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Ryan B. Stoa*

COOPERATIVE FEDERALISM IN BISCAYNE NATIONAL PARK

ABSTRACT

Biscayne National Park is the largest marine national park in the United States. It contains four distinct ecosystems, encompasses 173,000 acres (only five percent of which are land), and is located within densely populated Miami-Dade County. The bay has a rich history of natural resource utilization, but aggressive residential and industrial development schemes prompted Congress to create Biscayne National Monument in 1968, followed by the designation of Biscayne National Park in 1980. When the dust settled, Florida retained key management powers over the Park, including joint authority over fishery management.

States and the federal government occasionally share responsibility for regulating natural resources, but Biscayne National Park represents a unique case study in cooperative federalism. This article explores these cooperative federalism contours in order to assess whether the park's management paradigm provides a model worthy of replication. A diverse range of materials were reviewed for this project, including literature and jurisprudence on traditional models of cooperative federalism, federal natural resources laws, national park regulations and policy, Biscayne National Park's statutory frameworks and legislative history, state and federal management plans, inter-agency communications, and direct stakeholder interviews.

These materials combine to tell a story of cooperative federalism that has been frustrating and, at times, incoherent. But the story also demonstrates that shared responsibility over fishery management has produced beneficial results for the Park and its stakeholders by forcing state and federal officials to work together on planning and enforcement, diversifying human and financial resources, and incorporating federal, state, and local interests

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into park management and policy. The research suggests that future applications of the Biscayne National Park model of cooperative federalism, in which states and the federal government share joint authority over marine resources in some capacity, may enjoy similar success.

I. INTRODUCTION

The National Parks of the United States are nothing if not unique. Active volcanoes,¹ the world's longest cave system,² geothermal geysers,³ the largest island of the world's largest lake,⁴ and the tallest trees on Earth⁵ can be found in the National Park System, among other natural wonders. Some parks receive millions of visitors and are international tourist destinations—Grand Canyon National Park receives over 4.5 million visitors each year.⁶ Others are so remote they don't have park facilities and receive around a thousand visitors monthly.⁷

Biscayne National Park is neither remote nor highly frequented. Despite its location within Miami-Dade County (population 2.66 million),⁸ the Park receives only slightly more than half a million visitors annually. That number is fewer than Denali National Park in Alaska, which is serviced by a single, mostly-gravel access road.⁹ North of Biscayne National Park lies the highly developed barrier islands of Key Biscayne and Miami Beach, as well as the Port of Miami, the world's leading cruise port.¹⁰ To the south lie the Florida Keys, and to the west the Miami metropolitan area, including a solid waste landfill and nuclear power plant visible from the Park.¹¹

Nestled between these bustling coastal developments is Biscayne National Park, the largest marine national park in the United States, with ninety-five percent of its 173,000 acres located underwater.¹² The marine nature of the Park sets it apart

1. *Hawai'i Volcanoes*, NAT'L PARK SERV., <http://www.nps.gov/havo/index.htm> (last visited July 2, 2015).

2. *Mammoth Cave*, NAT'L PARK SERV., <http://www.nps.gov/mac/index.htm> (last visited July 2, 2015).

3. *Yellowstone*, NAT'L PARK SERV., <http://www.nps.gov/yell/index.htm> (last visited July 2, 2015).

4. *Isle Royale*, NAT'L PARK SERV., <http://www.nps.gov/isro/index.htm> (last visited July 2, 2015).

5. *Redwood*, NAT'L PARK SERV., <http://www.nps.gov/redw/index.htm> (last visited July 2, 2015).

6. *Annual Park Rating Report for Recreational Visitors in 2014*, NAT'L PARK SERV., <https://irma.nps.gov/Stats/SSRSReports/National%20Reports/Annual%20Park%20Ranking%20Report%20%281979%20-%20Last%20Calendar%20Year%29> (last visited July 2, 2015).

7. *Gates of the Arctic*, NAT'L PARK SERV. (July 2, 2015), <http://www.nps.gov/gaar/index.htm>; *Annual Park Ranking Report*, NAT'L PARK SERV., [https://irma.nps.gov/Stats/SSRSReports/National%20Reports/Annual%20Park%20Ranking%20Report%20\(1979%20-%20Last%20Calendar%20Year\)](https://irma.nps.gov/Stats/SSRSReports/National%20Reports/Annual%20Park%20Ranking%20Report%20(1979%20-%20Last%20Calendar%20Year)) (last visited July 2, 2015).

8. *State and County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12/12086.html> (last visited July 2, 2015).

9. *Id. Denali*, NAT'L PARK SERV., <http://www.nps.gov/dena/index.htm> (last visited July 2, 2015).

10. *Cruise Facts*, MIAMI-DADE CNTY., <http://www.miamidade.gov/portmiami/cruise-facts.asp> (last visited July 2, 2015).

11. NAT'L PARK SERV., FINAL GENERAL MANAGEMENT PLAN / ENVIRONMENTAL IMPACT STATEMENT VOL. 1 6 (2015) [hereinafter 1 FINAL GMP].

12. *Id.* at 5, 11.

in various ways. Much of Biscayne National Park's waters can only be accessed by boat; on the other hand, with a boat, nearly all of the Park can be accessed. The Park has four distinct ecosystems, including mangrove shorelines, estuarine shallows, barrier islands, and coral reefs.¹³ The Park's ecosystems sustain more than 100 species targeted by recreational and commercial fisheries.¹⁴ In fact, Biscayne National Park's lucrative marine resources are what prompted Congress to protect the area in the first place.¹⁵ As a result, management of the Park and its resources plays a particularly significant role in the South Florida tourism and fishing industries.

Park management has also become highly controversial. Aside from its marine character, Biscayne National Park is unique in the National Park System for the way in which its implementing legislation dictates the relationship between the National Park Service (NPS) and the State of Florida. With respect to fishing, Congress decreed that "the waters within the park shall continue to be open to fishing in conformity with the laws of the State of Florida."¹⁶ Stated differently, the state retains jurisdiction over fishing regulation and management in the Park. For a park that is mostly underwater and whose primary natural resource is fish, this reservation is a significant concession to state power. Florida's reserved power notwithstanding, Congress simultaneously authorized the Secretary of the Interior to "designate species for which, areas and times within which, and methods by which fishing is prohibited, limited, or otherwise regulated in the interest of sound conservation to achieve the purposes for which the park was established,"¹⁷ granting the NPS the right to promulgate and enforce their own fishing regulations in the Park. Nevertheless, in waters donated by the State of Florida after establishment of the Park, fishing must be regulated in conformity with state law.

While these seemingly overlapping and contradictory mandates are confusing, Florida and the NPS have agreed in principle to manage fisheries uniformly within park waters.¹⁸ That is likely a wise approach, as fishing compliance and enforcement would be challenging for stakeholders if a multitude of marine jurisdictions in close proximity to each other had distinct regulatory requirements. On the other hand, a uniform approach forces the state and federal government into a unique partnership, with each having arguably equal bargaining power over fisheries management.

States and the federal government have been engaging in "cooperative federalism" for decades, through state implementation of federally-funded programs¹⁹ or state compliance with minimum federal standards.²⁰ In the field of

13. *Id.* at 6.

14. NAT'L PARK SERV., FISHERY MANAGEMENT PLAN: BISCAYNE NATIONAL PARK ii (2014) [hereinafter FINAL FMP].

15. *Id.*

16. 16 U.S.C. § 410gg-2(a) (2012).

17. *Id.* Biscayne National Park was established "to preserve and protect for the education, inspiration, recreation and enjoyment of present and future generations a rare combination of terrestrial, marine, and amphibious life in a tropical setting of great natural beauty." 16 U.S.C. § 410gg (2012).

18. FINAL FMP, *supra* note 14, at iii.

19. See *infra* text accompanying notes 39–45.

20. See *infra* text accompanying notes 46–47.

environmental law, cooperative federalism takes place through state-managed compliance with the Clean Air Act²¹ and Clean Water Act,²² or the development of Coastal Zone Management Plans.²³ Cooperative federalism is less common in natural resources law, which is more place dependent and therefore subject to jurisdictional and territorial divides. Cooperative federalism is especially rare in the National Park System, where responsible park management must include state and local stakeholder involvement but rarely provides so much legal authority to the state. Biscayne National Park is therefore unique for both its marine and governance characteristics.

This article explores Biscayne National Park's cooperative federalism model in order to assess whether its management paradigm provides a workable model worthy of replication in waters of the United States and around the world. Materials supporting this research include implementing legislation, state and federal regulations, management policies, inter-agency documents and communications, and direct stakeholder interviews (including consultations with federal, state, and local officials). Ultimately there are some clear drawbacks to the Biscayne National Park cooperative federalism model—namely, that dual control over fisheries management lengthens and increases the cost of the joint policy-making process. However, the synergistic effect of joint management causes NPS planning to be more integrated with local legal frameworks and more responsive to stakeholder needs. Participatory planning creates the sense of ownership from surrounding communities that is so critical to the long-term sustainability of natural resources management. Cooperative federalism in Biscayne National Park has expanded the role and influence of the Park beyond its borders, producing an overall positive outcome for stakeholders and the marine environment. The research suggests that, while Biscayne National Park may be unique geographically and politically, a similar governance model could produce similar benefits for other public waters and natural resources.

II. TRADITIONAL MODELS OF COOPERATIVE FEDERALISM

Cooperative federalism is a broad concept that concerns the relationship between federal and state or local governments in the course of exercising non-exclusive powers. As Justice O'Connor noted in *New York v. United States*,²⁴ "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases."²⁵ Justice Joseph Story initiated a line of jurisprudence addressing the state-federal relationship as far back as 1816 in *Martin v. Hunter's Lessee*,²⁶ in which Story argued that while state courts could have jurisdiction to hear matters of federal law, the federal courts

21. Clean Air Act of 1955, ch. 360, 69 Stat. 322 (codified as amended in scattered sections of 42 U.S.C.).

22. Clean Water Act of 1945, ch. 758, 62 Stat. 1155 (codified as amended in scattered sections of 33 U.S.C.).

23. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2012).

24. *New York v. United States*, 505 U.S. 144 (1992).

25. *Id.* at 155.

26. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

established by Congress retained final authority.²⁷ Subsequent cases of the Supreme Court (including, e.g., *McCullough v. Maryland*,²⁸ *Gibbons v. Ogden*,²⁹ and *Prigg v. Pennsylvania*³⁰) affirmed federal supremacy but maintained that the federal government could not force state officials to implement federal law.

Two more recent cases affirm that the federal government cannot coerce states into taking certain actions, and therefore, states retain the bargaining power that gives rise to cooperative federalism. In *New York*, the Low-Level Radioactive Waste Policy Amendments Act³¹ forced states into choosing between complying with the Act's provisions or taking title to radioactive waste. Imposing a choice between two actions, neither of which on their own could be mandated by Congress, was held unconstitutional,³² notwithstanding Justice O'Connor's concession that Congress may provide incentives to encourage state compliance and cooperation.³³ In *Printz v. United States*,³⁴ Justice Scalia concluded that interim provisions of the Brady Handgun Violence Prevention Act,³⁵ requiring state police officers to perform federal background checks, were unconstitutional on the grounds that state officers cannot be compelled to enforce federal law.³⁶ Justice Scalia wrote that the "Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."³⁷

A. The Dual Prongs of Cooperative Federalism

While federalism jurisprudence appears to suggest that the state-federal relationship is a zero-sum game—either the federal government obtains state cooperation or the state invokes some protective defense against it—the reality is that by protecting states against coercion, *New York* and *Printz* provide states with leverage with which they can negotiate participation in federal programs.³⁸ This typically happens in one of two ways. The federal government may offer grants in exchange for state participation, essentially compensating states for services rendered. Alternatively, the federal government may provide states with a choice

27. *Id.* at 330–31.

28. *McCullough v. Maryland*, 17 U.S. 316 (1819).

29. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

30. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

31. Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021e(d)(2)(C) (2012).

32. *New York v. United States*, 505 U.S. 144, 176 (O'Connor, J., writing: "a choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

33. *Id.* at 166–69.

34. *Printz v. United States*, 521 U.S. 898 (1997).

35. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–38 (1993).

36. *Printz*, 521 U.S. at 935 (Scalia, J., concluding: "we held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly.>").

37. *Id.* at 919.

38. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 858 (1998) (describing this value for states as a "New York entitlement.>").

between regulating an activity according to federal standards or allowing direct federal regulation.

Cooperative federalism derived from conditional grants gained prominence with the passage of the New Deal and subsequent proliferation of economic regulations. In *Steward Machine Company v. Davis*,³⁹ for example, Congress enacted a taxing scheme designed to induce states to adopt unemployment compensation laws.⁴⁰ The scheme was upheld as a valid exercise of the spending clause. Similarly, in *South Dakota v. Dole*,⁴¹ the National Minimum Drinking Age Act⁴² was upheld despite conditioning federal highway funding on state adoption of a federal minimum drinking age.⁴³

Conditional grant programs today are developed in a two-step lawmaking and bargaining process. The lawmaking phase includes state-federal bargaining wherein states lobby for less onerous regulatory requirements, while Congress attempts to maximize the return on investment of federal funds by ensuring that spending is in line with national interests.⁴⁴ The lawmaking phase is followed by a second bargaining process in which states leverage their protection from coercion by negotiating the terms of the conditional grants should the state opt in to the federal program.⁴⁵ In the end, the protracted negotiation process reasonably assures that whatever cooperative federalism model emerges is mutually beneficial for both the state and federal government.

