the Commission's regulations were included within the meaning of "public lands" in article I, section 25 of the Constitution. There

is also little doubt, however, that marine reserves are incompatible with fishing. California has created ecological reserves and other protected areas on land and in the ocean for more than a century, and the California Supreme Court has cited the establishment of such reserves as one of the most important uses of public trust lands.¹⁰³ The State's long history of creating MPAs that restrict or prohibit fishing also supports the argument that such MPAs do not violate the Right to Fish provision.

More specifically, the Channel Islands MPAs were adopted to meet several goals, including the preservation of marine biodiversity and habitats, sustaining fish populations and fisheries, and providing reference areas for scientific research.¹⁰⁴ There can be no question that fishing inside of a marine reserve is incompatible with providing a reference area for scientific research, since fishing disturbs the diversity and abundance of marine life.¹⁰⁵ For the same reason, fishing is incompatible with preservation of the area in its natural state. In the abstract, fishing is not incompatible with sustaining fisheries and conserving fish populations—indeed, this is the central purpose of the federal Magnuson Act and California's sustainable fisheries law, the Marine Life Management Act.¹⁰⁶ But, fishing within a marine reserve is incompatible with that marine reserve because it prevents the marine reserve from serving as a source of replenishment for surrounding waters. A

101. *Ventura County Commercial Fishermen's Ass'n*, 2004 Cal. App. Unpub. LEXIS 1416, at *2.

102. *Id.* at *18-*19.

103. *Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971). The court wrote,

There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecologi-

cal units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

Id.

104. CHANNEL ISLANDS FEIS, *supra* note 7, at 1-4.

105. *See* CAL. FISH & GAME CODE § 2851(e)-(f) (West 2005).

106. 1998 Cal. Stat. ch. 1052 (codified at CAL. FISH & GAME CODE §§ 7050-7090 (West 2005)).

marine reserve is like a natural fish hatchery, which the Constitution specifically exempts from the right to fish; both a hatchery and a marine reserve are designated to help restore and sustain fish populations, and fishing in the reserve would dramatically undercut its effectiveness and undermine its purpose.

It should also be noted that in *San Luis Obispo Sportsman's Association*, the State was under both a statutory and a constitutional duty to provide fishing opportunities.¹⁰⁷ In the context of MPAs, however, the Legislature has come to the opposite conclusion: fishing should be prohibited within the boundaries of a marine reserve.¹⁰⁸ Moreover, the purpose of a marine reserve is not to establish a private fishery, which the legislative history suggests was what the constitutional amendment was intended to prevent,¹⁰⁹ but rather is intended to sustain public fisheries.

One of the stronger arguments favoring a more expansive interpretation of the constitutional Right to Fish provision comes from the U.S. Supreme Court, in a line of cases interpreting the State of Washington's power to restrict fishing vis-à-vis certain Native American treaty rights.¹¹⁰ Dicta in *Puyallup* suggested that, because the treaty with the tribe preserved the "right of taking fish, at all usual and accustomed grounds

and stations," the State could not prohibit the tribe from fishing at the mouth of the river.¹¹¹ The court stated "[t]he right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State."¹¹²

This argument has several flaws that undermine its application to the present question. First, the Supreme Court's interpretation of the meaning of state law is not binding on the state supreme court, as the State has exclusive and sovereign power to interpret its own laws, and thus the language above is merely persuasive, not precedent.¹¹³ Second, this interpretation of the statute is contrary to the state courts' interpretation of the California Constitution's provision since its adoption: the state courts have consistently held the provision creates only a qualified right, one that may be restricted by the State.¹¹⁴ Third, *Puyallup I* also upheld the power of the State to regulate treaty fishermen in a nondiscriminatory way in the interests of conservation.¹¹⁵ Indeed, in later litigation over the Puyallup Tribe's fishing rights, the Court wrote,

Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police

107. *San Luis Obispo Sportsman's Ass'n*, 22 Cal. 3d at 448-49.

