

## HAWAIIAN ISLANDS NATIONAL WILDLIFE REFUGE

This report summarizes available information for the purpose of reviewing and resolving the extent of the area of the several islands, reefs and shoals of the Hawaiian Islands National Wildlife Refuge that are subject to the administrative authority of the United States. The review has been necessarily limited to the information available from records at Portland, Oregon, and such other records as could be obtained from the Washington office of the Bureau of Sport Fisheries and Wildlife. No effort has been made to inquire into State and Territory of Hawaii files pending an initial determination of the extent of federal authority over the Refuge.

The Hawaiian Islands Reservation was created in 1909 because of massive slaughters of birds upon many of the Pacific Islands, principally by Japanese Nationals. A letter from the Secretary of the Interior to the President, dated February 3, 1909, transmitted a proposed order for establishment of a bird refuge. This letter states that in 1903 the State Department had:

"made representations to the Japanese Government that resulted in an order from the Japanese Foreign Office prohibiting the subjects of Japan from poaching upon these islets and slaughtering the valuable sea birds . . . . It was believed that this nefarious traffic had ceased but it now appears that there is grave danger that the slaughter of these valuable sea scavengers is continuing or is soon to be resumed with the assistance of citizens of the United States and of the Territory of Hawaii who will deliver the bird carcasses to the former Japanese poachers, thus relieving the latter from the danger of prosecution by their own government."

The letter dated January 28, 1909, transmitting the proposed executive order from the General Land Office to the Secretary of the Interior, stated:

" . . . The islets and reefs referred to are well known and are shown upon maps under the following names: Curc Island, Pearl and Hermes Reef, Lysianski or Bell Island, Laysan Island, Mary Reef, Dowsetts Reef, Gardiner Island, Two Brothers Reef, French Frigate Shoal, Necker Island, Frost Shoal and Bird Island."

The submitted Executive Order was issued as No. 1019, dated February 3, 1909:

"It is hereby ordered that the following islets and reefs, namely: Cure Island, Pearl and Hermes Reef, Laysan Island, Laysan Island, Mary Reef, Dowsetts Reef, Gardiner Island, Two Brothers Reef, French Frigate Shoal, Necker Island, Frost Shoal and Bird Island, situated in the Pacific Ocean at and near the extreme western extension of the Hawaiian archipelago, . . . and located within the area segregated by the broken lines shown upon the diagram hereto attached and made a part of this order, are hereby reserved and set apart, subject to valid existing rights, for the use of the Department of Agriculture as a preserve and breeding ground for native birds. . . ."

The map from the General Land Office attached to the printed copy of the Executive Order has found in the published volumes has some circles superimposed around the named islets and reefs which obscured the details of the designation as shown on other maps believed to have been submitted for the purposes of establishing the Reservation. A 1909 map of the Territory of Hawaii, obtained from the Archives, shows the "Hawaiian Island Bird Reservation" within two dashed line enclosures, and also has fine dotted lines around the islets and reefs indicating the area of reefs to be included. These roughly correspond with the more detailed present day Coast and Geodetic charts of the reefs. Only Bird Island and Gardiner Island are not shown with a surrounding reef area on this 1909 map. The map was prepared by the Commissioner of the General Land Office in 1909 "from data on file in the U. S. Coast and Geodetic Survey; Hydrographic Office; Hawaiian Government Surveys; and other authentic sources. . . ."

Close examination of the very small scale map attached to the printed copies of the Executive Order discloses the same dotted outlines of reef areas are under the heavier circles. The heavier circles apparently were used to identify the islands and reefs since about 1300 miles of ocean territory were shown on the 3½-inch wide map.

Executive Order No. 1019 refers to the "islets and reefs" by name as well as by the reference to the attached map. A "reef" is:

"A chain or range of rocks or ridge of sand lying at or near the surface of the water, esp. one where there is not more than six fathoms at low water."

A "shoal" is defined similarly but as applicable only to non-rocky areas.

The Forward Islands include 26 islets, reefs and shoals. (Bulletin 8, Geology of the Hawaiian Islands, p. 93) Kaula is omitted from Executive Order No. 1019 and shown on the 1909 General Land Office map outside of the broken line enclosure. Midway Island similarly was omitted from the Order and Kure or Ocean Island later was erroneously released to the Territory.

The following descriptions and histories of the islets and reefs of the Hawaiian archipelago are here related for further reference.

Kure (Kure) or Ocean Island is the easternmost atoll. It is approximately 6 miles across and has two or three small sand islands within the lagoon near the south side. It is named for Captain Kure, a Russian explorer, who is supposed to have discovered it in the early 1800's. Shipwrecks are reported in 1837, 1842, 1870 and 1886 with temporary occupancies of the sand islands by the seamen. The Hawaiian King Kalakaua is reported to have dispatched a Special Commissioner to Kure where, on September 20, 1886, the Commissioner took possession of the island for the Hawaiian monarchy. No occupancy was established but a rude shelter was constructed and stores left for future victims of shipwrecks. The stores were taken by intruders and the shelter soon disintegrated.

On February 15, 1894, the Provisional Government of Hawaii leased Kure Island, along with Morrell Island, Pearl and Hermes Reef, Midway Island and French Frigate Shoals for a term of 25 years at an annual rental of \$1.00, and 50¢ per ton royalty, to North Pacific Phosphate and Fertilizer Company. This lease was made only "so far as the Hawaiian Government held the right of possession." No substantial production of guano was made at any of the leased sites and it is presumed that the lease terminated at the end of 5 years for lack of production.

Kure Island was included in the 1909 Executive Order for the Hawaiian Islands Reservation. Without reference to that prior Order, a later Order, No. 7299, dated February 20, 1936, placed Kure (Ocean) Island under Navy jurisdiction. This designation was of:

" . . . Kure (Ocean) Island . . . together with the surrounding reef as indicated upon the diagram attached and made a part hereof, be, and it is hereby reserved, set aside, and placed under the control and jurisdiction of the Secretary of the Navy for naval purposes."

A subsequent Order No. 10413, dated November 17, 1952, restored " . . . Kure (Ocean) Island, together with the surrounding reef . . ." to the Territory of Hawaii. The 1909 Order relating to "Kure Island" has not been rescinded except by implication.

Midway Islands -- This is a circular atoll approximately 5 miles in diameter with two small sand islands in the lagoon near the south side.

The Midway atoll is reported to have been discovered on July 8, 1859, by a Captain H. C. Brooks of the Hawaiian bark, *Gambia*, owned by a Honolulu resident. Captain Brooks took possession of the islands--one report states in the name of the United States and another that it is not known whether for the United States or Hawaii. Subsequently, on August 28, 1867, pursuant to orders of the Secretary of the Navy, formal possession again was taken by the Captain of the U.S.S. *Lackawanna* for the United States. Congress appropriated \$50,000 in 1870 to blast a channel into the lagoon but this money was expended without material accomplishment. In 1903 Midway became a station for the new trans-Pacific cable and since has been used for that purpose, for air landing and refueling and finally for a naval station.

Midway Island was not included in the Hawaiian Islands Reservation of 1909, but was shown on the map as two islets and a reef. Exclusion of Midway was necessary because of the prior Executive Order No. 199A, dated January 20, 1903:

"Such public lands as may exist on the Midway Islands, Hawaiian Group, between the parallels of 28°5' and 28°25' North latitude, and between the meridians of 177°10' and 177°30' West longitude, are hereby placed under the jurisdiction and control of the Navy Department."