Cooperative federalism can also be produced through conditional preemption. If Congress has the Commerce Clause authority to regulate private activity, it may offer states the opportunity to regulate in compliance with federal standards. If the state declines the opportunity or cannot meet compliance standards, the federal government may preempt state law and begin direct federal regulation. Here, too, there is a state-federal negotiation process during lawmaking and implementation that makes it more likely the parties will find mutually beneficial outcomes leading states to participate in the federal program.⁴⁶ Conditional preemption is advantageous for the federal government because of its limited regulatory capacity; it would not otherwise be able to implement and enforce regulatory frameworks in all fifty states. For the states, the appeal lies in the freedom to choose. As Justice O'Connor put it in *New York*:

If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government, rather than the State, bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted.

39. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

40. *Id.* at 575.

41. *South Dakota v. Dole*, 483 U.S. 203 (1987).

42. National Minimum Drinking Age Act, 23 U.S.C. § 158 (1982 ed., Supp. III).

43. *Dole*, 483 U.S. at 206.

44. See also *Hills*, *supra* note 38, at 859–60.

45. *Id.* at 860–61.

46. *Id.* at 866–67.

Where Congress encourages state regulation, rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.⁴⁷

Given the limits of federal regulatory capacities, states can leverage the threat of accepting preemption to create a model of cooperative federalism that advances both state and federal interests.

B. Cooperative Federalism in Environmental Law⁴⁸

Although present to some degree in other fields, cooperative federalism is most prevalent in the fields of environmental and natural resources law.⁴⁹ Federal statutes utilize conditional grants and conditional preemption to obtain state participation in a variety of federal regulatory programs related to environmental quality and natural resources. The most commonly understood examples of cooperative federalism in the field are environmental law frameworks that address pollution control and blend conditional preemption with conditional grants to encourage states to create state programs that meet federal compliance standards. The Clean Water Act (CWA)⁵⁰ and Clean Air Act (CAA)⁵¹ are illustrative of the cooperative federalism dynamics at play in today's regulatory environment.

The CWA declared it the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."⁵² To implement this objective, Congress uses financial incentives and the threat of preemption to obtain state participation and compliance with the Act. For example, states are allowed to create their own water pollution control plans, including state water quality standards, effluent limitations, and watercourse-specific designated uses.⁵³ If the state fails to do so, or if its standards do not meet federal minimums,⁵⁴ the Environmental Protection Agency (EPA) is authorized to do the same on behalf of the state.⁵⁵ This rarely happens, in part because

47. *New York v. United States*, 505 U.S. 144, 168.

48. For purposes of this article, the fields of environmental and natural resources law are considered separately, with environmental law concerning pollution control statutes like the CAA and CWA, and natural resources law concerning place-based or resource-based statutes like the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2012) (CZMA) or the National Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271–1287 (2012)).

49. See generally THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS (Kalyani Robbins ed., forthcoming 2016).

50. Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1387 (2012).

51. Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401–7671(q) (2012).

52. Federal Water Pollution Control Act, 33 U.S.C. § 1251(b) (2012); see also *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) (holding that "Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the states"); see generally Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10426 (2014).

53. 33 U.S.C. § 1313 (2012).

54. *Id.* § 1313(e)(3)(A).z

55. *Id.* § 1313(i)(2).

Congress provides funding for the development of pollution control programs,⁵⁶ research,⁵⁷ and construction of treatment works,⁵⁸ a major incentive for state participation. Even during federal discharge permitting states are given deference by requiring permit applicants to obtain certification from the state.⁵⁹

The CAA similarly recognized air pollution prevention and air pollution control as the primary responsibility of states and local governments,⁶⁰ and operates in much the same way as the CWA. States may create their own air pollution control scheme using a variety of legal mechanisms or pollution control strategies as long as the state complies with the ambient air quality standards established by the EPA.⁶¹ Those standards in turn are determined by the status of air quality control regions, partly designated by the state.⁶² As with the CWA, the CAA incentivizes state participation through federal funding of state pollution control programs, revocable upon noncompliance with the statute or EPA standards.⁶³ In some cases, states and local governments may even be subject to noncompliance penalties with significant punitive effect.⁶⁴ To regulate municipal, industrial, and hazardous waste, Congress enacted the Resource Conservation and Recovery Act (RCRA). Though waste disposal, historically, was an even more local vocation than air or water pollution control,⁶⁵ Congress recognized that the federal government could play a strong role in providing financial and technical assistance to states and local governments, as well as ensuring certain minimum standards were met nationwide.⁶⁶ RCRA encourages state and local cooperation in waste management, including the development of interstate compacts.⁶⁷ RCRA follows the same CWA-CAA model of allowing states to develop waste management plans in compliance with federal standards,⁶⁸ while providing funding for waste management planning,⁶⁹ research,⁷⁰ and infrastructure.⁷¹

56. *Id.* § 1256.

57. *Id.* § 1255.

58. *Id.* §§ 1281–1301.

59. *Id.* § 1341(a); *see also* PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) (maintaining Washington's right to condition state certification of a federal hydropower project on salmon protection measures).

60. 42 U.S.C. § 7401(a)(3) (2012). *But see* U. S. SENATE COMM. ON ENV'T & PUB. WORKS, MINORITY REPORT: COOPERATIVE FEDERALISM: NEGLECTING A CORNERSTONE PRINCIPLE OF THE CLEAN AIR ACT: PRESIDENT OBAMA'S EPA LEAVES STATES BEHIND (2013), http://www.epw.senate.gov/public/_cache/files/baee029a-8455-4b36-bbbd-90ab7cea91c1/cooperativefederalism.pdf.

61. 42 U.S.C. § 7407.

62. *Id.* § 7407(d).

63. *Id.* § 7405, § 7509.

64. *Id.* § 7420; *see also* Tony Barboza, *San Joaquin Valley Officials Fight with EPA over Air Quality*, L.A. TIMES (Dec. 22, 2013), <http://articles.latimes.com/2013/dec/22/local/la-me-valley-air-20131223>.

65. William Kovacs & John Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM J. ENVTL. L. 205 (1977).

66. Resource Conservation and Recovery Act, 42 U.S.C. § 6902 (2012).

67. *Id.* § 6904.

68. *Id.* § 6926.

69. *Id.* § 6947, § 6948.

70. *Id.* § 6981.

71. *Id.* § 6908.

The CWA, CAA, and RCRA form the basis for understanding environmental law cooperative federalism, which largely follows traditional models of cooperative federalism in promoting conditional grants or conditional preemption. The notable absence of a federal climate change statutory framework may be giving rise to a new model in which the national policy is driven by states implementing individual mitigation and adaptation plans, rather than state plans being driven by national policy.⁷² Nonetheless, state planning and implementation of federal standards, facilitated by federal funds, is the dominant mode of cooperative federalism for the time being. This model benefits the federal government by extending its regulatory reach beyond what it could achieve alone, while providing states with technical and financial assistance to promote development and public health.⁷³ However, the model is contingent on federal funding, on the one hand, and the credible threat of federal preemption on the other. There is evidence that fiscal austerity is limiting the extent to which the federal government can continue subsidizing state pollution control programs, while at the same time states are obtaining more and more authority for implementing national policy.⁷⁴ As a result, these environmental legal frameworks are becoming vulnerable to local politics, state budget cuts, and administrative withdrawals that make enforcement more challenging.⁷⁵ The traditional model of cooperative federalism prevalent in environmental law has been successful but might benefit from innovative partnership formulations.

C. Cooperative Federalism in Natural Resources Law

In the face of these challenges imposed on federal environmental statutes, recent scholarship has taken a renewed interest in the cooperative federalism approaches offered by the lesser known statutes regulating natural resources. Some bear a resemblance to the CWA and CAA model. The Surface Mining Control and Reclamation Act,⁷⁶ for example, provides assistance to states developing coal mining regulations (subject to minimum federal standards) and provides exclusive jurisdiction to the state upon federal approval of state regulations.⁷⁷ Natural resources are in their nature place-based, however, and this distinction has given rise to new models of cooperative federalism. The principle of subsidiarity—well-known for its place in European Union law but also prevalent in natural resources management—

72. See generally Vivian E. Thomson & Vicki Arroyo, *Upside-Down Cooperative Federalism: Climate Change Policymaking and the States*, 29 VA. ENVTL. L.J. 1 (2011) (proposing a bottom-up approach to state-federal cooperation on climate change).

73. See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 287–88 (1997).

74. Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 17–18 (2010).

75. *Id.* 16–27.

76. 30 U.S.C. §§ 1201–1328 (2012).

77. *Id.* §§ 1253, 1295; see also Katie M. Sweeney & Sherrie A. Armstrong, *Cooperative Federalism in Environmental Law: A Growing Role for Industry*, http://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2013/10/21st_fall_conference/conference_materials/17-sweeney_katie-paper.authcheckdam.pdf (arguing that the regulated community is playing an increasingly large role in state-federal regulatory programs).

suggests that governance should take place at the lowest appropriate governance level in order to utilize local knowledge, increase stakeholder participation, diversify vulnerabilities and increase resilience.⁷⁸ These benefits have led to an increase in decentralized natural resources governance frameworks.⁷⁹ However, the property clause⁸⁰ of the U.S. Constitution makes it unlikely the federal government would cede exclusive control of federally-owned natural resources to state or local governments.⁸¹ As a result, natural resource statutes and resource-specific legislation incorporate state government participation in a variety of ways.

The Coastal Zone Management Act (CZMA)⁸² provides technical and financial assistance to states for the development and implementation of coastal zone management plans that protect and develop the natural, commercial, recreational, ecological, industrial, and aesthetic resources of coastal zones.⁸³ Unlike the CWA and CAA, however, the federal government does not induce participation by threatening federal preemption. If a state chooses not to participate, it only foregoes the benefits offered by the statute. However, those benefits are significant, consisting of federal funding of state programming as well as the federal deference provided to state plans. Before any activity with the potential to affect the coastal zone is authorized or funded by a federal agency, it must be deemed consistent with the state's coastal zone management plan.⁸⁴ This consistency requirement gives states leverage to bargain for mitigation actions or activities in line with the state interest, or to block projects altogether.⁸⁵ Of the 35 states with coastal zones, 34 are participants in the Coastal Zone Management Program.⁸⁶

78. See Ryan Stoa, *Subsidiarity in Principle: Decentralization of Water Resources Management*, 10 *UTRECHT L. REV.* 31, 34 (2014) (“[T]he advantages of decentralized environmental management are numerous. Among them: community actors have local knowledge of ecological processes and human behavior; the inclusion of trustworthy actors and the exclusion of untrustworthy actors is facilitated by community-level awareness and dynamics; local actors are more acutely aware of changes in ecological processes; local actors are more capable of adopting rules and regulations that reflect local realities; rules and regulations adopted locally are seen as more legitimate and less likely to be violated; and because multiple sub-regions are developing their own unique regulatory systems, diversification is more likely to withstand natural disasters and environmental change, making region-wide failure unlikely.”).

79. *Id.*

80. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

81. See also Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 *N.Y.U. ENVTL. L.J.* 179, 193–94 (2005) (proposing that the property clause provides a stronger basis for federal control of natural resources than the Commerce Clause, but noting the historical importance of the Sagebrush Rebellion in instilling principles of decentralization in federal administration of natural resources).

82. 16 U.S.C. §§ 1451–1466 (2012).

83. *Id.* § 1451, § 1455.

84. *Id.* § 1456.

85. See, e.g., *Connecticut v. U. S. Dept. of Commerce*, No. 3:04cv1271 (SRU), 2007 U.S. Dist. LEXIS 59320, 2007 WL 2349894 (D. Conn. Aug. 15, 2007) (setting aside the Secretary of Commerce's overturning of Connecticut's consistency objection).

86. Alaska Coastal Management Program Withdrawal From the National Coastal Management Program Under the Coastal Zone Management Act (CZMA), 76 *Fed. Reg.* 39, 857–58 (July 7, 2011) (Alaska is the only state that does not participate after its coastal zone management plan expired in 2011 and a new or renewed plan could not be agreed upon by state officials.).

Many other statutes promise states a role or voice in the process of administering federal natural resources. The Magnuson-Stevens Act,⁸⁷ which regulates fisheries in federal waters, allows states to regulate fishing vessels outside the boundaries of state jurisdiction under certain circumstances, as long as state regulations do not conflict with federally approved fishery management plans.⁸⁸ Fishery management plans are developed by regional fishery management councils, largely composed of state officials or state appointees.⁸⁹ The Federal Land Policy Management Act,⁹⁰ as well as the National Forest Management Act,⁹¹ require the Bureau of Land Management and Department of Agriculture, respectively, to develop land use plans in collaboration with state and local officials.⁹² Even the Endangered Species Act⁹³ involves state and local governments by requiring incidental take permits to be issued following completion of a habitat conservation plan, the development of which requires stakeholder engagement and collaboration to effectively protect the endangered species in question.⁹⁴

Laws regulating the National Park System, including the NPS Organic Act⁹⁵ and site-specific statutes, attempt to balance the dual objectives of conservation and enjoyment of the national parks,⁹⁶ both of which require state-federal cooperation to some degree. Federally-protected lands like national parks do not exist in a vacuum; they sit alongside state and tribal lands with human and natural activities that affect federal property and natural resources. Therefore, any responsible management planning process engages and involves local governments and community stakeholders.⁹⁷ In some cases, such as the St. Croix Scenic Coalition in Minnesota

87. Fishery Conservation and Management Act (Magnuson-Stevens), Pub. L. 94-265, 90 Stat. 331 (1976) (codified as amended in scattered sections of 16 U.S.C.).