108. CAL. FISH & GAME CODE §§ 2852(d), 2860(b).

109. See *supra* text accompanying note 90.

110. *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392 (1968) ("*Puyallup I*").

111. *Id.* at 398.

112. *Id.*

113. *Watson v. Buck*, 313 U.S. 387, 401 (1941) (state supreme court "has the last word on the construction and meaning of statutes of that state"); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 208 (1929) (proper interpretation of state statutes is "a matter primarily

for determination by the local courts.").

114. *San Luis Obispo Sportsman's Ass'n*, 22 Cal. 3d at 448 (holding the right to fish is not an unqualified right).

115. *Id.*; see also *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979) ("In *Puyallup I*, the Court sustained the State's power to impose nondiscriminatory regulations on treaty fishermen so long as they were 'necessary' for the conservation of the various species. In so holding, the Court again explicitly rejected the equal-opportunity theory. Although nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation.").

power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.¹¹⁶

Thus, it appears unlikely that this language provides much ammunition for opponents of MPAs.

Marine reserves in the Channel Islands were established for specific purposes that are incompatible with fishing. Therefore, the regulations creating the reserves do not *per se* violate article I, section 25 of the California Constitution. Although the provision has never been understood to encompass the idea that designating too large an area would impermissibly impinge on this constitutional right, even if the provision were so interpreted such an argument is unlikely to succeed. The vast majority of the waters (more than 80 percent of state waters) surrounding the Channel Islands do not prohibit fishing.¹¹⁷ The designation of marine reserves is designed to help improve fishing in the surrounding waters, thus meaningfully preserving the public's right to fish in the waters offshore of the Channel Islands. The legislative history of the consti-

tutional Right to Fish provision, the judicial precedents interpreting it, and the statutory provisions authorizing the creation of marine reserves all support the conclusion that the Channel Islands MPAs are consistent with the constitutional Right to Fish.

C. The State's Future MPAs Are Likely to be Consistent with the Right to Fish

Pursuant to the MLPA, the California Fish and Game Commission currently has a statutory mandate to develop a master plan for a statewide system of marine protected areas, including marine reserves, by January 1, 2005.¹¹⁸ The legislature has thereby made a determination that fishing is incompatible with marine reserves,¹¹⁹ and it has also determined that marine reserves are an important tool for conserving fish populations and sustainably managing fishing.¹²⁰ While a legislative act cannot trump a constitutional provision, the Legislature and the Fish and Game Commission have broad discretion in how to manage and conserve fisheries.

If a single marine reserve does not violate the constitutional Right to Fish, then the system of MPAs under the MLPA will not violate this provision, for, as noted above, the provision has never been interpreted to encompass a minimum area of the state that is required to support fishing.

116. *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973).

117. CHANNEL ISLANDS FEIS, *supra* note 7, at 2-1; *Ventura County Commercial Fishermen's Ass'n*, 2004 Cal. App. Unpub. LEXIS 1416, at *3.

118. CAL. FISH & GAME CODE §§ 2853(b), 2856(a)(2), 2859(a). As of this writing, the Fish and Game Commission still has not completed the master plan required under this section. Instead, the Commission has adopted a plan to develop and adopt a master

plan for the Central California Coast by late 2006. See Department of Fish and Game, Marine Life Protection Initiative, A Conceptual Overview, <http://www.dfg.ca.gov/mrd/mlpa/overview.html> (last visited Nov. 21, 2005).

119. *Id.* §§ 2852(d), 2860(b).

120. *Id.* § 2851(d) ("MPAs and sound fishery management are complementary components of a comprehensive effort to sustain marine habitats and fisheries.").