The Navy administration has continued to the present time through Section 203 of Executive Order No. 11048, dated September 4, 1962:

"Such public lands on the Midway Islands, Hawaiian Group, between the parallels of 28°5' and 28°25' north latitude, and between the meridians of 177°10' and 177°30' west longitude, as were placed under the jurisdiction and control of the Navy Department by the provisions of Executive Order No. 199A of January 20, 1903, are hereby continued under the jurisdiction and control of that Department. Executive Order No. 199A is hereby superseded."

Section 302 of Order No. 11048 also provided:

"As used herein, the terms 'Wake Island' and 'Midway Island' include the reefs appurtenant to, and the territorial waters of, Wake Island and Midway Island, respectively."

An area around Midway Island also was reserved as a Naval Defense Sea Area and Naval Airspace Reservation by Executive Order No. 8682, dated February 14, 1941, and amended by Executive Order No. 8729, dated April 2, 1941, and by Executive Order No. 9881, dated August 4, 1947.

Navy Administrative Regulations O.P. Nav. 5500.11C provide for a three-mile territorial sea around Midway Island outward from the outer barrier reef, leaving the reef, lagoon, channels and islets subject to the administrative control of the Secretary of the Navy as land and inland water areas.

Midway Islands were expressly excluded from the new State of Hawaii.

Pearl and Hermes Reef -- Pearl and Hermes Reef was shown on the 1909 map as consisting of small islets and a surrounding reef. The scale indicated the widest distance across was about 25 miles, in a northeast by southwest direction.

This reef was discovered in 1822 by two English whaling ships, the "Pearl" and the "Hermes", that ran aground the same night. It is named for the two vessels.

The reports available state that Captain John Ruty (probably on the schooner Manuokawai of Honolulu) visited this atoll on May 19-20, 1857, mapping it and locating it. This is but three weeks after the

the same Captain had landed King Kamehameha IV and Governor Kekuanāoa on Nihoa to take formal possession of that island for the Kingdom, and shortly after the May 1 and May 11 landings on Laysan and Lisianski Islands. Possibly such a claim also was made on Pearl and Hermes. Captain N. C. Brooks, in the Gambia, stopped in 1858. This is the same Brooks who took possession of Midway in 1859.

In 1894 it was leased for guano production with Cure and other islands by the Provisional Government of Hawaii, and in 1909 named in the Hawaiian Islands Reservation Order.

Pearl and Hermes Reef is reported to have been first located and shown on maps in 1857. The next year there were 12 small islands reported on the reef, yet another survey in 1867 showed only two islands. In 1923 the Tanager expedition reported 4 islands with vegetation and several sand spits. The present Coast and Geodetic Survey chart shows North Island, Southeast Island, Grass Island and Seal Island as having vegetation on them, 4 other sand islets and 2 areas of sand bars awash at high water.

The United States Coast Pilot (June 15, 1963) of the Coast and Geodetic Survey describes the reef: . .

"Pearl and Hermes Reef . . . is an extensive oval-shaped atoll about 40 miles in circumference, 17 miles long in a northeasterly direction, and 9 miles wide. . . . Within the outer reef is a lagoon in which are numerous coral reefs with deep water between. Two wrecks lie stranded on the eastern side of the reef. There are no known dangers outside the heavy breakers on the outer reef.

"On the outer reef are several small islets, most of which are on the south side; the exception is North Island. There also are several sand banks that are awash at high water. Southeast Island . . . is the largest of the group; five other named islands are scattered along a 7-mile stretch to westward. The islands are bare of shrubbery except for a few ironwood trees.

"The 6-mile opening on the northwest side of the outer reef has depths of 1 to 6 feet between the numerous coral heads. The small-boat channel between Southeast Island and Bird Island, next islet to the westward, has

a depth of 7 feet; the channel between Bird Island and Sand Island, has 19 feet. Lagoon entrance or navigation are definitely not for the amateur."

Lisianski or Bell Island is shown on the 1909 map as a large dot indicating an island and a large reef area extending to the southeast indicated by a dotted line. The sand island is about 1.2 miles long in a north-south direction and about 1/2 mile wide.

Discovery of this island as well as its name and the adjacent Neva Reef are attributed to a grounding on October 15, 1805 of the Russian exploring ship Neva commanded by Captain Lisianski. Captain Paty in the Hawaiian Manuokawui was at the island on May 11, 1857, presumably with the King of Hawaii on board.

In 1859 Captain Brooks in the Gambia visited this island and reported finding a notice of claim dated April 27, 1859, left by the ship San Diego from San Francisco. It is presumed this was a guano claim but was never perfected by bonding. In 1891 a Captain Walker estimated some 1,000 tons of good guano remained, which implies there had been some removal.

This island was leased by the Hawaiian Kingdom for 20 years from March 29, 1890. This activity had ended by 1915 when Carl Elschner reported the island had been almost totally stripped of vegetation by rabbits brought in by the guano operators. The rabbits had been starved into extinction by 1923 when the Tanager expedition reached this island.

And in 1904 some 75 Japanese either landed or were shipwrecked on Lisianski Island where they constructed four thatched roof shacks and collected about \$20,000 worth of bird wings. This group was removed by the U. S. cutter, Thetis, on June 16 of that year, by their consent, as their food was exhausted. Another Japanese boat apparently removed the bird wings before they could be removed by another American boat. This occurred after the 1903 representations of the State Department to Japan.

And in 1910 after the reservation was established 8 Japanese were arrested on Lisianski for poaching birds. At present Lisianski has been fairly well restored with vegetation.

The Coast Pilot states:

"A reef circles around to the southwestward from off the north side of the island. It is reached near its off-shore end by a coral ledge which bares at times and over which the seas break. The southern end of this ledge is 1.7 miles 260° from the northern end of the island. About 0.5 mile southwestward of this point is another ledge which is marked by a breaker in most weather. Midway between these ledges or breakers is a passage leading to the island and the reef. The passage has an uneven bottom with depths of 11 to 22 feet. About 350 yards southwestward of the northern ledge is a small shoal with a depth of 3 feet over it. . . .

"Neva Shoal, with innumerable coral ledges, extends about 8 miles southeastward from Lisianski Island. This reef, which is about 4 miles wide, has its western extremity about 4 miles south-southwestward of the island. The southerly end of the reef is usually marked by breakers, and many of the ledges break in almost all weather. The shoal has areas of deeper water between the ledges, and small boats can maneuver over many parts of the reef, but it must be avoided by larger vessels.

"In addition to Neva Shoal, there are many coral heads with depths of 3 to 6 fathoms over them within 3 miles of all sides of the island. A small coral ledge, with an islet on it and nearly always marked by breakers, lies 2.7 miles 254° from the south end of the island. Between this ledge and the island are depths as great as 8 fathoms and a scattering of coral heads, some of which are nearly awash. The lagoon could be entered between this ledge and the ledge marking the south side of the previously described opening 1 mile northward. A 14-foot rock, about 1.5 miles north-northeastward of the island, is marked by breakers only during heavy weather. Under favorable conditions dangerous coral heads can be seen for several hundred yards."

Laysan Island is shown on the 1909 map as a large dot inside of a dotted line indicating a reef. The sand island is about 1.6 miles long in a north-south direction and about 1 mile wide.