88. *Id.* § 1856 (The reach of state law is otherwise limited outside of state waters.). *See, e.g., in re Oil Spill*, 808 F. Supp. 2d 943 (E. D. La. 2011) (dismissing state common law claims for injuries in federal waters on the grounds that state law is preempted by federal maritime law and the Oil Pollution Act).

89. 16 U.S.C. § 1852 (2012).

90. 43 U.S.C. §§ 1701–1787 (2012).

91. 16 U.S.C. § 1600–1687 (2012).

92. *See also* Fischman, *supra* note 81, at 200.

93. 16 U.S.C. §§ 1351–1544 (2012).

94. *Id.* at § 1539. *See also* Fischman, *supra* note 81, at 197 (citing examples from San Diego and the lower Colorado River).

95. 16 U.S.C. § 1 (2012), *repealed by* Act effective Dec. 19, 2014, Pub. L. 113-287, § 7, 128 Stat. 3272.

96. 54 U.S.C.A. § 100101 (West 2014) (The “fundamental purpose” of the national parks (“System units”) is “to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”). *See also* Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851 (2009).

97. *See* JACQUELYN L. TUXILL ET AL., NAT’L PARK SERV., STRONGER TOGETHER: A MANUAL ON THE PRINCIPLES AND PRACTICES OF CIVIC ENGAGEMENT (2009) (for an overview of NPS best practices on stakeholder engagement); *see also* STEPHANIE L. TUXILL & JACQUELYN L. TUXILL, NAT’L PARK SERV., LEARNING TO BE BETTER NEIGHBORS: CASE STUDIES IN CIVIC ENGAGEMENT BETWEEN NATIONAL PARKS AND NEIGHBORING COMMUNITIES (2007). *But see* Simon B. Burse, *Wild Rivers and the Boundaries of Cooperative Federalism: The Wild and Scenic Rivers Act and the Allagash Wilderness Waterway*, 35 B.C. ENVTL. AFF. L. REV. 77 (2008) (describing conflicts between the federal government and state agencies that may arise despite otherwise sound stakeholder engagement).

and Wisconsin or the Tomales Bay Watershed Council in California, federal partnerships with state and local actors have been institutionalized to strengthen cooperation.⁹⁸

In cases where the dual mandates of conservation and enjoyment conflict, cooperative federalism plays an intriguing role. There is evidence that when the NPS prioritizes conservation over enjoyment, it does so in part because a multitude of environmental statutes impose additional regulations on park management that tilt in favor of conservation measures.⁹⁹ Many of these statutes, such as the CAA, CWA, and ESA, are administered according to cooperative federalism models as described above.¹⁰⁰ Perhaps in response to the trend toward prioritizing conservation, national park statutes occasionally amend enabling legislation to proscribe site-specific models of cooperative federalism that typically favor enjoyment opportunities.¹⁰¹ In the case of the Yukon Charley National Preserve, for example, the model was amended to remove the NPS' authority to regulate boating on waters within the preserve.¹⁰² In most other cases the NPS retains broad jurisdictional authorities, but remains tempered by the cooperative federalism dynamics inherent in park management and statutory compliance.

Traditional models of cooperative federalism, employing conditional grants, conditional preemption, or some mix of both, rose to prominence with the New Deal, and continue to feature prominently in the state-federal relationship.¹⁰³ Federal pollution control statutes, like the CWA, CAA, and RCRA, establish minimum national standards and a basic regulatory framework for pollution control that are complemented by federal funds for state programming and implementation. This model has worked well in part because decentralized governance is better suited to take advantage of local geographies and expertise, engage stakeholders, and foster innovation by allowing jurisdictions to experiment and adapt tailored programs.¹⁰⁴ Diversifying implementation ensures that the nation as a whole is less vulnerable to environmental shocks. However, even as these environmental laws were being passed in the 1970s, the drawbacks of traditional cooperative federalism models were apparent.¹⁰⁵ Vesting authority for regulation among 50 states may create a deregulatory incentive to attract investment; the federal government may not have the capacity to make good on its threat of preemption or federal funds may not be

98. TUXILL & TUXILL, *supra* note 97, at 15–21.

99. See John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 864–65 (2015).

100. See *supra* pp. 8–10.

101. Nagle, *supra* note 99, at 865–866.

102. *Id.* at 918–919. See *id.* at 909–922 (for additional examples from the Cape Hatteras National Recreational Seashore and the Fort Vancouver National Historic Site).

103. See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

104. Stoa, *supra* note 78, at 34.

105. See, e.g., Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977). Critiques of cooperative federalism continue to this day. See, e.g., Henry N. Butler & Nathaniel J. Harris, *Sue, Settle and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579 (2013); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutilation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006).

sufficient to grease the wheels of the statutory machine.¹⁰⁶ As a result, scholars have taken a renewed interest in alternative models of cooperative federalism that offer additional tools or improved management paradigms.¹⁰⁷ The next section introduces one such alternative, found in the governance framework of Biscayne National Park.

III. THE BISCAYNE NATIONAL PARK MODEL OF COOPERATIVE FEDERALISM

Humans have been reliant on South Florida's natural resources for roughly 14,000 years.¹⁰⁸ By the time Ponce de León made contact with the Tequesta tribe on the shores of Biscayne Bay in 1513,¹⁰⁹ he found a people that had largely abandoned agriculture, preferring instead the vast resources provided by the sea.¹¹⁰ Skilled in canoeing and fishing, the Tequesta established few settlements, moving between the coasts, barrier islands, and Florida Keys to harness the region's fisheries.¹¹¹ In 1598 the Spanish governor of Florida remarked that the Tequesta had fish "as plenty as they please."¹¹² Since as far back as recorded history goes, fishing has been the backbone of human life in Southeast Florida.

Today the land that is now Miami looks nothing like it did during Tequesta times,¹¹³ but the marine resources of what is now Biscayne National Park still hold the diverse fish species that sustained life for the Tequesta. Over 600 fish species have been observed in the Park,¹¹⁴ more than 100 of which are targeted by the commercial and recreational fishing industries.¹¹⁵ The spiny lobster fishery alone (most of which comes from South Florida) provides \$23 million in commercial and

106. Reisinger et al., *supra* note 74, at 23–24.

107. See generally Douglas Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047 (2013); Fischman, *supra* note 81; Elizabeth Burleson, *Cooperative Federalism and Hydraulic Fracturing: A Human Right to a Clean Environment*, 22 CORNELL J.L. & PUB. POL'Y 289 (2012).

108. TOMMY RODRIGUEZ, VISIONS OF THE EVERGLADES 19 (2011).

109. ROBERT E. MCNICOLL, THE CALOOSA VILLAGE TEQUESTA: A MIAMI OF THE SIXTEENTH CENTURY 12 (1941).

110. Daniel F. Austin, *The Glades Indians and the Plants They Used: Ethnobotany of an Extinct Culture*, THE PALMETTO, Summer/Fall 1997, at 7.

111. McNicoll, *supra* note 109, at 17.

112. *Id.* Lopez de Velasco's account notes that the Tequesta were adept at hunting marine mammals as well: "In winter all the Indians go out to sea in their canoes to hunt for sea cows. One of their number carries three stakes fastened to his girdle, and a rope on his arm. When he discovers a sea cow, he throws a rope around its neck, and as the animal sinks under the water, the Indian drives a stake through one of its nostrils, and no matter how much it may dive, the Indian never loses it, because he goes on its back. After it has been killed they cut open its head and take out two large bones, which they place in the coffins with the bodies of the dead and worship them." *Id.* at 18.

113. The only physical remains of the Tequesta are located in downtown Miami at the mouth of the Miami River, a site now called the Miami Circle. *Miami Circle*, FLA. DEP'T OF STATE, <http://info.flheritage.com/miami-circle/> (last visited July 7, 2015). The discovery of Tequesta remains has ignited debate about the value of preservation in the face of downtown economic development. See Matt Smith & Justin Lear, *Questions of Preservation After Ancient Village Found in Downtown Miami*, CNN, <http://www.cnn.com/2014/02/04/us/florida-indian-village> (last updated Feb. 5, 2014).

114. *Biscayne Fish*, NAT'L PARK SERV., <http://www.nps.gov/bisc/learn/nature/fish.htm> (last visited July 7, 2015).

115. FINAL FMP, *supra* note 14, at ii.

\$24 million in recreational economic output annually.¹¹⁶ While Southeast Florida has evolved into an urban metropolis, the waters of Biscayne National Park continue to provide the same resource that civilizations in the region have relied upon for thousands of years: fish.

That Biscayne National Park's implementing legislation carves out a special role for the state of Florida to regulate fishing in the park is not a modest concession. Fish are the most significant resource over which a polity may have jurisdiction in these waters. As explained further below, the importance of fisheries management in the Park gave rise to a dual management planning process: one process for developing a fishery management plan, and another for developing a general management plan.¹¹⁷ Given the integral role that fisheries play in a marine park, however, one can intuit fairly quickly that a parallel planning process will be vulnerable to overlap, conflict, or inconsistency. Negotiating these processes and their respective roles has been challenging for the state and local stakeholders, as well as the NPS. What has emerged is a cooperative federalism model with checks and balances triggered through legal, political, and economic mechanisms. Much of the park's management and planning has been conducted jointly between the state and federal government, but dueling interests have brought to light underlying tensions. This section presents the Biscayne National Park model of cooperative federalism. The enabling legislation provides a starting point for the model's statutory framework, but the legal, political, and economic checks and balances are what conspire to create the delicate balance between the state and federal government that is in place today.

A. Statutory Origins

The land and waters of Biscayne National Park have been of interest to developers since the early 1900s. For much of the early twentieth century, the keys of Biscayne Bay were used primarily for growing pineapple and lime.¹¹⁸ In the 1910s, however, Adam's Key was purchased by Carl Fischer, the entrepreneur who had successfully established and sold Miami Beach.¹¹⁹ Fischer envisioned the same for the keys of Biscayne Bay, starting with the construction of a resort and casino called the Cocolobo.¹²⁰ The resort catered to the rich and well-connected, including US Presidents Harding, Hoover, Kennedy, Johnson, and Nixon, as well as industrial families like the Vanderbilts, Firestones, Hertz, Honeywells, and Hoovers.¹²¹ When the Everglades National Park was being developed, some proposed including

116. Bryan Fluech & Lisa Krinsky, *Florida's Spiny Lobster Fishery: A History of User Conflict*, UNIV. OF FL. INST. OF FOOD AND AGRIC. SCI., http://Miami-dade.ifas.ufl.edu/environment/documents/seafood/Spiny_Lobster_Fact_Sheet.pdf (last visited July 7, 2015).

117. See *infra* notes 151–153.

118. Susan Shumaker, *Untold Stories From America's National Parks: Israel Lafayette "Parson" Jones, Sir Lancelot Jones, and Biscayne National Park*, PUB. BROAD. CORP., <http://www-tc.pbs.org/nationalparks/media/pdfs/tnp-abi-untold-stories-pt-03-jones.pdf> at 51–56 (2006).

119. *Id.* at 57.

120. *Id.*

121. *Id.* at 59–61.

Biscayne Bay and its keys in the Park's boundaries, but the proposals were eventually dropped and the bay remained unprotected and relatively undeveloped.¹²²

After World War II, landowners and developers took a renewed interest in the recreational and industrial potential of Biscayne Bay. A town named Islandia was incorporated in 1961 for the purposes of connecting the bay's island chains and lobbying for a causeway connecting the islands to the mainland.¹²³ In the meantime, a large industrial seaport was proposed for construction on the shores of the bay, with a corresponding channel to be cut through the bay's waters.¹²⁴ A power utility began construction on a power plant near the bay that now contains nuclear reactors and has the sixth highest electricity generation capacity in the United States.¹²⁵ Opponents of the proposed developments were initially outnumbered, but the movement to protect Biscayne Bay started gaining momentum as key supporters lent their support. The local chapter of the Izaak Walton League, editors of the Miami Herald, Florida's area Congressman and Governor, and entrepreneur Herbert Hoover, Jr., whose childhood affection for the area inspired him to underwrite the campaign, eventually turned the tide toward preservation.¹²⁶ Public Law 90-606 was signed by President Johnson in 1968, creating Biscayne National Monument to protect the "rare combination of terrestrial, marine, and amphibious life in a tropical setting of great natural beauty."¹²⁷

The conflicting values of industrial and residential development on the one hand, and conservation on the other hand, overshadowed the seemingly benign role that commercial and recreational fishing played in the area. Nonetheless, the authority to regulate fishing is a prominent feature of the enabling legislation. With respect to fishing, Congress decreed that "the waters within the park shall continue to be open to fishing in conformity with the laws of the State of Florida."¹²⁸ In other words, the state retained jurisdiction over fishing regulation and management in the

122. MICHAEL GRUNWALD, *THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE* 214 (1st ed. 2006).

123. Lizette Alvarez, *A Florida City That Never Was*, N.Y. TIMES (Feb. 8, 2012), http://www.nytimes.com/2012/02/08/us/islandia-a-florida-city-that-never-was.html?_r=1. See also LLOYD MILLER, *BISCAYNE NATIONAL PARK: IT ALMOST WASN'T* 17 (2008).