IV. Passage of the Freedom to Fish Act Could Greatly Restrict the Ability of Governments to Use MPAs

A. The State Freedom to Fish Act Would Greatly Restrict California's Ability to Create MPAs, Particularly Marine Reserves Where All Fishing Is Prohibited

The Channel Islands MPAs were very controversial, and elicited broad outrage, particularly in the sport fishing community. In response to these regulations, in 2003 Senator Oller introduced the "Freedom to Fish Act" in the California Senate.¹²¹ Although the bill failed to get out of committee,¹²² it would have drastically restricted, if not entirely eliminated, California's ability to create permanent marine reserves.¹²³ The bill provided that closures to rod and reel fishing could only be made when there is "a clear indication" that rod and reel fishing caused a specific conservation problem, other fishery management techniques could

not adequately solve the problem, and the closed area is reopened as soon as the conservation problem is addressed. As such, it would have prohibited the State from creating a marine reserve that prohibited all fishing in order to protect biodiversity or provide a reference area for scientific study, since neither of them is a "specific conservation problem" caused by rod and reel fishing. The bill would have prohibited any precautionary marine reserves and effectively gut the MLPA.

Although no similar legislation has been introduced this term,¹²⁴ some fishing proponents have suggested that the State Legislature last year adopted a Freedom to Fish bill.¹²⁵ This legislation added the following language to the Public Resources Code, as an objective for ocean management:

Provide for public access to the ocean and ocean resources, including to marine protected areas,

121. S.B. 281, 2003 Leg., 2003-2004 Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0251-0300/sb_281_bill_20030218_introduced.html (last visited Oct. 21, 2005).

122. Bill history for S.B. 281 of 2003, available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0251-0300/sb_281_cfa_20030421_144555_sen_comm.html (last visited Oct. 21, 2005). The bill failed to pass out of the California Senate Natural Resources and Wildlife Committee after getting 3 "yes" votes and 6 "no" votes. *Id.*

123. The bill would have added a new section 1702 to the Fish and Game Code, to read:

Notwithstanding any other provision of the law, the marine waters of the state may only be closed to rod and reel fishing if the department makes all of the following determinations:

(a) A clear indication exists that rod and reel fishing is the cause of a specific conservation problem and that less severe conservation measures, including, but not limited to, minimum size requirements, bag limits, and seasonal closures will not adequately provide for conservation of the affected stocks of fish.

(b) The closed area regulation, rule, or order includes specific measurable criteria to determine the conservation benefit of the closed area on the affected stocks of fish and provides a timetable for review of the continued need for the closed area at least once every three years.

(c) The closed area is no larger than necessary, and is supported by the best available scientific information.

(d) Adequate procedures exist to reopen the closed area to rod and reel fishing whenever the basis for the closure no longer exists.

Id.

124. On March 15, 2005, the author conducted a subject search on <http://leginfo.ca.gov> for all bills, using keywords "recreational fishing," and found no similar legislation.

125. See Press Release, United Anglers of Southern California, Governor Schwarzenegger Signs SB1319, at 2, available at http://www.unitedanglers.com/press_releases/2004/sb1319_release_5.pdf (last visited Oct. 21, 2005) ("But in instances where we were not

for recreational use, and aesthetic, educational and scientific purposes, consistent with the sustainable long-term conservation of those resources.¹²⁶

Some proponents argue that this language enshrines a recreational fishing preference into the law and requires recreational fishing access to MPAs.¹²⁷

Several problems arise with the argument that this statutory language restricts the Commission's authority to create marine reserves. First and foremost, the language ("provide public access . . . for recreational use") is general. Under the traditional canons of statutory construction, this general objective cannot trump specific mandates in the Fish and Game Code that explicitly prohibit fishing in a marine reserve.¹²⁸ Secondly, it does not explicitly mention "fishing," and therefore it may only refer to non-extractive recreational uses, such as scuba diving or surfing. If this language accomplishes anything with respect to the Fish and Game Code, it likely enhances the existing law on recreational access to marine reserves, which states, "[w]hile, to the extent feasible, the area shall be open to the public for managed enjoyment and study, the area shall be maintained

to the extent practicable in an undisturbed and unpolluted state."¹²⁹ Since the word "sustainably" is defined in this legislation very broadly, it is likely that this language does not meaningfully affect the Commission's authority to create marine reserves, and only slightly reduces the Commission's ability to restrict (non-extractive) public access to them.