The Coast Pilot states:

"A coral reef, a few hundred yards wide, fringes the island. About 0.3 mile off the western shore is a small, sharp rock, about 3 feet high. Coral heads, covered with  $\frac{1}{4}$  to 7 fathoms of water, are numerous in the area within 1 mile of the island. . . .

" . . . .

"Laysan Island is just southeastward of the center of a circular bank  $1\frac{1}{4}$  miles in diameter, with depths of 9 to 23 fathoms, beyond which the water deepens rapidly."

The reports indicate the island first was discovered by an American, Captain Briggs out of New Bedford, and thereafter in 1828 by a Russian captain who named it Moller Island.

Captain Paty annexed this island to Hawaii on May 1, 1857, at which time he estimated there were some 800,000 birds on it. In 1859 both Lieutenant J. M. Brooke on the U. S. ship, Pomorie Cooper, and Captain N. C. Brooks on the Gambia out of Honolulu were at Laysan. The reports do not indicate either of them claimed jurisdiction of the island.

Around 1890 a George D. Freeth took possession of the island under the Hawaiian flag, leaving two men on the island. He returned to Honolulu and organized the North Pacific Phosphate and Fertilizer Company and obtained a 20-year lease from the Hawaiian Kingdom to remove phosphates at 50¢ per ton royalty. In July 1890 the party returned to Laysan for the guano removal which continued until 1904 during which time structures were placed on the island for the personnel and operation. In 1894 the company changed its name to Pacific Guano and Fertilizer Company. In 1896 Max Schlemmer took over the position of superintendent of operations. The guano operation was given up in 1904 but Max Schlemmer continued to go to the island until November 1915. He had purchased the remaining property except the houses on the island and held an agent's authority from the Guano Company. The lease was terminated by relinquishment. Schlemmer tried to lease the island as well as Lisianski and French Frigate Shoals from the Territory but this was not completed.

Some seven or more Japanese vessels are reported to have visited Laysan in 1908-1909 to take feathers. In December of 1908 Schlemmer was reported to have gone to Tokyo and sold his rights for a 15-year period. In April of 1909 a party of fifteen Japanese landed and took feathers during the spring and summer and were replaced in the fall. Because the reservation had been established in February of 1909, the U.S. cutter Thetis went to the island in January of 1910, at which time fifteen Japanese were found using the guano operation buildings. They were arrested and removed and the feathers and wings confiscated. The Japanese claimed authority under Schlemmer.

Rabbits and guinea pigs almost completely denuded Laysan Island of vegetation. The remainder of the rabbits were destroyed in 1923 and this island has regained considerable vegetative cover.

Mary Reef and Dowsetts Reef are presently known as Maro Reef. The 1909 map shows two reef outlines. The Coast Pilot states:

" . . . The large, oval-shaped, coral bank is about 31 miles long in a northwesterly direction and about 18 miles wide. The center of the bank is a large area of reefs awash. This broken area, about 12 miles long in a northwesterly direction and 5 miles wide, is extremely foul, with many coral heads awash and channels of deep water between. Only one very small rock, about 2 feet high and on the north side of the reef shows above high water. Outside the broken portion of the reef, which is practically always marked by breakers, is the wide shelf of the bank with depths of 12 to 20 fathoms."

Gardiner Island (or Gardner Pinnacles) is shown on the 1909 map without indication of an appurtenant reef. There are three adjacent rock islands in this unit, with the highest estimated at 190 feet. The Coast Pilot states:

"Gardner Pinnacles lie near the northeastern side of a bank about 50 miles long, in a north-south direction, and about 20 miles wide near the northern end. The bank has depths of 10 to 25 fathoms, and the sand and coral bottom is plainly visible."

Two Brothers Reef is listed in the Order and shown as an islet surrounded by a reef on the 1909 map. Present charts and the Coast Pilot do not show the Two Brothers Reef.

French Frigate Shoal is shown on the 1909 map as a number of dots within a roughly crescent-shaped dotted line. It is considered as including La Perouse Pinnacle, a volcanic rock about 122 feet high. The reef area shown on the 1909 map scales about 25 miles long by 12 miles wide.

"French Frigate Shoal consists of a crescent-shaped reef on a circular platform about eighteen miles in diameter. . . . This reef forms a barrier against winds and currents around the north and east sides of the platform. The south and west sides of the platform are covered by water which averages a hundred feet in depth. Near the center of the platform stands a small rocky pinnacle, La Perouse Rock." (American Polynesia and the Hawaiian Chain, E. H. Bryan, Ch. 50)

In 1859 the entire coral reef was charted by an American expedition. A map based on this work was published in 1867 showing the reef extending some eight miles beyond the La Perouse 1786-1797 map. Five sand islets are shown on this map, the same number as reported in 1914. At present there are supposed to be twelve sandy islets at French Frigate Shoals.

French Frigate Shoals is named by reason of a French explorer, La Perouse, who almost lost two vessels on the reef on November 6, 1786. The rocky pinnacles are named for him. The Shoals were shown on a French published map in 1799. The Wilkes Exploration noted the Shoals in 1841.

Lieutenant John M. Brooke on the U.S. Fenimore Cooper explored the Shoals from January 3, 1859, until January 7, 1859. Lieutenant Brooke wrote to the Secretary of the Navy on February 7, 1859 stating:

" . . . We discovered a deposit of guano of good quality. In consequence of which I took formal possession of them in the name of the United States, erecting a cross, bearing the following notice printed in black on a white ground, upon the highest point of the islet:

"Taken possession of on the 4th of January 1859 by Lieutenant Commanding John M. Brooke, U. S. Schooner Peninsore Cooper, in accordance with Act of Congress passed August 18th 1856."

The description stated the claim consisted:

" . . . of an islet, sand banks above the water, and a reef . . . ."

Lieutenant Brooke also filed a guano act claim with the U. S. Consul at Honolulu but apparently did not complete the claim.

In 1859 the Gambia and Modern Times went to French Frigate Shoals and removed guano. Twenty men from the Gambia were left on the Shoal to take seal skins, oil, shark fins and guano. How long they stayed is not indicated.

On June 7, 1859, a George O. Baker, for himself and two men named Beatty, claimed French Frigate Shoals in a letter to the Secretary of State. Baker alleged that residence had been maintained since March 10, 1859, and claimed rights of the under-officers and crew of the Peninsore Cooper. This also would have been a guano act claim and was not completed.

The American whaler, Daniel Wood, from New Bedford, was wrecked on the Shoal on April 14, 1867. Survivors did not get rescued until April 29, 1867, at which time they planted an American flag to take possession.

The Hawaiian voyage of Captain Fady did not include the Shoals. It was not until July 13, 1895, that the Republic of Hawaii claimed them through a special appointment of the Minister of the Interior who planted a flag on and read a proclamation from the smaller pinnacle and repeated the procedure on one sand island.

A number of wrecks on and visits to the Shoals are reported. In 1881 a Japanese boat operated at the Shoals for about three months taking shark fins, oil and flesh, turtle flesh, shell and oil and bird down.

The Shoals were included in the 1894 lease from the Hawaiian Government to the Guano Company, even though prior to the 1895 claim of jurisdiction. No removal of guano is reported under this lease nor are there reports of extensive bird slaughter.