124. Shumaker, *supra* note 118, at 62.

125. The site contains two oil-fired generation units, one gas-fired generation unit, and two nuclear reactors. The power utility received approval to build an additional two nuclear reactors. See *Electricity in the United States*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states#tab3 (last updated Apr. 29, 2015); Jenny Staletovich, *Turkey Point Reactor Hearings Pit Jobs Against Water*, MIAMI HERALD (Apr. 24, 2015), <http://www.miamiherald.com/news/local/environment/article19425015.html>; Jenny Staletovich, *State Eases Oversight of Turkey Point Cooling Canals*, MIAMI HERALD (Jan. 16, 2015), <http://www.miamiherald.com/news/local/community/miami-dade/article7053941.html>. See also U.S. NUCLEAR REGULATORY COMM., OFFICE OF NEW REACTORS, ENVIRONMENTAL IMPACT STATEMENT FOR COMBINED LICENSES (COLS) FOR TURKEY POINT NUCLEAR PLANT UNITS 6 & 7: DRAFT REPORT FOR COMMENT (2015), available at <http://pbadupws.nrc.gov/docs/ML1505/ML15055A103.pdf>.

126. *The Birth of Biscayne National Park*, NAT'L PARK SERV., <http://www.nps.gov/bisc/learn/history/culture/the-birth-of-biscayne-national-park.htm> (last visited on Jul. 7, 2015); Alvarez, *supra* note 123; Shumaker, *supra* note 118, at 62–63.

127. Act of Oct. 18, 1968, Pub. L. No. 90-606, § 1, 82 Stat 1188 (authorizing the establishment of Biscayne National Monument).

128. 16 U.S.C. § 410gg-2 (2012).

park. The reserved power notwithstanding, Congress simultaneously authorized the Secretary of the Interior to “designate species for which, areas and times within which, and methods by which fishing is prohibited, limited, or otherwise regulated in the interest of sound conservation to achieve the purposes for which the park was established,”¹²⁹ giving the NPS the ability to impose their own more stringent fishing regulations in the park.

It is not clear how Congress intended the state and NPS to reconcile these overlapping mandates. The legislative history suggests a battle never arose between the state, federal government, and fishing interests in part because the Department of the Interior conceded fishing regulation to the state at the outset, declaring the department’s intention to “continue commercial and sport fishing for designated species in conformity with State laws and regulations and regulations of this Department designed to protect natural conditions and to prevent damage to marine life and formations.”¹³⁰ Contextually, it may have been unremarkable that the State of Florida retained the power to regulate fisheries in the monument. The Submerged Lands Act had given states broad jurisdiction to the ocean and its resources up to three miles from their coasts in 1953,¹³¹ and federal attempts to manage fisheries did not emerge until the Fishery Conservation and Management Act in 1976.¹³² As a consequence, states in 1968 had more developed capacities to regulate fisheries in their waters than the federal government. The designation of federally-protected marine sanctuaries and marine monuments was also in its infancy; Biscayne National Monument was established before the National Marine Sanctuaries Program was created in 1972.¹³³

Even federal courts were deferential to the constitutionally-protected sovereignty of states to regulate fishing. In *Corsa v. Tawes*,¹³⁴ a case decided in 1957 upholding Maryland fisheries regulations, the court wrote that since 1891:¹³⁵

it has been beyond dispute that in the absence of conflicting Congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states. . . . [T]he same Constitution which puts interstate commerce under the protection of Congress, recognizes the

129. *Id.* Biscayne National Park was established “to preserve and protect for the education, inspiration, recreation and enjoyment of present and future generations a rare combination of terrestrial, marine, and amphibious life in a tropical setting of great natural beauty.” Pub. L. No. 90–606, § 1, 82 Stat. 1188 (1968).

130. S. REP. NO. 90-1597, 90th Cong., 2d Sess. 7 (1968).

131. 43 U.S.C. § 1312 (2012) (bounds of seaward States extend three miles from coastline). *See also* *United States v. States of La., Tex., Miss., Ala. and Fla.*, 363 U.S. 121 (1960) and *United States v. Florida*, 420 U.S. 531 (1975) (two Supreme Court cases adjudicating Florida’s Gulf of Mexico and Atlantic Ocean boundaries).

132. Fishery Conservation and Management Act (Magnuson-Stevens), Pub. L. 94-265, 90 Stat. 331 (1976) (codified as amended in scattered sections of 16 U.S.C.).

133. *National Marine Sanctuaries: Legislation*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://sanctuaries.noaa.gov/about/legislation/> (last updated Oct. 5, 2015).

134. *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957).

135. *Citing Manchester v. Massachusetts*, 139 U.S. 240 (1891).

sovereignty of the states in local regulation for the protection of their natural resources.¹³⁶

Meanwhile, a definitive interpretation of the NPS Organic Act's dueling mandates between conservation and enjoyment did not exist in 1968 and still does not exist to this day.¹³⁷ The federal government's broad powers to regulate on federal lands without interference from the states was emerging, but the definitive statement provided by *Kleppe v. New Mexico* came after-the-fact in 1976.¹³⁸

Absent direction from other federal statutes or judicial decisions, the state-federal cooperative management of fisheries provisions were dictated by political compromise. The State of Florida retained an interest in regulating fisheries, while the NPS was beholden to its mission to achieve sound conservation. The federal government could not establish the monument without a title transfer from Florida, giving the state leverage to maintain a role in fisheries management.¹³⁹ The bill itself may not have been passed without the support of state and local officials with an interest in protecting the fishing industry.¹⁴⁰ Title to the state lands and waters designated for the Park were eventually vested with the federal government in 1975, but without mention of regulatory authority over fishing.¹⁴¹

In 1980 Biscayne National Monument was expanded and became Biscayne National Park.¹⁴² The designation included the same language balancing state and federal authority over fisheries,¹⁴³ but added the following proviso: "[p]rovided, that with respect to lands donated by the State after the effective date of this subchapter, fishing shall be in conformance with State law."¹⁴⁴ In 1985 Florida proceeded to

136. *Corsa*, 149 F. Supp. at 773–76.

137. Nagle, *supra* note 99, at 873; Antolini, *supra* note 96, at 857.

138. *Kleppe v. New Mexico*, 426 U.S. 529, 542–43 (1976) (stating that “while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State’s consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress’ powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.”).

139. Biscayne National Monument Establishment, Pub. L. No. 90-606, § 3, 82 Stat. 1188, 1189 (1968) (“Notwithstanding any other provision of this Act, lands and interests in land owned by the State of Florida or Dade County may be acquired solely by donation, and the Secretary shall not declare the Biscayne National Monument established until the State has transferred or agreed to transfer to the United States its right, title and interest in and to its lands within the boundaries of said national monument.”)

140. See Shumaker, *supra* note 118, at 63 (noting that Herbert Hoover, Jr. financed much of the campaign to protect Biscayne Bay, and spent his youth fishing in the area). Said one fishing guide of Hoover, Jr.’s father, President Herbert Hoover, “I fished with Herbert Hoover. He liked to fish between November and April. He fished with me for over seven years in the 1940s.” *Id.* at 60.

141. FINAL FMP, *supra* note 14, at 207. In 1974 the Park was expanded as well, again without mention of regulatory authority over fishing. *Id.*

142. 16 U.S.C. § 410gg-2 (2012).

143. *Id.* (“The waters within the park shall continue to be open to fishing in conformity with the laws of the State of Florida except as the Secretary, after consultation with appropriate officials of said State, designates species for which, areas and times within which, and methods by which fishing is prohibited, limited, or otherwise regulated in the interest of sound conservation to achieve the purposes for which the park is established.”).

144. *Id.*

dedicate over 72,000 acres to the Park, and to reinforce its exclusive jurisdiction over fisheries regulation, the dedication stated: “[a]ll rights to fish on the waters *shall be retained and not transferred* to the United States and fishing on the waters shall be subject to the Laws of the State of Florida.”¹⁴⁵ Therefore, it appears that both the state and federal government have authority to regulate fishing in the Park’s original (monument) borders, while the rest of the Park’s fisheries are regulated by the state. The NPS interprets the state and federal powers over fishing in substantially similar terms.¹⁴⁶

B. Dual (and Dueling) Management Plans

In practice, commercial and recreational fishing throughout the 1990s was regulated primarily by Florida regulations and, to a lesser degree, the Park’s 1983 General Management Plan (GMP).¹⁴⁷ Following the decline of sponge populations in the park, for example, the state prohibited sponge harvesting in 1991.¹⁴⁸ A 2001 study finding fish stocks in the Park to be overfished,¹⁴⁹ as well as a general increase in commercial and recreational fishing prompted the NPS to initiate a joint fishery management planning process.¹⁵⁰ The NPS and the Florida Fish and Wildlife Conservation Commission (FWC)¹⁵¹ signed a Memorandum of Understanding (MOU) in 2002 to jointly work towards the establishment of a Fishery Management Plan (FMP).¹⁵² Around the same time, the NPS initiated a general management planning process that would replace the 1983 GMP.¹⁵³ After years of deferring to the state on fishery management, the federal government would finally attempt to assert its authority.

Legislation establishing the Park and its cooperative federalism arrangement for fishery management is both succinct and ambiguous. The legislation clearly outlines a role for state law in regulating fishing, but simultaneously authorizes federal regulatory authority without articulating how these concurrent powers are intended to co-exist.¹⁵⁴ It is equally unclear as to what extent the state can be involved in the broader management of the Park. An express authorization to regulate fishing may imply that other management issues are implicitly reserved for

145. FINAL FMP, *supra* note 14, at 208.

146. *Id.* at 2–3 (“[I]n terms of management, Biscayne National Park can be divided into two zones: a) the original monument zone, in which fishing regulations follow State regulations, with the opportunity for the Secretary of the Interior to enforce additional regulations as deemed necessary, and b) the expansion zone, in which fishing regulations are fully consistent with regulations implemented by the State of Florida.”) 1 FINAL GMP, *supra* note 11, at 12 (containing similar language).

147. FINAL FMP, *supra* note 14, at 4.

148. *Id.*

149. T.R. Ault, J.E. Cole, M.N. Evans & H. Barnett, *A New Synthesis of Coral Records to Evaluate Spatiotemporal Characteristics of Tropical Decadal Variability*, Univ. of Ariz., Dep’t of Geosciences Lab. of Tree Ring Research (2001).

150. FINAL FMP, *supra* note 14, at 5–8.

151. FLA. CONST. ART. IV, § 9 (Authorized by Florida statute to regulate freshwater aquatic life, wild animal life, and marine life in Florida, including the areas encompassed by the Park).

152. FINAL FMP, *supra* note 14, at 217–19.

153. 1 FINAL GMP, *supra* note 11, at 4 (citing scoping meetings in 2001, 2003, and 2009).

154. 16 U.S.C. § 410gg-2 (2012); FINAL FMP, *supra* note 14, at 2–3, 208.

the federal government, but regulating fisheries in a marine environment will necessarily raise broader park management concerns, including coral reef restoration, species protection, boater traffic, recreational diving, and enforcement priorities. The NPS approach to resolving these overlaps was to create two management planning processes: one for fishery management and another for general management. As evidenced by the 2002 MoU, the NPS understood the FWC as having a significant, if not co-equal, role to play in the fishery management process, citing the FWC's "crucial role in implementing and promulgating new regulations . . . for the management of fisheries within the boundaries of the Park,"¹⁵⁵ and promising to coordinate and consult with the FWC on matters of fishery management with the ultimate goal of jointly producing a Fishery Management Plan.¹⁵⁶

Inter-agency letters during this time suggest the federal government did not see a similar role for the state in the general management planning process. Initial contact was limited to consultations required by law. For example, the NPS consulted with the National Marine Fisheries Service, US Fish and Wildlife Service, and the FWC regarding endangered species protections and essential fish habitats,¹⁵⁷ with state and local agencies regarding historic preservation,¹⁵⁸ and with American Indian tribes regarding traditional interests in the Park.¹⁵⁹ After several years, some state agencies were invited to comment on an early draft of the new GMP,¹⁶⁰ the FWC not among them.¹⁶¹ The NPS has since explained its reasoning by maintaining that fishery management is not addressed by the GMP, and presumably, the general management planning process.¹⁶² Taken together, the administrative record suggests

155. FINAL FMP, *supra* note 14, at 220, (Art. III(A)(2)).

156. *Id.* at 220–22, (Art. III(A)(1) to (13)).