B. The Federal Freedom to Fish Acts Could Restrict State Authority to Create MPAs in State Waters

The Channel Islands MPA process, as well as the MPA process in the northwestern Hawaiian Islands¹³⁰ and in the Dry Tortugas of Florida,¹³¹ led to Congressional opposition to the use of MPAs that restrict recreational fishing. In both California and Florida, the effort to create areas that prohibited fishing occurred within a National Marine Sanctuary, as a joint state and federal process. As a result, federal Freedom to Fish legislation was introduced in 2003¹³² and in 2004.¹³³ Although Congress did not enact either bill, similar legislation could be reintroduced in the future and could dramatically affect the ability of the federal and state governments to create MPAs that restrict or prohibit fishing. There are substan-

the cause of fishery declines, recreational anglers should be allowed to fish as long as we could do so in a non-destructive manner. The COPA language sets a clear recreational priority for access and use of California's marine resources"; see also Florida Sportsman, Flash: Freedom Act Adopted, http://www.floridasportsman.com/confron/openers/openers_0502/ (last visited Oct. 21, 2005).

126. 2004 Cal. Legis. Serv. Ch. 719 (West), codified at CAL. PUBLIC RES. CODE § 35515(e) (West 2005).

127. See *supra* note 125.

128. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("It is familiar law that a specific statute controls over a general one without regard to priority

of enactment.").

129. CAL. FISH & GAME CODE § 2852(d) (West 2005).

130. Exec. Order No. 13,196, 65 Fed. Reg. 76,903 (Dec. 4, 2000); Exec. Order No. 13,196, 66 Fed. Reg. 7395 (Jan. 23, 2001) (finalizing management of and creating the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve).

131. Florida Keys National Marine Sanctuary Regulations, 66 Fed. Reg. 4267 (Jan. 17, 2001).

132. H.R. 2890, 108th Cong. (2003).

133. S. 2244, 108th Cong. (2004); Jerald Horst, *Breaux Reintroduces Bill for Freedom to Fish Act*, NEW ORLEANS TIMES-PICAYUNE, Apr. 22, 2004, available at 2004 WLNR 1511493.

tial differences between the bills that demonstrate the potential reach of Congressional legislation.

The House bill mirrored the language of the California legislation; it prohibited closing areas to recreational fishing unless recreational fishing caused a specific problem that other fishery management techniques could not solve, and it required reopening the area to recreational fishing whenever the problem is solved.¹³⁴ However, this legislation only affected the federal government's ability to create MPAs that restrict fishing under the Magnuson Act. Although this might have persuasive effects on the states, and might restrict opportunities for joint state-federal MPA planning, this bill would not have affected state authority to create MPAs.

On the other hand, the Senate bill explicitly affected state authority to create MPAs in state waters that affected recreational fishing. Although this bill contained similar language to the House bill, it went much further. It would have amended Section 304(a)(5) of the National Marine Sanctuaries Act to read, in pertinent part:

(C) REGULATION WITHIN A STATE- Such regulations may regulate a fishery within the boundaries of a State (other than the State's internal waters) if –

(i) the Governor of the State approves such regulation; or

(ii) the Secretary determines, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that the State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the fulfillment of the purposes and policies of this Act and the goals and objectives of the proposed designation.¹³⁵

As such, this legislation would have restricted states' rights and expanded federal authority under the Congressional authority recognized in *California I*. Although the bill would nominally require acquiescence of the state's governor to the federal regulations, in California, this would vest the Governor with power currently held by the Legislature and the Fish and Game Commission. In addition, like the language in the Magnuson Act,¹³⁶ the bill would allow for federal preemption of state fisheries management in state waters without state acquiescence.