During World War II there were military uses of East and Tern Islands of the French Frigate Shoals. Tern Island was built into an airstrip and is still used for some radar and other purposes without modification of Executive Order No. 1019, nor authorization from the Territory. East Island was released by the federal agency back to the Territory but subsequent actions were taken to retain this islet as a part of the Refuge.

Frost Shoal is named in the Order and outlined on the 1909 map but is not listed in present-day charts or pilot's information.

Necker Island is about 210 feet high. It is shown on the 1909 map with an outlined reef area approximately 20 miles by 60 miles by scale. The Coast Pilot states:

"Necker Island is near the northern end of a bank about 40 miles long in a northwest-southeast direction. The bank is about 15 miles wide and has depths of 8 to 23 fathoms. The sand and coral bottom is plainly visible. A 10 fathom shoal has been reported about 1.9 miles north-eastward of Necker Island."

Necker Island first was reported by La Perouse in 1786. Lieutenant J. B. Brooke charted Necker Island in 1859 and W. C. Brooks of the *Gambia* was near the island that year also. It was not until 1894 during the provisional government of Hawaii that a claim of sovereignty was made by a special commission executed on May 27, 1894, by erecting the Hawaiian flag and reading of a proclamation. This action apparently was taken because of reported British interest in the island for a cable station.

Nihoa Island is a basalt tip of an underwater mountain about 910 feet high. It was not marked on the 1909 map as having an appurtenant reef and no reef is shown on charts or photographs. Nihoa Island had been sighted in 1789 and 1817. It was annexed to the Kingdom of Hawaii in 1822 by authority of the then Queen. And on April 23, 1857, on Captain Paty's trip, King Kamehameha IV and Governor Kekuanaoa took possession again.

Lieutenant Brooke of the *Fenimore Cooper* surveyed the island in 1859. Other landings were made in 1885, 1910, 1913, 1923, and 1935.

Brooks Shoal and Gambia Shoal. "also have been considered part of this reservation" according to the Territorial officer. Similar statements are made in a letter from the Deputy Attorney General, the Commissioner of Public Lands and the Territorial Surveyor to the Chairman of the House Subcommittee on Territorial Affairs dated May 26, 1959. The Deputy Attorney General of the Territory also has stated that under the Kingdom the King claimed the reefs and shoals as a part of his jurisdiction. (Letter May 27, 1959, to Commissioner of Public Lands.) The extent of the jurisdictional claims of the Kingdom probably will have to be determined from the Proclamations that were issued. These records have not been examined.

The Admission Act for Hawaii did not clarify the matter either, since it referred to the areas included in the Territory of Hawaii. The Resolution for Annexation in 1898 (Joint Resolution No. 55, July 7, 1898, 30 Stat. 750) described the annexed area as :

- "The Hawaiian Islands and their dependencies."

Reference has been made to Senate Document 16, 55th Cong., 3rd Sess., 1898, to determine what was included in the Annexation Resolution. The listing of islands includes, along with the main islands, Nihoa, Laysan, Lisianski, Necker, Gardiner and Ocean Islands and French Frigate Shoals. But Brooks Shoal, Pearl and Hermes Reef, Gambia Shoal, Dowsett and Maro Reef, and Frost Shoal were not included. A Deputy Attorney General of the Territory stated in a memorandum dated March 16, 1953, that these omitted reefs and shoals were, at the time of annexation and since had been, considered to be a part of the Territory by reason of the phrase:

"scattered reefs and shoals"

at the end of the list in Senate Document 16. Examination of that report shows that there were short descriptions following each of the named islands, and that the quoted phrase relied upon was descriptive of French Frigate Shoals rather than a further designation of area to be included.

Of the named islands in Senate Document 16 that were included in Executive Order No. 1019, the following claims of sovereignty by the Kingdom, Provisional Government and Republic have been noted:

Nihoa - 1822 by Queen; April 23, 1857, Captain Faby.  
Laysan - May 1, 1857, Captain Faby.  
Lisianski - May 11, 1857, Captain Faby.  
Necker - May 27, 1894, Provisional Government Special  
Commission.  
Gardiner -  
Ocean - September 20, 1886, Special Commission.  
French Frigate Shoals - Special Commission, July 13, 1895.

Only as to Nihoa, Laysan and Lisianski is there support for the statement that there had been a long-standing claim by the Kingdom. Necker Island and French Frigate Shoals were claimed after the termination of the Kingdom and Ocean Island was only claimed in 1886.

The reports show that Captain Faby was at Pearl and Hermes Reef on May 19-20, 1857, but whether sovereignty was claimed is not determined from the information available in Portland.

It is much more probable that the list in Senate Document 16 was based on the official records by proclamations and claims of sovereignty by the kings and governments of Hawaii than that the words "scattered reefs and shoals" were intended to include such of the other areas as had not been publicly claimed. This view is further confirmed by the limitation in the 1894 lease which did not warrant any ownership of the leased Kure and Ocean Islands, Pearl and Hermes Reef and French Frigate Shoals for guano and phosphate production.

The question is raised by the foregoing history of the Leeward Islands as to when or whether sovereignty of the Hawaiian Kingdom, Republic or Territory, attached to the various islands. The further question is raised as to when the sovereignty of the United States attached to any of those areas that were not Hawaiian.

The Supreme Court and the Attorney General of the United States have followed the well-recognized rule of international law that occupancy is necessary to establish sovereignty over unclaimed and unoccupied islands. And the Attorney General has distinguished claims made for protection for removal of guano as being only temporary in nature. The need to protect the interests of American citizens engaged in the guano trade led to the enactment of the Guano Islands Act of August 18, 1956, which provided governmental protection to guano island claimants who were citizens, filed claims, and posted bonds. But that protection was only for the period of occupancy

and did not constitute a claim of sovereignty over the Territory.  
(Op. A.G. May 8, 1873; 14 A.G. 603)

The Swan Islands in the Caribbean Sea were the subject of the Attorney General's opinion dated February 8, 1918 (31 A.G. 216). Guano Act claims had been completed by notice and bond in 1857 and 1863 but the operation was abandoned with complete removal from the islands on February 5, 1904. The former manager returned to the islands the next day and claimed them for the United States. The State Department, in 1908, requested compliance with the Guano Islands Act but no bond was filed. The islands then were used for growing coconuts. The Attorney General held that there was not a continuation of Guano Act jurisdiction after February 5, 1904:

" . . . but as has been shown, such rights would have been limited merely to the protection of the United States during the operation of said islands. The property rights of said company, irrespective of the Guano Islands Act, are dependent upon the assumption of sovereignty over the islands by the United States Government. Upon such assumption, there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision by the Government."

The rule is further illustrated in the case of Johnston, or Johnson, or Cornwallis Island in the Pacific. A William H. Parker from San Francisco chartered the ship, Palestine, in which he claimed to have found the two islands (Johnston and Sand) in 1858, at which time the captain of the ship planted an American flag on each island and erected crosses with a statement of claim for the United States. Some guano was loaded and the ship returned to San Francisco. The Pacific Guano Company was organized by the captain of the ship and others, and the ship then returned to the islands where on July 22, 1858, it was found that the previously erected flags and crosses and inscriptions had been taken down and a Hawaiian flag erected by a Samuel C. Allen of the ship Kalama, from Honolulu. On July 27, 1858, King Kamehameha proclaimed jurisdiction over Johnston Island. However, the Pacific Guano Company took possession, erected shelters, and had retained possession as of the date of the opinion in 1859. The opinion involved contesting claims of Parker and the Pacific Guano Company:

"An actual taking of possession and actual occupation of the island whereon guano has been discovered are express conditions of the act of Congress, which are not complied with by a mere symbolical possession or occupancy, as by the planting of a flag, the erection of a tablet, an inscription, or other like acts. And hence, neither of these rival claimants can have any show of right before the second arrival of the Palestine, in July, 1858; for although the island had been previously visited by them, guano discovered and removed, inscriptions raised, and the flag of the United States planted, still, when the Palestine sailed, the island was abandoned.