157. As required by the Endangered Species Act of 1973, Pub. L. No. 93-205 at 102-251, 56 Stat. § 1354 (1976); Fishery Conservation and Management Act (Magnuson-Stevens), Pub. L. 94-265, 90 Stat. 331 (1976) (codified as amended in scattered sections of 16 U.S.C.); Endangered and Threatened Species Act, FL. STAT. ANN. § 379.2291-231 (West 2014).

158. As required by section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470, § 106 (1992).

159. NAT'L PARK SERV., FINAL GENERAL MANAGEMENT PLAN / ENVIRONMENTAL IMPACT STATEMENT VOL. 2, at 62 (2015) [hereinafter 2 FINAL GMP].

160. These included the Division of Recreation and Parks within the Florida Department of Environmental Protection, the South Florida Regional Planning Council, and managers of Florida's Biscayne Bay Aquatic Preserve. *See* 2 FINAL GMP, *supra* note 159, at 186–92 (Letters from Lew Scruggs, Planning Manager, Fla. Dep't of Env'tl. Protection to Margaret DeLaura, National Park Service (Feb. 04, 2004); to Margaret DeLaura from Allyn L. Childress, Senior Planner, S. Fla. Reg'l Planning Council (Feb. 03, 2004); and from Marsha Colbert, Biscayne Bay Aquatic Preserve Manager to Linda Canzanelli, Superintendent, Biscayne Bay Nat'l Park (Feb. 06, 2004)).

161. The GMP's description of the consultation process with the FWC shows a lack of communication between 2000 and 2011. *See* 2 FINAL GMP, *supra* note 159, at 13.

162. The NPS repeatedly asserts that fishery management is addressed by the FMP, not the GMP. *See* 1 FINAL GMP, *supra* note 11, at 26–27, 44 ("many topics, such as fishery management, everglades restoration, and coral reef interagency management, are addressed in other park planning or in interagency planning and so are not specifically addressed in this general management plan but are included by reference"; "Because the Fishery Management Plan addresses future management of commercial fishing park wide, the National Park Service has determined that any regulatory and policy processes relevant to the parkwide phase-out of commercial fishing at the park is not addressed in the general management plan. The impacts of these proposed changes are assessed in the Fishery Management Plan"; "The state

the federal government interpreted its cooperative federalism relationship with the state to require a relatively co-equal partnership with regard to fishery management, contrasted by a nearly exclusive authority to manage park issues not pertaining to fisheries.¹⁶³ For its part, the state appears to have taken a similar view. The FWC worked closely with the NPS to develop the FMP,¹⁶⁴ while state involvement in, or attention to, general management planning in the early years of the process was limited to the modest consultation and review described above.¹⁶⁵

At the outset of the dual (and concurrent) planning process, neither the state nor the federal government appears to have raised concerns that extricating fishery management from general management would be a difficult, if not impossible, task. Once initiated, however, stakeholders became confused by the concurrent planning processes and unsure of where to focus their attention.¹⁶⁶ As a result, the general management planning process was put on hold so that the state and federal government could focus on the FMP.¹⁶⁷ To that end, a working group was established to provide recommendations to the NPS and FWC on the policies or activities necessary to achieve the desired outcomes of fishery management in the Park.¹⁶⁸

The central point of contention during the working group meetings and throughout the fishery management planning process was the potential use of marine reserve zones in which commercial and recreational fishing would be prohibited.¹⁶⁹ The 2002 MoU anticipated this conflict by agreeing to pursue the “least restrictive management actions” and ruling out the use of no-take zones by the FWC, while reserving the NPS’s right to consider such zones for means other than fishery management.¹⁷⁰ The working group’s recommendations included many provisions that were included in the final FMP, including a phase-out permit system for

manages fishing activities in the park. The issue of overfishing is addressed in the park’s Fishery Management Plan, which was developed in consultation with the state”).

163. Subject to other “special mandates and administrative commitments.” *See id.* at 11–16.

164. *See, e.g., supra* note 152 (MOU); Recommendations of the Working Group on the FMP; FINAL FMP, *supra* note 14, at 228.

165. *See supra* text accompanying notes 155–159.

166. Telephone Interview with Jessica McCawley, Marine Fisheries Management Director, Florida Fish and Wildlife Conservation Commission (June 1, 2015).

167. The existence of the 1983 General Management Plan, while outdated, may have been a factor in deciding to address the fishery management planning process first. *Id.* The Final FMP appears to corroborate this account, describing an initial round of activity from 2001–2003, after which no activity took place until 2009. FINAL FMP, *supra* note 14, at 8–10.

168. FINAL FMP, *supra* note 14, at 228.

169. McCawley, *supra* note 166.

170. The exact language of the provision is as follows: “FWC and the park agree to seek the least restrictive management actions necessary to fully achieve mutual management goals for the fishery resources of the park and adjoining areas. Furthermore, both parties recognize the FWC’s belief that marine reserves (no-take areas) are overly restrictive and that less-restrictive management measures should be implemented during the duration of this MOU. Consequently, the FWC does not intend to implement a marine reserve (no-take area) in the waters of the park during the duration of this MOU, unless both parties agree it is absolutely necessary. Furthermore, the FWC and the park recognize that the park intends to consider the establishment of one or more marine reserves (no-take areas) under its General Management Planning process for purposes other than sound fisheries management in accordance with Federal authorities, management policies, directives and executive orders.” FINAL FMP, *supra* note 14, at 218–19.

commercial and recreational fishing, but ultimately did not recommend a marine reserve or no-take zone.¹⁷¹ According to stakeholders involved in the process, working group members may have adopted the final recommendations under political duress from stakeholders and local citizens which could have potentially tainted the integrity of the process.¹⁷² Even if a marine reserve had been established, it is almost certain the FWC would not have acted on the recommendations.¹⁷³ Several years later, the 2009 Draft Environmental Impact Statement (EIS) for the FMP was released to the public,¹⁷⁴ containing the proposed phase-out permit system for commercial fishing and other restrictions on recreational fishing. The Final FMP, largely unchanged from the 2009 Draft, was published in 2014.¹⁷⁵

As the fishery management planning process came to a close, the NPS reinitiated the general management planning process.¹⁷⁶ Despite having been through a decade of vigorous debate over the costs and benefits of no-take zones that led to a rejection of the marine reserves approach, as well as an acknowledgment that fishery management would be addressed solely through the fishery management planning process, the NPS's preferred alternative proposed in the 2011 Draft GMP included a marine reserve zone in which all fishing would be prohibited.¹⁷⁷ The NPS was careful in characterizing the marine reserve zone as a means to achieve coral reef restoration, scientific research, and visitor experience enhancement so as to avoid the appearance of engaging in fishery management.¹⁷⁸ This characterization is undermined, however, by the express acknowledgment that the marine reserve zone would be located within the boundaries of the original monument, within which the NPS asserted its authority to change fishing regulations.¹⁷⁹

Florida rejected the federal government's authority to establish a marine reserve zone on the grounds that it constitutes fishery management requiring state collaboration and consent. In a series of letters to the NPS, the FWC expressed frustration that it had not been involved or consulted in the general management planning process, and accused the NPS of violating the terms of the MoU by

171. *Id.* at 44, 228.

172. McCawley, *supra* note 166.

173. As it is, certain provisions of the FMP are of questionable likelihood for implementation. The elimination of the two-day lobster mini-season, for example, is a major tourist and economic event for South Florida, and it is unlikely the FWC Commissioners would vote to eliminate it. McCawley, *supra* note 166. These reservations notwithstanding, the FWC delivered two letters, one in August 2010 and another in February 2014, expressing an intent to initiate Commission rulemaking following approval of the Final FMP. FINAL FMP, *supra* note 14, at 147.

174. NAT'L PARK SERV., FISHERY MANAGEMENT PLAN/DRAFT ENVIRONMENTAL IMPACT STATEMENT ii (2008).

175. *See generally* FINAL FMP, *supra* note 14.

176. Initially, with a series of workshops in 2009 to discuss the marine use zones proposed in 2001 and 2003. 2 FINAL GMP, *supra* note 159, at 7–10.

177. NAT'L PARK SERV., Draft GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT ii at 82 (2011).

178. *Id.* at 76.

179. *Id.*

engaging in fishery management without the FWC.¹⁸⁰ The FWC concluded that “the proposed regulatory actions combined with the lack of agency coordination make it abundantly clear that the Park’s regulatory strategy is to address fisheries management issues within the context of the General Management Plan and outside of the framework of the MOU and the Fishery Management Plan.”¹⁸¹ The state went a step further in asserting its cooperative federalism rights by refusing to issue a consistency finding with the State of Florida Coastal Management Program, pursuant to its rights under the CZMA.¹⁸²

Had the finding of inconsistency been challenged,¹⁸³ it is not clear whether a court would have found the marine reserve zone to be inconsistent with the Program.¹⁸⁴ Nonetheless, the inconsistency findings, coupled with the state’s vocal

180. 2 FINAL GMP, *supra* note 159, at 197 (Letter from Nick Wiley, Executive Director, Fl. Fish and Wildlife Conservation Comm’n to Ms. Sally Mann, Director, Office of Intergovernmental Programs, Fl. Dep’t of Env’tl. Prot.).

181. *Id.*

182. 2 FINAL GMP, *supra* note 159, at 193, 233 (Letters from Nick Wiley, Executive Director, Fl. Fish and Wildlife Conservation Comm’n to Sally Mann, Director, Office of Intergovernmental Programs, Fl. Dep’t of Env’tl. Prot.); 2 FINAL GMP, *supra* note 159, at 224 (Letter from Jennifer L. Fitzwater, Chief of Staff, Fl. Dep’t of Env’tl. Prot. to Mark Lewis, Superintendent, Biscayne National Park); 2 FINAL GMP, *supra* note 159, at 272 (Letter from Carla Gaskin Mautz, Deputy Chief of Staff, Fl. Dep’t. of Env’tl. Prot. to Brian Carlstrom, Superintendent, Biscayne National Park); 2 FINAL GMP, *supra* note 159, at 275 (Letter from Nick Wiley, Executive Director, Fl. Fish and Wildlife Conservation Comm’n, to Lauren Milligan, Office of Intergovernmental Programs, Dep’t of Env’tl. Prot.).

183. Technically, the state issued a “conditional consistency” finding, outlining the modifications required to make the GMP consistent with the Florida Coastal Management Program.

184. The portions of the Florida Coastal Management Program relied on by FWC are somewhat ambiguous and could be interpreted to allow a marine reserve zone. *See, e.g.*, 2 FINAL GMP, *supra* note 159, at 193, 224, 233; *id.* at 235–236 (for letters, citing:

379.23 Federal conservation of fish and wildlife; limited jurisdiction.—

(2) The United States may exercise concurrent jurisdiction over lands so acquired and carry out the intent and purpose of the authority except that the existing laws of Florida relating to the Department of Environmental Protection or the Fish and Wildlife Conservation Commission shall prevail relating to any area under their supervision.

379.244 Crustacea, marine animals, fish; regulations; general provisions.—

(1) OWNERSHIP OF FISH, SPONGES, ETC.—All fish, shellfish, sponges, oysters, clams, and crustacea found within the rivers, creeks, canals, lakes, bayous, lagoons, bays, sounds, inlets, and other bodies of water within the jurisdiction of the state, and within the Gulf of Mexico and the Atlantic Ocean within the jurisdiction of the state, excluding all privately owned enclosed fish ponds not exceeding 150 acres, are the property of the state and may be taken and used by its citizens and persons not citizens, subject to the reservations and restrictions imposed by these statutes. No water bottoms owned by the state shall ever be sold, transferred, dedicated, or otherwise conveyed without reserving in the people the absolute right to fish thereon, except as otherwise provided in these statutes.

379.2401 Marine fisheries; policy and standards.—

(1) The Legislature hereby declares the policy of the state to be management and preservation of its renewable marine fishery resources, based upon the best available information, emphasizing protection and enhancement of the marine and estuarine environment in such a manner as to provide for optimum sustained benefits and use to all the people of this state for present and future generations.

379.2401 Marine fisheries; policy and standards.—

(3) All rules relating to saltwater fisheries adopted by the commission shall be consistent with the following standards:

opposition to the marine reserve zone, were successful in prompting the NPS to issue a Supplemental EIS in 2013 providing an additional two management alternatives, neither of which contain a full-blown no-take zone.¹⁸⁵ One alternative provided for a special recreation zone in which some type of recreational fishing would be permitted, while the other alternative proposed seasonal fishing closures.¹⁸⁶ The state supported the special recreation zone alternative, believing it could offer the same type of benefits that the FWC's terrestrial hunting permit system provides,¹⁸⁷ but withdrew its support in the face of public backlash.¹⁸⁸ It is not clear what the preferred alternative (among those proposed by the 2013 Draft GMP) of the state would have been instead, but the FWC maintained consistent opposition to a no-take marine reserve zone throughout the general management planning process.