Because the states' power to regulate fisheries exists at the pleasure of Congress, Congress can always take this power away or restrict its use. Even though the states have a long history and tradition of managing offshore fisheries that long predates most federal efforts, the states must therefore be wary of attempts to limit their authority through similar legislation. As of this writing, no Freedom to Fish bill has been introduced in the 109th Congress.¹³⁷

134. H.R. 2890, *supra* note 132.

135. 16 U.S.C. § 1434(a)(5) (2005).

136. *See supra* notes 59-60.

137. Author's search on <http://thomas.loc.gov>, performed on March 16, 2005.

V. Conclusion: MPAs in State Waters Will Continue to Be Politically, If Not Legally, Controversial

It appears, therefore, that the challenges relating to creating MPAs, and in particular marine reserves, will primarily be political rather than legal, ones. However, those political challenges to creating MPAs and marine reserves will continue to pose a substantial impediment to implementing the MLPA's mandate. Although the constitutional Right to Fish does not appear to be a significant legal impediment to the creation of MPAs, it is interesting that the California Constitution has no comparable provision authorizing the protection of wild areas in their natural state, free from consumptive use. For a state that has led the way in protecting the environment, the lack of such a provision is surprising. Even if it had little practical effect, such a provision would likely be popular,¹³⁸ would eliminate any legal questions about the implication of the constitutional Right to Fish provision with regard to the MLPA and other regulations, and could be a vehicle for galvanizing public support, and generating general fund monies, for the MLPA.

The Channel Islands MPAs are a groundbreaking, landmark effort to transform the way that our oceans are managed. The magnitude of the change cannot be understated. In California, terrestrial protected areas have existed for more than a

century, starting with the protection of the Yosemite Valley. In the waters offshore of California, the Channel Islands MPAs represent the first large scale, scientifically designed network of protected areas in the United States that provides complete protection from all extractive uses.

In addition to their conservation benefits, marine reserves are philosophically important for two distinct reasons. First, they represent and help further a public awareness that place matters in the ocean. From the shore, the ocean's surface often does not hint at the complex diversity that exists below. Fishermen have long known that fish are not evenly distributed throughout the ocean, and MPAs are an acknowledgement that not all places are created equal. Second, MPAs may represent a growing attempt at preservation, not merely sustainable use and conservation, of marine biodiversity and habitats. This instinct to preserve parts of our shared ecological heritage has existed on land for more than a century; its extension to the ocean has been long overdue.

The Channel Islands MPAs have led to fights in other states over the power to create MPAs and to restrict fishing (especially recreational fishing), a fight that fishing proponents have dubbed the "Freedom to Fish Campaign."¹³⁹ Yet it has also galvanized legislative and administrative efforts to create

138. Polling data for California and national attitudes towards MPAs and marine reserves show strong public support for the creation of such areas, even when told that recreational fishing and other recreational activities would be prohibited. See Seaweb, American Attitudes Toward Marine Protected Areas and Fully Protected Marine Reserves, 2001, available at http://mpa.gov/information_tools/education/pdfs/wye_seaweb.pdf (last visited Oct. 24, 2005).

139. See, e.g., Coastal Conservation Association Florida, California Bans Recreational Fishing in Channel Islands, December 2002, available at <http://www.ccaflorida.org/seawatch/december02.html> (last visited Oct. 24, 2005) ("The closing of large areas of California's coastal waters to recreational fishing could lead to bans in other states—especially Florida.").

MPAs in other states.¹⁴⁰ In my experience, there are two primary reasons why MPAs, particularly marine reserves, are controversial. First, opponents argue that the science behind MPAs and marine reserves has not been extensively proven on the West Coast. Second, by prohibiting both recreational and commercial fishing, marine reserves antagonize recreational fishermen who believe that their impact on the resource is minimal and that commercial fishing is to blame for the decline of fish populations. There is some truth to these arguments, but they miss the mark.