" . . . .

"A Sandwich Island schooner, on the 14th day of June, had visited the islands, and by persons on board of her the United States flag was removed, and the flag of King Kamehameha planted upon the islands. But this vessel had departed, and the islands were deserted when the Palestine arrived. The acts of the persons on board the Kalama, however designed, were nothing more than empty ceremonies that could vest no jurisdiction over the islands in the Hawaiian government. Prior acts of possession equally solemn had been performed by American citizens before the Hawaiian vessel touched at the islands. And there is little room for doubt that the Kalama expedition was a sharp scheme of Americans, under cover of the Sandwich Island's sovereignty, to lay claim to a discovery which they knew to be in course or prosecution under the flag of the United States.

"The law of nations will not acknowledge the property and sovereignty of a nation over any uninhabited country, except where actual possession has been taken and settlement formed, or of which it makes actual use."

In another opinion relating to Johnson Island dated May 8, 1873, (14 A.G. 608) the statement was made:

" . . . Upon application at the office of the Secretary of State I am told that it has been the course of that Department to recognize such islands only while

occupied for the purposes of procuring guano, and, therefore, upon cessation of such occupancy, they became open again to discovery, possession, etc. If the allegation of forfeiture be true, I suppose that the islands are again subject to original proceedings before the Secretary of State. In such event Mrs. Parker will be obliged to take possession and occupy . . . ."

Palmyra Island was the subject of extensive litigation to determine ownership following a 1939 Congressional appropriation for construction of naval aviation facilities there. Proceedings for negotiated acquisition from the occupants of the island were terminated and litigation was commenced to quiet title on the basis of both sovereign and proprietary rights of the United States claimed by the United States under the Hawaiian annexation and Territorial Act. United States v. Fullard-Igo, Dist.Ct. Hawaii, 1940, 66 F.Supp. 774; 9th Cir. 1943, 133 F.2d 743; Dist.Ct. Hawaii (retrial) 1944, 66 F.Supp. 782; 9th Cir. 1946, 156 F.2d 256; U.S. S.Ct. 1946, 331 U.S. 256, 91 L.Ed. 1474.

Palmyra Island as the subject of this litigation was described in the District Court as:

" . . . an atoll comprising some 52 islets surrounding 3 deep water lagoons . . . ."

and in the Supreme Court:

"The Palmyra group is a coral covered atoll of about 50 islets, some with trees, and extends . . . reefs, intervening waters and land . . . 5-2/3 sea miles in an easterly and westerly direction and 1-1/3 sea miles northwardly and southwardly."

The atoll was discovered in 1802 by the American ship, Palmyra, but it was not until 1859 that a claim of sovereignty and possession was made by a party named Judd. For what nation he claimed is not shown. Then, in 1862, two naturalized citizens of the Kingdom of Hawaii obtained authorization of the King and Minister of the Interior to take possession of the island for the King. The required formalities were performed and private occupancy established. The claimants insisted that this occupancy was continuous down to the date of the litigation. The occupancy was in fact only for

about four years out of that total time, but the court found it was continuous. There also had been a Hawaiian land court proceeding in 1912 to register the private title in which the Territory disclaimed any proprietary interest. The courts considered Palmyra Island as having been removed from proprietary ownership of the Territory and that it was vested in the private claimants on the theory of a lost grant. The source of that title was the initial occupancy and proclamation by the King.

Palmyra Island was expressly excluded from the State of Hawaii in the Admission Act. The reason given in the legislative history was that it was an individually-owned island. The same was true of Niihau but that island was not excluded from the State.

Outside of the temporary occupancy of Laysan and Lisianski Islands for the guano removal and the holdover occupancy by Max Schlemer, and the airbase and coast guard occupancy of East Island and Tern Island on French Frigate Shoals, there has not been any occupancy of any of the islands and reefs designated in Executive Order No. 1019 such as was found in the Palmyra Islands litigation. The guano operation was temporary and would not be of value after its termination. The most definite action that has been taken upon which sovereignty can be based is the establishment of the Hawaiian Islands Reservation by the United States, and the patrol, arrest, and exclusion of people from those designated areas. This might be considered either as an independent assertion of sovereignty by the United States, or as a setting aside of previously-held Territorial lands for purposes of the United States. The latter approach is the one that is considered appropriate since the executive order was prepared and issued on the basis of Territorial claims to the area.

Assuming that the Kingdom, Republic and the United States have acquired sovereignty over all of the named areas of Executive Order No. 1019, as well as the areas not so named but considered a part of the Reservation, what are the boundaries of the several areas? Some, such as Nihoa, Necker and Gardner Islands are true islands as to which there is no problem. The territorial sea extends from the coast line, which is defined by the Submerged Lands Act (43 U.S.C.A. 1301(c)) as:

" . . . the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

On Niihau Island there may be an area between the island points that can be considered inland waters rather than territorial waters. Otherwise these three islands are in direct contact with the ocean.

The other named islands, reefs and shoals, except Maro Reef, are coral atolls with small sand islets protected by the reefs or shoals and in the case of French Frigate Shoals, two rocky islets in addition. Maro Reef does not have but one small rock standing above water. On Ocean or Cure Island there have been two named sand islets. On Pearl and Hermes Reef there are in excess of ten named sand islets, and on French Frigate Shoals there are some ten named sand islets. Some of the islets move, others disappear and new ones reappear. The Executive Order designation of Reefs and Shoals by their overall descriptive names rather than by the names of the small islets within the Reefs and Shoals indicate that the atolls were the real subject of the designation.

Assertion of jurisdiction over areas inclusive of reefs has been made as to similar designations in the Pacific area:

1. The Palmyra litigation included the atoll with some fifty islets upon it. The authorization of the Hawaiian King and Proclamation referred to "Palmyra Island", or the "Island of Palmyra." The list of islands in Senate Document 16 describes Palmyra Island as:

"A cluster of low islets, about 10 miles in circumference, with lagoon in center; has a few coconut trees."

2. Midway Islands were reserved as "public lands" but now are administered under the Navy as the atoll with two sand islets on it.

3. Cure Island was later designated for Navy use as including the "appurtenant reefs" and was released to the Territory also as including "the reefs."

4. Executive Order No. 11045, Sec. 302, defines "Wake Island" and "Midway Island" as including "the reefs appurtenant to, and the territorial waters of" those islands.

5. The Admission Act for Hawaii (P.L. 86-3, 73 Stat. 4) required, and the people of Hawaii voted for, alteration of the constitutional provision that defined the State as including reefs and excluding other areas similarly described:

"except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters.

". . . the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters"

which were not deemed to be included in the new State.