In June 2015, the NPS released the Final GMP,¹⁸⁹ which introduced for the first time, and ultimately selected, a new alternative featuring both a marine reserve zone and various special recreation zones.¹⁹⁰ Again the NPS was deliberate in characterizing the purpose of the fishing restrictions as a mechanism to enhance the visitor experience, conduct research, and restore coral reefs, while maintaining that fishery management is a topic not addressed by the GMP.¹⁹¹ Based on the similarity in language between the 2011 Draft GMP and 2015 Final GMP, it is likely that the State of Florida will continue to object to the federal government's authority to establish a marine reserve zone outside of the fishery management planning process. It is also likely that a conditional consistency finding will be issued requiring the NPS to relax its fishing regulations, and in particular, to abandon the marine reserve zone. For its part, the NPS believes that after fifteen years of planning, dozens of stakeholder meetings, and hundreds of thousands of pieces of correspondence, the Final GMP represents the best interests of the Park and the public's potential enjoyment of it.¹⁹²

(c) Conservation and management measures shall permit reasonable means and quantities of annual harvest, consistent with maximum practicable sustainable stock abundance on a continuing basis.

185. 1 FINAL GMP, *supra* note 11, at 4–5.

186. *See id.* at 107–14 (describing Alternative 6); *see also id.* at 115–22 (describing Alternative 7).

187. McCawley, *supra* note 166; *but see* 2 FINAL GMP, *supra* note 159, at 275 (letter supporting the special recreation zone but maintaining a conditional consistency finding).

188. McCawley, *supra* note 166; *see also* 2 FINAL GMP, *supra* note 159, at 295 (letter withdrawing support and offering modifications the FWC would support).

189. NAT'L PARK SERV., BISCAYNE FINAL GENERAL MANAGEMENT PLAN NEWSLETTER (July 7, 2015), <http://www.nps.gov/bisc/learn/management/information-about-the-current-and-developing-general-management-plans.htm>.

190. 1 FINAL GMP, *supra* note 11, at 123–27.

191. *Id.* at 125, 26–27 (where the GMP states: “Because the Fishery Management Plan addresses future management of commercial fishing park wide, the National Park Service has determined that any regulatory and policy processes relevant to the park wide phase-out of commercial fishing at the park is not addressed in the general management plan.”); *but see* 1 FINAL GMP, *supra* note 11, at 24–25 (where the GMP appears to contradict itself: “Because establishment of a marine reserve zone would prohibit all commercial fishing in the zone following passage of a park special regulation, the possibility is addressed in this Final General Management Plan.”).

192. Telephone Interview with Brian Carlstrom, Superintendent, Biscayne National Park (June 4, 2015).

At the outset of the fishery and general management planning processes, it appeared that both the state and federal government were more or less in agreement on the nature of the cooperative federalism relationship—a relatively co-equal partnership with regard to fishery management, contrasted by a nearly exclusive federal authority to manage park issues not pertaining to fisheries.¹⁹³ The planning processes clarified, however, that dividing marine management between “fisheries issues” and “non-fisheries issues” is cleaner on paper than in reality. The cross-cutting nature of fisheries in a marine environment exposed an interpretational divide between the state and federal government wherein the state believes any management actions regulating fisheries must be promulgated through the fishery management planning process, while the federal government believes fishing regulations are appropriate if the purpose of the regulations is not fishery management. The cooperative federalism relationship between the NPS and the State of Florida is evolving, and with respect to the interpretational divide, remains unresolved.

IV. EVALUATING THE BISCAYNE NATIONAL PARK MODEL OF COOPERATIVE FEDERALISM

Despite an apparent conflict over the validity of the Park’s marine reserve zone, the state, federal government, and local stakeholders enjoy many less-publicized benefits of cooperative federalism. These benefits include improved coordination, enforcement, and monitoring, diversified funding sources, and a more effective stakeholder engagement strategy that makes litigation or political interference less likely. The state and federal government, as represented by the FWC and NPS, respectively, have developed a productive co-management paradigm in the Park to harness the benefits of this unique cooperative federalism arrangement, but the proposed marine reserve zone threatens to undermine the relationship and suggests the NPS may have pushed the limits of its federal powers. Political opposition to the reserve zone is mounting, and litigation may not be far behind. This section proposes political and legal hurdles the federal government may encounter in finalizing and implementing the GMP, provides direct feedback from key stakeholders on the costs and benefits of the Biscayne National Park cooperative federalism model, and concludes with some lessons learned from the model that can be applied in future state-federal natural resources management arrangements.

A. Challenging the Finality of the Final GMP

Within days of the Final GMP being released in June 2015, interest groups and politicians in South Florida expressed their displeasure with the provisions restricting fishing in the Park. U.S. congressional representatives in South Florida requested the House Committees on Natural Resources and Small Business convene a joint oversight hearing to review the impacts of the GMP on the fishing industry.¹⁹⁴ The request was co-signed by Rep. Ileana Ros-Lehtinen, whose district largely

193. See 2 FINAL GMP, *supra* note 159, at 186–92.

194. Letter from Reps. Curbelo, Ros-Lehtinen, & Diaz-Balart to House Committees on Natural Resources and Small Business (June 15, 2015) (on file with author). See also Press Release, Representative Carlos Curbelo, U.S. House of Representatives (July 10, 2015), <http://curbelo.house.gov/news/documentsingle.aspx?DocumentID=285>.

encompasses the boundaries of the national park, Rep. Carlos Curbelo, who represents the Florida Keys, and Rep. Mario Diaz-Balart, who represents a large swath of the Everglades and surrounding areas.¹⁹⁵ The FWC maintains its opposition to the marine reserve zone,¹⁹⁶ and local interest groups like the Florida Keys Commercial Fishermen's Association challenge a number of the GMP's actions and findings.¹⁹⁷ A congressional hearing was eventually held in August of 2015, in which the GMP came under attack from congressional representatives and fishing industry leaders.¹⁹⁸ In light of these concerns, it is worth considering the political or legal challenges the NPS might face in implementing the GMP and its controversial marine reserve zone.

Aside from a formal legal challenge, the political process may play a formal or informal role in shaping NPS policy. Congress has successfully altered national park management without enacting legislation in the past,¹⁹⁹ and potential oversight hearings could play such a role by signaling congressional intent to enact formal legislation loosening fishing restrictions or further restricting federal regulation of fisheries in the Park. If the NPS does not yield to informal Congressional pressure, formal legislation could be introduced. A dispute over Cape Hatteras National Seashore provides an interesting parallel: a series of oversight hearings addressing the NPS' decision to prohibit vehicle access to sensitive beach areas in North Carolina eventually led to legislation requiring the NPS to loosen access restrictions.²⁰⁰ Incidentally, one of those hearings in 2012 jointly considered the vehicle and fishing closures in Cape Hatteras National Seashore and Biscayne National Park, respectively.²⁰¹ Representatives Lehtinen and Diaz-Balart presided over the hearing, with Diaz-Balart stating that "closing off areas to those that pay for the management of the areas I believe has to be the last resort, the last thing you do."²⁰²

195. Including federal lands such as the Big Cypress National Preserve and the Florida Panther National Wildlife Refuge. See *Congressional District Map: Florida* (July 10, 2015), <https://www.govtrack.us/congress/members/FL>.

196. E-mail from Jessica McCawley, Marine Fisheries Mgm't Dir., Fl. Fish and Wildlife Conservation Comm'n, to Author (June 22, 2015) (on file with author).

197. Telephone Interview with Capt. Bill Kelly, Executive Director, Fl. Key's Commercial Fisherman's Ass'n. (June 29, 2015).

198. See *Restricted Access at Biscayne National Park and Implications for Fishermen, Small Businesses, the Local Economy and Environment: Hearing Before the Comm. on Natural Res. & the Comm. on Small Bus.*, 114th Cong. (2015), <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399137> (statements of members and hearing memo).

199. Nagle, *supra* note 99, at 910 (citing JOHN COPELAND NAGLE, *LAW'S ENVIRONMENT: HOW LAW SHAPES THE PLACES WE LIVE* 119 (Yale University Press, illustrated ed. 2010)) (describing one Senator's successful campaign to convince the NPS to allow elk hunting in Theodore Roosevelt National Park).

200. HR Summary No. 3979 § 3057 (2015), <https://www.congress.gov/bill/113th-congress/house-bill/3979>; see generally Nagle, *supra* note 99, at 911–19 (outlining the dispute over access to the Cape Hatteras National Seashore).

201. *Preserving Access to Cape Hatteras National Seashore Recreational Area Act on H.R. 4094 & Access Denied: Turning Away Visitors to National Parks Friday, Legislative and Oversight Hearing Before the Subcommittee on National Parks, Forests, and Public Lands*, 112th Cong. 1 (2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73982/pdf/CHRG-112hhrg73982.pdf>.

202. *Id.* at 8.

It would not be surprising if a bill similar to the Cape Hatteras legislation considered at that hearing (or eventually signed into law) were introduced in order to loosen fishing restrictions in the marine reserve zone. In fact, Representative Lehtinen introduced legislation in late July 2015 that would require federal agencies to obtain state approval before closing coastal waters to fishing.²⁰³ While it may take months or years to enact the bill into law, its presence may alter the federal government's approach to fishery management country-wide, largely due to the controversial marine reserve zone in Biscayne National Park.

Florida could also use informal or political pressure to negotiate for more permissive fishing regulations within the Park, largely because inadequate federal funding of the Park forces the NPS to lean on its partners for enforcement capacity. A 2006 study found the Park operating under a fiscal deficit, and called for a total budget of at least \$4.3 million annually.²⁰⁴ Ten years later, the Park still hasn't reached that target.²⁰⁵ As a result, the Park is unable to fill critical enforcement positions, and "increasingly relies on partners and volunteers to bridge the gap between what is needed and what the park can afford."²⁰⁶ The NPS views the FWC and its officers as critical partners in the daunting task of management enforcement, with the NPS conceding that it cannot manage the Park adequately "without continuous cooperation with [the FWC]."²⁰⁷ Enforcement of the marine zone will be difficult, however, if the state is opposed to the fishing restrictions, and it is unlikely that the FWC commissioners will pass formal state rules and regulations codifying the problematic provisions of the GMP.²⁰⁸ Without the FWC's support the NPS will be forced to monitor the marine zone itself, relocating its enforcement resources away from other areas. The 2013 Draft GMP is evidence that the NPS takes the FWC's concerns seriously because it at least considered alternatives that did not include a full-blown marine reserve.²⁰⁹ The Final GMP's new marine reserve zone alternative suggests, however, that the NPS considered the costs of FWC's opposition and decided they were outweighed by the benefits of resource protection.²¹⁰

203. Press Release, Congresswoman Ileana Ros-Lehtinen, *Ros-Lehtinen Introduces the Preserving Public Access to Public Waters Act in Advance of Congressional Field Hearing in South Florida on Biscayne National Park's Proposed No-Fishing Zone*, Ros-Lehtinen Media Center (Aug. 6, 2015), <http://ros-lehtinen.house.gov/press-release/ros-lehtinen-introduces-preserving-public-access-public-waters-act-advance>.

204. See NAT'L PARKS CONSERVATION ASS'N, STATE OF THE PARKS: BISCAYNE NATIONAL PARK 36 (2015), http://www.npca.org/about-us/center-for-park-research/stateoftheparks/biscayne/Biscayne_full_rpt.pdf [hereinafter STATE OF THE PARKS].

205. See NAT'L PARK SERV., FISCAL YEAR 2016 BUDGET JUSTIFICATIONS, OPERATION OF THE NPS, at 8 (July 10, 2015), <http://www.nps.gov/aboutus/upload/FY-2016-Greenbook.pdf>.

206. See STATE OF THE PARKS *supra* note 204, at 37.

207. Carlstrom, *supra* note 192.

208. McCawley, *supra* note 166.

209. See GULF OF MEXICO FISHERY MGMT. COUNCIL, MODIFICATIONS TO GULF REEF AND SOUTH ATLANTIC SNAPPER GROUPER FISHERY MANAGEMENT PLANS 1 (July 10, 2015), [http://www.gulfcouncil.org/council_meetings/Briefing%20Materials/BB-03-2015/B-11\(a\)%20%20Joint%20Generic%20Gulf%20Reef%20Fish%20and%20S%20Atlantic%20Snapper-Grouper%20031915.pdf](http://www.gulfcouncil.org/council_meetings/Briefing%20Materials/BB-03-2015/B-11(a)%20%20Joint%20Generic%20Gulf%20Reef%20Fish%20and%20S%20Atlantic%20Snapper-Grouper%20031915.pdf).

210. Florida could also use its influence on the South Atlantic Fishery Management Council and Gulf of Mexico Fishery Management Council to modify fishery regulations outside the park to accommodate recreational and commercial fishing interests affected by the marine reserve zone. The state has submitted

In that case, the state may consider alternative powers conferred by cooperative federalism arrangements. As indicated by the FWC's 2012 letters to the NPS, Florida's appears willing to invoke its powers under the CZMA to block implementation of the marine reserve zone or at least to steer the discussion toward the fishery management planning framework within which it has more leverage and statutory backing.²¹¹ In those letters, Florida argued that a marine reserve zone would be inconsistent with several provisions of the Florida Coastal Management Program, such as declarations of state supremacy over shared waters and retention of fishing regulation rights, and provisions protecting reasonable and optimal uses of fisheries.²¹² The state supremacy claims are of questionable constitutional merit,²¹³ while the provisions establishing certain fishing and marine resource exploitation principles are sufficiently ambiguous that a marine reserve zone in Biscayne National Park could be read to comply with the state's coastal program, considering the program's reliance on "sustainable" use of fisheries and the GMP's stated goal of restoring fish stocks.²¹⁴

Furthermore, the CZMA allows an inconsistency finding to proceed if the agency has complied to the "maximum extent practicable" with the state program, or if the President exempts the federal activity from compliance.²¹⁵ Both steps would be rare,²¹⁶ but would nonetheless limit the extent to which the state's likely inconsistency (or conditional consistency) finding will prompt a revision of the marine reserve zone. This would not be the first time Florida has objected to a federal action on the grounds that it is inconsistent with the state coastal program, and in some cases the state has been successful in blocking the issuance of federal permits.²¹⁷ Here, however, the NPS can override the state's objection by making its

a proposal to both councils that would shift regulatory authority over mutton snapper, yellowtail snapper, and black grouper to the state of Florida. *See id.* at 7, 12, 32; *See also* Kelly, *supra* note 197.