The first criticism is a Catch-22: marine reserves have not been proven to work on the West Coast because there have not been large, scientifically designed marine reserves to study. The available evidence suggests that marine reserves will work, but ultimately, success will be measured on the water. It may take decades for marine reserves to make substantial contributions to fish populations, and it is important that the State monitor the Channel Islands MPAs to determine how effective they are, and how they might be more effective. It is also important that the State enforce the MPA regulations, primarily through education of fishermen but also using coercive remedies when necessary. Although enforcement of fishery laws in general is problematic, it was discouraging that the first criminal case arising from violations of the Channel Islands

MPA regulations resulted in an acquittal.¹⁴¹ Yet by and large, and unsurprisingly, fishermen seem to be abiding by the regulations; the conservation efforts of sport and commercial fishermen are critical to the success of MPAs and of sustainable fishery management in general.

With respect to the second criticism, it is true that commercial fishing catches a far larger percentage of the total catch of most species. Yet commercial fishermen supply fish from California to the vast majority of Californians who never go fishing,¹⁴² allowing them to enjoy the state's native bounty. Moreover, when fish populations reach extremely low levels, as with many Pacific rockfish species, both sport and commercial fishing must be restricted to rebuild these populations to levels that can sustain a fishery. This criticism also does not rebut the argument that some areas should be set aside as reference and study areas, or for their intrinsic worth.

Underlying this statistical argument over who catches more fish, however, is a political dispute: whether sport or commercial fishermen should have priority over the other in the race to catch fish, and indeed, whether commercial fishing should even exist. Market hunting for game has been eliminated on land, and at least some fishing proponents would like to eliminate most commercial fisheries and turn to a system of aquaculture to supply fish to markets.

140. See, e.g., Joel Gallob, *Bill Would Create Marine Reserves in Oregon Waters*, NEWPORT NEWS TIMES, Mar. 30, 2005 (discussing Senate Bill 734 in the Oregon State Legislature). The text of the bill is available from the Oregon Legislature's webpage, <http://www.leg.state.or.us/05reg/measpdf/sb0700.dir/sb0734.intro.pdf> (last visited Nov. 29, 2005).

141. *Crab Fisherman Acquitted in No-Fishing Case*, SANTA BARBARA NEWS-PRESS, Sept. 30, 2004.

142. In 2001, the U.S. Fish and Wildlife Service

estimated that 875,000 state residents sixteen years of age or older went fishing in the ocean at least one time. See U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE AND U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, 2001 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION: CALIFORNIA 22, available at <http://www.census.gov/prod/2002pubs/fhw01-ca.pdf>. The Census Bureau estimates that more than 33.8 million people resided in California in 2001. See U.S. Census Bureau, California Quickfacts, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Nov. 29, 2005).

The waters of the State of California should be managed for the interests of all Californians, for both present and future generations.¹⁴³ We owe a duty to future generations, as a matter of intergenerational equality, to conserve, preserve, and sustainably manage the State's magnificent diversity and abundance of marine life.¹⁴⁴ A system of MPAs and marine reserves is a necessary component of a fisheries management system that sustains recreational and commercial fishing opportunities so that everyone—recreational fishermen, commercial fishermen, and the non-fishing public—can enjoy the State's magnificent ocean life and conserve it for future generations.

143. See *In re Parra*, 24 Cal. App. at 343 ("It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state." (quoting *Geer v. Connecticut*, 161 U.S. at 532));

144. Ecological and economic sustainability are dependent on each other, and a recognition of place in the ocean is critical to achieving sustainability. Marketing fish by their real names and by the location where they are caught, as is done with salmon today, would be another important step towards achieving both aims. See Alaska Dep't. of Commerce, Seafood Marketing, <http://www.dced.state.ak.us/oed/seafood/seafoodmarketing/regionalmarketing.htm> (last visited Nov. 22, 2005).