6. The term "territorial sea," as defined in 32 CFR 761.5 with regard to Section 874(c) of the Code of Trust Territory of the Pacific is:

". . . that part of the sea comprehended within the envelope of all arcs of circles having a radius of three marine miles drawn from all points of the barrier reef, fringing reef, or other reef systems of the Trust Territory measured from the low water line, or in the absence of such reef system, the distance to be measured from the low water line of any island, islet, atoll, reef, or rocks within the jurisdiction of the Trust Territory."

7. A copy of a letter dated April 30, 1909, from W. F. Freas, Governor of Hawaii, to the Secretary of the Interior, the Governor reported that Laysan and Lisianski Islands had been leased by the Territory for a term of fifteen years. Among the conditions imposed upon Max Schlemmer were:

" . . . (3) not permit the use of explosives for killing or capturing fish, (4) not allow the destruction of birds or the capturing of birds for removal from said islands or their adjacent waters, and (5) that either the Federal or Territorial Government might at any time during the term withdraw a part or parts of the islands for any public purposes . . . ."

The lease was dated five days after the Executive Order but reported not with knowledge by the parties of the Order.

Necker Island previously had been leased with similar provisions, and the dissimilarity of the two areas raises questions as to whether the scrivener of the leases was aware of the kind of area that was involved.

A similar interpretation of the area included in the Hawaiian Islands Reservation has been made by the Fish and Wildlife Service and the Territory of Hawaii.

1. A 1945 letter from the President of the Board of Agriculture and Forestry of the Territory to the Fish and Wildlife Service stated that the Territorial Board might be able to police the area more regularly and effectively than the federal agency:

" . . . Since all of the islands and reefs within the Hawaiian Islands bird reservation are under the jurisdiction of the Territory of Hawaii (Revised Laws 1925, Page 64, Annotator's note) and the City and County of Honolulu (Revised Laws 1925, Section 1717) and concurrently with the United States Department of the Interior, as authorized by Presidential Executive Order No. 1019 mentioned above . . . ."

The ensuing correspondence culminated in an agreement dated December 21, 1951, which contained, among others, the following provisions:

"(1) The Board is hereby authorized to designate the lands and waters of the Hawaiian

Islands National Wildlife Refuge as a refuge for the protection of migratory birds and other wildlife under laws and regulations of the Territory of Hawaii (Chapters 17 and 18, Revised Laws of Hawaii 1945, as amended, Act 6, Session Laws of Hawaii 1951).

"(2) The Board agrees, in-so-far as they are able, to manage and administer the lands as a refuge and breeding grounds for native birds and other wildlife and to post and patrol the lands for the protection of wildlife. . . .

" . . . .

"(4) Any permit for entry, issued by the Board, shall contain a provision prohibiting the disturbance of wildlife, including the endemic and endangered Hawaiian Seal."

Upon receipt of the signed agreement the Acting Director of the Fish and Wildlife Service wrote to the President of the Board of Commissioners on January 31, 1952:

" . . . It is hoped now that your Board will take the additional step of designating these lands and waters as a refuge under Territorial regulations."

On April 25, 1952, the Board of Commissioners of Agriculture and Forestry adopted Resolution No. 7 which after reciting the fact of the agreement, stated:

"Whereas, the Fish and Wildlife Service in said agreement did authorize the Board of Agriculture and Forestry to designate land and waters of the Hawaiian Islands National Wildlife Refuge as a refuge for the mammal and bird wildlife found thereon for the purpose of preserving, protecting and propagating such wildlife."

The Resolution declared the area to be a Territorial Refuge "subject to the provisions of Regulation 15 . . . ."

On May 12, 1960, a letter from the Chief, Branch of Wildlife Refuges, Fish and Wildlife Service to the Director of the Territorial Division of Fish and Game, indicated receipt of copies of the first issued permit:

"No. 1 covering Mr. Heisei Shinsato's entry on French Frigate Shoals while fishing in that vicinity."

2. On June 14, 1960, an inquiry from the Director of Agriculture and Conservation of the State of Hawaii regarding use of Green Island of Kure atoll was answered by Mr. Tunison as Acting Director, BFWP. The following portion of this letter was taken from the opinion of Associate Solicitor A. M. Edwards dated May 23, 1960, stating that Kure Island no longer was a part of the Refuge, and that:

" . . . the lands and waters comprising the Hawaiian Islands National Wildlife Refuge were reserved and set apart by the President in Executive Order No. 1019. . . Mr. Collins might be advised that this Federal area is within the jurisdiction of the State of Hawaii (including any appropriate political subdivisions of the State) in the sense that it is a part of the State and that the civil and criminal laws of Hawaii are in force throughout the reservation to the extent that their exercise is not inconsistent with the right of the Federal Government to protect its land and property and to control their use and disposition. The Federal Government alone has jurisdiction to administer this area comprising publicly-owned lands and waters set aside for governmental purposes. Except as properly authorized by the United States, by agreement or otherwise, the State of Hawaii has no right to administer or manage the Refuge or to interfere with activities being conducted thereon by the United States."

On the basis that the islands, islets, reefs and lagoon waters were a part of the Territory of Hawaii and of the United States, the Executive Order could set apart not only the island areas but also inland water areas to the extent required for the purposes of the Executive Order. The recent 9th Circuit Court decision in United States v. Alaska, 423 F.2d 764 (1970), upheld the authority of the United States to reserve inland water areas as well as land by Executive Order during the territorial period:

"Water, in other words, is just as essential to the continued existence of the moose as it is to any other semi-aquatic animal in Alaska. If the Order failed to withdraw the navigable water in the designated area, it amounted to nothing more than an impotent gesture. If it failed to withdraw the land under the water it would be just as sterile. In neither case would this magnificent animal be the beneficiary of the declared design of the Order."

There also is the question of ownership of new or shifting sand islets within the reefs. Those islets become the property of the owner of the bed from which they rise. If the Refuge includes the reefs and lagoons, a basis for including new or shifting islets within the area can be established. But, if the area is not refuge, but territorial waters of the State of Hawaii, the new or shifting islet would be subject to claim by the State. And, there are areas where new or moving islets might occur more than three miles from other stable islets, which would possibly be claimed by the United States on the basis of the Outer Continental Shelf Act, or be open to claim by the first discoverer. For the security of titles it is desirable that the Refuge extend to and include the protective reefs, either on the basis of Territorial-State sovereignty or independent claim by the United States.

It should be noted that the Continental Shelf Act does not provide authority for control of fishing in the waters over that area.

The Hawaiian Islands Order established not only a breeding ground but a "refuge" for the birds, which necessarily included the reefs and lagoons:

1. It was necessary to protect the sand and rock islands as nesting places and resting places for these birds. Not all of them, but most of them, are sea birds,

feeding upon the fish in lagoons and ocean waters. The lagoons are the protected areas where the fish are grown and many of the smaller sizes live there. Carl Elschner, a chemical engineer, spent considerable time on the Pacific islands including some of the refuge islands. In the part of his study published in the Honolulu Sunday Advertiser, July 11, 1915, Mr. Elschner stated:

"Necker Island, like Bird Island, stands on a vast bank; it is nearly seven cables long from east and west and from one to one and a half cables wide. The bank extends, according to the notes of the American sailing direction towards Northeast, fifteen miles, towards southeast thirty miles, towards southwest five miles and northwest nine miles.

" . . . .

"It seems that with the thirty fathoms curve, there is a greater activity of the fishing birds than outside of same, as fishes in great numbers accumulate within this part of the banks because of the better advantages for food."