211. *See* 1 FINAL GMP, *supra* note 11, at 3.

212. Fish and Wildlife Conservation, FLA. STAT. §§ 379.23, 379.244, 379.2401 (2012). *See supra* quotation accompanying note 181.

213. For a discussion of the constitutionality of the consistency requirement generally, *see, e.g.*, Scott C. Whitney, George R. Johnson, Jr. & Steven R. Perles, *State Implementation of the Coastal Zone Management Consistency Provisions – Ultra Vires or Unconstitutionality?*, 12 HARV. ENVTL. L. REV. 67 (1988); *but see* Jack Archer and Joan Bondareff, *Implementation of the Federal Consistency Doctrine – Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115 (1988); *see also* Lieutenant Patrick J. Gibbons JAGC USN, *Too Much of a Good Thing? Federal Supremacy & the Devolution of the Regulatory Power: The Case of the Coastal Zone Management Act*, 48 NAVAL L. REV. 84 (2001).

214. *See, e.g.*, Fish and Wildlife Conservation, FLA. STAT. § 379.2401 (stating that "Conservation and management measures shall permit reasonable means and quantities of annual harvest, consistent with maximum practicable sustainable stock abundance on a continuing basis.")

215. Coastal Zone Management, 16 U.S.C. § 1456 (c)(1) (2015).

216. The presidential exemption is rarely invoked, though Navy sonar training has been exempted on the grounds that it is essential to national security. *See* Winter v. NRDC, Inc., 555 U.S. 7 (2008).

217. *See, e.g.*, OFFICE OF OCEAN AND COASTAL RESOURCE MGMT., FEDERAL CONSISTENCY BULLETIN: CONSISTENCY APPEAL OF MOBIL FROM AN OBJECTION BY THE STATE OF FLORIDA, US DEPARTMENT OF COMMERCE, OFFICE OF THE SECRETARY (1993); Consistency Appeal of Unocal from an Objection by the State of Florida (1993) (July 10, 2015), <http://coast.noaa.gov/czm/consistency/media/fedconbulletin1.pdf> (blocking proposed oil and gas development projects from moving forward over the state's inconsistency objection on the grounds that the projects are not consistent with the CZMA nor necessary in the interest of national security).

own finding that the marine reserve zone is consistent with the state program.²¹⁸ Although dispute resolution is encouraged and could delay implementation,²¹⁹ the NPS appears willing to move forward with the GMP despite state objections.²²⁰

If the state's cooperative federalism powers cannot force a revision, a direct legal challenge to the marine reserve zone, or the GMP generally, would be daunting but not without precedent. Closing a section of the Park to fishing is a classic example of the tensions between the NPS Organic Act's twin pillars of enjoyment and conservation.²²¹ Although the Supreme Court has never attempted to resolve those tensions, the Tenth Circuit in *Southern Utah Wilderness Alliance v. Dabney* established the "impairment" test in which an agency action will be validated if it leaves a park's resources "unimpaired for the enjoyment of future generations," a test that is facially broad and gives the NPS significant interpretational discretion.²²² The impairment test is typically invoked to challenge NPS policies that favor enjoyment over conservation, and these challenges usually fail to overcome the agency's broad *Chevron* discretion.²²³ When the NPS favors conservation, the agency's discretion has been particularly difficult to overcome—policies limiting recreational or commercial activities have almost always been upheld.²²⁴ The broad discretion given to the NPS may not always lead to conservation-minded policies,²²⁵ but when it does, courts are unlikely to overturn them.

Here, the NPS has established a marine reserve zone for the express purpose of both restoring park resources (including coral reefs and reef-dwelling species) and "to provide swimmers, snorkelers, scuba divers, and those who ride a glass-bottom boat the opportunity to experience a healthy, natural coral reef with larger and more numerous tropical reef fish and an ecologically intact reef system."²²⁶ The NPS' claim that the marine reserve does not constitute "fishery management" is dubious, as the FWC has pointed out several times,²²⁷ but the zone is located wholly within the original boundaries of the Biscayne National Monument, within which the

218. State Agency Objection, 15 C.F.R. § 930.43 (2000).

219. *Id.*

220. Carlstrom, *supra* note 192.

221. See *supra* text accompanying notes 93–100.

222. *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 827 (10th Cir. 2000); accord *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (giving federal agencies significant discretion to interpret ambiguous statutory mandates).

223. See, e.g., *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010) (upholding an NPS policy permitting motorized watercrafts in Grand Canyon National Park); *Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000) (upholding an NPS policy permitting controlled hunting in Gettysburg National Military Park).

224. See Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 676 (1997) (finding that courts consistently uphold NPS policies that favor conservation); see also Nagle, *supra* note 99, at 884 (citing George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 741 (1997) (finding that "Park Service discretion to limit recreational activities and facilities by commercial enterprises has been upheld in every litigated instance located"))).

225. This dynamic has been deemed problematic by some scholars, who see the discretion as confusing the priorities of park management. See, e.g., Antolini, *supra* note 96, at 911–13, 918 (proposing a legislative amendment clarifying that conservation is the highest priority of the National Park System).

226. 1 FINAL GMP, *supra* note 11, at 125; see also Carlstrom, *supra* note 192.

227. See, e.g., 2 FINAL GMP, *supra* note 159, at 197–98.

federal government has the authority to impose its own fishing regulations.²²⁸ Even if the preparation, establishment, and implementation of the marine reserve zone violates the terms of the 2002 MoU by not following through on the federal government's agreement to collaborate with the state on fishery management, that in itself would not be sufficient to invalidate the zone. The NPS's broad discretion to interpret the Organic Act, as well as the ambiguous cooperative federalism arrangement of the Park, will likely be sufficient to uphold the marine reserve zone as a valid exercise of its federal agency powers.

If litigation is unlikely to successfully challenge the marine reserve zone, the most likely mechanism to do so may be a legislative amendment. The state may invoke its powers under the CZMA to find the zone inconsistent with state planning, but the NPS will likely overcome the challenge. The state's best hope for influencing fishery management in the Park may be to move on from the marine reserve zone and focus on the rest of the park's fishery management needs. The marine reserve constitutes only six percent of the Park's waters;²²⁹ most of the rest of the park's fishing resources is governed by the FMP within which the state retains roughly co-equal regulatory powers. While the FMP was finalized in 2014, implementation and enforcement are an ongoing challenge requiring state-federal cooperation. For the best interests of the Park and its various stakeholders, the dispute over the marine reserve zone cannot be allowed to overshadow the important cooperative federalism responsibilities both the state and federal government must live up to.

B. Stakeholder Perceptions of Cooperative Federalism

Controversy over the marine reserve zone is dominating the headlines surrounding Biscayne National Park,²³⁰ but the noise is drowning out what has otherwise been a relatively productive relationship between the state and federal government. In fact, a variety of stakeholders report that while being forced into a cooperative relationship has been frustrating and time-consuming, the costs of cooperative federalism are outweighed by the benefits of inter-agency planning and stakeholder engagement. These consultations, as well as the above analyses, form the basis for a series of recommendations for future efforts to design or implement cooperative federalism arrangements, particularly those regulating marine resources.

Some of the federal government's actions in the management planning process suggest that it placed little value on its partnership with the state over fishery management. The FWC was largely left out of the general management planning process,²³¹ the marine reserve zone was not characterized as a fishery management issue so as to remove it from the fishery management planning process,²³² and the final alternative chosen in the GMP was essentially the same alternative the state

228. Act of Oct. 18, 1968, Pub. L. No. 90-606, § 1, 82 Stat 1188, 1189.

229. 1 FINAL GMP, *supra* note 11, at 126.

230. See, e.g., Jenny Staletovich, *New Rules, No-Fishing Zone for Biscayne National Park*, MIAMI HERALD (June 4, 2015), <http://www.miamiherald.com/news/local/community/miami-dade/article23137869.html>.

231. See *supra* text accompanying notes 157–163.

232. See *supra* text accompanying notes 176–179.

vehemently objected to in 2012.²³³ Those actions notwithstanding, the Superintendent of the Biscayne National Park maintains that the FWC is an essential partner in the Park's operations, particularly with respect to research, boater safety, law enforcement, and resource protection.²³⁴ While every national park must collaborate with state and local agencies to some degree, the statutory uniqueness of the cooperative federalism arrangement in Biscayne National Park has forced the state and federal government to work more closely than they otherwise would have.²³⁵ The forced partnership has taken longer but produces a more integrated management plan.²³⁶ Other NPS officials also tend to agree: the Inventory and Monitoring Program of the NPS's South Florida/Caribbean Network has seen a general increase in research and monitoring coordination between the state and federal government lead to more robust data on fish stocks and ecosystem health.²³⁷ The relationships between state, federal, and local scientists helped create a reef fish monitoring protocol to enhance cooperation between agencies,²³⁸ and produced research on a marine reserve zone in Dry Tortugas National Park that helped form the scientific basis for the marine reserve zone in Biscayne National Park.²³⁹

The FWC seems less inspired by its cooperative federalism arrangement with the NPS, but nonetheless acknowledges that the relationship has produced results. Though the presence of the national park interferes with the state's typically strong role in state and regional fisheries management,²⁴⁰ the federal government's authority to set aside and protect lands and waters has shielded Biscayne Bay from industrial or residential development that would have threatened the viability of the bay's fisheries.²⁴¹ And while the FWC felt left out of the general management planning process,²⁴² it was heavily involved in crafting regulations contained in the FMP.²⁴³ Because of the philosophical leanings of the two organizations, the FWC and NPS were able to engage stakeholders with disparate interests. The FWC worked closely with recreational and commercial fishing groups while the NPS is more attuned to environmental and conservation groups.²⁴⁴ The FWC remains disappointed that it is not more involved in the general management planning process, but acknowledges that cooperative federalism with the NPS has increased

233. See *supra* text accompanying notes 189–192.

234. Carlstrom, *supra* note 192.

235. *Id.*

236. *Id.*

237. Telephone Interview with Andrea Atkinson, Quantitative Ecologist, National Park Service: South Florida/Caribbean Network (June 9, 2015).

238. NAT'L PARK SERV., A COOPERATIVE MULTI-AGENCY REEF FISH MONITORING PROTOCOL FOR THE FLORIDA KEYS CORAL REEF ECOSYSTEM (July 10, 2015), https://irma.nps.gov/App/Reference/DownloadDigitalFile?code=472852&file=FLKeys_Reef_Fish_monitoring_protocol_1Oct2009.pdf.

239. See NAT'L PARK SERV., ASSESSING THE CONSERVATION EFFICIENCY OF THE DRY TORTUGAS NATIONAL PARK (July 10, 2015), <http://permanent.access.gpo.gov/gpo24804/DRTOSciencePlanSmall.pdf>; see also Tracy A Ziegler & John Hunt, Implementing the Dry Tortugas National Park Research Natural Area Science Plan (July 10, 2015).

240. See Carlstrom, *supra* note 192.

241. See *supra* text accompanying notes 123–127.

242. See *supra* text accompanying notes 157–163.

243. See *supra* text accompanying notes 167–168; McCawley, *supra* note 166..

244. McCawley, *supra* note 166.

the FWC's involvement in park management, to the benefit of the state and fishery resources.²⁴⁵

Other stakeholders echo similar sentiments about the rough transition to federal involvement in the Park to an equilibrium where state and local jurisdictions can co-exist. One of the Park's only marine structures form a small community of homes called Stiltsville.²⁴⁶ When the federal government acquired the submerged lands supporting Stiltsville from the State of Florida, the NPS called for the removal of the structures.²⁴⁷ A lengthy dispute between Florida, Stiltsville homeowners, and the federal government culminated in the creation of the Stiltsville Trust, which preserves the homes in partnership with the NPS.²⁴⁸ Stiltsville is now a valued ethnographic landmark in the Park, enhancing the visitor experience while providing a connection to the human-natural experience.²⁴⁹ Other stakeholders see room for improvement in the NPS' approach to community engagement. Several groups complained about the length of time between planning meetings and poorly organized workshops.²⁵⁰ Commercial fishing groups, in particular, were skeptical of the science relied upon to create the marine reserve zone and felt left out of the process.²⁵¹ If the state and federal government are to be partners in fishery management, whether in Biscayne National Park or elsewhere, the regulations must adhere to reasonable expectations of outcomes.²⁵²

Ultimately, stakeholders, including the FWC, NPS, and local organizations, were in general agreement on the costs and benefits of cooperative federalism in the Park. On the one hand, most found that forced engagement caused delays and frustration at the outset of the management planning processes, as institutions were unfamiliar with the operational styles and regulatory requirements of their partners and often came to the table with divergent views on the optimal use of park resources. In most cases, however, the shared authority over fishery management was viewed positively because it brought together human and financial resources, more effectively engaged constituents and other stakeholders, and bridged the gap between state and federal jurisdictions. While the marine reserve zone promises to reveal further conflicts between the FWC and NPS in the months and years to come, both agencies look favorably upon the statutorily mandated cooperative federalism arrangement they must both continue to navigate.