Protection of the fishery resource incidental to feeding the massive bird populations is a reasonable part of the intended scope of the executive order.

2. The reefs and atolls break the ocean waves so that the sand islands continue to exist. Without these protective reefs the sand islands would be washed out by the normal wave action that now breaks on the reefs. Dynamiting of fish in the reefs is known to be a fishing practice. Breaking of the barrier reef in this manner could destroy the sand islets. Also, there are coral predators, the "Seastars", which are the subject of current congressional research projects for control. The Seastars are known to be on the Reservation reefs, but so far have not done extensive damage. Blasting is thought to be one possible cause of population explosions of the Seastar which cause the reef destruction.

It is within the reasonably necessary authority for the Reservation that control of the lagoons and reefs be included so far as to protect the birds, their food and habitat. As to those islands, reefs or shoals that were subject to the sovereignty of the Kings, Republic and Territory, the residual rights and sovereignty are with the State of Hawaii--not the United States.

Section 5 of the Admission Act only retained authority over reserved territorial lands for the purposes stated in the Executive Order. As to any part of the refuge not previously subject to the sovereignty of the Kings, Republic, and which was a part of the Territory, the United States may have complete jurisdiction and authority.

The authority for establishment of the refuge from "public lands" in Hawaii is not the same as the authority of the President to set aside public lands in the 48 adjacent states. The Territorial Act of April 30, 1900, contained two sections that were relied upon in similar situations for authority.

Section 73 (31 Stat. 154.5) provided:

"That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. . . . Provided, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive Order, or orders, by the President of the United States."

And Section 91 (31 Stat. 159) provided:

"That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh,

eighteen hundred and ninety-eight, shall be and remain in the possession of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.  
. . ."

Prior to the issuance of Executive Order No. 1019 in 1909 the Attorney General had held that the President was, under the provisions of the two sections:

"authorized to take such land as he deems proper for the uses and purposes of the United States." (24 A.G. 600)

And the Department had similarly so ruled in opinion dated July 17, 1899 (29 L.D. 32).

The 1899 opinion was referred to in the submission to the President.

Subsequent to the 1909 Order, Sections 73 and 91 of the Territorial Act was amended in 1910 (36 Stat. 447). Section 73 then read:

"All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the governor, and all patents and deeds of such land shall issue from the office of the commissioner.  
. . . All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory. . . ."

And Section 91 read:

"That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic

of Hawaii under the joint resolution . . . shall be and remain in the possession, use, and control of the Government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii, and any such public property so taken for the uses and purposes of the United States maybe restored to its previous status by direction of the President; . . ."

Section 73 was further amended by Act of August 21, 1941 (55 Stat. 658) by addition of:

" . . . the provisions of this paragraph may also be applied where the 'public purposes' are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States. . . ."

There was a change of name from the Hawaiian Islands Reservation to Hawaiian Islands National Wildlife Refuge on July 27, 1940, but this Order did not change the basic designation of purpose.

However, there was, in April 25, 1952, a Resolution of the Board of Commissioners of Agriculture and Forestry that was adopted:

"Declaring the Hawaiian Islands National Wildlife Refuge a wildlife Refuge."

This was done pursuant to an agreement dated December 27, 1951, between the Fish and Wildlife Service and the Territorial Board of Commissioners of Agriculture and Forestry. The Resolution referred to Regulation 15 of the Division of Fish and Game. We do not have a copy of that regulation but do have a copy of a 1958 revision as Regulation 2.

Pursuant to the 1951 agreement the Territory of Hawaii became the active management agency for the refuge. This continued until 1963 when a B3F&W office was established on Oahu Island and inspection and enforcement of the refuge area was resumed. At this time not only were the native birds considered as subject to the refuge jurisdiction but migratory birds, seals and turtles as well, which appears

to be derived from the Territorial refuge authority rather than from Executive Order No. 1019.

From and after the 1910 amendment to Section 91, authority to set apart public lands was that of the Governor. We do not find any order by the Governor confirming the 1952 refuge. However, the same authority for the President after 1910 is found in the amended Section 91 as before, but Section 73 as so amended in 1910 and 1941 apparently gave the Governor authority to withdraw lands for both Territorial and United States purposes. It is doubtful that the 1952 Resolution of the Board of Commissioners can be established as such a withdrawal by the Governor for purposes of the United States.

The boundary of the State of Hawaii in the Leeward Islands has never been established. It was avoided and has been avoided by Congress and the Administrative Departments in the State Admission Act. The extent of Hawaiian claims to sovereignty over the inter-island waters was the subject of a letter from the Department of Justice to the Chairman of the Subcommittee on Territories and Insular Affairs, dated January 13, 1954 (Appendix A, House Report No. 83, 84th Cong., 1st Sess.), in which the problem was discussed:

" . . . There is similar doubt as to the water area of the Territory. The Second Act of Kamehameha III (1846) and a Privy Council Resolution of 1850 asserted jurisdiction over inter island channel waters, the former even asserting the right by proclamation to exclude foreign shipping, apparently indicating that the waters were regarded as inland rather than merely Territorial. However, the statute was repealed by section 1491 of the Civil Code of 1859, and the Privy Council resolution has been held to have been ultra vires (Territory of Hawaii v. Liliuokalani, 14 Hawaii 88, 1902). Nevertheless, the view has often been expressed that the inter island channels remain part of the Territory. In view of these doubts, it may be desirable to define the new State explicitly."

This letter also stated that a conference was held between representatives of the Departments of State, Interior, Navy, and Justice, the Coast and Geodetic Survey, the Civil Aeronautics Board, the Bureau of the Budget, the Maritime Commission and others, to discuss the general problem:

"The tentative conclusion was there reached that it would be most desirable to describe the new State as including all islands within a described perimeter. . . .

"The conference referred to did not intend that the water area within the proposed perimeter should be claimed, but no specific decision was reached as to what water area should be included in the State. . . . The suggestion has sometimes been made that the usual rules for Territorial waters might be liberalized in the case of Archipelagoes, but the United States has not adopted such a policy. Serious questions of policy, both domestic and foreign, are involved, which do not concern this Department. Domestically, whether the waters between the islands were Territorial waters or high seas would determine, for example, whether or not inter island commerce were intra state and so subject to local regulation. Internationally, such questions would be presented as whether the United States were entitled to exclusive fishing in those waters. In any case, there would be no right to exclude innocent passage of foreign merchant vessels, unless the channels were claimed as inland water, as was apparently done by the Second Act of Kamoharaha III. The advantages thus gained for our commercial and naval operations throughout the world have been thought to outweigh any defensive disadvantage resulting from the restriction of our own marginal belt. Your proposed amendment expressly adopts the 3-mile rule, thus adhering to the traditional policy, but does not specifically deal with the possible claim of the channels as inland waters, although I assume that you do not intend to advance such a claim. If those channels are not claimed as either inland or Territorial, they will of course remain high seas, with the United States having no special rights in them except to the extent that there is an 'island shelf' in which an interest is claimed similar to that in the Continental Shelf. Since such a shelf area beyond Territorial waters is outside State boundaries, there is no occasion to refer to it in this act."

Section 1, Article XIII of the 1950 draft of the Constitution for the State of Hawaii, described the new state:

"The State of Hawaii shall include the islands and territorial waters heretofore constituting the Territory of Hawaii."

H. R. Report No. 83, 84th Cong., 1st Sess., on H.R. 2535, Appendix D (p. 85), shows a proposed modification of the State Constitution to conform the new State boundaries to the intent of Congress. This proposal was included in the final Statehood Act, P.L. 86-3, March 18, 1959 (73 Stat. 4), Section 7(b)(2), which required an election in the new State agreeing to the description:

"The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said state shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters."

The Submerged Lands Act (43 U.S.C. § 1301, et seq.) is applicable to the State of Hawaii. Submerged lands include only an area "three geographical miles distant from the coast line." "Coast line" is described as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line making the seaward limit of inland waters." The territorial waters are the area out from the "coast line," which is the "portion of the coast which is in direct contact with the open sea. . . ."

The line marking the seaward limit of inland waters extends across bays and rivers not more than 24 miles across. See Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1608, et seq. Or, a straight line along the seaward projections of a "rock rampart," 1 Shalowitz, Shore and Sea Boundaries, pp. 212, 213 and 214.

The determination of areas designated as included within the Hawaiian Islands Reservation has a direct relationship to the Submerged Lands area that the State of Hawaii can claim since the State has relied upon the Reservation as the basis for its territorial claims.

Another possible basis for control of waters not within the 3-mile territorial designation is that of "Historic Bays" which constitute a part of inland waters rather than high seas. See I Shalowitz, *Shore and Sea Boundaries*, pp. 49-60. The Hawaiian designation of a "reef" is comparable to these historic bay situations and would provide justification for considering them as "inland waters" for purposes of the Hawaiian Islands Reservation as well as the Territory and State of Hawaii.

Material in the files shows that the Hawaiian Islands National Wildlife Refuge has been considered to be "acquired" lands. Review of the lands for purposes of the 1964 Revenue Sharing Act (16 U.S.C. § 715s) should be made since that act refers to lands "acquired in fee" that are within a "county." As to refuge lands within the State of Hawaii, they are within the City and County of Honolulu. Whether the refuge interest is a fee title though is doubtful. A definite ruling should be made on this after the area of interest of the United States is determined.

The Wilderness Act, P.L. 88-577, Sept. 3, 1964 (78 Stat. 890, 16 U.S.C. § 1131, et seq.), relates to land areas rather than water or combined land and water areas where the water area may be distinct from the upland ownership as tidewaters are. The statute states that its purpose is to avoid:

"leaving no lands designated for preservation and protection"

and that:

"No Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by a subsequent Act."

And:

"An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence  
..."

Subsection (c) of Section 3 of the Wilderness Act (16 U.S.C. § 1132) provides for a review of every "roadless island" within the national

wildlife refuges and game ranges and a report on the suitability for designation of such islands for preservation as wilderness.

The proposed Hawaiian Islands Wilderness Area would include all land and water areas of the refuge except Tern Island and the dredged channel. (Page 2, preface)

The statutory authorization appears to limit the proposal for wilderness area to land areas. Even as to the land areas there is not a public land ownership as in the 48 contiguous states but rather a limited authority for the Reservation for Native Birds created in 1909 by Executive Order No. 1019. That authority is the only authority retained by the United States as to any part of the remaining reservation included in the State of Hawaii and prior territory. There may be some areas that are not territorial, but this must be resolved before any wilderness area, even for the lands of those non-territorial areas, could be utilized.

Another procedure should be considered as an alternative as to areas not within the State of Hawaii or its territorial waters -- Establishment of a Coral Reef Preserve in cooperation with the State of Hawaii similar to the Key Largo Preserve (March 17, 1960, 25 F.R. 2352, Procl. No. 3339, Suppl. to 16 U.S.C. 461, note). The Outer Continental Shelf Act has been extended to Hawaii and would encompass such reef areas as were not within the 3-mile territorial water area of the State. A cooperative agreement for both State and Federal areas would be necessary. This would be a particularly desirable procedure if the area of the State of Hawaii and of the Refuge is limited to three miles from the low water line of the sand islands rather than the fringing reefs.

#### SUMMARY:

The Hawaiian Islands Reservation description utilized the commonly accepted names for certain areas as shown on maps. The maps available in 1909 and attached to the Executive Order represented the reefs around the sand islets as a part of the areas included.

The Resolution for Annexation and Territorial Act did not specify the area acquired from the Republic of Hawaii or included in the Territory. Senate Report 16 inventoried certain of the islands also by name and a brief description, but not including all of the areas named in the Executive Order.

The Executive Order was based upon the interest of the United States obtained through the Territorial acquisition from the Republic and not by an independent sovereignty asserted by the United States.

The admission of the State of Hawaii did not resolve the problem as to named areas, but it did recognize and require the State Constitution to be amended so as to include for each area of the Territorial claim that the reefs were included with the land areas. The enclosed or partially enclosed lagoons within the reefs thereby were recognized as being inland waters and the 3-mile territorial waters would extend outward from the reefs.

This recognition of reefs and lagoons as being a part of the mainland ownership of the State adopts the same policy that has been administratively and judicially recognized by the Territory as well as by the United States in other reef areas of the Pacific.

This recognition is retroactively effective to the Territorial, Republic and Kingdom claims to the areas, and to the Executive Order designation of the Hawaiian Island Reservation as including so much of the territorial area of land and inland waters as were required for the protection of the birds native to the named areas.

Most of the native birds are dependent upon fish for their sustenance, and the fish are most easily obtained by those birds in the shallow lagoons and shoal areas. These reef and shoal areas also are the natural reproduction areas for fish and provide varieties of smaller fish not so common on the open sea.

The reefs are essential to preservation of the sand islets upon Pearl and Hermes Reef and French Frigate Shoals. Authority to protect the reefs from damage or destruction is a necessary part of the reservation jurisdiction. The recent case of United States v. Alaska recognizes the authority of the United States to reserve authority over inland water areas for wildlife purposes.

The extent of each area should be ascertained and made permanent by agreement with the State of Hawaii as a boundary location. The areas then should be shown on all official charts as being the Reservation. The boundaries of the reef areas should be established at a 6-fathom depth in conformity with the usual practices for extending coastal boundaries across bays, river mouths and island dotted shore lines.

The authority to regulate the reservation area under the Federal Executive Orders of 1909 and 1940 is limited to native birds. This does not include the seals or green turtles, although these species may indirectly benefit from the regulations for protection of the bird life.

The Wilderness Act is not an appropriate authority for extension of Federal control over the Reservation. The Hawaiian Islands were never public lands of the United States, and the Wilderness Act reference to islands within the refuge system is not broad enough to include the reefs and inland water areas of the Hawaiian Islands reservation -- and it is those areas and the seals, turtles and fish in them that the wilderness proposal was intended to protect.

The State of Hawaii retains the residual jurisdiction over the Reservation and has, in the territorial period, declared the land and water areas to be a territorial refuge protecting the seals, turtles and fishery. We do not know whether this status has been retained after statehood. The State should be prevailed upon either to make such refuge status permanent or to cede such further interests to the United States as will permit the establishment of a wildlife refuge for protection of all resources of the areas.

The status of the Reservation as being acquired lands for the purposes of the 1964 Revenue Sharing Act should be reviewed and if further cession of authority from the State is not obtained, the Revenue Sharing Act should be determined to be inapplicable to the limited interest held by the United States or the Act amended so as to exclude the Hawaiian Islands Reservation.