245. *Id.*

246. See 1 FINAL GMP, *supra* note 11, at 69 (describing Stiltsville).

247. Telephone Interview with Gail Baldwin, Chairman, Stiltsville Trust (June 9, 2015).

248. For a basic overview of the dispute, see, e.g., Lloyd Miller, *Story of Stiltsville Trust*, http://www.stiltsvilletrust.org/pages/stiltsville_miami_fl_biscayne_bay.html (last visited Dec. 26, 2015); NAT'L PARK SERV., STILTSVILLE (July 10, 2015), *available at* <http://www.nps.gov/bisc/learn/historyculture/stiltsville.htm>; NAT'L PARK SERV., BISCAYNE FINAL ETHNOGRAPHIC OVERVIEW AND ASSESSMENT (2015), *available at* http://www.nps.gov/ethnography/research/docs/bisc_ethno.pdf.

249. *Id.* at 5–24.

250. Kelly, *supra* note 197; Baldwin, *supra* note 247; McCawley, *supra* note 166.

251. Kelly, *supra* note 197.

252. *Id.*

C. Exporting the Biscayne Model

As the fields of environmental and natural resources law continue to rely on cooperative federalism to implement federal policy while taking advantage of decentralized governance, the state-federal arrangements that experiment with, or depart from, the traditional models of cooperative federalism will provide opportunities for intergovernmental innovation. Some of these experiments will be more cautionary tales than success stories, but all should contribute to the evolving body of knowledge on cooperative federalism. Biscayne National Park's experience with fishery management thus provides both a cautionary tale and a success story.

In some ways, the public laws creating the Park—and the cooperative federalism arrangement over fisheries—were poorly conceived, sparking conflict where it might not have previously occurred. Authorizing both the state and federal government to regulate the same resource created ambiguities regarding their respective roles in fishery management, and the meaning of fishery management in the first place. Normally an ambiguity of that nature would be desirable, as the agencies themselves can more easily determine management structures and strategies. In this case, however, the federal agency's broad interpretational discretion allowed it to characterize a marine reserve zone prohibiting fishing as a resource management strategy that does not constitute fishery management. But if cooperative federalism is to play a meaningful role in natural resources management, both agencies must be involved in the planning process. In this case, Biscayne National Park's implementing legislation could have been more specific with respect to the State of Florida's rights to regulate fishing. While this is not the first time statutes have failed to appreciate how interconnected natural systems can be,²⁵³ it is especially important that laws establishing marine protected areas are cognizant of the pervasive influence fisheries exert on the rest of the marine environment.

At the same time, by expressly granting the state authority to regulate fishing (and remaining silent on other issues), the legislation may have implied that the state did not have a role in the general management planning process, an implication both the state and federal government appeared to agree with at the outset of the planning processes.²⁵⁴ While primary authority to manage the national park system should probably remain with the federal government, legislation can ensure that states play a role in park management. Otherwise, state involvement becomes vulnerable to NPS discretion. Biscayne National Park's fishery and general management planning processes demonstrate the perils of lackluster stakeholder engagement. The FWC's objection to the 2011 Draft GMP did more than voice opposition to the proposed marine reserve zone: it revealed the agency's profound disappointment that it had not been more involved in the planning process. One letter to the NPS stated that the conditional consistency determination "could have been avoided if the Park had honored commitments they made in the Memorandum of Understanding (MOU) between the FWC and BNP. The MOU was specifically

253. See, e.g., Ryan B. Stoa, *Droughts, Floods, and Wildfires: Paleo Perspectives on Disaster Law in the Anthropocene*, 27 GEO. INT'L ENVTL. L. REV. 393 (2015) (discussing how the evolution of environmental laws reveals a belief that nature can adapt to modern human activities, instead of vice versa).

254. See *supra* notes 161–163.

designed to facilitate fishery management planning by improving communication, cooperation, and coordination between the FWC and BNP.”²⁵⁵ Another letter to the NPS found it “unfortunate that—despite the existing MoU wherein FWC and the Park agreed to make efforts to the maximum extent possible to cooperate fully and jointly to manage fishing within the Park—the FWC is forced to provide extensive comments with regards to fisheries management issues on a Draft GMP/EIS through the Florida State Clearinghouse.”²⁵⁶

While the NPS (and any agency for that matter) can hardly be faulted for exerting authority over a matter with which they have jurisdiction, the manner in which that authority is exerted matters. Other stakeholders complained that community meetings were held concurrently, or with little notice.²⁵⁷ It is unlikely that a flawless stakeholder engagement process would have preempted opposition to the marine reserve zone entirely, but participatory approaches to marine resources management tend to be more responsive to local needs and characteristics, thereby reducing the likelihood of legal challenges.²⁵⁸ This is especially true if the cooperative federalism dynamics enumerate a participatory role for the state.

On the other hand, there are aspects of the Biscayne National Park model of cooperative federalism that are worth replicating in other contexts. Biscayne National Park’s origin story suggests that power sharing between the state and federal government may be an effective means of obtaining the political support needed to establish a federally protected area in the first place.²⁵⁹ The looming pressures of industrial and residential development that motivated the establishment of a national monument were a threat to fish stocks as much as they were to coral reefs, mangroves, and the natural aesthetic.²⁶⁰ By grouping these interests together, the campaign to protect Biscayne Bay maximized its coalition and minimized its opposition. Cooperative federalism, in this case concerning fishery management, may be a critical tool for future campaigns to obtain state support for federal protection. It may be particularly difficult to persuade states to transfer title to submerged lands under their jurisdiction without some concession, and joint

255. 2 FINAL GMP, *supra* note 159, at 237 (letter from Nick Wiley, Exec. Dir., Fla. Fish and Wildlife Comm’n, to Sally Mann, Dir., Office of Intergovernmental Programs, Dep’t of Env’tl. Prot. (Dec. 30, 2011)).

256. 2 FINAL GMP, *supra* note 159, at 252.

257. Kelly, *supra* note 197; Baldwin, *supra* note 247.

258. There is a wealth of research on the subject of stakeholder engagement, particularly with respect to natural resources and marine resources management. See Morgan Gopnik et al., *Coming to the table: Early stakeholder engagement in marine spatial planning*, 36 MARINE POL’Y 1139 (2012); Kelly Sayce et al., *Beyond traditional stakeholder engagement: Public participation roles in California’s statewide marine protected areas planning process*, 74 OCEAN COASTAL MGMT. 57, 58 (2013); Robert Pomeroy & Fanny Douvère, *The engagement of stakeholders in the marine spatial planning process*, 32 MARINE POL’Y 816, 817 (2008); Timothy Lynam et al., *A Review of Tools for Incorporating Community Knowledge, Preferences, and Values Into Decision Making in Natural Resources Management*, 12 ECOLOGY & SOC’Y 5 (2007); Daniel J. Decker et al., *Stakeholder Engagement in Wildlife Management: Does the Public Trust Doctrine Imply Limits?*, 79 THE J. OF WILDLIFE MGMT. 174, 175 (2015).

259. See 16 U.S.C. § 410gg-2 (2012) (noting that the legislative history establishing Biscayne National Monument includes statements from the Department of the Interior conceding Florida’s authority to regulate fishing in the monument).

260. See *supra* text accompanying notes 123–127.

management offers a mutually beneficial enticement.²⁶¹ The 1980 legislation creating Biscayne National Park went even further by guaranteeing the State of Florida exclusive authority to regulate fishing in any waters it subsequently granted to the Park, an option the state exercised by proceeding to dedicate an additional 72,000 acres.²⁶²

There are trade-offs to granting states exclusive authority to regulate fishing: first, because, as the NPS admits, its authority to establish the marine reserve zone (ostensibly not a fishery management action) derives from its joint powers to regulate fishing in the original monument boundaries of the Park.²⁶³ If the NPS did not have this authority, it would be forced to abandon the marine reserve zone, or assert its authority through less legally justifiable means that might strain the state-federal relationship and increase the likelihood of litigation. Alternatively, it might pursue a marine reserve zone through the general management planning process by working closely with the state to negotiate a mutually beneficial compromise. Granting states the exclusive authority to regulate fishing might also leave the federal government out of the fishery management planning process, just as GMP planning largely left out the FWC. The Biscayne National Park experience suggests that states and the federal government should engage in more joint planning, not less, but each case will need to explore how much joint or exclusive authority over resource management a state needs in order to lend its support.

From an operational standpoint, cooperative federalism has provided the Park with more diversified funding, staffing, and enforcement capacities. State officers are cross-deputized to enforce federal laws, allowing FWC and Miami-Dade County marine patrol officers to enforce regulations alongside NPS Rangers.²⁶⁴ The state and federal government share boating facilities and much of the day-to-day issues that arise are worked out jointly with state and federal officers, without prompting a jurisdictional dispute.²⁶⁵ While cooperative federalism may not be the causal factor behind each instance of cooperation, both the state and federal government indicate that the state's authority to regulate fishing has forced the agencies to establish joint management protocols and procedures.²⁶⁶ With the state's power to regulate fishing also comes responsibility; the resources Florida brings to the table are an invaluable contribution to the Park's manpower and financial solvency.²⁶⁷ In cases where the federal government may not have the human or financial capacity to adequately manage a national park or its natural resources, conferring certain regulatory powers to the state may induce substantial investments.²⁶⁸

261. See 16 U.S.C. § 410gg-2 (2012), (noting that in 1985 Florida dedicated over 72,000 acres to the park while reinforcing its exclusive jurisdiction over fisheries regulation).

262. See *supra* text accompanying note 145.

263. See 1 FINAL GMP, *supra* note 11, at 86.

264. FINAL FMP, *supra* note 14, at 237.

265. Carlstrom, *supra* note 192.

266. See Reef Fish Monitoring Protocol, *supra* note 238; Carlstrom, *supra* note 192; Atkinson, *supra* note 237; McCawley, *supra* note 166.

267. Carlstrom, *supra* note 192; see also *supra* text accompanying notes 204–207.

268. Although not part of the national park system, California's CALFED Bay-Delta Program is an excellent example of state and federal agencies jointly managing natural resources by sharing authority

V. CONCLUSION

Biscayne National Monument was created to protect the “rare combination of terrestrial, marine, and amphibious life in a tropical setting of great beauty.”²⁶⁹ What the drafters of Public Law 90-606 may not have realized is that a rare combination of state and federal powers was created in that tropical setting of great beauty as well. While conferring joint authority to regulate fishing to the state and federal government may have seemed innocuous enough at the time, the Park’s cooperative federalism framework has been anything but. The state and federal government have been forced to navigate their roles and responsibilities without the benefit of unambiguous legislation or judicial precedent, creating a relationship that has been at times both strained and co-dependent. After over a decade of management planning, the federal government is prepared to move forward with a marine reserve zone that lacks support from the state. For its part, the state looks prepared to challenge the zone through other informal and formal cooperative federalism powers and its Congressional delegation. The outcome of the conflict will shed light on the extent of the federal government’s powers within this unique arrangement, as it asserts its authority to establish the marine reserve zone by citing its joint authority over fishery management while simultaneously alleging that the zone does not constitute fishery management. The conflict also demonstrates that while fishery management may be excised from general management in theory, the interconnected nature of marine environments makes that more difficult in practice.²⁷⁰

The marine reserve zone conflict also casts a shadow over what has otherwise been a productive and innovative experiment in cooperative federalism. The majority of stakeholders interviewed for this project concluded that, on balance, the state’s role in fishery management has been a worthwhile experience for the agencies involved, with a positive impact on the Park and its resources. The state’s role in fishery management planning ensured that the federal government would accommodate Florida’s culturally and economically significant fishing industry to some extent, while lending legitimacy to federal planning. Human and financial resources are shared, providing long-term management stability to the park. The general management planning process may have suffered in part because the state was not more involved, an oversight implementing legislation could have addressed. The Biscayne National Park model of cooperative federalism suggests that future applications of the model, in which states and the federal government share joint authority over marine resources in some capacity, may enjoy similar success.

and responsibilities. See CAL. BAY-DELTA AUTH., CALFED BAY DELTA PROGRAM: PROGRAMMATIC RECORD OF DECISION 1 (2015), <http://calwater.ca.gov/content/Documents/ROD8-28-00.pdf>; CAL. BAY-DELTA AUTH., CALFED 10-YEAR ACTION PLAN 1 (2015), http://www.calwater.ca.gov/content/Documents/10_Year_Action_Plan_Final.pdf.

269. Biscayne National Monument Establishment, Pub. L. No. 90-606, 82 Stat. 1188 (1968).

270. The marine nature of the BNP model may limit the extent to which it can be applied in other (e.g., terrestrial) contexts. Further research that investigates the replicability of this and other management paradigms may shed light on those aspects of the model that are more or less easily replicated.